Center for American Progress

A Sensible Approach to Labor Standards to Ensure Free Trade

Daniel K. Tarullo

Progressive Ideas for a Strong, Just, and Free America

A Sensible Approach to Labor Standards to Ensure Free Trade

By Daniel K. Tarullo

Georgetown University Law Center
Center for American Progress

March 2007

Introduction

For a brief time this past winter, there was a glimmer of hope for bridging the partisan divide in Washington on international trade that has been growing for over a decade. It appeared that the Bush administration had read the election results, realized its window for progress was closing, and decided to seek a workable bipartisan consensus on some of its trade initiatives.

Most importantly, the administration signaled its desire to work constructively with the House Ways & Means Committee and the Senate Finance Committee to on a common approach to labor standards in U.S. bilateral and regional trade agreements.

By the first day of spring, these hopes had faded. Top congressional proponents of a new approach to trade have long advocated including five internationally recognized labor standards as basic obligations in all bilateral and regional trade agreements. This proposal has long been an explicit alternative to an approach that simply requires countries to enforce their own labor standards, regardless of their content. But instead of working with Congressional proponents to iron out differences over the core standards approach, Bush administration officials recently signed on to a new proposal that almost seems designed to be unworkable.

The administration's recently proposed alternative is to give the parties to a trade agreement the choice of the internationally recognized labor standards or labor standards "equivalent to" U.S. standards. This turnabout suggests that the administration has decided to throw in the towel on its trade agenda and is now trying to force an impasse in order to shift blame for its negotiating failures.

On the hopeful assumption that the administration is simply adrift—rather than steering intentionally towards the rocks—this paper addresses the flaws of its proposal and offers some suggestions for clarifying the core labor standards approach.

Alternative Approaches to Labor Rights in Trade Accords

The approach championed by many leaders in Congress would include in each U.S. bilateral trade agreement the five labor standards contained in the International Labor Organization's *Declaration on Fundamental Principles and Rights at Work*, which was adopted by the ILO membership (including the United States) in June 1998. These standards are:

- Freedom of association
- The effective recognition of the right to collective bargaining
- The elimination of all forms of forced or compulsory labor
- The effective abolition of child labor
- The elimination of discrimination in respect of employment and occupation

The ILO *Declaration* is specifically referenced in recent U.S. trade agreements, such as the Central American/Dominican Republic Free Trade Agreement, or CAFTA/DR. Various free trade agreements, including CAFTA/DR, also contain reference to another internationally recognized standard: "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."

Yet the obligation of signatories to these trade pacts with respect to all these standards is a soft one. All the parties to these accords shall "strive to ensure" that these standards are recognized and protected in domestic law. Moreover, even this soft obligation is not subject to dispute settlement. Congressional proponents of new approaches to labor rights in trade accords insist that these standards become "hard obligations" subject to the same dispute-settlement procedures as other obligations in any trade agreement.

The administration's recently proposed alternative is to give the parties to a trade agreement the choice of the internationally recognized labor standards *or* labor standards "equivalent to" U.S. standards. The obvious intention of this alternative is to ensure that the United States will always be able opt for its own standards—with which, tautologically, it will always be in compliance.

Exaggerated Fears of U.S. Vulnerability

The administration apparently justifies its proposed alternative on the grounds that current U.S. law is inconsistent with the ILO-recognized core labor standards. The specter is raised of frequent and far-reaching international dispute settlement decisions ordering extensive changes in federal or state labor laws.

A careful examination of this rationale, however, suggests that it is both exaggerated and premised on a very unattractive view of what U.S. labor standards should be. Because the administration has made no public statements on its proposal, one cannot evaluate any nuances in its position. Informal discussions, however, reveal some of their concerns. Moreover, various non-government commentators who oppose the core labor standards approach have developed the argument that incorporation of the internationally recognized labor standards would expose the United States to repeated dispute settlement losses.

This argument recalls a similar dispute half a century ago. In the 1950s a number of members of Congress feared that the United Nations Charter, the Genocide Convention, and other human rights treaties might be interpreted to override Jim Crow laws in various Southern states that discriminated against African Americans. In order to defeat a move in the Senate to restrict his foreign affairs powers, President Eisenhower reluctantly agreed not to become party to any more human rights treaties. The American opt-out from human rights treaties remained in place until 1978, when President Carter submitted several for ratification.

