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**Labour Rights Protections within International
Trade:
A study of Free Trade Agreements and
Generalised Systems of Preferences**

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Abbreviations

AFL-CIO	American Federation of Labor and Congress of Industrial Organisations
CGPT	Canadian General Preferential Tariff
DAG	Domestic Advisory Group
ECE	Evaluation Committee of Experts
EPA	Economic Partnership Agreement
EPZ	Export Processing Zone
EU	European Union
GATT	General Agreement on Tariffs and Trade
GFBTU	General Federation of Bahraini Trade Unions
GSP	Generalised System/Scheme of Preference
GSP+	Generalised System of Preference Plus
ILO	International Labour Organisation
ILO 1998 Declaration	ILO Declaration on Fundamental Principles and Rights at Work, 1998
ITO	International Trade Organisation
NAAEC	North American Agreement on Environmental Cooperation
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
NAO	National Administration Office
NGO	Non-Governmental Organisation
OTLA	U.S. Office of Trade and Labor Affairs
U.S.	The United States of America
USTR	United States Trade Representative
UN	United Nations
WTO	World Trade Organisation

Other abbreviations are used within footnotes for ease of reference.

Chapter 1 – Introduction

1.1 – Statement of the issue

An important aspect of the debate surrounding globalisation is the question of how best to ensure the process is socially sustainable. This includes, amongst other considerations, a need to assess how labour standards are upheld, or improved, as opposed to put at risk by globalisation. Creating a formal link between trade and labour issues has resulted in a protracted debate at both a multilateral, State level, and amongst academics. Some advocates claim that such provisions have both economical and altruistic benefits, whilst others believe such clauses to be merely disguised protectionism. As a result of a reluctance by international trade regimes, such as the General Agreement on Tariffs and Trade and the subsequent World Trade Organisation, to include labour rights compliance within their jurisdiction, and the lack of formal sanctioning powers on behalf of the International Labour Organisation, many advocates for improved labour protection within international trade have turned to the inclusion of “social clauses” within trade agreements to address concerns.

In relation to the trade agreements that include “social clauses” there are two general forms; Free Trade Agreements and Generalised Systems/Schemes of Preferences. Within both of these areas there is a wide variety as to the content of the “social clauses”, and also the mechanisms established in order to ensure compliance. Certain regimes include “conditional” social clauses that require obligations to be complied for continuation of benefits under the agreement or preference system. On the other hand, some agreements and systems include “promotional” obligations which reward compliance with incentives or greater benefits. Additionally, the content of such clauses is not universal. The scope of “labour rights” within these “social clauses” varies depending on the framework in question. As shall be seen, a number of agreements include complex inter-Governmental and independent procedures to ensure that parties to these agreements comply with obligations imposed by “social clauses”. However, these procedures, in certain frameworks, are limited to specific forms of non-

compliance in relation to a limited number of “labour rights”. These differences in content, and available implementation procedures, can create a hierarchy amongst seemingly universal “labour rights”.

The regulatory framework surrounding, and the content contained within, “social clauses” is one important factor in considering the extent to which they protect labour rights. Additionally, the degree to which these “social clauses” have been implemented in practice is of relevance. Within the regimes and agreements that include “social clauses” there is a wide range of levels of implementation. Despite the inclusion of such clauses having promoted much debate, the mechanisms for ensuring compliance are utilised in a relatively small number of cases. The agreements containing “social clauses” include high aspirations relating to the need to uphold labour standards, however, poor implementation of these obligations through a failure to utilise the proceedings for ensuring compliance could undermine such positive intentions.

1.2. – Importance of this study

Studies into the inclusion of “social clauses” within trade agreements have been previously carried out.¹ Additionally, a number of academic articles have discussed the link between trade and labour from a number of different approaches. However, this thesis shall fully examine the content and regulatory framework surrounding “social clauses” contained within all Free Trade Agreements and Generalised Systems/Schemes of Preferences. Additionally, this thesis shall also thoroughly discuss any proceedings relating to implementation of these clauses carried out under a number of different preference systems and trade agreements. As a result, this thesis will seek to examine the content and regulatory framework surrounding “social clauses” in the international trade regime, and also to what extent these have been implemented through proceedings provided for in the governing agreement.

¹ For example, ILO, “*Social Dimensions of Free Trade Agreements*”, (2013).

1.3. – Limitations

The linkage between trade and labour rights is subject to a multi-faceted, complex debate. The arguments advanced in favour, and against, such a linkage shall be set out in Chapter 2. Much of the debate surrounding the link between trade and labour includes economic and trade orientated concerns. However, the focus of this thesis is the way in which labour rights are protected from the repercussions of liberalised, global trade through “social clauses”. The extent to which these labour rights are protected by “social clauses” shall be carried out by an examination of the content, and implementation, of these clauses. Accordingly, an in depth examination of economic and trade focussed considerations shall not be undertaken within this thesis, but such issues are an important aspect of the wider debate surrounding the link between trade, labour rights, and globalisation.

When considering “implementation” of the identified “social clauses” a focus shall be placed upon the instances in which proceedings under the agreement have been employed. The discussion shall not consider whether the conclusion of these proceedings have resulted in practical changes to compliance with labour rights by a party. Establishing the link between any improvement and the specific procedures is too difficult a task due to the number of relevant factors that can lead to improvement; including economic and developmental considerations, and other forms of international pressure.

Further limitations shall be set out where necessary throughout this thesis.

1.4. – Terminology

“Free Trade Agreements” are agreements signed by two or more countries that intend to increase the trade of goods and services amongst the countries by removing existing barriers to trade.

“Generalised Systems/Schemes of Preferences” are frameworks that provide

beneficiary countries with reduced tariffs when importing goods into the preference giving country. Further information on such systems can be found in Chapter 5.1.

“Social clauses” shall comprise “(i) any labour standards which establishes minimum working conditions, terms of employment or worker rights, (ii) any norm on the protection provided to workers under national labour law and its enforcement, as well as (iii) any framework for cooperation in and/or monitoring of these issues”.²

1.5. – Structure and Methodology

Chapter 2 shall set out the historical background to the link between “trade” and “labour standards” and various inter-State discussions on the issue. The wider arguments advanced in favour, and against, this link from States and academics shall also be discussed.

Chapter 3 and 5 will set out instances of social clauses within Free Trade Agreements and Generalised Systems/Schemes of Preferences respectively. An overview of the Free Trade Agreements and regional agreements that include social clauses is contained within Annexes 1 and 2. These Chapters shall also include a detailed overview of the procedures to enforce and implement the contained “social clauses”. A comparative approach to the content and regulatory frameworks shall be taken and conclusions within the relevant Chapters, and Chapter 7, shall include such analysis.

Instances in which these procedures to implement “social clauses”, in relation to both Free Trade Agreements and Generalised Systems/Schemes of Preferences, shall be discussed in Chapters 4 and 6. This discussion shall take a formalistic approach to assessing implementation by examining the proceedings used to enforce “social clauses”, as opposed to assessing whether practical

² ILO, “*World of Work Report 2009: The Global Jobs Crisis and Beyond*”, (2009), page 64.

improvements have resulted.³ In certain circumstances there is a lack of information relating to certain proceedings. However, these Chapters shall contain detailed, information on proceedings instigated in relation to a number of differing regimes. Again, the comparative differences in implementation drawn from this discussion shall be set out in conclusion within the body of the Chapters, and Chapter 7.

Chapter 7 shall encompass concluding remarks in order to assess general trends in the protections contained within “social clauses”, and their implementation, as highlighted by the comparative approach used throughout this thesis.

³ As discussed above, see Chapter 1.3.

Chapter 2 – Link between “trade” and “labour rights”

Prior to any discussion of the particular forms of the links between trade and labour within “social clauses”, it is necessary to understand the historical context surrounding the issue. Additionally, the arguments advanced in favour and against the linkage shall be presented in order to provide a full background for further analysis and discussion. As mentioned above, the focus of this thesis is examining the ways in which labour rights are protected through emerging “social clauses” in international trade regimes. Accordingly, economic and trade focussed considerations fall outwith the scope of this thesis. Despite such arguments forming an important part of this complex debate, an in depth examination of the merits of the arguments advanced shall not be undertaken.⁴

2.1. – Historical Context

Historically, the development of labour standards at a domestic level have long had international consequences. In 19th Century Europe, a number of States enacted domestic legislation in order to combat the *laissez-faire* approach adopted by a number of employers towards working conditions. This change in approach was intended to prevent unfair domestic competition and, consequently, uphold industrial and political peace. But it had unintended consequences at an international level. Concern grew with regards to the unequal playing field that was developing amongst States due to the inconsistencies in domestic labour laws. This eventually resulted in the establishment of the International Association for the Protection of Workers in Basle, Switzerland in 1901 in order to level the playing field.⁵ However, the work of the organisation was frustrated by the outbreak of the First World War in 1914.⁶ Following the conclusion of the First World War in 1919, a permanent

⁴ For further information on the economic or trade focussed impacts of labour standards, see Siroën, J., “*Labour provisions in preferential trade agreements: Current practice and outlook*”, (2013), International Labour Review, Volume 152:1, pages 85-106 and Banks, K., “*The impact of globalisation on labour standards: A second look at the evidence*”, (2006), in Craig, J. D. R., and Lynk, S. M., (eds.), “*Globalization and the Future of Labour Law*”, (2006).

⁵ Servais, J.M., “*International Labour Law*”, (2005), page 22-23.

⁶ Collier, D. and Bamu, P. H., “*Linking trade to labour standards: A promising synergy or a double-*

body for the regulation of labour issues, the International Labour Organisation (hereinafter "ILO"), was developed as a result of the feeling that social justice was a prerequisite for lasting peace.⁷ In the Preamble to Part XIII of the Peace Treaty of Versailles that established the ILO, there is reference made to the impact that poor working conditions in one State can have on the development of labour standards in another State.⁸ As a result of increased international trade between States, the importance of differing domestic labour standards increased. This resulted in a formal discussion about the link between labour standards and international trade during the negotiations surrounding the establishment of the International Trade Organisation (hereinafter "ITO").

2.1.1. – International Trade Organisation

The Havana Charter⁹, concluded in 1948, aimed to establish the ITO. Within the Charter, Article 7 recognised that a link between labour standards and trade existed and that fair labour standards lead to greater productivity. Additionally, the Charter required the removal of any unfair labour conditions that constituted barriers to trade.¹⁰ The Charter recognised the importance of the work of the ILO in relation to labour issues and accordingly affirmed the need for cooperation with the ILO on such issues.¹¹ The Charter established a dispute settlement system that set out cooperative consultations and arbitration as the first step.¹² Following this, the Executive Board of the organisation could investigate the issue,¹³ with the assistance of the ILO.¹⁴ Finally, if the matter had not been resolved, the Conference of the Organisation could permit the removal of trade

edged sword?", (2012), Acta Juridica, at 328. The founding members of the organisation (Germany, Austria, Belgium, France, Italy, the Netherlands and Switzerland) were heavily involved in the First World War.

⁷ ILO, "*Origins and History*", available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>, (last accessed 12 March 2015).

⁸ Preamble to Part XIII, Peace Treaty of Versailles, 1919 - "*the failure of a nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries*".

⁹ United Nations, Havana Charter for an International Trade Organization, (24 March 1948), U.N. Doc.E/Conf.2/78, (hereinafter "Havana Charter, (1948)").

¹⁰ Article 7(1), Havana Charter, (1948).

¹¹ Article 7(2), Havana Charter, (1948).

¹² Article 93, Havana Charter, (1948).

¹³ Article 94, Havana Charter, (1948).

¹⁴ Article 94(4), Havana Charter, (1948).

concessions.¹⁵ Following on from the failure of the ITO, principally due to non-ratification by the United States Senate, the General Agreement on Tariff and Trade (hereinafter “GATT”) was instead agreed upon in 1947. This refusal to ratify by the U.S. was not as a result of the social clause,¹⁶ but stemmed from opposition by business lobbies that rejected the diversity of international markets, and the differing roles that business and Governments would have in different regimes. The U.S. opposition felt that the Charter did not go far enough in breaking down trade barriers cultivated by overly protectionist systems in countries with different models.¹⁷

2.1.2. – General Agreement on Tariffs and Trade

In general, the GATT removed references to trade and labour that existed within the Havana Charter resulting, in this regard, in a much more diluted agreement. This was despite the fact that such clauses were not the main failing of the Charter. The only formal reference to labour issues within the GATT is contained in Article XX, which allows restrictive measures in respect of products of prison labour. In 1953, the U.S. suggested the revival of the regulation of labour standards as part of the GATT framework. At this point in time Japan had requested to accede to the GATT and so the Ad Hoc Committee on Agenda and Intersessional Business established a Working Party on Accession of Japan.¹⁸ The Working Party consisted of delegations from Australia, Canada, Cuba, France, Germany, India, Italy, Pakistan, the United Kingdom, and the United States.¹⁹ Alongside the need to provide recommendations on the Japanese accession, the Working Party was also mandated to examine provisions of the GATT relating to situations where the commercial interests of a Party had been injured in order to

¹⁵ Article 95, Havana Charter, (1948).

¹⁶ Malmberg, J. and Johnsson, D., “Social Clauses and Other Means to Promote Fair Labour Standards in International Fora – A Survey”, (1998), Arbetslivsrapport, Vol. 25, page 15.

¹⁷ Ostry, S., “Looking Back to Look Forward: The Multilateral Trading System after 50 Years”, (2000), page 101, in Secretariat of the World Trade Organisation, “From GATT to the WTO: The Multilateral Trading System in the New Millennium”, (2000).

¹⁸ Working Party on Accession of Japan, Ad Hoc Committee on Agenda and Intersessional Business, General Agreement on Tariffs and Trade, “Membership and Terms of Reference”, (4 February 1953), IC/W/9, (hereinafter, “GATT Working Party, “Membership and Terms of Reference”, (1953)”).

¹⁹ GATT Working Party, “Membership and Terms of Reference”, (1953).

assess whether they provided adequate protection and redress. To this end the U.S. submitted a proposal that would result in the maintenance of “unfair labour standards” by a Party being actionable under Article XXIII, GATT.²⁰ Article XXIII allowed Parties to request consultations with the offending Party if their actions resulted in the impairment of benefits afforded under the GATT.²¹ Following this, the Contracting Parties as a whole could decide to withhold trade preferences from the offending Party.²² However, this suggestion was rejected by the Working Party and not included in their final report.²³ The proposal did not receive wide support or opposition within the Working Party but concerns were raised as to how useful it would be in practice and also how the term “unfair labour practices” would be defined.²⁴ Despite the decision not to formally accept this position, the U.S. maintained that issues relating to labour rights practices were actionable under Article XXIII,²⁵ although this provision has still never been utilised to such an end.²⁶ During the eighth round of multilateral trade negotiations held as part of the GATT framework, one of the topics covered was the creation of a World Trade Organisation (hereinafter “WTO”). The debate surrounding the link between trade and labour issues, and the most appropriate form of regulation if any, was reignited.

2.1.3. – *World Trade Organisation*

During the GATT’s eighth round of negotiations, lasting from 1986 to 1994, the U.S. again attempted to formalise the link between trade and labour within the

²⁰ Working Party on Accession of Japan, Ad Hoc Committee on Agenda and Intersessional Business, General Agreement on Tariffs and Trade, “*Draft Fair Labour Standards Clause: proposed by the United States Delegation*”, (6 February 1953), Sec/2/53.

²¹ Article XXIII(1), General Agreement on Tariffs and Trade, (1994).

²² Article XXIII(2), General Agreement on Tariffs and Trade, (1994).

²³ Working Party on Accession of Japan, Ad Hoc Committee on Agenda and Intersessional Business, General Agreement on Tariffs and Trade, “*Report on the Accession of Japan*”, (13 February 1953), L/76, § 12.

²⁴ Ad Hoc Committee on Agenda and Intersessional Business, General Agreement on Tariffs and Trade, “*Summary Record of the Meeting held at the Palais des Nations, Geneva, on 13 February 1953*”, (18 February 1953), IC/SR.9, page 5.

²⁵ U.S. Commission on Foreign Economic Policy, “*Staff Papers*”, (February 1954), page 438.

²⁶ Charnovitz, S., “*The influence of international labour standards on the world trading regime: A historical overview*”, (1987), International Law Review, Vol. 126:5, page 575 and World Trade Organisation, “*Analytical Index: Interpretation and Application of Article XXIII*”, available at https://www.wto.org/ENGLISH/res_e/booksp_e/analytic_index_e/gatt1994_08_e.htm, (last accessed 20 May 2015).

framework of the WTO. The Preparatory Committee, established to prepare for the Uruguay round of negotiations, first met in January 1986.²⁷ The round of negotiations had a broad mandate to extend trade rules to areas that had previously been difficult to liberalise and also newly emerging relevant areas, such as intellectual property rights and investment policies.²⁸ The Preparatory Committee eventually agrees on a Declaration that sets out the general scope, objectives, and principles that steer subsequent negotiations. During the work of the Preparatory Committee, the U.S. delegation submitted a proposal to include the issue of worker rights within the ensuing negotiations.²⁹ This proposal, on 25 June 1986, suggested the review of the effect of denial of worker rights on Contracting Parties and consideration of the best possible ways to deal with the issue within the GATT framework. This proposal was discussed during the Preparatory Committee's meeting on 13 August 1986 and was met with much opposition.³⁰ Of the 22 delegations³¹ to comment on the U.S. proposal, fifteen were against the inclusion of worker rights in the Declaration that would preclude negotiations.³² In general, the opposition were worried at the potentially protectionist impact that could result from arbitrary application of any provisions.³³ These concerns were accompanied by issues relating to how to define "worker rights" and assess compliance by Contracting Parties,³⁴ as well as a belief that the ILO was best placed to deal with such issues and "worker rights" fell outwith the scope of the jurisdiction of the GATT.³⁵ The delegations that

²⁷ Preparatory Committee, General Agreement on Tariffs and Trade, "*Note on First Meeting*", (31 January 1986), PREP.COM(86) 1.

²⁸ *Ibid.*, § 4.

²⁹ Preparatory Committee, General Agreement on Tariffs and Trade, "*Worker Rights*", (25 June 1986), PREP.COM(86)W/83.

³⁰ Preparatory Committee, General Agreement on Tariffs and Trade, "*Record of Discussions; Discussions of 23-26 June*", (13 August 1986), PREP.COM(86)SR/8, (hereinafter "Preparatory Committee, GATT, "*Discussion on Worker Rights*", (1986)"), §§ 43-65.

³¹ Argentina, Brazil, Chile, Colombia, Cuba, Gabon, Hong Kong, India, Jamaica, Malaysia, New Zealand, Nicaragua, Nigeria, Peru, Romania, Singapore, South Korea, U.S., Uruguay, Yugoslavia, Zaire, and Zimbabwe, see Preparatory Committee, GATT, "*Discussion on Worker Rights*", (1986), §§ 43-65.

³² Argentina, Brazil, Colombia, Cuba, Hong Kong, India, Malaysia, New Zealand, Nicaragua, Nigeria, Peru, Romania, Singapore, South Korea, and Zaire, see Preparatory Committee, GATT, "*Discussion on Worker Rights*", (1986), §§ 43-65.

³³ For example, Argentina; New Zealand; and, Hong Kong. See Preparatory Committee, GATT, "*Discussion on Worker Rights*", (1986), §§ 44, 56, and 61 respectively.

³⁴ Argentina and Malaysia, Preparatory Committee, GATT, "*Discussion on Worker Rights*", (1986), §§ 44 and 51 respectively.

³⁵ South Korea; Brazil; Cuba; Romania; and, Peru, see Preparatory Committee, GATT, "*Discussion*

opposed the U.S. proposal were generally developing countries in South America and Asia. However, most African countries were interested in discussing the issue further. The proposal was also supported by Chile and Yugoslavia, who were particularly interested in discussing the issue of free movement of labour forces and looking at worker rights as a global, as opposed to a national, issue.³⁶ In the resultant Ministerial Declaration, the issue of “worker rights” was not to be discussed during the Uruguay round of negotiations.³⁷ However, the issue was not discarded and it was agreed that future discussions were necessary.³⁸

The negotiations were seen as groundbreaking within the regime of international trade. The negotiations liberalised trade in areas such as agriculture, textiles, and cross-border services.³⁹ Additionally, at an institutional level, the Marrakesh Agreement, signed at the end of negotiations, replaced the GATT Secretariat with the WTO.⁴⁰ During the first Ministerial Conference of the WTO, held during 1996 in Singapore, the decision not to link trade and labour issues was reaffirmed. Despite including a commitment from WTO members to observe “internationally recognised core labour standards”,⁴¹ the WTO reinforced the fact that the ILO remained the competent body to deal with labour issues.⁴² No further declarations on the issue of labour have been made by the WTO and, in fact, the Singapore Declaration has been reaffirmed by the WTO at subsequent Ministerial Conferences.⁴³

The above constitutes a historical account of the link between the issues of trade and labour within the WTO, and preceding frameworks. Originally, States

³⁶ See Preparatory Committee, GATT, “Discussion on Worker Rights”, (1986), §§ 49, 53, 54, 58, and 65 respectively.

³⁷ General Agreement on Tariffs and Trade, “Punta del Este Declaration”, (20 September 1986), MIN(86)/W/19.

³⁸ Bhatnagar, H. and Mishra, V. V., “Workers rights vis-à-vis the WTO: Do we need a paradigm shift?”, (2008), Hibernian Law Journal, Vol. 8, page 188.

³⁹ Cline, W. R., “Evaluating the Uruguay Round”, (1995), World Economy , Volume 18:1, page 1.

⁴⁰ General Agreement on Tariffs and Trade, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, (15 April 1994), UR-94-0083, page 9, commonly known as the “Marrakesh Agreement”.

⁴¹ WTO, Singapore Ministerial Declaration, (13 December 1996), WT/MIN(96)/DEC, at 4.

⁴² *Ibid.*

⁴³ WTO, Doha Ministerial Declaration, (14 November 2001), WT/MIN(01)/DEC/1, at 8.

recognised that differing domestic labour laws could have international consequences. However, international bodies established in the latter part of the 20th century that regulate international trade have stopped short of formalising a link between international trade and domestic labour standards. The attempt by the U.S. to firstly bring worker rights issues within the jurisdiction of the GATT dispute settlement regime were rejected in 1953. Following this, the proposal to further discuss worker rights during negotiations that resulted in the WTO were not supported by a number of States due to issues surrounding the potentially protectionist impact of inclusion within the international trade regime. The WTO has subsequently reaffirmed the decision not to include a formal link between trade and labour rights in several Ministerial Declarations.

In order to provide a full background to the issue, the arguments advanced by scholars, and States, on either side of the debate are worthy of consideration in order to provide a full background to the issue.

2.2. – For and against the link

With regards to the reasons advanced for inclusion of labour standards provisions within international trade frameworks it is necessary to make a distinction between the two principal arguments.⁴⁴ The first is motivated by preventing the so-called “race-to-the-bottom” and ensuring that labour standards within a State are not reduced. The second is based on the belief that international trade mechanisms can be used in order to actually increase the level of protection with regard to labour rights.

The first motivation is economic in nature and stems from the belief that producers that fail to comply with labour standards have an advantage in the international trade forum. Non-compliance with labour standards allows producers to take advantage of lower wages and alternative sources of labour, including child labour, in order to drastically lower production costs. As a result,

⁴⁴ Rodrik, D., *“Labor Standards in International Trade: Do They Matter and What Do We Do About Them?”* in Lawrence, R. Z., Rodrik, D., and Whalley, J. (eds.), *“Emerging Agenda for Global Trade: High Stakes for Developing Countries”*, (1996), page 5.

these producers in exporting States can undercut domestic producers to the detriment of the domestic workforce and economy.⁴⁵ Despite the US proposals for inclusion of labour rights within the competency of the WTO being allegedly motivated by the fact that such rights were referred to in the preamble to the GATT,⁴⁶ Article XX,⁴⁷ and Article XXIX,⁴⁸ many scholars believe that these economic reasons were the real motivation.⁴⁹ These concerns are further increased due to the greater mobility of capital in modern times which affords businesses the opportunity to establish manufacturing centres and import goods from a wider range of international destinations. Consequently, this results in the potential for producers to lower production costs, by failing to comply with labour standards, in order to attract further foreign business and potential investment. This can result in a “race to the bottom” amongst developing States where each State attempts to “outbid” the others in order to appear the most attractive.⁵⁰ Preventing this phenomenon, known as “social-dumping”, is a further strand of the economic motivations for a link between trade and compliance with labour standards.⁵¹

In addition to the above economic reasons, more altruistic avenues of thinking have been advanced in order to justify the link. For some, the potential for international trade mechanisms to increase respect for labour standards in certain States should be a sufficient reason to include them within the

⁴⁵ These motivations were evident in the adoption of a specific labour orientated side-agreement to the NAFTA as discussed below in Chapter 3.2.

⁴⁶ Preamble to the GATT, (July 1986) – “relations (...) should be conducted with a view to raising the standards of living”.

⁴⁷ Article XX(e), GATT, (July 1986) – relating to restriction of products of prison labour.

⁴⁸ Article XXIX, GATT, (July 1986) – covering the relation of the GATT to the Havana Charter – “*The contracting parties undertake to observe to the fullest extent (...) the general principles (...) of the Havana Charter*”.

⁴⁹ See Charnovitz, S., “*The World Trade Organisation and Social Issues*”, (1994), Journal of World Trade, Vol.28:5, page 17 and Bhatnagar, H. and Mishra, V. V., “*Workers rights vis-à-vis the WTO: Do we need a paradigm shift?*”, (2008), Hibernian Law Journal, Vol. 8, page 187.

⁵⁰ “Race to the bottom” is when “states compete with each other as each tries to underbid the others in lowering taxes, spending, regulation (including labour standards ... so as to make itself more attractive to outside financial interests”, Schram, S., “*After Welfare: The Culture of Postindustrial Social Policy*”, (2000), page 91.

⁵¹ Caire, G., “*Labour Standards and International Trade*” in International Institute for Labour Studies, “*International Labour Standards and Economic Interdependence: Essays in Commemoration of the 75th Anniversary of the International Labour Organisation and the 50th Anniversary of the Declaration of Philadelphia*”, (1994), (hereinafter “ILS, “*Commemorative Volume*”, (1994)”), page 298.

international trade framework. Labour rights are a part of the doctrine of universal human rights and, therefore, there exists a moral obligation to improve them whenever possible.⁵² Additionally, an objective of increased trade liberalisation is to “raise the general standard of living of ... people”.⁵³ This aim was used by the U.S. to justify the formalisation of the link between trade and labour at a multi-lateral level during discussion prior to the establishment of the WTO.⁵⁴ Linking trade and worker rights were seen as a means to ensure that the “fruits of economic development” were shared amongst all.⁵⁵ Concerns relating to ethical globalisation are also shared by corporations as a result of the growing importance placed upon a company portraying a positive image.⁵⁶ Alleged complicity with poor labour practices can have a damaging impact on the reputation of a company. This provides strong motivation for the improvement of labour standards in manufacturing and exporting countries.

Previously, potential trade restrictions have been used as a means to further concerns regarding both environmental⁵⁷ and intellectual property issues.⁵⁸ However, with regards to labour rights, the ILO has no formal sanctioning powers and the WTO has been, as discussed above, unwilling to formally bring worker rights within their jurisdiction. Accordingly, many social advocates see bilateral and regional trade agreements as a powerful tool in order to affect the improvement of labour standards in foreign countries.⁵⁹ Increased social

⁵² Brown, A. G. and Stern, R. M., *“What are the issues in using trade agreements for improving international labor standards?”*, (2007), Discussion paper No. 558, University of Michigan, Ann Arbor.

⁵³ Preamble to the General Agreement on Tariffs and Trade, (1947).

⁵⁴ Preparatory Committee, GATT, *“Discussion on Worker Rights”*, (1986), § 45.

⁵⁵ *Ibid.*

⁵⁶ Artuso, M. and McLarney, C., *“A Race to the Top: Should Labour Standards be Included in Trade Agreements?”*, (2015), The Journal for Decision Makers, Volume 40:1, page 9.

⁵⁷ See Kerr, W. A., *“The World Trade Organization and the environment”*, in Michelman, H. J., Rude, J., Stabler, J. and Storey, G. (eds.), *“Globalization and Agricultural Trade Policy”*, (2001), pages 53-65 and Holtby, K. L., Kerr, W. A. and Hobbs, J. E., *“International Liability and Barriers to Trade”*, (2007).

⁵⁸ For example, WTO, Agreement on Trade Related Aspects of Intellectual Property, (15 April 1994). The sanctioning power of the GATT was a major motivation for having such issues incorporated within the WTO regime, see Bakhs, S., and Kerr, W. A., *“Do Labour Standards Have a Role in International Trade?: Private Standards, Preferential Trade Agreements or the WTO”*, (2009), CATPRN Working Paper 2009-07, page 6.

