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A WISHFUL THOUGHT: ENFORCEABILITY AND AVOIDANCE OF LABOR PROVISIONS IN FOREIGN TRADE AGREEMENTS

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LABOR rights, such as the freedom of association, the right to organize, and the right to bargain collectively, are not ingrained in the fiber of societies and government systems universally. Unlike first world countries, developing nations continuously struggle to enforce labor right provisions attached as conditions in trade agreements.[1] The inability of governments to redress gruesome acts of violence against union workers,[2] as well as deliberate cases of forced labor and child

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1. *See, e.g., infra* notes 2–3.

2. In Guatemala, after leaders of the Sindicato de Trabajadores de la Empresa Portuaria (the City of Quetzal Dockers' Union) (STEPQ) were fired for participating in assemblies in opposition to the privatization plans of the Empresa Portuaria Quetzal (EPQ), the General Secretary of the union was shot over twenty times in front of his children for allegedly leading the opposition to the privatization plans. Additionally, two leaders of the Union of Izabal Banana Workers (SITRABI), including the Secretary of Culture and Sports, were assassinated for their continued efforts, through marches and rallies, to enforce terms of a collective bargaining agreement. Moreover, the founder of the Sindicato de Trabajadores del Sur (SINTRABANSUR), another banana union, was assassinated outside his home after he refused to resign to his position in the union. Also, Sandra Isabel Ramirez, the daughter of the General Secretary of SINTRABANSUR was kidnapped and gang-raped by four men who interrogated her about her father's role in the union. AM. FED'N OF LABOR AND CONG. OF INDUS. ORG.'S (AFL-CIO) ET AL., CONCERNING THE FAILURE OF THE GOVERNMENT OF GUATEMALA TO EFFECTIVELY ENFORCE ITS LABOR LAWS AND COMPLY WITH ITS COMMITMENTS UNDER THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (2008), *available at* http://www.dol.gov/ilab/reports/pdf/GuatemalaSub.pdf [hereinafter SUBMISSION FROM AFL-CIO]; In Mexico, over ninety organizations, and labor unions jointly complained after 44,000 employees and members of the Sindicato Mexicano de Electricistas (Mexican Union of Electrical Workers) (SME) were ejected by the military police from their workplace after the government ordered the police to seize the company's facility. This "mass termination" of workers was "undertaken to eliminate SME's collective agreement and bargaining rights." PUBLIC COMMUNICATION TO THE U.S. OFFICE OF TRADE AGREEMENT IMPLEMENTATION (OTLA), (2011), *available at* http://www.dol.gov/ilab/reports/pdf/MexicoSubmission2011.pdf [hereinafter Public Submission from SME].

workers,[3] underscores the ghastly and grave state of labor rights in developing countries. The United States, for economic purposes and to improve labor rights in developing countries, has used labor rights provisions as a condition to international agreements. Although this development might be considered as a victory in the improvement of labor rights internationally, the advancement of these rights remains simply as a wishful thought. Statistics show that despite the pervasiveness of these provisions in Free Trade Agreements (FTAs), the enforcement mechanisms of these provisions go largely unused; to this date, "no complaint has given rise to a decision of a dispute settlement body or even led to sanctions."[4] The reasons behind this disappointing outcome are multifaceted, but can be partly attributed to: (1) the complexity of enforceability provisions in an international setting; (2) poor enforceability systems; and (3) avoidance of the countries themselves to comply with these provisions. This article will discuss the history and development of labor rights provisions in international trade agreements, specifically those to which the United States is a party. Subsequently, it will analyze the structure of some of these FTAs and how labor provisions are included in the text of the agreements, followed by an analysis of the type of labor provisions and standards in the agreements. To conclude, this paper will discuss violations, deliberate avoidance, and the lack of enforceability that render the labor provisions ineffective by using as illustration the current complaints under review of the Office of Trade and Labor Affairs (OTLA).

I. TRADE LIBERALIZATION: THE RISE OF FTAS AND THE PROMOTION OF LABOR RIGHTS

The International Labor Organization (ILO) recently announced that there has been a substantial increase in the addition of labor provisions and labor standards in FTAs.[5] There are over 120 countries that are parties to fifty-eight FTAs containing labor provisions.[6] The United States alone is a party to FTAs with nineteen countries.[7] In the majority of these agreements, the parties are bound to follow the principles outlined in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up.[8] These include the advancement of the "free-

3. *See infra* pp. 141–144.
4. *ILO Report Surveys Proliferation of Labor Provisions in Trade Pacts*, 30 BLOOMBERG BNA INT'L TRADE REP. 1755 (2013).
5. *Id.*
6. *Id.*
7. North American Trade Agreement (NAFTA) with Mexico and Canada; bilateral agreements with Jordan, Chile, Singapore, Australia, Morocco, Bahrain, Oman; CAFTA-DR, a regional agreement with the Dominican Republic, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua; FTAs with Peru, Colombia, Panama, and South Korea. MARY JANE BOLLE, OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS 2 (2013), *available at* http://fas.org/sgp/crs/misc/RS22823.pdf; *see also infra* note 32.
8. *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, Geneva, 68th Sess. (June 18, 1998), *available at* http://www.ilo.org/declaration/

dom of association and effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation."[9] Although the adherence to these standards might not be a serious issue for developed countries like the United States, it can be a challenge for those developing countries that lack minimum labor protection laws. Therefore, the increased addition of labor provisions in FTAs means that more and more developing countries are faced with the requirement to meet these minimum labor standards.[10] There are at least sixteen FTAs that contain minimum labor standards to which developing countries are parties.[11] However, the prominence of labor provisions in FTAs has not always been so pervasive.[12] The following is a discussion of how the surge of FTAs and globalization in the last decades has affected labor and employment globally.

A. The Effect of Trade Liberalization on Labor and Employment

The surge of bilateral agreements and FTAs in the last twenty years has focused the attention to labor organizations, such as the ILO, to assess the effects of the liberalization of trade on labor and employment.[13] According to the ILO, currently the "most commonly cited reasons for unemployment in both developed and developing countries is increased trade and offshoring."[14] The results of several reports on the effect of liberalization of trade on employment show mixed results, including the increase of unemployment in certain sections of the economy, such as manufacturing.[15] Although trade liberalization has been found to have a positive effect on wages and the increase of the informal economy,[16] the majority of empirical data indicates "negative effects on unionization and bargaining power of employees."[17] As a result of this harmful effect on unions and unionization, trade liberalization is a "highly significant contributor to union militancy."[18] This is the result of the "ongoing generation of surplus labour in the global economy and increased labour

thedeclaration/textdeclaration/lang—en/index.htm [hereinafter ILO 1998 Declaration].

9. *Id.*
10. *ILO Report Surveys Proliferation of Labor Provisions in Trade Pacts*, *supra* note 4.
11. *Id.*
12. Originally the U.S. trade policy was mostly "focused on lowering tariffs on goods," rather than the promotion of labor rights. Bolle, *supra* note 7, at 1.
13. *See* ILO, Social Dimensions of Free Trade Agreements 11 (2013), *available at* http://www.ilo.org/wcmsp5/groups/public/—-dgreports/—-inst/documents/publication/wcms_228965.pdf.
14. Int'l Labour Office, Trade and Employment From Myths to Facts 24 (2011), *available at* http://ilo.org/wcmsp5/groups/public/—-ed_emp/documents/publication/wcms_162297.pdf.
15. ILO, *supra* note 13, at 13.
16. *Id.* at 13–15.
17. *Id.* at 15.
18. *Id.* at 15–16.

substitution" resulting in the "erosion of union rights."[19] Additionally, "there has been a growing concern that globalization and the work of the World Trade Organization (WTO) have led to sacrificing of human rights."[20] This negative effect of trade liberalization and the surge of FTAs along with the concerns of globalization and the erosion of human and labor rights is justified in the sense that "labor principles and standards are not subject to the World Trade Organization (WTO) rules and disciplines."[21] This means that there is no enforcement mechanism to resolve labor concerns arising from trade agreements under the WTO. Furthermore, the WTO has punted the responsibility of dealing with labor related issues to the ILO, naming the ILO as the "competent body to set and deal with [labor] standards."[22] The reasoning behind the WTO's avoidance to promote labor provisions in its agreements is that its "developing-country members resist including labour standards in WTO rules because: (a) they see it as a guise for protectionism in developed-country markets . . . and (b) they argue that better working conditions and improved labour rights arise through economic growth. . . . ."[23] In the midst of this lack of accountability and substantive forum to address labor rights, the United States has stepped up as the leading actor in the international labor rights' arena. Before the WTO and the surge of FTAs in international trade agreements, there was a gradual development in U.S. trade policy that resulted in the prominence of labor provisions in international trade agreements.

B. WHERE DID IT ALL BEGIN? TRADE LIBERALIZATION IN TRADE LAW

The evolution of the United States' trade policy favoring labor provisions in trade agreements can be traced back to the late 1800s.[24] Successively, through a series of legislative acts in the 1900s, the United States started a trend to linking international trade with fair labor standards.[25]

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19. INT'L LABOUR OFFICE, *supra* note 14, at 188.
20. VALANTINA AMALRAJ, LINKING LABOR STANDARDS TO TRADE INSTRUMENTS: CONCERNS, METHODS, AND BENEFITS 3 (2012), *available at* http://www.chumirethicsfoundation.ca/files/pdf/ChumirHumanRightsEssayAmalraj2012.pdf.
21. BOLLE, *supra* note 7, at 1.
22. *Trade and Labour Standards Subject of Intense Debate*, WTO, http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm (last visited Oct. 27, 2014).
23. *Top 10 Reasons to Oppose the World Trade Organization? Criticism, yes. . . misinformation, no!*, WTO, http://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/03lab_e.htm (last visited Oct. 27, 2014).
24. *See infra* note 25.
25. The McKinley Act of 1890 "prohibited the import of goods made by convict labor," and legislative acts such as the Smoot-Hawley Tariff Act of 1930, which expanded the McKinley Act to encompass convicts, forced and indentured labor; the National Industrial Recovery Act of 1933, which prohibited certain trades that negatively affected labor rights; the Omnibus Trade and Competitiveness Act of 1988 expanded the definition of "unreasonable" actions for trade purposes. William (Bud) Clatanoff, *Labor Standards in Recent U.S. Trade Agreements*, 5 RICH. J. GLOBAL L. & BUS. 109, 109 (2005).