The irony of the opposition in the early 1950s to U.S. compliance with human rights treaties, so obvious in retrospect, might be usefully considered sim-

ply to lend some perspective on the present dispute. In addition, such a review also helps to distinguish the current controversy. Today, the perceived risk is not that a domestic court will invoke a treaty to invalidate previously enacted domestic legislation, but rather that an international dispute settlement process will reach a similar conclusion. This institutional difference matters greatly in practical, as well as jurisprudential, terms.

When considering the likely effects of any arrangement that assigns certain rights and obligations, it is critical to ask, first, who is entitled to set the legal process in motion and, second, what interests and incentives attach to parties that are entitled to do so. The labor standards provisions of free trade agreements will be enforceable only upon the initiative of the government of another party to the agreement. Thus the relevant question is when the government of a country like Peru or South Korea will have sufficient incentive to challenge a U.S. labor standard or practice.

While there may be circumstances under which a country would consider such a challenge, it is more than a little difficult to imagine another government having the incentive to initiate and fund bilateral dispute settlement cases challenging some of the practices identified by opponents of the core labor standards approach as vulnerable. For instance, opponents of core labor standards ostensibly worry that federal or state requirements that a prisoner obtain a job as a condition of parole, or that certain classes of government employees in the United States are forbidden by law from striking, might spark a challenge by one of our trading partners.

Such challenges are highly unlikely, not least because the relative frequency with which *any* dispute settlement actions will be brought under free trade agreements is at best uncertain. To date, with the important exception of NAFTA, there have been *no* dispute settlement cases of any sort initiated under *any* free trade agreements to which the United States is a party. Many actions have been brought under NAFTA, yet in the 12 years in which NAFTA has been in effect there have been only three dispute settlement proceedings initiated by governments. The rest have been initiated under special provisions allowing private parties to challenge the imposition of trade remedies and foreign investors to challenge a broad range of activities by host governments.

The government-to-government dispute settlement mechanisms of free trade agreements are, unlike those of the World Trade Organization, quite undeveloped, a further disincentive to invoke them. Quite apart from the question of incentive and ability to bring cases challenging U.S. labor standards, however, is the central issue of the scope and detail of the obligations that would actually be created through incorporation of the five fundamental principles.

Some opponents of this approach argue that various features of U.S. labor law are arguably inconsistent with one or more of the ILO conventions that elaborate the five principles identified in the ILO's *Declaration on Fundamental Principles and Rights at Work*. The opponents argue, in effect, that inclusion of those five principles as obligations in a trade agreement would incorporate by reference all the terms of the conventions to which the United States is not party.

This reasoning is unsound. The *Declaration* itself makes clear that it addresses the obligation of each member of the ILO to promote the *principles* behind the rights elaborated in the conventions, not the conventions themselves. Indeed, the very purpose of the *Declaration* was to affirm the core status of those principles in international law, even though some members of the ILO (including the United States) were not willing to ratify the conventions that expound those rights in detail.

If the concern is that a dispute settlement panel might look to an ILO convention to determine whether the United States has violated one of the core standards incorporated into an FTA, there is a straightforward solution. The agreements themselves can specify that the *principles* of the core labor standards and not the ILO conventions are the obligations being assumed by the parties to the agreements.

Thus the relevant question to be posed to the opponents of the core labor standards approach is whether they believe that current U.S. law and practice are inconsistent with the *principles* of freedom of association, collective bargaining, elimination of force labor, abolition of child labor, and elimination of discrimination. If their answer is no, as I would expect, then they obviously have good arguments to suggest for use in a future dispute settlement case, however unlikely it may be.

If, contrary to my expectation, their answer is yes, then one would hope they have suggestions for reforming U.S. laws and practices to make them consistent with these general principles.