⁵⁹ Bakhs, S. and Kerr, W. A., *“Do Labour Standards Have a Role in International Trade?: Private Standards, Preferential Trade Agreements or the WTO”*, (2009), CATPRN Working Paper 2009-07, page 5.

protection and respect for labour rights is best brought about via political negotiation; leaving the issue to market forces is insufficient.⁶⁰ Accordingly, the strength of trade agreements as a means to achieve this end is further reinforced.

However, contrary to this position, some scholars believe that a free trade market is sufficient enough to ensure adequate social protection.⁶¹ Employers who fail to offer safe working conditions or reasonable wages will be unable to retain their workers and will thus lose the many benefits of a stable workforce unless these shortcomings are improved.⁶² The imposition of labour standards within the international trade framework could be considered a distorting factor that impedes efficiency, stifles competition, and constrains growth.⁶³ These labour standards, in effect, fix an aspect of market diversity and, in this regard, run contrary to one of the fundamental principles behind the entire international free trade regime; the exploitation of comparative advantages that certain States have. This counterargument formed one of the bases of concern raised during the WTO negotiations which lead to a refusal to formalise a link between trade and labour issues as outlined above.⁶⁴ This alleged form of protectionism nullifies the comparative advantage that many developing states enjoy and, according to certain scholars, this can have wide ranging negative consequences. On a wider level, protectionism in the form of imposition of labour standards could result in cost equalisation that could be detrimental to the world economy.⁶⁵ Potter uses the U.S. Smoot-Hawley Act of 1930, which provided the President with the power to adjust tariffs in order to equate costs between international and domestic products, in order to exemplify these potential negative consequences. The Act's intention was to counteract the low labour costs in exporting countries that had resulted in economic difficulties that

⁶⁰ De Wet, E., "Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organisation", (1995), Human Rights Quarterly, Vol.17:3, page 447.

⁶¹ *Ibid.*

⁶² Alston, P., "Post-post Modernism and International Labour Standards: The Quest for a New Complexity" in ILS, "Commemorative Volume", (1994).

⁶³ *Ibid.*

⁶⁴ Bhatnagar, H. and Mishra, V. V., "Workers rights vis-à-vis the WTO: Do we need a paradigm shift?", (2008), Hibernian Law Journal, Vol. 8, pages 187-188.

⁶⁵ Potter, E., "International Labour Standards, the Global Economy and Trade" in ILS, "Commemorative Volume", (1994), page 363.

particularly affected the agriculture industry.⁶⁶ Instead, it stifled international trade and caused unemployment that lasted until the Second World War.⁶⁷ The ILO, in advocating the need for “social clauses” to not be solely aimed at instances of social-dumping, potentially shares the fears surrounding the issue of cost-equalisation.⁶⁸ However, despite the fact that “social clauses” may inadvertently raise the costs of production, this is a large step from artificially raising the costs of production to match domestic costs. The link between labour standards and trade issues would not automatically constitute cost equalisation. What should be noted is the fact that such clauses focus upon non-compliance with labour standards, often the source of lower costs, and are not aimed at equalising the cost of products on a global scale.⁶⁹ The introduction of labour standards would not result in cost equalisation and, in many cases, would not eradicate the comparative advantage of developing countries as production costs, and wages, will generally correlate to the GDP per capita of the State.⁷⁰

2.3. – Conclusion

The above has charted the development of the discussion surrounding the link between trade and labour standards, alongside the arguments advanced in favour and against such a link. As can be seen there has been a sustained reluctance to formalise the link between trade and worker rights at an international level. Concerns relating to the potential protectionist effect of the

⁶⁶ Irwin, D. A., *“From Smoot-Hawley to Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s”*, page 334, in Bordo, M. D., Goldin, C. and White, E. N., (eds.), *“The Defining Moment: The Great Depression and the American Economy in the Twentieth Century”*, (1998).

⁶⁷ *Ibid.* The proposed Act had been subject to a statement of 1,028 economists who believed increased protective duties would be a mistake and requested revision of the Act by Congress, or, if passed veto by the President, see Fetter, F. W., *“The Economists’ Tariff Protest of 1930”*, (1942), American Economic Review, Volume 32:2, pages 355-356, reprinted in Economic Journal Watch, (2007), Volume 4:3, pages 345-358.

⁶⁸ De Wet, E., *“Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organisation”*, (1995), Human Rights Quarterly, Vol.17:3, page 450 citing ILO, Director-General, *“Defending Values, Promoting Change”*, (1994), at 59 - “it would Utopian (...) to think that we could legislate a standardisation of labour costs”.

⁶⁹ Marshall, R., *“The Importance of International Labour Standards in a More Competitive Global Economy”*, in ILS, *“Commemorative Volume”*, (1994), page 71.

⁷⁰ Secretary of Labour, United States, *“9 International Labour Conference Provisional Record”*, 10 (1994), page 3.

link, and the fact that it may erode the competitive advantage of developing States, have motivated this stance. Despite these concerns, in the years since the above noted discussion, there have been a number of trade instruments adopted that have included “social clauses” recognising the link between trade and labour.

Chapter 3 – Free Trade Agreements

3.1. – Introduction

The following shall be an outline of the mechanisms contained within concluded Free Trade Agreements that include “social clauses” aiming to protect labour rights. The provisions of the North American Free Trade Agreement (hereinafter “NAFTA”) and the North American Agreement on Labor Cooperation (hereinafter “NAALC”), the first group of agreements to include such a mechanism, shall be set out first, followed by the approaches taken within subsequent agreements concluded by the United States, the EU, and Canada. The outline shall focus upon the rights covered within such agreements, the obligations of the Parties to the agreement, and the mechanisms for implementation and enforcement of these obligations.

3.2. – North American Agreement on Labor Cooperation

Following the success of the U.S.-Canada Free Trade Agreement, the Mexican President Carlos Salinas wished to be part of a similar agreement with the U.S. and Canada. Negotiations resulted in the signature of the NAFTA on 17 December 1992. Before the agreement came into force, however, it required to be ratified by the three contracting parties. At this point, within the U.S. a Presidential election campaign was ongoing. The incumbent George H. Bush, heralded the NAFTA as a major achievement of his administration.⁷¹ On the other hand, the Democratic candidate, Bill Clinton, was under pressure from environmental and labour organisations to denounce the NAFTA. However, financial institutions that had supported Clinton’s campaign were in favour of the NAFTA and so a compromise was the only realistic conclusion. Clinton agreed to support ratification of the NAFTA provided two side agreements, on labour and the environment, were also signed. One of these side agreements, the

⁷¹ Compa, L., “*Chapter 6 – A Glass Half Full: The NAFTA Labor Agreement and Cross-Border Labor Action*”, page 140 in Andreopoulos, G. J. (ed.), “*Concepts and Strategies in International Human Rights Law*”, (2002).

NAALC which covered labour issues, was motivated by the deficiency in protection of labour rights of Mexican workers and the potential detrimental effect this could have on the U.S. economy.⁷² With Mexican workers willing to work for \$0.58 per hour instead of the U.S. minimum wage of \$4.25, many were worried that U.S. companies would relocate South to take advantage of these savings.⁷³ Following Clinton's victory in the election, the NAALC and NAAEC were signed on 13 September 1993 and came into force on 1 January 1994.

The NAALC, in contrast to certain agreements that shall be discussed below, is a non-invasive regime that does not require Parties to enact new domestic legislation, but merely requires effective implementation of pre-existing domestic laws.⁷⁴ The agreement, however, does oblige parties to respect the following eleven labour principles:

1. Freedom of association and protection of the right to organise
2. The right to collective bargaining
3. The right to strike
4. Prohibition of forced labour
5. Labour protections for children and young persons
6. Minimum employment standards
7. Elimination of employment discrimination
8. Equal pay for women and men
9. Prevention of occupational injuries and illnesses
10. Compensation in cases of occupational injuries and illnesses
11. Protection of migrant workers⁷⁵

These eleven principles are split into three "groups": Group One relates to principles 1, 2, and 3; Group Two relates to principles 4, 6 (in relation to

⁷² Brower, A., "Rethinking NAFTA's NAALC Provision: The Effectiveness of its Dispute Resolution System on the Protection of Mexican Migrant Workers in the United States", (2008), *Independent International and Comparative Law Review*, Volume 18:1, page 156.

⁷³ See footnote 44.

⁷⁴ Articles 2 and 5, U.S., Canada, and Mexico, "North American Agreement on Labor Cooperation", (13 September 1993), (hereinafter "NAALC, (1993)").

⁷⁵ Article 49 and Annex 1, NAALC, (1993).

overtime), 7, 8, 10, and 11; and Group Three includes principles 5, 6 (in relation to payment of a minimum wage), and 9.⁷⁶ These groups are especially important in the context of the NAALC's complicated dispute resolution system. This resolution system involves a number of bodies that have been established under the NAALC.

Part 3 of the NAALC establishes the Commission for Labour Cooperation which consists of a Council and a supplementary Secretariat. The Council, consisting of labour ministers from the Contracting Parties,⁷⁷ oversees the implementation of the agreement and facilitates the inter-Party consultations that form part of the dispute resolution system.⁷⁸ In addition to the Commission for Labor Cooperation, the agreement requires Parties to establish a National Administrative Office (hereinafter "NAO"). The most important role for the NAOs is to receive independent communications from individuals, or other interested parties, on labour law matters that arise in the territory of another contracting party.⁷⁹ Such submissions can be made by an individual, trade union, or other organisation and no citizenship requirements to make a submission exist.⁸⁰ Once the NAO has received the submission it shall review the substance of the submission and, with the assistance of the NAO in the contracting party which is the subject of the submission,⁸¹ produce a report on the issue. If the report finds that there has been a failure to implement domestic law relating to one of the above outlined labour principles, then "ministerial consultations" can be requested between the relevant Parties.⁸² Following these consultations it is general practice that the Parties will conclude a "ministerial declaration" that shall outline any steps to be taken in order to remedy any shortcomings in the implementation of domestic law. If the issues concern a Group One labour

⁷⁶ U.S. Department of State, Boller, M.J. (author), "*CRS Report for Congress: NAFTA Labor Side Agreement: Lessons for the Worker Rights and Fast-Track Debate*", (11 January 2002), CRS-4, Figure 1.

⁷⁷ Article 9(1), NAALC, (1993).

⁷⁸ Article 10(1), NAALC, (1993).

⁷⁹ Article 16(3), NAALC, (1993).

⁸⁰ Compa, L., "*Chapter 6 – A Glass Half Full: The NAFTA Labor Agreement and Cross-Border Labor Action*", page 142 in Andreopoulos, G. J. (ed.), "*Concepts and Strategies in International Human Rights Law*", (2002).

⁸¹ Article 21, NAALC, (1993).

⁸² Article 21(1), NAALC, (1993).

principle⁸³ then no further actions are available under the NAALC procedure. However, if the issues relate to a Group Two or Three issue, then the matter can continue on to an Evaluation Committee of Experts (hereinafter “ECE”).

The ECE, consisting of three independent experts, analyses the enforcement and implementation of the domestic labour laws that form the basis of the submission.⁸⁴ The ECE are assisted by the NAOs of the relevant Parties and also the Commission’s Secretariat. The ECE then produce a draft report, which can include practical recommendations on how to resolve the issue,⁸⁵ that the Parties subsequently submit written comments on. The ECE are then obliged to take these written comments into account when producing a final, non-binding report.⁸⁶ If the matter relates to a Group Three issue,⁸⁷ then there are further steps in the NAALC dispute settlement procedure that may be utilised. Following another round of cooperative consultations between the parties, the matter can proceed to an Arbitral Panel if there has been a “persistent pattern of failure” by a Party to implement domestic labour law in a trade related matter.⁸⁸ This Arbitral Panel has the power to impose both monetary fines and, eventually, restriction of trade benefits that are enjoyed under the NAFTA.⁸⁹

The procedure in the NAALC is characterised by a high importance placed upon public communications, which form the first step in the dispute settlement system. Additionally, due to the non-invasive nature of the agreement, the obligations purely relate to non-implementation of existing domestic laws in relation to the eleven labour principles. As has been outlined, the available enforcement procedures within the NAALC differ depending on which labour principles are impacted upon, thus creating a hierarchy amongst labour

⁸³ Containing three of the ILO’s Fundamental Principles and Rights at Work: the freedom of association and the right to organise, the right to collective bargaining, and the implied right to strike. See ILO, *“Declaration on Fundamental Principles and Rights at Work”*, (1998), ILO, Freedom of Association and the Right to Organise Convention (No.87), (1948), and ILO, Right to Organise and Collective Bargaining Convention (No.98), (1949).

⁸⁴ Articles 23 and 24, NAALC, (1993).

⁸⁵ Article 25(1), NAALC, (1993).

⁸⁶ Article 25, NAALC, (1993).

⁸⁷ Child Labour, Occupational Health and Safety, or employment standards relating to minimum wage.

⁸⁸ Article 29, NAALC, (1993).

⁸⁹ Article 39, NAALC, (1993).

principles. The extent to which these enforcement procedures have been utilised shall be fully examined in Chapter 4.

3.3. – United States Free Trade Agreements

Since the adoption of the NAFTA, and the corresponding NAALC side agreement, the U.S. has subsequently entered in to a number of Free Trade Agreements with various other States. All of these agreements, apart from the Free Trade Agreement concluded with Israel,⁹⁰ contain social clauses that intend to uphold respect for fundamental labour rights. Of the eleven agreements containing such provisions, there are both a number of common features and fundamental differences.

3.3.1. – Obligations

With regards to the obligations that are accepted by the Parties to Free Trade Agreements with the U.S. there are common provisions relating to the implementation of domestic laws that protect fundamental labour rights. The obligations relating to implementation prohibit Parties from failing to implement domestic labour laws through sustained action/inaction in a manner that affects trade or investment.⁹¹ However, these provisions also include a caveat that decisions taken to enforce other labour protections, in exercise of discretion or

⁹⁰ U.S.-Israel, Free Trade Agreement, (22 April 1985).

⁹¹ Chapter 15, Article 2(1)(a), U.S.-Australia, Free Trade Agreement, (18 May 2004), (hereinafter "U.S.-Australia, FTA, (2004)"); Chapter 15, Article 2(1)(a), U.S.-Bahrain, Free Trade Agreement, (14 September 2004), (hereinafter "U.S.-Bahrain, FTA, (2004)"); Chapter 16, Article 2(1)(a), U.S.-Dominican Republic-Central America, Free Trade Agreement, (5 August 2004), (hereinafter "U.S.-DR-CA, FTA, (2004)"); Chapter 18, Article 2(1)(a), U.S.-Chile, "Free Trade Agreement", (6 June 2003), (hereinafter "U.S.-Chile, FTA, (2003)"); Chapter 17, Article 3(1)(a), U.S.-Colombia, "Free Trade Agreement", (22 November 2006), (hereinafter "U.S.-Colombia, FTA, (2006)"); Chapter 6, Article 4(a), U.S.-Jordan, "Free-Trade Agreement", (24 October 2000); Chapter 19, Article 3(1)(a), U.S.-Korea, "Free Trade Agreement", (30 June 2007), (hereinafter "U.S.-Korea, FTA, (2007)"); Chapter 16, Article 2(1)(a), U.S.-Morocco, "Free Trade Agreement", (15 June 2004), (hereinafter "U.S.-Morocco, FTA, (2004)"); Chapter 16, Article 2(1)(a), U.S.-Oman, "Free Trade Agreement", (19 January 2006), (hereinafter "U.S.-Oman, FTA, (2006)"); Chapter 16, Article 3(1)(a), U.S.-Panama, "Free Trade Agreement", (28 June 2007), (hereinafter "U.S.-Panama, FTA, (2007)"); Chapter 17, Article 3(1)(a), U.S.-Peru, "Free Trade Agreement", (12 April 2006), (hereinafter "U.S.-Peru, FTA, (2006)"); Chapter 17, Article 2(1)(a), U.S.-Singapore, "Free Trade Agreement", (6 May 2003), (hereinafter "U.S.-Singapore, FTA, (2003)").

relating to the allocation of resources, will not fall foul of this obligation.⁹² Accordingly, in order to rely upon the procedures outlined below the complaining Party must demonstrate that a practice by the respondent State satisfies a number of criteria. In addition to this obligation, the agreements concluded by the U.S. also include common provisions that prohibit Parties from derogating from, or waiving, domestic labour laws in a manner that affects trade or investment and undermines labour rights.⁹³ In effect, this provision prevents against “social dumping”.⁹⁴ However, although the form of these obligations is consistent amongst the agreements, their content differs due to the divergence in definitions of “labour laws” contained within the agreements.

The agreements concluded between the U.S. and Australia, Bahrain, the Dominican Republic and Central America, Chile, Jordan, Morocco, Oman, and Singapore, include a definition of “labour laws” as laws relating to freedom of association and collective bargaining, the prohibition of forced and child labour, and minimum standards of employment.⁹⁵ However, those concluded with Colombia, Korea, Panama, and Peru, also include the abolition of discrimination in employment within this definition.⁹⁶ Further, the latter group of agreements also impose upon the parties the need to adopt domestic labour laws relating to these labour issues⁹⁷; an obligation that is missing from the other agreements. Not only do the agreements contain different obligations relating to different rights, but the mechanisms for implementation of these obligations also differ. The agreements concluded by the U.S. generally contain two different enforcement and implementation systems which shall be set out in turn, after the initial steps, common to both systems, are outlined.

⁹² *Ibid.* – paragraph (b).

⁹³ For example Chapter 18, Article 2(2), U.S.-Australia, FTA, (2004); Chapter 17, Article 2(2), U.S.-Colombia, FTA, (2006); and, Chapter 19, Article 1(2), U.S.-Korea, FTA, (2007).

⁹⁴ See footnote 50.

⁹⁵ “Minimum employment standards” includes issues such as “Occupational Health and Safety and the need to establish and enforce a minimum wage”.

⁹⁶ Chapter 17, Article 2(1), U.S.-Colombia, FTA, (2006); Chapter 19, Article 2(1), U.S.-Korea, FTA, (2007); Chapter 16, Article 2(1), U.S.-Panama, FTA, (2007); and, Chapter 17, Article 2(1), U.S.-Peru, FTA, (2006).

⁹⁷ *Ibid.*

3.3.2. – Enforcement and Implementation procedures

If a Party to any of the U.S. Free Trade Agreements has an issue with regards to compliance by another Party then the initial step is to resolve this through cooperative consultations.⁹⁸ A number of agreements include the need to establish domestic bodies to receive public submissions on implementation issues.⁹⁹ As discussed below,¹⁰⁰ this often results in the initiation of consultations following an examination by this domestic body of the substance of the submission. An emphasis is placed upon the resolution of the issue at the stage. However, in the event that consultation between the parties do not result in resolution of the issue, or alleged non-compliance with obligations, then the complaining Party can refer the issue to a body established by the agreement.¹⁰¹ The body, generally called the “Sub-Committee on Legal Affairs” or the “Labour Affairs Council”, consists of cabinet-level representatives from the Parties’ Governments. Their attempts to resolve the issue of non-compliance can involve mediation and the consultation of outside technical experts and advisors. At this point, if the issue has not been resolved, there are different avenues available for resolution dependent upon the obligations and agreements concerned.

Within the agreements concluded with Colombia, Korea, Panama, and Peru, any issue of non-compliance with obligations relating to labour standards in trade related matters can be referred to the main body mandated with implementation of the agreement.¹⁰² The dispute settlement system that can be utilised in such circumstances is the same that is used in issues that relate to all issues of non-compliance under the entire agreement. This body will then attempt to mutually resolve the situation before the complaining Party has the ability to refer the

⁹⁸ For example, Chapter 18, Article 6(1), U.S.-Australia, FTA, (2004).

⁹⁹ For example, Chapter 18, Article 4, U.S.-Australia, FTA, (2004); Chapter 15, Article 4(2), U.S.-Bahrain, FTA, (2004); Chapter 16, Article 4(3), U.S.-DR-CA, FTA, (2004); and, Chapter 17, Article 5(5), U.S.-Colombia, FTA, (2006).

¹⁰⁰ Chapter 4.2.3-4.2.7.

¹⁰¹ For example, Chapter 18, Article 6(3), U.S.-Australia, FTA, (2004).

¹⁰² Chapter 21, Article 5(2), U.S.-Colombia, FTA, (2006); Chapter 22, Article 8(2), U.S.-Korea, FTA, (2007); Chapter 20, Article 5(2), U.S.-Panama, FTA, (2007); and, Chapter 21, Article 5(2), U.S.-Peru, FTA, (2006).

issue to a Panel.¹⁰³ This Panel normally consists of three members and considers both oral and written submissions of the Parties before producing a report which contains findings of fact, whether there has been non-compliance with obligations under the agreement, and recommendations for resolution if the Parties have requested them.¹⁰⁴ The Parties then enter into negotiations, taking into account the report of the Panel, in order to resolve the issue. If the Parties fail to reach an agreement on how to resolve the non-compliance, or an agreement has been reached but not honoured by the respondent Party, then the Parties enter into a further round of negotiations to determine monetary compensation.¹⁰⁵ If they fail to reach an agreement on this, or an agreement is reached and not honoured, then the complaining Party has the ability to suspend trade benefits to a level equivalent to the effect on trade that the non-compliance has had.¹⁰⁶ This proposed restriction can be challenged by the respondent Party and even substituted for an annual monetary assessment of half the proposed value of the restrictions.¹⁰⁷ There are no limits to the level of these restrictions of trade benefits or annual monetary assessments; they merely have to be proportionate to the damage caused by the non-compliance. These measures are intended to be temporary. Accordingly, the respondent Party has the ability to reconvene the Panel in the event that the non-compliance has been rectified in order to remove such measures.¹⁰⁸

With regards to the systems in other agreements including Australia, Bahrain,

¹⁰³ Chapter 21, Article 6(1), U.S.-Colombia, FTA, (2006); Chapter 22, Article 9(1), U.S.-Korea, FTA, (2007); Chapter 20, Article 6(1), U.S.-Panama, FTA, (2007); and, Chapter 21, Article 6(1), U.S.-Peru, FTA, (2006).

¹⁰⁴ Chapter 21, Article 13, U.S.-Colombia, FTA, (2006); Chapter 22, Article 11, U.S.-Korea, FTA, (2007); Chapter 20, Article 12, U.S.-Panama, FTA, (2007); and, Chapter 21, Article 13, U.S.-Peru, FTA, (2006).

¹⁰⁵ Chapter 21, Article 16(1), U.S.-Colombia, FTA, (2006); Chapter 22, Article 13(1), U.S.-Korea, FTA, (2007); Chapter 20, Article 15(1), U.S.-Panama, FTA, (2007); and, Chapter 21, Article 16(1), U.S.-Peru, FTA, (2006).

¹⁰⁶ Chapter 21, Article 16(2), U.S.-Colombia, FTA, (2006); Chapter 22, Article 13(2), U.S.-Korea, FTA, (2007); Chapter 20, Article 15(2), U.S.-Panama, FTA, (2007); and, Chapter 21, Article 16(2), U.S.-Peru, FTA, (2006).

¹⁰⁷ Chapter 21, Article 16(3) and (6), U.S.-Colombia, FTA, (2006); Chapter 22, Article 13(3) and (5), U.S.-Korea, FTA, (2007); Chapter 20, Article 15(3) and (6), U.S.-Panama, FTA, (2007); and, Chapter 21, Article 16(3) and (6), U.S.-Peru, FTA, (2006).

¹⁰⁸ Chapter 21, Article 17, U.S.-Colombia, FTA, (2006); Chapter 22, Article 14, U.S.-Korea, FTA, (2007); Chapter 20, Article 16, U.S.-Panama, FTA, (2007); and, Chapter 21, Article 17, U.S.-Peru, FTA, (2006).

the Dominican Republic and Central America, Chile, Morocco, Oman, and Singapore enforcement proceedings beyond cabinet-level consultations outlined are only available when a Party has failed to implement domestic labour laws.¹⁰⁹ As mentioned above, this requires a Party to show that there was a continued failure to implement these laws in a manner that affected a fundamental right and related to trade or investment. Additionally, the issue will not be considered as non-compliance if it related to a *bona fide* decision to allocate resources to enforcement of other labour rights or an exercise of discretion. However, if the issue does relate to such non-compliance then the complaining Party has the ability to request a Panel to be convened following another round of cooperative consultations, much in the same manner as above.¹¹⁰ Specific procedures exist if the Panel report adverse findings relating to non-implementation of domestic labour laws.¹¹¹ If the Parties cannot agree on steps to address the non-compliance, or a plan is agreed upon but not respected, the complaining Party may request the Panel to be reconvened in order to impose an annual monetary assessment upon the other Party.¹¹² In determining this amount, a limit of \$15million (U.S.) is imposed and the Panel should take in to account, amongst other factors, the resource constraints of the non-compliant Party.¹¹³ If this annual monetary assessment imposed by the Panel is not paid, only then may the complaining Party take any other necessary steps to collect the assessment whilst bearing in mind the objectives of the agreement.¹¹⁴

With regards to the U.S.-Jordan FTA, the parties exchanged side-letters following conclusion of the agreement that stated a shared understanding that the dispute

¹⁰⁹ For example, Chapter 18, Article 6(4), U.S.-Australia, FTA, (2004); Chapter 18, Article 6(6) and (7), U.S.-Chile, FTA, (2003); and, Chapter 16, Article 6(4) and (5), U.S.-Morocco, FTA, (2004).

¹¹⁰ For example, Chapter 21, Article 7(1), U.S.-Australia, FTA, (2004); Chapter 22, Article 6(1), U.S.-Chile, FTA, (2003); and, Chapter 20, Article 7(1), U.S.-Morocco, FTA, (2004).

¹¹¹ For example, Chapter 21, Article 12, U.S.-Australia, FTA, (2004); Chapter 22, Article 16, U.S.-Chile, FTA, (2003); and, Chapter 20, Article 12, U.S.-Morocco, FTA, (2004).

¹¹² For example, Chapter 21, Article 12(1), U.S.-Australia, FTA, (2004); Chapter 22, Article 16(1), U.S.-Chile, FTA, (2003); and, Chapter 20, Article 12(1), U.S.-Morocco, FTA, (2004).

¹¹³ For example, Chapter 21, Article 12(2), U.S.-Australia, FTA, (2004); Chapter 22, Article 16(2), U.S.-Chile, FTA, (2003); and, Chapter 20, Article 12(2), U.S.-Morocco, FTA, (2004).

¹¹⁴ “bearing in mind the Agreement’s objective of eliminating barriers to bilateral trade and while seeking to avoid unduly affecting parties or interests not party to the dispute.” - Chapter 21, Article 12(6), U.S.-Australia, FTA, (2004); Chapter 22, Article 16(5), U.S.-Chile, FTA, (2003); and, Chapter 20, Article 12(6), U.S.-Morocco, FTA, (2004). These necessary steps could include the restriction of trade benefits.

settlement procedures, and the potential for sanctions, would not be used in relation to issues concerning interpretation or application of the agreement.¹¹⁵

The main difference between these two groups of agreements is the fact that the former allows access to the general dispute settlement system, and the ability to restrict trade benefits, for all issues of non-compliance with labour obligations. In such agreements this means that failure to enact domestic legislation to protect fundamental labour rights, including discrimination, or undertaking “social dumping” can be examined under the full dispute settlement system. However, the latter group of agreements only afford these procedures if the issue relates to non-implementation of domestic labour laws. Additionally, the ability to temporarily restrict trade benefits exists under both systems. In addition to the above implementation procedures, certain agreements set up mechanism for advanced cooperative efforts. All agreements concluded by the U.S. include an aspiration to increase cooperative activities, but some agreements go further in specifying the form that such cooperation should take.

3.3.3. – Cooperation

Certain agreements¹¹⁶ include annexes that establish a specific “Labour Cooperation Mechanism”. The provisions of the agreement firstly set out specific issues that the programmes should focus upon, with the ability to add to this as necessary following consultation with interested parties and the public.¹¹⁷ The programmes unanimously include provisions to promote issues of discrimination in employment, despite some agreements excluding this from their definitions of “labour laws”.¹¹⁸ Additionally, issues such as labour

¹¹⁵ USTR, “Side Letter on Dispute Settlement”, (23 July 2001) available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005665.asp (last accessed 5 May 2015).

¹¹⁶ For example, U.S.-Bahrain, FTA, (2004); U.S.-DR-CA, FTA, (2004); U.S.-Chile, FTA, (2003), U.S.-Colombia, FTA, (2006), U.S.-Korea, FTA, (2007), U.S.-Morocco, FTA, (2004), U.S.-Oman, FTA, (2006), U.S.-Panama, FTA, (2007), U.S.-Peru, FTA, (2006), and U.S.-Singapore, FTA, (2003).

¹¹⁷ For example, Annex 15-A, Article 6, U.S.-Bahrain, FTA, (2004); Annex 16.5, Article 5, U.S.-DR-CA, FTA, (2004); and, Annex 16.6, Article 5, U.S.-Panama, FTA, (2007).