This tendency was also reflected in the promotion of labor standards by governmental institutions such as the Overseas Private Investment Corporation (OPIC), which considers whether an investor company will uphold workers' rights as a preliminary assessment of eligibility,[26] and the Multilateral Investment Guarantee Agency (MIGA),[27] which requires the exclusion of certain labor violations such as forced and child labor as a prerequisite to eligibility of risk insurance guarantees.[28]

Despite the robust promotion of labor standards by institutions and also reflected in legislative trade laws, the real materialization of this development has been strikingly displayed in the last twenty-five years.[29] With the enactment of the Trade Act of 1974,[30] the United States unilaterally and forcefully pushed for the inclusion of labor standards in all trade agreements and trade laws.[31] The Trade Act of 1974 authorizes the President to "designate countries as beneficiary developing countries" for the purposes of the Trade Act.[32] It also lists, as one of the bases of ineligibility, whether the country fails to take "steps to afford internationally recognized worker rights to workers in the country."[33] The decades after the enactment of the Trade Act were marked by an outburst of "trade preference laws" that required "as a condition of obtaining and maintaining program eligibility" to abide by the requirements of the Trade Act of 1974.[34] This is exemplified in the Caribbean Basin Initiative (CBI)[35] enacted in 1983 and its companion, the Generalized System of Preferences (GSP).[36] Both allowed developing countries to trade goods with the United States, but eligibility to trade was based on whether these countries took steps to promote certain labor standards.[37] Some other examples of these "trade preference laws" were the Andean Trade Preference Act (ATPA) 1991;[38] the African Growth and Opportunity Act (AGOA) 2000;[39] the Trade Act of 2002;[40] and the Haiti Opportunity through Partnership Act (HOPE), 2006.[41] It was in this background that the United States began including labor provisions in FTAs.

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26. *Investor Screener*, OPIC, http://www.opic.gov/what-we-offer/financial-products/financing-details/investor-screener (last visited Oct. 27, 2014).
27. *Performance Standards*, MIGA, http://www.miga.org/projects/index.cfm?stid=1828 (last visited Oct. 27, 2014).
28. *Id.*; *see also* Robert Rogowsky & Eric Chyn, *U.S. Trade Law and FTAs: A Survey of Labor Requirements*, USITC J. OF INT'L COM. AND ECON. (2007) at 7.
29. *See* Clatanoff, *supra* note 25, at 110.
30. Trade Act of 1974, 19 U.S.C. A. § 2101 (2014).
31. *See* Clatanoff, *supra* note 25, at 110; *see also* Rogowsky, *supra* note 28, at 3.
32. Trade Act of 1974, 19 U.S.C.A. § 2462(a)(1) (2014).
33. *Id.* § 2462(c)(7).
34. BOLLE, *supra* note 7, at 1.
35. Caribbean Basin Economic Recovery, 19 U.S.C.A. § 2701 (2014).
36. Trade Act of 1974, 19 U.S.C.A. § 2461 (2014).
37. BOLLE, *supra* note 7, at 1.
38. Andean Trade Preference Act (ATPA), 19 U.S.C.A. § 3202 (2014).
39. African Growth and Opportunity Act (AGOA), 19 U.S.C.A. § 3701 (2014).
40. Trade Act of 2002, 19 U.S.C.A. § 3803 (2014).
41. Haitian Hemispheric Opportunity Through Partnership Encouragement Act of 2006 (Haitian HOPE Act), Pub. L. 109–432, 120 Stat. 2922 (2006); BOLLE, *supra* note 7, at 1.

II. LABOR PROVISIONS IN TRADE AGREEMENTS

Currently, the United States is a party to fourteen FTAs with twenty countries[42] and in present negotiations for the Trans-Pacific Partnership, which will include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.[43] Based on the current trend, it is very likely that the Trans-Pacific Partnership FTA will have labor provisions attached to it,[44] but this was not always the case. The first FTA the United States entered was with Israel in 1985, followed by Canada in 1988.[45] These two agreements did not contain labor provisions.[46] But starting in 1993, the United States began to include labor standards in all trade agreements and it has continued this practice since then.[47] Behind this shift is the fact that the United States began negotiating FTAs with developing countries.[48] It became generally accepted that labor issues had an impact on trade and that globalization had positive and negative effects.[49] There are different theories that attempt to explain the incredibly rapid rise of labor provisions in FTAs.[50] Whatever the theory, whether political, economic, or moral, the trend continues strong after twenty-five years.

The North American Free Trade Agreement (NAFTA)[51] was the "first U.S. international trade agreement actively to include labor provisions."[52] The North American Agreement on Labor Cooperation (NAALC), which is a side agreement of NAFTA, "required each party [Mexico, Canada, and the United States] to maintain high levels of labor protection without lowering standards to attract investors."[53] The NAALC includes eleven labor rights that must be observed by the parties.[54] As this paper will discuss, variations of these provisions are in-

42. *Free Trade Agreements*, INT'L TRADE ADMIN., http://trade.gov/fta/ (last visited Nov. 4, 2014).
43. *Trans-Pacific Partnership (TPP)*, UNITED STATES TRADE REPRESENTATIVE, http://www.ustr.gov/tpp (last visited Nov. 4, 2014).
44. *See infra* p. 111, note 56.
45. BOLLE, *supra* note 7, at 2.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. It is argued that the inclusion of labor standards in FTAs reflects the acceptance that the adoption of said provisions is linked to economic development and reduction of production costs. This implies that the adoption of these standards enhances the labor market in developing countries which in turn increases productivity. Additionally, it has been argued that consumers in developed countries have a moral compass which results in the refusal to buy products from countries that fail to meet decent labor standards. But this moral theory is subject to a great deal of criticism. *See* JACQUE BOURGEOIS ET AL., A COMPARATIVE ANALYSIS OF SELECTED PROVISIONS IN FREE TRADE AGREEMENTS 22–23 (2007), *available at* http://eulib.com/documents/tradoc_138103.pdf.
51. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).
52. Rogowsky & Chyn, *supra* note 28, at 6.
53. *Id.*
54. *Infra* note 93.

cluded in most FTAs to which the United States is a party. Some of the FTAs vary in the scope of these provisions, but all remain very similar. The following is a discussion about the different labor provisions in the several FTAs to which the United States is a party.

A. Scope and the Different FTA Models

The preamble in any FTA will indicate the general purpose of the agreement itself.[55] FTAs which include a direct reference to upholding labor standards in the preamble will usually have a stronger emphasis on these standards, as the preamble is "designed to establish a definitive record of the intention or purpose of the parties in entering the agreement."[56] Therefore, the preamble "may be used as a source of interpretative guidance by government officials and judges in the process of implementation and dispute settlement."[57] Every FTA to which the United States is a party contains references to labor standards,[58] except the U.S.-Israel[59] and U.S.-Canada agreements, which was superseded by NAFTA in 1994.[60] For example, the U.S.-Singapore FTA contains a very general and weak reference to labor standards, and lumps it together with environmental and social issues.[61] In contrast, the FTAs with Jordan[62] and Chile[63] have the most direct and strong commitments to international labor law and standards.[64] The U.S.-Jordan FTA's preamble indicates the desire of the parties to "promote higher labor standards by building on their respective international commitments and strengthening their cooperation on labor matters."[65] The U.S.-Chile FTA contains resolutions in the preamble to "create new employment opportunities and improve working conditions and living standards" and to "build on their respec-

55. Bourgeois et al., *supra* note 50, at 13.
56. *Id.* at 13, 24.
57. *Id.* at 13.
58. *Id.* at 24.
59. Free Trade Area Agreement, U.S.-Isr., Apr. 22, 1985, 24 I.L.M 653 (1985), *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp.
60. United States-Canada Free Trade Agreement, U.S.-Can., Jan. 2, 1988, 27 I.L.M. 281 (1988), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf [hereinafter Canada FTA].
61. "Recognizing that economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development, and that an open and non-discriminatory multilateral trading system can play a major role in achieving sustainable development." United States-Singapore Free Trade Agreement, U.S.-Sing., pmbl., May 6, 2003, Hein's KAV No. 6376, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf [hereinafter Singapore FTA]; Bourgeois et al., *supra* note 50, at 24.
62. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, pmbl., Oct. 24, 2000, 41 I.L.M. 63 (2000) [hereinafter Jordan FTA].
63. United States-Chile Free Trade Agreement, U.S.-Chile, pmbl., June 6, 2003, http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text, (2003) [hereinafter *Chile FTA*].
64. Bourgeois et al., *supra* note 50, at 25.
65. Jordan FTA, *supra* note 62.

tive international commitments and strengthen their cooperation on labor matter."[66]

The general structure of the FTA can also reflect on the scope and impact of the labor provisions. The FTA approach for each country will vary according to the terms of the agreement. But all of these agreements can be categorized in four different categories.[67]

