

# MAKING FREE TRADE FAIR: HOW THE WTO COULD INCORPORATE LABOR RIGHTS AND WHY IT SHOULD

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*Labor rights protections for workers participating in international trade have been a part of United States trade pacts and preference programs since the Tariff Act of 1890. These worker protections have gained increased attention in the modern era, as they have become a linchpin for securing bipartisan support of trade agreements in the U.S., a means of promoting international human rights, and a prevalent embodiment of the sustainable development and “fair trade” movements. However, even as labor chapters have become a mainstay in U.S. and European trade agreements, the World Trade Organization has chosen not to directly incorporate labor rights into its negotiating rounds. This note argues that the labor provisions of U.S. trade agreements and preference programs provide a viable model for integrating these same protections into the WTO system. Moreover, this note contends that as the largest multilateral framework in the world committed to trade, WTO has both a moral and an economic imperative to include worker protections.*

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I. INTRODUCTION

As the world’s largest organization devoted to inter-state trade,<sup>1</sup> the World Trade Organization (WTO) stands at the vanguard of the movement for global interconnectedness and the free flow of goods. Proponents of the WTO, and free trade more generally, contend that such globalization not only leads to financial gains for buyers and sellers, but also results in net economic development and growth for free-trading societies at large.<sup>2</sup> However, the prevalence of international trade agreements has also brought other trade-related concerns

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1. See, e.g., George C. Nnona, *Multidisciplinary Practice Under the World Trade Organization’s Services Regime*, 16 IND. INT’L & COMP. L. REV. 73, 78 (2005) (calling the WTO “the largest multilateral trade arrangement in the world. . .”); Jane C. Hong, *Enforcement of Corporate Codes of Conduct: Finding a Private Right of Action for International Laborers Against MNCs for Labor Rights Violations*, 19 WIS. INT’L L. J. 41, 44 (2000) (describing the WTO as “the largest organization for the regulation of international trade.”); *Understanding the WTO: The Organization*, WORLD TRADE ORG. [WTO], [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Sept. 15, 2011) (listing 153 members of the WTO as of July 23, 2008).

2. See, e.g., Alan V. Deardorff & Robert M. Stern, *What You Should Know About Globalization and the World Trade Organization*, in THE WTO AND LABOR AND EMPLOYMENT 3, 4 (Drusilla K. Brown & Robert M. Stern eds., 2007) (suggesting that “the vast majority of people in the world are ultimately made better off by the spread of global markets and the efforts of the WTO to keep those markets reasonably free.”); Paulette L. Stenzel, *Free Trade and Sustainability Through the Lens of Nicaragua: How CAFTA-DR Should be Amended to Promote the Triple Bottom Line*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 653, 662 (2010) (observing that “proponents of free trade agreements say that the agreements bring economic development that trickles down benefits to all, lifting all boats through a rising tide of greater prosperity and development.”); JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 52-64 (2004) (describing the significant benefits that free trade provides for the world’s poorest people).

and externalities to the forefront of global consciousness and debate. Two of the most obvious of these issues are the impacts of world trade on international labor standards and the environment.<sup>3</sup> On December 1, 1999, former President Clinton focused attention on labor rights in the world trade debate by suggesting to WTO representatives in Seattle that “the WTO must make sure that open trade does indeed lift living standards, [and] respects core labor standards that are essential not only to worker rights, but to human rights.”<sup>4</sup>

More recently, actions by the United States (U.S.) government have shown the Obama Administration’s intention to go beyond mere rhetoric in enforcing labor protections in world trade. The present case between the United States and Guatemala for alleged labor violations under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) demonstrates the Administration’s intention to hold American trade partners to their agreed labor obligations.<sup>5</sup> But what of the WTO? As the world’s largest forum for international trade, should the WTO also incorporate labor protections? Does the present action to enforce labor protections through regional free trade agreements create an impetus for similar enforcement on a global level through the WTO? Do variegated labor standards and protections lead to a “race to the bottom” in the context of global trade? And if such regulation should exist, is the WTO the proper forum? These are some of the questions which this paper seeks to address.

## II. SHOULD THE WTO INCLUDE LABOR RIGHTS IN ITS NEGOTIATING ROUNDS?

### A. *History and Current Situation of Labor Standards in the WTO*

#### 1. From Havana to Singapore

While labor standards have been debated in the General Agreement

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3. See, e.g., *War of the Worlds*, *ECONOMIST*, Oct. 1, 1994, at 32 (stating that “labour standards and environmental issues are playing an increasing role in international trade disputes.”); Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 *WASH. & LEE L. REV.* 347, 348 (2004) (suggesting that “the link between trade, labor, and the environment has been pressed in much academic and policy discourse.”).

4. *Clinton’s Plea: ‘Open the Meetings,’* *N.Y. TIMES*, Dec. 1, 1999, at A1.

5. See Letter from Ron Kirk, U.S. Trade Representative, and Hilda Solis, U.S. Sec’y of Labor, to Erick Coyoy Echevarria, Guat. Minister of Econ., and Edgar Alfredo Rodriguez, Guat. Minister of Labor and Soc. Prot. (July 30, 2010) [hereinafter Kirk-Solis Letter], available at [http://www.ustr.gov/webfm\\_send/2114](http://www.ustr.gov/webfm_send/2114) (requesting consultations with Guatemala for alleged labor violations under CAFTA-DR).

on Tariffs and Trade (GATT) and WTO trade rounds since 1948, at present the WTO does not explicitly incorporate labor standards into its trade framework. The Havana Charter, which was to be the basis for the post-World War II international trade order, declared that “[m]embers recognize that unfair labor conditions, particularly in production for export, create difficulties in international trade and accordingly each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.”<sup>6</sup> However, the Havana Charter was never adopted and GATT Article XX only makes reference to items produced by prison labor,<sup>7</sup> measures necessary to protect public morals,<sup>8</sup> and measures relating to human life or health.<sup>9</sup>

The issue was subsequently raised in the 1978 Tokyo Round, but received little support.<sup>10</sup> During the 1994 Uruguay Round, the United States proposed that a study group be formed to examine the role of labor rights in free trade, but developing countries opposed such a measure.<sup>11</sup> Rather, they suggested that the International Labor Organization (ILO), instead of a trade organization like the WTO, was the proper forum for discussions of labor rights.<sup>12</sup> The Ministerial Declaration of the WTO’s 1996 Singapore Round echoed this sentiment in its Article 4 pronouncement that “[the ILO] is the competent body to set and deal with these [labor] standards, and we affirm our support for its work in promoting them.”<sup>13</sup> This position has been reiterated by the 2001 Doha Ministerial Declaration.<sup>14</sup>

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6. Havana Charter for an International Trade Organization art. 7(1), Mar. 24, 1948, 1948 CAN. T.S. NO. 32, *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/havana\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/havana_e.pdf).

7. General Agreement on Tariffs and Trade art. XX(e), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

8. *Id.* art. XX(a).

9. *Id.* art. XX(b).

