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Leveling the Playing Field: Labor Provisions in CAFTA

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Abstract

Part I of this Article details labor problems in CAFTA countries, with specific emphasis on problems related to fundamental labor rights. Part II discusses the labor-related trading objectives mandated by the U.S. Congress in the TPA, including the relationship of those objectives to core international labor standards promulgated by the International Labor Organization ("ILO"). Part III then analyzes the labor provisions that are included in CAFTA. To the extent that these provisions do not fulfill the labor objectives set forth in the TPA and do not adequately promote core international labor standards, Part IV proposes provisions that the United States should include in future trade agreements.

LEVELING THE PLAYING FIELD: LABOR PROVISIONS IN CAFTA

*Marisa Anne Pagnattaro**

Decent work should be at the heart of global, national and local strategies for economic and social progress. It is central to efforts to reduce poverty, and a means for achieving equitable, inclusive and sustainable development.¹

INTRODUCTION

When the United States enters into a free trade agreement (“FTA”), it has an opportunity to alter the labor playing field with its trade partners, improving international core labor standards and creating fair competition for U.S. workers. This was certainly true when United States entered into the United States-Central America Free Trade Agreement on May 28, 2004 with El Salvador, Guatemala, Honduras, Nicaragua, and Costa Rica, and when the Dominican Republic signed the agreement on August 5, 2004 (these agreements are collectively referred to as “CAFTA”).² After much debate in the U.S. Congress, CAFTA was approved, creating the second-largest free trade zone in Latin America for exports from the United States and making it easier for Central American countries to export products such as sugar and apparel to the United States.³ CAFTA also offers an

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1. INT’L LABOR ORG. [ILO], THE ILO: WHAT IT IS. WHAT IT DOES. 12 (Geneva, 2003), available at http://bravo.ilo.org/public/english/bureau/inf/download/brochure/pdf/broch_0904.pdf.

2. Dominican Republic—Central America—United States Free Trade Agreement, 19 U.S.C.S. § 4011 (2005) [hereinafter CAFTA], available at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

3. See generally Press Release, Office of the U.S. Trade Representative, Statement of USTR Rob Portman on House Passage of CAFTA-DR (July 27, 2005), available at http://www.ustr.gov/Document_Library/Press_Releases/2005/July/Statement_of_USTR_Rob_Portman_On_House_Passage_of_CAFTA-DR.html (the House of Representatives passed CAFTA on July 27, 2004 by a vote of 217 to 215); see also Press Release, Office of the U.S. Trade Representative, Statement of USTR Rob Portman Regarding Senate Passage of CAFTA-DR (June 30, 2005), available at http://www.ustr.gov/Document_Library/Press_Releases/2005/June/Statement_of_USTR_Rob_Portman_regarding_Sen

unprecedented chance to reinforce democracy in Central America by helping to improve living standards and create strong economies in this region.⁴ However, CAFTA is criticized for not doing enough to promote and enforce international labor standards.⁵

Although CAFTA contains labor provisions, more comprehensive provisions should have been included to truly improve labor conditions in Central America, where the deficiencies in labor laws and the enforcement of existing labor laws are particularly pronounced.⁶ Ongoing labor abuses include prohibitions on freedom of association and the right to organize (accompanied by brutal treatment of labor organizers), child labor, and employment discrimination against women.⁷ Unfortunately, instead of fully addressing these issues, CAFTA replicates the central labor provisions and problems that were present in the Singapore, Chile, Australia and Morocco Free Trade Agreements.⁸

ate_passage_of_CAFTA-DR_House_Ways_Means_Approval.html (the Senate passed CAFTA on June 30, 2005 by a vote of 54 to 45); OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE CASE FOR CAFTA: GROWTH, OPPORTUNITY, AND DEMOCRACY IN OUR NEIGHBORHOOD (Feb. 2005), available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file235_7178.pdf (discussing the scope of CAFTA). President Bush signed CAFTA on August 2, 2005. See Press Release, Office of the U.S. Trade Representative, Statement of USTR Rob Portman on Signing of U.S.—Central American—Dominican Republic Free Trade Agreement (Aug. 2, 2005), available at http://www.ustr.gov/Document_Library/Press_Releases/2005/August/Statement_of_USTR_Rob_Portman_on_Signing_of_US-Central_American-Dominican_Republic_Free_Trade_Agreement.html.

4. See generally WORLD BANK GROUP, DR-CAFTA: CHALLENGES AND OPPORTUNITIES FOR CENTRAL AMERICA (June 28, 2005), available at <http://lnweb18.worldbank.org/LAC/LAC.nsf/0/EF19E9E2E78A00458525702D006D0E7E?Opendocument>.

5. See, e.g., AFL-CIO, USTR MISLEADS CONGRESS ON CAFTA LABOR PROVISIONS (2004), available at http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/USTR_Misleads_Congress_on_CAFTA.pdf; HUMAN RIGHTS WATCH, CAFTA'S WEAK LABOR RIGHTS PROTECTIONS: WHY THE PRESENT ACCORD SHOULD BE OPPOSED (Mar. 2004) [hereinafter WEAK LABOR RIGHTS PROTECTIONS], available at <http://hrw.org/english/docs/2004/03/09/usint8099.htm>; Public Citizen, CAFTA and Labor Rights, <http://www.citizen.org/trade/cafta/labor/> (last visited Oct. 1, 2005). See generally Letter from President Jimmy Carter to Senator Charles Grassley (R-IA) (June 8, 2005), available at http://www.ustr.gov/assets/Document_Library/Press_Releases/2005/June/asset_upload_file875_7784.pdf (supporting CAFTA, but noting that improvements could be made, "particularly on the labor side").

6. See SANDRA POLASKI, CARNEGIE ENDOWMENT FOR INT'L PEACE, CENTRAL AMERICA AND THE U.S. FACE CHALLENGE—AND CHANCE FOR HISTORIC BREAKTHROUGH—ON WORKERS' RIGHTS (Feb. 2003), available at <http://www.carnegieendowment.org/pdf/files/TED-CAFTA-and-labor.pdf>.

7. *Id.*

8. See Marisa Anne Pagnattaro, *The 'Helping Hand' in Trade Agreements: An Analysis*

CAFTA also falls short of the trading objectives related to labor set forth by the U.S. Congress in the Trade Act of 2002 and the Bipartisan Trade Promotion Authority Act ("TPA").⁹ If free trade agreements are to be an effective way to promote better working conditions with our trading partners, and if the United States is committed to protecting labor rights, the labor provisions in CAFTA should improve labor conditions in CAFTA countries.

Part I of this Article details labor problems in CAFTA countries, with specific emphasis on problems related to fundamental labor rights. Part II discusses the labor-related trading objectives mandated by the U.S. Congress in the TPA, including the relationship of those objectives to core international labor standards promulgated by the International Labor Organization ("ILO").¹⁰ Part III then analyzes the labor provisions that are included in CAFTA. To the extent that these provisions do not fulfill the labor objectives set forth in the TPA and do not adequately promote core international labor standards, Part IV proposes provisions that the United States should include in future trade agreements.

The promotion of fundamental labor rights allows for fair competition for American workers and supports the right of international workers to enjoy the most basic threshold of workplace standards.¹¹ The advocacy for more substantial labor provisions in this Article is not intended to argue in favor of protectionism or to shield domestic manufacturers and workers from foreign competition. Rather, it is designed to create a fair playing field in which U.S. workers and companies are not pitted against foreign competitors who take advantage of their nation's

of and Proposal for Labor Provisions in U.S. Free Trade Agreements, 16 *FLA. J. INT'L L.* 845, 889 (2004).

9. Bipartisan Trade Promotion Authority Act ("TPA"), 19 U.S.C.S. §§ 3801-3813 (LexisNexis 2005).

10. As a specialized agency of the United Nations, the International Labor Organization ("ILO") "seeks the promotion of social justice and internationally recognized human and labour rights." ILO, Mandate, <http://www.ilo.org/public/english/about/index.htm>. The ILO formulates international labor standards in the form of conventions and recommendations, which may be ratified by its member countries. *Id.* The full text of each ILO convention and recommendation, plus ratification information, is available at the ILOLEX Database of International Labor Standards ("ILOLEX") website. ILOLEX Database of International Labor Standards [hereinafter ILOLEX], <http://www.ilo.org/ilolex/> (last visited Oct. 2, 2005).

11. See generally Pagnattaro, *supra* note 8.

lack of or failure to enforce labor and employment laws. Exploiting workers' lack of bargaining power is not legitimate competition. If workers are not able to engage in freedom of association and collective bargaining, they have little chance of improving their working conditions.¹² Ultimately, the goal of including fundamental labor rights in FTAs is consistent with the larger goal of the United States: to promote the spread of democracy.¹³

I. THE U.S. TRADE PROMOTION AUTHORITY: DEFINING CORE LABOR STANDARDS

In 2002, the U.S. Congress undertook the task of encouraging increased protection of worker rights through trade agreements by mandating the promotion of such rights in the TPA.¹⁴ Congressional action was in response to two essential arguments for including labor provisions in FTAs: First, that labor rights are human rights and that trade agreements provide an ideal

12. *Id.* at 847.

13. See generally OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2004 TRADE POLICY AGENDA AND 2003 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM (Mar. 2004) [hereinafter 2004 TRADE POLICY AGENDA], available at http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/Section_Index.html. In his overview to the 2004 Trade Policy Agenda and 2003 Annual Report of the President of the United States on the Trade Agreements Program ("2004 Trade Policy Agenda"), U.S. Trade Representative Robert B. Zoellick states that America's agenda is "a vision of a world in which free trade opens minds as it opens markets, encouraging democracy and greater tolerance." *Id.* at 8. See generally Maria L. Ontiveros, *Work in the 21st Century—Creating the Social Architecture*, 37 U.S.F. L. REV. 511, 514 (2004). Ontiveros argues that "Labor movements—at home and abroad—have traditionally served the democratizing function of allowing and encouraging participation." *Id.*

14. See generally TPA §§ 3801-3813. Note that prior to the TPA, Congress tied preferential trade treatment to adherence to "internationally recognized worker rights." MARY JANE BOLLE, FREE TRADE AGREEMENTS WITH SINGAPORE AND CHILE: LABOR ISSUES 2 (Cong. Research Serv., CRS REPORT FOR CONGRESS Order Code RS21560, Aug. 13, 2003), available at <http://fpc.state.gov/documents/organization/23398.pdf>. Examples include the Generalized System of Preferences, the Andean Trade Preference Act, and the Caribbean Basin Initiative. See *id.* (citing 1984 amendments to the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975), as amended by Pub. L. No. 98-573, § 503, 98 Stat. 2948 (1984), as including internationally recognized worker rights). See also Generalized System of Preferences, 19 U.S.C. §§ 2461-66 (2000); Caribbean Basin Economic Recovery Act, 19 U.S.C. §§ 2701-06 (2000); Overseas Private Investment Corporation, 22 U.S.C. § 2191 (2000) (requiring a country to be in compliance with internationally recognized worker rights before Congress provides financing and insurance for U.S. companies investing in that country).

context for the promotion of international human rights;¹⁵ and second, that it is unreasonable for U.S. workers to compete against foreign workers who are subjected to low wages and egregious working conditions in which they have little or no voice for change.¹⁶ Included in the overall trade negotiating objectives of the United States for all FTAs are the following goals: To promote respect for worker rights and the rights of children consistent with core labor standards of the ILO and an understanding of the relationship between trade and worker rights;¹⁷ to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce protections afforded in domestic environmental or labor laws as an encouragement of trade;¹⁸ and to promote universal ratification and full compliance with ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor.¹⁹

Consistent with these overall trade negotiating objectives, the TPA contains three principle negotiating objectives with respect to labor:

- 1) to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party after entry into force of a trade agreement between those countries;
- 2) to recognize that parties to a trade agreement retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to

15. See, e.g., Grace H. Brown, *Making Coffee Good to the Last Drop: Laying the Foundation for Sustainability in the International Coffee Trade*, 16 *Geo. Int'l Envtl. L. Rev.* 247, 265 (2004) ("The correlation that fair trade labor groups make between a fair wage and quality of life is considered by many to be a basic human right.").

16. See, e.g., Daniel A. Zaheer, *Breaking the Deadlock: Why and How Developing Countries Should Accept Labor Standards in the WTO*, 9 *Stan. J.L. Bus. & Fin.* 69, 77 (2003); see also Juan Carlos Linares, *The Development Dilemma: Reconciling U.S. Foreign Direct Investment in Latin America with Laborers' Rights: A Study of Mexico, the Dominican Republic and Costa Rica*, 29 *N.C. J. Int'l L. & Com. Reg.* 249, 265-81 (2003) (describing the treatment of workers in export processing zones and *maquiladoras* in Latin America).

17. See TPA § 3802(a)(6).

18. See *id.* § 3802(a)(7).

19. See *id.* § 3802(a)(6), (7), (9).

have higher priorities, and to recognize that a country is effectively enforcing its laws if a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources, and no retaliation may be authorized based on the exercise of these rights or the right to establish domestic labor standards;

3) to strengthen the capacity of the United States trading partners to promote respect for core labor standards, which are defined as: a) the right of association; b) the right to organize and bargain collectively; c) a prohibition on the use of any form of forced or compulsory labor; d) a minimum age for the employment of children; and e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.²⁰

Additionally, the TPA explains that FTAs are to include provisions for dispute resolutions “between governments” in an “effective, timely, transparent, equitable, and reasoned manner” that treat “principal negotiating objectives equally” with respect to procedures and equivalent remedies.²¹

By definition, “core labor standards” in the TPA means:

- 1) the right of association;
- 2) the right to organize and bargain collectively;
- 3) a prohibition on the use of any form of forced or compulsory labor;
- 4) a minimum age for the employment of children; and
- 5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.²²

Consistent with these objectives, the Bush Administration has “deemed it crucial for the United States to insure that worker rights and labor standards are addressed in global, regional, and bilateral economic interactions with other countries.”²³ Accordingly, the U.S. Bureau of International Labor Affairs “seeks to ensure that the United States Government recog-

20. *Id.* §§ 3802(b)(11)(A)-(C), 3813(6)(A)-(E). Note that these are the same five basic worker rights defined as internationally recognized worker rights in the Trade Act of 1974, as amended, § 502(a)(4).

21. TPA § 3802(b)(12)(A), (G).

22. *Id.* § 3813(6)(A)-(E).

23. Bureau of Int'l Labor Affairs, U.S. Dep't of Labor, Mission & Vision [hereinafter USDL-BILA Mission], <http://www.dol.gov/ILAB/mission.htm> (last visited Sept. 28, 2005); see also Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Mission Statement for the Office of International Labor Affairs (May 5, 2000), <http://>

nizes and promotes international standards of excellence, and that its bilateral, multilateral, and international trade agreements assure that core labor standards are observed throughout the world."²⁴

The TPA is unequivocal in its definition of "core labor standards," yet it offers virtually no guidance as to what these standards mean in practice.²⁵ Inasmuch as the standards of the ILO figure prominently into the TPA trading objectives, and the TPA states that the President shall "seek greater cooperation between the WTO and the ILO,"²⁶ it is important to discuss the conventions promulgated by the ILO in its mission to establish international labor standards. In a report to the U.S. Congress, the Congressional Research Service set forth the following table comparing international worker rights recognized by the United States with ILO core labor standards:²⁷

TABLE 1: Definition of Core Labor Standards and Internationally Recognized Worker Rights

U.S. Internationally Recognized Worker Rights	ILO Core Labor Standards
1. The right of association;	1. (1 & 2 are combined); ILO C. 87 and C. 98.
2. The right to organize and bargain collectively;	2. Same; ILO C. 87 and C. 98.
3. Prohibition of forced labor;	3. Same; ILO C. 29 and C. 105.
4. Minimum age for the employment of children and protection from the "worst forms of child labor" (i.e., drug trafficking, prostitution, and soldiering);	4. Same; ILO C. 138 and C. 182.
5. Acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.	5. Freedom from employment discrimination; ILO C. 100 and C. 111.

www.state.gov/www/global/human_rights/drl_labor_mission.html ("The United States believes that worker rights are human rights. . .").

24. USDL-BILA Mission, *supra* note 23.

25. See generally TPA §§ 3801-3813.

26. *Id.* § 3802(c)(1).