1. Model 1

An example of a Model 1 FTA is the NAALC.[68] These labor provisions are included not in the main agreement (NAFTA), but in a separate arrangement.[69] Although violations for noncompliance of the labor provisions in the NAALC could be enforced under the NAFTA enforcement procedures, the NAALC contains its own separate enforcement mechanism.[70]

2. Model 2

The Model 2 FTAs contain both commercial and labor provisions, which are enforced under the same dispute resolution mechanism.[71] The labor provisions in these FTAs are defined "as U.S. internationally recognized worker rights."[72] An example of this Model is the U.S.-Jordan FTA.[73]

3. Model 3

These agreements include only one enforceable labor resolution, which states that the parties "shall not fail to effectively enforce its labor laws . . . in a manner affecting trade between the Parties."[74] The definition of labor rights is also "internationally recognized worker rights."[75] The FTAs with Chile, Singapore, Australia, Morocco, Bahrain, Oman, and the CAFTA-DR regional agreement, which includes Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic, are examples of this Model.[76]

4. Model 4

These agreements are based on the Bipartisan Trade Deal, which is a "policy template" used in the drafting of FTAs with Peru, Columbia, Pan-

66. Chile FTA, *supra* note 63.
67. BOLLE, *supra* note 7, at 3.
68. *See*, BOLLE, *supra* note 7, at 3; North American Agreement on Labor Cooperation (NAALC), pmbl., Sept. 14, 1993, 32 I.L.M 1519 (1993), *available at* http://www.naalc.org/naalc/naalc-full-text/preamble.htm [hereinafter NAALC].
69. BOLLE, *supra* note 7, at 3.
70. *See id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

ama, and Korea.[77] The Bipartisan Trade Deal requires the inclusion of reciprocal obligations for these countries to "adopt and maintain in their laws and practice the five basic internationally-recognized labor principles."[78] These principles are: (1) adoption of freedom of association; (2) the effective recognition of the right to collective bargaining; (3) the elimination of all forms of forced or compulsory labor; (4) the effective abolition of child labor and a prohibition on the worst forms of child labor; and (5) the elimination of discrimination in respect of employment and occupation.[79] These principles are based on the 1998 ILO Declaration on Fundamental Principles at Work,[80] with the only difference that the Bipartisan Deal principles separate the freedom of association and the effective recognition of right to collective bargaining as two different principles.[81]

The structure of the FTAs themselves, including the statement in the preamble as a vision of the purpose of the agreement, might affect the enforceability and scope of the agreements. But the actual labor provisions in the agreements are the main attraction.

B. WHAT ARE THESE LABOR PROVISIONS?

The ILO is the prominent and active branch of the United Nations (UN), responsible for the promotion and enforcement of labor rights around the world. It was established in 1919 as part of the Treaty of Versailles at the end of the First World War.[82] The ILO attempts to meet its goals by encouraging "its constituents and member States by promoting a social dialogue between trade unions and employers in formulating, and where appropriate, implementing national policy" aimed at improving workers' rights.[83] Since its creation, the ILO has promulgated fundamental principles and rights of workers. The most recognized of these promulgations is the ILO Declaration on Fundamental Principles and Rights at Work.[84] The ILO refers to these principles and rights as "obligation[s] arising from the very fact of membership in the [ILO]," but also obligations to those countries that have not ratified the ILO Conventions.[85] When it comes to implementation of these labor principles, the ILO "provides for supervision of implementation of its Conventions and sets out a complaints procedures," but "neither the Declaration, nor any

77. OFFICE OF THE U.S. TRADE REPRESENTATIVE, BIPARTISAN TRADE DEAL 1 (2007), *available at* http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf [hereinafter Bipartisan Trade Deal].
78. *Id.*
79. *Id.*
80. *ILO 1998 Declaration*, *supra* note 8.
81. *See* BIPARTISAN TRADE DEAL, *supra* note 77, at 1–2.
82. *Origins and History*, ILO, http://www.ilo.org/global/about-the-ilo/history/lang—en/index.htm (last visited Nov. 11, 2014).
83. *How the ILO Works*, ILO, http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang—en/index.htm (last visited Nov. 11, 2014).
84. *ILO 1998 Declaration*, *supra* note 8.
85. *Id.*

of the Conventions contain an enforcement mechanism."[86] Therefore, the ILO does not provide for a remedy under the WTO Dispute Settlement Understanding,[87] and the only recourse would be a challenge before the International Court of Justice (ICJ) "for failure to uphold its treaty obligations."[88] As a result, the United States and, to some degree, the European Union (EU) have included their own labor standards in the FTAs (some that go beyond the ILO's principles)[89] and enforcement mechanisms to enforce these provisions. The United States has led the developed world in the inclusion of these provisions in trade agreements. These labor standards have been included in some very well-known and influential FTAs, such as NAFTA. The following is an analysis and comparison of some of the more relevant FTAs based on the different types of labor provisions included in them.

1. NAFTA or NAALC?

The NAALC is the side agreement of NAFTA that includes the labor provisions. The NAALC was the first trade agreement "ever linked to worker rights provisions in a major way."[90] Additionally, it was the first agreement where the United States included specific labor provisions with "potential economic sanctions for labor rights violations following an arbitration process."[91] Because it was the first agreement of this kind, it has been used as a model since then. Therefore, a careful analysis of its structure and breadth is warranted.

The structure of the NAALC is unlike most other FTAs. This difference is because, as discussed before,[92] the NAALC includes all of the labor provisions detached from the commercial provisions. For this reason, the NAALC is technically an agreement exclusively for the promotion and protection of labor rights. It calls for the parties to comply with the NAFTA commercial resolutions from the perspective of workers' rights.[93] Additionally, it recognizes labor rights and principles that are

86. Roman Grynberg & Veniana Qalo, *Labour Standards in US and EU Preferential Trading Arrangements*, 40 J. WORLD TRADE 619, 622 (2006).
87. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, *available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm* [hereinafter DSU].
88. Grynberg & Qalo, *supra* note 86, at 622.
89. *See supra* p. 114.
90. MARY JANE BOLLE, NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATE, intro. (2001), *available at* http://fpc.state.gov/documents/organization/6211.pdf [hereinafter NAFTA LABOR SIDE AGREEMENT].
91. Grynberg & Qalo, *supra* note 86, at 626.
92. *See supra* pp. 111–114.
93. The parties agree to promote the economic development envisioned in NAFTA by "investing in continuous human resource development, including for entry into the workforce and during periods of unemployment; promoting employment security and career opportunities for all workers through referral and other employment services; strengthening labor-management cooperation to promote greater dialogue between worker organizations and employers and to foster creativity and

not part of the ILO's 1998 Declaration. Under the agreement, Mexico, Canada, and the United States are committed to promote the following "guiding principles":

1. The freedom of association and protection of right to organize;
2. The right to bargain collectively;
3. The right to strike;
4. The prohibition of forced labor;
5. Labor protections for children and young people;
6. Minimum employment standards, including minimum wage;
7. The elimination of employment discrimination;
8. Equal pay for women and men;
9. The prevention of occupational injuries and illnesses;
10. Compensation for occupational injuries and illnesses; and
11. Protection of migrant workers.[94]

Out of these eleven provisions, the minimum wage requirement and prevention of occupational injuries are a significant departure from the standard ILO principles.[95] Nevertheless, these eleven principles are "guiding principles" that the parties are "committed to promote," not necessarily enforce.[96] But the parties are (without infringing on each other's constitutions) obligated to adhere to their own domestic labor laws and "adopt or modify" to ensure that their laws "provide for high labor standards."[97] Therefore, the NAALC is both a very expansive but constricted agreement when it comes to the promotion versus the enforcement of labor provisions. On one hand, it dramatically expands what was considered fundamental labor rights under the ILO, but it does not require the parties to adopt them, rather to simply continue to observe their own labor laws. Also, the NAALC does not provide a definition of "high labor standards," and it is left to the interpreter to discern this meaning from the preamble and annex 1, which contain the eleven principles the agreement seeks to promote.[98]

Although the NAALC adoption is revolutionary because it dramatically changed the landscape of FTAs in terms of labor rights, it has been subject to criticism from all fronts.[99] The criticism might be warranted. The NAALC falls short in achieving what was originally an expansive plan, and there is no real threat behind obligations. This is because under

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productivity in the workplace; promoting higher living standards as productivity increases; encouraging consultation and dialogue between labor, business and government both in each country and in North America; fostering investment with due regard for the importance of labor laws and principles; encouraging employers and employees in each country to comply with labor laws and to work together in maintaining a progressive, fair, safe and healthy working environment." North American Agreement on Labor Cooperation (NAALC), pmbl., Sept. 14, 1993, 32 I.L.M 1519 (1993).

94. *Id.* at annex 1.
95. *ILO 1998 Declaration*, *supra* note 8.
96. NAALC, *supra* note 93, at annex 1.
97. *Id.* at pt. 2.
98. *See* Grynberg & Qalo, *supra* note 86, at 627; *see also* BOLLE, *supra* note 90, at 4.
99. BOLLE, *supra* note 90, at 8–9.