¹¹⁸ For example, Annex 15-A, Article 4(a), U.S.-Bahrain, FTA, (2004); Annex 16.5, Article 3(a), U.S.-DR-CA, FTA, (2004); and, Annex 16.6, Article 3(a), U.S.-Panama, FTA, (2007).

administration and inspection issues,¹¹⁹ employment opportunities,¹²⁰ gender issues,¹²¹ and compliance with labour rights by private enterprises¹²² appear in the provisions of the relevant agreements. The activities that such programmes intend to carry out include exchanges between the Parties of information, experts, and the organisation of seminars and conferences.¹²³ Such cooperative activities are highlighted as providing a serious opportunity to improve labour standards in the Parties' territory.¹²⁴

3.3.4. – United States – Cambodia Textile Agreement

Following an era of civil strife from the 1960s-1980s, the Cambodian Government transformed a number of state-owned textile factories into a booming export industry. Due to Cambodia's late entry into the market, they were not subject to the quota system that had governed the export industry relating to apparel and textiles for the previous 40 years. The Cambodian apparel industry grew from almost no exports in 1994, to an industry worth half a billion U.S. Dollars by 1998.¹²⁵ Whilst this industry grew, individuals in both the U.S. and Cambodia were harbouring growing discontent. The U.S. domestic textile and apparel industry was concerned with the high level of cheap, quota-free imports. Additionally, the Cambodian workforce was concerned with working conditions. Demonstrations and strikes that were carried out in protest were supported by U.S. labour groups that petitioned to U.S. Government to review workers' rights abuses.¹²⁶ These concerns developed the background for negotiations between the U.S. and Cambodia on how best to address all the relevant concerns.

¹¹⁹ Annex 16.6, Article 3(d), U.S.-Panama, FTA, (2007).

¹²⁰ Annex 16.5, Article 3(k), U.S.-DR-CA, FTA, (2004).

¹²¹ Annex 15-A, Article 4(f), U.S.-Bahrain, FTA, (2004).

¹²² Annex 18.5, Article 4(d), U.S.-Chile, FTA, (2003); Annex 17.6, Article 2(p), U.S.-Colombia, FTA, (2006); and, Annex 17.6, Article 2(p), U.S.-Peru, FTA, (2006).

¹²³ For example, Annex 15-A, Article 5, U.S.-Bahrain, FTA, (2004); Annex 16.5, Article 4, U.S.-DR-CA, FTA, (2004); and, Annex 16.6, Article 4, U.S.-Panama, FTA, (2007).

¹²⁴ For example, Annex 15-A, Article 1, U.S.-Bahrain, FTA, (2004); Chapter 16, Article 5(1), U.S.-DR-CA, FTA, (2004); and, Chapter 16, Article 6(1), U.S.-Panama, FTA, (2007).

¹²⁵ International Monetary Fund, “*Cambodia: Selected Issues and Statistical Appendix*”, (March 2003), Country Report No. 03/59, page 9.

¹²⁶ Polaski, S., “*Combining Global and Local Forces: The Case of Labor Rights in Cambodia*”, (2006), World Development, Volume 34:5, page 3.

On 20 January 1999, the parties signed a textile trade agreement for the period of 1999-2001.¹²⁷ The agreement was subsequently prolonged until 2005 when it finally expired. This expiration in 2005 coincided with the ending of the international apparel quota system that was the catalyst for the creation of the U.S.-Cambodia Textile Agreement.¹²⁸ This agreement set quotas for the twelve largest groups of apparel exports. However, such quotas could be increased on an annual basis if the Cambodian Government could increase compliance levels of apparel factories with both “internationally recognized core labor standards”¹²⁹ and domestic workers’ rights.¹³⁰ These positive incentives for compliance with labour rights were an innovative feature of the U.S.-Cambodia Textile Agreement that is not evident in any other U.S. Trade Agreement. The parties also agreed to consultations twice a year on labour standards issues and compliance.¹³¹ Additionally, another innovative feature of the Textile Agreement was the use of the ILO as the body to undertake monitoring of the private sector factories. The Cambodian Government did not have the capacity to properly inspect, and no not-for-profit groups or organisations existed that had the appropriate levels of credibility to undertake monitoring. Despite the fact that the ILO had never previously undertaken on the ground monitoring of private firms, and the debate this provoked within the ILO, the ILO supported the project.¹³² The extent to which this innovative agreement was implemented in practice, and the results of ILO monitoring, shall be fully discussed in Chapter 4.

3.3.5. – Conclusion

The U.S. Trade Agreements discussed above contain a general trend of

¹²⁷ U.S.-Cambodia, “*Bilateral Textile Agreement*”, (20 January 1999), (hereinafter “U.S.-Cambodia, Textile Agreement, (1999)”).

¹²⁸ Polaski, S., “*Harnessing Global Forces to Create Decent Work in Cambodia*”, (2009), International Institute for Labour Studies, page 7.

¹²⁹ Article 10(B), U.S.-Cambodia, Textile Agreement, (1999). The ILO, in subsequent reports, covered issues such as freedom of association, child labour, discrimination, occupational safety and health, and wages and overtime. See ILO, “*Synthesis Reports on the Working Conditions Situation in Cambodia’s Garment Sector*”, (2001-2004), Reports 1-8.

¹³⁰ Article 10(D), U.S.-Cambodia, Textile Agreement, (1999).

¹³¹ Article 10(C), U.S.-Cambodia, Textile Agreement, (1999).

¹³² Polaski, S., “*Combining Global and Local Forces: The Case of Labor Rights in Cambodia*”, (2006), World Development, Volume 34:5, page 4.

conditional trade benefits. In all agreements there exist obligations to not undertake social-dumping or fail to implement existing domestic labour laws. Additionally, agreements with Colombia, South Korea, Peru, and Panama include obligations to adopt domestic law protecting fundamental labour rights which, in contrast with the other U.S. agreements, includes discrimination alongside other rights. Failure to comply with certain obligations can result in restriction of trade benefits, or fines. However, in certain agreements there are further procedures that must be exhausted before recourse to such sanctions is afforded. The Textile Agreement concluded with Cambodia, in a departure from the above mentioned agreements, includes positive incentives to comply with labour standards. Increases in quotas that restrict access to the U.S. market can be applied in the event that Cambodia improves compliance with both international labour rights and domestic labour laws.

The implementation of these agreements, and the extent to which the mechanisms described above have been used, shall be discussed in Chapter 4.

3.4. – European Union Free Trade Agreements

3.4.1. – Introduction

In general, the forms of “social clauses” contained within Free Trade Agreements concluded by the EU are consistent. In certain circumstances the agreements only allow for cooperation and dialogue between the parties on issues relating to fundamental labour rights.¹³³ However, certain other agreements have specific mechanisms to ensure parties fulfil specific obligations relating to these

¹³³ For example. European Community-Chile, Association Agreement, (18 November 2002), (hereinafter “EU-Chile, Association Agreement, (2002)”) and European Community-South Africa, Trade Development and Cooperation Agreement, (11 October 1999), (hereinafter “EU-South Africa, Cooperation Agreement, (1999)”). Additionally, certain agreements also include cooperation and dialogue provisions on sustainable economic and social development. Such agreements do not include specific references to labour issues, but such issues could fall within the scope of such provisions. See, Title III, EU-Palestinian Authority, Interim Association Agreement, (24 February 1997); Title V, EU-Morocco, Association Agreement, (26 February 1996); Title VI, EU-Israel, Association Agreement, (20 November 1995); Title V, EU-Algeria, Association Agreement, (22 April 2002); and Title V, EU-Cameroon, Economic Partnership Agreement, (15 January 2009).

fundamental labour rights.

3.4.2. – Obligations and Implementation Procedures

Certain agreements oblige the parties to fully implement laws that uphold the fundamental labour rights as outlined in the ILO Declaration on Fundamental Principles and Rights at Work, 1998 (hereinafter “ILO 1998 Declaration”).¹³⁴ In addition to this, a common feature of Free Trade Agreements that the EU is party to are provisions that prohibit “social-dumping”.¹³⁵ Such obligations are generally contained in specific chapters that relate to “Trade and Sustainable Development”. In the event that a Party fails to fulfil their obligations that relate to labour issues the agreements generally set up mechanisms to allow Parties to raise concerns. The agreements, excluding those concluded with Chile and South Africa,¹³⁶ highlight inter-Governmental consultations as the primary method for rectifying any issues.¹³⁷ Following this, the agreements generally allow for the issues to be passed on to specific Committee established under the agreement that are mandated to deal with trade and sustainable development issues.¹³⁸ If the issue is not remedied by this point then the Party that initially made the request has the ability to request a panel of three experts, chosen by the signatories, to be convened to consider this issue.¹³⁹ Following a period which affords the panel the opportunity to request information from the parties, interested bodies, and international organisations, a report containing

¹³⁴ For example, Article 269(3), European Union, Colombia, and Peru, Trade Agreement, (June 2012), (hereinafter “EU-Colombia and Peru, Trade Agreement, (2012)”); Article 286(2), EU-Central America, Association Agreement, (29 June 2012), (hereinafter “EU-CA, Association Agreement, (2012)”); and, EU-Georgia, Association Agreement, (16 June 2014), (hereinafter “EU-Georgia, Association Agreement, (2014)”), Article 269(2).

¹³⁵ For example, Article 193, EU-CARIFORUM, Economic Partnership Agreement, (20 October 2008), (hereinafter “EU-CARIFORUM, Economic Partnership Agreement, (2008)”); Chapter 13, Article 7, EU-Korea, Free Trade Agreement, (6 October 2010), (hereinafter “EU-Korea, Free Trade Agreement, (2010)”); and, Article 371(2), EU-Moldova, Association Agreement” (27 June 2014).

¹³⁶ Such agreements only include aspirations relating to cooperation and no obligations relating to implementation, social dumping, or any other issues.

¹³⁷ For example, Article 242(2) and (3), EU-Georgia, Association Agreement, (2014); Article 195(4), EU-CARIFORUM, Economic Partnership Agreement, (2008); and, Chapter 13, Article 14(1), EU-Korea, Free Trade Agreement, (2010).

¹³⁸ For example, Article 242(4), EU-Georgia, Association Agreement, (2014); and, Chapter 13, Article 14(3), EU-Korea, Free Trade Agreement, (2010).

¹³⁹ For example, Article 243(1), EU-Georgia, Association Agreement, (2014); Article 195(5), EU-CARIFORUM, Economic Partnership Agreement, (2008); and, Chapter 13, Article 15(1), EU-Korea, Free Trade Agreement, (2010).

recommendations to ensure compliance is published. The Parties then adopt a mutually agreeable action plan relating to these non-binding recommendations and the Committee then oversees implementation of them.¹⁴⁰ In the majority of the agreements concluded by the EU there are no further enforcement mechanisms available, such as monetary compensation or restriction of trade benefits.¹⁴¹ However, if an issue of implementation is not resolved under the EU-CARIFORUM EPA then recourse to the general dispute settlement system is available.

The EU-CARIFORUM EPA, in a departure from the approach taken in previous agreements, allows the parties to continue with either mediation¹⁴² or arbitration¹⁴³ in the event that Governmental consultations or the expert panel has not resolved the issue.¹⁴⁴ The arbitral panel, which must include labour experts,¹⁴⁵ produces a report on the issue. If this report, and recommendations, are not complied with then the aggrieved Party can take “appropriate measures”. However, the agreement explicitly prohibits the suspension of trade concessions if the issue relates to non-compliance with labour rights obligations. It has been suggested that “appropriate measures” could therefore relate to cooperative activities between the parties¹⁴⁶ due to the need for any “appropriate measures” to have the aim of promoting compliance.¹⁴⁷

3.4.3. – Cooperative Activities and Civil Society Dialogue

Cooperative activities amongst Parties are provided for in a number of

¹⁴⁰ For example, Article 243(8), EU-Georgia, Association Agreement, (2014); Article 195(6), EU-CARIFORUM, Economic Partnership Agreement, (2008); and, Chapter 13, Article 15(2), EU-Korea, Free Trade Agreement, (2010).

¹⁴¹ Recourse to the general dispute settlement procedure is expressly prohibited in the majority of agreements, see Article 242(1), EU-Georgia, Association Agreement, (2014); Article 285(5), EU-Colombia and Peru, Trade Agreement, (2012); and, Article 284(4), EU-CA, Association Agreement, (2012).

¹⁴² Article 205, EU-CARIFORUM, Economic Partnership Agreement, (2008).

¹⁴³ Article 206(1), EU-CARIFORUM, Economic Partnership Agreement, (2008).

¹⁴⁴ Article 204(6), EU-CARIFORUM, Economic Partnership Agreement, (2008).

¹⁴⁵ Article 207(4), EU-CARIFORUM, Economic Partnership Agreement, (2008).

¹⁴⁶ Ebert, F. C. and Posthuma, A., “*Labour provisions in trade arrangements: current trends and perspectives*”, (2011), International Institute for Labour Studies, page 15.

¹⁴⁷ Article 213(2), -CARIFORUM, Economic Partnership Agreement, (2008).

agreements concluded by the EU. As mentioned above, some agreements only provide for such activities.¹⁴⁸ Such cooperative activities are underpinned by recognition that economic development must be accompanied by social progress.¹⁴⁹ The EU-South Africa Agreement also establishes a cooperative council that is charged with overseeing the functioning of the agreement and exchanging information relating to cooperative activities in relation to protection of labour rights.¹⁵⁰ This dialogue on such issues, and the importance of civil society's input, is expressly emphasised within the EU-Korea FTA. This agreement established Domestic Advisory Groups that include representatives from labour, environmental, and business organisations in order to provide information on the implementation of the provisions relating to sustainable development to the Parties.¹⁵¹ These opinions can be used by the Parties as justification to enter into cooperative consultations.¹⁵² The importance of the Domestic Advisory Groups in this process will be fully explored below.¹⁵³

3.4.4. – Conclusion

As can be seen, the mechanisms relating to fundamental labour right obligations place a heavy emphasis on Parties collaborating to achieve compliance, as opposed to compelling this through potential fines. Despite the EU-CARIFORUM EPA including the availability of stronger enforcement proceedings under the general dispute settlement regime, the ability to impose trade sanctions is explicitly prohibited in relation to labour rights issues. This position contrasts with the U.S. agreements discussed above where restriction of trade benefits can be imposed under almost all of the agreements in relation to labour rights issues. The EU-CARIFORUM EPA in design is most comparable with the agreements concluded between the U.S. and Colombia, Korea, Panama, and Peru. This is due

¹⁴⁸ EU-Chile, Association Agreement, (2002), and EU-South Africa, Cooperation Agreement, (1999), see footnote 132.

¹⁴⁹ Article 86, EU-South Africa, Cooperation Agreement, (1999).

¹⁵⁰ Article 97. EU-South Africa, Cooperation Agreement, (1999). “Labour rights” within the agreement include freedom of association, the right to collective bargaining, and the prohibition of forced labour, child labour, and discrimination in the workplace, see Article 86, EU-South Africa, Cooperation Agreement, (1999).

¹⁵¹ Chapter 13, Article 12(4), EU-Korea, Free Trade Agreement, (2010).

¹⁵² Chapter 13, Article 14(1), EU-Korea, Free Trade Agreement, (2010).

¹⁵³ Chapter 4.3.4.

to the fact all issues of non-compliance can proceed to consideration by a Panel as opposed to such procedures being restricted to non-implementation of domestic labour laws as is the case under the other U.S. agreements.

Collaboration between Parties is a theme that runs throughout the entirety of Free Trade Agreements concluded by the EU. A number of agreements specifically allow for cooperation between parties in order to ensure, or bring about, compliance with fundamental labour rights stemming from the ILO 1998 Declaration or general labour rights issues. Additionally, the EU-Korea FTA goes further in establishing bodies to ensure the opinion of civil society is considered and acted upon. The extent to which these mechanisms have been fulfilled and utilised in practice shall be discussed in Chapter 4.

3.5. – Canadian Free Trade Agreements

The following shall be a discussion of the provisions contained within Free Trade Agreements that have been concluded by Canada since the adoption of the NAFTA and NAALC. The provisions of the agreement concluded with Chile are of significant difference to systems contained in other Canadian agreements and are therefore worthy of separate consideration. Following this, the procedures within other Canadian agreements shall be considered.

3.5.1. – Chile

The Canada-Chile Free Trade Agreement, concluded on 6 February 1997, was accompanied by two side agreements on environmental and labour issues. As a result of the desire for Chile to accede to the NAALC the mechanisms within the Canada-Chile Agreement on Labour Cooperation was closely modelled on the NAALC.¹⁵⁴ The agreement obliges the Parties to promote eleven labour principles that are intended to protect workers. Such eleven principles are

¹⁵⁴ “Desiring to facilitate the accession of Chile to the North American Agreement on Labour Cooperation” - Preamble to Canada-Chile, Agreement on Labour Cooperation, (6 February 1997), (hereinafter “Canada-Chile, Labour Agreement, (1997)”).

identical to those contained within the NAALC.¹⁵⁵ With regards to domestic labour law, covering these eleven principles, the Parties are again, in keeping with the non-invasive nature of the NAALC system, only required to implement existing domestic law relating to the relevant labour principles.

The agreement establishes a number of bodies that assist with the administrative and dispute settlement mechanisms contained within the agreement, including the Canada-Chile Commission for Labour Cooperation that consists of a Ministerial Council and National Secretariats located within both Canada and Chile.¹⁵⁶ The Council oversees the implementation of the agreement whilst establishing priorities for the cooperative activities carried out by the Parties relating to a number of labour principles covered by the agreement through seminars, conferences, and research projects.¹⁵⁷ The National Secretariats act as a contact point for each Party to the agreements and are intended to provide publicly available information if requested by the Ministerial Council, the Secretariat of the other Party, or by the Evaluation Committee of Experts; a body involved in the dispute settlement mechanism established by the agreement. The National Secretariats also receive public communications on labour law issues within their territory that have to be dealt with in accordance with domestic legislation and procedures.¹⁵⁸ These Secretariats act in a very similar manner to the NAOs set up under the NAALC.

Any issues under the agreement are initially intended to be dealt with via Ministerial Consultations.¹⁵⁹ If this is not sufficient then the issue is passed on to the Evaluation Committee of Experts if it is trade related¹⁶⁰ and concerns occupational safety and health or another technical labour standard.¹⁶¹ The three

¹⁵⁵ See footnote 74.

¹⁵⁶ Article 8, Canada-Chile, Labour Agreement, (1997).

¹⁵⁷ Articles 10 and 11, Canada-Chile, Labour Agreement, (1997).

¹⁵⁸ Article 14(3), Canada-Chile, Labour Agreement, (1997).

¹⁵⁹ Article 20, Canada-Chile, Labour Agreement, (1997).

¹⁶⁰ Article 21(3), Canada-Chile, Labour Agreement, (1997).

¹⁶¹ Article 21(2), Canada-Chile, Labour Agreement, (1997). “Technical labour standards” defined as laws and regulations directly related to the prohibition of forced labour, labour protections for children and young persons, minimum employment standards, elimination of employment discrimination, equal pay for men and women, prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses, and protection of migrant workers,

independent experts that make up the Committee then consider information from the National Secretariats, public individuals and organisations and other interested interlocutors in order to produce a report on the issue.¹⁶² The Parties to the agreement then provide comments on the report that the Committee are obliged to take into consideration before finalising the report.¹⁶³ Following this, if the issue relates to occupational safety and health, child labour, or minimum wage standards, then a special session of the Ministerial Council can be requested if the Panel report found a persistent pattern of failure to implement the relevant domestic laws to have occurred.¹⁶⁴ An important caveat to this is that a State will not be considered to have failed to apply its labour laws if the action/inaction of the authorities was as a result of a reasonable exercise of discretion or a *bona fide* legitimate allocation of resources to enforcement of other labour laws.¹⁶⁵ If this special Ministerial Council session does not resolve the issue then an Arbitral Panel can be established in order to provide a further report on the issue, again, only if it relates to occupational safety and health, child labour, or minimum wage provisions.¹⁶⁶ The final step of the procedure, in the event that this report and recommendations of the Panel are not enforced, is the ability of the panel to impose an annual monetary assessment of up to \$10 million (U.S.) against a Party that will be used to improve labour law enforcement in the relevant territory.¹⁶⁷

In general, the mechanisms in the Canada-Chile Agreement on Labour Cooperation are very similar to that contained in the NAALC. However, the other agreements concluded by Canada depart from the NAALC model.

3.5.2. – Other Agreements

The six other side agreements relating to labour cooperation concluded by

see Article 44, Canada-Chile, Labour Agreement, (1997).

¹⁶² Articles 22 and 23, Canada-Chile, Labour Agreement, (1997).

¹⁶³Article 23(2), Canada-Chile, Labour Agreement, (1997).

¹⁶⁴ Article 25(1), Canada-Chile, Labour Agreement, (1997).

¹⁶⁵ Article 44, “Definitions”, Canada-Chile, Labour Agreement, (1997).

¹⁶⁶ Article 26(1), Canada-Chile, Labour Agreement, (1997).

¹⁶⁷ Annex 35(1) and (3), Canada-Chile, Labour Agreement, (1997).

Canada are all very similar in design, scope, and the mechanisms included. The most recent free trade agreement concluded by Canada, with Korea, includes a specific chapter on labour issues as opposed to including such provision within a side agreement. The procedure, however, is the same as contained within the side agreements outlined below.

In general, the agreements cover the four fundamental rights contained within the ILO's 1998 Declaration as well as certain rights that are part of the ILO's Decent Work Agenda.¹⁶⁸ These cooperation agreements all establish both Ministerial Councils, which consist of labour ministers from the two parties, and national bodies that act as contact points and receive public communications on labour law issues within the territory of the other Party.¹⁶⁹ Generally, under the agreements the Parties are obliged to ensure that the above rights are protected via domestic legislation, to implement these domestic laws, and to not reduce such protections in order to encourage trade or investment, thus protecting against "social dumping".¹⁷⁰

The procedure for dealing with instances of non-compliance with obligations is consistent throughout the agreements concluded by Canada. Initially, it is the intention that issues will be resolved through Ministerial Consultations.¹⁷¹ If this is not successful, and the issue relates to persistent non-implementation of domestic labour laws, or undertaking "social dumping" that impacts upon any of

¹⁶⁸ For example, Article 1(1), Canada-Jordan, Agreement on Labour Cooperation, (28 June 2009), (hereinafter "Canada-Jordan, Labour Agreement, (2009)"); Article 1(1), Canada-Peru, Agreement on Labour Cooperation, (29 May 2008), (hereinafter "Canada-Peru, Labour Agreement, (2008)"); Chapter 18, Article 2, Canada-Korea, Free Trade Agreement, (11 March 2014), (hereinafter "Canada-Korea, Free Trade Agreement, (2014)").

¹⁶⁹ For example, Articles 7 and 9, Canada-Jordan, Labour Agreement, (2009); Articles 7, 8, and 10, Canada-Peru, Labour Agreement, (2008); and, Chapter 18, Articles 8-10, Canada-Korea, Free Trade Agreement, (2014).

¹⁷⁰ Article 2, Canada-Colombia, Agreement on Labour Cooperation, (21 November 2008), (hereinafter "Canada-Colombia, Labour Agreement, (2008)"); Article 2(1), Canada-Honduras, Agreement on Labour Cooperation, (5 November 2013), (hereinafter "Canada-Honduras, Labour Agreement, (2013)"); and, Article 2, Canada-Panama, Agreement on Labour Cooperation, (14 May 2010), (hereinafter "Canada-Panama, Labour Agreement, (2010)"). Within the Canada-Costa Rica, Agreement on Labour Cooperation, (April 2001), (hereinafter "Canada-Costa Rica, Labour Agreement, (2001)'), the only obligations relate to effective enforcement of domestic labour legislation.

¹⁷¹ For example, Article 11, Canada-Jordan, Labour Agreement, (2009); Article 12, Canada-Peru, Labour Agreement, (2008); Chapter 18, Article 13, Canada-Korea, Free Trade Agreement, (2014).

the fundamental labour rights contained within the ILO's 1998 Declaration, then further procedures are available.¹⁷² However, if the issue falls outwith this scope, or is not trade related, then no further steps can be taken to rectify non-compliance. This contrasts with the NAALC model, and the Canada-Chile Agreement on Labour Cooperation, where procedures are limited to specific labour rights.

The further procedures include the convening of a Review Panel, consisting of three independent experts, to investigate and report upon the issue. Following this initial report, the Parties have the opportunity to provide comments before the publication of final report. If the Review Panel finds that there has been a pattern of failure to apply domestic labour laws, or "social dumping" that impacts upon fundamental labour rights, then the Parties are invited to mutually agree upon an action plan to address this.¹⁷³ If this action plan is not agreed upon, or not implemented following agreement, then a monetary fine can be imposed upon the offending party.¹⁷⁴ In certain circumstances there are limits imposed upon the maximum value of any fine.¹⁷⁵ The money paid by the offending Party is generally used to improve the situation with regards to implementation of labour laws in their territory.¹⁷⁶

In addition to this dispute settlement procedure for non-implementation of

¹⁷² Article 13, Canada-Colombia, Labour Agreement, (2008); Article 13(1), Canada-Honduras, Labour Agreement, (2013); Article 12(1), Canada-Jordan, Labour Agreement, (2009); Article 13(1), Canada-Panama, Labour Agreement, (2010); and, Article 13, Canada-Peru, Labour Agreement, (2008).

¹⁷³ Article 19, Canada-Colombia, Labour Agreement, (2008); Article 14(5), Canada-Honduras, Labour Agreement, (2013); Article 13(6), Canada-Jordan, Labour Agreement, (2009); Article 14(5), Canada-Panama, Labour Agreement, (2010); and, Article 19, Canada-Peru, Labour Agreement, (2008).

¹⁷⁴ The ability to impose monetary fines does not exist under the Canada-Costa Rica, Labour Agreement, (2001). For examples of such provisions see Article 20, Canada-Colombia, Labour Agreement, (2008); Article 14(6), Canada-Honduras, Labour Agreement, (2013); Article 14(6), Canada-Panama, Labour Agreement, (2010); and, Article 20, Canada-Peru, Labour Agreement, (2008).

¹⁷⁵ Annex 4, Article 1, Canada-Colombia, Labour Agreement, (2008); Appendix 3, Article 2(b), Canada-Panama, Labour Agreement, (2010); and, Annex 4, Article 1, Canada-Peru, Labour Agreement, (2008).

¹⁷⁶ Article 20(5), Canada-Colombia, Labour Agreement, (2008); Annex 3, Article 3, Canada-Honduras, Labour Agreement, (2013); Annex 4, Article 3, Canada-Jordan, Labour Agreement, (2009); Appendix 3, Article 3, Canada-Panama, Labour Agreement, (2010); Article 20(5), Canada-Peru, Labour Agreement, (2008); and, Annex 18-E, Article 3, Canada-Korea, Free Trade Agreement, (2014).

domestic law, a number of the agreements also oblige the parties to undertake cooperative activities to improve the situation with regards to respect for labour standards in the respective territories of the Parties.¹⁷⁷ Potential areas for cooperation include effective application of fundamental labour rights, labour administration and inspection systems, gender issues, and any other matters as the Parties agree.¹⁷⁸ Such cooperative activities can encompass exchange of information, specialists, and the organisation of joint seminars and conferences.¹⁷⁹

3.6. – Other Agreements

3.6.1. – Bilateral Agreements

As can be seen in Annex 1 there are a number of bilateral Free Trade Agreements that include labour protections that fall outwith the above country specific categories. In recent years, Chile has concluded a number of trade agreements with developing countries. All of these agreements include promotional, as opposed to conditional, provisions, and only those concluded with Panama and Colombia include recourse to a consultative body in the event of disagreements.¹⁸⁰ Additionally, a group of three trade agreements include labour rights obligations within the text of the agreement.¹⁸¹ The Japan-Philippines and Japan-Switzerland agreements include obligations preventing “social-dumping”

¹⁷⁷ Article 9, Canada-Colombia, Labour Agreement, (2008); Article 9, Canada-Honduras, Labour Agreement, (2013); Article 8, Canada-Jordan, Labour Agreement, (2009); Article 9, Canada-Panama, Labour Agreement, (2010); Article 20(5), Canada-Peru, Labour Agreement, (2008); and, Article 11, Canada-Korea, Free Trade Agreement, (2014).

¹⁷⁸ Annex 1, Canada-Colombia, Labour Agreement, (2008); Annex 1, Canada-Honduras, Labour Agreement, (2013); Annex 1, Canada-Jordan, Labour Agreement, (2009); Appendix 1, Canada-Panama, Labour Agreement, (2010); Annex 1, Canada-Peru, Labour Agreement, (2008); and, Annex 18-A, Article 3, Canada-Korea, Free Trade Agreement, (2014).

¹⁷⁹ Article 9(3), Canada-Colombia, Labour Agreement, (2008); Article 9(2), Canada-Honduras, Labour Agreement, (2013); Article 8(2), Canada-Jordan, Labour Agreement, (2009); Article 9(2), Canada-Panama, Labour Agreement, (2010); Article 9(3), Canada-Peru, Labour Agreement, (2008); and, Annex 18-A, Article 2, Canada-Korea, Free Trade Agreement, (2014).