10. See Peter S. Watson, *The Framework for the New Trade Agenda*, 25 LAW & POL’Y INT’L BUS. 1237, 1253 (1994).

11. Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT’L ECON. L. 61, 63 (2001).

12. *Id.*

13. WTO, Ministerial Declaration of 18 December 1996, WT/MIN(96)/DEC, 36 I.L.M. 218, 221 (1997) [hereinafter Singapore Declaration].

14. WTO, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746, 747 (2002) [hereinafter Doha Declaration] (“We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labor standards. We take note of work under way in the International Labor Organization (ILO) on the social dimension of globalization.”).

2. Deference to the ILO

As of the writing of this note, the WTO has chosen not to directly address the subject of labor standards in its negotiating rounds.<sup>15</sup> However, that is not to say that the issue of labor is completely ignored by the WTO. The WTO website states that all WTO member governments are committed to a narrow set of core labor standards—freedom of association, no forced labor, no child labor, and no discrimination at work (including gender discrimination).<sup>16</sup> Given the WTO’s stated policy of deferring labor matters to the judgment of the ILO, it should come as no surprise that these “core” labor rights recognized by the WTO are the very rights enshrined in the ILO’s Declaration of Fundamental Principles and Rights at Work.<sup>17</sup> Moreover, the current practice of the WTO, as emphasized in the Singapore Ministerial Declaration referenced above, is to defer decisions about appropriate labor standards and protections to the ILO.<sup>18</sup> While such deference may be politically expedient, it also presents problems and limitations from the standpoints of both labor protection and trade integration.

Since its founding in 1919 as part of the Treaty of Versailles that ended World War I,<sup>19</sup> the ILO has been the principal global body responsible for recognizing and enumerating global labor standards.<sup>20</sup> As an organization made up of member-states, the ILO primarily seeks to accomplish this goal through the enactment of international conventions.<sup>21</sup> Though the ILO has 188 conventions as of May

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15. See *Labour Standards: Consensus, Coherence, Controversy*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey5\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm) (last visited Sept. 28, 2011).

16. *Id.*

17. See Int’l Labour Org. [ILO], *Declaration on Fundamental Principles and Rights at Work* art. 2, June 18, 1998, 37 I.L.M. 1233 (1998) [hereinafter ILO Declaration], available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/index.htm> (last visited Sept. 10, 2011). In addition to the aforementioned core labor standards listed on the WTO web site, the ILO Declaration also includes the effective recognition of the right to collective bargaining.

18. See Doha Declaration, *supra* note 14.

19. See *About the ILO: Origins and History*, ILO, [http://www.ilo.org/global/About\\_the\\_ILO/Origins\\_and\\_history/lang—en/index.htm](http://www.ilo.org/global/About_the_ILO/Origins_and_history/lang—en/index.htm) (last visited Sept. 10, 2011) [hereinafter *ILO, Origins and History*]; International Labour Organization Constitution, June 28, 1919, 49 Stat. 2712, 225 Consol. T.S. 378.

20. See *ILO, Origins and History*, *supra* note 19. As of the writing of this paper, the ILO has 183 member-states. Notable exceptions include North Korea, Bhutan, Micronesia, Andorra, Monaco, and Liechtenstein. See *Member States of the ILO*, ILO, <http://www.ilo.org/ilolex/english/mstatede.htm> (last visited Sept. 10, 2011).

21. See Kenneth G. Dau-Schmidt, *Economic Analysis of Labor and Employment Law in the New Economy: Proceedings of the 2008 Annual Meeting, Association of American Law Schools, Section on Law*

2011,<sup>22</sup> the organization cannot oblige states to comply with the provisions of these conventions.<sup>23</sup> Despite having the capacity to investigate alleged labor violations and make findings, the organization lacks an enforcement mechanism.<sup>24</sup> The ILO cannot issue sanctions directly, and its Constitution was specifically amended in 1946 to preclude any use of “measures of an economic character.”<sup>25</sup> As such, its findings are regularly ignored by non-compliant states.<sup>26</sup>

In 2000, the ILO sought to hold Myanmar accountable for gross labor violations by “recommending” sanctions through an expansive reading of its Article 33 powers under the ILO Constitution.<sup>27</sup> In response to reports of widespread coerced labor and other core labor violations, the ILO called on member-states and international organizations to review their trade and association with Myanmar, lest they tacitly support the abrogation of core labor standards.<sup>28</sup> But this call for action by the ILO went largely unheeded: the international community responded with little in the way of concrete economic sanctions on Myanmar.<sup>29</sup> Unilateral United States action, on the other hand, came in the form of both federal legislation<sup>30</sup> and a judicial decision of the Ninth Circuit Court of Appeals, which held that oil companies who benefitted from coerced labor could be held liable under the Alien Tort Statute for violating the law of nations.<sup>31</sup>

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*and Economics*, 12 EMP. RTS. & EMP. POL'Y J. 327, 375 (2008) (describing the ILO conventions as “labor standards”).

22. See *ILOLEX: Database of International Labour Standards*, ILO, <http://www.ilo.org/ilolex/english/newratframeE.htm> (last visited Sept. 10, 2011).

23. See Summers, *supra* note 11, at 63.

24. *Id.*; see also Miriam Mafessanti, *Corporate Misbehavior and International Law: Are There Alternatives to “Complicity”?*, 6 S.C. J. INT'L. L. & BUS. 167, 191 (2010) (stating that “[t]he ILO can only bind the member states that ratify the various ILO conventions, but even then it is not equipped with an enforcement mechanism against recalcitrant states . . .”).

25. Anne Trebilcock, *Putting the Record Straight About International Labor Standard Setting*, 31 COMP. LAB. L. & POL'Y J. 553, 563 & n.36 (2010).

26. See Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNAT'L L. 659, 680-84 (1998).

27. See Francis Maupin, *Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience*, in *LABOUR RIGHTS AS HUMAN RIGHTS* 85, 108 (Philip Alston ed., 2005).

28. See Press Release, ILO, *International Labour Conference Adopts Resolution Targeting Forced Labour in Myanmar (Burma)* (June 14, 2000), [http://www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Press\\_releases/lang-en/WCMS\\_007899/index.htm](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang-en/WCMS_007899/index.htm).

29. Alan Hyde, *The International Labor Organization in the Stag Hunt for Global Labor Rights*, 3 LAW & ETHICS HUM. RTS. 153, 161 (2009).

30. *Burmese Freedom and Democracy Act of 2003*, Pub. L. No. 108-61, 117 Stat. 864 (2003).

31. *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated for rehearing en banc*, 395 F.3d 978 (9th Cir. 2003), *and dismissed by settlement*, 403 F.3d 708 (9th Cir. 2005).

Far from demonstrating any sort of ILO institutional or multilateral enforcement capacity, the Myanmar case demonstrates the organization's inability to enforce labor protections even in the most egregious of circumstances.<sup>32</sup> As the Solidarity Center put it in its summary of the Myanmar case, "while the ILO can capably hold the moral compass to point the way toward freedom of association and other fundamental worker rights, permanent change is unlikely through this action alone."<sup>33</sup> Thus, though the ILO may be an apt forum for the enunciation of core labor standards, deferring to the ILO to enforce these standards in international trade seems to be tantamount to no enforcement at all.