27. BOLLE, *supra* note 14, at 2 (citing the ILO core labor standards and the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975), as amended by Pub. L. No. 98-573, § 503, 98 Stat. 2948 (1984)). Note that the "U.S. Internationally Recognized Worker Rights" in this chart correspond to the rights articulated in the TPA. See generally TPA §§ 3801-3813. For more information on the four core labor conventions listed above—(1) freedom of association; (2) the abolition of forced labor; (3) the elimination of child labor; and (4) equality—see ILOLEX, *supra* note 10, at <http://www.ilo.org/ilolex/>.

A. *The Right of Association and the Right to Organize and Bargain Collectively*

The right of association and the right to bargain collectively are considered to be absolutely fundamental to the advancement of labor rights.²⁸ The TPA explicitly provides that FTAs should promote worker rights in these areas consistent with the ILO.²⁹ ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise (“ILO Convention No. 87”) provides for freedom of association and protection of the right to organize.³⁰ Pursuant to Article 2 of this Convention, “[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”³¹ Workers’ and employers’ organizations shall also have the right to “draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.”³² An important aspect of ILO Convention No. 87 is the mandate that “public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.”³³ Adopted in 1948, ILO Convention No. 87 has been ratified by 142 countries.³⁴

Just a year after the adoption of ILO Convention No. 87, the ILO adopted core ILO Convention No. 98 Concerning the Application of Principles of the Right to Organize and to Bargain Collectively (“ILO Convention No. 98”), which provides for the right to organize and to engage in collective bargaining.³⁵ ILO Convention No. 98 states that workers “shall enjoy adequate protection against acts of anti-union discrimination in respect to

28. *See, e.g.*, TPA § 3813(6)(A)-(B).

29. *See id.* § 3802(a)(6).

30. *See generally* Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, July 9, 1948, 68 U.N.T.S. 17 (entered into force July 4, 1950) [hereinafter ILO Convention No. 87], available at <http://www.ilo.org/ilolex/>.

31. *Id.* art. 2.

32. *Id.* art. 3(1).

33. *Id.* art. 3(2).

34. *See* ILOLEX, *supra* note 10.

35. Convention (No. 98) Concerning the Application of Principles of the Right to Organize and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951) [hereinafter ILO Convention No. 98], available at <http://www.ilo.org/ilolex/>.

their employment.”³⁶ An important aspect of ILO Convention No. 98 is that workers and their organizations shall enjoy “adequate protection against any acts of interference by each other or each other’s agents or members in their establishment, functioning or administration.”³⁷ Actions that constitute “acts of interference” under the Convention include those where employers or their organizations are designed to dominate, by financial or other means, the establishment of workers’ organizations.³⁸ One hundred and fifty-four countries have ratified ILO Convention No. 98.³⁹

B. *Prohibition on the Use of Any Form of Forced or Compulsory Labor*

Like the right to associate and the right to organize and collectively bargain, the TPA contains a provision stating that the United States should endeavor to prohibit the use of any form of forced or compulsory labor.⁴⁰ Slavery is considered to be so universally abhorrent that it constitutes a *jus cogens* violation of international law.⁴¹ Slavery, forced or compulsory labor are prohibited by a number of international agreements, including the International Covenant on Civil and Political Rights (“ICCPR”),⁴² the American Convention on Human Rights,⁴³ the Hague Convention,⁴⁴ and the Geneva Convention.⁴⁵

36. *Id.* art. 1.

37. *Id.* art. 2(1).

38. *Id.* art. 2(2).

39. *See* ILOLEX, *supra* note 10.

40. *See* TPA, 19 U.S.C.S. §§ 3802(6), 3813(6) (2005).

41. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987) (explaining that “[n]ot all human rights norms are peremptory norms (*jus cogens*),” but noting that the universal prohibition of slavery *is* one such norm, and that “an international agreement that violates [this norm] is void.”) A *jus cogens* norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980).

42. *See* International Covenant on Civil and Political Rights art. 8(1)-(3), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

43. *See* American Convention on Human Rights art. 6, Nov. 22, 1969, 1144 U.N.T.S. 143, 9 I.L.M. 673 (entered into force July 18, 1978).

44. *See* Hague Convention Respecting the Laws and Customs of War on Land art. 6, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 539, 1 Bevans 631 (entered into force Jan. 26, 1910).

45. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time

The most comprehensive statements prohibiting forced or compulsory labor are found in two ILO Conventions: ILO Convention No. 29 Concerning Forced or Compulsory Labor ("ILO Convention No. 29")⁴⁶ and ILO Convention No. 105 Concerning the Abolition of Forced Labor ("ILO Convention No. 105").⁴⁷ The first, ILO Convention No. 29, which was proposed in 1930, has been ratified by 163 Member States.⁴⁸ It provides that the term "*forced or compulsory labour* shall mean all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."⁴⁹

ILO Convention No. 105 is an outgrowth of a meeting of the ILO Governing Body in Geneva in 1957.⁵⁰ Ratified by 161 Member States, including the United States,⁵¹ the Convention provides for specific contexts in which forced or compulsory labor shall not be used:

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the establishment of political, social or economic system; (b) as a method of mobilizing and using labour for purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; or (e) as a means of racial, social, national or religious discrimination.⁵²

of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

46. Convention (No. 29) Concerning Forced or Compulsory Labor, June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932) [hereinafter ILO Convention No. 29], available at <http://www.ilo.org/ilolex/>.

47. Convention (No. 105) Concerning the Abolition of Forced Labor, June 25, 1957, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959) [hereinafter ILO Convention No. 105], available at <http://www.ilo.org/ilolex/>.

48. See ILO Convention No. 29, *supra* note 46. Note that even though the United States has not ratified this Convention, slavery and forced labor have been prohibited by Amendment XIII of the U.S. Constitution since 1865. U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.").

49. ILO Convention No. 29, *supra* note 46, art. 2(1). The term *forced or compulsory labour* specifically excludes any compulsory military service, normal civic obligations, work as a consequence of a conviction in a court of law, work in cases of emergency, and minor communal services. *Id.* art. 2(2).

50. See ILO Convention No. 105, *supra* note 47, pmbl.

51. See generally ILOLEX, *supra* note 10 (noting that the United States ratified ILO Convention No. 105 in 1991).

52. ILO Convention No. 105, *supra* note 47, art. 1(a)-(e).

Each member of the ILO which ratifies ILO Convention No. 105 “undertakes to take effective measures to secure the immediate and complete abolition of forced or compulsory labour.”⁵³ Consistent with ILO Conventions No. 29 and No. 105 and international law, the United States prohibits slavery and involuntary servitude.⁵⁴

C. *Minimum Age for the Employment of Children*

The inclusion of child labor prohibitions in the TPA further confirms the existence of international concern about this issue.⁵⁵ An estimated 246 million children work in the global economy.⁵⁶ Of those children, almost 171 million work in hazardous situations or conditions, “such as working in mines, working with chemicals and pesticides in agriculture or working with dangerous machinery.”⁵⁷ Over the last forty years, a number of attempts have been made to curb the use of child labor.⁵⁸ In 1959, for example, the United Nations General Assembly passed the Declaration of the Rights of the Child resolution.⁵⁹ Thirty years later, the United Nations passed the Convention on the Rights of the Child.⁶⁰

The ILO has also been working to eliminate child labor, adopting two core Conventions which address this issue.⁶¹ The first, ILO Convention No. 138 Concerning Minimum Age for Admission to Employment (“ILO Convention No. 138”), is a general instrument, adopted in 1973.⁶² ILO Convention No. 138 takes into consideration ten previous conventions on child

53. *Id.* art. 2.

54. U.S. CONST. amend. XIII.

55. See TPA, 19 U.S.C.S. §§ 3802(6), 3802(9), 3813(6)(D) (2005).

56. See United Nation Children’s Fund [UNICEF], Child Protection: Child Labour, http://www.unicef.org/protection/index_childlabour.html (last visited Sept. 28, 2005).

57. *Id.*

58. See Terry Collingsworth, General Counsel, Int’l Labor Rights Fund, *Foreign Policy in Focus: Child Labor in the Global Economy*, 2 WORKERS RTS. NEWS 46 (Oct. 1997), available at <http://www.fpif.org/pdf/vol2/46ifchil.pdf>.

59. Declaration on the Rights of the Child, G.A. Res. 1386, at 19, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (1959).

60. Convention on the Rights of the Child, G.A. Res. 44/25, at 166, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES 44/736 (1989).

61. See *infra* notes 64-67 and accompanying text.

62. Convention (No. 138) Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 297 (entered into force June 19, 1976) [hereinafter ILO Convention No. 138], available at <http://www.ilo.org/ilolex/>.

labor that were all applicable to limited economic sectors.⁶³ Ratified by 134 countries,⁶⁴ ILO Convention No. 138 is designed "to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons."⁶⁵ ILO Convention No. 138 specifically provides that the minimum age for work "shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years."⁶⁶ Notwithstanding this age restriction, member nations whose economy and educational facilities are insufficiently developed may, after a requisite level of consultation, initially specify a minimum age of 14 years.⁶⁷ If the employment is likely to jeopardize the "health, safety or morals of young persons," then the minimum age for such employment shall not be less than 18 years.⁶⁸ Even though

63. *Id.* (citing Convention (No. 5) Fixing the Minimum Age for Admission of Children to Industrial Employment, Nov. 28, 1919, 38 L.N.T.S. 81 (entered into force June 13, 1921), *revised by* Convention (No. 59) Fixing the Minimum Age of Children to Industrial Employment, June 22, 1937, 40 U.N.T.S. 217 (entered into force Feb. 21, 1941) and ILO Convention No. 138, *supra* note 62; Convention (No. 7) Fixing the Minimum Age for Admission of Children to Employment at Sea, July 9, 1920, 38 U.N.T.S. 109 (entered into force Sept. 27, 1921), *revised by* Convention (No. 58) Fixing the Minimum Age for Admission of Children to Employment at Sea, Oct. 24, 1936, 40 U.N.T.S. 205 (entered into force Apr. 11, 1939) [hereinafter ILO Convention No. 58] and ILO Convention No. 138, *supra* note 62; Convention (No. 10) Concerning the Age for Admission of Children to Employment in Agriculture, Nov. 16, 1921, 38 U.N.T.S. 143 (entered into force Aug. 31, 1923), *revised by* ILO Convention No. 138, *supra* note 62; Convention (No. 33) Concerning the Age for Admission of Children for Non-Industrial Employment, Apr. 30, 1932, 39 U.N.T.S. 133 (entered into force June 6, 1935), *revised by* Convention (No. 60) Concerning the Age for Admission of Children for Non-Industrial Employment, June 22, 1937, 78 U.N.T.S. 181 (entered into force Dec. 29, 1950) and ILO Convention No. 138, *supra* note 62; Convention (No. 112) Concerning the Minimum Age for Admission to Employment as Fishermen, June 19, 1959, 413 U.N.T.S. 147 (entered into force Nov. 7, 1961); Convention (No. 123) Concerning the Minimum Age for Admission to Employment Underground in Mines, June 22, 1965, 610 U.N.T.S. 79 (entered into force Nov. 10, 1967), *revised by* ILO Convention No. 138, *supra* note 62). The full text of each convention is available at ILOLEX, *supra* note 10. ILO Convention No. 58 sets forth restrictions for children working on all ships and boats, excluding ships of war and those upon which only members of the same family are employed. See ILO Convention No. 58, *supra*, arts. 1-2.

64. See ILOLEX, *supra* note 10.

65. *Id.* art. 1.

66. *Id.* art. 2(3).

67. See *id.* art. 2(4).

68. *Id.* art. 3(1). This age minimum can be reduced to 16 years if the health, safety, and morals of young persons are fully protected and they receive "adequate specific instruction or vocational training in the relevant branch of activity." *Id.* art. 3(3).

the United States has not yet ratified ILO Convention No. 138,⁶⁹ the child labor provisions of the Fair Labor Standards Act (“FLSA”) contain corollary provisions.⁷⁰

The second ILO Convention, ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (“ILO Convention No. 182”), was just adopted in 1999, yet it has already been ratified by 150 countries, including the United States.⁷¹ For purposes of ILO Convention No. 182, “the worst forms of child labour” comprise: (a) all forms of slavery or practices similar to slavery, such as the sale or trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; and (d) work which, by its nature or circumstances in which it is carried out, is likely to harm the health, safety or morals of children.⁷²

For purposes of the Convention, the term “child” applies to all persons under the age of eighteen.⁷³ Each party to the Convention is required to “take all necessary measures to ensure [. . .] effective implementation and enforcement of the provisions,” including the application of penal or other sanctions.⁷⁴ Moreover, each party is charged with the responsibility of taking “effective and time-bound” measures to: (a) prevent the engagement of children in the worst forms of child labor; (b) provide the necessary and appropriate direct assistance for the removal of children from the works forms of child labor and for their rehabilitation and social integration; (c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of

69. See *ILOLEX*, *supra* note 10.

70. See Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 203(l) (2000).

71. Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, June 17, 1999, 2133 U.N.T.S. 163 (entered into force Nov. 19, 2000) [hereinafter ILO Convention No. 182], *available at* <http://www.ilo.org/ilolex/>.

72. See *id.* art. 3.

73. See *id.* art. 2.

74. *Id.* art. 7(1).

child labor; (d) identify and reach out to children at special risk; and (e) take account of the special situation of girls.⁷⁵ These “worst forms” of child labor are considered to be so egregious that they are specifically referenced in the TPA as a priority in trade negotiating objectives.⁷⁶

D. *Acceptable Conditions of Work*

The most amorphous of the core labor standards referenced in the TPA are the “acceptable conditions at work with respect to minimum wages, hours of work, and occupational safety and health.”⁷⁷ Under domestic law in the United States, these considerations are primarily covered by the FLSA⁷⁸ and the Occupational Safety and Health Act (“OSHA”)⁷⁹ yet, to the extent that discrimination can affect wages, Title VII of the Civil Rights Act of 1964,⁸⁰ the Equal Pay Act,⁸¹ and the Americans with Disabilities Act⁸² all are relevant. It is not clear, however, how far-reaching the U.S. Congress intended the trade objectives to extend, yet it should be noted that in its labor report section on acceptable conditions at work, the U.S. Trade Representative includes minimum wage, hours of work, occupational safety and health, as well as a report on women and work.⁸³ Although the TPA explicitly refers to the “core labor standards of the ILO,”⁸⁴ this final category does track ILO core labor standards as neatly as those previously discussed.⁸⁵

The remaining ILO core labor principle, freedom from employment discrimination, consists of two conventions, ILO Con-

75. *See id.* art. 7(2).

76. *See* TPA, 19 U.S.C.S. §§ 3802(a)(9), 3802(b)(17), 3802(c)(2) (2005).

77. *Id.*

78. FLSA, 29 U.S.C. §§ 201-219 (2000).

79. Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. §§ 651-678 (2000). *See also* Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962 (2000).

80. Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2000).

81. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000).

82. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

83. OFFICE OF THE U.S. TRADE REPRESENTATIVE, LABOR RIGHTS REPORT: COSTA RICA, DOMINICAN REPUBLIC, EL SALVADOR, GUATEMALA, HONDURAS AND NICARAGUA (June 2005) [hereinafter USTR REPORT], available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Transmittal/asset_upload_file436_7822.pdf.

84. TPA, 19 U.S.C.S. § 3813(6) (2005).

85. TPA § 3813(6).

vention No. 100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value ("ILO Convention No. 100")⁸⁶ and ILO Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation ("ILO Convention No. 111"),⁸⁷ which both pertain to wages. Both of these core conventions are widely accepted, as reflected by the fact that they have been ratified by over 150 countries.⁸⁸ They are also set forth in the ILO Declaration as fundamental labor rights.⁸⁹

ILO Convention No. 100 broadly defines remuneration to include "the ordinary, basic or minimum wage or salary and any additional emoluments payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment."⁹⁰ Pursuant to this Convention, members shall ensure there is "equal remuneration for men and women workers for work of equal value."⁹¹ There should be no discrimination based on sex.⁹² Member States are charged with the responsibility of employing means appropriate to determine rates of remuneration, including the use of national laws or regulations; legally established or recognized machinery for wage determination; and collective bargaining agreements.⁹³

Even before Title VII of the 1964 Civil Rights Act was passed in the United States,⁹⁴ the ILO adopted Convention No. 111 to prevent discrimination in employment.⁹⁵ The Convention ex-

86. Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303 (entered into force May 23, 1953) [hereinafter ILO Convention No. 100], available at <http://www.ilo.org/ilolex/>.

87. Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960) [hereinafter ILO Convention No. 111], available at <http://www.ilo.org/ilolex/>.