¹⁸⁰ Chile-Panama, Free Trade Agreement, (27 June 2006) and Chile-Peru, Free Trade Agreement, (22 August 2006).

¹⁸¹ Japan-Philippines, Economic Partnership Agreement, (9 September 2006), (hereinafter “Japan-Philippines, Economic Partnership Agreement, (2006)’); Japan-Switzerland, Free Trade and Economic Partnership Agreement, (19 February 2009), (hereinafter “Japan-Switzerland, Free Trade Agreement, (2009)’); and, Taiwan-Nicaragua, Free Trade Agreement, (16 June 2006), (hereinafter “Taiwan-Nicaragua, Free Trade Agreement, (2006)’).

in order to attract investment,¹⁸² whilst the Chinese Taipei-Nicaragua agreement also includes the need to establish, and implement, minimum labour standards at a domestic level.¹⁸³ All of these agreements afford access to the regular dispute settlement procedures in the event of non-compliance with the above mentioned obligations; this can eventually lead to trade sanctions.¹⁸⁴

3.6.2. – Regional Agreements

Six regional trade agreements incorporate social clauses.¹⁸⁵ Such clauses take a purely promotional form, and so no sanctions can be imposed as a result of failing to meet standards. The three agreements concluded by African States include cooperative activities relating to a number of labour issues, including gender equality and working conditions, but make no reference to any ILO international standards.

Of the three agreements amongst Latin American and Caribbean States, the relevant MERCOSUR and CARICOM Labour Agreements include commitments to meet minimum labour standards relating to rights contained within the ILO 1998 Declaration.¹⁸⁶ However, the specific agreement relating to labour issues under the Andean Community's OSH Agreement only covers Occupational Health and Safety. These agreements also include implementation mechanisms, including technical assistance and cooperation from bodies established under the agreements, as well as monitoring of progress towards achieving certain

¹⁸² Article 103, Japan-Philippines, Economic Partnership Agreement, (2006) and Article 101, Japan-Switzerland, Free Trade Agreement, (2009).

¹⁸³ Chapter 18, Taiwan-Nicaragua, Free Trade Agreement, (2006).

¹⁸⁴ Article 157, Japan-Philippines, Economic Partnership Agreement, (2006); Article 145 Japan-Switzerland, Free Trade Agreement, (2009); and, Chapter 22, Article 16, Taiwan-Nicaragua, Free Trade Agreement, (2006).

¹⁸⁵ Treaty of the Economic Community of West African States (ECOWAS), (1993); Agreement Establishing the Common Market for Eastern and Southern Africa (COMESA), (1994); Treaty for the Establishment of the East African Community (EAC), (2000); Caribbean Community, "Declaration of Labour and Industrial Relations Principles", (1998); Andean Community, "Instrument on Occupational Safety and Health", (1998, amended in 2004); MERCOSUR, "Social-Labour Declaration", (1998).

¹⁸⁶ Agreements only available in Spanish. See overview in Ebert, F. C. and Posthuma, A., "Labour provisions in trade arrangements: current trends and perspectives", (2011), International Institute for Labour Studies, page 19.

standards.¹⁸⁷

3.7. – Conclusion

As can be seen from the discussion above, the general framework for enforcement of obligations relating to labour rights within various agreements have certain similarities and differences. Most systems encourage public communications on issues, followed by cooperative consultations, an independent panel report. The procedures under agreements concluded by the U.S. and Canada can result in the imposition of monetary compensation or restriction of trade benefits. The EU agreements, however, focus on cooperation in order to ensure implementation of the panel report and no hard mechanisms for enforcement exist. However, the one agreement that affords further enforcement proceedings, the EU-CARIFORUM EPA, specifically excludes the imposition of trade restriction for non-compliance with labour rights obligations.

The main differences in the systems relate to the level of protection afforded to specific rights. Within the NAALC, only issues concerning a small group of rights can proceed to the final stage of enforcement. This approach is mirrored in the Canada-Chile Agreement on Labour Cooperation. Under other agreements concluded by the United States, all instances of non-compliance with certain labour obligations can eventually be implemented via a restriction of trade benefits. The agreements concluded by Canada, with the exception of the Canada-Chile Agreement on Labour Cooperation, also afford the ability to restrict trade for failure to implement domestic labour laws or “social-dumping” in relation to all the rights contained within the ILO 1998 Declaration.

One common feature of these agreements and systems is the provisions relating to cooperative activities. Although some agreements specify the issues and activities that should be carried out, all agreements recognise the benefits that increased cooperation can have upon respect for labour standards within the various territories.

¹⁸⁷ *Ibid.*, page 18.

Despite failed attempts to formalise a link between trade and labour at an international level, as discussed above, there has been a multitude of bilateral and multilateral trade agreements concluded that include “social clauses”. At an international level, concern relating to the potentially protectionist results from inclusion of worker rights within the GATT dispute settlement regime, or potentially within the WTO regime, resulted in attempts to do so being rejected. At a bilateral or regional level, protections exist, such as the general need for non-compliance with labour obligations to impact upon trade, before the dispute settlement procedures can be utilised. Additionally, States may feel they have greater control over treatment of such issues under these mutually agreed regimes as opposed to at a potentially unpredictable multilateral, international level where political interference can amend obligations without the consent of all Parties. Under the Free Trade Agreements discussed above there are thorough reporting and investigative procedures before potential trade sanctions can be imposed. These procedures, again, are generally separated from the wider pool of political considerations that may have influenced proceedings at an international level. Also, in contrast to the vague proposals presented to the GATT and WTO, trade sanctions can only be imposed in very limited, and clearly defined, instances under the Free Trade Agreements discussed above.

The above has fully set out the mechanisms that exist for enforcement of labour obligations that exist in various Free Trade Agreements. However, it is important to examine to what extent these mechanisms are in fact utilised and implemented in reality.

Chapter 4 – Implementation of Free Trade Agreements

4.1. – Introduction

The above has fully set out the phenomena of social clauses that protect labour rights within a variety Free Trade Agreements. Whilst these protections, and mechanisms to enforce, may exist within the text of agreements, practical effect can only be given through action by the Parties.

The following shall be a discussion of instances of implementation of the mechanisms for protection of labour rights within the agreements discussed above. In certain cases there have been no steps towards fulfilling the obligations within the agreements or utilisation of the available procedures relating to review of compliance by the parties. This Chapter shall focus on the extent to which procedures under the agreements have been exhausted and shall not enter into consideration of whether this has subsequently lead to practical improvements with regards to the labour rights concerned.

4.2. – United States Free Trade Agreements

4.2.1. – Introduction

The majority of U.S. Free Trade Agreements oblige the parties to establish domestic bodies to consider public communications on issues relating to implementation of labour obligations within the agreement. Submissions under the agreement to the U.S. are received by the Office of Trade and Labour Affairs (hereinafter “OTLA”). As discussed above, following consideration of these submissions, a Party may request cooperative consultation with the other Party. In relation to a number of specific situations, the issue can further proceed to consideration by an independent panel.

The following shall be a discussion of a number of these submissions that have been received by the OTLA and the subsequent steps taken under the procedures

that have been outlined above. Not all of the following case studies have been concluded. However, a discussion of the steps taken thus far have been included to provide a full picture as to the extent to which the labour rights protections within the agreements have been implemented.

4.2.2. – North American Agreement on Labor Cooperation

The NAALC, a side agreement to the NAFTA, was the first multi-lateral trade agreement to include labour rights protection mechanisms. Since the adoption of the agreement in 1993 there have been a number of submissions made that allege failures to comply with obligations under the agreement. In total, 38 submissions have been made to the NAOs situated in the United States, Canada, and Mexico. The content of such submissions shall not be set out in full. However, a consideration of the trends in what rights are the subject of these submissions, and any action taken, shall be undertaken. An overview of the submissions made in relation to the NAALC is included in Annex 3.

As set out above, the NAOs receive communications on labour law matters that arise in the territory of another contracting party.¹⁸⁸ The U.S. NAO has received 22 out of the 38 submissions made under the NAALC, with Canada receiving six, and the Mexican NAO receiving the remaining ten. All of the submissions received by the Mexican NAO have been directed against the U.S., whilst of the 22 received by the U.S. NAO, all but two relate to compliance by Mexico.

Following receipt of these submissions the NAO will either decline the issue for review, or produce a report on the issue. Submissions can be declined or review if further consideration would not further the objectives of the NAALC, or as a result of procedural issues. Following a substantive report, as discussed above, it is common practice for the relevant parties to conclude a “ministerial declaration/agreement” in order to rectify any identified shortcomings. Of the 38 submissions, nine have been declined for review, whilst 22 have been

¹⁸⁸ NAALC, (1993), Article 16(3).

accepted.¹⁸⁹ Three of the remaining reports are currently under consideration, whilst in four cases the submission was withdrawn by the submitters. In examining the content of these submissions, only the 22 submissions that have been accepted for review will be considered.

As set out above, the labour principles within the NAALC are effectively split in to three groups as a result of different implementation mechanisms being available depending on the issues concerned. As discussed above, submissions relating to any issues can be subject to review by the NAO and a ministerial agreement. If the issue relates to a Group Two or Three issue, then the submissions can be examined by the ECE. Only in the event that the issue falls within Group Three, and concerns a persistent pattern of failure to implement domestic labour law, can the submissions proceed to an Arbitral Panel. Of the 22 submissions that have resulted in reports from the receiving NAO, fourteen have resulted in the conclusion of a ministerial agreement. Seventeen of these 22 submissions included Group Two issues and fifteen included Group Three issues. However, none of the eligible submissions have ever moved beyond ministerial consultations to review by the ECE or an Arbitral Panel.

Within the ministerial agreements concluded, the States generally agree to undertake a number of capacity building and awareness raising activities. This can include activities such as workshops, outreach programmes, and international conferences on the issues raised within the original submission.¹⁹⁰ These activities are comparable to the cooperative activities outlined in other U.S.¹⁹¹ and EU¹⁹² trade agreements.

¹⁸⁹ See Annex 3 for an overview of all NAALC Submissions.

¹⁹⁰ Compa, L., “Chapter 6 – A Glass Half Full: The NAFTA Labor Agreement and Cross-Border Labor Action”, pages 144, 151, and 153 in Andreopoulos, G. J. (ed.), “Concepts and Strategies in International Human Rights Law”, (2002). For example, Office of Trade and Labor Affairs, “Ministerial Consultations – Submission 9501 (Sprint Case) Agreement on Implementation”, (13 February 1996), and Office of Trade and Labor Affairs, “Ministerial Consultations – Mexico Submissions 9801, 9802 and 9803”, (18 May 2000).

¹⁹¹ Chapter 3.3.3. above.

¹⁹² Chapter 3.4.3. above.

4.2.3. – DR-CAFTA – Guatemala

The American Federation of Labor and Congress of Industrial Organisations (hereinafter “AFL-CIO”), with the support of six local trade unions,¹⁹³ made a submission to the OTLA on 23 April 2008 that covered labour issues in Guatemala.¹⁹⁴ The submission alleged continued failure to “respect, promote and realize” core workers’ rights contained within the ILO Declaration 1998.¹⁹⁵ The petitioners stated that their cases showed a recurring course of action, or inaction, which impacted upon trade with the U.S. due to the fact that the workers and companies involved exported a number of goods to the United States.¹⁹⁶ The information contained within the submission included issues relating to failure to protect the right to collective bargaining, the unlawful dismissal of trade union members, the blacklisting of union officials and members, and also the failure to protect such individuals from violence.¹⁹⁷ The actions, or inactions, of the Guatemalan authorities violated a number of provisions of the domestic Labour Code, the Constitution, and international agreements protecting workers’ rights. Some issues within the submission had been raised within the ILO. The subsequent recommendations made to Guatemala on order to rectify the deficiencies were largely ignored.¹⁹⁸ The ILO Committee of Experts on the Application of Conventions and Recommendations had also commented on the repeated failure by Guatemala to take action in order to fully implement ILO Conventions.¹⁹⁹ This submission was accepted for review

¹⁹³ The trade unions were STEPQ (Union of Port Quetzal Company Workers), SITRABI (Union of Izabal Banana Workers), SITRAINPROSCA (an enterprise level union in the fruit and vegetable sector), the Coalition of Avandia Workers, SITRAFRIBO (a trade union representing workers in a garment production company), and FESTRAS (Federation of Food and Similar Industries Workers of Guatemala).

¹⁹⁴ AFL-CIO et al., *“Public Submission to the Office of Trade and Labor Affairs (OTLA) under Chapters 16 (Labor) and 20 (Dispute Settlement) of the Dominican Republic – Central America Free Trade Agreement Concerning the Failure of the Government of Guatemala to Effectively Enforce its Labor Laws and Comply with its Commitments Under the ILO Declaration on Fundamental Principles and Rights at Work”*, (23 April 2008), available at <http://www.dol.gov/ilab/reports/pdf/GuatemalaSub.pdf>, (last accessed 24 April 2015), (hereinafter “AFL-CIO, “Guatemala Submission”, (2008)”].

¹⁹⁵ AFL-CIO, “Guatemala Submission”, (2008), page 2.

¹⁹⁶ AFL-CIO, “Guatemala Submission”, (2008), page 3.

¹⁹⁷ See AFL-CIO, “Guatemala Submission”, (2008), pages 2 and 3 for a summary of the submission.

¹⁹⁸ Committee on the Freedom of Association, ILO, “Case No 2540 (Guatemala)”, Report 354, (June 2009).

¹⁹⁹ AFL-CIO, “Guatemala Submission”, (2008), page 22. See also Committee on the Application of

on 12 June 2008 by the OTLA.²⁰⁰

The review process by the OTLA resulted in a public report on 16 January 2009.²⁰¹ This report was completed following two fact-finding missions to Guatemala and the consideration of information received from various parties. The report noted the willingness of the Guatemalan authorities, including President Colom, to cooperate with the U.S. investigation.²⁰² The review of the submission noted the inefficiency of the inspection system, the failure to enforce court orders relating to labour law violations, and issues relating to the investigation of instances of violence against trade union members. Despite making a number of recommendations that should be followed to ensure compliance, the report did not recommend the initiation of cooperative consultations at a ministerial level between the parties.²⁰³ The OTLA felt that the cooperation of Guatemala was sufficient to suggest that the issues would be resolved without recourse to such proceedings. However, the implementation of the recommendations would be reviewed in six months to assess whether the situation had changed.²⁰⁴

As a result of the continued failure to enforce internationally recognised labour rights, the U.S. authorities eventually requested cooperative consultations under the DR-CAFTA on 30 July 2010.²⁰⁵ The request highlighted the recurring failure of authorities to investigate labour law violations and take enforcement action in the event that such violations were established, and the failure to enforce court

Standards, ILO, “*Observation on Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Guatemala*”, (2008), International Labour Conference, 97th session and Committee on the Application of Standards, ILO, “*Observation on Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Guatemala*”, (2007), International Labour Conference, 96th session.

²⁰⁰ Office of Trade and Labor Affairs, Office of the U.S. Trade Representative, “*Public Report of Review of Office of Trade and Labor Affairs, U.S. Submission 2008-01 (Guatemala)*”, (16 January 2009), (hereinafter “OTLA, “Review Report”, (2009)”), Executive Summary, page i.

²⁰¹ OTLA, “*Review Report*”, (2009).

²⁰² OTLA, “*Review Report*”, (2009), Executive Summary, page i.

²⁰³ OTLA, “*Review Report*”, (2009), page 34.

²⁰⁴ *Ibid.*

²⁰⁵ Office of the U.S. Trade Representative, “*Letter to Guatemalan Minister of Economy and Minister of Labor and Social Protection*”, (30 July 2010), available at <https://ustr.gov/sites/default/files/uploads/agreements/morocco/pdfs/073010%20Kirk%20Solis%20Letter%20to%20Guatemala%20about%20Labor%20Rights%20Violations.pdf>, (last accessed 24 April 2015).

order relating to labour law violations. The deterioration, as opposed to improvement, of the situation within Guatemala motivated this decision. Despite these consultations the U.S. authorities still felt that steps taken by Guatemala were “insufficient” and so a meeting of the Free Trade Commission, established under the DR-CAFTA,²⁰⁶ was requested in order to facilitate resolution of the issue through the adoption of an action plan. Such an action plan was not forthcoming and so the U.S. Trade Representative (hereinafter “USTR”) took the unprecedented step of requesting the formation of an arbitral panel.²⁰⁷ The arbitral panel, prior to the start of proceedings, was suspended in order to offer parties the opportunity to adopt a mutually agreed action plan to ensure implementation of workers’ rights in Guatemala.

Contrary to previous attempts, an action plan was adopted by the parties in April 2013.²⁰⁸ The action plan outlined steps that Guatemala were obliged to take in order to resolve the situation. Such steps included the adoption of legislation relating to the sanctioning of employers that violated labour laws, the increasing of powers and funding of the labour inspectorate, and better enforcement of court orders finding violations of labour laws.²⁰⁹ The action plan included a number of obligations that coincided with the recommendations of the OTLA in their report of 2009. Proceedings of the arbitral panel were suspended for a further 12 months, pending review of implementation of the action plan.²¹⁰ Following this review, the USTR found that the Guatemalan authorities had taken some steps towards enforcement of the action plan, but concerns still existed, especially in relation to the failure to develop legislation to sanction employers that violated labour rights.²¹¹ Accordingly, the arbitral panel proceedings were

²⁰⁶ Chapter 20, Article 5(2), DR-CAFTA, see also Office of the U.S. Trade Representative, “*Letter to Guatemalan Minister of Economy*”, (16 May 2011), available at <https://ustr.gov/sites/default/files/Letter%20-%20FTC%20Request%20%28signed%29%20May%202016%202011.pdf>, (last accessed 24 April 2015).

²⁰⁷ Office of the U.S. Trade Representative, “*Press Release – U.S. Trade Representative Ron Kirk Announces Next Step in Labor Rights Enforcement Case against Guatemala*”, (August 2011).

²⁰⁸ U.S. and Guatemala, “*Mutually Agreed Enforcement Action Plan between the Government of the United States and the Government of Guatemala*”, (April 2013), (hereinafter “U.S. and Guatemala, “Action Plan”, (2013)).

²⁰⁹ *Ibid.*

²¹⁰ Articles 18(1) and (2), U.S. and Guatemala, “*Action Plan*”, (2013).

²¹¹ Office of the United States Trade Representative, “*Press Release: United States Proceeds with*

resumed on 18 September 2014. This decision was taken in order to send a “strong message” that the U.S. would “act firmly to ensure effective enforcement of labour laws by ... trading partners”.²¹² Reaction to this decision was generally positive. The AFL-CIO, the original submitters, heralded the decision as a step towards improving the working conditions of Guatemalan workers and achieving justice on behalf of them. Concurrently, members of the U.S. Congress, and Thomas Perez, the U.S. Secretary of Labour, emphasised the fact that pursuing litigation would help level the playing field between American and Guatemalan workers and prevent the former being disadvantaged.²¹³ Currently, the proceedings have resulted in written submissions from both parties and receipt of submissions from interested third parties.²¹⁴

4.2.4. – DR-CAFTA – Dominican Republic

A petition, submitted by Father Christopher Hartley,²¹⁵ was accepted for review by the OTLA on 22 February 2012.²¹⁶ The petition concerned failure to implement domestic labour laws within the sugar industry relating to forced and child labour, protection from hazardous working conditions, and retaliatory dismissal of workers for attempts to organise in trade unions. The petition included a number of references to the U.S. Department of State’s Human Rights Report for 2010 and audits of the Better Sugar Cane Initiative relating to Dominican sugar companies.²¹⁷

Labor Enforcement Case Against Guatemala, (18 September 2014), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/September/United-States-Proceeds-with-Labor-Enforcement-Case-Against-Guatemala>, (last accessed 24 April 2015), (hereinafter “USTR, “Continuation of Arbitral Panel”, (2014)”).

²¹² USTR, “Continuation of Arbitral Panel”, (2014).

²¹³ *Ibid.*

²¹⁴ See Office of the United States Trade Representative, “In the Matter of Guatemala – Issues Relating to Obligations under Article 16.2.1(a) of the CAFTA-DR”, available at <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr>, (last accessed 24 April 2015).

²¹⁵ Father Christopher Hartley, “Formal Public Submissions”, (22 December 2011), available at <http://www.dol.gov/ilab/reports/pdf/DRSubmission2011.pdf>, (last accessed 28 April 2015), (hereinafter “Hartley, “DR Submission”, (2011)”).

²¹⁶ U.S. Department of Labour, “Dominican Republic-Central America-United States Free Trade Agreement; Notice of Determination Regarding Review of Submissions #2011-03”, (15 March 2012), Federal Register, Vol. 77, No. 51, page 15397.

²¹⁷ Hartley, “DR Submission”, (2011), pages 2 and 3.

The OTLA published a public report on the petition on 27 September 2013.²¹⁸ Having considered evidence provided by the Government and the submitters, alongside public submissions, the review concluded that despite the Dominican Republic's strong legal framework for protecting labour rights, there was evidence to suggest violations of a number of internationally recognised workers' rights.²¹⁹ Concerns were raised as to the implementation of laws relating to forced labour, occupational safety and health, provision of a minimum wage, and the prohibition of child labour. Underpinning instances of violations was a defective domestic investigation procedure.²²⁰ The OTLA received evidence of fourteen inspections carried out by authorities within the sugar industry during the monitoring period. Review of the inspection reports showed shortcomings as a result of language barriers that were not addressed, failure to interview a sufficient number of workers, and the interviewing of such workers being carried out in the presence of their supervisors.²²¹ Additionally, the initial inspections were only followed-up in one instance and there was no reaction from authorities in situations where labour rights violations had been highlighted. The OTLA concluded their report with eleven recommendations to be implemented in order to cure the shortcomings that had been identified.²²² Whilst strengthening the enforcement of domestic law in relation to the minimum wage, occupational health and safety, and the prohibition of forced and child labour was included in the recommendations, the improvement of the inspectorate was also heavily recommended. The review did not recommend consultations under the DR-CAFTA but the OTLA would continue to engage with the Government and review implementation of the recommendations at six monthly intervals.²²³

The first review, published on 4 April 2014, noted the fact that steps had been

²¹⁸ Office of Trade and Labor Affairs, "Public Report of Review of U.S. Submissions 2011-03 (Dominican Republic)", (27 September 2013), (hereinafter "OTLA, "Review Report - DR", (2013)").

²¹⁹ OTLA, "Review Report - DR", (2013), page 31.

²²⁰ OTLA, "Review Report - DR", (2013), page 32.

²²¹ OTLA, "Review Report - DR", (2013), page 24.

²²² OTLA, "Review Report - DR", (2013), pages 32-34.

²²³ OTLA, "Review Report - DR", (2013), page 34.

taken towards implementation of some of the OTLA recommendations.²²⁴ The Government had stated their intention to raise awareness amongst the inspectorate of the Ministry of Labour's inspection protocols, but many other recommendations had been regrettably ignored. This lack of concrete steps taken towards practical implementation of the recommendations was mirrored in the subsequent review reports of October 2014²²⁵ and April 2015.²²⁶ Additionally, the \$10 million (U.S.) project initiated by the U.S. Government in order to address a number of the issues highlighted in the OTLA review²²⁷ was discontinued due to a lack of support from the Dominican Government.²²⁸ The latest statement from the OTLA included a continuation of the monitoring of the situation whilst a consideration of appropriate further actions was undertaken. Under the DR-CAFTA there is the possibility to engage the dispute settlement system for issues regarding continued non-implementation of domestic labour laws if the matter impacts trade between the parties,²²⁹ but only once the cooperative consultations and other specific mechanisms within the labour chapter have been exhausted.²³⁰

4.2.5. – DR-CAFTA – Honduras

The OTLA, on 26 March 2012, received a petition from the AFL-CIO relating to

²²⁴ Office of Trade and Labor Affairs, "Six-Month Review of Implementation of Recommendations in the U.S. Department of Labor's Public Report of Review of Submission 2011-03 (Dominican Republic)", (4 April 2014), available at <http://www.dol.gov/ilab/reports/pdf/Six%20month%20assessment.pdf>, (last accessed 28 April 2015).

²²⁵ Office of Trade and Labor Affairs, "Twelve-Month Review of Implementation of Recommendations in the U.S. Department of Labor's Public Report of Review of Submission 2011-03 (Dominican Republic)", (16 October 2014), available at <http://www.dol.gov/ilab/reports/pdf/20141017-DomRepub12MonthStatement.pdf>, (last accessed 28 April 2015), (hereinafter, "OTLA, "12 Month Review – DR", (2014)").

²²⁶ Office of Trade and Labor Affairs, "Eighteen-Month Review of Implementation of Recommendations in the U.S. Department of Labor's Public Report of Review of Submission 2011-03 (Dominican Republic)", (22 April 2015), (last accessed 28 April 2015).

²²⁷ U.S. Department of Labor, "News Release: US Labor Department issues report on labor concerns in Dominican sugar sector, announces \$10 million project on agriculture", (27 September 2013), available at <http://www.dol.gov/opa/media/press/ilab/ILAB20131979.htm>, (last accessed 28 April 2015).

²²⁸ OTLA, "12 Month Review – DR", (2014).

²²⁹ Chapter 16, Article 6(7), U.S.-DR-CA FTA, (2004).

²³⁰ Chapter 16, Article 6(8), U.S.-DR-CA FTA, (2004).

labour law issues in Honduras.²³¹ The petition, filed in coordination with 26 Honduran union and civil society organisations, alleged a number of failures by the authorities to effectively enforce domestic labour laws. The petition highlighted examples from seventeen worksite areas in support of their proposition across a number of export related sectors, including manufacturing, ports, and agriculture.²³² The failure to implement domestic related to a number of internationally recognised workers' rights.

In June 2009 a coup d'état ousted the democratically elected President. The resultant caretaker regime undertook a number of anti-union measures including the killing, beating and detention of trade union leaders and activists for their part in the resistance. During the Presidency of Porfirio Lobo, from 27 January 2010 onwards, little respect was attached to the rule of law which cultivated a climate of impunity. Intimidation towards those exercising their labour rights was a common occurrence. The petition highlighted a number of such instances, including the violent police repression of striking teachers that lead to injuries and fatalities.²³³

In review of this petition, the OTLA found evidence of violations of labour rights in almost all cases identified by the petition. There were serious concerns regarding the protection of a number of internationally recognised labour rights including the freedom of association, child labour, and forced labour.²³⁴ In addition to this, the review, based upon detailed research carried out, found cross-cutting issues with the adequacy and competence of the inspectorate.²³⁵ The inspectorate had a poor response rate following receipt of notice of labour violations and in the event that inspections were called for, access to worksites

²³¹ AFL-CIO, "Public Submission to the Office of Trade and Labor Affairs (OTLA) under Chapters 16 (Labor) and 20 (Dispute Settlement) of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) Concerning the Failure of the Government of Honduras to Effectively Enforce Its Labor Laws and Comply with Its Commitments under the ILO Declaration on Fundamental Principles and Rights at Work", (26 March 2012), (hereinafter "AFL-CIO, "Submission - Honduras", (2012)").

²³² AFL-CIO, "Submission - Honduras", (2012), page 1.

²³³ *Ibid.*

²³⁴ Office of Trade and Labor Affairs, "Public Report of Review of U.S. Submissions 2012-01 (Honduras)", (27 February 2015), (hereinafter "OTLA, "Review Report - Honduras", (2015)").

²³⁵ OTLA, "Review Report - Honduras", (2015), page 87.

was often refused and this only lead to sanctions in one out of 33 instances. Additionally, in the event that labour violations were uncovered, sanctions were not imposed in 90% of the cases involving minimum wages violations. Despite the generally negative findings of the report, the willingness of Honduras to engage with U.S. authorities was commended. Further to this, the launching of an open dialogue between the Government and NGOs and unions was heralded as a step forward, but it had not resulted in any measurable systematic improvement in relation to the concerns identified.²³⁶

As a result of the serious failings in the implementation of domestic labour laws the OTLA issued seven core recommendations to the Government of Honduras.²³⁷ This included a number aimed at the improvement of the inspectorate and their ability to access worksites, investigate, and sanction employers that had violated the relevant labour laws. Recommendations were also aimed at improving the enforcement of domestic laws protecting the freedom of association, collective bargaining, and the prohibition of child labour. The OTLA also recommended the instigation of cooperative consultation between the contact points and a meeting of the Labour Affairs Council established under the DR-CAFTA.²³⁸ The OTLA set out their intention to continue to engage with the willing Honduran Government in order to fully implement these recommendations. Following the publication of the report a joint statement was made by U.S. and Honduran authorities that reinforced their pledge to work together to implement the findings.²³⁹ A \$7 million (U.S.) cooperative agreement was made to combat child labour and other labour rights issues within Honduras by focussing on building the capacity of the Honduran Government to identify and remediate any violations of domestic labour laws.

²³⁶ OTLA, "Review Report – Honduras", (2015), page 86.

²³⁷ OTLA, "Review Report – Honduras", (2015), page 88-91.

²³⁸ OTLA, "Review Report – Honduras", (2015), page 88. Established under Chapter 16, Article 4(1) and (3), U.S.-DR-CA FTA, (2004).