### B. *Justifications for Linking Labor Standards and Trade Agreements*

In light of the enforcement shortcomings of the ILO, linking labor rights to trade agreements presents a more promising avenue for giving these rights meaning. But are trade agreements the proper avenue for regulating labor standards? There are at least five justifications for linking labor standards and trade agreements: (1) preventing a "race to the bottom" in labor standards; (2) allowing states to coordinate labor standards on an international level; (3) protecting labor rights as a subset of international human rights; (4) building a middle class, which can increase the size of the market that participates in and benefits from such trade agreements; and (5) increasing the economic benefits and productivity of firms that recognize and comply with fundamental labor rights. We address each of these justifications in turn.

#### 1. Preventing a "Race to the Bottom"

The concept of a "race to the bottom" in labor standards implies that low labor standards in some exporting countries will give those countries a comparative advantage vis-a-vis countries that respect labor rights, which will create downward pressure on the labor standards of all exporting countries.<sup>34</sup> While the World Trade Organization has

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32. See Hyde, *supra* note 29 (suggesting that "far from demonstrating the power of Article 33, the Myanmar matter conclusively demonstrated its impotence.").

33. See THE SOLIDARITY CTR., JUSTICE FOR ALL: A GUIDE TO WORKER RIGHTS IN THE GLOBAL ECONOMY 22 (3rd ed. 2008) [hereinafter Justice for All], available at [http://www.solidaritycenter.org/files/pubs\\_jfa2009.pdf](http://www.solidaritycenter.org/files/pubs_jfa2009.pdf).

34. See Dani Rodrik, *Labor Standards in International Trade: Do They Matter and What Do We Do About Them?*, in EMERGING AGENDA FOR GLOBAL TRADE : HIGH STAKES FOR DEVELOPING COUNTRIES 35, 44 (Robert Z. Lawrence, Dani Rodrik & John Whalley eds., 1996).

found that applying core labor standards actually increases productivity and reduces the real costs of contracting workers,<sup>35</sup> the perception of a comparative advantage to be gained through a “race to the bottom” is still quite prevalent.<sup>36</sup> It seems unlikely that an economically developed state will rescind existing labor protections in an effort to gain economic ground on a developing country;<sup>37</sup> however, the temptation may be great for developing countries seeking to attract foreign investment to attempt to keep costs down by maintaining a minimal level of labor protection or enforcement. Advocates of this version of the prisoner’s dilemma argue that it can only be preempted by international agreement and enforcement of minimum labor standards.<sup>38</sup>

Critics may question the ability of trade-linked labor standards to stem the “race to the bottom” by pointing to the case of China, which has become the world’s top location for foreign direct investment<sup>39</sup> but has historically had a poor record of labor protections.<sup>40</sup> Proponents of such a criticism might question why, if trade-linked labor standards have not significantly improved labor protections in China, they should be expected to do so elsewhere. China’s record on labor rights may be changing, however. Recent workers’ strikes, most famously at Honda Motors in May and June 2010, have led to increased wages and increased bargaining between workers and management.<sup>41</sup> It remains

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35. See PABLO LAZO GRANDI, INT’L CTR. FOR TRADE & SUSTAINABLE DEV., TRADE AGREEMENTS AND THEIR RELATION TO LABOUR STANDARDS: THE CURRENT SITUATION 4-5 (2009), available at <http://ictsd.org/i/publications/61843/>; see also Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 49 (1999).

36. See, e.g., Thomas, *supra* note 3, at 381 n.163.

37. See Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 270 (2005) (stating that “the empirical evidence provides no support for the claim that liberal international trade and investment regimes are leading developed countries to relax their . . . labor standards.”).

38. *Id.*

39. See Paul Laudicina, *Don’t Give Up on Globalization*, BLOOMBERG BUS. WK. (Mar. 5, 2010), [http://www.businessweek.com/globalbiz/content/mar2010/gb2010035\\_430768.htm](http://www.businessweek.com/globalbiz/content/mar2010/gb2010035_430768.htm).

40. See Virginia E. Harper Ho, *From Contracts to Compliance?: An Early Look at Implementation Under China’s New Labor Legislation*, 23 COLUM. J. ASIAN L. 35, 38 (2009); see also THE SOLIDARITY CTR., JUSTICE FOR ALL: THE STRUGGLE FOR WORKER RIGHTS IN CHINA (2004), available at <http://www.solidaritycenter.org/content.asp?contentid=928> (referencing China’s worker rights history and deficiencies in recognizing and actualizing the freedom of association, rights to organize and bargain collectively, right to be free from discrimination in the workplace, and rights to be free from child and forced labor).

41. See Keith Bradsher, *An Independent Labor Movement Stirs in China*, N.Y. TIMES, June 11, 2010, at A4; see also David Barboza & Hiroko Tabuchi, *Power Grows for Striking Chinese Workers*, N.Y. TIMES, June 9, 2010, at B1 (noting how TPV Technology raised salaries fifteen percent in January

to be seen whether these changes will become systemic or remain merely outliers. Nevertheless, evidence has suggested that, generally speaking, countries with weak core labor standards tend to have very little foreign direct investment.<sup>42</sup> This may be due, at least in part, to the increased attention paid to corporate social responsibility programs<sup>43</sup> and management's strong aversion to the negative publicity that can come with media allegations of mistreating workers.<sup>44</sup>

## 2. Coordination of International Labor Standards

A second argument contends that trade and labor should be linked in international trade frameworks because this solves coordination problems for countries that seek to raise labor standards.<sup>45</sup> Proponents of this approach advocate seeing international labor standards not as a

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in response to labor demands and market forces); David Barboza, *More Honda Labor Trouble in China*, N.Y. TIMES, June 10, 2010, at B4 (discussing how a two-week strike by workers at a Honda plant in Southern China resulted in pay raises of 24–32%); *Strike at Shenzhen Brother Industries Ends After Management Compromise*, CHINA LAB. BULL., Sept. 10, 2010, <http://www.clb.org.hk/en/node/100874> (observing that a strike at the Brother Industries plant in Shenzhen resulted in a 100 yuan monthly pay increase for workers).

42. See Trebilcock & Howse, *supra* note 37, at 270; see also Hyde, *supra* note 29, at 164.

43. The Corporate Social Responsibility Initiative at Harvard's Kennedy School of Government defines corporate social responsibility as:

encompass[ing] not only what companies do with their profits, but also how they make them. It goes beyond philanthropy and compliance and addresses how companies measure their economic, social, and environmental impacts, as well as their relationships in all key spheres of influence: the workplace; the marketplace; the supply chain, the community; and the public policy realm.

