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Enforcement by Design: The Legalization of Labor Rights Mechanisms in US Trade Policy

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For Henry J. Frundt.

Abstract

The paper analyzes two trade-based labor rights conditionality clauses — The North American Agreement on Labor Cooperation (NAALC), the NAFTA side accord on labor, and the US Generalized System of Preferences program (GSP), a unilateral US trade promotion initiative— to describe how the dimensions of legalization of the dispute processes can insulate the dispute mechanisms from states interests in the outcomes. Using the Abott et al. (2000) typology of legalization as a tentative framework, the paper argues that while greater legalization may serve to increase the effectivness of the trade clauses in promoting labor rights within states, it is the greater control of the USTR in administering the GSP program —that is, minimal insulation— that accounts for the more successful resolutions of the GSP cases as compared to the NAALC cases.

Resumen

El trabajo analiza dos cláusulas de condicionalidad sobre derechos laborales relacionadas con acuerdos de comercio internacional —el Acuerdo de Cooperación Laboral de América del Norte (ACLAN), acuerdo paralelo del TLCAN en materia de trabajo, y el Sistema Generalizado de Preferencias (SGP), una iniciativa de promoción de comercio unilateral de EE.UU.— para describir cómo las dimensiones de la legalización de los procesos de litigio y sus mecanismos de resolución de disputas pueden ser aislados de los intereses de los Estados en sus resultados. Uso la tipología de la legalización de Abott et al. (2000) como marco provisional en el documento, que sostiene que si bien una mayor legalización puede servir para aumentar la efectividad de las cláusulas comerciales en la promoción de los derechos laborales dentro de los Estados, es el mayor control de la USTR en administrar el programa del SGP —es decir, un caso de aislamiento mínimo— el que cuenta con las resoluciones más exitosas de los casos del SGP en comparación con los casos del ACLAN.

Introduction

Trade-based labor rights clauses have become an enduring feature of the landscape of international trade. While attempts to integrate worker's rights protections into the GATT and WTO have failed thus far (De Wet, 1995; Alben, 2001; Ehrenberg, 1996), both the US and the EU have appended guarantees for labor rights protections to regional and bilateral trade accords nearly universally since the mid-1990s (Nolan Garcia, 2009; Hafner-Burton, 2009). Under these programs, the benefits of trade remain contingent on demonstrated respect for a number of internationally recognized labor rights standards. While international institutions such as the International Labor Organization (ILO) already feature "soft law" mechanisms that render internationally-recognized labor rights protections and enforcement largely voluntary, the shift to trade-based conditionality attempts to insert the "hard law" mechanisms characteristic of dispute resolution in other trade areas into labor rights monitoring, thus increasing the potential for state compliance with labor rights obligations.[1]

Though the EU, the US, and a number of other states have made commitments through varied legal instruments to include social guarantees in trade policy, the effects that these agreements have had in promoting state compliance with the labor standards they feature, or in galvanizing improvements in labor standards and practices for workers within states, has been mixed. For example, case studies of the labor clause attached to the US Generalized System of Preferences Program (GSP) have suggested that the labor dispute resolution process has precipitated major improvements in labor rights protections within a number of states that have been subject of labor rights reviews, including institutional changes in the ways that labor rights are monitored and enforced, and have precipitated reforms to labor law (Frundt, 1998b; Compa and Vogt, 2001; Douglass *et al.,* 2004). In contrast, the range of case resolutions of the North American Agreement on Labor Cooperation (NAALC), the NAFTA labor side accord, so far have been limited to government–to-government consultations and cooperative activities rather than mandates that improve protections for workers at the local level. While in a few instances, the dispute resolution process has contributed to positive outcomes for workers, including the recognition of unions at the local level, in

[1]Though dispute resolution is most accurately an administrative step towards resolution in most trade based labor clauses, I refer to adjudication over labor issues as dispute resolution here as these agreements conform to similar structures for labor as for disputes in traditional trade areas, such as intellectual property rights protection, investors rights, and AD/CVD assessments. Further, later trade agreements signed by the US have eliminated the separate dispute panels for labor and environmental issues, instead streamlining all trade conflicts into a single dispute resolution procedure, thus bringing labor rights disputes both functionally and symbolically into formalized structures on par with other trade-related areas.

most other cases, there was little remedy to affected workers, let alone a policy response. To the extent that the differing effectiveness of each clause in promoting state compliance with labor rights obligations under these agreements is an effect of how the dispute resolution mechanisms that they contain are managed (Nolan Garcia forthcoming 2011) the degree to which tying trade benefits to social guarantees then promotes labor rights protections for workers is thus partly a function of the mechanisms that promote state compliance with treaty obligations, and therefore a question of institutional design.

This paper attempts to account for the differing effectiveness of labor clauses by comparing the institutional features of two agreements, the GSP and NAALC labor clauses, to assess how features contained in the design of these accords and their dispute resolution mechanisms condition the effectiveness of such clauses in protecting labor rights within states. I ask two questions. First, how does the degree of legalization of each agreement affect the probability that states will then comply with their obligations under the agreement? Second, I ask how the specific design elements of each labor clause account for the effectiveness of each in resolving labor rights violations for workers within states. By this I mean how does the selection of rights to be protected, discourse around rights included in the agreement, the construction of dispute resolution mechanisms and their isolation from states' interests in enforcement, all contribute to the successful promoting of labor rights within the GSP program, while the NAALC clause is associated with far less ambitious case resolutions?

The paper draws on insights culled from the literature on the growing legalization of international politics, and the understandings drawn from it on how legalization may improve compliance with treaty obligations. Legalization refers to the degree to which the instruments of agreements between states are legally binding, specified, and delegated to third parties for their enforcement (Abbott *et al.,* 2000). At one end of a continuum of legalization exists an ideal type, where all three dimensions are high, and from this point, devolved to institutions that feature "hard" law, where obligation and delegation are high (Abbott *et al.,* 2000). Agreements that are less legalized across these dimensions feature "soft" mechanisms that may facilitate compromise among states that allow them to commit to rules and processes of agreements (Abbott and Snidal, 2000), but at the same time may result in agreements that are less enforceable, more open to interpretation by the parties involved, and in turn, more malleable to states interests in how commitments are interpreted and fulfilled. As such, some design decisions may facilitate state compliance with the obligations of international institutions (McLaughlin Mitchell and Hensel, 2007; Chayes and Chayes, 1993), while other design elements instead create avenues by which states can seek to avoid or limit these obligations. To the extent that compliance with treaty

obligations is an important factor that conditions whether international institutions are in turn effective at what they are created to do, design plays a large role in how such institutions ultimately function.