88. See ILOLEX, *supra* note 10. Note that even though the United States has not ratified either of these conventions, it has similar domestic laws. See Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000); Title VII, 42 U.S.C. § 2000e (2000).

89. See ILO, *ILO Declaration on Fundamental Principles and Rights at Work*, § 2(a)-(d) (June 18, 1998) [hereinafter *ILO Declaration*], available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT.

90. ILO Convention No. 100, *supra* note 86, art. 1(a).

91. *Id.* art. 2(1).

92. See *id.* art. 1(b).

93. See *id.* art. 2(2).

94. See generally Title VII, 42 U.S.C. § 2000 (2000).

95. ILO Convention No. 111, *supra* note 87.

pressly defines discrimination to include “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”⁹⁶ The inclusion of “political opinion” makes this provision significantly broader than the protections offered in the United States under Title VII of the Civil Rights Act of 1964.⁹⁷ Despite this fact, the U.S. Department of State Office of International Labor Affairs is currently seeking ratification of Convention No. 111.⁹⁸ Pursuant to the Convention, discrimination is prohibited in a variety of employment-related contexts: access to vocational training, access to employment and particular occupations, and terms and conditions of employment.⁹⁹

In addition to ILO Conventions No. 100 and No. 111, the protection of wages, hours of work, and occupational safety and health could be interpreted in a variety of ways and potentially implicates a number of ILO conventions. With regard to wages, the ILO has wage conventions¹⁰⁰ and other conventions regarding other kinds of employment discrimination.¹⁰¹ For example,

96. *Id.* art. 1(1)(a).

97. *See generally* Title VII § 2000e (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin).

98. *See generally* Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, Labor, <http://www.state.gov/g/drl/lbr/>.

99. *See* ILO Convention No. 111, *supra* note 87, art. 1(3).

100. In addition to the Conventions discussed herein, also note the following ILO conventions pertaining to wages: Convention (No. 94) Concerning Labor Clauses in Public Contracts, June 29, 1949, 138 U.N.T.S. 207 (entered into force Sept. 20, 1952) [hereinafter ILO Convention No. 94]; Convention (No. 99) Concerning Minimum Wage Fixing Machinery in Agriculture, June 28, 1951, 172 U.N.T.S. 159 (entered into force Aug. 23, 1953) [hereinafter ILO Convention No. 99]; Convention (No. 173) Concerning the Protection of Workers’ Claims in the Event of the Insolvency of their Employer, June 23, 1992, 1886 U.N.T.S. 3 (entered into force June 8, 1995) [hereinafter ILO Convention No. 173]. The full text of each convention is available at ILOLEX, *supra* note 10.

101. *See generally* Convention (No. 26) Concerning the Creation of Minimum Wage-Fixing Machinery, June 16, 1928, 39 U.N.T.S. 3 (entered into force June 14, 1930) [hereinafter ILO Convention No. 26]; Convention (No. 63) Concerning Statistics of Wages and Hours of Work in the Principal Mining and Manufacturing Industries, Including Building and Construction, and in Agriculture, June 20, 1938, 40 U.N.T.S. 255 (entered into force June 22, 1940) [hereinafter ILO Convention No. 63]; Convention (No. 64) Concerning the Regulation of Written Contracts of Employment of Indigenous Workers, June 27, 1939, 40 U.N.T.S. 281 (entered into force July 8, 1948) [hereinafter ILO Convention No. 64]; Convention (No. 66) Concerning the Recruitment, Placing and Conditions of Labor of Migrants for Employment, June 28, 1939 (with-

ILO Convention No. 26 Concerning the Creation of Minimum Wage-Fixing Machinery (“ILO Convention No. 26”) requires parties to undertake “to create or maintain machinery whereby minimum rates of wages can be fixed for workers employed” in certain trades, including manufacturing and commerce.¹⁰² ILO Convention No. 131 Concerning Minimum Wage-Fixing, with Special Deference to Developing Countries (“ILO Convention No. 131”) was adopted to compliment wage conventions such as ILO Conventions No. 26 and No. 100 to provide “protection for wage earners against unduly low wages” and to also pay special regard to the needs of developing countries.¹⁰³ The Convention contains the very significant requirement of requiring Member States to undertake to establish a system of minimum wages, taking into consideration: (a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups; and (b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining high levels of employment.¹⁰⁴

In addition to these important conventions regarding wages, ILO Convention No. 95 offers further protection of

drawn by the ILO Conference May 30, 2000), *revised by* Convention (No. 97) Concerning Migration for Employment, July 1, 1949, 120 U.N.T.S. 71 (entered into force Jan. 22, 1952) [hereinafter ILO Convention No. 97]; Convention (No. 76) Concerning Wages, Hours of Work on Board Ship and Manning, June 29, 1946 (not yet entered into force) [hereinafter ILO Convention No. 76], *revised by* Convention (No. 93) Concerning Wages, Hours of Work on Board Ship and Manning, June 18, 1949 (not yet entered into force) [hereinafter ILO Convention No. 93] *and* Convention (No. 109) Concerning Wages, Hours of Work on Board Ship and Manning, May 14, 1958 (not yet entered into force) [hereinafter ILO Convention No. 109]; Convention (No. 88) Concerning the Organization of the Employment Service, July 9, 1948, 70 U.N.T.S. 85 (entered into force Aug. 10, 1950) [hereinafter ILO Convention No. 88]; Convention (No. 95) Concerning the Protection of Wages, July 1, 1949, 138 U.N.T.S. 225 (entered into force Sept. 24, 1952) [hereinafter ILO Convention No. 95]; ILO Convention No. 99, *supra* note 100; ILO Convention No. 111, *supra* note 87; Convention (No. 131) Concerning Minimum Wage Fixing, with Special Reference to Developing Countries, June 22, 1970, 825 U.N.T.S. 77 (entered into force April 29, 1972) [hereinafter ILO Convention No. 131]; Convention (No. 145) Concerning Continuity of Employment of Seafarers, Oct. 28, 1976, 1136 U.N.T.S. 91 (entered into force May 3, 1979) [hereinafter ILO Convention No. 145]. The full text of each convention is available at ILOLEX, *supra* note 10.

102. ILO Convention No. 26, *supra* note 101.

103. ILO Convention No. 131, *supra* note 101.

104. *See id.* art. 3.

wages, requiring them to be “capable of being expressed in terms of money” and to be paid in legal tender to protect workers from unscrupulous employers.¹⁰⁵ The ILO also adopted ILO Convention No. 159 Concerning Vocational Rehabilitation and Employment (“ILO Convention No. 159”) to protect disabled persons from employment discrimination¹⁰⁶ and ILO Convention No. 183 to protect against discrimination on the basis of pregnancy.¹⁰⁷ Pursuant to ILO Convention No. 159, Member States shall “formulate, implement and periodically review a national policy on vocational rehabilitation and employment of disabled persons.”¹⁰⁸ The goal of this Convention is to enable disabled persons to have an equal opportunity to secure, retain and advance in employment in the open labor market.¹⁰⁹ ILO Convention No. 183 offers very broad protection for pregnant women and new mothers, including a period of maternity leave that is not less than fourteen weeks, cash benefits of not less than two-thirds of the woman’s previous earnings, accommodations for breast feeding and a guaranteed right to return to the same or an equivalent position paid at the same rate at the end of her maternity leave.¹¹⁰

The second aspect of the “acceptable conditions at work” TPA trading objective pertains to hours of work.¹¹¹ Similar to wage and discrimination protection, the ILO has adopted a

105. ILO Convention No. 95, *supra* note 101. Payment in the form of promissory notes, vouchers, coupons, or in the form of high-alcohol liquor or noxious drugs is prohibited. *Id.* arts. 3(1), 4(1).

106. See Convention (No. 159) Concerning Vocational Rehabilitation and Employment, June 20, 1983, 1401 U.N.T.S. 235 (entered into force June 20, 1985) [hereinafter ILO Convention No. 159], *available at* <http://www.ilo.org/ilolex/>. ILO Convention No. 159 has been ratified by 78 countries, including a number of countries that have entered into FTAs with the United States. See ILOLEX, *supra* note 10.

107. See Convention (No. 183) Concerning the Revision of the Maternity Protection Convention (Revised), June 15, 2000, 2181 U.N.T.S. 255 (entered into force Feb. 7, 2002) [hereinafter ILO Convention No. 183], *available at* <http://www.ilo.org/ilolex/>. Only recently adopted by the ILO, ILO Convention No. 183 has been ratified by 11 countries. ILOLEX, *supra* note 10.

108. ILO Convention No. 159, *supra* note 106, art. 2. For purposes of ILO Convention No. 159, “disabled person” is defined as “an individual whose prospects in securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment.” *Id.* art. 1(1).

109. See *id.* arts. 1(2), 3, 4.

110. See ILO Convention No. 183, *supra* note 107, arts. 3, 4, 6, 8(2).

111. See TPA, U.S.C.S. § 3813(6)(E) (2005).

number of conventions pertaining to hours of work.¹¹² The most fundamental and widely ratified convention is ILO Convention No. 1 Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-Eight in the Week (“ILO Convention No. 1”), which specifies maximum hours of work for workers involved in an “industrial undertaking,” such as manufacturing.¹¹³ The general rule that industrial workers shall not be employed for more than eight hours a day or more than forty-eight hours per week is subject to exceptions.¹¹⁴ Another widely ratified Convention on hours of work is ILO Convention No. 14 Concerning the Application of the Weekly Rest in Industrial Undertakings (“ILO Convention No. 14”), which provides that workers in industry shall have a period of rest of at least twenty-four consecutive hours every seven days.¹¹⁵ Other less-widely ratified conventions addressing hour issues include: ILO Convention No. 30 Concerning the Regulation of Hours of Work in Commerce and Offices (“ILO Convention No. 30”) (providing for an eight-hour work day and forty-eight hour week);¹¹⁶ ILO Convention No. 47 Concerning the Reduction of Hours of Work to Forty a Week (“ILO Convention No. 47”) (affirming the principle of a forty-hour work week, which does not result in reduction of a worker’s standard of living);¹¹⁷ ILO Convention No. 52

112. See generally *supra* note 101 (detailing several conventions promulgated by the ILO that address work hour regulation).

113. See Convention (No. 1) Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-Eight in the Week, Nov. 28, 1919, 38 U.N.T.S. 17 (entered into force June 13, 1921) [hereinafter ILO Convention No. 1], available at <http://www.ilo.org/ilolex/>. ILO Convention No. 1 has been ratified by fifty-two countries, including a number of U.S. trading partners. See ILOLEX, *supra* note 10.

114. See *id.* art. 2. For example, workers can negotiate nine-hour days or workers in shifts may work in excess of eight hours one day and forty-eight hours in one week, if the average number of hours over a period of three weeks or less does not exceed eight per day or forty per week. See *id.* art. 2(b)-(c).

115. See Convention (No. 14) Concerning the Application of the Weekly Rest in Industrial Undertakings, Nov. 17, 1921, 38 U.N.T.S. 187 (entered into force June 19, 1923) [hereinafter ILO Convention No. 14], available at <http://www.ilo.org/ilolex/>. ILO Convention No. 14 has been ratified by 117 countries. See ILOLEX, *supra* note 10.

116. Convention (No. 30) Concerning the Regulation of Hours of Work in Commerce and Offices, June 28, 1930, 39 L.N.T.S. 85 (entered into force Aug. 29, 1933) [hereinafter ILO Convention No. 30], available at <http://www.ilo.org/ilolex/>. ILO Convention No. 30 has been ratified by thirty countries. See ILOLEX, *supra* note 10.

117. Convention (No. 47) Concerning the Reduction of Hours of Work to Forty a Week art. 1, June 22, 1935, 271 U.N.T.S. 199 (entered into force June 23, 1957) [hereinafter ILO Convention No. 47], available at <http://www.ilo.org/ilolex/>. ILO Convention No. 47 has been ratified by fourteen countries. See ILOLEX, *supra* note 10.

Concerning Annual Holidays with Pay (“ILO Convention No. 52”) (providing for paid vacation days);¹¹⁸ ILO Convention No. 106 Concerning Weekly Rest in Commerce and Offices (“ILO Convention No. 106”) (providing for one day of rest per week of work);¹¹⁹ ILO Convention No. 171 Concerning Night Work (“ILO Convention No. 171”) (protecting night workers);¹²⁰ ILO Convention No. 175 Concerning Part-Time Work (“ILO Convention No. 175”) (offering protections for part-time workers in access to employment, working conditions and social security);¹²¹ and ILO Convention No. 177 Concerning Home Work (“ILO Convention No. 177”) (extending protections, including equality of treatment to persons who work in a place other than the workplace of the employer).¹²²

The third aspect of the “acceptable conditions of work” TPA trading objective pertains to occupational safety and health.¹²³ It is unlikely that the U.S. Congress intended the TPA to require our trading partners to abide by standards at the level of OSHA, yet there are wide variations worldwide on occupational safety and health standards.¹²⁴ ILO Convention No. 155 Concerning Occupational Safety and Health and the Working Environment

118. Convention (No. 52) Concerning Annual Holidays with Pay, June 24, 1936, 40 L.N.T.S. 137 (entered into force Sept. 22, 1939) [hereinafter ILO Convention No. 52], available at <http://www.ilo.org/ilolex/>, revised by Convention (No. 132) Concerning Annual Holidays with Pay, June 24, 1970, 883 U.N.T.S. 97 (entered into force June 6, 1973). ILO Convention No. 52 has been ratified by fifty-four countries. See ILOLEX, *supra* note 10.

119. Convention (No. 106) Concerning Weekly Rest in Commerce and Offices, June 26, 1957, 325 U.N.T.S. 279 (entered into force Mar. 4, 1959) [hereinafter ILO Convention No. 106], available at <http://www.ilo.org/ilolex/>. ILO Convention No. 106 has been ratified by sixty-two countries. See ILOLEX, *supra* note 10.

120. Convention (No. 171) Concerning Night Work, June 26, 1990, 1855 U.N.T.S. 305 (entered into force Jan. 4, 1995) [hereinafter ILO Convention No. 171], available at <http://www.ilo.org/ilolex/>. ILO Convention No. 171 has been ratified by nine countries. See ILOLEX, *supra* note 10.

121. Convention (No. 175) Concerning Part-Time Work, June 24, 1994, 2010 U.N.T.S. 52 (entered into force Feb. 28, 1998) [hereinafter ILO Convention No. 175], available at <http://www.ilo.org/ilolex/>. ILO Convention No. 175 has been ratified by ten countries. See ILOLEX, *supra* note 10.

122. Convention (No. 177) Concerning Home Work, June 20, 1996, 36 I.L.M. 55, 57 (entered into force Mar. 22, 2000) [hereinafter ILO Convention No. 177], available at <http://www.ilo.org/ilolex/>. ILO Convention No. 177 has been ratified by four countries. See ILOLEX, *supra* note 10.

123. TPA, 19 U.S.C.S. § 3813(6)(E) (2005).

124. See generally ILO, Int'l Labor Standards: Occupational Safety and Health, <http://www.ilo.org/public/english/standards/norm/subject/occupational.htm> (last visited Sept. 29, 2005).

("ILO Convention No. 155") contains a general and comprehensive statement on occupational safety and health.¹²⁵ ILO Convention No. 155 requires members to "formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment."¹²⁶ The aim of this policy should be "to prevent accidents and injury to health arising out of, linked with or occurring in the course of work" by minimizing the causes of hazards inherent in the working environment.¹²⁷

Moreover, to give effect to the policy-setting requirements of ILO Convention No. 155, a competent authority is charged with the obligation of establishing reporting procedures so that incidents of occupational accidents and diseases can be recorded, holding inquiries into serious situations, and publishing annually information on measures taken pursuant to the country's occupational health and safety policy.¹²⁸ ILO Convention No. 155 also places the onus on employers to ensure that, so far as is reasonably practicable, "the workplaces, machinery, equipment and processes under their control are safe and without risk to health;" that "chemical, physical and biological substances and agents under their control are without risk to health when the appropriate measures of protection are taken;" and "to provide, where necessary, adequate protective clothing and protective equipment" intended to prevent the risk of accidents or adverse effects on health.¹²⁹ Employers are also required to have measures in place to deal with emergencies and accidents, including adequate arrangements for administering first aid.¹³⁰

In 2002, the Governing Body of the ILO met and drafted ILO Protocol No. 155 to the Occupational Safety and Health Convention ("ILO Protocol No. 155").¹³¹ The Protocol, which

125. See Convention (No. 155) Concerning Occupational Safety and Health and the Working Environment, June 22, 1981, 1331 U.N.T.S. 279 (entered into force Aug. 11, 1983) [hereinafter ILO Convention No. 155], available at <http://www.ilo.org/ilolex/>. ILO Convention No. 155 has been ratified by forty-four countries. See ILOLEX, *supra* note 10.