²³⁹ U.S. Department of Labor and Honduran Secretariat of Labor and Social Security, "Joint Statement regarding the Public Report of Review on U.S. Submission 2012-01 (Honduras)", (27 February 2015), available at http://www.dol.gov/ilab/media/pdf/FINAL_joint_statement_Honduras.pdf, (last accessed 28 April 2015).

The report also included a review mechanism. Within twelve months of the publication the steps taken by Honduras to implement the recommendations would be undertaken in order to assess whether further consultations available under the DR-CAFTA should be utilised.²⁴⁰

4.2.6. – Bahrain

In February 2011, following continued discontent within civil society as to the lack of decent work, basic social services, and adequate housing, a peaceful mass pro-democracy protest took place in Bahrain. Over the following days the protest grew to include thousands of individuals. In response to this, the riot police engaged protesters on 17 February 2011 and, as a result, hundreds of individuals were injured and many were killed following the use of tear gas, batons, and live ammunition. Despite this, the unrest continued. On 14 March, troops from Saudi Arabia and the United Arab Emirates arrived in Bahrain to help quell the unrest after being sent by the Gulf Cooperative Council. The following day, the King of Bahrain declared a state of emergency. The state of emergency resulted in severe restrictions being placed upon the freedom of assembly and expression and the prohibition of the continued operation of NGOs, political societies, and unions. As a result of this declaration, the General Federation of Bahraini Trade Unions (hereinafter “GFBTU”) called a strike that lasted until 22 March.

The above issues, and their subsequent impact on internationally recognised labour rights, were highlighted in a public petition of the AFL-CIO sent to the OTLA on 21 April 2011.²⁴¹ The petition alleged that Bahrain had failed to comply with labour rights obligations within the US-Bahrain Free Trade Agreement. The Government had taken a number of actions that resulted in such lack of compliance, including the arbitrary detention of activists and the suspension of

²⁴⁰ Such as cooperative consultations between contact points, a meeting of the Labor Affairs Council, or recourse to the general dispute settlement regime – see Chapter 16, Article 6, U.S.-DR-CA FTA, (2004).

²⁴¹ AFL-CIO, “*Public Submission to the Office of Trade and Labor Affairs under Chapter 15 of the US-Bahrain Free Trade Agreement Concerning the Failure of the Government of Bahrain to Comply with Its Commitments under Article 15.1 of the US-Bahrain Free Trade Agreement*”, (21 April 2011), (hereinafter, “AFL-CIO, “*Submission – Bahrain*”, (2011)”).

the Bahrain Medical Society Board due to their continued treatment of protesters. Additionally, many trade union leaders and members had been dismissed, or prosecuted, as a result of their involvement with the strikes that followed the protests.²⁴² The ILO had previously raised concerns with such actions taken against union members,²⁴³ especially in light of their ability to strike for reasons other than internal disputes.²⁴⁴ The petition stated that the freedom of association could not be properly exercised within the climate of fear created by the Government of Bahrain.

The petition was accepted for review on 10 June 2011. The OTLA undertook a thorough investigation and produced a report on 20 December 2012 that concluded that the labour rights environment within Bahrain had deteriorated since the unrest.²⁴⁵ Bahrain, by failing to remedy shortcoming in the legal framework that was relied upon by employers to dismiss union members following the strikes, had failed to comply with obligations under Article 15(1) of the U.S.-Bahrain Free Trade Agreement. Despite the creation of a tripartite committee charged with overseeing the reinstatement of dismissed workers, involving the Minister of Labour, the Chamber of Commerce, and the GFBTU, this was still insufficient to address certain concerns.²⁴⁶ The OTLA recommended a number of concrete steps to be taken to address the inconsistencies, including explicit prohibition on discrimination in employment on the basis of religion or political persuasion, amendment of criminal sanctions on those involved in the strikes, and the initiation of investigations into allegation of intimidation and harassment of union members by employers.²⁴⁷ Additionally, the OTLA recommended that cooperative consultations be requested by the U.S. in order to properly resolve the issues.²⁴⁸

²⁴² AFL-CIO, “*Submission – Bahrain*”, (2011), page 5.

²⁴³ ILO, “*Statement: ILO Director-General sounds alarm on situation of workers in Bahrain*”, (5 April 2011).

²⁴⁴ ILO, “*Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*”, 5th Edition, (2006), § 526.

²⁴⁵ Office of Trade and Labor Affairs, “*Public Report of Review of U.S. Submissions 2011-01 (Bahrain)*”, (20 December 2012), (hereinafter “OTLA, “*Review Report – Bahrain*”, (2012)”), Executive Summary, page i.

²⁴⁶ OTLA, “*Review Report – Bahrain*”, (2012), pages 38 and 39.

²⁴⁷ OTLA, “*Review Report – Bahrain*”, (2012), pages 40 and 41.

²⁴⁸ OTLA, “*Review Report – Bahrain*”, (2012), page 40.

The recommendations of the OTLA, in relation to request for cooperative consultations, were followed and a formal request for such consultations was made on 6 May 2013.²⁴⁹ The request highlighted the fact that Bahrain had failed to meet the obligation to ensure that the freedom of association and the elimination of discrimination were recognised and protected by domestic law,²⁵⁰ and the need to ensure domestic protections were improving in line with international standards.²⁵¹ Bahrain had failed to address shortcomings in law relating to the protection of freedom of association and discriminatory practices against Shia employees. The request, however, pointed out that no issues regarding obligations that could give recourse to the full dispute settlement proceedings had occurred.²⁵² This decision to request cooperative consultations was motivated by a “sincere hope ... that consultations will produce a concrete plan of action, based on recommendations in the Labor Department’s report, which will strengthen labor protections in Bahrain and help prevent future violations of workers’ rights”.²⁵³ In June 2013 the consultations began and a subsequent round has also occurred. As of February 2015 the consultations have not concluded and the U.S. are still continuing support in Bahrain’s efforts to tackle freedom of association and discrimination shortcomings in their domestic law.²⁵⁴

²⁴⁹ United States Trade Representative and Secretary of Labor, “*Letter to Minister of Industry and Commerce and Minister of Labour*”, (6 May 2013), available at <http://www.dol.gov/ilab/reports/pdf/20130506BahrainLetter.pdf>, (last accessed 28 April 2015), (hereinafter “USTR, “*Request for Consultations – Bahrain*”, (2013)”).

²⁵⁰ Chapter 15, Article 1(1), U.S.-Bahrain, FTA, (2004).

²⁵¹ Chapter 15, Article 1(2), U.S.-Bahrain, FTA, (2004).

²⁵² USTR, “*Request for Consultations – Bahrain*”, (2013). As noted above, recourse to the full dispute settlement proceedings is only available under the U.S.-Bahrain, FTA, (2004) if the issue relates to continued non-implementation of domestic labour laws. See footnote 108 and also Chapter 15, Article 6(5), U.S.-Bahrain, FTA, (2004). In this situation the non-compliance concerned Chapter 15, Article 1, U.S.-Bahrain, FTA, (2004) which requires domestic law to protect certain labour rights.

²⁵³ U.S. Department of Labor, “*News Release: United States seeks to protect worker rights under US-Bahrain trade agreement*”, (7 May 2013), available at <http://www.dol.gov/opa/media/press/ilab/ILAB20130865.htm>, (last accessed 28 April 2015).

²⁵⁴ U.S. Department of Labor, “*Standing Up for Workers: Promoting Labor Rights through Trade*”, (February 2015), page 16.

4.2.7. – Peru

On 30 December 2010, the Peruvian National Union of Tax Administration Workers (SINAUT) submitted a petition alleging that their employer, an executive branch of the Government, had failed to comply with labour laws relating to the right to collective bargaining.²⁵⁵ Failure to comply with such domestic labour laws was allegedly in violation of the labour rights provisions within the US-Peru Trade Promotion Agreement. In order to establish a violation of this obligation there is, as discussed above,²⁵⁶ a need to demonstrate that the failure affected trade between the Parties.²⁵⁷

The petition was accepted for review on 19 July 2011.²⁵⁸ Following engagement with both the submitters and the Government of Peru, the OTLA found that no further action was required and no subsequent recommendations relating to steps to be taken or cooperative consultations were made.²⁵⁹ The Peruvian Minister of Labour and Promotion of Employment had fulfilled the duties imposed by domestic collective bargaining laws. Additionally, although the employer had failed to comply with certain deadlines contained within the collective bargaining laws, certain legal ambiguities prevented a finding that there had been a failure to comply, or effectively enforce, the relevant domestic laws. The issue of whether the matter concerned related to trade between the Parties was not raised in substance in either the original petition, or the OTLA review report. The review report noted the willingness of Peruvian authorities to cooperate and discuss in a productive manner with U.S. authorities. Additionally, since the filing of the petition the Government had taken a number of steps to clarify the existing legal ambiguities and further facilitate the collective

²⁵⁵ National Union of SUNAT Workers (SINAUT), “*Complaint for non-compliance by the National Supreintendency of Tax Administration (SUNAT) in the collective bargaining for the 2008-2009 term*”, (29 December 2010).

²⁵⁶ See footnote 90.

²⁵⁷ Chapter 17, Article 2, U.S.-Peru, FTA, (2006).

²⁵⁸ U.S. Department of Labour, “*United States-Peru Trade Promotion Agreement Notice of Determination Regarding Review of Submission #2010-03*”, (26 July 2011), Federal Register, Vol. 76, No. 143, page 44609.

²⁵⁹ Office of Trade and Labor Affairs, “*Public Report of Review of U.S. Submissions 2010-03 (Peru)*”, (30 August 2012), (hereinafter “OTLA, “*Review Report – Peru*”, (2012)”), pages 18 and 19.

bargaining rights of workers.²⁶⁰

4.2.8. – United States – Cambodia Textile Agreement

This agreement, as noted above, provided increased quotas for apparel and textile exports from Cambodia to the U.S. in the event that compliance with internationally recognised workers' rights and domestic labour laws were also increasing. In order to add legitimacy to the project, the ILO undertook monitoring of privately run factories operating in the industry. The initial operation of the Textile Agreement, and the results of the subsequent monitoring reports, shall be examined in order to broadly assess the extent to which the agreement has been fully implemented.

An initial shortcoming in the monitoring process conducted by the ILO was the fact that participation by factories was voluntary. This resulted in an incentive for firms to stay out of the monitoring process: the burden of improving labour rights compliance could fall on other firms, whilst the firms that did not volunteer could continue to benefit from increased quotas. This "free-rider" problem was recognised by the Cambodian Government and addressed by a regulation that only allowed firms that were participating in the monitoring process to benefit from the increased quotas.²⁶¹ Once the programme was properly established, it created a unique system of corporate self-regulation. Exporting factories had incentives to increase compliance with labour laws, due to the potential for increased quotas, and also negative pressure from other factories not to drop standards and risk quotas for the entire sector. Additionally, U.S. importing companies, who were concerned about how tacit support of poor working conditions could damage their reputation, were now able to choose their suppliers based on transparent, independent, and reliable monitoring reports from the ILO. The successful monitoring scheme overseen by the ILO continued beyond the end of the agreement²⁶² and has been the catalyst for the

²⁶⁰ OTLA, "Review Report – Peru", (2012), page 19.

²⁶¹ International Monetary Fund, "Cambodia: Selected Issues and Statistical Appendix", (March 2003), Country Report No. 03/59, page 13.

²⁶² See Better Factories Cambodia website, available at <http://betterfactories.org/>, (last accessed

ILO and International Finance Corporation's "Better Work" programme that been established in other countries within the region.²⁶³

Reports from the ILO included an initial first round of monitoring where shortcomings were identified. Following this, the factories were given a period of time to implement ILO recommendations in order to improve compliance before a second inspection. In the report following this second inspection, the factories, whether compliant or not, were mentioned by name. In general, the reports showed an improvement in compliance by the factories. These improvements resulted in increased quotas for the industry.²⁶⁴ However, the agreement did not only bring about practical improvement in the situation at factory level. Institutional changes, as a result of the dialogue between the parties and the ILO, were also positive results stemming from the agreement. The creation of a National Arbitration Council, that aimed to resolve workplace disputes without the need for strikes, was brought about as a result of the cooperative discussions mandated by the agreement. This Council has improved the dispute settlement system in Cambodia for workers, and promoted the rule of law.

As can be seen, the innovative U.S.-Cambodia Textile Agreement was successful in both improving compliance with labour rights in private factories and the general system for labour rights protections within Cambodia. The ILO monitoring was of significant importance in developing a system that could be relied upon by parties, and private U.S. importers, in order to ensure the effectiveness of the regime. The continuation of the monitoring programme by the ILO, and the subsequent "Better Work" campaign pursued in the region, shows that benefits of the agreement have extended beyond its expiration.

18 May 2015).

²⁶³ For more information see ILO, "Better Work", available at <http://www.ilo.org/washington/areas/better-work/lang--en/index.htm>, (last accessed 18 May 2015).

²⁶⁴ Increases of 9% in 2000 and 2001. Following extension of the Agreement from 2002-2004, increases of 9%, 12%, and 18% awarded during these years respectively. See Polaski, S., "*Combining Global and Local Forces: The Case of Labor Rights in Cambodia*", (2006), World Development, Volume 34:5, page 4.

4.2.9. – Conclusion

As can be seen from the above, the number of submissions made differs amongst the various U.S. agreements. Under the NAALC, a large number of submissions have been made. Of the submissions that have been reported upon, a number have resulted in ministerial agreements that include cooperative activities to be carried out in order to ensure further compliance. However, a striking feature in relation to the NAALC system is that no submission has resulted in the establishment of an ECE or an Arbitral Panel.

In relation to the other U.S. Free Trade Agreements, a number of submissions have been accepted and reported upon by the OTLA. This has resulted in concrete recommendations to improve the labour rights situation in a number of instances. The implementation of these recommendations by the other party, which should lead to full compliance with labour rights obligations, is monitored by the OTLA and in certain cases of non-compliance this has resulted in suggestions for cooperative consultations. Most importantly, in relation to the situation involving Guatemala under the DR-CAFTA, the U.S. have taken the unprecedented step of establishing an Arbitral Panel to consider the issue. This could eventually lead to the imposition of an annual monetary assessment of up to \$15 million (U.S.). The proceedings under the Arbitral Panel have, however, not yet concluded.

4.3. – European Union Free Trade Agreements

4.3.1. – Introduction

As discussed above, the EU Free Trade Agreements contain similar mechanisms for implementation of labour rights obligations. However, no substantive issues have been raised as a part of these procedures. Despite this, in certain instances, the establishment of implementation and advisory bodies as required under the various agreements has resulted in information pertaining to implementation of the agreements at a more general level. Additionally, monitoring reports

produced by the EU provide further information on the state of implementation of a number of agreements containing labour rights protections.

The following shall set out information obtained in relation to the EU agreements with CARIFORUM States, Colombia and Peru, and South Korea. With regards to the EU-Central America Association Agreement, the Civil Society Dialogue Forum and the Board on Trade and Sustainable Development, established under the agreement, have met.²⁶⁵ However, neither the Board, nor the civil society advisory group, have published any substantive information on implementation of the agreement with regards to labour rights obligations contained within the agreement. The agreements concluded with Georgia and Moldova have produced no relevant information regarding implementation.

4.3.2. – CARIFORUM

Since the signing of the Economic Partnership Agreements between the EU and CARIFORUM states (hereinafter “EPA”) in October 2008, both parties have been working closely on implementation of the agreement. In general, this implementation has taken three forms: support of the CARIFORUM Governments and organisations; the holding of both regions to account for obligations under the agreements; and, helping Caribbean businesses to understand and utilise the agreement.²⁶⁶ With regard to this first form, the EU adopted a €47million project from 2012-2015 in order to assist Governments and businesses in the Caribbean region.²⁶⁷ The project aimed to assist Governments with modernising their tax raising methods, assist businesses in complying with EU health and safety, and environmental, standards, whilst also promoting the diversification of economies through growth in service industries. The EU also set out the specific bodies that would be provided with money as a part of this project. Money would be

²⁶⁵ European Commission, European Union, “*Press Release: First civil society organisations meeting related to the EU-Central America Association Agreement*”, (10 November 2014), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1189>, (last accessed 9 May 2015).

²⁶⁶ European Commission, European Union, “*The CARIFORUM-EU Economic Partnership Agreement (EPA): A new partnership for trade and development. Factsheet: How the EU is putting the EPA into practice*”, (April 2012), (hereinafter “EU, “CARIFORUM Factsheet”, (2012)”).

²⁶⁷ EU, “*CARIFORUM Factsheet*”, (2012), page 5.

provided to, *inter alia*, the Caribbean Development Bank and the International Monetary Fund who both support sustainable development projects.²⁶⁸ No money was being directly provided to organisations concerned with protection of labour rights or involved in the implementation of labour obligations under the agreement. The monitoring bodies under the agreement, intended to hold parties to account for the obligations they had undertaken, have generally been established and held their first meeting.²⁶⁹ However, one Committee established under the agreement had not yet been formed; the Consultative Committee. This Committee is comprised of business and civil society representatives as well as members of the EU Economic and Social Committee. It was intended for this Committee to hold its first meeting at some point in 2012.²⁷⁰

Under the EPA, there was an obligation to undertake monitoring of the implementation of the agreement.²⁷¹ It was decided that an initial report on implementation should be carried out within five years, and at five yearly intervals following this. The first implementation report, from September 2014, noted difficulties in assessing compliance with obligations relating to internationally recognised labour rights.²⁷² On a very broad level, the Report noted that compliance could be measured by the existence of laws that address rights contained within the relevant EPA provisions and agencies with adequate resources to ensure compliance with such laws.²⁷³ The ratification record of CARIFORUM states, with regards to the eight ILO Fundamental Conventions, is generally positive. Only one State, St. Lucia, has not ratified all eight. The Report concluded that despite there being no comprehensive survey on the level of protections within CARIFORUM states, the level of social protections within such states outstripped those in other developing countries.²⁷⁴ In relation to the obligations to not reduce levels of protection in order to attract foreign

²⁶⁸ EU, “CARIFORUM Factsheet”, (2012), page 6.

²⁶⁹ EU, “CARIFORUM Factsheet”, (2012), page 7.

²⁷⁰ *Ibid.*

²⁷¹ Article 5, EU-CARIFORUM, Economic Partnership Agreement, (2008).

²⁷² European Union, “Monitoring the Implementation and Results of the CARIFORUM-EU EPA Agreement: Final Report”, (September 2014), 2013/325520, (hereinafter, “EU, “CARIFORUM Report”, (2014)).

²⁷³ EU, “CARIFORUM Report”, (2014), page 56.

²⁷⁴ EU, “CARIFORUM Report”, (2014), page 57.

investment of trade, so-called “social-dumping”, the Report noted that no cases had been brought to any court or arbitration body raising such issues.²⁷⁵ As discussed above, the dispute settlement procedure within the EPA requires the parties to nominate five experts each to sit on a Panel.²⁷⁶ The EU had presented a list with their five experts, and a further five available for mutual acceptance. However, the CARIFORUM states had not yet nominated any individuals.²⁷⁷

4.3.3. – Colombia and Peru

The implementation of the Colombia and Peru Trade Agreement is subject to an annual monitoring report carried out by the EU.²⁷⁸ This report includes an overall assessment of trade flows and information on activities of the implementation and monitoring bodies established under the agreement. The Sub-Committee on Trade and Sustainable Development, which is part of the Trade Committee established under the agreement and comprises a number of ministerial level representatives that oversee implementation, held its first meeting in Lima, Peru on 6 February 2014.²⁷⁹ The Subcommittee agreed on a list of experts to be used in the event of proceedings under the Trade Agreement. The Sub-Committee also shared experiences on how to best involve civil society in relevant sustainable development discussions at a domestic level. Each of the parties also updated the Sub-Committee on the steps they had taken on implementation of labour related provisions, and especially ratification of the eight ILO Fundamental Conventions.²⁸⁰ The EU monitoring report also noted the agreement of parties to continue to share information on measures relating to freedom of association, collective bargaining, and the prohibition of child and

²⁷⁵ *Ibid.*

²⁷⁶ Article 221, EU-CARIFORUM, Economic Partnership Agreement, (2008).

²⁷⁷ EU, “CARIFORUM Report”, (2014), page 58.

²⁷⁸ Article 13, European Union, “Regulation (EU) No 19/2013 of the European Parliament and of the Council of 15 January 2013 implementing the bilateral safeguard clause and the stabilisation mechanism for bananas of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part”, Official Journal of the European Union, L 17/1.

²⁷⁹ European Commission, European Union, “Report from the Commission to the European Parliament and the Council: Annual Report on the Implementation of the EU-Colombia/Peru Trade Agreement”, (4 December 2014), COM(2014) 718 Final, (hereinafter, “EU, “Colombia/Peru Report”, (2014)”), page 6.

²⁸⁰ EU, “Colombia/Peru Report”, (2014), page 8.

forced labour.²⁸¹

4.3.4. – South Korea

As discussed above, a number of institutions relating to implementation of labour related organisations were established under the EU-Korea FTA.²⁸² The Domestic Advisory Groups (hereinafter “DAG”), comprising of representatives from labour, environmental, and business organisations, has held annual meeting to discuss implementation of the EU-Korea FTA. At the first annual meeting, in Brussels, Belgium, on 27 June 2012, the DAG examined the ratification record of the fundamental ILO Conventions of both parties.²⁸³ The DAG noted that Korea had fallen short of international labour standards in a number of areas. This issue was discussed further at the second meeting, of 12-13 September 2013, where seminars were held on labour rights in the contracting parties with a focus on the fundamental rights contained within the ILO 1998 Declaration.²⁸⁴ Following these seminars the DAG published their conclusions which asked Korea to remove obstacles that were preventing ratification of ILO Conventions relating to freedom of association, collective bargaining, and forced and child labour. The EU had also raised similar concerns during the second meeting of the Trade and Sustainable Development Committee.²⁸⁵ The EU also encouraged Korea to cooperate closely with the ILO in order to ensure ratification of the relevant Conventions.

In furtherance of these concerns, the DAG submitted a letter to Karel De Gucht, the EU Commissioner for Trade, requesting the initiation of Governmental

²⁸¹ *Ibid.*

²⁸² See Chapter 3.4.3. above.

²⁸³ EU-Korea FTA Civil Society Forum, “*Minutes of 1st Meeting*”, (27 June 2012), available at <http://portal.eesc.europa.eu/eu-korea-dag/Civil-Society-Forum/Meetings/Pages/1st-SC-Forum.aspx>, (last accessed 9 May 2015).

²⁸⁴ EU-Korea FTA Civil Society Forum, “*Minutes of 2nd Meeting*”, (12 December 2013), available at <http://portal.eesc.europa.eu/eu-korea-dag/Civil-Society-Forum/Meetings/Pages/The-2nd-SC-Forum.aspx>, (last accessed 9 May 2015).

²⁸⁵ Trade and Sustainable Development Committee under the Korea-EU Free Trade Agreement, “*Joint Statement of the 2nd Meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA*”, (11 September 2013).

Consultation under Chapter 13, Article 14.²⁸⁶ The letter included four specific cases relating to trade unions that have resulted in violations of obligations under the EU-Korea FTA. One of such cases, involving the Korean Government Employee's Union, had been considered by the ILO Committee on Freedom of Association.²⁸⁷ The issues raised, namely the refusal to register the union, was still ongoing despite the conclusions of the ILO Committee. The letter also identified the search and seizure of trade union property, including the use of police and SWAT teams, as violations of the right to freedom of association. However, this request for consultations has gone unnoticed and without response from either Party. The Trade and Sustainable Development Committee, in their third meeting during December 2014, did not raise the submission.²⁸⁸ Additionally, the Report submitted to the EU Commission on 26 March 2015 on implementation of the agreement did not consider this submission.²⁸⁹ The Report mirrored the conclusions of the Trade and Sustainable Development Committee's conclusions where they agreed to continue dialogue and share texts on progress towards ratification of the eight ILO Fundamental Conventions.

This failure to properly take in to account the DAG's submissions appears in stark contrast to previous assurances from the Committee and those contained within the EU-Korea FTA. The agreement itself mentions that Governmental consultations can be initiated as a result of any matter under the sustainable trade chapter, "including communications from the Domestic Advisory Group".²⁹⁰ Additionally, the Trade and Sustainable Development Committee had previously noted their intention to consider any communications from the DAG and the Civil Society Forum and make conclusions in respect of any such

²⁸⁶ EU-Korea Domestic Advisory Group, "*Letter to Karel De Gucht: Serious Violations of Chapter 13 of the EU-Korea FTA*", (13 January 2014), available at <http://portal.eesc.europa.eu/eu-korea-dag/About-DAG/Pages/Adopted-Documents.aspx>, (last accessed 9 May 2015).

²⁸⁷ Committee on Freedom of Association, ILO, "*The Korean Confederation of Trade Unions et al., Case No 1865*", Complaint Date 14 December 1995.

²⁸⁸ Trade and Sustainable Development Committee under the Korea-EU Free Trade Agreement, "*Joint Statement of the 3rd Meeting of the Committee on Trade and Sustainable Development under the Korea-EU FTA*", (8 December 2014).

²⁸⁹ European Commission, European Union, "*Report from the Commission to the European Parliament and the Council: Annual Report on the Implementation of the EU-Korea Free Trade Agreement*", (26 March 2015), COM(2015) 139 Final.

²⁹⁰ Chapter 13, Article 14(1), EU-Korea, Free Trade Agreement, (2010).

submissions.²⁹¹

4.3.5. – Conclusion

In contrast with the U.S. agreements discussed above, there have been no instances of the mechanisms for quasi-dispute settlement being used in relation to the EU agreements. The EU agreements do place a much greater emphasis on cooperation, and this has been implemented through meetings of various bodies established under the agreements. However, the monitoring of implementation in relation to the CARIFORUM agreement included very shallow discussion of labour issues in comparison with other more economic issues contained within the report. Finally, in the case of the EU-Korea FTA, the attempts by the DAG to initiate consultations have not resulted in any action taken. This should be contrasted with the generally positive efforts of the AFL-CIO discussed above when submitting cases to the U.S. OTLA, despite the fact that the DAG is specifically mandated to present such submissions under the agreement and the parties have recognised the need to consider and react to such submissions.

²⁹¹ Trade and Sustainable Development Committee under the Korea-EU Free Trade Agreement, “*Joint statement to the Civil Society Forum on the outcomes of the 1st Trade and Sustainable Development Committee*”, (27 June 2012), page 2.

Chapter 5 – Generalised Schemes of Preference

5.1. – Introduction

Generalised Schemes/Systems of Preferences (hereinafter “GSP”) provide reduced tariff rates to certain beneficiary countries when importing goods to the preference giving country. These schemes are a departure from the general requirement to not discriminate amongst WTO members when trading.²⁹² A permanent exception to this principle in favour of developing countries was made²⁹³ following acceptance of such schemes by the UNCTAD in 1968.²⁹⁴

These schemes, adopted in order to increase export earnings of developing countries and thus accelerate their economic growth, have been adopted by a number of countries. A number of these schemes include specific provisions requiring respect for international human rights conventions, including those relating to labour rights. The eligibility criteria, and procedures for withdrawal of preferences, within such GSPs shall be fully set out below before an examination of their implementation in Chapter 6.

5.2. – United States Generalised Scheme of Preference

The U.S. GSP system, governed by the Trade Act 1974, includes two schemes; a general scheme, and one that covers “Least Developed Countries”.²⁹⁵ The former scheme provides eligible countries with duty free access to the U.S. market for a specific set of eligible products. The latter scheme applies to lesser developed countries and provides access to a greater number of products. The system provides the President, representing the executive branch, with ultimate power

²⁹² This is known with the WTO as the “Most-Favoured-Nation” principle. It originated within the General Agreement on Tariffs and Trade (1947).

²⁹³ WTO, *“Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries”*, (28 November 1979), L/4903. The GATT Contracting Parties had previously agreed to a ten year waiver to the Most-Favoured-Nation Principles in 1971.

²⁹⁴ UNCTAD, Resolution 21(ii), *“Preferential or free entry of exports of manufactures and semi-manufactures of developing countries to the developed countries”*, (1968), Second Conference, New Delhi, India.

²⁹⁵ Section 2462, U.S., Trade Act, (1974).

in relation to the granting of eligibility for products and countries, and also removal of such preferences.²⁹⁶

The eligibility criteria for the U.S. GSP begins with a list of countries that are automatically non-eligible, including, *inter alia*, EU Member States, Australia, Canada, and Japan.²⁹⁷ In addition to this, countries that have not taken, or are not taking, steps to afford internationally recognised rights to workers within their territory are ineligible.²⁹⁸ However, failure to take steps to afford such rights shall not prevent designation as a beneficiary if the President believes that making such a designation would be in the economic interests of the United States.²⁹⁹ Internationally recognised worker rights are defined as those covering freedom of association and the right to collective bargaining, prohibitions on forced and child labour, and the need to provide a minimum wage and protections for occupational safety and health.³⁰⁰ Accordingly, one of the grounds for refusing access to the GSP scheme is a failure to protect these core labour rights. Once a country has been considered eligible, and receives various tariff preferences, there is the possibility of these being removed if the country falls in to one of the categories for ineligibility.³⁰¹

Despite the President having ultimate authority with regards to the granting and withdrawal of preferences, the implementation and administrative functioning of the GSP system is generally overseen by the U.S. Trade Representative and the GSP Subcommittee that consists of U.S. representatives from Departments of Agriculture, Commerce, Labour, and Immigration.³⁰² These bodies carry out an annual review of the functioning of the GSP system.³⁰³ This annual review begins with a request for public petitions and comments from any interested parties and can relate to the addition or removal of preferences with regards to certain

²⁹⁶ Section 2462(a)(1) and (2), and (d)(1), U.S., Trade Act, (1974).