The paper begins by discussing the inclusion of labor rights standards in trade agreements more generally, and locates the shift from voluntary international standards and monitoring to enforceable standards represented by the linking of labor standards to trade. I then turn to the theoretical literature on the legalization of international institutions to situate the design of the two labor clauses considered here, the GSP and NAALC clauses, within this larger conversation about the potential effects of design choices on compliance with state's legal obligations. I compare some of the specific design elements associated with the clauses across the dimensions of legalization posed by the literature to illustrate how the differences in enabling legislation, the processes established to file cases, the dispute resolution mechanisms, and potential for trade sanctions may account for the improved enforcement of labor rights protections associated with the GSP program, and the more limited results achieved under the NAALC side accord.

By bringing these two frameworks together, this paper potentially provides important insight into the study of legalization of international institutions by extending the conversation about how design may condition compliance into a new issue area, trade-based labor rights conditionality. At the same time, the comparison of the two clauses across the dimensions of legalization lends a systematic treatment of how specific design choices may in turn condition state compliance with labor rights obligations, and as such provides insight into how international institutions may more effectively promote labor protections for workers in the states that are party to such agreements, thus adding to the conversation on whether and how trade-based strategies may best promote labor rights protections in the global economy.

Trade-based Labor Rights Enforcement

Support for linking trade and labor rights is largely a reaction to the perception that the expansion of trade is not only associated with increased poverty and inequality in less-developed countries (reviewed in Pangalangan and Brysk, 2002), but competition for investment engendered by freer capital flows leads to the erosion of domestic labor standards (Mosley and Uno, 2007; Cingranelli and Tsai, 2003; Rodrik, 1997). The "race to the bottom" dynamic suggests that national leaders in developing countries face incentives to relax regulations in order to attract international investors, which exacts downward pressure on labor standards and wage rates globally (Harrison and Scorse, 2003; Pangalangan and Brysk, 2002; Elliott and Freeman, 2003), and creates comparative advantages in labor costs among less-developed states (Rodrik *et al.,* 1996). Thus countries that already endure low wages and poor working

conditions will use lax labor regulation to attract foreign direct investment away from other poor countries competing for the same investment (Gordon, 2000; Chan and Ross, 2003).

Empirical support for a race to the bottom thesis is still thin (Kucera, 2002; Rodrik *et al.,* 1996; Cingranelli and Tsai, 2003; Basinger and Hallerberg, 2004), in part because of the difficulty of collecting disaggregated cross-national measurements of labor outcomes, especially wages (Mosley, 2008). Thus far, econometric models have been unable to provide convincing explanations of the effect of globalization on poverty and inequality in general (Wade, 2004), much less account for the concomitant erosion of wages and working conditions as capital concentrates in states with "selectively applied" labor protections, like China (Chan and Ross, 2003; Chan, 1998, 2001). Meanwhile, a number of case studies on developing nations suggest that a "race to the bottom" exists in some labor-intensive industries, and is speeding up as economic integration moves forward. For example, in the processing zones established to facilitate assembly of goods for exports, labor standards are sometimes subject to selective regulation, leading to substandard working conditions and below-market wages (Armbruster-Sandoval, 2003; Gordon, 2000; Klein, 2000; Frundt, 1998b, 1998a). Testimonial accounts of poor working conditions, health and safety risks, and labor repression that have accompanied labor rights campaigns against major US brands lend the impression of widespread gross abuses (Hartman and Wokutch, 2003; National Labor Committee, 1997; Harrison and Scorse, 2003). Others have documented how labor costs have influenced firm migration from industrialized nations like the United States to Latin American countries and finally to Asia, where the weakest labor protections and lowest labor costs offset increases in transportation expenses to US markets (Ross and Chan, 2002; Goodman and Blustein, 2004). According to this perspective, globalization writ large is responsible for weakening labor protections in the developing world.

One result of the failure of states to protect labor rights at the domestic level is the emergence of alternative models for protecting workers rights that locate enforcement mechanisms at supranational levels of governance, including by attaching them to trade agreements. Because the "race to the bottom" is triggered by competition for trade and investment, and are partly the result of domestic preferences to continue to violate labor rights, trade agreements are increasingly seen as the best arena for promoting common protections for workers in less-developed states (Ross and Chan, 2002). Trade-based conditionality is seen as one way to reestablish the minimum standards of employment for workers party to trade agreements, in an effort to insulate the most vulnerable workers from the pressures of competition from factors that are not market driven. Labor clauses establish minimum standards of employment for all workers party to trade agreements, erasing the

comparative advantages that stem from lax regulatory regimes. Since lax enforcement is a domestic problem, placing consequences for compliance at supranational levels of enforcement, such as through dispute resolution, can cut through the political deadlock that sometimes complicates efforts to improve labor rights enforcement within states. Trade based mechanisms thus represent a compromise point for states between global labor standards and national labor relations systems, both of which have proven to be less than effective in enforcing labor rights obligations (Teague, 2002).