126. ILO Convention No. 155, art. 4(1).

127. *Id.* art. 4(2).

128. See *id.* art. 11.

129. *Id.* art. 16(1)-(3).

130. See *id.* art. 18.

131. Protocol (No. 155) to the Occupational Safety and Health Convention, June 20, 2002 (entered into force Feb. 9, 2005) [hereinafter ILO Protocol No. 155], available at <http://www.ilo.org/ilolex/>.

entered into force in 2005,¹³² is intended to further refine the notification procedures of ILO Convention No. 155.¹³³ In particular, the reporting requirements and procedures shall determine, inter alia, the responsibility of the employers and there should be annual publication of statistics concerning occupational accidents and diseases.¹³⁴ In addition to ILO Convention No. 155 and ILO Protocol No. 155, the ILO has seventeen conventions pertaining to specific areas of safety and health in the workplace.¹³⁵

II. LABOR PROBLEMS IN CAFTA COUNTRIES

Much concern has been raised about the adequacy of the

132. See ILOLEX, *supra* note 10.

133. See ILO Convention No. 155, *supra* note 125, art. 26.

134. See ILO Protocol No. 155, *supra* note 131, arts. 3, 4, 6.

135. See Convention (No. 13) Concerning the Use of White Lead in Painting, Nov. 19, 1921, 38 L.N.T.S. 175 (entered into force Aug. 31, 1923); Convention (No. 45) Concerning the Employment of Women on Underground Work in Mines of all Kinds, June 21, 1935, 40 L.N.T.S. 63 (entered into force May 30, 1937); Convention (No. 62) Concerning Safety Provisions in the Building Industry, June 23, 1937, 40 L.N.T.S. 233 (entered into force July 4, 1942); Convention (No. 115) Concerning the Protection of Workers against Ionizing Radiations, June 22, 1960, 431 U.N.T.S. 41 (entered into force June 17, 1962); Convention (No. 119) Concerning the Guarding of Machinery, June 25, 1963, 532 U.N.T.S. 159 (entered into force Apr. 21, 1965); Convention (No. 120) Concerning Hygiene in Commerce and Offices, July 8, 1964, 560 U.N.T.S. 201 (entered into force Mar. 29, 1966); Convention (No. 127) Concerning the Maximum Permissible Weight to Be Carried by One Worker, June 28, 1967, 21 U.N.T.S. 39 (entered into force Mar. 10, 1970); Convention (No. 136) Concerning Protection against Hazards of Poisoning Arising from Benzene, June 23, 1971, 885 U.N.T.S. 45 (entered into force July 27, 1973); Convention (No. 139) Concerning Prevention and Control of Occupational Hazards caused by Carcinogenic Substances and Agents, June 24, 1974, 17 I.L.M. 422 (entered into force June 10, 1976); Convention (No. 148) Concerning the Protection of Workers against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration, June 20, 1977, 1141 U.N.T.S. 107 (entered into force July 11, 1979); Convention (No. 161) Concerning Occupational Health Services, June 25, 1985, 1498 U.N.T.S. 19 (entered into force Feb. 17, 1988); Convention (No. 162) Concerning Safety in the Use of Asbestos, June 24, 1986, 1539 U.N.T.S. 315 (entered into force June 16, 1989); Convention (No. 167) Concerning Safety and Health in Construction, June 20, 1988, 1592 U.N.T.S. 33 (entered into force Jan. 11, 1991); Convention (No. 170) Concerning Safety in the use of Chemicals at Work, June 25, 1990, 1753 U.N.T.S. 189 (entered into force Nov. 4, 1993); Convention (No. 174) Concerning the Prevention of Major Industrial Accidents, June 22, 1993, 1967 U.N.T.S. 231 (entered into force Jan. 3, 1997); Convention (No. 176) Concerning Safety and Health in Mines, June 22, 1995 (entered into force June 5, 1998) [hereinafter ILO Convention No. 176]; and Convention (No. 184) Concerning Safety and Health in Agriculture, June 21, 2001, 2227 U.N.T.S. 243 (entered into force Sep. 20, 2003). The full text of each convention is available at ILOLEX, *supra* note 10. Note that the United States has ratified ILO Convention No. 176. *Id.*

labor laws in CAFTA countries and the lack of enforcement of existing laws.¹³⁶ In connection with the negotiation of CAFTA and the need to formally access the status of labor in Central America, the International Labour Office was invited by the governments of Costa Rica, Guatemala, El Salvador, Honduras and Nicaragua to prepare a study of labor laws relating to fundamental principles and rights at work in each of the respective countries.¹³⁷ Specifically, the 2003 study surveyed laws in each of these countries to determine the extent to which they conform to the ILO Declaration on Fundamental Principles and Rights at Work.¹³⁸ The study focuses on what these countries are doing to promote and implement the most relevant provisions of the core conventions. As the study notes, each of these countries has made efforts to codify these fundamental labor rights.¹³⁹ In practice, however, the study is of limited use because it does not attempt to evaluate the practice or enforcement of the labor laws discussed; it also does not consider labor laws dealing with other issues.¹⁴⁰ The actual labor practices of these countries leave open serious questions about the manner in which CAFTA countries will be able to ensure that their laws provide for labor standards consistent with internationally recognized standards.

In response to such criticism, the ministers responsible for trade and labor in the CAFTA countries met under the sponsor-

136. See generally J.F. HORNBECK, *THE DOMINICAN REPUBLIC—CENTRAL AMERICA—UNITED STATES FREE TRADE AGREEMENT (DR-CAFTA)* (Cong. Research Serv., CRS Report for Congress Order Code RL31870, June 1, 2005), available at <http://fpc.state.gov/documents/organization/48812.pdf> (acknowledging the criticism levied against CAFTA's labor provisions).

137. See generally ILO, *Fundamental Principles and Rights at Work: A Labour Law Study* (2003) [hereinafter ILO Labour Law Study], available at <http://www.ilo.org/public/english/dialogue/download/cafta.pdf>. Note that the study does not consider labor laws dealing with other issues. *Id.*

138. See *id.* See also ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (1998), available at <http://www.ilo.org/ilolex/>.

139. See ILO Labour Law Study, *supra* note 137, at 2.

140. See *id.* at iii; see also LABOR ADVISORY COMM. FOR TRADE NEGOTIATIONS AND TRADE POLICY [LAC], *THE U.S.-CENTRAL AMERICA FREE TRADE AGREEMENT REPORT 6-7* (Mar. 19, 2004) [hereinafter CAFTA LAC REPORT], available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA_Reports/asset_upload_file63_5935.pdf. The Labor Advisory Committee for Trade Negotiations and Trade Policy ("LAC") criticizes the ILO report as "commissioned by the Central American governments, deliberately limited in scope, marked by grave omissions, and written in only a couple of weeks." *Id.* pt. V.B (Labor Provisions of CAFTA).

ship of the Inter-American Development Bank in 2004.¹⁴¹ At that meeting they established a working group which ultimately issued a report entitled “The Labor Dimension in Central America and the Dominican Republic—Building on Progress: Strengthening Compliance and Enhancing Capacity” (the “White Paper”), in April 2005.¹⁴² The White Paper focuses on efforts to enhance implementation and enforcement of labor standards in the region, while also acknowledging that the countries are constrained by serious resource limitations and employment problems.¹⁴³ For example, the White Paper notes that the annual gross domestic products per capita ranges from slightly over US\$4000 in Costa Rica to as little as US\$500 in Nicaragua.¹⁴⁴ With this in mind, the White Paper identifies six key areas in which action is needed to improve workers’ rights and to fulfill their larger goal of creating a “culture of compliance” with labor standards.¹⁴⁵

1) *Labor Law and Implementation*, regarding a) freedom of association, trade unions and labor relations; and b) inspection and compliance;¹⁴⁶

2) *Budget and Personnel Needs of the Labor Ministries*, enhancing resources, personnel and training;¹⁴⁷

3) *Strengthening the Judicial System for Labor Law*, increasing the number of judges, support personnel and equipment to avoid delay in the resolution of cases;¹⁴⁸

4) *Protections Against Discrimination in the Workplace*, assuring that women’s workplace rights are a priority, especially in countries with a large *maquila* or free trade zone industry where concerns have been raised about workplace conditions for women;¹⁴⁹

5) *Worst Forms of Child Labor*, following through on the

141. INTER-AM. DEV. BANK, THE LABOR DIMENSION IN CENTRAL AMERICA AND THE DOMINICAN REPUBLIC—BUILDING ON PROGRESS: STRENGTHENING COMPLIANCE AND ENHANCING CAPACITY (Apr. 2005) [hereinafter WHITE PAPER], available at http://www.iadb.org/trade/1_english/pub/labor-CADR.pdf.

142. *See id.*

143. *See id.* at 2.

144. *See id.*

145. *See id.*

146. *See id.* at 3.

147. *See id.*

148. *See id.* at 3-4.

149. *See id.* at 4.

strong commitment expressed by the countries to address child labor, including the elimination of the worst forms of child labor;¹⁵⁰

6) *Promoting a "Culture of Compliance,"* by broadening the understanding and commitment to compliance from all key actors, through enhanced education on the obligation with regard to fundamental labor rights and training on how to effectively implement them in practice.¹⁵¹

The focus of the White Paper is how to strengthen labor conditions in the CAFTA countries.¹⁵² The White Paper acknowledges that much more needs to be accomplished regarding effective enforcement of labor rights in Central America.¹⁵³ Likewise, throughout the CAFTA discussion period in the U.S. Congress, labor and human rights groups maintained that key weaknesses in the countries' labor laws remain unaddressed and if the countries fail to amend their laws they face no consequences.¹⁵⁴ The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") issued its own report on labor conditions in CAFTA countries entitled "The Real Record on Worker's Rights in Central America" ("AFL-CIO Real Record").¹⁵⁵ This report highlights what the AFL-CIO viewed as "deep flaws" in the existing labor laws and their enforcement in CAFTA countries.¹⁵⁶

In June 2005, the U.S. Trade Representative, in accordance with the requirements of the TPA, issued the most recent official report on labor rights in CAFTA countries ("USTR Report").¹⁵⁷ For each of the CAFTA countries, the USTR Report describes the national legal framework, the administration of labor law, labor institutions, the system of labor justice, and the relevant

150. *See id.*

151. *See id.* at 5.

152. *See id.* at 1.

153. *See id.* at 51.

154. *See, e.g.,* HUMAN RIGHTS WATCH, FAILURE TO PROTECT INTERNATIONAL LABOR RIGHTS STANDARDS (Apr. 2005), <http://hrw.org/backgrounders/arms/hearing0405/2.htm>; AFL-CIO, THE REAL RECORD ON WORKERS' RIGHTS IN CENTRAL AMERICA (Apr. 2005) [hereinafter AFL-CIO REAL RECORD], available at <http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/CAFTABook.pdf>.

155. *See generally* AFL-CIO REAL RECORD, *supra* note 154.

156. *See id.* at 3. Country-specific issues are discussed *infra* Part II.A-F.

157. *See* USTR REPORT, *supra* note 83. The report was prepared pursuant to § 2102(c)(5) of the TPA in consultation with the Secretary of Labor. *Id.* at 1.

legal frameworks and practice.¹⁵⁸ The report also provides detailed information about the extent to which each country addresses exploitative child labor,¹⁵⁹ and, because CAFTA has been criticized for failing to protect women workers,¹⁶⁰ the USTR Report focuses on women and work in each country.¹⁶¹ Although this Part focuses on labor problems, it should be noted that the USTR Report comprehensively details the existing labor laws in CAFTA countries, which have been improving.¹⁶² The most fundamental problem seems to be in the area of labor enforcement, which is widely recognized as a problem.¹⁶³ Between 2000 and 2004, the U.S. Department of Labor funded a project to reduce the number of accidents and injuries in the workplace in Central America and the Dominican Republic,¹⁶⁴ and has committed US\$8.75 million to the *Cumple y Gana* project for strengthening labor systems in this region.¹⁶⁵ To understand the depth of the criticism about CAFTA's labor provisions, however, the following discussion details the kinds of labor problems in CAFTA countries that are at issue.¹⁶⁶

158. *See id.* at 3.

159. *See generally id.* "Exploitative child labor" generally means employment that prevents effective school attendance and work which is performed under conditions hazardous to the physical and mental health of the child. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, LAWS GOVERNING EXPLOITATIVE CHILD LABOR REPORT COSTA RICA, DOMINICAN REPUBLIC, EL SALVADOR, GUATEMALA, HONDURAS AND NICARAGUA 3 (June 2005), available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Transmittal/asset_upload_file588_7823.pdf.

160. *See* HUMAN RIGHTS WATCH, THE UNITED STATES—DOMINICAN REPUBLIC—CENTRAL AMERICA FREE TRADE AGREEMENT FALLS SHORT ON WORKERS' RIGHTS 6 (Apr. 21, 2005), available at <http://hrw.org/backgrounder/arms/hearing0405/hearing0405.pdf>.

161. *See* USTR REPORT, *supra* note 83, at 5.

162. *See id.* As will be discussed *infra* in Part III, however, there is no requirement for CAFTA countries to adopt new laws and the penalties for failure to enforce existing laws may not be sufficient to improve labor conditions in the region.

163. *See* Hornbeck, *supra* note 136, at 27 (acknowledging that "there is little disagreement that labor law enforcement is a problem and that unionization is not widespread").

164. USTR REPORT, *supra* note 83, at 26.

165. *See id.*

166. *See, e.g.,* Thea M. Lee, Assistant Dir. for Int'l Econ., AFL-CIO, Comments on the Proposed U.S.-Central America Free Trade Agreement (CAFTA) (Nov. 19, 2002), available at <http://www.aflcio.org/mediacenter/prspum/tm11192002.cfm>; 15 HUMAN RIGHTS WATCH, DELIBERATE INDIFFERENCE: EL SALVADOR'S FAILURE TO PROTECT WORKERS' RIGHTS (Dec. 2003) [hereinafter DELIBERATE INDIFFERENCE], available at <http://www.hrw.org/reports/2003/elsalvador1203/>; Bama Athreya, Deputy Dir., Int'l Labor Rights Fund, Written Testimony Regarding the Central American Free Trade Agree-

A. *El Salvador*

El Salvador is often cited as having the most serious labor shortcomings in the Central-American region.¹⁶⁷ A 2003 Human Rights Watch report entitled “Deliberate Indifference: El Salvador’s Failure to Protect Workers’ Rights,” uses eight case studies to illustrate how Salvadorian workers’ rights are “abused with virtual impunity.”¹⁶⁸ According to that report, only about 5.3% of employees in El Salvador are unionized;¹⁶⁹ it is speculated that anti-union practices, such as firing trade unions and leaders, pressuring workers to renounce their union membership, and discrimination contribute to this low number.¹⁷⁰ Employers are also charged with routinely violating local labor laws, including delaying the payment of salaries, denying workers mandatory paid vacations, and failing to pay overtime as required by law.¹⁷¹ The following Table details selected specific examples of labor problems in El Salvador:

TABLE 2: *Human Rights Practices: El Salvador*

The Right of Association	• Not preventing the illegal/retaliatory dismissal of workers or requiring their reinstatement. ¹⁷²
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ment (CAFTA) (Apr. 12, 2005) [hereinafter ILRF Testimony], available at <http://www.laborrights.org/publications/CAFTA%20Testimony%20April%202005.pdf>.

167. See, e.g., HUMAN RIGHTS WATCH, GLOBAL POLICY FORUM, EL SALVADOR: GOVERNMENT IGNORES WIDESPREAD LABOR ABUSE (Dec. 4, 2003), available at <http://www.globalpolicy.org/soecon/inequal/labor/2003/1204elsalvador.htm>; DELIBERATE INDIFFERENCE, *supra* note 166.

168. DELIBERATE INDIFFERENCE, *supra* note 166, at 2.

169. *Id.*

170. *Id.*

171. *Id.*

172. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, EL SALVADOR: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004 § 6(a) (Feb. 28, 2005) [hereinafter STATE DEP’T EL SALVADOR REPORT], available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41760.htm>; see also USTR REPORT, *supra* note 83, at 58-59 (citing COMM. ON FREEDOM OF ASS’N, ILO, REPORT NO. 330: EL SALVADOR (CASE NO. 2208) ¶ 601 (Mar. 2003), available at <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?Lang=EN&hdroff=1>).