See *Corporate Soc. Responsibility Initiative*, HARVARD JOHN F. KENNEDY SCH. OF GOV'T, [http://www.hks.harvard.edu/m-rcbg/CSRI/init\\_define.html](http://www.hks.harvard.edu/m-rcbg/CSRI/init_define.html) (last visited Sept. 10, 2011).

44. See Harper Ho, *supra* note 40, at 63; see also M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 591 (2009) (describing the negative press coverage of unsafe working conditions and child labor in Nike factories in developing countries, and the company's response); INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1388-89 (Henry J. Steiner, Philip Alston & Ryan Goodman eds., 2007) (suggesting that "it was the damaging experience of Shell and BP in Nigeria and Colombia respectively which proved the catalyst for a change of attitudes and provided a lesson about corporate responsibility which was reinforced by the experience of Nike and other major international brands with reputations to protect.").

45. Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 207 (2007).

cost upon business, but as a global public good.<sup>46</sup> They contend that providing a venue for states to coordinate their labor standards will encourage a “race to the top” and lead to greater economic efficiency and higher productivity.<sup>47</sup>

Critics of this view, however, question why, if international labor standards are a “public good,” states don’t implement them voluntarily.<sup>48</sup> Furthermore, these critics charge emphasizing this coordination rationale may be oversimplifying or ignoring the potentially significant economic, administrative, and political hurdles impeding the implementation of extensive labor protections in developing countries. While the attainment of basic core international labor rights may be plausible, economic and political reality may limit the possibility of sweeping procedural protections and enforcement.

### 3. Labor Rights as International Human Rights

As the contemporary human rights movement has evolved and become a fundamental aspect of global public morals, the content of these public morals has come to include the condemnation of labor practices that violate universal human rights.<sup>49</sup> For example, the United Nations International Covenant on Civil and Political Rights (ICCPR) recognizes the right to form and join trade unions.<sup>50</sup> As of May 2, 2011, 167 states are party to the ICCPR.<sup>51</sup> The International Covenant on Economic, Social, and Cultural Rights (ICESCR) also recognizes the right to form and join trade unions,<sup>52</sup> but goes even further, recognizing the right to just and favorable conditions of work,<sup>53</sup> including fair wages,<sup>54</sup> safe and healthy working condi-

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46. See WERNER SENGENBERGER, GLOBALIZATION AND SOCIAL PROGRESS: THE ROLE AND IMPACT OF GLOBAL LABOUR STANDARDS 60-63 (2005), available at <https://www.gtz.de/de/dokumente/en-FES-Intern-labour-standards.pdf>.

47. *Id.*

48. See Kolben, *supra* note 45, at 207.

49. See Philip Alston, *Labour Rights as Human Rights: The Not So Happy State of the Art*, in LABOUR RIGHTS AS HUMAN RIGHTS 1, 1 (Philip Alston ed. 2005).

50. International Covenant on Civil and Political Rights art. 22(1), Dec. 16, 1966, 171 S. Treaty Doc. 95-20, 999 U.N.T.S. 171.

51. *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last updated Sept. 29, 2011).

52. International Covenant on Economic, Social, and Cultural Rights art. 8(1)(a), Dec. 16, 1966, S. Treaty Doc. 95-20, 993 U.N.T.S. 3.

53. *Id.* art. 7.

54. *Id.* art. 7(a)(i).

tions,<sup>55</sup> equal opportunity for promotion,<sup>56</sup> and reasonable limitation of working hours and periodic holidays with pay.<sup>57</sup> As of May 2, 2011, the ICESCR currently has 160 state parties.<sup>58</sup> The widespread state adoption of the ILO Declaration and the ILO's eight Fundamental Conventions is further evidence of the broad acceptance of core labor standards.<sup>59</sup>

As Professors Trebilcock and Howse point out, "to the extent that core labor standards are appropriately characterized as basic or universal human rights, a linkage between trade policy and such labor standards is not only defensible, but arguably imperative."<sup>60</sup> Moreover, Trebilcock and Howse go on to suggest that "core labor standards viewed as basic or universal human rights . . . by promoting human freedom of choice, are entirely consistent with a liberal trading regime that seeks to ensure other human freedoms, in particular the right of individuals to engage in market transactions with other individuals without discrimination on the basis of country or location."<sup>61</sup> Thus, there is a strong case for both the universality of core labor standards as basic human rights and the applicability and appropriateness of a trade-labor linkage when viewed in the human rights context.

This argument has a strong normative component. However, as Trebilcock and Howse point out, the existence of a linkage between trade and human rights in other contexts is readily apparent.<sup>62</sup> When states applied trade embargoes to apartheid South Africa or presently apply trade and economic sanctions on the Republic of Sudan for the Darfur atrocities, their actions were not based on economic self-interest. These were acts taken from a policy standpoint in support of human rights. As core labor rights are widely recognized as human rights, perhaps the precedent has already been set for the adoption of the trade-labor linkage on human rights grounds.

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55. *Id.* art. 7(b).

56. *Id.* art. 7(c).

57. *Id.* art. 7(d).

58. *International Covenant on Economic, Social, and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) (last updated Sept. 29, 2011).

59. See Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 142 (1999) (noting that the ILO Declaration has been adopted by 150 of its 175 members).

60. Trebilcock & Howse, *supra* note 37, at 272-73.

61. *Id.* at 273.

62. See *id.* at 272.

#### 4. Building a Middle Class

Representative Charles Rangel has suggested that the inclusion and enforcement of labor provisions in trade agreements helps to raise the standards of living for workers and thereby builds a middle class.<sup>63</sup> Not only does the growth of a middle class have obvious benefits for developing countries, but as Rangel suggests, it can also have positive ramifications for their developed country trading partners. The growth of a middle class in developing states creates a new market for developed state exports.<sup>64</sup> In addition, a large and stable middle class is believed to be positively correlated with social peace and stability.<sup>65</sup> Developing states with strong middle classes are less likely to embrace dictatorship and extremism, which can also have implications for national security in developed nations.<sup>66</sup>

#### 5. Increasing Economic Benefits and Productivity

In addition to the market growth implications of building a middle class, firms adhering to core labor rights may also serve their own economic interests in other ways. In a 2000 report, the Organisation for Economic Co-operation and Development (OECD) suggested that prior studies of the economic benefits of adherence to labor standards had failed to differentiate core or fundamental labor standards from other labor standards.<sup>67</sup> Unlike the panoply of potential labor rights and labor-related concerns which may present net costs for firms, the OECD suggested that core labor standards—freedom of association, the right to collective bargaining, the elimination of forced and child labor, and the elimination of employment discrimination<sup>68</sup>—have been linked to firms' increased economic benefits and productivity.<sup>69</sup>

Specifically, Professor Joseph Stiglitz has asserted that the “high road” to economic development—which includes the right to collec-

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63. See Rep. Charles A. Rangel, *Moving Forward: A New, Bipartisan Trade Policy That Reflects American Values*, 45 HARV. J. ON LEGIS. 377, 394 (2008).