A second argument for linking trade and labor rights seeks to introduce the "hard" enforcement mechanisms of trade agreements to the "soft" standards of human rights and labor rights regimes (Graubart, 2008; Hafner-Burton and Tsutsui, 2005; Rodrik *et al.,* 1996; Abbott and Snidal, 2000). International labor rights standards are already codified in the UN Declaration of Human Rights as well as the ILO conventions that establish "core rights", those labor rights that can be achieved by states regardless of their level of development, as later defined by the 1998 ILO Declaration on Fundamental Principles and Rights at Work.[2] However, compliance with the international labor conventions is largely voluntary (Collingsworth, 2002), and in the ILO's case, limited to reporting and monitoring without a credible apparatus for enforcement of the conventions (Teague, 2002).[3] Labor rights enforcement under soft standards thus suffers from the same enforcement weaknesses as human rights guarantees.[4] Recent work on compliance with human rights conventions have demonstrated that that government ratification is followed by either no change in human rights protections (Camp Keith, 1999; Hafner-Burton and Tsutsui, 2005; Hathaway, 2002b) or worse, some countries that ratify human rights treaties commit more human rights violations than before ratification (Hill, 2009; Hathaway, 2002b).

Accordingly, if labor rights standards are used as a comparative advantage by states, labor rights is a trade issue. As such, labor standards should be

[2] While the identification of exactly which labor rights are fundamental rights has itself been subject to intense debate, "core labor rights" here refers to those established as fundamental rights by the International Labour Organization's 1998 Declaration on Fundamental Principles and Rights at Work: the rights of freedom of association and collective bargaining, freedom from forced labor, the abolition of child labor, and protection from discrimination in occupation and employment. See Brown, Deardorff, and Stern (2000) for a review of the debate on defining labor rights, Leary (1996) for the argument on minimum definitions of core labor rights as established by the International Labour Organization, and Chan (1998) for the argument for maximum definitions as follows the Universal Declaration of Human Rights.

[3] Bohning's data (2003) records the gaps on reporting for states that have signed the ILO conventions, illustrating that states do not always commit to their most basic obligation, reporting progress back to the ILO. The limits to ILO enforcement are illustrated by the attempt to implement a boycott of imports from Myanmar in 2001 for forced labor practices. Nearly all ILO member states refused to participate, citing WTO rules on non-discrimination as the reason as to why they could not join the boycott (Olson, 2001).

[4] Human rights treaties also lack clear channels for enforcement as the councils established to monitor compliance often lack the capacity to do so, or the mechanisms to induce compliance are absent (Hill, 2009). Even when states report violations, international organizations are powerless to punish violations other than to file a formal complaint.

subject to dispute resolution just like tariff assessments, intellectual property rights, and investment rules (Ehrenberg, 1996; Moorman, 2001). Further, trade agreements feature "harder" mechanisms for compliance than either human rights or labor rights enforcement regimes (Harvey, 2001; Collingsworth, 2002; Rodrik *et al.,* 1996; Hafner-Burton, 2005), because they include rules whose transgressions can be penalized through dispute resolution (Rosen, 1992; Elliott, 2000; Burtless, 2001). Once tied to trade agreements, labor rights enforcement falls under similar processes that protect commercial rights, intellectual property, and investors' rights (Collingsworth, 2002; Olson, 2001; Ehrenberg, 1996), thus shifting labor rights compliance from voluntary to binding.[5]

The potential consequences that labor violations pose to altering or interrupting the trade relationship are sometimes important enough to encourage treaty compliance. Worker protections may already be written into constitutions and domestic labor law, but might not be enforced by states. States that relax labor standards thus face strong incentives to improve labor rights performance and conform to policies supported by industrialized countries (Rodrik, 1996). Because signing onto labor rights conditionality is the price of admission to trade cooperation, even states that disregard labor rights should cooperate, because non-compliance can potentially have serious implications for the overall trade relationship.

Labor Rights Clauses in US Trade Policy

The United States have adopted labor rights conditionality into their trade law more than any other state or federation, including the EU, and labor guarantees have become an enduring feature of US trade policy. Every bilateral and multilateral trade agreement signed by the United States since NAFTA (1994) features a labor clause, and in the late 1990s and early 2000s, Presidential Trade Promotion Authority —"fast track" legislation— was itself conditioned on reaching trade negotiations that included some form of labor provisions (Weiss, 2003; Compa, 2001). In addition, eligibility for the Overseas Private Investment Corporation, a federal program that provides political risk insurance for US investors in developing countries is tied to labor rights performance (Douglass *et al.,* 2004), and the Omnibus Trade and Competitiveness Act of 1988 recognizes the denial of worker's rights as unfair trade competition (Amato, 1990).[6]

Though there are a number of clauses from which to draw evidence, the GSP and NAALC labor clauses serve as the case studies here for two reasons.

[5] Though certainly labor rights and environmental standards are not protected as vigorously as the rights of commercial actors.

[6] Labor conditionality was also tied to the requirements for some USAID programs in the 1990s (Compa and Vogt, 2001).

First, the GSP was the first trade-based labor clause that was attached to a unilateral trade promotion initiative by the US, and the NAALC was the first clause attached to a multilateral —and later, bilateral— trade agreement. As such, the design of these two clauses have served as the templates for including trade based labor rights guarantees to US trade accords, and the labor clauses that have been introduced into the subsequent unilateral and bilateral agreements have generally adopted these institutional forms (Weiss, 2003). Further, these clauses are among the few that feature a series of case filings and resolutions that we can draw from to estimate the effects of institutional design on states' compliance with their legal obligations, and can provide a wealth of case studies to generalize about the effectiveness of these clauses to promote labor rights within trading partners, whereas more recent trade agreements lack case material from which to draw inferences about case resolutions.

The US GSP program is a trade promotion initiative s first authorized in the Trade Act of 1974 (19 USC 2461 et. seq.), implemented in 1976, and periodically renewed by Congress (Amato, 1990). The GSP extends duty-free importation of some 3500 selected products from 131 less-developed countries, subject to additional procedural constraints (Office of the United States Trade Representative, 2009). For the poorest states —which is drawn from the list of Least Developed Countries maintained by the United Nations— an additional set of nearly 1400 products are included.[7] The US is not alone in offering non-reciprocal trade benefits to less-developed states. Twenty-five countries currently maintain GSP programs, which were followed by an alphabet soup of preferential agreements in the form of overlapping trade commitments in multilateral, bilateral, and unilateral arenas. In the US, trade promotion initiatives in Latin America under the Caribbean Basin Economic Recovery Act/ Caribbean Basin Initiative (CBERA/CBI) and Andean Trade Preference Act/ Andean Trade Promotion and Drug Eradication Act (ATPA/ATPDEA), and in Africa under the African Growth and Opportunity Act (AGOA). These other US trade promotion initiatives overlap with the GSP by including additional goods to the list of those eligible for duty-free importation to US markets.