Although proposals for use of the five core labor standards vary a bit among proponents, generally these proposals would limit the coverage of an FTA's labor provisions to practices that were "related" to trade. Labor policies governing most government employees, for example, would not be covered since they have no effect on imports or exports. Many other practices identified as vulnerable to international challenge have little or no relationship to trade. Thus, if this limiting condition of "trade-related" practices is included in trade agreements, concerns about the potential applicability of FTA labor standards to U.S. practice should be further assuaged.

Problems with a U.S "Equivalency" Approach

The current administration position is not just based on greatly exaggerated fears about U.S. vulnerability to dispute settlement proceedings under FTAs that adopt the core standards approach. It is itself built on the misguided notion that U.S. law should constitute the basis for *international* obligations on labor standards. That approach is flawed for both practical and policy reasons.

As a practical matter, establishing conformity with a particular nation's practice as an international norm means that other parties to the agreement do not know what obligations they are undertaking. If U.S. law or practice relevant to labor standards were to change in significant respects following entry into an FTA, then the international obligations of all other signatories to that FTA would automatically change.

Since the U.S domestic process would be the source of change, they would have no role in deciding what these new obligations might be. One suspects that the vast majority of members of Congress would be uneasy with any international agreement that bound the United States to follow the laws of another country, however those laws might change in the future. That would surely be the case in other national legislatures as well.

Even if "U.S. equivalence" were treated as a static concept—that is, as equivalent to U.S. law and practice as it stood at the moment of entry into an FTA—practical problems would abound. The determination of whether a country's labor standards were equivalent to U.S. law, in all its complexity, would be a much more difficult undertaking for a dispute-settlement panel than evaluating a country's overall practice against a general principle of, for example, eliminating child labor.

As a policy matter, insistence by the United States that its law and practice must be followed by everyone else and that, by definition, the United States can never violate an international obligation is an untenable position. In its own way, this approach partakes of the view that the United States is not bound by the norms, obligations, and practices that bind all other countries in the world. It is, in fact, a literal embodiment of the idea that whatever we decide is law for everyone else.

Conclusion

Congressional interest in the incorporation of core labor standards into trading relationships dates back to the conditions it placed upon application of the Generalized System of Preferences. GSP is a unilateral grant of duty-free treatment to certain products from developing countries. Congress included a requirement that recipients of this favorable treatment adhere to "internationally recognized" labor standards.

In doing so, Congress sought to assure that any labor standards conditions the United States placed on GSP reflected genuine international consensus on core principles. Yet by insisting that our own laws must be the international norm, as the Bush administration now proposes, we assure that the United States has essentially no chance to make the provisions in our FTAs the starting point for bilateral trade agreements involving other countries.

Nor will the administration's new approach ever become the basis for multilateral consensus on how to incorporate labor standards into trading relationships. Attitudes towards the inclusion of labor standards in trade agreements have changed noticeably in recent years. The European Union has indicated its intention to include labor provisions in its free trade agreements. Numerous actual or potential developing country negotiating partners of the United States have indicated either acceptance of or, in some cases, affirmative desire for labor standards in trade agreements.

This growing receptivity of other countries to provisions that help assure that the benefits of globalization are widely shared provides an opportunity for U.S. leadership to influence the form that these provisions take around the world. The United States should, and does, work vigorously to shape international economic and human rights standards in ways consistent with U.S. values and interests. If we are to lead (rather than dictate to) the rest of the world, then it is important to participate in those discussions instead of insisting that everyone follow our practices.

While the details of how to incorporate the core ILO standards into free trade agreements must still be worked out, these internationally recognized principles should provide the starting point for crafting the operative labor provisions. Members of Congress and the Bush administration should seize the opportunity to resolve this issue and move on to the differences over fast-track renewal that remain.

Center for American Progress

ABOUT THE CENTER FOR AMERICAN PROGRESS

The Center for American Progress is a nonpartisan research and educational institute dedicated to promoting a strong, just and free America that ensures opportunity for all. We believe that Americans are bound together by a common commitment to these values and we aspire to ensure that our national policies reflect these values. We work to find progressive and pragmatic solutions to significant domestic and international problems and develop policy proposals that foster a government that is "of the people, by the people, and for the people."

Center for American Progress
1333 H Street, NW, 10th Floor
Washington, DC 20005
Tel: 202.682.1611 • Fax: 202.682.1867
www.americanprogress.org