²⁹⁷ Section 2462(b)(1), U.S., Trade Act, (1974).

²⁹⁸ Section 2462(b)(2)(G), U.S., Trade Act, (1974).

²⁹⁹ Section 2462(b)(2)(H), U.S., Trade Act, (1974).

³⁰⁰ Section 2467(4), U.S., Trade Act, (1974).

³⁰¹ Including a change in circumstances that results in failure to afford internationally recognised worker rights, see Section 2462(d)(2), U.S., Trade Act, (1974).

³⁰² U.S. Trade Representative, “U.S. Generalized System of Preferences: GUIDEBOOK”, (July 2013).

³⁰³ Section 2464, U.S., Trade Act, (1974).

countries or products and also the country practice relating to workers' rights or intellectual property rights issues. Submissions generally come from foreign Governments, domestic and foreign companies, and labour or other public interest groups. The procedure for review of these submissions and suggestions include detailed written briefs, and oral hearings, before any decision is ultimately taken by the President on the issues raised.

The U.S. GSP system was terminated on 31 July 2013.³⁰⁴ Since this date the preferences that previously would have been afforded under the GSP schemes have been no longer applicable, until the U.S. Congress reinstates the scheme.³⁰⁵ However, the operation of the scheme prior to this termination still provides useful information relating to the implementation of social clauses that can be of relevance to other frameworks.

5.3. – The European Union Generalised Scheme of Preference

The GSP developed by the EU in 1971 was the first of its kind in the international trade system. Since its conception, the GSP has gone through a number of reformulations that are scheduled every ten years in order to allow the system to adapt to changes in global trade patterns. The EU GSP, since 2005, has included three specific schemes: the general scheme; an incentive scheme relating to respect for sustainable development and good governance; and, a specific system of preferences for the least developed countries.³⁰⁶ The specifics of these systems, as contained within the latest relevant EU Regulation,³⁰⁷ shall be set out before the system for withdrawal of benefits is discussed.

³⁰⁴ Section 2465, U.S., Trade Act, (1974).

³⁰⁵ U.S. Trade Representative, "*GSP Expiration: Frequently Asked Questions*", (November 2014), available at https://ustr.gov/sites/default/files/FAQs-on-GSP-Expiration-Nov2014_4.pdf, (last access 7 May 2015).

³⁰⁶ See European Union, "*Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences*", Official Journal of the European Union, L 169/1.

³⁰⁷ The EU GSP is implemented by way of Regulations that expire after a three year period.

5.3.1 – Generalised Scheme of Preference, Generalised Scheme of Preference Plus, and Everything But Arms

The GSP affords certain states the ability to export goods to the EU market whilst enjoying reduced tariffs on such goods. The criteria for the GSP scheme states that all States, apart from those that are classed as high or upper-middle income countries by the World Bank or those that enjoy similar preferential market access through other trade agreements with the EU, will qualify for the tariff benefits.³⁰⁸ The countries that do not fall within the aforementioned categories, and are therefore eligible for GSP tariff benefits, are set out in Annex II of the Regulation. This list is reviewed every year in light of the most recent reports of the World Bank. The scheme only covers a specific list of products that are set out within the Regulation. Due to the importance placed on fostering industrialisation in order to promote sustainable growth in the economies of developing countries, the majority of products covered by the GSP scheme are manufactured or semi-manufactured.³⁰⁹ As of October 2014, 34 countries enjoyed preferences under the general GSP.³¹⁰

The Generalised Scheme of Preference Plus (hereinafter “GSP+”) was adopted in 2005 after public consultations on how the EU’s system should be updated. The promotional scheme places an importance on principles such as sustainable development and good governance. The products covered by this scheme are generally the same as covered under the general GSP scheme but instead of mere reductions in tariffs, the GSP+ scheme affords complete removal of tariffs. As of October 2014, 13 countries received preference under this scheme.³¹¹ In order to qualify for this scheme, the country must satisfy a number of criteria. Firstly, the country must satisfy the eligibility criteria relating to acceptance to the GSP

³⁰⁸ Article 4, European Union, “*Regulation (EU) No 978/2012 of 25 October 2012 applying a scheme of generalised tariff preferences*”, Official Journal of the European Union, L 303/1, (hereinafter “EU, “GSP Regulation”, (2012)”).

³⁰⁹ Bartels, L., “*The Trade and Development Policy of the European Union*”, (2007), The European Journal of International Law, Volume 18:4, page 740.

³¹⁰ European Union, “*GSP Info Pack*”, (October 2014), page 2.

³¹¹ European Union, “*GSP Info Pack*”, (October 2014), page 3.

scheme.³¹² Additionally, the country must be considered “vulnerable” as a result of a lack of diversification in trade products and poor integration into the international trade system.³¹³ The main feature of the eligibility criteria, however, relates to an obligation to ratify and effectively implement a number of international Conventions that relate to human rights, labour rights, and environmental issues.³¹⁴ The State also undertakes to accept the monitoring procedures of the Conventions and also the European Commission (hereinafter “EU Commission”). These monitoring procedures, and the general provisions relating to withdrawal of benefits, shall be discussed after the final scheme relating to the least developed countries is set out.

The third variation within the EU GSP system is referred to as the “Everything but Arms” scheme. This scheme is available to States that are defined as “Least Developed” by the UN, and allows duty and quota free access to all products from these States, except ammunition and arms.³¹⁵ As of October 2014 there were 49 beneficiaries under this arm of the EU GSP system.³¹⁶

Despite only the GSP+ regime including specific eligibility provisions relating to compliance with international labour conventions, the preferences afforded under all schemes can be removed due to non-compliance with certain international human rights conventions.³¹⁷ The list of conventions includes the eight fundamental ILO Conventions.³¹⁸ The operation of this removal procedure shall be examined further below.

5.3.2. – Mechanisms

In general, the systems for removal of tariff preferences afforded under these schemes are identical. However, different reporting mechanisms exist in relation

³¹² Article 9(1), EU, “*GSP Regulation*”, (2012).

³¹³ Article 9(1)(a), EU, “*GSP Regulation*”, (2012).

³¹⁴ Annex VIII, EU, “*GSP Regulation*”, (2012). The list includes the eight core ILO conventions within the ILO 1998 Declaration.

³¹⁵ Articles 17 and 18, EU, “*GSP Regulation*”, (2012).

³¹⁶ European Union, “*GSP Info Pack*”, (October 2014), page 3.

³¹⁷ Article 19(1)(a), EU, “*GSP Regulation*”, (2012).

³¹⁸ Annex VIII, EU, “*GSP Regulation*”, (2012).

to the GSP+ scheme. Such reporting mechanisms shall be set out before a discussion of the general tariff withdrawal system.

This mechanism under the GSP+ scheme, in addition to the obligation to adhere to the monitoring mechanisms under the various Conventions, results in the EU Commission regularly reviewing the implementation of the various Conventions by beneficiary States. Every two years the EU Commission is mandated to report to the European Parliament and the Council of the EU on the ratification status of the labour Conventions, their implementation, and the beneficiary State's compliance with Convention reporting obligations.³¹⁹ This report can be used in the specific process relating to temporary withdrawal of tariff preferences under the GSP+ scheme.

Under the GSP+ scheme, unlike the general GSP and Everything but Arms schemes, the beneficiary State agrees to a number of obligations. If these obligations, including the ratification and implementation of the Conventions, compliance with reporting procedures under the Conventions, and an agreement not to formulate reservations contrary to the object and purpose of the Convention, are not complied with then the EU Commission may temporarily remove benefits from the State.³²⁰ The burden of proof in such situations is on the State to show that they have fully implemented the Conventions in question or otherwise complied with obligations.³²¹

In addition to this procedure, there is a general procedure for the temporary withdrawal of benefits that is relevant to all three schemes. The temporary withdrawal of benefits under any scheme can be justified in a number of situations, one of which is serious and systematic violations of principles laid down in the eight ILO Conventions that protect the fundamental labour rights contained within the ILO 1998 Declaration.³²² If the EU Commission believes that a beneficiary State under any of the schemes had undertaken such activity, then

³¹⁹ Article 14, EU, "*GSP Regulation*", (2012).

³²⁰ Article 15(1), EU, "*GSP Regulation*", (2012).

³²¹ Article 15(2), EU, "*GSP Regulation*", (2012).

³²² Article 19(1)(a), EU, "*GSP Regulation*", (2012).

an investigation is carried out.³²³ Following the decision to investigate, if the EU Commission believes the complaints are legitimate, the beneficiary State in question is placed under a period of monitoring and evaluation.³²⁴ During the process surrounding a decision to investigate, the investigation itself, and the monitoring and evaluation phase, information from the beneficiary State and relevant reports of international bodies and other third parties are of central importance.³²⁵ Prior to any decision regarding withdrawal of benefits a beneficiary State or a third party can request an oral hearing. Once an informed decision is made by the EU Commission on whether to withdraw the tariff preferences or not then this decision is passed on to the beneficiary State and the Council of Ministers, who formally adopt the EU Commission's recommendation. In the event that tariff preferences are removed, the beneficiary State has the ability to request review of the decision once it believes that the actions that lead to the removal have been rectified.³²⁶

5.3.3. – Conclusion

The procedure within the various schemes under the EU GSP result in failure to respect of the ILO fundamental labour rights being punishable with withdrawal of tariff preferences. Additionally, failure to satisfy reporting obligations in relation to the eight ILO core labour Conventions, or a host of other human rights conventions, can result in preferences under the GSP+ being withdrawn. The procedure leading up to a decision to withdraw such benefits is principally carried out by the EU Commission, although they have the ability to consider reports from international monitoring bodies and any other relevant third parties.

³²³ Article 19(3), EU, “*GSP Regulation*”, (2012).

³²⁴ Article 19(4)(b), EU, “*GSP Regulation*”, (2012).

³²⁵ Article 19(6), EU, “*GSP Regulation*”, (2012). See also, Article 1, European Union, “*Commission Delegated Regulation (EU) No 1083/2013 of 28 August 2013 establishing rules related to the procedure for temporary withdrawal of tariff preferences and adoption of general safeguard measures under Regulation (EU) No 978/2012 of the European Parliament and the Council applying a scheme of generalised tariff preferences*”, Official Journal of the European Union, L 293/16, (hereinafter “EU, “*GSP Removal Rules*”, (2013)”).

³²⁶ Article 7(1), EU, “*GSP Removal Rules*”, (2013).

5.4. – Other Systems

The Canadian General Preferential Tariff (hereinafter “CGPT”) was first introduced in 1974.³²⁷ Following on from this, in a similar vein to other systems discussed above, a further scheme was introduced for Least Developed Countries in 1983. The Canadian Economic Action Plan 2013 aimed to renew and modernise the CGPT. In implementation of this action plan, on 1 January 2015, 72 beneficiaries were removed from the CGPT³²⁸ and two states were removed from the Least Developed Countries scheme as a result of economic progress.³²⁹ The system in its current form has been extended until 31 December 2024. Under the Customs Tariff Act 1997, the principal text relating to the CGPT system, the Governor has ultimate discretion whether to extend or remove preferences with regards to any country.³³⁰ The use of this discretion follows a recommendation from the Minister of Finance but no further considerations, such as compliance with international labour rights, are included within the governing text.

Globally there are a number of other systems that provide general preferences to developing countries and least developed countries.³³¹ However, none of these systems include provisions within the eligibility criteria relating to respect for international labour rights or similar provisions within grounds for their withdrawal.

³²⁷ UN Conference on Trade and Development, “*Generalized System of Preferences: Handbook on the Scheme of Canada*”, (2013), page ix.

³²⁸ Canada, “*General Preferential Tariff Withdrawal Order (2013 GPT Review)*”, (27 September 2013), P.C. 2013-967.

³²⁹ Canada, “*Least Developed Country Tariff Withdrawal Order (2013 GPT Review)*”, (27 September 2013), P.C. 2013-968.

³³⁰ Section 34. Canada, Customs Tariff (S.C. 1997, c. 36).

³³¹ Thirteen in total. Ten that have been notified to the Secretariat of the UN Conference on Trade and Development: Australia; Belarus; Bulgaria; Estonia; Japan; New Zealand; Norway; Russia; Switzerland; and, Turkey, list available at <http://unctad.org/en/Pages/DITC/GSP/About-GSP.aspx>, (last accessed 7 May 2015). See also UN Conference on Trade and Development, “*Generalized System of Preferences: List of Beneficiaries*”, (2015), for the existence of schemes in Iceland and Kazakhstan. See also UN Conference on Trade and Development, “*Handbook on the Preferential Tariff Scheme of The Republic Of Korea in favour of Least Developed Countries*”, (2013), for the existence of a scheme in favour of Least-Developed Countries in South Korea.

5.5. – Conclusion

As can be seen, the need to respect and implement a number of internationally recognised labour rights form central aspects of the criteria for initiation, and continuation, of preferences under both the U.S. and EU GSPs. Both of these schemes include procedures to fully investigate situations where non-implementation of labour rights may have occurred. Additionally, the EU GSP systems also cover implementation of other international human rights and environmental conventions. The need for continued monitoring under both of these schemes should afford the parties the ability to fully ensure compliance with all labour rights requirements. Examples of actions taken by preference giving countries in order to assess compliance shall be set out in the following Chapter.

Chapter 6 – Implementation of Generalised Systems of Preference

6.1. – Introduction

The above has charted the content, and mechanisms for implementation, of labour rights provisions within the U.S. and EU GSPs. Additionally, the withdrawal provisions of the CGPT, although it includes no specific reference to labour rights, have also been outlined. The following shall include discussion of instances where unilateral preferences have been removed for issues relating to compliance with “social clauses” under the U.S. and EU GSPs, and also withdrawal under the CGPT.

6.2. – United States Generalised System of Preferences

6.2.1. – Introduction

The following section shall discuss instances in which the mechanisms within the U.S. GSP relating to review and suspension of preferences have been implemented. In general, accessing information relating to situations that have been concluded, through withdrawal of preferences or the decision to take no further action prior to 2013, has been troublesome. Secondary sources show that preferences have been suspended in fifteen instances in total in relation to labour rights concerns.³³² However, detailed information relating to such decisions to suspend is only available in relation to the most recent decision concerning Bangladesh. Additionally, investigations are currently ongoing in relation to six other countries³³³ and information is available on these

³³² Includes Nicaragua, Romania, Paraguay, Chile, Myanmar, Central African Republic, Liberia, Sudan, Syria, Mauritania, and Maldives, see Tsogas, G., *“Labour Standards in the Generalized Systems of Preferences of the European Union and the United States”* (2000), European Journal of Industrial Relations, Volume 6, Issue 3, 349-370 and Belarus, Pakistan, Bangladesh, and Guatemala, see Mosley, L. and Tello, L., *“The Politics of Petitions: Interest Groups and Labor Rights in the US Generalized System of Preferences?”*, (2013), available at <http://www.yale.edu/leitner/resources/papers/The%20Politics%20of%20Petitions%20November%202013.pdf> (last accessed 19 April 2015).

³³³ Concerning Fiji, Georgia, Iraq, Niger, Philippines, and Uzbekistan.

proceedings. However, as a result of the expiration of the GSP as noted above, these investigations have been put on hold. Although the U.S. Trade Representative Office is engaging with relevant stakeholders they “do not expect to move toward final disposition of these reviews while the program is without authorization” and no further public hearings or request for public submissions are being made.³³⁴ Accordingly, the following discussion shall examine the complete process relating to the review of Bangladesh, followed by the steps taken in ongoing investigations in relation to the aforementioned six countries.

6.2.2. – Bangladesh

A number of petitions have been submitted in respect of Bangladesh’s systems for the protection of internationally recognised labour rights. As a result of a petition presented in 1990 regarding the failure to implement labour laws in Bangladesh’s Export Processing Zones (hereinafter “EPZ”) the Government of Bangladesh agreed to implement the relevant labour laws within certain deadlines. However, consistent failure to carry out their obligations, irrespective of previous statements espousing the intention to do so, resulted in a number of petitions being consistently submitted against Bangladesh.³³⁵ On 22 June 2007, the AFL-CIO presented a petition that included substantial new information alleging failure to implement labour protections relating to freedom of association, the right to organise and bargain collectively, the prohibition of child and forced labour, and the need to provide acceptable conditions of work.³³⁶ The petition also covered a number of industries and sectors as well as general remarks relating to harassment of trade unions and their members by the authorities.

The first sector covered by the petition was, in a similar vein to previous

³³⁴ U.S. Trade Representative, “*GSP Expiration: Frequently Asked Questions*”, (November 2014), available at https://ustr.gov/sites/default/files/FAQs-on-GSP-Expiration-Nov2014_4.pdf, (last access 7 May 2015), page 2.

³³⁵ AFL-CIO, “*Petition to Remove Bangladesh from the List of Eligible Beneficiary Developing Countries Pursuant to 19 USC 2462(d) of the Generalized System of Preferences (GSP)*”, (22 June 2007), (hereinafter “AFL-CIO, “*Bangladesh Petition*”, (2007)”), page 3.

³³⁶ AFL-CIO, “*Bangladesh Petition*”, (2007), page 3.

petitions, Bangladesh's EPZ. In 2004, the Export Processing Zone Workers' Association and Industrial Relations Act, which included protections relating to the rights of workers to form and join trade unions, was passed into law.³³⁷ The Act included two implementation phases: firstly, the workers were able to create Representative and Welfare Committees to deal with health and safety at work issues; secondly, the workers could then create Workers' Associations which acted in a similar manner to trade unions but without all the same powers. The petition raised concerns that had arisen under both periods of implementation.³³⁸ Members of the Welfare Committees had been unable to engage with employers on genuine health and safety concerns and, in certain circumstances, the members of such Welfare Committees were terminated and not reinstated upon review. The second stage of implementation, in reality, never came to fruition.³³⁹ The mechanisms necessary to establish the Workers' Association have yet to be set up and, in a number of cases, individuals have been threatened by authorities for requesting steps to be taken towards establishing such Associations.³⁴⁰ The second industry within the petition is the Ready Made Garment industry. Despite an agreement in 2006 between workers and the Government about prohibition of the worst forms of violence that were prevalent in the industry, little has been done to implement such an agreement.³⁴¹ Further to this, issues relating to payment of the minimum wage, failure to pay wages in a timely manner, and the failure to pay wage arrears were also raised in the petition. In the largely unregulated Shrimp and Fish Processing Industry, which is Bangladesh's second largest exporting industry, there were concerns raised as to the prevalence of child labour, forced labour, and shortcomings in relation to occupational health and safety protections.³⁴² Within this industry there is also little respect for the minimum wage or overtime pay. In general the Government has failed to respond to such issues when raised by relevant NGOs. In addition to this, when labour inspectors have raised concerns,

³³⁷ AFL-CIO, "*Bangladesh Petition*", (2007), page 4.

³³⁸ *Ibid.*

³³⁹ AFL-CIO, "*Bangladesh Petition*", (2007), page 5.

³⁴⁰ AFL-CIO, "*Bangladesh Petition*", (2007), pages 7 and 8.

³⁴¹ AFL-CIO, "*Bangladesh Petition*", (2007), page 8.

³⁴² AFL-CIO, "*Bangladesh Petition*", (2007), page 9.

they have been reassigned to a different geographical region or industry.³⁴³ Finally, the petition also highlighted a number of instances of repression of trade unions by Government forces. Since the state of emergency that had been declared on 11 January 2007, the civil liberties of all trade unions had been greatly restricted.³⁴⁴ Additionally, the petition outlined instances where the Governmental authorities had refused to register trade unions and forced resignation of union representatives through the use of forced detention and intimidation.³⁴⁵ International NGOs that had based themselves in Bangladesh to combat such issues were, in certain situations, removed by authorities.³⁴⁶

The AFL-CIO highlighted that previous petitions, concentrating on EPZs, had resulted in changes being agreed upon, but these had rarely been implemented in practice. The petitioners believed that in addition to this reluctance to implement change, the other issues highlighted within other sectors demonstrated systemic deficiencies within Bangladesh's system for protection of workers' rights. Additionally, Bangladesh was not appearing to take steps towards rectifying the situation. Due to the cumulative effect of the shortcomings, the AFL-CIO urged the withdrawal of tariff preferences from Bangladesh.³⁴⁷

The petition was accepted as part of the 2008 Annual Review. Following this acceptance, public hearings were held in October 2007, April 2009, and January 2012 which included testimony from the petitioners and the Government of Bangladesh.³⁴⁸ After the January 2012 hearing, the petition was updated to include comments on the deterioration of the situation since the previous hearing. Following this updated petition, the U.S. GSP Subcommittee requested public comments on the potential withdrawal of preferences for Bangladesh³⁴⁹

³⁴³ *Ibid.*

³⁴⁴ AFL-CIO, "Bangladesh Petition", (2007), page 10.

³⁴⁵ AFL-CIO, "Bangladesh Petition", (2007), page 12.

³⁴⁶AFL-CIO, "Bangladesh Petition", (2007), page 11.

³⁴⁷ AFL-CIO, "Bangladesh Petition", (2007), page 13.

³⁴⁸ See GSP Country Practice Review – Bangladesh, Docket ID: USTR-2012-0036, available at <http://www.regulations.gov/#!docketDetail;D=USTR-2012-0036> (last accessed 19 April 2015).

³⁴⁹ Office of the United States Trade Representative, "Possible Withdrawal, Suspension, or Limitation of Generalized System of Preferences Benefits: Bangladesh", (8 January 2013),

which were discussed at a final public hearing in March 2013.³⁵⁰ As a result of this hearing, a recommendation was made to the President to withdraw preferences from Bangladesh due to a failure to respect, or take steps towards respecting, internationally recognised labour rights. This recommendation was followed by the President and, via a Presidential Proclamation of 27 June 2013, Bangladesh was removed from the list of beneficiaries under the GSP.³⁵¹

6.2.3. – Ongoing Investigations

6.2.3.1. – Fiji

The original petition concerning failure to protect fundamental labour rights within Fiji was submitted by the AFL-CIO and accepted as part of the 2011 Annual Review on 12 July 2012.³⁵² The petition alleged that the interim Government of Fiji had failed to afford protection to the freedom of association and rights relating to collective bargaining.³⁵³ In January 2012 the Public Order Act Amendment decree came into force and required prior authorisation by the police for trade unions to hold meetings. Additionally, the decree limited the rights of public sector workers to engage in collective bargaining.³⁵⁴ These allegations relating to the need for permission to hold meetings was contested by the Fijian authorities and, accordingly, the petitioners advised that a fact-finding mission should be sent by the U.S. in order to ascertain the reality of the situation.³⁵⁵ The petitioners also raised issues with violations of internationally recognised labour rights that had also occurred in practice. Trade union members had been assaulted and harassed without any repercussions and high

Document Ref. USTR-2012-0036-0001.

³⁵⁰ Office of the United States Trade Representative, “*Public Hearing for U.S. Generalized System of Preferences (GSP) Review of Country Practices*”, (28 March 2013), Document Ref. USTR-2012-0036-0054.

³⁵¹ The President of the United States of America, “*Proclamation 8997 – To Modify Duty-Free Treatment Under the Generalized System of Preferences and for Other Purposes*”, (27 June 2013), Federal Register, Vol. 78, No. 127.

³⁵² Office of the United States Trade Representative, “*Public Hearing for U.S. Generalized System of Preferences (GSP) 2011 Review of Country Practices*”, (2 October 2012), Document Ref. USTR-2013-0012-0002, (hereinafter “USTR, “*Fiji, 2012 Hearing*””), page 9.

³⁵³ USTR, “*Fiji, 2012 Hearing*”, page 10.

³⁵⁴ USTR, “*Fiji, 2012 Hearing*”, page 11.

³⁵⁵ USTR, “*Fiji, 2012 Hearing*”, page 17.

ranking union officials had been prevented from attending the International Labour Conference in 2011.³⁵⁶ In response, the Government stated their intention to adopt a new Constitution that would adequately protect workers' rights and also reforms of domestic labour legislation.

Following the hearing of 12 October 2012, the AFL-CIO submitted an updated petition on 4 October 2013 that took into account developments in the situation within Fiji. The new Constitution, which ignored input from the independent Constitution Commission that had received 7,000 public submissions, did not include adequate protection of workers' rights. The rights afforded by the Constitution included sweeping caveats that provided authorities with wide discretion to limit rights of workers in practice.³⁵⁷ The updated petition also noted the use of harassment and intimidation techniques to prevent workers from exercising their right to strike³⁵⁸ and a continued failure by the Government to cooperate with the ILO.³⁵⁹

6.2.3.2. – Georgia

Following the 2003 “Rose Revolution”, attempts were made within Georgia to create a more representative and accountable Government. Following this, a new Labour Code was adopted without consulting relevant trade unions and other stakeholders. The new Labour Code included restrictions on both the freedom of association and the right to enter into collective bargaining.³⁶⁰ A petition was presented by the AFL-CIO on 20 September 2010 that raised three issues: the fact that the new Labour Code fell short of internationally recognised labour

³⁵⁶ USTR, “Fiji, 2012 Hearing”, page 12.

³⁵⁷ The American Federation of Labor and Congress of Industrial Organizations, “Update to 2011 Petition to Remove Fiji from the List of Eligible Beneficiary developing Countries Pursuant to Section 19 U.S.C. § 2562(d) of the Generalized System of Preferences (GSP)”, Document Ref. USTR-2013-0012-0013, (hereinafter “AFL-CIO, “Updated Fiji Petition”, (2013)”), page 2.

³⁵⁸ AFL-CIO, “Updated Fiji Petition”, (2013), page 5.

³⁵⁹ ILO, 317th Governing Body, “Decision on the seventh item on the agenda: Latest development in Fiji in light of the resolution of the 15th Asia-Pacific Regional Meeting”, (26 March 2013), Document Ref. dec-GB.317/INS/7.

³⁶⁰ The American Federation of Labor and Congress of Industrial Organizations, “Petition of the AFL-CIO to remove Georgia from the List of Eligible Beneficiary Developing Countries Pursuant to 19 USC 2462(d) of the Generalized System of Preferences (GSP)”, (10 September 2010), (hereinafter “AFL-CIO, “Georgia Petition”, (2010)”), page 1.

standards; the use of extra-legal methods to attack trade unions; and, other failures to afford internationally recognised workers' rights in practice.

The petition alleged that the new Labour Code fell short of protections relating to freedom of association, the right to enter into collective bargaining, the right to strike, and child labour. The relevant provisions within the Labour Code allowed a court to suspend the activity of any trade union if it "stir[red] up social conflict".³⁶¹ This wide discretionary power was seen to undermine practical effect for the freedom of association.³⁶² Additionally, there were no specific protections from discrimination afforded to trade union members during recruitment or termination proceedings, where such individuals would be at their most vulnerable.³⁶³ In relation to the right to strike there was no real coherent process contained within the new Labour Code³⁶⁴ and this right was undermined by the ability for the employer to request arbitration proceedings in all circumstances, not just where the strike concerned "essential services" as was recommended by the ILO.³⁶⁵ Finally, the Labour Code also failed to adequately protect against child labour by abolishing the labour inspectorate that was central to ensuring compliance with relevant obligations and also failing to include specific protections for employees aged between 13 and 15.

In addition to these shortcomings in the domestic legislation, the petition also raised concerns about specific instances of interference with trade union activities that had occurred in Georgia.³⁶⁶ The effectiveness of a trade union in

³⁶¹ Article 4, The Organic Law of Georgia on the Suspension and Prohibition of the Activities of Voluntary Associations, (14 November 1997), see AFL-CIO, "*Georgia Petition*", (2010), page 1.

³⁶² International Trade Union Confederation, "*Annual Survey of Violations of Trade Union Rights, Georgia*", (2010).

³⁶³ AFL-CIO, "*Georgia Petition*", (2010), page 2, referring to Art 5(8), Labour Code of Georgia, 2006, "An employer shall not be liable to substantiate his/her decision on not recruiting an applicant". The ILO has commented that this may result in an employee facing "an insurmountable obstacle" when attempting to prove their refusal of employment was as a result of trade union discrimination, see Committee of Experts on the Application of Conventions and Recommendations, ILO, "*Right to Organize and Collective Bargaining Convention (No. 98), Georgia*", (2010).

³⁶⁴ AFL-CIO, "*Georgia Petition*", (2010), page 3.