<p>Right to Organize & Bargain Collectively</p>	<ul style="list-style-type: none"> • Reports that factories dismissed union organizers, and that there were no collective bargaining agreements with the 18 unions active in the <i>maquila</i> sector.¹⁷³ • Reports of workers being threatened with dismissal for union-related activities and of blacklists circulating in apparel factories in Export Processing Zones (EPZs).¹⁷⁴ • Allegations that corrupt employees of the General Directorate of Labor illegally provided advanced information on union information to companies, resulting in dismissals and thwarted union organizing efforts.¹⁷⁵ • Workers reporting verbal abuse, sexual harassment and, in some cases, physical abuse by supervisors.¹⁷⁶
<p>Prohibition of Forced or Compulsory Labor</p>	<ul style="list-style-type: none"> • The government generally enforced the prohibition against forced labor;¹⁷⁷ however, trafficking in persons, primarily women and children continues to be a problem.¹⁷⁸
<p>Prohibition of Child Labor</p>	<ul style="list-style-type: none"> • It is estimated that approximately ten percent of children in El Salvador work (less than two percent of children aged 5-9 work, yet approximately thirteen percent of children aged 10 to 14 work).¹⁷⁹ Child labor is more common in rural areas.¹⁸⁰ • Some children work long hours as domestic servants in third-party homes.¹⁸¹

173. See STATE DEP'T EL SALVADOR REPORT, *supra* note 172, § 6(b).

174. See USTR REPORT, *supra* note 83, at 59; Steven Greenhouse, *Labor Abuses in El Salvador are Detailed in Document*, N.Y. TIMES, May 10, 2001, at A12.

175. See USTR REPORT, *supra* note 83, at 59-60.

176. See STATE DEP'T EL SALVADOR REPORT, *supra* note 172, § 6(b).

177. See *id.* § 6(c).

178. See *id.*; see also USTR REPORT, *supra* note 83, at 62 (noting that Salvadorian women and children are trafficked internally for sexual exploitation).

179. See STATE DEP'T EL SALVADOR REPORT, *supra* note 172, § 6(d).

180. See *id.*; see also HECTOR QUITENO & WALTER RIVAS, ILO, EL SALVADOR—CHILD LABOUR IN THE URBAN INFORMAL SECTOR: A RAPID ASSESSMENT (Feb. 2002), available at <http://www.ilo.org/public/english/standards/ipecc/simpoc/elsalvador/ra/urbano.pdf>.

181. See USTR REPORT, *supra* note 83, at 64; 16 HUMAN RIGHTS WATCH, EL SALVA-

	<ul style="list-style-type: none"> • Even though it is known that many children work, there are few complaints.¹⁸² This is likely due to the fact that there is a large informal sector where it is difficult to monitor the enforcement of child labor laws and many citizens perceive child labor as an essential component of family income.¹⁸³
Elimination of the Worst Forms of Child Labor	<ul style="list-style-type: none"> • Commercial sexual exploitation and trafficking of children, especially girls, is a problem.¹⁸⁴ El Salvador is considered to be a source, transit, and destination country for such purposes.¹⁸⁵
Acceptable Conditions of Work	<ul style="list-style-type: none"> • 53.6% of Salvadoran workers age fifteen or older earned less than minimum wage in 2000.¹⁸⁶ Most cases occur in the extensive informal work sector, although underpayment of wages also occurs in the formal sector.¹⁸⁷ • Violations of hours of work regulations are common, including forced overtime to meet production quotas.¹⁸⁸ • Workers in the garment industry complain about pain caused by repetitive motion and psychological stress caused by working long hours to meet production quotas.¹⁸⁹

DOR: ABUSES AGAINST CHILD DOMESTIC WORKERS IN EL SALVADOR 13 (Jan. 2004), available at <http://www.hrw.org/reports/2004/elsalvador0104/>.

182. See STATE DEP'T EL SALVADOR REPORT, *supra* note 172, § 6(d).

183. See *id.*

184. See USTR REPORT, *supra* note 83, at 64.

185. See *id.*

186. See *id.* at 68.

187. See *id.*

188. See *id.*; see also STATE DEPT. EL SALVADOR REPORT, *supra* note 172, § 6(e).

189. See USTR REPORT, *supra* note 83, at 69; Jane Turner, *Health and Safety in Maquila: Surveys from El Salvador and Nicaragua*, CAWN NEWSLETTER, June 15, 2002, at 2, 5, available at http://www.cawn.org/newsletter/15/health_safety.html.

Women and Work	<ul style="list-style-type: none"> • Women have fewer economic opportunities than men.¹⁹⁰ Priority is given to men and women are not accorded equal stature in traditionally male-dominated areas, such as agriculture and business.¹⁹¹ • Violence against women is “a widespread and serious problem.”¹⁹² • Women workers in the <i>maquilas</i> report sexual harassment, verbal abuse, and, in some cases, physical abuse by supervisors.¹⁹³ • Some factories required female applicants to provide pregnancy test results and did not hire pregnant women.¹⁹⁴
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As Table 2 illustrates, despite many labor laws intended to protect workers,¹⁹⁵ there are ongoing abuses of fundamental labor rights in El Salvador.¹⁹⁶ Resource constraints are one impediment to effective labor law enforcement—it is estimated that thirty-seven labor inspectors are responsible for 2.6 million workers.¹⁹⁷ Equally importantly, however, is what is seen as the lack of political will by El Salvador’s Ministry of Labor to enforce the law, which is a much more intractable problem.¹⁹⁸

B. Guatemala

In Guatemala, ILO-assisted revisions to the Labor Code and clarification by the courts have created a framework of labor laws that is largely in conformity with international core labor rights.¹⁹⁹ However, despite efforts to restructure and modernize the labor court system,²⁰⁰ the courts lack credibility and effective-

190. See USTR REPORT, *supra* note 83, at 71; see also STATE DEP’T EL SALVADOR REPORT, *supra* note 172, § 5.

191. See USTR REPORT, *supra* note 83, at 71; see also STATE DEP’T EL SALVADOR REPORT, *supra* note 172, § 5.

192. See STATE DEP’T EL SALVADOR REPORT, *supra* note 172, § 5.

193. See USTR REPORT, *supra* note 83, at 71.

194. See *id.*; see also STATE DEP’T EL SALVADOR REPORT, *supra* note 172, § 5.

195. See DELIBERATE INDIFFERENCE, *supra* note 166, at 2.

196. See *id.*

197. See *id.*

198. See *id.*

199. See USTR REPORT, *supra* note 83, at 73.

200. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, GUATEMALA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004 § 6(a) (Feb. 28,

ness.²⁰¹ Labor activists are targets for attacks and threats in Guatemala where “[o]ngoing acts of political violence and intimidation” threaten to reverse the progress toward the rule of law made in recent years.²⁰² Moreover, the offices of two organizations opposed to CAFTA have been the target of raids in Guatemala City where information about their work and membership lists were stolen.²⁰³ There are numerous instances of labor problems in all core labor areas; a representative selection appears in Table 3 below.

TABLE 3: *Human Rights Practices: Guatemala*

The Right of Association	<ul style="list-style-type: none"> • The Secretariat of Social Welfare fired twenty-two individuals the day after they submitted a list of members for a fledgling union.²⁰⁴ • The most common violation of freedom is the dismissal of workers for engaging in unionizing activity.²⁰⁵ The Ministry of Labor received 2972 complaints of illegal firings in the first half of 2004.²⁰⁶ Employees are reluctant to exercise their right of association for fear of reprisal by employers.²⁰⁷ • Labor leaders reported death threats and acts of intimidation.²⁰⁸
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2005), [hereinafter STATE DEP'T GUATEMALA REPORT], available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41762.htm>.

201. See *id.*

202. HUMAN RIGHTS WATCH, WORLD REPORT 2005: GUATEMALA, available at <http://hrw.org/english/docs/2005/01/13/guatem9849.htm>.

203. See AMNESTY INT'L, GUATEMALA: FEAR FOR SAFETY (May 13, 2005), available at <http://web.amnesty.org/library/Index/ENGAMR340212005?open&of=ENG-GTM>.

204. See STATE DEP'T GUATEMALA REPORT, *supra* note 200, § 6(a).

205. See *id.*

206. See *id.*

207. See *id.*

208. See *id.* There was even one report that a labor union leader's fifteen year-old daughter was raped in an attempt to dissuade union members from demanding compensation for wages under the legal minimum. See Frank Jack Daniel, *Guatemala Farm Rape Clouds Free Trade Debate*, REUTERS, July 29, 2004, available at <http://www.globalexchange.org/campaigns/fairtrade/coffee/2402.html>.

Right to Organize & Bargain Collectively	<ul style="list-style-type: none"> • Less than three percent of the work force is unionized.²⁰⁹ Historically workers in Guatemala were reported to be reluctant to exercise their right to organize for fear of reprisal by employers; workers who attempted to organize experienced intimidation and violence.²¹⁰ • An anti-union tactic used by employers is the dismissal of workers and anti-union blacklisting allegedly occurs in Guatemala.²¹¹
Prohibition of Forced or Compulsory Labor	<ul style="list-style-type: none"> • Guatemala is a source and transit country for alien smuggling and trafficking of persons (especially women and children) for sexual exploitation;²¹² there is also internal trafficking.²¹³ • Reports of employers forcing workers to work overtime without the premium pay required by law.²¹⁴
Prohibition of Child Labor	<ul style="list-style-type: none"> • Informal and agricultural sectors regularly employ children, especially in family enterprises.²¹⁵ • An estimated twenty-three percent of minors under age eighteen worked during 2004 (with twenty percent of the group between seven and fourteen years old).²¹⁶ • On average, working children ages five to fourteen years work 6.5 hours per day and five days per week.²¹⁷

209. See STATE DEP'T GUATEMALA REPORT, *supra* note 200, § 6(a).

210. See USTR REPORT, *supra* note 83, at 82.

211. See *id.* at 83.

212. See STATE DEP'T GUATEMALA REPORT, *supra* note 200, § 5.

213. See USTR REPORT, *supra* note 83, at 86; see also STATE DEP'T GUATEMALA REPORT, *supra* note 200, § 5.

214. See STATE DEP'T GUATEMALA REPORT, *supra* note 200, § 6(c).

215. See *id.* § 6(d).

216. See *id.*

217. See USTR REPORT, *supra* note 83, at 88.

	<ul style="list-style-type: none"> • Laws governing the employment of minors are not effectively enforced;²¹⁸ their illegal status makes them ineligible to receive social benefits, social insurance, vacations or severance pay, and they often earn salaries below the minimum wage.²¹⁹ • Many children work as domestics in private homes where they suffer psychological mistreatment, including sexual abuse.²²⁰
Elimination of the Worst Forms of Child Labor	<ul style="list-style-type: none"> • Child prostitution is on the rise in Guatemala where street children are especially vulnerable to sexual exploitation.²²¹ • <i>Casa Alianza</i>, a non-profit group serving homeless children in Central America, reported an increase in gang recruitment of street children for thievery, prostitution or drug rings.²²²
Acceptable Conditions of Work	<ul style="list-style-type: none"> • Reports of wage violations, including illegal deductions in pay.²²³ • Persons with physical disabilities suffer from discriminatory employment practices with few resources devoted to address this problem.²²⁴ • Reports of pressure to work over the legal work week and to work off the clock without pay to meet manufacturing quotas.²²⁵
Women and Work	<ul style="list-style-type: none"> • Women's inequality in the workforce mirrors their inequality in the home and society.²²⁶

218. See STATE DEP'T GUATEMALA REPORT, *supra* note 200, § 6(d).

219. See *id.*

220. See *id.*

221. See USTR REPORT, *supra* note 83, at 88.

222. See STATE DEP'T GUATEMALA REPORT, *supra* note 200, § 5.

223. See USTR REPORT, *supra* note 83, at 93.

224. See STATE DEP'T GUATEMALA REPORT, *supra* note 200, § 5.

225. See USTR REPORT, *supra* note 83, at 93-94.

226. See HUMAN RIGHTS WATCH, FROM THE HOUSEHOLD TO THE FACTORY: SEX DISCRIMINATION IN THE GUATEMALAN LABOR FORCE pt. IV (Background: Gender and Race in Guatemala) (2002) [hereinafter FROM THE HOUSEHOLD TO THE FACTORY], available at <http://hrw.org/reports/2002/guat/>.

	<ul style="list-style-type: none"> • Sexual harassment is not illegal;²²⁷ human rights and women's organizations reported that harassment is widespread.²²⁸ • Many women face job discrimination; women receive lower pay than men²²⁹ and are less likely to hold management positions.²³⁰ • Some factories require female applicants to present pregnancy test results and they did not hire pregnant women.²³¹ • As a condition of employment, some female applicants are required to sign documents agreeing that they will not have any more children.²³²
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Thus, despite many laws that should protect Guatemalan workers,²³³ serious issues persist which are likely to remain unaddressed by the Guatemala's existing judicial system.²³⁴

C. Honduras

The same issues of enforcement that are problematic in El Salvador and Guatemala are also present in Honduras, where the judiciary is "poorly staffed and equipped, often ineffective, and subject to corruption and political influence."²³⁵ Honduras' market economy is primarily based on agriculture and, increasingly, on the *maquiladora* ("assembly plant") industry.²³⁶ Ap-

227. See STATE DEP'T GUATEMALA REPORT, *supra* note 200, § 5.

228. See *id.*

229. See USTR REPORT, *supra* note 83, at 96.

230. See STATE DEP'T GUATEMALA REPORT, *supra* note 200, § 5.

231. See USTR REPORT, *supra* note 83, at 97 (citing FROM THE HOUSEHOLD TO THE FACTORY, *supra* note 226, pt. III).

232. See *id.*

233. See STATE DEP'T GUATEMALA REPORT, *supra* note 200, § 5 (noting laws that prohibit forced or compulsory labor, protect individuals forming union and establish minimum wages, for example).

234. See generally Lee, *supra* note 166 (quoting the United Nations Mission in Guatemala which reports "serious legal inconveniences and practices that make it impossible to achieve effective labor norms such as prompt and thorough treatment by the justice system").

235. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, HONDURAS: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004, intro., (Feb. 28, 2005), [hereinafter STATE DEP'T HONDURAS REPORT] available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41765.htm>.

236. See *id.*

proximately 7.3% of the work force is unionized.²³⁷ As can be seen by the examples below, there are numerous labor problems in Honduras, for many reasons, such as because labor inspectors are insufficiently trained and enforcement in the *maquiladora* industry is poor.²³⁸

TABLE 4: *Human Rights Practices: Honduras*

The Right of Association	<ul style="list-style-type: none"> • Retribution by employers for trade union activity is a common occurrence, often in the form of threatening to close unionized companies, harassing workers seeking to unionize, or dismissing them.²³⁹ • Blacklisting occurs in the <i>maquilas</i> for workers who are known to engage in union activity.²⁴⁰ • Union organizers must submit a list of founding members to the Ministry of Labor to obtain official recognition.²⁴¹ Sometimes, companies receive this list illegally and retaliate against the organizers.²⁴²
Right to Organize & Bargain Collectively	<ul style="list-style-type: none"> • Employers often refuse to bargain with the union.²⁴³
Prohibition of Forced or Compulsory Labor	<ul style="list-style-type: none"> • There are credible allegations of compulsory overtime at <i>maquiladora</i> plants primarily for women who make up about sixty-five percent of the workforce in this sector.²⁴⁴

237. *See id.* § 6(a).

238. *See* USTR REPORT, *supra* note 83, at 100.

239. *See* STATE DEP'T HONDURAS REPORT, *supra* note 235, § 6(a).

240. *See id.*

241. *See id.*

242. *See id.*

243. *See id.* § 6(b).

244. *See id.* § 6(c).

	<ul style="list-style-type: none"> • Honduras is a source and transit country for trafficking for the purposes of sexual and labor exploitation;²⁴⁵ women and children are also trafficked internally.²⁴⁶
Prohibition of Child Labor	<ul style="list-style-type: none"> • Child labor is a significant problem because the Labor Code is not enforced effectively, especially in rural areas and in small companies.²⁴⁷ In 2002, the Honduran National Institute of Statistics estimated that approximately sixteen percent of children work illegally.²⁴⁸
Elimination of the Worst Forms of Child Labor	<ul style="list-style-type: none"> • Trafficking in children for commercial sexual exploitation and child prostitution is a problem.²⁴⁹ • In addition to commercial sexual exploitation, the worst forms of child labor include: fireworks manufacturing, marine diving, work in limestone quarries and garbage dumps, mining and dirt extraction, pesticides, construction, agricultural work (especially in the coffee and melon industries), harvesting of sugar cane and the sale of drugs.²⁵⁰
Acceptable Conditions of Work	<ul style="list-style-type: none"> • The minimum wage "did not provide a decent standard of living for a worker and family."²⁵¹ • The Ministry of Labor lacks the personnel and resources for effective enforcement of the minimum wage, yearly bonus provided for by law, payment of overtime, overtime in excess of the law, and enforcement of health and safety rules.²⁵²

245. *See id.* § 5.