64. See *id.*

65. See *id.*

66. See *id.*

67. See ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], INTERNATIONAL TRADE AND CORE LABOUR STANDARDS 11 (2000) [hereinafter OECD REPORT], available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM/TD/TC/DEELSA/ELSA\(2000\)4/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM/TD/TC/DEELSA/ELSA(2000)4/FINAL&docLanguage=En).

68. These are the same rights contained in the ILO Declaration. See ILO Declaration, *supra* note 17, art. 2.

69. See OECD REPORT, *supra* note 67, at 27.

tive bargaining—can improve a firm’s economic efficiency by promoting buy-in from workers.<sup>70</sup> This, in turn, can promote productivity by providing workers with an opportunity to exercise their “voice,” rather than leaving them the less productive option of “exit.”<sup>71</sup> The ILO offers additional examples of the positive economic effects to be derived through the enforcement of core labor standards, such as a more productive future workforce when children attend school instead of working and increased economic efficiency and social development when discrimination against women and minority groups is eliminated from the workplace.<sup>72</sup>

Thomas Palley’s research has identified a number of ways in which adherence to labor standards can result in positive economic results.<sup>73</sup> For the countries he examined, Palley found that improvements in freedom of association rights correlated with with an average increase in GDP growth of 1.2–1.4% for the five-year period afterwards.<sup>74</sup> Palley’s work has also shown that countries with improved freedom of association are marked by lower corruption, greater economic security, and are more democratic.<sup>75</sup>

Finally, a study by Michael Hiscox which examined bidding prices on eBay found that, on average, shoppers paid a 45% premium for ethically labeled, or Fair Trade, shirts versus unlabeled shirts.<sup>76</sup> As Hiscox notes, “the key finding from the experiment is that a label with information about [Fair Trade] certification of fair labor standards in factories . . . generates a sizeable price premium in eBay auctions.”<sup>77</sup> The Hiscox study seems to suggest that, at least for some products, firms that comply with core labor standards and make this compliance known to consumers may expect to receive a

70. See Joseph Stiglitz, Chief Economist, World Bank, Keynote Address at the Industrial Relations Research Association: Democratic Development as the Fruits of Labor (Jan. 2000), available at <http://chenry.webhost.utexas.edu/global/coursemats/2006/Stiglitz0100boston.pdf>.

71. See *id.*

72. See ILO, *Country Studies on the Social Impact Of Globalization: Final Report*, ¶¶ 93-98, GB.276/WP/SDL/1 (Nov. 1999), available at <http://ilo-mirror.library.cornell.edu/public/english/standards/reln/gb/docs/gb276/sdl-1.htm#D.%20The%20role%20of%20policies>.

73. See Thomas I. Palley, *The Economic Case for Labor Standards: A Layman’s Guide*, 2 RICH. J. GLOBAL L. & BUS. 183 (2001).

74. See OECD REPORT, *supra* note 67, ¶ 33.

75. See Palley, *supra* note 73, at 189.

76. See Michael J. Hiscox et al., Consumer Demand for Fair Labor Standards: Evidence from a Field Experiment on eBay 1 (Apr. 12, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1811788](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811788).

77. *Id.* at 22.

market premium. In sum, these studies show that firms and states have both microeconomic and macroeconomic incentives to comply with core labor standards.

C. *Why the WTO is the Proper Forum*

1. Normative and Pragmatic Justifications

As the world's largest multilateral framework dedicated to trade issues,<sup>78</sup> the WTO would seem to be the appropriate forum for addressing the trade-labor linkage and labor standards. In addition, Professor Summers has contended that perhaps the WTO has a moral obligation to address the labor rights consequences of the markets it has had a powerful role in creating. As Summers posits, "if an international organization is to establish an open global market and enforce international free trade, does it not have an obligation to place limits on that market to protect internationally recognized social and human values? It is the only international structure with the capacity to curb the market forces it has unleashed."<sup>79</sup> Pragmatic considerations also vitiate towards the WTO being the proper forum for addressing the trade-labor linkage. As Professor Andrew Guzman observes, "a non-WTO agreement that permitted such sanctions would conflict with WTO obligations, and that conflict would ultimately find its way to the WTO's dispute resolution system."<sup>80</sup> In addition, since many of the world's fastest-growing economies have not included labor rights in their bilateral trade agreements,<sup>81</sup> WTO inaction on the issue of labor standards will likely leave large segments of the world's workers without actionable labor protections.

2. Existing WTO Textual Precedents

Moreover, there are already WTO textual precedents related to the recognition of the trade-labor linkage. The Article XX exceptions of GATT provide that a state may derogate from its general GATT obligations of trade liberalization and Most Favored Nation treatment

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78. *See supra* note 1.

79. Summers, *supra* note 11, at 80.

80. Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CALIF. L. REV. 885, 899 (2003).

81. For example, the recent Comprehensive Economic Partnership Agreement between India and South Korea (signed August 7, 2009; in force January 1, 2010) does not address labor rights. *See* Comprehensive Economic Partnership Agreement, India-S. Kor., Aug. 7, 2009, *available at* <http://commerce.nic.in/trade/india%20korea%20cepa%202009.pdf>.

under certain circumstances.<sup>82</sup> These exceptions may recognize the trade-labor linkage in two ways. First, there are strong arguments that labor standards should fall within the ambit of the existing exceptions, as will be discussed below. Second, one may reason that the very existence of the Article XX exceptions, and the moral basis for these exceptions, legitimate the future inclusion of explicit labor rights exceptions within the WTO framework.

Article XX permits states to adopt measures which would normally be prohibited as violations of Most Favored Nation (MFN) status, but which have been excepted for public policy reasons. These general exceptions must be applied by a state in such a way so as not to discriminate arbitrarily or unjustifiably between countries where the same conditions exist and may not be used as a pretext to restrict international trade.<sup>83</sup> Of particular relevance for purposes of a trade-labor linkage are Articles XX(a) and XX(b).

Article XX(a) permits contracting parties to adopt measures necessary to protect public morals.<sup>84</sup> Article XX(b) allows states to adopt measures necessary to protect human, animal, or plant life or health.<sup>85</sup> Could these Article XX general exceptions apply to labor standards, and as such, imply the existence of a trade-labor linkage in the WTO? We turn first to the Article XX(a) exception for measures necessary to protect public morals.

Professor Howse has suggested that the interpretation of “public morals” should not be frozen in time.<sup>86</sup> This sentiment is in accord with the Vienna Convention on the Law of Treaties (Vienna Convention), which in Article 31 states that treaties should be interpreted in light of any subsequent practice, subsequent relevant agreements between the parties, and any relevant rules of international law.<sup>87</sup> Thus per the Vienna Convention, the “public morals” provision of Article XX(a) should be understood not solely within the definitional limitations of 1947 but rather should be interpreted in light of present-day practice, law, and conceptions related to “public morals.” Moreover, the WTO Appellate Body implemented just such an evolving standard of Article XX interpretation in the Shrimp-Turtle case.

In the Shrimp-Turtle case, the Appellate Body held that the meaning

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82. GATT, *supra* note 7, art. XX.