³⁶⁵ Committee of Experts on the Application of Conventions and Recommendations, ILO, "*Freedom of Association and Protection of the Right to Organise Convention (No. 87), Georgia*", (2010).

³⁶⁶ AFL-CIO, "*Georgia Petition*", (2010), page 5.

the education sector had been severely undermined by the establishment of an NGO with close affiliation to public authorities. The NGO encouraged head-teachers to advise staff to leave the trade union and join the NGO, whilst providing training incentives to do so. Additionally, the effectiveness of trade unions had generally been affected by the changing of rules relating to automatic deduction of membership fees from wages. As a result of the changes to these rules, the resources available to trade unions were greatly reduced. The petitioners also raised concerns relating to the dismissal of a number of trade union members and activists as a result of attempts to exercise their right to strike.³⁶⁷ Following the dismissals the courts were unwilling to reinstate them as they held there were sufficient protections within the Labour Code to protect against discrimination on grounds of trade union membership and, therefore, the dismissal must have resulted from legitimate concerns.

The petition was accepted by the U.S. authorities as part of the 2010 annual review³⁶⁸ and accordingly a series of public hearings were carried out. These hearings were supplemented by written submissions from a number of organisations, including the Georgian Employer's Association, the Georgian International Chamber of Commerce, and Women for Green Future, as well as oral submission from the petitioners, the Government of Georgia, the Business Association of Georgia, and two private companies.³⁶⁹ In the second oral hearing, which took place on 28 March 2013, it was noted that the new Georgian Government had drafted amendments to the Labour Code to take into account recommendations of the ILO in relation to the shortcomings that were also the subject of the original petition.³⁷⁰ The petitioners, however, believed that there were still deficiencies in the protections afforded by the re-drafted Labour Code and, anyway, “promises of change” included within the drafts that had not been

³⁶⁷ AFL-CIO, “Georgia Petition”, (2010), page 8.

³⁶⁸ Office of the United States Trade Representative, “Public Hearing for U.S. Generalized System of Preferences (GSP), 2011 Annual Review of Country Practices”, (24 January 2012), Document Ref. USTR-2013-0009-0012, (hereinafter “USTR, “Georgia, 2012 Hearing””), page 10.

³⁶⁹ See GSP Country Practice Review – Georgia (WR), Docket ID: USTR-2013-0009, available at <http://www.regulations.gov/#!docketDetail;D=USTR-2013-0009> (last accessed 19 April 2015).

³⁷⁰ USTR, “Georgia, 2012 Hearing”, page 106.

signed in to law were “not an accomplishment in and of themselves”.³⁷¹ Accordingly, despite potential improvements, the petitioners still advocated removal of tariff preferences from Georgia.³⁷² As a result of the expiration of the U.S. GSP, as noted above, no further steps towards resolution of this review have been taken.

6.2.3.3. – Iraq

The original petition, submitted by the AFL-CIO, related to deficiencies in Iraq’s protection of internationally recognised labour rights and was accepted as part of the 2011 Annual Review. The petition alleged severe deficiencies in the Labour Code of 1987 relating to the freedom of association, the rights to enter into collective bargaining, and the prohibition of both child and forced labour.³⁷³ Following the fall of Saddam Hussein there had not been any amendments to this Labour Code despite other areas of the law being developed. The original draft amendments to the Code did not include any rights relating to trade union members; instead, the authorities noted their intention to create a separate Trade Union Code.³⁷⁴ However, there have been significant delays in this process and no such Code has been forthcoming. The petitioners alleged that the current draft law, despite the provision of assistance and comments from the ILO Committee of Experts, did not include sufficiently clear language securing freedom of association and collective bargaining rights.³⁷⁵ In addition to the issues relating to the Labour Code, the petitioners also noted a number of instances of trade union repression; including the detention of activists and the withdrawal of legal recognition of a number of trade unions.³⁷⁶ In response, during an oral hearing on 2 October 2012, the Iraqi ambassador to the U.S. recognised that Iraq was undertaking amendments in a number of areas following the fall of Hussein. The process was slow, however, the authorities

³⁷¹ USTR, “*Georgia, 2012 Hearing*”, page 108.

³⁷² USTR, “*Georgia, 2012 Hearing*”, page 111.

³⁷³ Office of the U.S. Trade Representative, “*Public Hearing for U.S. Generalized System of Preferences (GSP), 2011 Review of Country Practices*”, Document Ref. USTR-2013-0004-0002, (hereinafter “USTR, “*Iraq Hearing, 2012*””), page 55.

³⁷⁴ USTR, “*Iraq Hearing, 2012*”, page 59.

³⁷⁵ USTR, “*Iraq Hearing, 2012*”, page 57.

³⁷⁶ USTR, “*Iraq Hearing, 2012*”, page 56

wished to ensure that the final draft of the law included adequate protections before it was accepted.³⁷⁷ Whilst this process continued, the legislature was in continued correspondence with the relevant advisory bodies of the ILO.³⁷⁸

6.2.3.4. – Niger

The petition filed by the International Labour Rights Fund on 20 July 2006 related to instances of child and forced labour within Niger.³⁷⁹ The petition was supported by a number of reports and studies that states that tens of thousands of workers within Niger were forced into work under threats of punishment or torture.³⁸⁰ It was alleged that the Government has failed to take adequate steps to protect individuals from forced labour and, when such practices were uncovered, the authorities had not taken steps to rectify the situation.

Despite the Constitution of Niger, and the domestic Labour Code, prohibiting forced labour, there had been few instances of investigations by the authorities despite evidence of the widespread use of forced labour.³⁸¹ The Government made a number of promises in 2001 to initiate and implement an action plan to combat the problem but this never materialised. Additionally, despite the criminalisation of forced labour in June 2003, there had only been four subsequent investigations, which all resulted in no prosecution.³⁸² The petition was accepted for review by the U.S. GSP Subcommittee and two public hearings have since been carried out.³⁸³ In these hearings, the Government of Niger has alleged that the situation has greatly improved. During the hearing on 28 March

³⁷⁷ USTR, “*Iraq Hearing, 2012*”, pages 69-73.

³⁷⁸ USTR, “*Iraq Hearing, 2012*”, page 77.

³⁷⁹ International Labor Rights Fund, “*Request for Review of the GSP Status of the Republic of Niger for Violations of Worker Rights*”, (20 July 2006), Document Ref. USTR-2013-0005-0002, (hereinafter ILRF, “*Niger Petition*”, (2006)).

³⁸⁰ U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, “*Trafficking in Persons Report – Niger*”, (5 June 2006), available at <http://go.usa.gov/3bAZQ> (last accessed 19 April 2015), (hereinafter “U.S. DoS, “*TIP Report*”, (2006)”) and Committee of Experts on the Application of Conventions and Recommendations, ILO, “*Forced Labour Convention (No. 29), Niger*”, (2004).

³⁸¹ ILRF, “*Niger Petition*”, (2006), page 8.

³⁸² U.S. DoS, “*TIP Report*”, (2006).

³⁸³ See GSP Country Practice Review – Niger, Docket ID: USTR-2013-0005, available at <http://www.regulations.gov/#!docketDetail;D=USTR-2013-0005> (last accessed 19 April 2015).

2013, the Government stated that new domestic legislation prohibiting human trafficking had been adopted and implemented. This new legislation had already resulted in seventeen individuals being taken in custody and six prosecutions.³⁸⁴ Additionally, improved training and the raising of awareness amongst the judiciary, the police force, and religious leaders, relating to issues of forced labour had been funded by the National Commission and were seen as an important step in improving the situation.³⁸⁵ The public hearings did not include submissions from the petitioners or any other interested bodies. Again, as a result of the expiration of the U.S. GSP, the public hearing in early 2013 was the last action taken towards disposition of this issue.

6.2.3.5. – Philippines

Within the Philippines, issues surrounding the prevalence of the repression of trade union activities were highlighted by a petition filed on 22 June 2007, again by the International Labour Rights Fund. The petition included information relating to extra-judicial killing and an increase of abductions of trade union leaders, members, and supporters.³⁸⁶ Such actions had been allegedly carried out by members of the Armed Forces of the Philippines alongside members of national and local police forces, and private security forces.³⁸⁷ These allegations were supported by evidence from the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.³⁸⁸ The widespread nature of such activities, in addition to common assaults on such individuals,³⁸⁹ resulted in the Philippines being classified as the second most dangerous country in the world for trade

³⁸⁴ Office of the U.S. Trade Representative, “*Public Hearing for U.S. Generalized System of Preferences (GSP) Review of Country Practices*”, (28 March 2013), Document Ref. USTR-2013-0005-0012, (hereinafter “USTR, “*Niger, 2013 Hearing*””), page 224.

³⁸⁵ USTR, “*Niger, 2013 Hearing*”, pages 225-227.

³⁸⁶ International Labor Rights Fund, “*Request for Review of the GSP Status of the Republic of the Philippines for Violation of Worker Rights*”, (22 June 2007), Document Ref. USTR-2013-0006-0002, (hereinafter “ILRF, “*Philippines Petition*”, (2007)””), pages 6 and 11.

³⁸⁷ ILRF, “*Philippines Petition*”, (2007), page 8.

³⁸⁸ Alston, P., “*Preliminary Report on the Visit of the Special Rapporteur, Phillip Alston, to the Philippines (12-21 February 2007)*”, UN, General Assembly, Human Rights Council, (22 March 2007), Document Ref. A/HRC/4/20/Add.3, page 4.

³⁸⁹ Centre for Trade Union and Human Rights Monitor, “*Workers’ Rights Report, 2006*”, (December 2006).

unionists in 2006.³⁹⁰ In general, a culture of impunity existed within the Philippines with regards to these crimes.³⁹¹ Alongside these grave concerns, the petition also covered issues relating to obstacles standing in the way of workers exercising their right to strike. Provisions and technicalities within the Labour Code allowed the assumption of jurisdiction and imposition of mandatory arbitration for all strike actions that related to “essential services”. However, the authorities broadly interpreted this term to include industries involving automobiles, hotels, and pineapple production.³⁹² This mandatory arbitration resulted in a binding decision by the Secretary of State for Labour and Employment that would effectively result in termination of employment if not followed. Workers that did engage in collective strike action were often subject to criminal felony charges of sedition or violent dispersal of their pickets. The cumulative effect of these issues resulted in a severe diminishment of the strength of trade unions within the Philippines.

The petition was accepted and resulted in a first set of public hearings on 24 and 25 January 2012. During this hearing, the International Labour Rights Fund noted that although there had been a drop in the rate of extra-judicial killings as a result of international pressure in 2008 and 2009, this had reversed in recent years.³⁹³ The Secretary of State for Labour and Employment noted that the Government had undertaken a threefold action plan to address the issues within the petition.³⁹⁴ Increased training had been provided to the police and armed forces with the assistance of the ILO. Additionally, there had been increases in investigations and subsequent prosecutions by the Supreme Court. The Government were also undertaking reform of domestic law relating to the assumption of jurisdiction in arbitration cases to protect against arbitrariness and also to strengthen the rights of workers to organise and enter into collective bargaining. Following these hearings the U.S. Subcommittee on the GSP held a

³⁹⁰ ILRF, “Philippines Petition”, (2007), page 5.

³⁹¹ ILRF, “Philippines Petition”, (2007), page 16.

³⁹² ILRF, “Philippines Petition”, (2007), page 20.

³⁹³ Office of the U.S. Trade Representative, “U.S. Generalized System of Preferences (GSP) 2011 Annual Review of Country Practices”, (24 January 2012), Document Ref. USTR-2013-0006-0003, (hereinafter “USTR “Philippines, 2012 Hearing””), page 92.

³⁹⁴ USTR “Philippines, 2012 Hearing”, page 129.

further hearing on 28 March 2013 during which the Government again highlighted steps that were being taken to address deficiencies in the protection of workers' rights. The Government had established the Interagency Committee on Extra-judicial Killings which presented detailed information on ongoing investigations in the pre-hearing brief. Furthermore, the Government were taking into account recommendations of the ILO Committee of Experts in order to fully comply with the relevant conventions on freedom of association and the right to organise and bargain collectively.

Following the expiration of the GSP there has been no formal disposition of the issue. However, the USTR believe that the investigation shall be closed, and no withdrawal of the Philippines' preferences shall occur, once the programme has been reauthorized by the U.S. Congress.³⁹⁵

6.2.3.6. – Uzbekistan

The International Labour Rights Fund also submitted a petition on 21 June 2007 in relation to instances of forced and child labour in the cotton industry within Uzbekistan.³⁹⁶ The Uzbekistani authorities failed to consider this an issue and instead believed the inclusion of children within the cotton harvest as a "patriotic act by the Uzbek youth".³⁹⁷ Despite the Constitution and Labour Code prohibiting economic exploitation, the practice of mobilising the youth during the cotton harvest was widespread throughout Uzbekistan.³⁹⁸ The issues within the petition had been raised by both the ILO,³⁹⁹ the UN Committee on the Rights of the Child,⁴⁰⁰ and the UN Human Rights Committee.⁴⁰¹

³⁹⁵ Office of the United States Trade Representative, "*Annual Reviews, Active GSP Country Practice Reviews*", last updated November 2014, available at <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp/current-review-0> (last accessed 19 April 2015).

³⁹⁶ International Labor Rights Fund, "*Request for Review of the GSP Status of the Republic of Uzbekistan for Violations of Worker Rights*", (21 June 2007), Document Ref. USTR-2013-0007-0002, (hereinafter "ILRF, "*Uzbekistan Petition*", (2007)").

³⁹⁷ ILRF, "*Uzbekistan Petition*", (2007), page 2.

³⁹⁸ U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, "*Country Report on Human Rights Practices, 2006 – Uzbekistan*", (6 March 2007).

³⁹⁹ ILRF, "*Uzbekistan Petition*", (2007), page 8.

⁴⁰⁰ UN, Committee on the Rights of the Child, "*Concluding Observations – Uzbekistan*", 42nd Session, (2 June 2006), Document Ref. CRC/C/UZB/CO/2.

Following the acceptance of the petition, the U.S. GSP Subcommittee held public hearings including testimony from the Government of Uzbekistan and the petitioners. The public hearing on 28 March 2013⁴⁰² was the last activity carried out in relation to these issues by the authorities before the expiration of the U.S. GSP in June 2013.

6.2.4. – Conclusion

The above provides a clear picture of the extent to which the mechanisms for labour protection are being implemented as part of the U.S. GSP. The full discussion of the Bangladesh issue shows the journey from original petition through to the withdrawal of benefits. The withdrawal of benefits, as noted above, has occurred on fourteen other occasions, however, no primary information was available on such instances. In general, the annual review proceedings under the U.S. GSP can take a number of years. For example, in the Bangladesh situation discussed above, the proceedings took six years from the original petition to removal of preferences. The expiration of the U.S. GSP has resulted in a number of situations that are currently under review being placed on hold. These six issues, once the programme has been reauthorized, may continue the U.S. practice of removing preferences for non-compliance with internationally recognised workers' rights.

6.3. – European Union Generalised Scheme of Preferences

6.3.1. – Introduction

As discussed above, preferences under any of the three strands of the EU GSP can be temporarily withdrawn for systemic violations of certain labour protections

⁴⁰¹ UN, Human Rights Committee, “*Concluding Observations – Uzbekistan*”, 82nd Session, (26 April 2005), Document Ref. CCPR/CO/83/UZB.

⁴⁰² Office of the U.S. Trade Representative, “*Public Hearing for U.S. Generalized System of Preferences (GSP) Review of Country Practices*”, (28 March 2013), Document Ref. USTR-2013-0007-0013.

by a beneficiary country. In making a decision about whether to remove preferences, the EU Commission carries out an investigation with the input of the Parties, third parties, and international monitoring bodies. As withdrawal can be motivated by failure to comply with the eight fundamental ILO Conventions, reliance is placed upon the reports of certain bodies within the ILO. The following contains all six investigations carried out under the procedure for withdrawal of preferences afforded by the EU GSP. The content of the original submission, the investigative process, and the final decision on the matter shall be set out in situations involving a number of beneficiary countries.

6.3.2. – Belarus

On 29 January 2003,⁴⁰³ three international trade union organisations⁴⁰⁴ submitted a joint request to the EU Commission alleging violations of freedom of association and collective bargaining rights under ILO Conventions No. 87 and 98.⁴⁰⁵ Such a request was submitted under Article 27 of the then applicable Regulation concerning the EU GSP,⁴⁰⁶ which allowed the EU Commission to initiate an investigation with regards to a certain beneficiary if they received information that includes sufficient grounds to do so. The request alleged specific issues with the domestic law of Belarus, which required authorisation prior to the establishment of a trade union organisation and included significant restrictions on foreign funding of such unions and other NGOs. In addition to this, the request contained information on specific instances of intimidation used by authorities to replace regional and sectoral union officials and interfere with union elections.⁴⁰⁷

⁴⁰³ European Council, European Union, “Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalised tariff preferences from the Republic of Belarus”, Official Journal of the European Union, L 405/35, (hereinafter “European Council, “Belarus Removal Regulation”, (2006)”), § 1.

⁴⁰⁴ The three organisations were the International Confederation of Free Trade Unions, the Europe Trade Union Confederation, and the World Confederation of Labour.

⁴⁰⁵ ILO, “Freedom of Association and Protection of the Right to Organise Convention, (No. 87)”, (1948) and ILO, “Right to Organise and Collective Bargaining Convention, (No. 98)”, (1949), see European Council, “Belarus Removal Regulation”, (2006), § 2.

⁴⁰⁶ European Council, European Union, “Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004”, Official Journal of the European Union, L 346/1.

⁴⁰⁷ See European Union, “Notice of initiation of an investigation of violation of freedom of

The submitted request was examined by the EU Generalised Preferences Committee which subsequently decided that sufficient grounds existed to initiate a formal investigation into the situation in Belarus.⁴⁰⁸ This decision was intimated to the Belarusian authorities and made public. The public notice also called upon interested parties to “make themselves known in writing and submit and useful information to the EU Commission”.⁴⁰⁹ In response to the initiation of the investigation the Belarusian authorities denied any wrongdoing and ensured the EU Commission that they fully complied with the relevant ILO Conventions.⁴¹⁰ However, information gathered during this initial investigation painted a different picture.

During the investigation the EU Commission heavily relied upon research and reports produced by the ILO. An investigation into Belarus’ compliance with ILO Conventions began in November 2003, and the subsequent report by the Commission of Inquiry was published on 23 July 2004.⁴¹¹ The scathing report included evidence that Belarus had failed to comply with a number of obligations relating to the freedom of association and the right to organise and bargain collectively. The report also included twelve recommendations that the ILO urged Belarus to implement in order to rectify the situation.⁴¹² These recommendations included the need to remove restrictions on the ability of trade unions to register,⁴¹³ the disbandment of the opaque Republican

association in Belarus in view of temporary withdrawal of benefits under the Scheme of Generalised Tariff Preferences (GSP)”, (14 February 2004), 2004/C 40/04, Official Journal of the European Union, (hereinafter “EU, “Public Notice of Belarus Investigation”, (2004)”). The intimidation techniques included direct threats of dismissal, unlawful entry into union premises, and confiscation and destruction of union property and documents.

⁴⁰⁸ European Commission, European Union, “Decision of 29 December 2003 providing for the initiation of an investigation pursuant to Article 27(2) of Council Regulation (EC) No 2501/2001 with respect to the violation of freedom of association in Belarus”, 2004/23/EC, Official Journal of the European Union.

⁴⁰⁹ EU, “Public Notice of Belarus Investigation”, (2004).

⁴¹⁰ European Council, “Belarus Removal Regulation”, (2006), § 4.

⁴¹¹ ILO, “Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine Observance by the Government of the Republic of Belarus of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)”, (23 July 2004), (hereinafter “ILO, “Commission of Inquiry Report on Belarus”, (2004)”).

⁴¹² ILO, “Commission of Inquiry Report on Belarus”, (2004), §§ 633ff.

⁴¹³ ILO, “Commission of Inquiry Report on Belarus”, (2004), Recommendation 2.

Registration Commission that oversaw such registration requests,⁴¹⁴ thorough investigations into previous allegations of anti-union discrimination submitted by workers,⁴¹⁵ and the amendment of a number of Belarusian laws to fully ensure complete compliance with international labour obligations.⁴¹⁶ The ILO urged Belarus to implement these recommendations by 1 June 2005.⁴¹⁷ However, the EU Commission noted that no steps had been taken towards implementation.⁴¹⁸ As a result of this evidence gathered during the investigation, the EU Commission decided to formally monitor and evaluate the labour rights situation in Belarus.⁴¹⁹ This monitoring period would last for six months and if no effective implementation of the ILO recommendations occurred within the next eight months then a recommendation would be made to the European Council to withdraw tariff preference from Belarus.⁴²⁰

During this monitoring period the ILO published a follow up to the Commission of Inquiry's report.⁴²¹ The report noted that the "Government [is] on a path to eliminating all remnants of an independent Trade Union in Belarus"⁴²² and that there had been no progress or desire to implement the Commission of Inquiry's recommendations. The ILO noted that there had been a "continued failure to implement the Convention".⁴²³ As a result of these issues during the monitoring and evaluation period, the EU Commission recommended to the European

⁴¹⁴ ILO, "*Commission of Inquiry Report on Belarus*", (2004), Recommendation 3.

⁴¹⁵ ILO, "*Commission of Inquiry Report on Belarus*", (2004), Recommendation 7.

⁴¹⁶ ILO, "*Commission of Inquiry Report on Belarus*", (2004), Recommendations 9 and 10.

⁴¹⁷ ILO, "*Commission of Inquiry Report on Belarus*", (2004), § 635.

⁴¹⁸ European Council, "*Belarus Removal Regulation*", (2006), § 5.

⁴¹⁹ European Commission, European Union, "*Decision of 17 August 2005 on the monitoring and evaluation of the labour rights situation in Belarus for temporary withdrawal of trade preferences*", 2005/616/EC, Official Journal of the European Union, (hereinafter "European Commission, "*Decision on monitoring of Belarus*", (2005)).

⁴²⁰ Article 2, European Commission, "*Decision on monitoring of Belarus*", (2005). See also the public notice of this decision, "*Announcement of the period for the monitoring and evaluation of the labour-rights situation in Belarus in view of the temporary withdrawal of benefits under the scheme of generalised tariff preferences (GSP)*", (30 September 2005), 2005/C 240/09, Official Journal of the European Union.

⁴²¹ Committee on Freedom of Association, ILO, "*Measures taken by the Government of the Republic of Belarus to implement the recommendations of the Commission of Inquiry*", March 2006, 341st Report, adopted by the Governing Body of the ILO during their 295th Session, (hereinafter "ILO, "*Belarus Follow-up Report*", (2006)).

⁴²² ILO, "*Belarus Follow-up Report*", (2006), § 51.

⁴²³ Committee on Freedom of Association, ILO, "*Observation on Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Belarus*", (2006), International Labour Conference, 95th session.

Council that preferences be withdrawn from Belarus for a continued failure to comply and implement international conventions on freedom of association and the right to organise and collective bargaining. The Council consequently withdrew such preferences on 21 December 2006.⁴²⁴ The withdrawal took effect on 21 June 2007 due to Belarus failing to take up a final opportunity to prevent withdrawal through implementation of the ILO's recommendations.⁴²⁵

6.3.3. – Myanmar

The prevalence of forced labour within Myanmar was brought to the attention of the EU Commission via a report submitted by the European Trade Union Confederation and the International Confederation of Trade Unions on 7 June 1995.⁴²⁶ The report highlighted the exaction of labour from civilian population in order to assist military operations, development and infrastructure projects, and also tourist development projects. It was stated that the use of forced labour was a central feature of Myanmar's domestic infrastructure policy.⁴²⁷ The EU Commission considered this information, and the corroborating reports of the ILO,⁴²⁸ and decided to instigate an investigation into the use of forced labour in Myanmar. This decision was public disseminated and interested parties were afforded the opportunity to submit relevant information to the EU

⁴²⁴ European Council, “*Belarus Removal Regulation*”, (2006).

⁴²⁵ European Commission, “*Press Release: EU will withdraw GSP trade preferences from Belarus over workers' rights violations*”, (15 June 2007), available at http://trade.ec.europa.eu/doclib/docs/2007/june/tradoc_134943.pdf (last accessed 20 April 2015). Belarus had six months, from the date of the adoption of the Regulation to withdraw preferences, before it took effect in order to implement the ILO recommendations, see European Council, “*Belarus Removal Regulation*”, (2006), § 12.

⁴²⁶ European Council, European Union, “*Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preference from the Union of Myanmar*”, Official Journal of the European Union, L085/8, (hereinafter “European Council, “*Myanmar Removal Regulation*”, (1997)”).

⁴²⁷ European Commission, European Union, “*Notice of initiation of an investigation of forced labour practices being carried out in Myanmar in view of a temporary withdrawal of benefits from the European Union's Generalized Scheme of Preferences*”, (20 January 1996), 96/C 15/03, (hereinafter “European Commission, “*Initiation of Investigation*”, (1996)”).

⁴²⁸ ILO, “*Report of the Committee set up to consider the representation made by the International Confederation of Free Trade Unions under Article 24 of the ILO Constitution alleging non-observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*”, (1994) and Committee on the Application of Standards, ILO, “*Observation on Forced Labour Convention, 1930 (No. 29) – Myanmar*”, (1995), International Labour Conference, 82nd session.

Commission.⁴²⁹ The authorities of Myanmar responded and stated their belief that the practices highlighted in the report were in fact not in violation of obligations under ILO Convention No. 29 as they fell within the exceptions provided for in Article 2.⁴³⁰ However, similar arguments had been raised in response to ILO criticisms and, in a similar vein to the ILO's treatment of the situation, such arguments were refused by the EU Commission. The EU Commission collected oral and written submissions that further corroborated the complaints made against Myanmar. Accordingly, on 24 March 1997 the Council adopted a Regulation that withdrew trade preferences from Myanmar.⁴³¹ However, if the circumstances justifying the removal no longer existed, such preferences could be reinstated.⁴³²

Following the withdrawal of preferences within the EU context, the issue of forced labour in Myanmar continued to receive attention from the ILO. An ILO Commission of Inquiry, which concluded in 1998, reported the widespread use of forced labour within the country and included certain recommendations to rectify the situation.⁴³³ Such recommendations included the removal of domestic legislation that violated the obligations under the ILO's Forced Labour Convention, 1930 (No. 29) and the proper enforcement of sanctions and protections contained within the Penal Code of Myanmar relating to forced labour.⁴³⁴ These recommendations, however, were not followed by Myanmar.⁴³⁵ As a result of this, the ILO ended all cooperative activities with Myanmar in 1999 unless they directly related to forced labour issues.⁴³⁶

⁴²⁹ European Commission, "*Initiation of Investigation*", (1996).

⁴³⁰ European Council, "*Myanmar Removal Regulation*", (1997).

⁴³¹ Article 1, European Council, "*Myanmar Removal Regulation*", (1997).

⁴³² Article 2, European Council, "*Myanmar Removal Regulation*", (1997).

⁴³³ Commission of Inquiry, ILO, "*Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*", (2 July 1998), (hereinafter "ILO, "*Commission Inquiry Report – Myanmar*", (1998)).

⁴³⁴ ILO, "*Commission Inquiry Report – Myanmar*", (1998), § 539.

⁴³⁵ ILO, "*Measures recommended by the Governing Body under article 33 of the Constitution – Implementation of recommendations contained in the report of the Commission of Inquiry entitled Forced Labour in Myanmar (Burma)*", (2000), International Labour Conference, 88th session.

⁴³⁶ ILO, "*Resolution on the widespread use of forced labour in Myanmar*", (1999), International Labour Conference, 87th session and ILO, "*Decision of the Governing Body concerning the application of the Conference Resolution*", (1999), Governing Body, 276th Session.

The ILO continued to monitor the situation in Myanmar with regards to forced labour. A report of the Committee on the Application of Standards, in 2011, noted that the tide appeared to be turning and authorities appeared more willing to implement recommendations and comply with obligations under the Forced Labour Convention, 1930 (No. 29).⁴³⁷ The authorities had expressed intent to revise the offending domestic laws and had already carried out activities with the purpose of raising awareness of the issue of forced labour amongst ethnic minority groups. These changes resulted from the good governance priorities established by the newly elected President of Myanmar. Although no substantive changes had taken place, the ILO believed that these steps and intentions were sufficient to justify removal of the restrictions on assistance placed upon Myanmar in 2012.⁴³⁸ The EU Commission took note of this change of attitude by the ILO. In September 2012 the then EU Trade Commissioner, Karel De Gucht, outlined the need to “underpin deep and important changes with real economic support” in Myanmar.⁴³⁹ This statement was accompanied by the intention to afford preferences to Myanmar again under the “Everything but Arms” programme due to the substantial progress made with regards to forced labour issues. These preferences were fully reinstated with regards to Myanmar on 22 April 2013, sixteen years after their initial removal.⁴⁴⁰

6.3.4. – El Salvador

El Salvador was granted GSP+ beneficiary status under the first formulation of the scheme in 2005.⁴⁴¹ Following the routine renewal of the scheme, all

⁴³⁷ Committee on the Application of Standards, ILO, *“Observation on Forced Labour Convention, 1930 (No. 29) – Myanmar”*, (2011), International Labour Conference, 100th session.

