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Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes

In the debate over global economic liberalization, few issues have been as contentious or hard-fought as the calls to incorporate social standards and labor rights provisions into free trade agreements (“FTAs”).

In the United States, the inclusion and design of such provisions—a process often referred to as “linkage”—remains a highly controversial issue and one that has played a significant role in the political and policy debates over the rapidly increasing number of bilateral and regional FTAs that the U.S. government is negotiating. In one of the most widely followed recent examples, the U.S. House of Representatives, in a 217-215 vote, and the U.S. Senate in a 54-45 vote, barely ratified the Central American Free Trade Agreement (“CAFTA”) with six Central American countries. One of the major causes of its near defeat was the design of its labor provisions, which were deemed to be too weak given the poor record of labor law enforcement and the levels of poverty in CAFTA countries. Even more recently, in the debate over an FTA with the Sultanate of Oman, Democrats in the relevant House Committee voted unanimously to defeat the FTA in part because its labor rights provisions were inadequate in light of Oman’s weak labor standards. In the final vote, the FTA passed the whole Congress, with some key Democrats changing their votes based upon assurances by the Government of Oman that it would amend its collective bargaining laws.



Much of the disagreement in these debates centers on the question of how effectively trade-related labor rights provisions hold states accountable for their inadequate labor laws or inadequate labor law enforcement. The approach states have taken is an approach that I term a “State Action–State Sanctions Model”, which primarily aims to pressure states to amend or enforce their labor laws in a prescribed manner, or suffer economic consequences.

However, in light of contemporary scholarship on regulation and international governance, and in light of the fact that developing countries often have highly dysfunctional labor regulatory systems and are ineffective enforcers of labor laws and workers’ rights, such a state-centric focus is misguided. Instead, if trading partners are serious about protecting workers’ rights in a global economy, a new approach should be adopted that simultaneously recognizes the increasingly important role of private regulatory regimes in the enforcement of workers’ rights.

I therefore argue for a new approach to trade and labor linkage that I term “Integrative Linkage” (“IL”). It is so termed because the IL methodology integrates public and private regulatory approaches in the design and implementation of trade-based labor rights enforcement regimes. IL moves away from the predominant State Action–State Sanctions Model toward a more nuanced and encompassing approach that utilizes the powerful potential of private regulatory strategies. Rather than conceptualizing public and private regulation as operating in discrete realms that have little overlap, IL aims to create institutions that effectively combine the two in order to achieve a more effective trade and labor rights regime. Importantly, IL does not necessarily seek as a normative end the deregulation or even decentralization of regulatory authority, but instead actively seeks to bolster public regulatory capacity and improve democratic functioning. Such an approach is generally applicable, and is relevant not only to the United States and its trading partners, but to other regional free trade areas and their members as well.

In this research paper, I shall briefly survey the legal and normative justifications for linking trade agreements and labor standards and describe some principles that ought to guide the construction of labor provisions in trade agreements, taking special note of human rights and development concerns.