NAFTA, the "maximum disciplinary action is suspension of a portion of NAFTA benefits for one year" if there is a violation of the agreement.[100] But this provision does not apply because the NAALC is a side agreement of NAFTA.[101] On the other hand, there are those who argue that it is an invasive agreement that "impinges on the freedom of multinational corporations to bring goods to the consumer at the lowest possible cost."[102] Nevertheless, the NAALC is innovative, and it "promotes worker rights by creating a system of mutual obligation and mutual responsibility" while allowing the parties to maintain their sovereignty and to adopt their "own labor laws and standards and enforce them as [they] see fit."[103]

2. *Next? The U.S.-Jordan FTA*

The U.S.-Jordan FTA is significant because, unlike NAFTA and its companion, the NAALC, it included the labor provisions in the main text of the agreement.[104] Furthermore, it was the first FTA that the United States entered into with an Arab state[105] and the first time labor provisions were added to the main text of a U.S. bilateral trade accord.[106] It also contains a reference to the promotion of "higher labor standards" and enforcement of "labor law" by the parties in the preamble of the agreement.[107] Additionally, the labor section of the agreement is enclosed in article 6 of the FTA.[108] Unlike NAFTA, the U.S.-Jordan FTA defines "labor laws" as those principles in the 1998 ILO Declaration.[109] Also, it not only requires the promotion of these standards, but also requires the parties to improve or enact labor laws in order to meet those standards.[110] Therefore, although this agreement does not include all eleven principles from the NAALC, it obligates the parties to take affirmative action to adhere to the terms.

3. *FTAs in the South . . . Way South: U.S.-Chile FTA*

The original design of this agreement was intended to mirror the NAALC, meaning that the FTA would be divided into two parts—one commercial and one labor-related.[111] In the end, the agreement followed

100. *Id.* at 8.
101. *Id.*
102. *Id.*
103. *Id.* at 9.
104. *See* Grynberg & Qalo, *supra* note 86, at 624.
105. Abdul Quader Shaikh, *Bilateral Accords and U.S. Trade with the Middle East: A Track Record for Success*, INT'L TRADE ADMIN. (Apr. 2008), http://trade.gov/press/publications/newsletters/ita_0408/middle-east_0408.asp.
106. MOHAMED RAMADAN HASSANIEN, UNITED STATES BILATERAL FREE TRADE AGREEMENTS: CONSISTENCIES OR CONFLICTS WITH NORMS IN THE MIDDLE EAST? 192 (2010).
107. Jordan FTA, *supra* note 62, at pmbl.
108. *Id.* art. 6.
109. *See id.* at pmbl.
110. *Id.*
111. *See* Grynberg & Qalo, *supra* note 86, at 633.

the U.S.-Jordan example.[112] Consequently, unlike the NAALC, this FTA has an exclusive article for its labor related matters.[113] It also contains two resolutions in the preamble where the parties agree to "[b]uild on their respective international commitments and strengthen their cooperation on labor matters" and "[p]rotect, enhance, and enforce basic worker's rights."[114] Article 18 of the agreement is a "robust labor chapter . . . [that] set the template for all future U.S. free trade agreements . . . ."[115] But the labor provisions are limited to those from the 1998 ILO Declaration. Additionally, it defines labor laws to include "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."[116] It also mandates the parties to ensure that the parties do not "waive," "derogate," "weaken[ ], or reduce[ ] adherence to the internationally recognized labor rights" from the ILO Declaration.[117] Another important aspect of the agreement is that it includes a provision requiring the countries to guarantee access to the judicial system for the enforcement of their labor laws.[118] This article seems to indicate that the parties should create a system to allow aggrieved parties to bring their claims for violations of the agreement.

4. *More Acronyms, the DR-CAFTA*

The Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) includes the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua.[119] The DR-CAFTA (also referred as the CAFTA-DR depending on what side of the Equator you live) is very much like the U.S.-Chile FTA in the sense that it contains its labor provisions within the main text of the agreement and adopts the same 1998 ILO labor principles, plus minimum wage, hours, and occupational safety provisions.[120] Prior to the enactment of the agreement, the regional countries "asked the ILO to do an assessment of their conformity with the obligations reflected in the 1998 Declaration."[121] In 2003 and 2004, the ILO certified that the constitutions and labor laws of these countries followed with the 1998 ILO Declaration.[122] Also, the DR-CAFTA thrice

112. *Id.*
113. Chile FTA, *supra* note 63, at ch. 18.
114. Chile FTA, *supra* note 63, at pmbl.
115. ANDREW SAMET, LABOR PROVISIONS IN U.S. FREE TRADE AGREEMENTS CASE STUDY OF MEXICO, CHILE, COSTA RICA, EL SALVADOR 40 (2011), *available at* http://www.iadb.org/en/publications/publication-detail,7101.html?id=57986.
116. Chile FTA, *supra* note 63, art. 18.8(e).
117. *Id.* art. 18.2(2).
118. *Id.* art. 18.3(1).
119. SAMET, *supra* note 115, at 50.
120. Dominican Republic-Central America-United States Free Trade Agreement, U.S.-Dom. Rep.-Cent. Am., ch.16, Aug. 5, 2004, 119 Stat. 462, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf [hereinafter DR-CAFTA].
121. SAMET, *supra* note 115, at 51.
122. *Id.*

references labor provisions and social development in the preamble.[123] As discussed, the preamble could be an indicator of how important the labor provisions are to the parties—as it can be used as an interpretative guide when resolving disputes.[124] It should be noted that the United States was particularly weary of entering into this agreement due to several concerns over labor conditions in the region.[125] This concern is somewhat apparent from the strong language in the preamble regarding labor standards. A peculiar aspect of this agreement is that the agreement almost did not pass due to these concerns.[126] The International Labor Rights Forum (ILRF) offered testimony in front of the U.S. House of Representatives where it argued that "[t]he DR-CAFTA was premised in part on the belief that participating Central American countries had made progress in advancing worker rights" but that the ILRF "found the opposite to be true: rampant workers' rights abuses, such as union oppression; mandatory pregnancy testing; use of child labor; and forced overtime continue."[127] According to the ILRF, the agreement would "lead to further the exploitation of workers" and "leaves conditions ripe for corporate growth and control."[128] As a response to the criticism and concerns, the Working Group of the Vice Ministers Responsible for Trade and Labor in the CAFTA region submitted *The Labor Dimension in Central America and the Dominican Republic, Building on Progress: Strengthening Compliance and Enhancing Capacity* report, which is referred to as the White Paper.[129] The White Paper "includes recommendations designed to make progress on labor law administration and capacity building and identify ways to improve enforcement and enhance labor institutions."[130] It determined six areas on which the parties could focus and act to improve labor rights: "labor law and its implementation; budget and personnel needs in Labor Ministries; strengthening the judicial system for labor law; protection against discrimination in the workplace; worst forms of child labor; and promoting a culture of

123. The parties agree to "[c]reate new opportunities for economic and social development in the region; [p]rotect, enhance, and enforce basic worker's rights and strengthen their cooperation on labor matters; [and] create new employment opportunities and improve working conditions and living standards in their respective territories . . . ." *See* DR-CAFTA, *supra* note 120, at pmbl.

124. *See infra* pp. 145–46.

125. Edmund L. Andrews, *How Cafta Passed House by 2 Votes*, N.Y. TIMES (July 29, 2005), http://www.nytimes.com/2005/07/29/politics/29cafta.html?pagewanted=all&_r=0.

126. *Id.*; *see DR-CAFTA and Worker's Rights: Moving from Paper to Practice*, WASH. OFF. ON LATIN AM. (June 11, 2009), http://www.wola.org/publications/dr_cafta_and_workers_rights_moving_from_paper_to_practice.

127. *DR-CAFTA*, INT'L LAB. RTS. F., http://archive-org.com/page/3182380/2013-11-18/http://www.laborrights.org/creating-a-sweatfree-world/changing-global-trade-rules/dr-cafta (last visited Nov. 20, 2014).

128. *Id.*

129. *CAFTA-DR: White Paper and Verification Reports,* OFFICE OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-topics/labor/bilateral-and-regional-trade-agreements/cafta-dr-white-paper-and-verification-rep (last visited Nov. 20, 2014).

130. *Id.*

compliance."[131] The White Paper recommendations are actually a two-step process: (1) it required the countries to present a report on their current labor laws along with an implementation plan, followed by (2) a verification report every six months between 2007 and 2010.[132] As part of the deal to pass the agreement, the U.S. Trade Representative and Congress agreed to provide forty million dollars for trade capacity building in the signatory countries and three million dollars to the ILO to monitor the member countries.[133] The White Paper has been criticized as "a tactic to get DR-CAFTA passed in the U.S. Congress"[134] and "a self-assessment, written by the CAFTA-DR governments at the signing of the free trade agreement, on how to improve labor rights in their own countries."[135] Nevertheless, the FTA was enacted, and each country submitted their implementation plan and subsequently the verification report.[136] Accordingly, each country identified areas where improvement was needed and suggested action to correct the issues.[137] Some of these findings were:

- Costa Rica
- Clarify legal status of collective bargaining in the public sector . . . .
- Alter regulations concerning union membership: change law that prevents foreign nationals from holding office or exercising influence in trade unions . . . .
- Strengthen protections for union members . . . .
- Dominican Republic
- Ensure protections for collective bargaining rights . . . .
- Guarantee the right to strike . . . .
- Increase efforts to reform the status of collective bargaining and the requirements for legal union recognition . . . .
- El Salvador
- Must ratify ILO Conventions 87 and 98.
- Remove limitations on Article 47 of the Constitution regarding public sector unions. . . .
- Address concerns about blacklisting . . . .
- Guatemala
- Reform limits on union membership . . . .
- Remove conditions on striking . . . . .
- Comply with reinstatement of illegally dismissed workers.
- Restore the authority of the Ministry of Labor . . . .
- Honduras
- Amend exceptions in applicability of the Labor Code . . . .