⁴³⁸ ILO, *“Report of the subcommittee on the review of measures previously adopted by the Conference to secure compliance by Myanmar with the recommendations of the Commission of Inquiry”*, (2012), International Labour Conference, 101st session. The restrictions were lifted, following the advice of the subcommittee report, via ILO, *“Resolution concerning remaining measures on the subject of Myanmar adopted under article 33 of the ILO Constitution”*, (18 June 2013), International Labour Conference, 102nd session.

⁴³⁹ European Commission, *“Press release: European Commission proposes to reinstate trade preferences to Myanmar/Burma”*, (17 September 2012), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=831>, (last accessed 21 April 2015).

⁴⁴⁰ European Council, European Union, *“Decision 2013/184/CFSP of 22 April 2013 concerning restrictive measures against Myanmar/Burma and repealing Decision 2010/232/CFSP”*, (22 April 2013), Official Journal of the European Union, L 111/75.

⁴⁴¹ European Commission, European Union, *“Decision of 21 December 2005 on the list of*

beneficiaries were required to apply again in order to have their tariff preferences continued. Beneficiaries had to show continued implementation of the relevant international human rights and labour rights Conventions in order to retain their beneficiary status.⁴⁴²

On 16 October 2007, the Constitutional Court of El Salvador held that aspects of the ILO's Freedom of Association and Protection of the Right to Organise Convention (No. 87), (1948) (hereinafter "ILO Convention No. 87") were incompatible with El Salvador's Constitution.⁴⁴³ ILO Convention No. 87 is one of the international agreements that must be ratified and effectively implemented in order to gain tariff preferences under the GSP+ scheme.⁴⁴⁴ Specifically, the Constitutional Court held that the provisions stating that freedom of association should be afforded to all "without distinction whatsoever" was contrary to the Constitutional prohibition on such rights being extended to workers in the public sector.⁴⁴⁵ The EU Commission received notification of this decision and decided that it constituted sufficient grounds to open an investigation into the implementation of ILO Convention No. 87 in El Salvador.⁴⁴⁶ Tariff preferences under the GSP+ scheme were still provided to El Salvador pending the outcome of the investigation.⁴⁴⁷

The EU Commission investigation took into account information provided by El

beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance, provided for by Article 26(e) of Council Regulation (EC) No 980/2005 applying a scheme of generalised tariff preferences", 2005/924/EC, Official Journal of the European Union, L 337/50.

⁴⁴² Article 9(2), European Council, European Union, "Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulation (EC) No 552/97, (EC) No 1933/2006 and Commission Regulation (EC) No 1100/2006 and (EC) No 964/2007", Official Journal of the European Union, L 211/1, (hereinafter "European Council, "GSP+ Regulation", (2008)").

⁴⁴³ Published in the Official Journal of El Salvador, No. 203, Volume 377, (31 October 2007).

⁴⁴⁴ Annex III, European Council, "GSP+ Regulation", (2008).

⁴⁴⁵ European Commission, European Union, "Report: Investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the protection of the freedom of association and the right to organise in El Salvador", C(2009) 7934, (hereinafter "European Commission, "El Salvador Investigation Report", (2009)", § 13.

⁴⁴⁶ European Commission, European Union, "Decision of 31 March 2008 providing for the initiation of an investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the protection of the freedom of association and the right to organise in El Salvador", 2008/316/EC, Official Journal of the European Union, L 108/29.

⁴⁴⁷ Article 10(6), European Council, "GSP+ Regulation", (2008).

Salvador's Government, the ILO, and two groups of interested parties that had responded to the public notice regarding the investigation.⁴⁴⁸ The Government highlighted the fact that a review of the Constitution had been launched in 2005 to assess any potential conflicts between ILO Convention No. 87 and the Constitution.⁴⁴⁹ The subsequent report highlighted the same issues exposed in the Constitutional Court cases and so the legislature agreed to implement ILO Convention No. 87 whilst also undertaking reform of the Constitution to eradicate the inconsistencies relating to public sector workers.⁴⁵⁰ However, safeguards existed that required any amendment to the Constitution to be approved by two successive legislatures.⁴⁵¹ Accordingly, the amendment to the Constitution had not yet come into force at the time of the Constitutional Court judgments. Information gathered from the ILO following the relevant judgments expressed "regret" over the decision and aspirations for the Constitutional changes to be brought in to force.⁴⁵² Additionally, a complaint had been made to the Committee on the Freedom of Association alleging that the Union of Salvadorian Judiciary Employees had been refused legal status due to the relevant public bodies being obliged to follow the binding Constitutional Court decision.⁴⁵³ The Committee held that a violation of the freedom of association had occurred and included express expectations that the next legislature should approve the Constitutional amendments.⁴⁵⁴

The EU Commission investigation concluded that El Salvador had taken steps, through the amendment of the Constitution, to fully implement ILO Convention No. 87. Additionally, on 27 May 2009, prior to the publication of the investigation

⁴⁴⁸ The two groups were the Independent Monitoring Group of El Salvador and the Organisation of Salvadorian Women for Peace (two NGOs who submitted information on 18 September 2008) and Luis Calvo Sanz El Salvador S.A. de C.V. and Calvo Conservas El Salvador S.A. de C.V. (two Salvadorian companies who submitted information on 26 September 2008). See European Commission, "*El Salvador Investigation Report*", (2009), § 10.

⁴⁴⁹ European Commission, "*El Salvador Investigation Report*", (2009), § 11.

⁴⁵⁰ European Commission, "*El Salvador Investigation Report*", (2009), § 12.

⁴⁵¹ Article 248, Constitution of the Republic of El Salvador, (1983 as amended in 2003)

⁴⁵² Committee of Experts on the Application of Conventions and Recommendations, ILO, "*Direct Request – Freedom of Association and Protection of the Rights to Organise Convention, 1948 (No. 87)*", (2009), International Labour Conference, 98th Session.

⁴⁵³ Committee on the Freedom of Association, ILO, "*Case No 2629 (El Salvador)*", (25 February 2008).

⁴⁵⁴ Committee on the Freedom of Association, ILO, "*Report in which the committee request to be kept informed of development*", Case No 2629 (El Salvador), (March 2009), Report 353.

report, El Salvador's new legislature had overwhelmingly voted in favour of the amendments to the Constitution.⁴⁵⁵ However, the EU Commission felt that amendments passed had not fully cured inconsistencies with ILO Convention No. 87 due to restrictions still being placed upon the freedom of association for civil servants public officials, and the judiciary⁴⁵⁶; contrary to the recommendations of the ILO.⁴⁵⁷ Despite this, the EU Commission decided that El Salvador should continue to receive preferences under the GSP+ regime. Two successive legislatures of El Salvador had shown intention to fully implement and comply with obligations under ILO Convention No. 87 and, due to the incentive based nature of the GSP+ scheme, the preferences should remain in place in order to encourage El Salvador to adopt further, necessary amendments. This decision to not withdraw preferences was formalised in a later decision to terminate the investigation into El Salvador's compliance with ILO Convention No. 87.⁴⁵⁸

6.3.5. – Pakistan

In 1995 a Human Rights Watch Report documented that instances of forced labour were rife in Pakistan.⁴⁵⁹ The report noted the widespread servitude imposed on workers through physical abuse, forced confinement, and debt bondage by employers. Following this report a number of trade unions petitioned the EU Commission to investigate the use of forced labour in Pakistan.⁴⁶⁰ Despite the information submitted, there was no investigation carried out by the EU Commission. Various reasons for this have been advanced, including attempts by the Pakistani authorities to derail the potential for an investigation and reluctance on behalf of EU Member States to initiate an

⁴⁵⁵ European Commission, "El Salvador Investigation Report", (2009), § 36.

⁴⁵⁶ European Commission, "El Salvador Investigation Report", (2009), §§ 38 and 39.

⁴⁵⁷ See Recommendation in Committee on the Freedom of Association, ILO, "Report in which the committee request to be kept informed of development", Case No 2629 (El Salvador), (March 2009), Report 353.

⁴⁵⁸ European Commission, European Union, "Decision of 20 October 2009 providing for the termination pursuant to Article 19(2) of Council Regulation (EC) No 732/2008 of the investigation initiated by Commission Decision 2008/316/EC with respect to the protection of the freedom of association and the right to organise in El Salvador", (20 October 2009), C(2009) 7936.

⁴⁵⁹ Human Rights Watch, "Contemporary Forms of Slavery in Pakistan", (1995), available at <http://www.hrw.org/reports/pdfs/c/crd/pakistan957.pdf>, (last accessed 21 April 2015).

⁴⁶⁰ Kryvoi, Y., "Why European Union Trade Union Trade Sanctions Do Not Work", (2005), Minnesota Journal of International Law, Volume 17:2, page 235.

investigation.⁴⁶¹ Recently, Pakistan applied to be included as a beneficiary under the GSP+ scheme which, as noted above, requires effective implementation of a number of international Conventions including the ILO's Forced Labour Convention (No. 182), (1932).⁴⁶² If the most recent conclusions of the relevant monitoring bodies show that certain Conventions are not effectively implemented then the application will be rejected.⁴⁶³ However, on 28 August 2013 Pakistan was granted status as a beneficiary under the GSP+ scheme alongside nine other countries, thus showing the EU Commission was satisfied with their implementation of all international labour Conventions.⁴⁶⁴

6.3.6. – Sri Lanka and Bolivia

Other petitions have been submitted to the EU Commission regarding violations of other human rights conventions that beneficiaries are obligated to comply with under the GSP. In 2010, as a result of sustained failures to implement and protect rights contained within the International Covenant on Civil and Political Rights,⁴⁶⁵ the Convention against Torture,⁴⁶⁶ and the Convention on the Rights of the Child,⁴⁶⁷ tariff preferences were withdrawn from Sri Lanka.⁴⁶⁸ During the

⁴⁶¹ Tsogas, G., "Labour Standards in the Generalized Systems of Preferences of the European Union and the United States", (2000), European Journal of Industrial Studies, Volume 6:3, page 362.

⁴⁶² Article 9(1)(b), European Union, "Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008", Official Journal of the European Union, L 303/1.

⁴⁶³ *Ibid.*

⁴⁶⁴ European Commission, European Union, "Regulation (EU) No 1/2014 of 28 August 2013 establishing Annex III to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences", Official Journal of the European Union, L 1/1.

⁴⁶⁵ UN, International Covenant on Civil and Political Rights, (1966). See Part A, Annex III, European Council, "Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences", Official Journal of the European Union, L 169/1 for the list of International Conventions applicable at the time.

⁴⁶⁶ UN, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984). See Part A, Annex III, European Council, "Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences", Official Journal of the European Union, L 169/1 for the list of International Conventions applicable at the time.

⁴⁶⁷ UN, Convention on the Rights of the Child, (1989). See Part A, Annex III, European Council, "Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences", Official Journal of the European Union, L 169/1 for the list of International Conventions applicable at the time.

⁴⁶⁸ European Council, "Implementing Regulation (EU) No 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic

investigation proceedings the European Trade Union Confederation and the International Trade Union Confederation submitted information on 19 November 2008⁴⁶⁹ but this was not a substantial aspect of the decision to remove preferences.

Additionally, following Bolivian denouncement of the UN Single Convention on Narcotic Drugs (1961), and subsequent re-accession with a reservation regarding traditional use of coca leaves, the situation was investigated by the EU Commission.⁴⁷⁰ Following correspondence with the Bolivian Government and the UN Office on Drugs and Crime, the EU Commission decided that Bolivian legislation was still in accordance with, and effectively implementing, the UN Single Convention on Narcotic Drugs (1961). Accordingly, the investigation was terminated without any further action.⁴⁷¹

6.3.7. – Conclusion

The EU procedures within the GSP have rarely resulted in withdrawal of preferences. In contrast with the U.S. system, where preferences have been withdrawn fifteen times, EU preferences have only been withdrawn twice out of the four investigations relating to labour rights discussed above. Additionally, in contrast with the U.S. GSP proceedings discussed above, the resolution of EU investigations took a comparatively shorter period of time. A common theme running through the situations discussed above is the reliance on third party reports by the investigating body. Such reliance allows decisions regarding withdrawal of preferences to be intimately linked to compliance with the

Socialist Republic of Sri Lanka", Official Journal of the European Union, L 45/1.

⁴⁶⁹ See B.2 12, Annex 1, Evidentiary sources, Official submissions during the 4-month comment period under art. 18 of Council Regulation (EC) No 980/2005, in European Commission, "Report on the findings of the investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka", (19 October 2009), C(2009) 7999.

⁴⁷⁰ European Commission, European Union, "Implementing Decision of 19 March 2012 providing for the initiation of an investigation pursuant to Article 17(2) of Council Regulation (EC) No 732/2008 with respect to the effective implementation of the United Nations Single Convention on Narcotic Drugs in Bolivia", 2012/161/EU, Official Journal of the European Union, L 80/30.

⁴⁷¹ European Commission, European Union, "Implementing Decision of 15 March 2013 terminating the investigation initiated by Implementing Decision 2012/161/EU with respect to the effective implementation of the United Nations Single Convention on Narcotic Drugs in Bolivia", 2013/136/EU, Official Journal of the European Union, L 75/35.

relevant labour rights. The reinstatement of preferences for Myanmar shows that any removal is considered temporary and can be reversed in the event that compliance with labour standards is shown by the beneficiary country.

6.4. – Canadian General Preferential Tariff

As discussed above, no formal conditions exist for the withdrawal of tariff preferences under the CGPT. In deciding whether preferences should be withdrawn the Governor has ultimate discretion, although she/he will only act in pursuance of a recommendation from the Minister of Finance.⁴⁷² In December 2006, Canada imposed a number of economic sanctions on Belarus as a result of the deteriorating human rights situation in the country.⁴⁷³ The presidential election of 19 March 2006 was, in the opinion of international observers, severely flawed. The issues surrounding the run up to the election and the subsequent continuation of intimidation and unwarranted imprisonment of democratic supporters motivated Canada’s decision to place Belarus on an “Area Control List” which prohibited exports to Belarus unless on humanitarian or personal grounds.⁴⁷⁴ Following this general prohibition on exports, the Governor of Canada removed tariff preferences for Belarus that were previously afforded under the CGPT.⁴⁷⁵ The decision followed a recommendation of the Minister of Finance and again related to the human rights situation in Belarus. This removal occurred a period of time after the general sanctions were imposed but was likely motivated by similar concerns relating to human rights, but not specifically labour rights, within Belarus.

⁴⁷² Canada, “*Customs Tariff*”, S.C. 1997, c. 36, Article 34(1)(b), “*Extension and withdrawal of entitlement*”.

⁴⁷³ Canada, “*Area Control List*”, SOR/81-543.

⁴⁷⁴ Foreign Affairs, Trade and Development Canada, “*Notice – Export Controls to Belarus*”, (14 December 2006), available at <http://www.international.gc.ca/controls-controles/systemes-excol-ceed/notices-avis/148.aspx?lang=eng>, (last accessed 23 April 2015).

⁴⁷⁵ Canada, “*General Preferential Tariff Withdrawal Order (Republic of Belarus)*”, SOR/2007-174, (31 July 2007).

Chapter 7 – Conclusion

This thesis has charted the phenomena of “social clauses” throughout a number of international trade agreements and unilateral schemes of preference. In considering these clauses it is clear that although a regular feature in such instruments, their implementation by way of utilisation of procedures contained within such instruments is not such a common occurrence.

Historically there had been a reluctance to create a formal link between trade and labour at an international level. Despite repeated attempts by the U.S., during the operation of the GATT and the negotiations surrounding the creation of the WTO, States that commented on the U.S. proposals were particularly concerned by the potentially protectionist repercussions of the vague proposals. Accordingly, these proposals were rejected and the WTO made clear, within the Singapore Ministerial Declaration, that labour issues fell outwith their jurisdiction and were best regulated and promoted by the ILO.

However, since this refusal to bring labour rights issues into the international trade regime, there has been the emergence of many “social clauses” within trade agreements; both in the form of Free Trade Agreements and Generalised Schemes/Systems of Preferences. Many of these agreements have been concluded by the States that were previously concerned about the impact that labour rights provisions could have on their comparative advantage if included in the abovementioned multilateral frameworks. When comparing the content of these “social clauses” to the proposals of the U.S., the scope of the labour rights included are clearly defined. Additionally, the circumstances in which trade benefits can be restricted due to a failure to ensure fundamental labour rights are limited to specific rights, and specific forms of non-compliance. The concerns that States previously had, regarding protectionism and vague proposals, have been addressed by the specificity of these agreements. Further, the fact that proceedings regarding implementation would be free from the multitude of political considerations that could impact proceedings at a multilateral level under the GATT or WTO could be a further motivation for this emerging

acceptance of “social clauses” and the link between trade and labour.

The NAALC, the first of instrument to formalise a link between trade and labour, contains complex mechanisms to implement labour obligations. These procedures however, mirroring the provisions of some other U.S. trade agreements, only apply to certain circumstances. Only matters that relate to trade and specific labour rights can lead to the eventual imposition of fines, thus creating a clear hierarchy amongst labour rights. Under the NAALC there have been a number of submissions made requesting review of compliance with certain “social clauses”. However, none of these issues have ever extended beyond the initial stage of ministerial consultations. This shows a clear reluctance to utilise the entirety of the implementation procedures available under the NAALC. Additionally, the failure to pursue the issues beyond ministerial consultations may result in issues of compliance not being fully resolved in a satisfactory manner. The activities in subsequent ministerial agreements to ensure compliance merely include workshops and international conferences; similar to those activities mandated under certain cooperative activities provisions of other trade agreements concluded by the United States. This failure to utilise the procedures for ensuring implementation is also evident in relation to other trade agreements. With regards to agreements concluded by the EU, no formal reviews have been carried out by the EU Commission. Additionally, monitoring of compliance with labour rights as mandated by certain agreements has placed little priority on the contained “social clauses”. This lack of priority is also reinforced by the failure to react to the DAG’s submission on labour rights compliance by Korea, despite previous assertions that these would be treated with seriousness and respect.

This picture could be contrasted with the situation in relation to GSPs that include “social clauses”. Two out of the eleven schemes currently in operation, those established by the U.S. and the EU, include such clauses. Withdrawal of preferences as a result of failure to comply with labour rights obligations as occurred a number of times under both schemes. The U.S. system, as part of their annual review of beneficiaries, has withdrawn preferences fifteen times.

Currently, despite the expiration of the GSP, there are six ongoing investigations that may lead to further withdrawals. However, the U.S. process can be a protracted affair. For example, from the original submission to final removal of preferences, the proceedings relating to Bangladesh took six years to conclude.

The EU GSP+ scheme, in contrast with the U.S. and other EU schemes, provides additional trade incentives for countries that ratify and fully implement core labour conventions. This scheme creates a strong link between trade and labour rights and imposes a number of additional obligations, including monitoring obligations, upon beneficiaries. However, trade incentives under all three branches of the EU GSP programme can be withdrawn in the event that beneficiaries carry out serious and systemic violations of the principles contained within fundamental labour conventions. Generally, when reviewing the beneficiary status of States within the EU system with regards to compliance with these labour conventions, a heavy reliance is placed upon the reports of the ILO in order to ensure that preferences are only afforded to compliant countries. This has resulted in removal of preferences for Belarus and Myanmar under the GSP scheme, despite the latter having preferences reinstated once compliance was achieved. The reliance on ILO reports and proceedings may have also resulted in the EU proceedings being a more expedient process compared with that of the United States. For example, the removal of preferences in respect of Myanmar took less than two years from the original submissions to the final decision of the European Council.

Generally, there appears reluctance to fully utilise the procedures available within the abovementioned agreements to implement “social clauses”. The recent unprecedented decision of the U.S. to pursue arbitration with regards to the non-compliance of Guatemala could be a change in the tide. However, it remains to be seen whether the review mechanisms in other agreements will also be utilised in a similar manner in the future. Further implementation of these “social clauses” is a necessary step in order to move towards the high aspirations relating to the protection of labour rights from the potentially adverse effects of liberalised trade and globalisation.

Annex 1 – Free Trade Agreements including “social clauses”

Party	Core Agreement	Side-Agreement	Cooperation
Australia	South Korea (12/12/2014), U.S. (01/01/2005)		Chile (06/03/2009)
Bahrain	U.S. (01/08/2006)		
Bosnia and Herzegovina	EFTA (01/01/2015)		
Canada	South Korea (01/01/2015)	Chile (05/07/1997), Colombia (15/08/2011), Costa Rica (01/11/2002), Honduras (01/10/2014), Jordan (01/10/2012), NAALC (01/01/1994), Panama (01/04/2013), Peru (01/08/2009)	
CARIFORUM*	EU (01/11/2008)		
Central America*	EU (01/08/2013), U.S. and Dominican Republic (01/03/2006)		
Chile	Colombia (08/05/2009), EU (01/02/2003), Turkey (01/03/2011), U.S. (01/01/2004)	Canada (05/07/1997), China (01/08/2010), Panama (07/03/2008), Peru (01/03/2009)	Australia (06/03/2009)
China		Chile (01/08/2010)	New Zealand (01/10/2008)
Chinese Taipei	New Zealand (01/12/2013), Nicaragua (01/01/2008)		
Colombia	Chile (08/05/2009), EU (with Peru, 01/03/2013), U.S. (18/05/2012)	Canada (15/08/2011)	
Costa Rica	EFTA (with Panama, 19/08/2014)	Canada (01/11/2002)	Singapore (01/07/2013)
Dominican Republic	Central America and U.S. (01/03/2006)		
EFTA*	Bosnia and Herzegovina (01/01/2015), Costa Rica/Panama (19/08/2014), Hong Kong (01/10/2012)		

Party	Core Agreement	Side-Agreement	Cooperation
EU	CARIFORUM (01/11/2008), Central America (01/08/2013), Colombia/Peru (01/03/2013), Georgia (01/09/2014), South Korea (01/01/2011), OCT (01/01/1971), Moldova (01/09/2014)		Chile (01/02/2013), South Africa (01/01/2000)
Georgia	EU (01/09/2014)		
Honduras		Canada (01/10/2014)	
Hong Kong	EFTA (01/10/2012)	New Zealand (01/01/2011)	
Japan	Philippines (11/12/2008), Switzerland (01/09/2009)		
Jordan	U.S. (17/12/2001)	Canada (01/10/2012)	
Malaysia		New Zealand (01/08/2010)	
Mexico		NAALC (01/01/1994)	
Moldova	EU (01/09/2014)		
Montenegro	EFTA (01/09/2012)		
Morocco	U.S. (01/01/2006)		
New Zealand	Chinese Taipei (01/12/2013)	Malaysia (01/08/2010), Hong Kong (01/01/2011), Thailand (01/07/2005)	China (01/10/2008)
Nicaragua	Chinese Taipei (01/01/2008)		
OCT*	EU (01/01/1971)		
Oman	U.S. (01/01/2009)		
Panama	U.S. (31/10/2012)	Canada (01/04/2013), Chile (07/03/2008)	
Peru	EU (with Colombia, 01/03/2013), South Korea (01/08/2011), U.S. (01/02/2009)	Canada (01/08/2009), Chile (01/03/2009)	
Philippines	Japan (11/12/2008)		
Singapore	U.S. (01/01/2004)		Costa Rica (01/07/2013)
South Africa	EU (01/01/2000)		
South Korea	Australia (12/12/2014), Canada (01/01/2015), EU (01/07/2011), Peru (01/08/2011), Turkey (01/05/2013), U.S. (15/03/2012)		

Party	Core Agreement	Side-Agreement	Cooperation
Switzerland	Japan (01/09/2009)	China (01/07/2014)	
Thailand		New Zealand (01/07/2005)	
Turkey	Chile (01/03/2011), South Korea (01/05/2013)		
U.S.	Australia (01/01/2005), Bahrain (01/08/2006), Chile (01/01/2004), Colombia (18/05/2012), Dominican Republic and Central America (01/03/2006), Jordan (17/12/2001), Morocco (01/01/2006), Oman (01/01/2009), Panama (31/10/2012), Peru (01/02/2009), Singapore (01/01/2004), South Korea (15/03/2012)	NAALC (01/01/1994)	

Key

*CARIFORUM

Antigua and Bermuda; Bahamas; Barbados; Belize; Dominica; Dominican Republic; Grenada; Guyana; Jamaica; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Suriname; Trinidad and Tobago.

*Central America

Costa Rica; El Salvador; Guatemala; Honduras; Nicaragua; Panama.

*EFTA

Iceland; Liechtenstein; Norway; Switzerland.

*OCT

Anguilla; Aruba; British Indian Ocean Territory; Cayman Islands; Falkland Islands (Islas Malvinas); French Polynesia; French Southern Territories; Greenland; Mayotte; Montserrat; Netherlands Antilles; New Caledonia; Pitcairn; Saint Helena; Saint Pierre and Miquelon; South Georgia and the South Sandwich Islands; Turks and Caicos Islands; Virgin Islands, British; Wallis and Futuna Islands.

Dates refer to the date on which the agreement came into force.

Annex 2 – Regional Free Trade Regimes including “social clauses”

Agreement	State Parties
CARICOM (Caribbean Community) – Declaration of Labour and Industrial Relations Principles (1995)	Antigua and Barbuda; Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Haiti; Jamaica; Montserrat; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Suriname; Trinidad and Tobago
ECOWAS (Economic Community of West African States)(1993)	Benin; Burkina Faso; Cape Verde; Côte d'Ivoire; Ghana; Guinea; Guinea-Bissau; Liberia, Republic of; Mali; Niger; Nigeria; Senegal; Sierra Leone; The Gambia; Togo
Trans-Pacific Partnership Agreement (2006)	Brunei Darussalam; Chile; New Zealand; Singapore
COMESA (Common Market for Eastern and Southern Africa)(1994)	Angola; Burundi; Comoros; Eritrea; Ethiopia; Kenya; Lesotho; Malawi; Mauritius; Rwanda; Sudan; Swaziland; Tanzania; Uganda; Zambia; Zimbabwe
EAC (East African Community)(2000)	Burundi; Kenya; Rwanda; Tanzania; Uganda
Cartagena Agreement on the Andean Community – Andean Instrument on Occupational Safety and Health (1994)	Bolivia; Colombia; Ecuador; Peru; Venezuela
MERCOSUR (Southern Common Market) – Social-Labour Declaration (1998)	Argentina; Brazil; Paraguay; Uruguay

Annex 3 – Overview of NAALC Submissions

Submission	Group 1	Group 2	Group 3	Status	Against
U.S. 2005-03	✓	✓	✓	R	Mexico
U.S. 2003-01	✓	✓	✓	R+A	Mexico
U.S. 2000-01			✓	R+A	Mexico
U.S. 9901	✓	✓	✓	R+A	Mexico
U.S. 9703	✓		✓	R+A	Mexico
U.S. 9702	✓		✓	R+A	Mexico
U.S. 9701		✓		R+A	Mexico
U.S. 9601	✓			R+A	Mexico
U.S. 940003	✓			R+A	Mexico
U.S. 940001/2	✓			R	Mexico
CAN 2003-1	✓	✓	✓	R+A	Mexico
CAN 98-1	✓		✓	R	Mexico
MEX 2011-1		✓	✓	R	U.S.
MEX 2006-1	✓	✓	✓	R	U.S.
MEX 2005-1		✓	✓	R	U.S.
MEX 2003-1	✓	✓	✓	R	U.S.
MEX 2001-1		✓	✓	R	U.S.
MEX 9801	✓			R+A	U.S.
MEX 9802	✓	✓	✓	R+A	U.S.
MEX 9803		✓	✓	R+A	U.S.
MEX 9804		✓		R+A	U.S.
MEX 9501	✓			R+A	U.S.
U.S. 2011-02	✓			Under Review	Mexico
CAN 2011-1	N/A	N/A	N/A	Under Review	Mexico
CAN 2008-1	✓	✓	✓	Under Review	U.S.
U.S. 2006-01	✓		✓	Declined	Mexico
U.S. 2005-02	✓			Declined	Mexico
U.S. 2005-01	✓			Declined	Mexico
U.S. 2001-01	✓			Declined	Mexico
U.S. 9804	✓			Declined	Canada
U.S. 9802			✓	Declined	Mexico
U.S. 9801	✓			Declined	Mexico
CAN 2005-1	✓			Declined	Mexico
CAN 99-1	N/A	N/A	N/A	Declined	U.S.
U.S. 2004-01			✓	Withdrawn	Mexico
U.S. 9803	✓			Withdrawn	Canada
U.S. 9602	✓			Withdrawn	Mexico
U.S. 940004	✓			Withdrawn	Mexico

Key

- R - Report Issued
 R+A - Report Issued and Ministerial Agreement signed
 N/A - No information on submission available
 Group 1 - Freedom of association, collective bargaining, and the right to strike.
 Group 2 - Discrimination, migrant workers' rights, and payment of overtime.
 Group 3 - Occupational safety and health, child labour, and payment of the minimum wage

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