83. *Id.*

84. *Id.* art. XX(a).

85. *Id.* art. XX(b).

86. See Howse, *supra* note 59, at 142.

87. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

of Article XX(g) (relating to the “conservation of exhaustible natural resources”) had evolved in light of developments in international law and policy.<sup>88</sup> Even if Article XX(g) did not encompass living species at the time of its drafting, the Appellate Body held that it should be interpreted as doing so today.<sup>89</sup> According to the Appellate Body, “the words of Article XX(g) . . . must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”<sup>90</sup> The Appellate Body went on to interpret Article XX(g) in light of the “sustainable development” objective contained in the preamble to the WTO Agreement.<sup>91</sup> As this same preamble recognizes that “relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand,”<sup>92</sup> a contemporary labor rights interpretation of Article XX(a) should run parallel to, and be justified by, the Appellate Body’s contemporary environmental interpretation of Article XX(g).

I would suggest that in determining what constitutes “morals,”<sup>93</sup> we should turn to the international human rights movement. And in assessing the extent to which those morals are “public,” we should look at the degree of state adoption and ratification of various international human rights instruments. The more widely adopted a particular human rights norm or instrument, the more universal and truly “public” its moral code can be said to have become. As noted earlier, the widespread state ratification of the labor rights provisions of the ICCPR, ICESCR, the ILO Declaration, and the ILO Fundamental Conventions creates a strong justification for viewing these rights as universal and public.<sup>94</sup>

In addition to the Article XX(a) exceptions for public morals, the Article XX(b) exceptions for measures necessary to protect human,

88. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 129, WT/DS58/AB/R (Oct. 12, 1998).

89. *Id.*

90. *Id.*

91. *Id.*

92. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm).

93. For a discussion of the past, current and potential future scope of the GATT Article XX(a) “public morals” exception after the WTO’s 2005 *U.S.—Gambling* case, see Mark Wu, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 YALE J. INT’L L. 215 (2008).

94. See *supra* notes 49-60.

animal or plant life or health may provide grounds for a trade-labor linkage within the WTO. This argument rests on the understanding that certain labor-rights-related measures, such as prohibitions against forced or compulsory labor or child labor, are necessary to protect human life and health.<sup>95</sup> In addition, occupational safety and health measures such as using safety protection when dealing with toxic materials or asbestos can be seen as necessary to protect the lives and health of workers.<sup>96</sup> Thus, to the extent that some labor protections may also be necessary to protect the lives or health of workers, the exceptions of Article XX(b) also provide ground for a trade-labor link in the WTO.

Finally, the WTO Government Procurement Agreement contains even broader language, incorporating the Article XX(b) exception for restrictions “necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property,” but also specifically including measures “relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.”<sup>97</sup> Thus, from pragmatic and moral standpoints, as well as in light of its present inclusion of similar non-trade exceptions, the WTO appears to be the proper forum for addressing the trade-labor link and regulating labor standards. Given then the case for including labor standards within the WTO framework, we turn to what such labor regulation might look like.

### III. HOW WTO LABOR REGULATION MIGHT LOOK—THE U.S. FTA/RTA MODEL

As the Doha Round in the World Trade Organization has stalled, states have increasingly focused their international trade efforts on the

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95. See Guzman, *supra* note 80, at 886-87 (suggesting that “[t]rade sanctions aimed at abhorrent or illegal labor practices may bring pressure on states to change those practices—improving, and even saving, the lives of workers.”).

96. For a more detailed discussion of the substandard working conditions of the Mexican maquiladora sector in particular, and the various resultant deleterious health consequences for the workers there, see Joshua M. Kagan, *Workers’ Rights in the Mexican Maquiladora Sector: Collective Bargaining, Women’s Rights, and General Human Rights*, 15 J. TRANSNAT’L L & POL’Y 153, 158 (2005).

97. Agreement on Government Procurement art. XXIII(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1915 U.N.T.S. 103, *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_02\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gpr-94_02_e.htm).

proliferation of regional and free trade agreements.<sup>98</sup> While certainly not the only state to incorporate labor provisions into its trade deals,<sup>99</sup> the development of labor obligations in United States free trade agreements provides some insight into how such regulation could work in the WTO. In the U.S., labor issues have been explicitly linked to trade agreements since the Tariff Act of 1890, which prohibited the importation of goods manufactured by prison labor.<sup>100</sup> In the modern era, the trade-labor linkage initially reemerged in a variety of unilateral trade preference programs. In the General System of Preferences of 1971,<sup>101</sup> the Caribbean Basin Recovery Act of 1983,<sup>102</sup> and the Overseas Private Investment Corporation Amendments Act of 1985,<sup>103</sup> the United States tied the receipt of trade benefits to a country's recognition of minimum labor standards.<sup>104</sup>

More recently however, labor provisions have become a congressionally mandated part of all U.S. FTAs.<sup>105</sup> The 2002 Trade Promotion

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98. See JO-ANN CRAWFORD & ROBERTO V. FIORENTINO, WTO, *THE CHANGING LANDSCAPE OF REGIONAL TRADE AGREEMENTS 1* (2005), available at [http://www.wto.org/english/res\\_e/booksp\\_e/discussion\\_papers8\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf).

99. Recent European Union trade agreements with South Korea and Central America have also included labor provisions. See European Union-South Korea Free Trade Agreement, E.U.-S. Kor., Oct. 6, 2010, available at <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/korea/>; European Union-Central America Free Trade Agreement, Mar. 22, 2011, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=689>. While both the U.S. and EU trade deals incorporate the five core labor rights from the ILO Declaration, EU trade agreements seek to enforce labor rights provisions through a consultative and cooperative approach, rather than a trade sanctions-based approach. Monetary compensation and the suspension of trade benefits are not available remedies for violations of labor provisions in EU trade agreements. It remains to be seen whether the labor provisions in these agreements will be enforceable in practice or will serve primarily as aspirational or hortatory statements by the parties.

100. Marianne Hogan, *DR-CAFTA Prescribes a Poison Pill: Remediating the Inadequacies of Dominican Republic-Central American Free Trade Agreement Labor Provisions*, 39 SUFFOLK U. L. REV. 511, 520 (2006).

101. See Trade Act of 1974, Pub. L. No. 93-618, § 121, 88 Stat. 1978 (1975).

102. See Caribbean Basin Economic Recovery Act of 1983, Pub. L. No. 98-67, § 212, 97 Stat. 369 (1983).

103. See Overseas Private Investment Corporation Amendments Act of 1985, Pub. L. No. 99-204, § 5, 99 Stat. 1669 (1985).

104. See Summers, *supra* note 11, at 64. However, some scholars have contended that these statutes had limited effectiveness because of their vague standards and lack of enforcement. See Philip Alston, *Labor Rights Provisions in U.S. Trade Law: "Aggressive Unilateralism?"*, 15.1 HUM. RTS. Q. 1, 16-19 (1993).