131. *Id.*
132. *See id.*
133. WASH. OFF. ON LATIN AM., DR-CAFTA AND WORKER'S RIGHTS: MOVING FROM PAPER TO PRACTICE 2 (2009), *available at* http://www.wola.org/sites/default/files/downloadable/Rights%20and%20Development/2010/WOLA_RPT_Workers Rights_FNL.pdf [hereinafter WOLA].
134. *Id.* at 10.
135. *Id.* at 4.
136. A list of the Implementation Plans and Verification Reports can be accessed at *CAFTA-DR: White Paper and Verification Reports*, *supra* note 129.
137. *See id.*

- Ease onerous requirements for unionization such as requiring the minimum of 30 members . . . .
- Reform limitations on the right to strike . . . .
- Require consultation with the Economic and Social Council about any reforms to labor laws.
- Nicaragua
- Restore laws protecting public sector unions' rights . . . .
- Remove restrictions on the participation of foreign nationals in trade unions.
- Repeal laws governing membership in trade unions . . . .
- Recognize the right to strike for federations and confederations . . . .[138]

As we will discuss, many of these recommendations were not followed through, and the DR-CAFTA is by far the most contentious FTA of today when it comes to labor conditions and labor rights violations.[139]

5. *United States-Peru Trade Promotion Agreement*

The United States-Peru Trade Promotion Agreement (U.S.-Peru TPA) is very similar to the DR-CAFTA agreement because it follows the same labor principles from the 1998 ILO Declaration, but also includes the obligation "on the elimination of discrimination in respect of employment."[140] This is highly relevant because this was the first time that this ILO principle was ever included in the main body of an FTA.[141] Before this FTA, the only other agreement that mentioned this principle was the NAALC.[142] Additionally, the U.S.-Peru Trade Promotion Agreement (TPA) imposes "hard obligation[s]" on the parties to follow these principles.[143] In contrast with previous FTAs, the U.S.-Peru TPA states that the parties "shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work."[144] Therefore, it requires the parties to actually amend their labor laws to mirror the ILO principles.

6. *FTAs Between Equals*

The United States-Australia FTA (U.S.-Australia FTA) is an interesting treaty because both countries are considered developed countries, and as a result, they are assumed to have better labor conditions than

138. WOLA, *supra* note 133 at 4.
139. *See infra* pp. 144–46.
140. SAMET, *supra* note 115, at 73.
141. *Id.*
142. Following the adoption of this principle, the United States conditionally included it in following FTAs such as the agreements with Panama, Colombia, and South Korea. *Id.* at 73–74.
143. *Id.* at 74.
144. United States-Peru Trade Promotion Agreement, U.S.-Peru, ch.17, Apr. 12, 2006, 121 Stat. 1455, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text [hereinafter U.S.-Peru TPA].

those of developing countries. It was also the first FTA "between the [United States] and another developed country since the U.S.-Canada FTA in 1988."[145] The U.S.-Australia FTA "only requires that each [p]arty include in their domestic labour laws recognition and protection of 'acceptable conditions of work with respect to minimum wages.'"[146] Under the agreement, as in the U.S.-Chile FTA, the parties retain the power to "exercise their discretion with respect to compliance matters . . . ."[147]

7. *Let's Not Forget About the Rest of the World*

Although this article is mostly focused on U.S. trade policy in regards to labor provisions, it is informative to compare other FTAs between countries that affirmatively lower the scope of their labor provisions to fit their economic needs. A perfect example of this is the agreement between Japan and the Republic of the Philippines for an Economic Partnership.[148] Specifically, the parties agree to not weaken or reduce observance to international labor rights, as opposed to strive to improve labor laws within each country.[149] The agreement among Iceland, Liechtenstein, Norway, and Swiss (the European Free Trade Association (EFTA) States) with Singapore[150] also reflects the delicate issue of labor provisions in international trade agreements. The EFTA-Singapore FTA does not make any reference to labor provisions or labor rights, but calls for the creation of "conditions encouraging economic, trade[,] and investment relations" between the countries.[151] The EFTA-Singapore FTA is similar to most EFTA trade agreements in that these FTAs "only contain references dealing with labour standards in the preamble and in the objectives."[152] For example, the FTA between Colombia and the EFTA States contains one single reference to labor in the preamble: "Reaffirming their commitment to economic and social development and the respect for the fundamental rights of workers, including the principles set out in the *International Labor Organization (ILO) Conventions* to which

145. Grynberg & Qalo, *supra* note 86, at 34.

146. *Id.* at 34–35 (quoting United States-Australia Free Trade Agreement, U.S.-Austl., art. 18.7, Jan. 1, 2005, 118 Stat. 919, *available at* http://www.ustr.gov/sites/default/files/australia_FTA_Labor.pdf).

147. *Id.* at 35.

148. Agreement Between the EFTA States and Singapore, EFTA-Sing., pmbl., June 26, 2002, *available at* http://www.efta.int/media/documents/legal-texts/free-trade-relations/singapore/EFTA-Singapore%20Free%20Trade%20Agreement.pdf.

149. *Id.* art. 103.

150. Agreement Between the EFTA States and Singapore, EFTA-Sing., pmbl., June 26, 2002, available at http://www.efta.int/media/documents/legal-texts/free-trade-relations/singapore/EFTA-Singapore%20Free%20Trade%20Agreement.pdf [hereinafter EFTA-Singapore FTA].

151. *Id.*

152. *European FTAs*, ILO (Oct. 19, 2009), http://www2.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115822/lang—en/index.htm.

the Parties are party."[153] The contrast between the FTA approach of the European Union (EU) and that of the United States is dramatic. The EU "has shown no appetite for such [labor] provisions in its FTA and association agreements."[154] The result is a great disparity in the number of labor provisions in U.S. FTAs and EU FTAs.[155]

The Middle East is another region worth mentioning because of its unique approach to FTAs. Despite the predominance of FTAs and establishment of "trade areas" in the Middle East, there has been no serious attempt to connect these trade instruments with labor provisions.[156] An illustration of this is the Greater Arab Free Trade Area (GAFTA), which creates a massive regional trade area in North Africa and the Middle East.[157] GAFTA was enacted on January 1, 1998, and since then has "reached full trade liberalisation of goods through the full exemption of customs duties and charges" between its members.[158] Despite the scope and size of the agreement, GAFTA does not contain any references to labor standards.[159] In contrast, the 2001 Economic Agreement Between the GCC States[160] contains one single reference to labor standards.[161] It calls for the unification of labor laws and elimination of restrictions on labor.[162] But this provision remains unenforced and unfulfilled.[163]

Despite the explosion in recent years of FTAs with labor provisions, the United States is the strongest advocate for the conditional inclusion of labor standards and labor provisions in international trade agreements.[164] This is demonstrated by the low number of international FTAs and trade areas that have labor references. Other issues with labor refer-

153. Free Trade Agreement Between the Republic of Colombia and the EFTA States, pmbl., Nov. 25, 2008, *available at* http://www.efta.int/free-trade/free-trade-agreements/colombia [hereinafter Colombia EFTA].

154. Grynberg & Qalo, *supra* note 86, at 5.

155. *See id.*

156. *See* HASSANIEN, *supra* note 106, at 193.

157. The seventeen countries that are part of GAFTA are: Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. *Greater Arab Free Trade Area (GAFTA)*, MINISTRY INDUSTRY & TRADE-HASHEMITE KINGDOM OF JORDAN, http://mit.gov.jo/EN/The%20Center/ForeignTrade/Pages/Greater-Arab-Free-Trade-Area-%28GAFTA%29.aspx (last visited Jan. 12, 2015).

158. *Id.*

159. HASSANIEN, *supra* note 106, at 193.

160. The Economic Agreement Between the GCC States, art. 17, Dec. 21, 2001, *available at* sites.gcc-sg.org/DLibrary/download.php?B=168 [hereinafter GCC Agreement]. The Arab States of the Gulf Cooperation Council (GCC) is a group that includes Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab States. *List of GCC countries*, DUBAI FAQS, http://www.dubaifaqs.com/list-of-gcc-countries.php (last visited Jan. 12, 2015).

161. GCC Agreement, *supra* note 160, art. 17.

162. HASSANIEN, *supra* note 106, at 194.

163. *Id.*

164. *See* FRANZ CHRISTIAN EBERT & ANNE POSTHUMA, LABOUR PROVISIONS IN TRADE ARRANGEMENTS: CURRENT TRENDS AND PERSPECTIVES 9 (2011), *available at* http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_192807.pdf.

ences in FTAs include the difficulty enforcing these provisions and the struggle on the part of developing countries to meet these standards.

III. AVOIDANCE, ENFORCEMENT, AND COMPLAINTS: HOW ARE THESE PROVISIONS ENFORCED? OR, ARE THEY?

Bringing foreign labor standards into countries that are in the process of developing their economies might cause friction. Developing countries are "reluctant to enforce labour laws in general and to support union rights . . . in particular for fear of losing foreign direct investment."[165] This fear is the consequence of the "race to the bottom" effect, which causes developing countries to "compete with each other by instituting laws that unfriendly to workers" to bring in foreign investment and factories by offering low costs of production.[166] The result is that when labor standards fall in one country, surrounding countries' standards also fall.[167] Statistics show that despite the increase of labor laws enacted in developing countries, which can be attributed to the adoption of ILO standards and inclusion of labor standards in trade agreements with other countries, there is a steady decline in the adherence to these standards.[168] Therefore, although there has been a significant increase in the adoption of labor provisions in the last twenty-five years,[169] these standards continue to decline. The reasons behind this phenomenon are complex and expand beyond the scope of this paper. Conversely, a careful analysis of the enforcement provisions, along with current violations and avoidance, is warranted in order to understand what contributes to this regression.