During the 1980s, both business leaders and trade unions were troubled about the precipitous loss of US manufacturing jobs, and attributed it to competition from low wage countries (Adams, 1989). Not only were they concerned about the effects of allowing poor states to import duty free to the US, thus introducing trade diverting price distortions and possibly leading to job losses at home, but also the emerging incentives for US companies to take

[7] The states that are eligible to participate in GSP are subject to both statutory and discretionary criteria apart from the labor rights sections discussed here, including per capita income limits, whether they have a history of expropriation, and adherence to communism, and there are limits to the products that can be included through rules of origin and need limits, among other factors (USTR, 2009).

US jobs to these same states where costs and regulations were lower. If the job losses of the 1980s were aggravated by low wages in poor countries, they believed the US should not award trade preferences to countries that are weakening labor protections in order to compete with the US. In 1984, the Trade Act was up for renewal again, and, business leaders and unionists lobbied hard for legislation that would condition trade benefits for poor countries on labor rights protections in the renewal bill.[8] As such, a conditionality clause was introduced into the GSP program in 1984 that tied participation in the program to demonstrated respect for labor rights in the countries that participated in the trade, subject to a yearly review process administrated by the Office of the US Trade Representative (USTR).

Like the GSP clause, the NAALC side labor accord is the product of lobbying Congress to attach labor conditionality to trade programs. As the United States moved closer to negotiating a trade agreement with Mexico and Canada, sectors of civil society in all three states began to mobilize against the agreement and the possible negative impacts regional integration might hold for labor (Nolan Garcia forthcoming 2010). Eventually, these actors in the US successfully pushed Congress to condition fast track authority on the inclusion of labor and environmental protections in the final agreement, and committed the Bush administration to accept an "action plan" that promised that any final agreement would include worker adjustment and retraining programs.[9] Thus, the labor clause was added to the treaty as a condition of its ratification in the USA, and is a product of political exigencies rather than reflective of state's interests in protecting labor rights (Cameron and Tomlin, 2000; Mayer, 1998; Hafner-Burton, 2009).[10] The NAALC sets forth obligations of states under the accord and the labor rights that are protected under the agreement, establishes the institutions that implement and enforce the accord through the labor dispute resolutions process, and details the procedures states use to receive and process petitions.

To date, 38 petitions have been filed with the NAALC regarding labor rights violations in 32 separate petitions. In total, twenty-five of the petitions, or 68.6%, were accepted for review, while ten petitions were rejected. From 1984 to 2005, 135 petitions have been filed with the USTR under the GSP alleging labor rights violations in 43 participating countries. Of these, 78, or 57.78% of the petitions have been chosen for further review by the GSP subcommittee, ultimately triggering in-country investigations in 35 states (Nolan Garcia, 2007). Since 1984, thirteen states have been suspended

[8] For more on the passage of the 1984 Renewal Act and the genesis of the worker rights clause, see Compa and Vogt (2001) and Adams (1989).

[9] The administration committed itself to "expanded US-Mexico labor cooperation" and "an expanded program of environmental cooperation" as part of the negotiations (Mayer, 1998: 90).

[10] At times, disagreements about the design of the labor and environmental side accords and whether their obligations would be binding stalled the negotiations for six months and threatened to upend the entire agreement (Cameron and Tomlin, 2000).

from the GSP program for labor rights violations, and 6 of these states have been reinstated once they have in turn solicited reinstatements following labor reforms. While the case filing process and dispute resolution mechanisms are more formalized in the NAALC than in the GSP, the NAALC is also less effective at promoting labor rights protections, especially within Mexico (Buchanan and Chaparro, 2008), and has never mandated trade sanctions. The next section introduces the theoretical insights drawn from the work on legalization, and applies them to trade based labor rights clauses, to shed light on the differences in institutional effectiveness.

Legalization and Compliance with Labor Rights Guarantees

Early debates about whether international institutions are reflective of state power have been eclipsed by debates about how institutions matter in constraining state behavior (Koremenos *et al.,* 2001; Martin and Simmons, 1988) as the research agenda has moved farther away from responding to purely realists critiques into a widening research program of its own. Part of the focus on how international institutions matter for states behavior is the foray in questions of how such institutions are designed. This paper draws from insights from the merging theoretical work that recognizes that international institutions vary across institutional characteristics that can be described across a continuum of "legalization" (Abbott *et al.,* 2000), and how these elements may condition how states comply with such institutions to varying degree (Abbott and Snidal, 1998; Chayes and Chayes, 1993), as well as how effective different design configurations may be in achieving institutional objectives (Simmons, 1998).

I tentatively adopt the framework advanced by Abbott, Keohane, Moravcsik, Slaughter and Snidal (2000), and Abbott and Snidal (2000) that situates legalization across a continuum that varies across three dimensions: obligation, precision, and delegation. Because the labor clauses analyzed here are dispute resolution mechanisms, I adopt the framework for the third dimension, delegation, from the work of Keohane, Moravcsik, and Slaughter (2000). This work further specifies the ways that international agreements are enforced by third parties though an analysis of access to tribunals, the independence of actors in the tribunals from states, and embeddedness, the degree to which states party to dispute resolution procedures can control the resolution process and the implementation of tribunal recommendations. Similar work on the design of trade based labor rights clauses (Weiss, 2003; Polaski, 2003) provides a review of institutional features that vary across agreements that is helpful in identifying the relationship between design, compliance, and effectiveness for labor rights conditionality more specifically, but remains isolated from the larger conversation on legalization. In this section I attempt to merge these two conversations to identify how the

legalization framework may be applied to a new issue area: the global protection of labor rights.