246. *See id.*

247. *See id.* § 6(d).

248. *See id.*

249. *See id.* § 5.

250. *See* USTR REPORT, *supra* note 83, at 111. To combat the worst forms of child labor, the Honduras government launched programs in 2002, including initiatives to address the educational needs of working children. STATE DEP'T HONDURAS REPORT, *supra* note 235, § 6(d).

251. *See* STATE DEP'T HONDURAS REPORT, *supra* note 235, § 6(e).

252. *See id.*

	<ul style="list-style-type: none"> • There is no law allowing a worker to leave a dangerous work situation without jeopardy to continued employment.²⁵³
Women and Work	<ul style="list-style-type: none"> • Labor unions, women's groups, and human rights groups report complaints that employers require applicants to take illegal pre-employment pregnancy tests, severely limit access to medical services, verbally abuse workers, prevent union organizing, and require forced and unpaid overtime.²⁵⁴ • Illegal sexual harassment continues to be a problem in the workplace.²⁵⁵

As the most recent U.S. State Department report indicates, the Honduran government is not effectively enforcing labor laws.²⁵⁶ The “weak, underfunded, and often corrupt judicial system” contributes to the on-going human rights problems, including the lack of effective labor law enforcement.²⁵⁷

D. *Nicaragua*

Similar labor problems persist in Nicaragua, where approximately fifteen percent of the workforce is unionized.²⁵⁸ As has been seen in other Central American countries, the enforcement of labor rights in Nicaragua is affected by a judiciary susceptible to “political influence and corruption.”²⁵⁹ Moreover, there were complaints that fines levied by the Ministry of Labor against employers who violated the Labor Code did not serve as effective deterrents, because the maximum fine is so low (approximately US\$620), and because companies rarely pay any fines, as there is no collection mechanism.²⁶⁰

253. *See id.*

254. *See* USTR REPORT, *supra* note 83, at 118-19.

255. *See id.* at 119.

256. *See* STATE DEP'T HONDURAS REPORT, *supra* note 235, intro.

257. *See id.*

258. *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, NICARAGUA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004, § 6(a) (Feb. 28, 2005) [hereinafter STATE DEP'T NICARAGUA REPORT], available at <http://www.state.gov/g/drl/rls/hrrpt/2004/index.htm>. *See also* USTR REPORT, *supra* note 83, at 129-42.

259. *See* STATE DEP'T NICARAGUA REPORT, *supra* note 258, at intro.

260. *See id.* § 6(b).

TABLE 5: *Human Rights Practices: Nicaragua*

The Right of Association	<ul style="list-style-type: none"> • Representatives of labor unions criticize “cooperatives” into which transportation and agricultural workers are organized for not permitting strikes, having inadequate grievance procedures, and for displacing genuine independent trade unions which are not dominated by employers.²⁶¹
Right to Organize & Bargain Collectively	<ul style="list-style-type: none"> • Allegations of violations of the right to organize, especially that employers fired employees who were trying to form a union.²⁶²
Prohibition of Forced or Compulsory Labor	<ul style="list-style-type: none"> • Although the Nicaraguan Constitution prohibits forced or compulsory labor, it does not specifically address forced or compulsory labor by children and such practices occur.²⁶³
Prohibition of Child Labor	<ul style="list-style-type: none"> • Child labor rules are rarely enforced (except in the small formal sector of the economy).²⁶⁴ This is largely due to the economic needs of many families, a cultural legacy of child work among peasants, and the lack of effective government enforcement mechanisms.²⁶⁵ • Child labor occurs in both urban and rural areas, with the majority working in the informal sector.²⁶⁶
Elimination of the Worst Forms of Child Labor	<ul style="list-style-type: none"> • Child prostitution and trafficking of children to other countries for purposes of sexual exploitation is a problem.²⁶⁷

261. *See id.* § 6(a).262. *See id.* § 6(b).263. *See id.* § 6(c).264. *See id.* § 6(d).265. *See id.*266. *See id.*267. *See id.* §§ 5, 6(d).

	<ul style="list-style-type: none"> • The Ministry of Labor reports that thousands of children are forced to beg by their parents (some parents rented their children to organizers of child beggars), spent their days scavenging in garbage dumps, and working on coffee farms.²⁶⁸
Acceptable Conditions of Work	<ul style="list-style-type: none"> • The national minimum wage did not provide a decent standard of living for a worker and family.²⁶⁹ • The constitutionally-mandated eight hour work day, maximum forty-eight hour work week with one day of rest was routinely ignored by employers.²⁷⁰ • The Ministry of Labor's Office of Hygiene and Occupational Security lacks adequate staff and resources to enforce workplace hygiene and safety standards.²⁷¹ • Workers complain about poor working conditions, being forced to work unpaid overtime, and restrictions on when they may go to the toilet.²⁷²
Women and Work	<ul style="list-style-type: none"> • Even with comparable educational backgrounds, salaries for male and female workers differ significantly, with men sometimes making twice as much as women in the same positions.²⁷³ • Domestic and sexual violence are widespread and underreported.²⁷⁴ • Sexual harassment in the workplace is a widespread problem;²⁷⁵ the penalties are negligible and the government does little to enforce the law.²⁷⁶

268. *See id.* § 6(d).

269. *See id.* § 6(e).

270. *See id.*

271. *See id.*

272. *See id.*

273. *See* USTR REPORT, *supra* note 83, at 142 (citing BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, NICARAGUA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2003, § 5, (Feb. 25, 2004) available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27906.htm> (referencing a 2000 survey sponsored by the Nicaraguan Women's Institute)).

274. *See* STATE DEP'T NICARAGUA REPORT, *supra* note 258, § 5.

275. *See id.*

276. *See id.*

With the assistance of the ILO, Nicaragua adopted a fairly comprehensive Labor Code in 1996²⁷⁷ yet, as can be seen by these examples, enforcement continues to be a major shortcoming to the achievement of labor rights.

E. Costa Rica

Among the five countries that originally signed CAFTA, Costa Rica maintains the best labor conditions.²⁷⁸ This is likely due to the relatively effective operation of the political system and the presidential term of Abel Pacheco de la Espriella, who won fifty-eight percent of the vote in a fair and free election in 2002.²⁷⁹ An independent judiciary also undoubtedly contributes to improved labor standards and better enforcement than in other Central American countries.²⁸⁰ In 2004, for example, the Ministry of Labor continued to work on resolving a number of cases from previous years.²⁸¹ In Costa Rica, approximately twelve percent of the work force is unionized.²⁸²

TABLE 6: *Human Rights Practices: Costa Rica*

The Right of Association	<ul style="list-style-type: none"> • Enforcement is lax regarding protection from dismissal for union organizers and members during union formation.²⁸³
Right to Organize & Bargain Collectively	<ul style="list-style-type: none"> • Unions complained about the burdensome administrative requirements in order for a strike to be legal.²⁸⁴

277. See USTR REPORT, *supra* note 83, at 120.

278. See generally WHITE PAPER, *supra* note 141 (evaluating the implementation and enforcement of labor standards in Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua).

279. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, COSTA RICA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004, at intro. (Feb. 28, 2005) [hereinafter STATE DEP'T COSTA RICA REPORT], available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41755.htm>.

280. See *id.*

281. See *id.* § 6(a).

282. See *id.*

283. See *id.*

284. See *id.* § 6(b). Workers, however, are able to exercise their right to organize strike and engage in collective bargaining. *Id.*

Prohibition of Forced or Compulsory Labor	<ul style="list-style-type: none"> • Forced and compulsory labor, including by children, is prohibited by the Costa Rica Constitution and there were no reports of such practices in 2004.²⁸⁵
Prohibition of Child Labor	<ul style="list-style-type: none"> • Child labor is a problem mainly in the informal sector of the economy, including small-scale agriculture, domestic work, and family enterprises.²⁸⁶
Elimination of the Worst Forms of Child Labor	<ul style="list-style-type: none"> • Child prostitution is a serious problem and it is estimated that 3,000 children suffered from commercial sexual exploitation in 2004.²⁸⁷
Acceptable Conditions of Work	<ul style="list-style-type: none"> • Although the Ministry of Labor effectively enforced minimum wages in the San Jose area, it did so less effectively in rural areas, especially where large numbers of migrant workers are employed.²⁸⁸ • The national minimum wage does not provide a decent standard of living for a worker and family.²⁸⁹ • Agricultural workers often do not receive overtime pay if they work voluntarily beyond their daily work shift.²⁹⁰ • Workers who exercise their legal right to leave work if conditions become dangerous may jeopardize their jobs unless they file written complaints with the Ministry of Labor.²⁹¹
Women and Work	<ul style="list-style-type: none"> • The estimated earned income for women is approximately seventy-eight percent of the earned income for men, despite the fact that twenty percent of women in the workforce have some university instruction, compared with eleven percent of men.²⁹²

285. *See id.* § 6c.

286. *See id.* § 6d. A new child labor awareness campaign was initiated in 2004, which is designed to remove children from work and return them to school. *Id.*

287. *See id.* § 5.

288. *See id.* § 6(e).

289. *See id.*

290. *See id.*

291. *See id.*

292. *See id.* § 5.

	<ul style="list-style-type: none"> • Occupational segregation locates most women in the services sector where the wage gap is more pronounced.²⁹³ • Because pregnancy testing and discrimination has been a problem, the national directive on discrimination at work was amended in March 2005 to address these issues.²⁹⁴
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Although child labor persists in Costa Rica, despite efforts by the government to increase awareness and eradicate it,²⁹⁵ labor conditions are on the right track to meet international core labor rights standards.

F. *Dominican Republic*

Like the other parties to CAFTA, the Dominican Republic is a democracy, yet serious human rights issues persist creating an overall oppressive situation which, in turn, also affects labor standards.²⁹⁶ At the most primary level, internal corruption and interference from outside authorities prevent the judiciary from being independent and enforcement of judgments from the labor courts can be unreliable.²⁹⁷ The government's human rights record is "poor," with members of the security forces continuing to commit unlawful killings.²⁹⁸ Serious labor-related problems noted below persist in a wide range of areas and local wages are not keeping pace with an annual inflation rate estimated at twenty-nine percent.²⁹⁹

293. See USTR REPORT, *supra* note 83, at 28.

294. See *id.*

295. See STATE DEP'T COSTA RICA REPORT, *supra* note 279, at intro.

296. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, DOMINICAN REPUBLIC: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004, at intro. (Feb. 28, 2005) [hereinafter STATE DEP'T DOMINICAN REPUBLIC REPORT], available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41758.htm>.

297. See *id.* § 6(b).

298. See *id.* intro.

299. See *id.*

TABLE 7: *Human Rights Practices: Dominican Republic*

The Right of Association	<ul style="list-style-type: none"> • The law forbidding companies from firing union organizers or members is enforced inconsistently and penalties are insufficient to deter employers from violating worker rights.³⁰⁰ • The Dominican Federation of Free Trade Zone Workers reports anti-union activity at the FM company in Santiago, a production facility belonging to apparel manufacturing firm Grupo M, the largest private sector employer in the country.³⁰¹
Right to Organize & Bargain Collectively	<ul style="list-style-type: none"> • The majority of Haitian laborers in the sugar and construction industries do not exercise their rights under the Labor Code because they fear deportation or job loss.³⁰² • Reports of widespread covert intimidation by employers in Free Trade Zones ("FTZs") to prevent union activity.³⁰³ Unions in FTZs report members hesitating to discuss union activity at work for fear of job loss.³⁰⁴ It is estimated that less than ten percent of the workers in FTZs are unionized.³⁰⁵ • The International Confederation of Free Trade Unions ("IFCTU") claims that the Santiago FTZ has hired thugs to prevent union organization and that blacklists of union activists are circulated in the FTZs.³⁰⁶
Prohibition of Forced or Compulsory Labor	<ul style="list-style-type: none"> • Mandatory overtime is a common practice and it is sometimes enforced by locking the doors or loss of jobs and/or pay for workers who refuse.³⁰⁷

300. *See id.* § 6(a).301. *See id.*302. *See id.* § 6(b).303. *See id.* §6(a).304. *See id.* §6(b).305. *See id.* According to the State Department's Report, employer resistance to union organization in the Dominican Republic has increased in response to growing pressure from firms in other Central American countries and China. *Id.*306. *See* USTR REPORT, *supra* note 83, at 36.307. *See* STATE DEP'T DOMINICAN REPUBLIC REPORT, *supra* note 296, § 6(b), (c).

	<ul style="list-style-type: none"> • Reports of workers in sugarcane plantations are prevented from leaving during the harvest season.³⁰⁸ • The Dominican Republic is a source, transit, and destination country for persons trafficked for the purposes of sexual exploitation and forced labor.³⁰⁹
Prohibition of Child Labor	<ul style="list-style-type: none"> • Tens of thousands of children begin working before the age of fourteen, primarily in the informal economy, small businesses, clandestine factories, and sugarcane fields.³¹⁰ The high level of unemployment and the lack of a social safety net create pressures on families to allow or encourage their children to work.³¹¹ • Some young children, particularly Haitians, are “adopted” by families and work in indentured servitude.³¹² • There is evidence that poor Haitian and Dominican adolescents accompany their parents to work in the cane fields with the tacit approval of the sugar companies.³¹³ Children twelve years old and younger also work planting sugarcane for as little as US\$1 for a full day’s labor.³¹⁴
Elimination of the Worst Forms of Child Labor	<ul style="list-style-type: none"> • Within the Dominican Republic, the prostitution of minors is a serious problem; it is estimated that up to 30,000 children and adolescents may be involved in the sex industry.³¹⁵ • An official study in 2003 estimates that fifty to sixty Haitian children were trafficked into the country each week and many Haitian girls were brought into the country to work as prostitutes.³¹⁶

308. *See id.* § 6(c).

309. *See* USTR REPORT, *supra* note 83, at 39.

310. *See* STATE DEP’T DOMINICAN REPUBLIC REPORT, *supra* note 296, § 6(d).

311. *See id.*

312. *See id.* § 6(c).

313. *See id.* § 6(d).

314. *See id.*

315. *See id.* § 5.

316. *See id.*

Acceptable Conditions of Work	<ul style="list-style-type: none"> • The national minimum wage does not provide a decent standard of living for a worker and family.³¹⁷ • Minimum wage violations primarily occur in the sugarcane plantations, especially those that are privatized.³¹⁸ An insufficient number of labor inspectors and a large number of undocumented workers contribute to this problem.³¹⁹ There have also been reports of employers withholding the pay and personal items of laborers to make sure they will not leave the plantations.³²⁰ • HIV testing in the workplace is prohibited by law,³²¹ yet many companies routinely test workers and applicants;³²² on the basis of a positive test, workers were fired or not hired.³²³ • Many workers on sugarcane plantations are forced to buy products from company stores that charge ten percent interest.³²⁴ • Persons with disabilities encounter discrimination in employment.³²⁵ • There is strong prejudice against Haitians, Dominicans of Haitian ancestry, and foreigners of dark complexion.³²⁶ • The Labor Code requires employers to provide a safe working environment,³²⁷ but the practical reality is that workers cannot remove themselves from hazardous situations without losing their jobs.³²⁸
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317. *See id.* § 6(e).

318. *See* USTR REPORT, *supra* note 83, at 45.

319. *See id.*

320. *See id.*; *see also* STATE DEP'T DOMINICAN REPUBLIC REPORT, *supra* note 296, § 6(e).

321. *See* STATE DEP'T DOMINICAN REPUBLIC REPORT, *supra* note 296, § 5.

322. *See id.*

323. *See id.* § 6(e).

324. *See* USTR REPORT, *supra* note 83, at 45-46.

325. *See* STATE DEP'T DOMINICAN REPUBLIC REPORT, *supra* note 296, § 5.

326. *See id.* §§ 1(d), 2(d), 5.

327. *See id.* § 6(e).