It is important to consider that there are two types of labor provisions in FTAs: provisional and conditional.[170] The conditional provisions "are linked to economic consequences, in the form of sanctions or, less frequently, incentives, which concern trade or other benefits, including technical cooperation."[171] In contrast, the promotional provisions are legally binding or non-binding commitments between parties to engage in "cooperative activities, dialogue, and monitoring."[172] Moreover, all FTAs (to which the United States is a party) include internal processes and procedures to resolve disputes, or make recommendations in case one of the parties is in noncompliance with the labor provisions.[173] But these enforcement provisions are often no more than discretionary measures that

165. INT'L LABOUR OFFICE, *supra* note 14, at 189.
166. C.W. *Racing to the Bottom*, ECONOMIST (Nov. 27, 2013, 5:12 PM), http://www.economist.com/blogs/freeexchange/2013/11/labour-standards [Hereinafter *Racing to the Bottom*].
167. *Id.*
168. *Id.*
169. Between 1990 and 2013 the number of trade agreements containing labor provisions rose from zero to fifty-eight. ILO, *supra* note 13, at 19, fig.1.3.
170. *See id.* at 21, box 1.1.
171. *Id.*
172. *Id.*
173. *See* EBERT & POSTHUMA, *supra* note 164, at 10–11.

result in nonbinding conclusions or recommendations.[174]

But the U.S. Department of Labor might offer some recourse to affected parties. The Office of Trade and Labor Affairs (OTLA) is an organization within the U.S. Department of Labor with oversight over the protection of labor standards in FTAs with labor provisions and labor chapters.[175] OTLA accepts "'submissions' from interested organizations that believe a trading partner is not fulfilling the labor commitments it made."[176] With that in mind, the following discussion will highlight some of the most significant shortcomings of the most relevant FTAs.

A. THE GOOD?: NAALC

1. Enforcement

The NAALC is a complex agreement with different enforcement mechanisms linked to specific obligations of the parties. The highpoint of the NAALC is that its "guiding principles" are not enforced equally.[177] For example, the principles of freedom of association and right to bargain collectively are "enforceable by discussion of the National Administrative Offices, Secretariat, and Ministerial Council."[178] These entities are created by the NAALC, along with the Evaluation Committee and Arbitral Panel,[179] to receive, review, investigate, enforce, and implement policies and decisions deriving from noncompliance issues.[180] The dispute resolution mechanism to resolve noncompliance issues[181] begins with a "submission" to the National Administrative Office (NAO).[182] But if the issue is not resolved by the NAO, the next step depends on what type of provision is involved.[183] For example, minimum wage, or any other Group III provision, can be referred to an Evaluation Committee of Ex-

174. *See id.* at 21.
175. *Free Trade Agreement Administration*, U.S. DEPARTMENT LAB., http://www.dol.gov/ilab/trade/agreements/ (last visited Jan. 14, 2015).
176. *Submissions Under the Labor Provisions of Free Trade Agreements*, U.S. DEPARTMENT OF LAB., http://www.dol.gov/ilab/trade/agreements/fta-subs.htm (last visited Jan. 14, 2015) (alteration in original).
177. The guiding principles can be divided into three different groups. Group I includes the freedom of association and right to organize; the right to bargain collectively; and the right to strike. Group II includes the prohibition of forced labor; minimum employment standards pertaining to overtime pay; elimination of employment discrimination; equal pay for women and men; compensation in cases of occupational injuries and illnesses; and protection of migrant workers. Group III includes labor protections for children and young persons; minimum employment standards pertaining to minimum wages; and prevention of occupational injuries. *See* BOLLE, *supra* note 90, at 4, fig.1.
178. *Id.*
179. *Id.* at 7. The Evaluation Committee and the Arbitral Panel are ad hoc entities that are created to address complaints under Group II and Group III of the principles. *Id.*
180. *See id.*, at 6, fig.3.
181. Under the NAALC, the countries are not obligated to adhere to the guiding principles, but to enforce their own labor laws. *See supra* pp. 118–19.
182. *See* BOLLE, *supra* note 90, at 7.
183. *See id.*

perts (ECE), then to an Arbitral Panel (AP).[184] An AP can issue monetary sanctions, which, if no payment is made, could lead to the loss of NAFTA benefits.[185]

2. Complaints

Within six years of the implementation of the NAALC, NAOs received a total of twenty-three submissions.[186] Currently, thirty-eight submissions have been filed under this agreement.[187] Most of the complaints are against Mexico, which is the only developing country party to the agreement.[188] These complaints are mostly related to violations of child labor, gender-based discrimination, minimum wage, and occupational safety.[189] Additionally, Mexico has had some issues complying with the right of workers to organize and bargain collectively, as adopted in the NAALC.[190] In Mexico, it is common for employers to use "protections contracts" to avoid unionization.[191] These instruments are a "collective agreement reached at an enterprise between 'ghost' unions—simulated unions devoid of actual worker representation—and an employer, with no reference to the workers they cover . . . [and where] the workers have no knowledge of being represented by any union."[192] Currently, OTLA is reviewing a submission from the SME and on behalf of over ninety organizations and labor unions in Mexico.[193] The submission was submitted after Luz y Fuerza del Centro, a state-owned electricity enterprise, was seized by the government and 44,000 public employees were ejected from the workplace by the military police.[194] According to the submission, the Mexican government unlawfully expelled thousands of state employees with the help of 27,000 police and military.[195] The allegations include violations of the freedom of association and protection of the right to organize; the right to bargain collectively, the right to strike; and prevention of occupational injuries and illnesses.[196] In January 2012,

184. *Id.*
185. *Id.*
186. *Id.*, at 11. Fourteen of these submissions were filed against Mexico, seven against the United States, and two against Canada. *Id.*
187. *Submissions Under the North American Agreement on Labor Cooperation (NAALC)*, U.S. DEPARTMENT LAB., http://www.dol.gov/ilab/trade/agreements/naalc.htm (last visited Jan. 14, 2015).
188. *See id.*
189. *See* BOLLE, *supra* note 90, at 11.
190. *Id.*
191. *Current FTAs and Labor Rights*, GALLOWAY FAM. FOUND., http://www.gallowayfoundation.org/category-current-ftas-and-labor-rights/ (last visited Jan. 14, 2015).
192. *Id.*
193. *See* PUBLIC COMMUNICATION TO THE U.S. OFFICE OF TRADE AGREEMENT IMPLEMENTATION (OTLA), *supra* note 2, at i-iii.
194. *Union Workers for Mexico's LyFC Electric Company Dismantled*, VOXXI (Jul. 21, 2012), http://voxxi.com/2012/07/21/union-workers-for-mexicos-lyfc-electric-company-dismantled/.
195. PUBLIC COMMUNICATION TO THE U.S. OFFICE OF TRADE AGREEMENT IMPLEMENTATION (OTLA), *supra* note 2, at 1.
196. *Id.* at 2.

OTLA accepted the submission for review and published notice of receipt along with a request for extension to review in the Federal Register.[197] Canada and the United States have also had their share of complaints filed against them.[198]

As bad as it might sound, the NAALC has been largely successful. The NAALC "has encouraged Mexico to begin enforcing its own labor law permitting workers the right to organize and bargain collectively."[199] Additionally, it has allowed the communication between these countries to study and compare labor-related issues and laws.[200] This has enabled the understanding of labor standards and allowed the flow of quantifiable data related to labor standards, especially in Mexico.[201] But this optimistic result has not been constant across the board.

B. THE BAD?: JORDAN

1. What Enforcement?!

When it comes to enforcement, the Jordan FTA states that each country "retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters."[202] Consequently, the only method of enforcement of the labor provisions included in article 6 is through the Joint Committee, which is established in article 15 of the agreement.[203] The Joint Committee is a group of trade representatives from each country who are responsible for reviewing, recommending, and releasing reports regarding issues or developments with the FTA.[204] If a dispute arises between the parties, they are required to engage in consultations before a matter is referred to the Joint Committee.[205] The Joint Committee (or a Settlement Panel) then issues a nonbinding decision on the parties.[206] Another limitation to enforcement is that, under article 18 of the agreement, the parties promise not to allow a right of action under their domestic laws and jurisdiction against the other country for violations of the agreement.[207] Technically, the Jordan FTA falls within the oversight of OTLA.[208] A caveat, however, is that the Jordan FTA does

197. *North American Agreement on Labor Cooperation: Notice of Extension of the Period of Review of Submission*, 77 FED. REG. 39265, 39265 (2012), *available at* http://regulations.justia.com/regulations/fedreg/2012/07/02/2012-16140.html.
198. Two submissions are currently under review against Canada, and one against the United States. Additionally, there are two submissions that resulted in reports issued against Canada, and ten against the United States. *See Submissions under the NAALC*, *supra* note 187.
199. BOLLE, *supra* note 90, at 11.
200. *Id.*
201. *See id.*
202. Jordan FTA, *supra* note 62, at art. 5(3)(b).
203. *Id.* art. 6(5).
204. *Id.* art. 15(2), (3).
205. *Id.* art. 17(1)(b).
206. *Id.* art. 17(1)(d).
207. *Id.* art. 18(1).
208. The Jordan FTA is specifically listed as one of the FTAs with labor provisions in the OLTA website. *Free Trade Agreement Administration*, *supra* note 175.

not establish a process for receiving complaints from "interested parties."[209] Therefore, it can be argued that if a submission is submitted to OTLA's review, a report resulting from it is nonbinding.