105. Justifications for the U.S.'s inclusion of labor rights chapters in FTAs may include, but are not limited to: (1) regulating labor rights as a supply chain issue and a component of the production process for goods included in the trade agreement; (2) advancing U.S. policies of "fair

Authority Act (TPA) identified the United States' overall objective of "promot[ing] respect for worker rights . . . consistent with core labor standards of the ILO."<sup>106</sup> Furthermore, the TPA specifically stated that a principal trade negotiating objective was: "to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its . . . labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party . . . ."<sup>107</sup>

This language would come to be the template for future U.S. free trade agreement (FTA) language regarding labor standards.<sup>108</sup> In particular, recent U.S. free trade agreements have contained labor rights provisions addressing: (1) which rights are enumerated and protected in the agreement; (2) the regulatory or monitoring mechanism envisioned; (3) the system for settlement of inter-state labor issues which may arise; and (4) the method for deterring and remedying any such labor violations. Based on the development of these provisions in U.S. FTAs, I will briefly address how the WTO could use a similar framework to incorporate labor standards.

#### A. *The Rights Included in the Agreement*

United States FTAs have asserted two basic models for the specific enumeration of labor rights. The first model, unique to the labor side agreement to NAFTA,<sup>109</sup> the North American Agreement on Labor

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trade" and the promotion of international human rights; (3) helping to secure bipartisan support for FTAs by appealing to domestic constituencies such as unions and labor organizations; and (4) attempting to prevent the offshoring of U.S. jobs and a "race to the bottom" by making core labor standards enforceable in all U.S. FTA partners. Nevertheless, labor rights remain a contentious part of the FTA process. For a discussion of some of these issues see Steven R. Weisman, *Bush in Accord with Democrats in Trade Deals*, N.Y. TIMES, May 11, 2007, at A1. For an example of the contentiousness of labor rights in the congressional debates on the ratification of the U.S.-Colombia, U.S.-Panama, and U.S.-Korea FTAs, see Congressman Sandy Levin, Remarks on the Implementation of the Colombia Free Trade Agreement Without a Worker Rights Action Plan (June 27, 2011), <http://levin.house.gov/press-release/colombia-fta-implementing-bill-fatally-flawed-without-worker-rights-action-plan>. See also Jagdish Bhagwati, *The Wrong Way to Free Trade*, N.Y. TIMES, July 24, 2011, [http://www.nytimes.com/2011/07/25/opinion/25bhagwati.html?\\_r=1&hp](http://www.nytimes.com/2011/07/25/opinion/25bhagwati.html?_r=1&hp).

106. Trade Act of 2002, 19 U.S.C. § 3802(b)(11)(A) (2006).

107. *Id.*

108. See Paula Church Albertson, *The Evolution of Labor Provisions in U.S. Free Trade Agreements: Lessons Learned and Remaining Questions Examining the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*, 21 STAN. L. & POL'Y REV. 493, 495-96 (2010).

109. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

Cooperation (NAALC), involves a lengthy list of eleven labor principles.<sup>110</sup> Each of these principles includes specific clarifying language defining the scope of the right involved.<sup>111</sup> However, the NAALC only makes three of these rights fully actionable through the full range of its dispute settlement and enforcement system.<sup>112</sup>

A more recent model for the enumeration of labor rights in U.S. FTAs was formed as a result of the U.S. Congress' "New Trade Policy with America" on May 10, 2007.<sup>113</sup> This model can be seen in the texts of the U.S. FTAs with Peru,<sup>114</sup> Korea,<sup>115</sup> Panama,<sup>116</sup> and Colombia.<sup>117</sup> These agreements include the rights to: (a) freedom of association; (b) the effective recognition of the right to collective bargaining; (c) the elimination of all forms of compulsory or forced labor; (d) the effective abolition of child labor and a prohibition on the worst forms of child labor; and (e) the elimination of discrimination in respect of employment and occupation.<sup>118</sup> Though this most recent model only includes five labor rights, it makes each of these rights fully actionable. According to these agreements, a state is prohibited from waiving or derogating from these rights "in a manner affecting trade or investment between the parties."<sup>119</sup> Labor rights could be linked to existing WTO trade provisions through similar language.

Moreover, the five labor rights included in these recent U.S. FTAs

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110. North American Agreement on Labor Cooperation, Can.-Mex.-U.S., Annex I, Sept. 13, 1993, 32 I.L.M. 1499 (1993) [hereinafter NAALC], available at <http://www.dol.gov/ilab/regs/naalc/naalc.htm>.

111. *Id.*

112. *Id.* art. 39(1). The three actionable rights in the NAALC are: (1) occupational safety and health; (2) child labor; and (3) minimum wage technical labor standards. *Id.*

113. See Weisman, *supra* note 105.

114. United States-Peru Trade Promotion Agreement, U.S.-Peru, art. 17, April 12, 2006 [hereinafter U.S.-Peru FTA], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

115. United State-Korea Free Trade Agreement, U.S.-Kor, art. 19, June 30, 2007 [hereinafter U.S.-Korea FTA], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

116. United States-Panama Trade Promotion Agreement, U.S.-Pan., art. 16, June 28, 2007 [hereinafter U.S.-Panama FTA], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>.

117. United States-Colombia Trade Promotion Agreement, U.S.-Col., art. 17, November 22, 2006 [hereinafter U.S.-Colombia FTA], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>.

118. U.S.-Peru FTA, *supra* note 114, art. 17.2; U.S.-Korea FTA, *supra* note 115, art. 19.2; U.S.-Panama FTA, *supra* note 116, art. 16.2; U.S.-Colombia FTA, *supra* note 117, art. 17.2.

119. U.S.-Peru FTA, *supra* note 114, art. 17.2(2); U.S.-Korea FTA, *supra* note 115, art. 19.2(2); U.S.-Panama FTA, *supra* note 116, art. 16.2(2); U.S.-Colombia FTA, *supra* note 117, art. 17.2(2).

are those specifically designated as “fundamental labor rights” by the ILO Declaration.<sup>120</sup> Given the WTO’s Singapore Declaration statement that “[t]he International Labor Organization is the competent body to set and deal with these [labor] standards,”<sup>121</sup> this latter model seems to best comport with the present WTO system. In addition, the widespread state ratification of the ILO Declaration suggests that states would be less likely to oppose these specific labor rights.<sup>122</sup>

B. *A Regulatory or Monitoring Mechanism*

1. State-to-state and Cross-state Reporting

Each of the recent U.S. FTAs rely on a labor rights monitoring system that is based on cross-state reporting. According to this system, individuals or non-state entities may file submissions with any state-party alleging that another state-party is not in compliance with its labor obligations. In each of the agreements, these submissions are received by designated political divisions of a state-party’s government. The state receiving the submission then has discretion as to whether or not to pursue the matter. The NAALC mandates the creation of such designated points of contact and refers to them as National Administrative Offices (NAOs).<sup>123</sup> More recent agreements simply assert that “each party shall designate an office within its labor ministry or equivalent entity that shall serve as a contact point with the other parties and with the public.”<sup>124</sup>

An example of this cross-state reporting system can be seen in the 2008 submission by Guatemalan labor unions and the AFL-CIO alleging that Guatemala has failed to fulfill its labor obligations under CAFTA.<sup>125</sup> Though the incidents at issue are alleged to have occurred

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120. See ILO Declaration, *supra* note 17, art. 2.