Much of the work on legalization is in the early stages and centers on describing the phenomenon in order to develop a typology. What various authors have adopted is a continuum of the legalization of international institutions that refers to the degree that international obligations are binding, the precision of which rules and procedures are specified and codified, and the extent to which the power to implement and enforce agreements is delegated to third parties (Abbott *et al.,* 2000). These dimensions then fall across two extremes, by which institutions with more precise and greater enforcement capacity, among other features, are designed with "hard" legalization, and those with fewer binding obligations and less capacity to enforce rules include "soft law" mechanisms (Abbott and Snidal, 2000). The authors go to great lengths to underscore that these designations are for categorization, and do not lend superiority to one type of institutional design or another, but instead feature distinct tradeoffs that states must make between reaching an agreement that all parties can agree to and can abide by.

At the same time, scholars working on questions of state compliance with international institutions assume that harder forms of legalization are more likely promote compliance with legal obligations. On one hand, compliance only has value when states know that other parties to agreements are also complying with their obligations (Smith, 2000). When agreements are maintained by international institutions, states can infer with greater precision whether or not their partners are complying with their prescriptions given all of the classic arguments as to why institutions reduce the costs of gathering information, and promote cooperation among states in general (Abbott and Snidal, 2001; Martin and Simmons, 1998). International institutions in turn can signal a state's credible commitment to follow through on agreements (Abbott and Snidal, 2000), and can leverage costs to a state's reputation for reneging on commitments, that may become important across other issue areas (Simmons, 2000; McLaughlin Mitchell and Hensel, 2007).

Further, higher degrees of legalization make it hard for states to renege on agreements because legalization reduces the space available for domestic groups to change the rules (Abbott and Snidal, 1998), it limits the legal authority for policymakers to change rules through unilateral policy decisions (Smith, 2000), and limits the ability for states or interpret the rules in ways that reflect personal motivations of individual actors (Chayes and Chayes, 1993), or states interests more generally (Abbott and Snidal, 2000).[11] This is of course precisely what advocates of trade based labor rights enforcement strategies hope shifting the burden of compliance out of state's hands and

[11] As such states agree only to commitments they know they can meet (Chayes and Chayes, 1993), even if the form such agreements take is "softer".

into international agreements will provide to the current efforts to protect labor rights globally. Each of the components of legalization might then have an effect on the probability that states will comply with labor rights conditionality, as they do across other issue areas (McLaughlin Mitchell and Hansel, 2007).

Obligation

The first dimension of legalization, obligation, refers to the degree to which states and other actors are legally bound to a rule or commitment (Abbott *et al.,* 2000). Once applied to labor rights conditionality, is contingent on the underlying legal basis for the agreement. Some labor rights agreements are based on negotiated treaties, as is the case for bilateral and multilateral agreements, or come out of domestic law as is the case for unilateral agreements. When labor rights clauses stem domestic law, obligation is higher, as the set of labor rights and the rules and procedures for investigation of abuses, all come from a single legal source, which in the US is subject to judicial review. In entering a unilateral agreement with the US, states know that the US government is bound by legal authority to both follow procedures listed in the law, and apply them, according to the letter of the law in relationships with other countries.[12] When the source of the agreement is a treaty between states, respect for the sovereignty of each state can limit the extent to which any aspect of the process is binding (Weiss, 2003). Instead, agreements and their instruments are more likely to be presented as "recommendations", as they are in the NAALC.

The degree of obligation accounts for some of the differences in the effectiveness of the two agreements in promoting compliance with labor rights standards. As a unilateral agreement, the GSP presents states with a set of potential benefits —but packaged together with a set of legal obligations in terms of labor rights protections— and reserves the right to investigate compliance with these instruments. Because the source of the GSP is the US Trade Act, a domestic law, states are presented with an offer under terms they cannot influence. Because the GSP is a unilateral program, all decisions about the application of the GSP, whether in the labor rights arena or in commercial interests, are subject to domestic political structures in the US. This is very different than the NAALC, which comes out of a treaty signed nominally by equal partners. As such, the agreement that was ultimately negotiated responds to the tradeoffs states were willing to make to include labor guarantees, but also protects each partner's ability to make and enforce its own labor laws (Weiss, 2003). As such, some aspects of the agreement are legally binding, like the establishment of the institutions that manage the

[12] Though the US therefore has a set of binding rules they must follow in administering trade clauses, I discuss in subsequent sections how the US have introduced ways to interpret the rules in ways that add flexibilization to what the rules may mean, and how the US can choose to apply them.

dispute resolution process and the procedures for accepting and reviewing cases, while others are not, most notably, some of the resolution stages of panel disputes.[13]

These both can have serious implications for the way that agreements are enforced. Whether or not procedures are binding on states has an import on which cases may be heard in dispute resolution, and therefore, who sets the agenda for how the agreement will be applied. Whether the results of dispute resolution must be adopted, or are recommendations, obviously has potential effects on the degree to which enforcement mechanisms in turn promote labor rights protections within states. As such, the GSP agreement features a number of cases where states were suspended from the program, and still other cases where the states under review reformed their labor laws or labor relations system in order to comply with the US regulations (Frundt, 1998b). The NAFTA resolutions have been far less ambitious. No cases have ended in fines or trade sanctions as punishment for violating the agreements, and where the NAALC has made a positive contribution to strengthening labor rights in Mexico, it has generally come out of the legally binding Ministerial Consultations (Nolan Garcia, forthcoming 2010).

Precision

Precision, the degree to which rules unambiguously define the conduct that is required or proscribed (Abbott *et al.,* 2000), is an important aspect of how rules may be open to interpretation by the parties involved. In labor rights agreements, precision is generally high as the texts list which labor rights are protected, but also refer to them in relation to bodies of international and/or domestic law for further specification. In both the GSP and the NAALC, the precision of the rules is also high, but the interpretation of whether states have met their obligations is problematic because certain institutional factors leave space for states to interpret those rules.