2. *Noncompliance: What Is Being Done about It?*

In Jordan, the government struggles with the enforcement of its labour law.[210] Violations go without prosecution and child labor is rampant.[211] In 2008, eight years after the signing of the Jordan FTA, the International Trade Union Confederation (ITUC) released a blistering report on the state of labor standards and labor rights in Jordan.[212] The report indicates that despite the fact that Jordan ratified "seven of the eight core ILO labour Conventions," its labor law fails to enforce such commitments.[213] One of the key violations is its failure to allow workers to enforce their right to organize as unions.[214] Although the law in Jordan technically allows for workers to join unions, workers are constrained and discouraged from doing so.[215] According to the report, "trade unions are required to be members of the [General Federation of Jordanian Trade Unions] GFJTU, which is the only trade union federation" and under the control of the government.[216] This violation of the ILO right to organize would also mean that Jordan is in noncompliance with the Jordan FTA, which requires Jordan to take affirmative action in the implementation and promotion of the ILO labor standards,[217] including the right of association and the right to organize and bargain collectively. These two standards are specifically listed in the agreement with the United States.[218] In addition to violations of the ILO right of association, the ITCU also found that Jordan is in violation of the ILO protection against discrimination, which Jordan also adopted.[219] This ILO standard was not included in the Jordan FTA.[220] In contrast, protections against child labor and the prohibition on forced or compulsory labor are part of the Jordan FTA.[221] The Jordan labor law prohibits employment of children under sixteen.[222] The ITCU found that "more than 290,000" children in Jordan are work-

209. *Id.*
210. HASSANIEN, *supra* note 106, at 200.
211. *See id.*
212. INTERNATIONALLY RECOGNISED CORE LABOUR STANDARDS IN JORDAN (2008), *available at* http://www.ituc-csi.org/IMG/pdf/Jordan_final_report_2008.pdf.
213. *Id.* at 1.
214. *Id.* at 3.
215. *Id.*
216. The report also indicates that the Jordanian Labor Code "does not ensure protection against anti-union discrimination" and that only three percent of Jordanian workers are protected by collected bargaining agreements. *Id.*
217. Jordan FTA, *supra* note 62, art. 6(3).
218. *Id.* art, 6(6).
219. INTERNATIONALLY RECOGNISED CORE LABOUR STANDARDS IN JORDAN, *supra* note 212, at 6.
220. Jordan FTA, *supra* note 62, at art. 6.
221. *Id.*
222. INTERNATIONALLY RECOGNISED CORE LABOUR STANDARDS IN JORDAN, *supra* note 212, at 9.

ing children,[223] despite the fact that Jordan adopted the Minimum Age Convention from the ILO in 1998.[224] Moreover, the ILO in 2008 found that "Jordan still faces serious challenges to control and eliminate forced labour and trafficking in and through the country."[225] The U.S. Department of Labor has also made findings that challenge the ability of Jordan to enforce its labor laws, and comply with the Jordan FTA provisions.[226] Additionally, the U.S. Department of State holds that Jordan is a destination for trafficking and forced labor, specifically in the factories in Qualifying Industrial Zones (QIZs).[227] The ITCU issued a list of conclusions and recommendations, which, among other things, advises the government of Jordan to implement enforcement mechanisms to better monitor its labor standards and to make amendments to its current labor code to bring it into compliance with ILO standards.[228] The Jordan FTA also requires the parties to take proactive action and amend their labor laws to comply with the ILO labor standards adopted in the FTA.[229] Furthermore, in 2009, U.S. members of the Joint Committee, which included U.S. Trade Representatives and Department of State and Labor officials, visited Jordan and factories in QIZs to "monitor working conditions and urge the government of Jordan to continue making improvements on labor rights issues."[230] As a result, the Joint Committee agreed that the United States and Jordan would fund an ILO Better Work Program to monitor the conditions of Jordan's factories.[231] Despite the widespread complaints and violations of labor standards in Jordan, OTLA has not accepted any submissions for failure to comply with Jordan's obligations

223. *Id.*

224. *Id.* at 8.

225. According to the ITCU, "Filipino, Sri Lankan Bangladeshi and Indonesian women migrate to work as domestic workers but upon arrival are subject to forced conditions of work, passports are withhold, restrictions on movement, abusive working conditions, non-payment of wages, threats and physical or sexual abuse." *Id.* at 10.

226. The DOL found that working children are subject to physical and sexual abuse, and exposed to dangerous working conditions. *Jordan*, DOL http://www.dol.gov/ilab/reports/child-labor/findings/tda2004/jordan.pdf (last visited Jan. 14, 2015).

227. U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: JORDAN, (2009), *available at* http://www.state.gov/j/drl/rls/hrrpt/2008/nea/119118.htm.

228. INTERNATIONALLY RECOGNISED CORE LABOUR STANDARDS IN JORDAN, *supra* note 212, at 12.

229. Jordan FTA, *supra* note 62, art. 6(1).

230. *Jordan Free Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta (last visited Jan. 14, 2015).

231. The oversight is limited to factories in the garment section. *Id.* The ILO Better Work Program's last report from December 2013 indicates a mix result in the efforts to address the noncompliance of labor standards in garment factories. Specifically, the report found that there has been improvement in areas such as child labor issues, where it is non-existent in the garment industry, but revealed major concerns in issues such as the Freedom of Association, Forced Labor, and Compensation. *See* ILO, BETTER WORK JORDAN: GARMENT INDUSTRY 5TH COMPLIANCE SYNTHESIS REPORT 6 (2013), *available at* http://betterwork.org/jordan/wp-content/uploads/5th-CSR-FINAL.pdf.

under the Jordan FTA.[232] Although the violations under the Jordan FTA might sound appalling, they are certainly not the worst.

C. THE UGLY?: DR-CAFTA

The United States has entered into thirteen FTAs with twenty countries.[233] Of these agreements, the DR-CAFTA is likely the most contentious and infamous FTA due to its problematic road to enactment and the large number of complaints since its passing. This agreement almost did not pass Congress because of the United States' concerns about the labor conditions in other countries.[234] Additionally, OTLA submissions have been filed against three of the five countries that signed the agreement with the United States.[235] To fully grasp the bleak fallout and complexity of the challenges under the DR-CAFTA's labor provisions, one must first analyze each country's obligations and enforcement mechanisms under the agreement.

1. Enforcement and Obligations

Article 16 of the DR-CAFTA[236] lists ten obligations related to labor standards.[237] According to these obligations, each party:

1. Shall not fail to effectively enforce its own labor laws in a manner affecting trade;
2. Shall strive to ensure that ILO labor principles and internationally recognized worker rights are recognized and protected by domestic law;
3. Shall strive to ensure it does not to "waive or derogate from" domestic labor law in order to encourage trade or investment;
4. Has the right to establish its own domestic labor standards and adopt or modify its labor laws;
5. Retains the right to exercise discretion in allocating enforcement resources;
6. May not undertake labor law enforcement in the others' territories;
7. Shall ensure procedural guarantees for enforcement of the its labor laws;
8. Shall establish a Labor Affairs Council of cabinet-level or equivalent representatives, and an office in its labor ministry to serve as a point of contact for carrying out the Council's work;

232. *Submissions Under the Labor Provisions of Free Trade Agreements*, *supra* note 176.
233. BOLLE, *supra* note 7, at 2.
234. Marianne Hogan, *DR-CAFTA Prescribes a Poison Pill: Remedying The Inadequacies of Dominican Republic-Central American Free Trade Agreement Labor Provisions*, 39 SUFFOLK U. L. REV. 511, 511 (2006).
235. *Submissions Under the Labor Provisions of Free Trade Agreements*, *supra* note 176.
236. *DR-CAFTA*, *supra* note 127, art. 16.
237. MARY JANE BOLLE, DR-CAFTA LABOR RIGHTS ISSUES 2 (2005), *available at* http://www.au.af.mil/au/awc/awcgate/crs/rs22159.pdf.

9. Shall be guided by a detailed mechanism for cooperative activities and trade capacity building.
10. May request consultations with another party on any matter under the labor chapter.[238]

Article twenty of the agreement establishes the dispute settlement provision and sanctions for violations.[239] These sanctions are limited only to failure to enforce each country's own labor laws and the maximum penalty is fifteen million dollars annually.[240] The enforcement and obligation structure of the DR-CAFTA falls within the Model Three classification.[241] This means that the members to the agreement are obligated to "not fail to effectively enforce" their own labor laws.[242] Although each member country has adopted ILO core standards as a guide for their labor laws, complying with their own labor laws has been a significant challenge.[243]

2. *The Difference Between Compliance and Complaints*

As a condition for the passage of DR-CAFTA, the U.S. Trade Representative agreed to provide twenty million dollars to ensure compliance and "improve labor rights practice and enforcement" in the member countries.[244] The result was a verification system in which each country agreed to monitor six focus areas related to workers' rights and labor laws.[245] Despite years of commitment to this system, "improved labor conditions in the DR-CAFTA countries have not materialized and abuses continue unabated."[246] Furthermore, failure to protect and meet core