328. *See id.*

Women and Work	<ul style="list-style-type: none"> • The law prohibiting sexual harassment is not enforced and it is a problem.³²⁹ The Dominican Labor Foundation estimates that approximately forty percent of female workers in the FTZs are victims of sexual harassment by supervisors or coworkers.³³⁰ Women who resist sexual advances of supervisors are fired, threatened or otherwise discriminated against.³³¹ • Women experience discrimination in the workplace;³³² they do not enjoy equal social and economic status or opportunity with men; men hold the majority of leadership positions; women are often paid less than men for jobs of equal content and skill level.³³³ • Some employers give pregnancy tests to women before hiring them, as part of a required medical exam.³³⁴ Pregnant women are often not hired, and female employees who become pregnant are sometimes fired.³³⁵ • There are no effective government programs to combat economic discrimination against women.³³⁶ • Women are routinely tested for HIV as a condition for obtaining and retaining employment in the FTZs and tourism industry.³³⁷
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As these examples illustrate, some of the most serious labor problems are occurring in the Dominican Republic. In light of

329. *See id.* § 5.

330. *See id.*

331. *See id.*

332. *See id.*

333. *See id.*

334. *See id.*

335. *See id.*; *see also* HUMAN RIGHTS WATCH, PREGNANCY-BASED SEX DISCRIMINATION IN THE DOMINICAN REPUBLIC'S FREE TRADE ZONES: IMPLICATIONS FOR U.S.-CENTRAL AMERICAN FREE TRADE AGREEMENT (CAFTA) (Apr. 2004), *available at* http://hrw.org/backgrounder/wrd/cafta_dr0404.hum. Nearly two thirds of the thirty-one women free trade zone workers that Human Rights Watch interviewed in January 2004 reported being subjected to mandatory pregnancy testing as a condition for access to work or as a condition for maintaining their jobs. *Id.*

336. *See* STATE DEP'T DOMINICAN REPUBLIC REPORT, *supra* note 296, § 5.

337. *See* USTR REPORT, *supra* note 83, at 49.

the ongoing labor issues in each of these countries, the next Part analyzes the labor provisions in CAFTA.

III. ANALYSIS OF CAFTA'S LABOR PROVISIONS

Unlike some of the United States' other trading partners—such as Chile and Singapore—that have arguably made advances in their labor laws toward enforcement of core labor provisions,³³⁸ CAFTA countries lag far behind. Although the countries vary in their degree of labor and employment law protection, all have ongoing enforcement issues. This presents a formidable situation, which could have been addressed by CAFTA. Like many of its predecessor FTAs, however, CAFTA falls short of the TPA mandate because it does not fully meet the requisite negotiating objectives. As a threshold matter, CAFTA unfortunately does not require El Salvador, Guatemala, Honduras, Nicaragua, Costa Rica or the Dominican Republic to revise their laws to increase labor standards to more closely mirror international core labor rights.³³⁹ Another central deficiency in CAFTA's labor provisions is that they lack meaningful enforcement provisions; despite recognized internal problems in each country with enforcement, the agreement permits signatory countries to agree to enforce their own laws.³⁴⁰ A related fundamental shortcoming of CAFTA's labor chapter is in the area of dispute resolution. Instead of tying remedies to trade sanctions, "damage" assessments are limited and are not paid to the injured party.³⁴¹ This is not an adequate incentive for countries to enforce their labor laws. Lastly, while it is laudable that CAFTA creates a Labor Cooperation and Capacity Building Mechanism to improve labor standards in the region,³⁴² this mechanism cannot be successful without adequate funding. As it stands, it is unclear if sufficient funding will be available to effectuate the envisioned tasks. As such, the labor provisions in CAFTA are inadequate to fully realize the objectives of the TPA.³⁴³

338. See, e.g., BOLLE, *supra* note 14, at 4.

339. See CAFTA, *supra* note 2, art. 16.2(1)(a).

340. See *id.* art. 16.2(1)(a); see also ILRF TESTIMONY, *supra* note 168, at 1-2 ("CAFTA's labor chapter effectively sets the fox to guard the henhouse.").

341. See CAFTA, *supra* note 2, annex 20.17(2).

342. See *id.* art. 16.5.

343. See AFL-CIO, USTR MISLEADS CONGRESS ON CAFTA LABOR PROVISIONS (2004), available at <http://www.aflcio.org/issues/jobseconomy/globaleconomy/>

On the surface, CAFTA appears to be positioned to contain comprehensive provisions. The Preamble to the agreement states the parties' resolve to:

Protect, enhance, and enforce basic workers' rights and strengthen their cooperation on labor matters;
Create new employment opportunities and improve working conditions and living standards in their respective territories;
Build on their respective international commitments on labor matters.³⁴⁴

This language suggests that the parties are committed to increasing and enforcing international core labor standards with this agreement. Likewise, in the first section of CAFTA's chapter on labor, the parties also adopt a Statement of Shared Commitment in which they "reaffirm their obligations" as members of the ILO and their "commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*."³⁴⁵ This ambitious language, however, is quickly undercut, revealing that CAFTA does not require any revision of labor laws to increase standards consistent with international core labor rights. The United States and CAFTA countries merely agree "to strive to ensure" that such labor principles and "internationally recognized labor rights" are "recognized and protected by" domestic law.³⁴⁶ Moreover, the countries "shall strive to ensure" that their laws provide for labor standards consistent with the internationally recognized labor standards set forth in the agreement and "shall strive to improve" their labor standards in that light.³⁴⁷ Consistent with the TPA, CAFTA defines internationally recognized labor rights as: (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition against any

upload/USTR_Misleads_Congress_on_CAFTA.pdf. Note that to the extent that the U.S.-Dominican Free Trade Agreement relies on the labor provisions of CAFTA, it is not discussed separately herein. See generally CAFTA, *supra* note 2. See also LAC, THE U.S.-DOMINICAN REPUBLIC FREE TRADE AGREEMENT: REPORT OF THE LABOR ADVISORY COMMITTEE FOR TRADE NEGOTIATIONS AND TRADE POLICY 4, 6-7 (Apr. 22, 2004), available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/DR_Reports/asset_upload_file12_3321.pdf. See generally HORNBECK, *supra* note 136, at 29 (recognizing that, inasmuch as the dispute settlement procedures for labor and commercial disputes do not operate identically, "it may be a matter of interpretation as to whether there is a problem in their meeting congressional negotiating objectives").

344. CAFTA, *supra* note 2, at pmbl.

345. *Id.* art. 16.1(1); see also *ILO Declaration*, *supra* note 89, § 2(a)-(d).

346. See CAFTA, *supra* note 2, art. 16.1(1).

347. See *id.* art. 16.1(2).

form of forced or compulsory labor; (d) labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.³⁴⁸ Ironically, with the exception of the United States, most of the ILO core conventions have been ratified by CAFTA countries.³⁴⁹

TABLE 8: *Ratifications of the ILO Fundamental Conventions*

Country	Forced Labor		Freedom of Association		Discrimination		Child Labor	
	Conv. 29	Conv. 105	Conv. 87	Conv. 98	Conv. 100	Conv. 11	Conv. 138	Conv. 182
United States	—	1991	—	—	—	—	—	1999
Costa Rica	1960	1959	1960	1960	1960	1962	1976	2001
El Salvador	1995	1958	—	—	2000	1995	1996	2000
Guatemala	1989	1959	1952	1952	1961	1960	1990	2001
Honduras	1957	1958	1956	1956	1956	1960	1980	2001
Nicaragua	1934	1967	1967	1967	1967	1967	1981	2000
Dominican Republic	1956	1958	1956	1953	1953	1964	1999	2001

Unfortunately, “striving to ensure” does not *require* the countries to enact laws to meet the ILO’s core labor standards. Striving is only an aspirational statement that efforts will be attempted. As was seen in Part II, even though many of the ILO core conventions have been adopted, there are serious, ongoing labor problems in each of these areas. Additionally, despite these affirmations, concern is also raised by the accompanying footnote reminder in the Statement of Shared Commitment that

348. *See id.* art. 16.8(a)-(e).

349. *See ILO, Fundamental Convention Ratifications*, <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN> (last visited Sept. 28, 2005). Although the United States has not ratified a number of these conventions, in many instances, it has domestic protection. *See* Thomas Niles, Letter to the Editor, *FIN. TIMES* (London), Sept. 7, 2004, at 14; *see also* Richard McIntyre & Matthew M. Bodah, *The US and ILO Conventions No. 87 and No. 98: The Freedom of Association and Right to Bargain Collectively*, AFL-CIO/Michigan State University Worker Right Conference (Oct. 11, 2002) available at <http://www.lir.msu.edu/event/worker-rights/McIntyre-Bodah%20Paper.doc>.

“labor standards should not be used for protectionist trade purposes.”³⁵⁰ By including this statement, the specter is raised that any challenge to a labor practice will be met with the defense that the allegations are merely made for protectionist purposes.

Next, although many of the CAFTA countries have revised their labor laws to move more in line with international standards,³⁵¹ there is an overall lack of meaningful enforcement of those laws.³⁵² CAFTA does not remedy this problem in its Enforcement of Labor Laws section.³⁵³ The parties merely agree that they will “not fail to effectively enforce” their labor laws “through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties.”³⁵⁴ By recognizing that they each retain the “right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement,”³⁵⁵ the burden is on each country to enforce its laws—even though the judicial systems are currently not reliable.³⁵⁶ The requirement that each party enforce its labor laws is further eviscerated by a provision providing that a party is in compliance with the labor chapter “where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.”³⁵⁷ As a practical matter, this high degree of discretion will make it extremely difficult for any challenges to be successfully made against a CAFTA country.

Moreover, there is concern about the lack of enforcement should a country weaken its labor law. In the last part of the enforcement section of the labor chapter, the parties recognize that “it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic la-

350. See CAFTA, *supra* note 2, art. 16.1 n.1; see also ILO Declaration, *supra* note 89, sec. 5.

351. See generally USTR REPORT, *supra* note 83 (detailing the status of labor laws in each country).

352. See *id.*

353. See CAFTA, *supra* note 2, art. 16.2.

354. See *id.* art. 16.2(1)(a).

355. See *id.* art. 16.2(1)(b).

356. See *supra* Part II (discussing problems with existing labor laws in CAFTA countries).

357. CAFTA, *supra* note 2, art 16.2(1)(b). See generally PUBLIC CITIZEN, CAFTA AND LABOR RIGHTS: NEW ANNOTATED VERSION OF KEY CAFTA LABOR TEXT, available at <http://www.citizen.org/documents/ACF1C98.pdf> (last visited Sept. 30, 2005).

bor laws.”³⁵⁸ Accordingly, each party agrees to “strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights” identified in the agreement.³⁵⁹ This is very weak language with no real recourse should a party weaken existing labor protections. Even before CAFTA was ratified, the International Labor Rights Fund filed petitions with the U.S. Trade Representative alleging that steps were being taken in Costa Rica, El Salvador, Guatemala, and Honduras to weaken their existing labor laws.³⁶⁰ CAFTA’s “Enforcement of Labor Laws” article may sound effective, yet it is illusory; the parties are only required to enforce existing laws, which may be flawed.³⁶¹

The real shortcoming of CAFTA is in dispute resolution. Arguably, CAFTA “actually backtracks” from the Jordan FTA and from the unilateral trade preference programs.³⁶² Unlike CAFTA, unilateral trade preference programs provide for the withdrawal of trade benefits if agreed-upon steps are not taken to meet international core labor standards.³⁶³ The lack of meaningful enforcement is particularly troubling with regard to CAFTA countries, because much of the labor law reform that has taken place in Central America can be directly tied to the threat of withdrawal of trade benefits under the United States’ preference programs.³⁶⁴ The TPA provides that with respect to dispute settlement and enforcement of trade agreements the principle negotiating objectives should be treated equally with respect to: “the ability to resort to dispute settlement under the applicable agreement; the availability of equivalent dispute settlement procedures; and the ability of equivalent remedies.”³⁶⁵ CAFTA fails

358. CAFTA, *supra* note 2, art. 16.2(2).

359. *Id.*

360. See INT’L LABOR RIGHTS FUND, WATCHDOG FILES PROTEST WITH U.S. TRADE REPRESENTATIVE OVER LABOR RIGHTS VIOLATIONS IN CENTRAL AMERICA: ACTION COMES AS SEVERAL COUNTRIES WEAKEN LABOR LAWS AS CAFTA RATIFICATION VOTES NEAR (Dec. 16, 2004), available at http://www.laborrights.org/projects/linklabor/GSP_CentralAm_1204.htm. The specific petitions filed are also available at this site.

361. See CAFTA, *supra* note 2, art. 16.2.

362. See CAFTA LAC REPORT, *supra* note 140, at 7.

363. See AFL-CIO, CAFTA WEAKENS EXISTING LABOR RIGHTS PROTECTIONS FOR CENTRAL AMERICAN WORKERS (2005), available at www.aflcio.org/issues/jobseconomy/globaleconomy/upload/CAFTA_factsheet.pdf.

364. See CAFTA LAC REPORT, *supra* note 140, at 7.

365. TPA, 19 U.S.C.S. § 3802(b)(12)(G) (2005).

to treat labor and commercial negotiating objectives equally. If a party is aggrieved under the labor chapter, it may request a "consultation."³⁶⁶ To the extent that the consultation does not resolve the matter, either party may request that the Labor Affairs Council be convened.³⁶⁷ These procedures, however, *only* apply to a dispute arising from a party's alleged failure to effectively enforce its own labor laws.³⁶⁸ Failure to comply with internationally recognized labor standards is not actionable.³⁶⁹

Another shortcoming of labor dispute resolution under CAFTA is the cap on fines and sanctions.³⁷⁰ The penalty for a party failing to enforce its own laws is capped at fifteen million U.S. dollars.³⁷¹ To determine the amount of the "assessment," the panel is to take into account:

- (a) the bilateral trade effects of the Party's failure to effectively enforce the relevant law;
- (b) the pervasiveness and duration of the party's failure to effectively enforce the relevant law;
- (c) the reasons for the Party's failure to effectively enforce the relevant law;
- (d) the level of enforcement that could reasonably be expected of the Party given its resource constraints;
- (e) the efforts made by the Party to begin remedying the non-enforcement after the final report of the panel, including through the implementation of any mutually agreed upon action plan; and
- (f) any other relevant factors.³⁷²

The "assessment" is to be paid into a fund and used for appropriate labor law initiatives³⁷³—not to compensate the injured party. The cap on the assessments may not be sufficient to deter violations, especially as the volume of trade increases—fifteen million U.S. dollars will likely be a minimal sum compared to the competitive advantage to be gained by violating labor laws.³⁷⁴ More-

366. See CAFTA, *supra* note 2, art. 16.6(1).

367. See *id.* art. 16(4). The Labor Affairs Council is to be established under CAFTA, comprised of cabinet-level or equivalent representatives of the parties, or their designees. *Id.* 16.4(1).

368. See *id.* art. 16.6(7).

369. See *id.* arts. 16.2(1)(a), 16.6(7).

370. See *id.* art. 20.17(2).

371. See *id.*

372. See *id.*

373. See *id.* art. 20.17(4).

374. See WEAK LABOR RIGHTS PROTECTIONS, *supra* note 5, at 4-5.

over, the “factors” to be considered by the dispute resolution panel inherently circumscribe the extent of the assessment;³⁷⁵ in a commercial dispute, the panel is not under any such direction. For commercial disputes, after considering the final report of the dispute panel, if the parties are unable to agree on compensation or if one party fails to observe the terms of an agreement, the complaining party may provide written notice that it “intends to suspend the application to the other Party of benefits of equivalent effect.”³⁷⁶ These labor dispute resolution procedures and penalties fall short of being equivalent remedies. An assessment is simply not the same as trade sanctions. As such, CAFTA’s assessment provisions do not comply with the plain language or spirit of the TPA.

Lastly, inasmuch as funding is uncertain, the effectiveness of the Labor Cooperation and Capacity Building Mechanism³⁷⁷ is questionable.³⁷⁸ This provision requires the parties to cooperate on a wide range of labor issues including, but not limited to, the ILO core labor conventions (such as the worst forms of child labor); labor administration; labor inspection systems; alternative dispute resolution; labor relations; working conditions; migrant workers; social assistance programs; labor statistics; employment opportunities; gender; and technical issues.³⁷⁹ Given the serious labor issues in Central America and the Dominican Republic, these are very worthwhile goals. But because CAFTA does not guarantee a certain level of funding, it is difficult to know how effective this mechanism will be in practice.