Under the GSP program, states are obligated to protect a narrow set of labor rights, which while following the ILO core rights generally without mentioning the ILO Declaration, refer to them as "internationally recognized worker's rights".[14] These rights include the right to association and right to collective bargaining, acceptable conditions of work and minimum standards

[13] The panels that review cases make recommendations to the Secretaries of Labor on what level of dispute resolution should follow, or how the case should be resolved. In practice, all recommendations to hold consultations between the Labor Secretaries (Ministerial Consultations) have been accepted. If Ministerial Consultations have not been able to resolve the issues, four progressively ordered stages of dispute resolution then come into play, ending in fines and trade sanctions. These additional states are legally binding on member states. In practice, no case has gone beyond the first stage. In some cases, Ministerial Consultations have resulted in Ministerial Agreements, the promises to change labor rights policies or practices, and these are legally binding on member states (Nolan Garcia, forthcoming 2010).

[14] The selection of specific rights protected by trade law, and their overlap with ILO conventions that the US has not signed, has been highly controversial. I discuss the rights language in the text. See Alston (1993) and Charnowitz (1986) for more.

of employment, freedom from forced labor, and a ban on child labor. The NAALC mentions 11 labor principles that are to be protected in the agreement, across five categories, including freedom of association and the right to collective bargaining, health and occupational safety, discrimination at work, technical labor standards (including wages and hours), and the rights of migrant workers. As such, the NAALC offers a wide range of labor standards that are protected by the agreement, more than the GSP, but in turn limits its application to the enforcement of domestic laws in each state.[15] As such, in the GSP, states follow standards that are codified by the ILO, and in the NAALC, each state follows its domestic labor laws.[16]

At the same time, the language of rights compliance can create spaces for interpretation and ambiguity that states have then used to determine the outcome of panel resolutions. An example from one clause serves to illustrate: The GSP guidelines for panel review set by the US Congress requires mandatory suspension for those states that do not meet the labor rights criteria (19 U.S.C.A. § 2462 (b) (2) (G)). During the course of a review, the USTR determines compliance by whether states are "taking steps to afford internationally recognized standards for worker rights", a discursive shift that replaces concrete measurement against the legally binding yardstick of trade law with an interpretation of progress towards a predetermined goal, and allows the USTR and the GSP subcommittee greater autonomy in applying the statue than intended in the law.

The use of "taking steps" criteria was probably meant to give the USTR discretion in matching their expectations for compliance with labor standards to a level appropriate for the states in question given their ranging levels of economic development. For example, inspection is key to determining compliance with domestic labor law, but poor states have fewer resources to commit to inspection regimes than the United States or other industrialized countries. However, the effect of introducing "taking steps" criteria is that it allows the USTR to avoid creating concrete measures to assess compliance in favor of discretionary interpretations, which critics charge has lead to an arbitrary application of the trade law.[17] Groups that have filed GSP petitions have long argued that indeed, the outcomes of country review decisions have been driven primarily by political concerns —including advancing foreign policy objectives— rather than following the relatively specific labor rights criteria. States that are allies of the US are more likely to be awarded with

[15] The NAALC, and the domestic labor standards approach that appears in subsequent agreements, has been criticized because it avoids the more important question of whether domestic labor laws are in turn consistent with internationally recognized labor standards, such as those enumerated in the ILO core conventions.

[16] In investigating cases, the labor representatives to the GSP refer to ILO documents and legal precedent in determining whether states are in compliance with the ILO standards (Interview, Bureau for International Labor Affairs, US Department of Labor, Washington, D.C, July 2007).

[17] Arbitrary application of the trade statute has been the most common criticism of the design of the program, even from within the government (Dorman, 1989).

"taking steps" designations that allow them to continue to participate in the program than other states (Nolan Garcia, 2007), even when their domestic labor rights practices clearly violate the labor standard set in the agreement.

Bilateral and multilateral agreements also feature areas where the use of language in applying the rules cuts through the precision with which labor rights are identified and their protection specified, but these areas are far less controversial. These agreements add the language "strive to ensure" in describing a trade partner's willingness to meet its labor rights obligations, again to avoid applying a standard that partner states cannot match given their lower levels of economic development, with a second effect in giving the US wider discretion on applying panel decisions (Weiss, 2003). In turn, adding this flexibilization to the way statues are then applied in turns opens up a new dimension to the specificity of which rights are protected in agreements. Setting a standard based on a set of rights to be protected, but only for states that can afford to protect them, threatens the entire project of including labor clauses in trade agreements to establish universal practices that will eliminate the pressures to weaken rights guarantees among the poorest states.

Delegation

Finally, the degree to which states delegate authority to third parties to implement agreements, delegation, is relevant here, to the extent that trade based labor rights clauses are enforced (and state's compliance monitored) through dispute resolution (Keohane *et al.,* 2000). This dimension of legalization is further disaggregated into separate factors, each of which condition whether dispute resolution is impartial in respect to state's interests.

Access refers to questions of legal standing, and specifically, whether non-state actors as well as states or can file claims, and the process by which they may do so (Keohane *et al.,* 2000). Like obligation, access can have an agenda setting effect in that access determines whose claims are legitimized (Graubart, 2008), and which rights are ultimately most important. The question of access is the least controversial of the dimensions for the labor clauses analyzed here. The NAALC and the GSP both give standing to individuals and groups rather than states, which is interesting given that most other dispute resolution panels and human rights treaties give space to states to bring cases, or allow individuals to bring cases, but only through formal state sponsorship. Both the GSP and NAALC dispute processes are open to the public, and there is no requirement that states sponsor petitions. As such, for both clauses, access is fully open.

Independence measures the extent to which the adjudication of claims is rendered impartially with respect to states' interests in case outcomes (Keohane *et al.,* 2000). The least degree of independence is associated with

dispute mechanisms that allow agents of the states in question to resolve conflicts, while additional constraints on adjudicators, and the methods by which adjudicators are selected, mark the distance from this ideal type along a continuum of delegation. Questions of independence center on how the dispute panel arbitrators are selected, and their relationship to the states subject to dispute resolution. In both the GSP and NAALC, state bureaucrats administer the adjudication process, and in both, adjudication outcomes reflect states interests, meaning independence is low. However, the different structure of the two panels and how they are constituted also affects the degree to which the US can manipulate the dispute resolution process to support state's interests. GSP is very different from the NAALC panel, where resolutions are more insulated from state's interests.