238. *Id.* at 2.
239. *Id.*
240. Each country has adopted labor laws that are consistent with ILO standards, except El Salvador, which has only adopted six out of the eight ILO standards. *Id.*
241. *Id.*
242. DR-CAFTA, *supra* note 127, art. 16.2.
243. BOLLE, *supra* note 237, at 4.
244. WOLA, *supra* note 133, at 1.
245. *See CAFTA-DR: White Paper and Verification Reports*, *supra* note 129.
246. WOLA, *supra* note 133, at 12. There has been a significant surge in the number of assassinations and other violent crimes against labor leaders in the six member countries of DR-CAFTA. *Id.* For example, in El Salvador the Secretary of Finances of the Salvadoran Electrical Workers Union was killed. *Id.* Similarly, in Honduras the Secretary of the Confederation of Honduran workers was shot and killed, and a labor lawyer was murdered while en route to court to represent workers whose rights had been violated by their employers. *Id.* This increase in violence is especially pronounced in Guatemala, where six union leaders have been assassinated since 2007, including: Pedro Zamora, Secretary General of the Port Workers Union in Quetzal; Marco Tulio Ramírez Portela, Secretary of Sports and Culture of the Guatemalan Banana Workers Union; Carlos Enrique Cruz Hernandez, member of the Banana Workers Union; Sergio Garcia, member of the Health Workers Union; and Israel Romera Estacuy, Secretary General of the Retalhuleu Municipality Workers Union. *Id.*

ILO standards such as freedom of association,[247] discrimination,[248] and child labor[249] have resulted in submissions to OTLA for failure to comply with the labor provisions under DR-CAFTA. Consequently, OTLA submissions have been made against the Dominican Republic, Guatemala, and Honduras.[250] In turn, the OTLA has issued reports for the submissions against the Dominican Republic and Guatemala, and is currently reviewing the submission against Honduras.[251]

In the case of Guatemala, which had some of the most serious of complaints,[252] the United States and Guatemala entered into a "robust 18-point Enforcement Plan" to address labor rights issues.[253] This plan[254] required Guatemala to address labor the violations within specific timelines.[255] Guatemala also agreed to:

> strengthen labor inspections, expedite and streamline the process of sanctioning employers and ordering remediation of labor violations, increase labor law compliance by exporting companies, improve the monitoring and enforcement of labor court orders, publish labor law enforcement information, and establish mechanisms to ensure that workers are paid what they are owed when factories close.[256]

The plan was enacted in April 2013, five years after the OTLA ac-

247. In the Dominican Republic, where freedom of association is protected by law, thirty members of the TOS Dominicana union were fired after they petitioned the Secretary of Labor for recognition and proposed a collective bargaining agreement with Hanesbrand Inc., a textile facility. *Id.* at 13. In Nicaragua, thirty-five workers from KB Manufacturing and twenty workers from Atlantic Manufacturing were dismissed after they tried to form unions. *Id.* at 14.

248. Female employees throughout the region face sexual harassment and wage discrimination at work. For example, Honduran women that work in fast food restaurants are required to show proof that they are not pregnant and take pregnancy tests every two weeks. *Id.* at 15. Women in the Dominican Republic face similar challenges and many refuse to assert their pregnancy testing rights out of fear of being fired or forced to resign. *Id.* Sexual violence is also pervasive, and affects women across the region in multiple industries, from Honduran fast food workers to Nicaraguan textile mill employees. *Id.*

249. According to the ILO, 9.9 percent of children between the ages of five and fourteen provide child labor in Central America. *Id.* at 16.

250. *Submissions Under the Labor Provisions of Free Trade Agreements*, *supra* note 176.

251. *Id.*; *see also Reports & Submissions*, U.S. DEPARTMENT OF LAB., http://www.dol.gov/ilab/reports/search/?q=submission (last visited Jan. 15, 2015).

252. The petition was submitted by seven different worker's unions and the complaints ranged from violations of freedom of association and discrimination, to assassination and violent crimes against union leaders. *See* SUBMISSION FROM AFL-CIO, *supra* note 2, at 1–3.

253. *Guatemala Submission under CAFTA-DR*, U.S. DEPARTMENT OF LAB., http://www.dol.gov/ilab/trade/agreements/guatemalasub.htm (last visited Jan. 15, 2015).

254. *Mutually Agreed Enforcement Action Plan between the Government of the United States and the Government of Guatemala*, U.S. DEPARTMENT OF LAB., 1, http://dol.gov/ilab/reports/pdf/0413GuatEnforcementPlan.pdf (last visited Jan. 15, 2015).

255. *See id.*

256. *Guatemala Submission under CAFTA-DR*, *supra* note 253; *see also Fact Sheet: Guatemala Agrees to Comprehensive Labor Enforcement Plan*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Apr. 11, 2013), http://www.ustr.gov/about-us/press-office/fact-sheets/2013/april/guatemala-labor-enforcement.

cepted the AFL-CIO's submission.[257] Recently, trade representatives from both countries met in March 2014 to discuss the plan's implementation.[258] According to the U.S. Trade Representative, "further action is urgently needed to implement the enforcement plan," and if the concerns are not resolved the "United States reserves the right to restart the dispute settlement proceedings that were suspended as a result of the enforcement plan."[259] According to the officials, the deadline for Guatemala to fully comply with the plan is April 25, 2014.[260]

The OTLA made public a report in response to the submission by Father Christopher Hartley.[261] Father Hartley's submission was actually a compilation of complaints made by other organizations, families, and unions, and includes allegations of human trafficking, forced labor, child labor, unsanitary living conditions, hazardous working conditions, and retaliation against workers for their affiliations with organized labor.[262] After an investigation by the OTLA, the U.S. Department of Labor found evidence of violations of labor law, specifically in the sugar cane industry, related to "minimum wages, hours of work, occupational safety and health," child labor, and violations against the freedom of association.[263] The OTLA made eleven recommendations in the report to address the violations and improve labor conditions.[264] Also, "the Department of Labor announced a [ten million dollar] project to reduce child labor and to improve labor rights and working conditions in the Dominican agriculture sector."[265]

Similarly, the OTLA accepted a submission from the AFL-CIO and twenty-six Honduran federations and trade unions alleging that the government of Honduras failed to protect the rights of workers under Honduran law.[266] The OTLA requested an extension to issue a report and is

257. *Guatemala Submission under CAFTA-DR*, *supra* note 253.
258. Press Release, Embassy of the United States, Brussels, Belgium, Guatemala, U.S. Discuss Labor Enforcement Plan Implementation (Mar. 10, 2014), *available at* http://www.uspolicy.be/headline/guatemala-us-discuss-labor-enforcement-plan-implementation.
259. *Id.*
260. *Id.*
261. Letter from Father Christopher Hartley to Gregory Schoepfle, Director of Office of Trade and Labor Affairs (OTLA), (Dec. 11, 2011), *available at* http://www.dol.gov/ilab/reports/pdf/DRsubmission2011.pdf.
262. *Id.*
263. *Dominican Republic Submission under CAFTA-DR*, U.S. DEPARTMENT OF LAB., http://www.dol.gov/ilab/trade/agreements/dominicanrepsub.htm (last visited Jan. 15, 2015).
264. *Id.*
265. Press Release, United States Department of Labor, US Labor Department issues report on labor concerns in Dominican Republic sugar sector, announces $10 million project in agriculture (Sept. 27, 2013), *available at* http://www.dol.gov/opa/media/press/ilab/ILAB20131979.htm.
266. AM. FED'N OF LABOR AND CONG. OF INDUS. ORGS. (AFL-CIO) ET AL., PUBLIC SUBMISSION TO THE OFFICE OF TRADE & LABOR AFFAIRS (OTLA) UNDER CHAPTERS 16 (LABOR) AND 20 (DISPUTE SETTLEMENT) OF THE DOMINICAN REPUBLIC-CENTRAL AMERICA FREE TRADE AGREEMENT (DR-CAFTA), U.S. DEP'T OF LABOR (2012), *available at* http://dol.gov/ilab/reports/pdf/0413GuatEnforcementPlan.pdf.

currently reviewing the allegations.[267]

The DR-CAFTA is a large trade agreement that highlights the trajectory of the U.S. Government towards conditional inclusion of labor rights provisions in FTAs. This contentious agreement has led to the exposure of egregious labor violations in Central America. The outcome of these complaints under review by the OTLA is crucial to understand the effectiveness of including labor protections in FTAs. But we must remember that the DR-CAFTA was enacted almost fourteen years ago, and, until today, the governments of the countries accused of labor rights violations have not addressed the complaints.

IV. CONCLUSION

The predominance of labor provisions in FTAs is a polarizing development in international trade law that is derived, in part, from the mixed socioeconomic effects of trade liberalization on developing countries. Although conditional inclusion of these labor protections in FTAs was arguably a response to the negative effects of international trade liberalization, developing countries still struggle to meet their obligations under the FTAs. For example, the landmark and most popular of these FTAs, like the NAALC and DR-CAFTA, have not made a significant improvement in the labor conditions of their member countries.[268] The failure to meet the standards and obligations as mandated by the FTAs' labor rights provisions can be attributed to the complexity of the agreements themselves. In addition, the different models and mix/tier enforcement mechanisms have resulted in a patchwork of instruments that, in some cases, fail to address the specific nature of each country as a party to the agreements.[269] These enforcement mechanisms have low impact retributory penalties for labor rights violations. Moreover, the evident apathy[270] of the WTO towards labor rights in the international trade arena leaves the ILO as the sole keeper of international labor rights. But the ILO's lack of jurisdiction to enforce labor rights has forced the United States to take on the role of advocate and enforcer of labor rights in the international setting, at least in FTAs to which the United States is a party. Nevertheless, the surge of labor rights protections in FTAs has only become prevalent in the last twenty-five years. Therefore, the real effect of these provisions on the labor conditions in developing countries remains to be seen. Hopefully, the results turn out to be more than wishful thinking.

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267. *Dominican Republic-Central America-United States Free Trade Agreement; Notice of Extension of the Period of Review for Submission #2012-01 (Honduras)*, 77 FED. REG. 66,870 (Nov. 2, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-11-07/pdf/2012-27255.pdf.

268. *See supra* pp. 135–36.

269. *See supra* note 177.

270. *See supra* p. 106.

Updates