These inadequacies of CAFTA were not lost on advocates for international labor standards. The TPA requires that advisory committees provide the President, the USTR, and Congress with reports on any proposed FTA.³⁸⁰ The Labor Advisory Committee (“LAC”) report prepared on CAFTA concluded that the “labor provisions in CAFTA are unacceptable.”³⁸¹ Acknowledging that CAFTA falls short of the TPA negotiating objectives, the report states that the labor provisions will “drag down workers in

375. See CAFTA, *supra* note 2, art. 20.17(2).

376. *Id.* art. 20.16(2).

377. See *id.* art. 16.5.

378. See generally WEAK LABOR RIGHTS PROTECTIONS, *supra* note 5, at 4.

379. See CAFTA, *supra* note 2, annex 16.5(3)(a)-(m).

380. See TPA, 19 U.S.C.S. § 3804(e) (2005).

381. CAFTA LAC REPORT, *supra* note 140, at 10.

the region into an even more desperate cycle of poverty and misery [that] will only increase opportunities and incentives for employers to fire, harass, intimidate and threaten workers who try to form unions and dare to ask for decent wages.”³⁸² Despite the LAC reports, as well as opposition from labor groups and human rights groups,³⁸³ CAFTA was passed by the U.S. Congress.³⁸⁴

IV. GOING ONE STEP FURTHER: A PROPOSAL FOR MORE EFFECTIVE LABOR PROVISIONS IN U.S. FREE TRADE AGREEMENTS

By not including more effective and comprehensive labor provisions in CAFTA, the United States has squandered an opportunity that could have improved labor conditions around the world and also level the playing field for American workers. The United States should take the “high road” of globalization, seeking to enforce the internationally recognized labor rights that the U.S. Congress intended to be included—in a meaningful way—in FTAs.³⁸⁵ As it now stands, despite several pages of “labor provisions” in CAFTA, it just boils down to a simple provision: Each party is to enforce its existing laws. This is simply inadequate. The only way to ensure that the United States’ trading

382. *Id.* Note that there was no official response to the CAFTA LAC report. *Cf.* OFFICE OF THE U.S. TRADE REPRESENTATIVE, RESPONSE TO LABOR ADVISORY COMMITTEE REPORT ON THE PROPOSED CHILE AND SINGAPORE FTAs, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Reports/asset_upload_file763_3221.pdf (last visited Sept. 30, 2005) (outlining an official response to the LAC report on the proposed FTAs with Chile and Singapore).

383. *See, e.g.*, Letter from Hector Flores, National President of the League of United Latin American Citizens, to Member of Congress (June 24, 2004), *available at* <http://www.citizen.org/documents/LULAC%20letter%20on%20CAFTA.pdf>. For a collection of opposition documents authorized by labor groups and human rights groups, amongst others, see the Public Citizen website, <http://www.citizen.org/trade/cafta/opposition/>.

384. *See supra* notes 3, 5 and accompanying text (discussing CAFTA).

385. At this time, the United States is actively involved in negotiating FTAs all over the world. For information about current trade negotiations, see the web site of the USTR, <http://www.ustr.gov/>. One of the largest is the proposed Free Trade of the Americas Agreement (“FTAA”) with Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay and Venezuela. For more information about the current status of the Free Trade of the Americas Agreement, see http://www.ustr.gov/Trade_Agreements/Regional/FTAA/Section_Index.html.

partners implement and enforce core labor rights is to tie them to market access; failure to comply should result in trade sanctions, and/or the loss of tariff reductions.

As opposed to the labor chapter in CAFTA, a much more effective approach could be modeled after the trade agreement between the United States and Jordan ("Jordan FTA").³⁸⁶ This agreement, which was signed on October 24, 2000, is the first FTA that the United States has entered into with an Arab State.³⁸⁷ At this point, the Jordan FTA is considered the high-water mark for labor provisions in a trade agreement.³⁸⁸ The primary reason is that the labor provisions are incorporated into the body of the agreement.³⁸⁹ This is particularly important, because the dispute resolution procedures are the same for labor disputes as they are for commercial issues.³⁹⁰ As such, if a dispute cannot be resolved, the affected party "shall be entitled to take any appropriate and commensurate measure;"³⁹¹ the labor provisions of the Jordan FTA are not subject to watered-down enforcement mechanisms.³⁹² Second, the parties to the Jordan FTA reaffirmed their obligations as members of the ILO, agree-

386. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63 [hereinafter Jordan FTA], available at http://www.ustr.gov/Trade_Agreements/Bilateral/Jordan/Section_Index.html. The Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area ("Jordan FTA") was the last major FTA negotiated and signed before the change in presidential administrations. President Bill Clinton signed this agreement in 2000. See The U.S.-Jordan Free Trade Agreement: Fact Sheet [hereinafter Jordan FTA: Fact Sheet], <http://www.usembassy-amman.org.jo/FactSh.html> (last visited Sept. 23, 2005). The Jordan FTA was later ratified by Congress on Sept. 24, 2001. See *U.S.-Jordan FTA Finding the Bottom Line*, STAR (Jordan), Oct. 6, 2001. The Jordan FTA went into force on December 17, 2001. See Fact Sheet: U.S.-Jordan Free Trade Agreement, <http://www.usembassy-amman.org.jo/12FTA-FS.html> (last visited Sept. 23, 2005).

387. Mohammad Nsour, *Fundamental Facets of the United States-Jordan Free Trade Agreement: E-Commerce, Dispute Resolution, and Beyond*, 27 *FORDHAM INT'L L.J.* 742, 743 (2004).

388. See Press Release, Sen. Evan Bayh (D-IN), *Statement From Senator Bayh on CAFTA*, June 30, 2005 ("[E]nforcement provisions in CAFTA are a step backward from the recent free trade agreement with Jordan"), available at <http://bayh.senate.gov/~bayh/releases/2005/07/30JUNE05PR.htm>; see also Jordan FTA Fact Sheet, *supra* note 386.

389. See Jordan FTA, *supra* note 386, art. 6.

390. See *id.* art. 17(1) (specifying the remedies for any violation of the Jordan FTA).

391. *Id.* art. 17(2)(b).

392. See Jordan FTA Fact Sheet, *supra* note 386.

ing to “strive to ensure that such labor principles” are recognized and protected by law.³⁹³ Third, the Jordan FTA has what has been referred to as a “no relaxation” or “anti-relaxation”³⁹⁴ clause: Jordan FTA parties agree to “strive to ensure that [they do] not waive or otherwise derogate from” their existing domestic labor laws.³⁹⁵ Ultimately, the parties agree that they will “not fail to effectively enforce [their] labor laws, through a sustained or recurring course of action or inaction,” in a manner that affects trade between the parties.³⁹⁶ This provision is particularly important because if Jordan is engaging in labor practices in violation of the Jordan FTA that affect trade under the agreement, the United States can seek meaningful recourse.³⁹⁷

Similar to the Jordan FTA, the United States-Cambodia Bilateral Textile Agreement (“Cambodia Textile Agreement”)³⁹⁸ contains incentives for our trading partner to enforce labor standards.³⁹⁹ Under the Cambodia Textile Agreement, Cambodia agrees to support the implementation of a program to improve working conditions in the textile and apparel sectors, including internationally recognized core labor standards.⁴⁰⁰ To this end, Cambodia is required to conduct at least two consultations each agreement year to discuss “labor standards, specific benchmarks, and the implementation of this program.”⁴⁰¹ Based on these consultations and the information gathered therein, the United States then determines if the Cambodia textile and apparel sector are in substantial compliance with the agreed-upon labor standards.⁴⁰² If there is a positive determination, more favorable trade provisions in the form of increased exports to the United

393. See Jordan FTA, *supra* note 386, art. 6(1).

394. See generally, Thomas J. Manley and Luis Lauredo, *International Labor Standards in Free Trade Agreements of the Americas*, 18 EMORY INT'L L. REV. 85, 105 (2004); Marley S. Weiss, *Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan via Chile, to Latin America and Beyond*, 37 U.S.F. L. REV. 689, 714 (2003).

395. See Jordan FTA, *supra* note 386, art. 6(2).

396. See *id.* art. 6(4)(a).

397. See *id.* art. 6.

398. Agreement on Trade in Textiles and Textile Products, U.S.-Cambodia, Jan. 20, 1999, Hein's No. KAV 5781 [hereinafter Cambodia Textile Agreement].

399. See Jordan FTA, *supra* note 386.

400. See Cambodia Textile Agreement, *supra* note 398, ¶10(b).

401. See *id.* ¶10(c).

402. See *id.* ¶10(d).

States are triggered.⁴⁰³ Importantly, if there is a subsequent determination that Cambodia has taken or failed to take a major action resulting in a “significant change in working conditions,” then the United States may withdraw the increase.⁴⁰⁴

Using the Jordan FTA and Cambodian Textile Agreement as models, the following provisions are proposed for the United States to include in all FTAs to fully meet its obligations under the TPA. First, and fundamentally, all labor provisions should be part of the body of the agreement, not a side agreement.⁴⁰⁵ Workers should be protected from unfair trade practices just as the goods they produce are protected under the FTA.⁴⁰⁶ Upholding core international labor standards is essential to fair trade; doing so does not create unfair protections for U.S. workers. Studies by both the World Bank and the Brookings Institute “document the positive links between trade, economic growth and labor standards.”⁴⁰⁷

A. Preamble

Consistent with the objectives of the TPA, the Preamble to all future FTAs should incorporate resolutions that specifically relate to labor and the parties’ resolve to:

- Improve working conditions, by requiring respect for and

403. *See id.*

404. *See id.* *See generally* Andrew Wells-Dang, *Linking Textiles to Labor Standards: Prospects for Cambodia and Vietnam*, FOREIGN POL’Y IN FOCUS (2002), available at <http://www.fpif.org/papers/txt-labor.html> (discussing the link between the Cambodia Textile Agreement and improved labor standards in Cambodia).

405. *See generally* MARY JANE BOLLE, NAFTA SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATE (Cong. Research Serv., CRS Report for Congress Order Code 97-861 E, Jan. 11, 2002), available at <http://fpc.state.gov/documents/organization/8118.pdf> (outlining shortcomings of the NAFTA side agreement on labor).

406. *See generally* Craig VanGrasstek, *U.S. Law and Policy on the Linkage Between Labor Rights and Trade*, WASH. TRADE REP. (2000) (copy on file with author) (discussing the use of trade sanctions as a penalty for producing goods produced through exploitative labor practices).

407. Press Release, Office of the U.S. Trade Representative, U.S.-Cambodian Textile Agreement Links Increasing Trade with Improving Workers’ Rights (Jan. 1, 2002), available at http://www.ustr.gov/Document_Library/Press_Releases/2002/January/US-Cambodian_Textile_Agreement_Links_Increasing_Trade_with_Improving_Workers'_Rights.html (citing Gary Burtless, *Workers’ Rights, Labor Standards and Global Trade*, 19:4 BROOKINGS INST. REV. 10 (Fall 2001), available at <http://www.brookings.edu/press/review/fall2001/burtless.htm>).

enforcement of worker rights and the rights of children consistent with ILO core labor standards;

- Build on their understanding of the relationship between trade and worker rights;
- Ensure that they do not weaken or reduce protections afforded in domestic labor laws as an encouragement of trade; and
- Require universal ratification and full compliance with ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor.

B. *Labor Law Provisions*

The main text of an FTA should include a separate article on labor rights that addresses the goals and objectives of the TPA. Provisions in this article should accomplish the following general goals of the parties:

- Reaffirm their obligations as members of the ILO and their commitments under the ILO Declaration;
- Agree to strengthen domestic law to be consistent with core labor standards, defined as:
 - a) the right of association: workers shall have the right to freedom of association free from any interference from public authorities or their employers, consistent with ILO Convention No. 87;
 - b) the right to organize and bargain collectively: workers shall have the right to establish and join organizations of their own choosing; workers shall enjoy adequate protection against acts of anti-union discrimination in respect to their employment, including employment that shall not be subject to the condition that a worker not join a union and a worker shall not be dismissed or otherwise prejudiced by reason of union membership or because of participation in union activities outside working hours or, with the employer's consent, within working hours, consistent with ILO Conventions No. 87 and No. 98;
 - c) a prohibition on the use of any form of forced or compulsory labor, meaning all work or service which is extracted from any person under the menace of a penalty and for which the person has not offered him or herself voluntarily; additionally, forced or compulsory labor shall not be used as a means of political coercion or education or as a punishment for holding or expressing political views or views ide-

logically opposed to the establishment of political, social or economic system; as a method of mobilizing and using labor for purposes of economic development; as a means of labor discipline; as a punishment for having participated in strikes; or as a means of racial, social, national or religious discrimination, consistent with ILO Conventions No. 29 and No. 105; d) a minimum age for the employment of children, consistent with ILO Conventions No. 138 and No. 183; and e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, consistent, among other things, with ILO Conventions No. 100 and No. 111.⁴⁰⁸

- To require universal ratification and full compliance with ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor.

- To work toward full compliance with all other ILO Conventions that the parties have or will ratify on an agreed-upon schedule with each country that is appropriate given its economic, social and legal circumstances.

- To the extent that a party's laws are inconsistent with their ILO obligations and commitments or full legal recognition of core labor standards, benchmarks need to be set with a schedule of changes that need to be made with free trade benefits tied to a clear and relatively short phase-in of those changes.⁴⁰⁹

- Use an independent oversight board (such as the ILO) to determine the level of compliance, which would also take into consideration annual comments by international groups who monitor labor issues.⁴¹⁰

- The parties must not fail to effectively enforce their labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and

408. This provision could be much more expansively interpreted consistent with Part II, depending on the level of development of the United States' trading partners.

409. See generally Cambodia Textile Agreement, *supra* note 498 (providing for increased imports in recognition of Cambodia's labor condition reforms in textile factories).

410. This process could be similar to that provided for under the GSP, which uses an annual review process to determine a country's GSP eligibility; a country must take or be taking steps to afford internationally recognized worker rights to workers in the country, including any designated zone in that country. See Generalized System of Preferences, 19 U.S.C.S. § 2462(b)(2)(G) (2005).

that party after entry into force of a trade agreement between those countries.

- The parties shall recognize that they retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities, *unless* it is apparent that a country is not effectively enforcing its laws.

- The parties shall not weaken, relax or reduce protections afforded in domestic labor laws as an encouragement of trade; to the extent there is any weakening, relaxing, or reduction in domestic labor laws, the country shall be subject to trade sanctions.

C. Dispute Resolution Procedures

- Any failure to comply with the labor provisions must be subject to the same dispute resolution procedures used to resolve any disagreement under the agreement. Dispute resolution will expressly *not* be limited to a party's failure to enforce its own labor laws.

- A party to the FTA should be able to bring an action against another party.

- The dispute resolution proceedings should be open to the public.

D. Enforcement/Remedies/Penalties

- Trade sanctions should be available for disputes regarding any provision of the labor article the same as they are for a commercial dispute, in the form of suspension of tariff benefits and/or payment of penalties or fines.

- Goods manufactured in violation of a member's labor laws should not be allowed to be imported into the United States.

E. Labor Cooperation and Capacity Building Mechanism

- A specific provision for adequate funding should be included to ensure that the goals of improving labor laws and enforcement can be met.

CONCLUSION

When negotiating FTAs, the United States is at a point where it can seize the opportunity to improve the labor standards of its trading partners, and hold countries and companies accountable to internationally recognized labor standards. An easier alternative is to look the other way, hoping that with time and increased trade, labor standards will improve. The United States should, however, actively pursue a trade agenda that creates “high-road competition based on skills and productivity” that is positive for all workers in the global workplace, as opposed to creating “low-road competition based on low wages, poor working conditions, and weak workers’ rights” that “drags all workers down into a race to the bottom.”⁴¹¹ American workers deserve better than being placed in the global workplace on an unfair playing field under the guise of free trade. Decades of work by the ILO and other international groups to promote core international labor standards could move toward full realization if the United States required its trading partners to abide by these minimum thresholds. Access to United States markets should be a reward for countries enforcing core labor standards; our trading partners should not be allowed to suppress their workers, thereby creating unfair competition. Countries who fail to protect basic labor standards simply should not be granted an unfair trade advantage via the United States’ FTAs.

411. LAC, THE U.S.-DOMINICAN REPUBLIC FREE TRADE AGREEMENT: REPORT OF THE LABOR ADVISORY COMMITTEE FOR TRADE NEGOTIATIONS AND TRADE POLICY 4 (Apr. 22, 2004), available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/DR_Reports/asset_upload_file12_3321.pdf.