An enforcement mechanism to assess and monitor compliance with the labor rights clause among program beneficiaries is included in the GSP renewal statute. Each year, a complaint procedure allows any person or group to file a petition with the USTR, asking the office to initiate a review into the labor practices of any state that is eligible for GSP benefits.[18] A GSP Subcommittee is charged with reviewing the petitions each year during the course of the GSP Annual Review. This Subcommittee is part of the Trade Policy Staff Committee, which is composed of representatives from nineteen different branches of the federal government, including the Department of State, the Treasury, Agriculture, Justice, Commerce, Customs, the Council of Economic Advisors, National Security Council, and the International Trade Commission (Rigby, 2003). The GSP Subcommittee deliberates on both the labor rights petitions and any petitions submitted on intellectual property rights infringement submitted during the Annual Review. The Subcommittee then provides recommendations to the USTR on all aspects of the Annual Review, including the labor rights petitions, the intellectual property rights petitions, requests for product inclusions and waivers, and country eligibility under the income requirements. As such, state agents are charged with managing the entire process of filing and receiving cases, as well as reviewing them and eventually, determining whether or not states are keeping their commitments to protect labor rights. Given that it is an extension of US trade law, the US government alone is charged with the administration of dispute mechanism. However, the degree of concentration of responsibilities in the hands of state agents also has important effects on how cases are reviewed and resolved, in that the US is less likely to review cases that targeted important US allies (Nolan Garcia, 2007). As such, the degree of independence from states interests in the GSP is low.

[18] Though the USTR could initiate this review under its own volition, it has only done so twice, once in the legally-mandated first review of 1985-1986 where the USTR was obligated to review workers rights practices in all countries then participating in GSP, and once in 2000, for Guatemala (Compa and Vogt, 2001).

Though state agents manage the NAALC as well, by virtue of its genesis as an international treaty, the NAALC features tripartite obligations for the dispute panels that limit the influence of any single state in the process. The agreement establishes National Administrative Offices (NAO) to oversee the process of filing cases for dispute resolution in each country, and a Commission for Labor Cooperation (CLC) that includes a tri-national Secretariat that assists the NAOs and the three labor ministers in administering the activities associated with the NAALC (NAALC, 1993).[19] Under the NAALC, any interested party can file a complaint with a National Administrative Office regarding labor law enforcement in Canada, Mexico, or the United States (NAALC, 1993; Hafner-Burton, 2005; Rodrik *et al.,* 1996; Collingsworth, 2002; Harvey, 2001). As such, all three NAFTA partners have NAO offices to receive cases, but the legislation further prevents NAOs from hearing their own complains. Cases must be filed at an NAO in a state other than where the violation takes place, meaning cases against Mexico can be filed in the US and Canada only, and the NAO that receives the case is charged with managing the dispute resolution process. This rule minimizes the influence that states have on determining which cases are heard, and determining how they should be reviewed and resolved. Though a number of critics have charged that the NAALC does not adequately protect labor rights because it reflects US interests in keeping it ineffectual (Buchanan and Chaparro, 2008), and the case process has become politicized in recent years in ways that discredit its ability to address labor rights violations (Nolan Garcia forthcoming 2010; Graubart, 2009; Nolan Garcia forthcoming 2010) the process for filing cases is largely insulated from states interests, and so the degree of independence is moderate.

The question of state influence in institutional outcomes, and the degree to which panel resolutions are enforceable, is addressed by embeddedness, the degree of control individual governments have over the implementation of judgments (Keohane *et al.,* 2000). Under labor rights conditionality, this area is further complicated by the degree to which panel resolutions are binding on states. If panel resolutions are merely recommendations, states have full control over whether or not judgments will be implemented, though whether they ignore them or not is subject to additional factors unique to each case.

For the GSP, embeddedness is low, as state agents implement the recommendations of the panel unilaterally, and thus state agents have full control over the implementation of judgments. In this case, the high level of control over implementation ironically increases compliance and effectiveness. In order to remain eligible for GSP benefits, states must demonstrate that they are "taking steps to afford internationally recognized

[19] The US NAO is now the OTLA, and is charged with following labor issues in all US agreements with conditionality clauses. I will continue to refer to it as the NAO to keep consistent with the parallel institutions in Mexico and Canada.

worker rights". During the course of the Annual Review, the GSP Subcommittee may either determine that the labor rights allegations listed in the petition seem credible, and recommend a formal in-country investigation to the USTR, or decide to reject the petition for further review. The in-country review then involves State Department personnel and labor attachés in the US embassy of the targeted state, and the government of the state in question may be brought into consultations with the US Ambassador to determine if the allegations are credible, and what actions could be done to address the labor rights allegations. The outcome of this review process in turn determines whether the USTR recommends to the President that GSP benefits should be extended or suspended for specific countries. The USTR has also established a third option in practice, a continuance of the country review, in order to monitor progress on labor rights enforcement for an additional year. The continued review decision temporarily extends GSP benefits until the time in which the USTR decides either that governments are making efforts to come into compliance with the GSP labor rights clause ("taking steps"), or that a suspension is in order.

Because the loss of GSP trade benefits can be substantial for some countries, and further, that GSP suspension is magnified by the loss of overlapping TPIs, the threat of withdrawing benefits has precipitated changes within states to comply with the labor rights standards included in the agreement. Among the changes in labor policy documented by the case studies are reforms of labor codes and statues compatible with the ILO labor rights conventions, as in El Salvador, Guatemala, the Dominican Republic, Honduras and Swaziland (Frundt, 1998b; Douglas *et al.,* 2004). At other times, a USTR review precipitated changes in labor practices, such as improved respect for freedom of association in Indonesia, El Salvador, the Dominican Republic, Honduras, and Guatemala, including the recognition of unions in Panama, the Dominican Republic and El Salvador (Frundt, 1998b; Davis, 1995). In Chile, Guatemala, El Salvador, Honduras and Indonesia, repression of union leaders and organizers abated during the course of the USTR review, though in the last case, repression returned once the review period was over.

The GSP program has advanced new programs to effectively combat child labor in developing countries as well. The Bangladeshi ILO monitoring program for child labor had its genesis in a 1990 GSP petition on Bangladesh (Douglas *et al.,* 2004), and a GSP review that resulted in the partial suspension of rugs and soccer balls prompted programs in Pakistan that limited the use of child labor in these and other industries (Compa and Vogt, 2001). Finally, there is evidence that the GSP process, and the ways that successive US administrations paid attention to the interests of labor leaders legitimized the political role of unions domestically, leading to an opening for union activity in some cases, like Haiti, the Dominican Republic and Guatemala (Frundt, 1998), and in El Salvador, Honduras, and the Dominican Republic, unions

gained a voice in government policy negotiations where they were previously ignored. As such, the GSP program features an impressive record of generating substantial improvements in labor rights policy and practice that in turn have increased the protection of labor rights in certain cases.

For the NAALC, panel resolutions are largely voluntary, and as such, partner states have full control over implementing agreements. Further, the three states negotiated stages of dispute resolution, but limited the types of cases that could be resolved through fines and trade sanctions, thus limiting the reach of the panel, and minimizing the effectiveness of the panel process to address labor rights violations. Once labor rights cases are filed, the NAO makes a decision on whether to further examine the allegations presented in the case. If a review is granted, the NAO then researches the allegations, attempts to verify them through discussions with the NAO in the state where the violation took place, and most importantly, assesses whether such violations of labor principles are consistent with national labor law.[20] At the conclusion of the review, the NAO issues a public report with its findings, and provides recommendations on how the states in question can resolve the issues presented in a case. These resolutions can include Ministerial Consultations between the respective Ministers of Labor, and if issues remain unresolved, the CLC can convene an evaluation by a committee of experts (the ECE), or request panel arbitration. If labor violations remain unresolved, fines and trade sanctions are included in the agreement, though the procedure for assessing fines and applying sanctions are among the least specified sections of the text, and many analysts believe that sanctions will never be applied in the NAALC (Weiss, 2003; Buchanan and Chaparro, 2008).

Further, the types of resolutions that can be applied during the course of dispute resolution are limited further by the categories of violation charged in the petition. For health and safety violations, the full range of remedies is available, including Ministerial Consultations, public outreach programs, and fines and sanctions. Cases involving child labor, minimum wage disputes or health and safety violations are subject to dispute resolution, and if still unresolved, fines and trade sanctions. Cases concerning "technical labor standards" such as forced labor, minimum employment standards, discrimination, workers' compensation, or protection of migrants are limited to consultation and expert evaluation (NAALC, 1993). Freedom of association, the right to organize, the right to strike, and collective bargaining disputes are afforded the least redress- these cases are exempt from all but Ministerial Consultations.

All of the cases that were ultimately reviewed ended in Ministerial Consultations; none reached higher levels of arbitration. While most of these cases ended without any further action on the part of states to improve labor

[20] In addition, public hearings are not included in the text of the agreement, but the US conducts them in nearly every case, much to Mexico's protests.

rights practices, in a few cases, the case process ended with resolutions that favored unions. For example, in a few instances, filing a case has pushed the Mexican government intervene to solve labor disputes at the local level, and in others, the NAALC process helped to promote important reforms in Mexican labor rights policies and practices, especially in the administration of union recognition and the freedom of association (Nolan Garcia, 2009). In some cases, the political dynamics that emerged out of individual NAALC cases has opened dialogue about labor rights in Mexico, legitimizing actors within Mexico that had previously been excluded from policy discussions (Graubart, 2008), allowing them to push for —and secure— reforms in specific aspects of labor rights enforcement (Finbow, 2006; Hertel, 2006).[21] Compared to the GSP clause, the resolutions that were possible under the agreement were far less effective at promoting labor rights protections.

[21] A number of scholars have pointed to the resurgence of cross-border labor organizing that was encouraged by NAFTA, and the effects that union solidarity has had on worker's organization in both Mexico and the United States as positive developments (Kay, 2005; Stillerman, 2003; Hathaway, 2002a; Babson, 2002b; Bandy, 2004; Babson, 2002a; Juarez Nunez, 2002; Cook, 1997; Williams, 1999).

Conclusions

The design of trade based labor rights clauses has an important effect on whether states will comply with their obligations to protect labor rights. The GSP clause has been highly effective in promoting compliance with labor rights guarantees within partner states, even though by virtue of coming out of domestic law, nearly all of the elements of the design of the clause and the process by which it is implemented is subject to control by the United States. While legalization literature looks to the ways that design can isolate the implementation of agreements from states interests, the GSP instead shows us that under certain circumstances, state control over the dispute resolution process can instead increase compliance. However, the linkage to trade also is an important factor to consider. Non-compliance can disrupt the trading relationship given that disputes can end with suspension from the program.

The NAALC by contrast features institutions that reduce the ability that any one state has to shape the agreement, but in turn, allows states wider discretion in implementing its recommendations, and in the interpretation of compliance with the law. In turn, the NAALC is much less effective at promoting labor rights protections. However, if the NAALC lacks enforcement power, it is because each trading partner was more interested in negotiating an agreement that respects state sovereignty, rather than one that had effective sanctioning power (Weiss, 2003; Dombois, 2002; Bensusán and Weintraub, 2004). As such, it features softer mechanisms that allowed these states to come to agreement about what a labor clause should include, but in ways that prevent anyone state from interfering in the application or interpretation of labor law.

Though more reproach is needed in developing a more precise legalization framework that explains where trade-based labor rights clauses may be more effective at promoting compliance with labor standards, it is a first attempt to analyze labor rights clauses in a more systematic way, and in turn identify which aspects of institutional design serve to strengthen the clauses currently in use. Further research may benefit from a discussion of which dimensions are most important for improving state compliance. Given that trade based labor rights clauses have become a lasting part of trade negotiations, understanding the design elements that best promote labor rights will help identify the optimal set of institutions, and degree of legalization, that strengthen labor rights enforcement in subsequent agreements.

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