121. Singapore Declaration, *supra* note 13.

122. See Howse, *supra* note 59.

123. On December 17, 2004, the U.S. NAO, located in the Department of Labor, formally changed its name to the Division of Trade Agreement Administration and Technical Cooperation (TAATC) to better reflect its expanded mandate as the point of contact for all U.S. FTA labor chapters, not just the NAALC. See *Division of Trade Agreement Administration and Technical Cooperation*, U.S. DEP’T LAB., <http://www.dol.gov/ilab/programs/nao/> (last visited Sept. 10, 2011).

124. U.S.-Peru FTA, *supra* note 114, art. 17.5(5); U.S.-Korea FTA, *supra* note 115, art. 19.5(3); U.S.-Panama FTA, *supra* note 116, art. 16.5(3); U.S.-Colombia FTA, *supra* note 117, art. 17.5(5).

125. See Public Submission, AFL-CIO et al., Public Submission to the Office of Trade & Labor Affairs (OTLA) Under Chapters 16 (Labor) and 20 (Dispute Settlement) the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) Concerning the Failure of the Government of Guatemala to Effectively Enforce Its Labor Laws and Comply With Its Commit-

in Guatemala and directly involve only Guatemalan citizens, because they occurred in industries related to trade with the U.S.,<sup>126</sup> submissions under the CAFTA labor chapter were filed directly with the U.S. by the Guatemalan unions.<sup>127</sup> This ability of individuals and non-state entities of one party to file submissions, or essentially “self-report” on their own state, is a common characteristic of recent U.S. FTAs. The WTO could also implement a similar cross-state reporting system for labor violations.

## 2. Supranational Monitoring

Each of the recent U.S. FTAs supplements the cross-state complaint system by creating a supranational Labor Affairs Council comprised of cabinet-level or equivalent representatives of the parties.<sup>128</sup> The NAALC specifically asserts that these representatives will be the parties’ labor ministers or their designees.<sup>129</sup> As an additional monitoring mechanism, the most recent U.S. FTAs grant these Councils the ability to prepare reports on matters related to the implementation of their respective labor chapters.<sup>130</sup> In the case of the NAALC, the Council is tasked with additional monitoring functions, including overseeing the implementation of the agreement,<sup>131</sup> facilitating party-to-party consultations, including through the exchange of information,<sup>132</sup> and promoting the collection and publication of data on enforcement and labor standards among the parties.<sup>133</sup>

However, the monitoring system of the NAALC differs from the mechanisms employed by more recent U.S. FTAs in its creation of an

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ments Under the ILO Declaration on Fundamental Principles and Rights at Work (Apr. 23, 2008), available at [http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/guatemala\\_petition.pdf](http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/guatemala_petition.pdf).

126. The six Guatemalan labor unions who filed this submission are involved in the following industries: (1) port workers at a port that handles exports destined for the U.S., (2) bananas exported to the U.S., (3) processed and packaged fruits and vegetables exported to the U.S., (4) apparel and clothing exported to the U.S., and (5) garments exported to the U.S. (two unions). *Id.*

127. *Id.*

128. See, e.g., U.S.-Peru FTA, *supra* note 114, art. 17.5(1); U.S.-Korea, *supra* note 115, art. 19.5(1); U.S.-Panama FTA, *supra* note 116, art. 16.5(1); U.S.-Colombia FTA, *supra* note 117, art. 17.5(1).

129. NAALC, *supra* note 110, art. 9.

130. U.S.-Peru FTA, *supra* note 114, art. 17.5(2)(c); U.S.-Korea FTA, *supra* note 115, art. 19.5(6); U.S.-Panama FTA, *supra* note 116, art. 16.5(6); U.S.-Colombia FTA, *supra* note 117, art. 17.5(2)(c).

131. See NAALC, *supra* note 110, art. 10(1)(a).

132. *Id.* art. 10(1)(f).

133. *Id.* art. 10(1)(h).

additional supranational body, the Secretariat.<sup>134</sup> The monitoring responsibilities of the NAALC Secretariat include periodically preparing background reports on each party related to labor law and administrative procedures, trends and administrative strategies related to the implementation and enforcement of labor law, and labor market conditions of the parties.<sup>135</sup> I believe that having such a supranational monitoring body would be essential for the success of labor monitoring in an organization as large and variegated as the WTO. Without such an authority, there would likely be disparities in labor rights enforcement across the state parties. Moreover, having a central monitoring authority could serve to remove any penumbra of ancillary motives from labor rights monitoring.<sup>136</sup> An apolitical supranational entity could focus exclusively on monitoring without concerning itself with state bilateral relations, retaliatory tactics, or protectionist motivations. However, there is no need to create a supranational labor monitoring entity for the WTO framework: we already have the ILO.

The WTO has already decreed the ILO to be the appropriate body for dealing with and promoting labor standards. As noted earlier, in the Singapore Declaration the WTO members asserted that “[t]he International Labor Organization (ILO) is the competent body to set and deal with these [labor] standards, and we affirm our support for its work in promoting them.”<sup>137</sup> In order to carry out these duties of dealing with and promoting labor standards, the ILO could also be tasked with monitoring WTO labor standards.

In addition, though the example of Myanmar suggests that the ILO is not well-equipped to enforce labor rights, it has shown itself to be more than capable of monitoring international labor conditions. ILO bodies such as the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA) already monitor state-party compliance with ILO

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134. *Id.* art. 12-14.

135. *Id.* art. 14.

136. For example, a country may be reticent to file a cross-state complaint alleging labor violations by another party for fear of the geopolitical or economic consequences. This situation may be especially acute in circumstances where one state is largely dependent on another for its economic livelihood, such as in the case of developing countries that rely on remittances sent home by migrant workers in more developed countries. For a discussion of this phenomenon in the Haitian-Dominican context, see Jessica Morreale, Comment *DR-CAFTA: The Siren Song for Improved Labor Standards for Haitians in the Dominican Republic*, 44 U.S.F. L. REV. 707, 723-24 (2010).

137. Singapore Declaration, *supra* note 13.

conventions and issue reports to that effect.<sup>138</sup> Within the context of the U.S.-Cambodian Bilateral Textile Trade Agreement,<sup>139</sup> the ILO also successfully served as an independent factory monitor on which the countries relied for accurate and high quality monitoring.<sup>140</sup> Prior to taking office, U.S. Deputy Undersecretary of Labor for International Affairs Sandra Polaski noted that with regard to Cambodia, “[t]he ILO proved there that it could conduct cost-effective, neutral and credible monitoring that won the trust—indeed, praise—of all parties.”<sup>141</sup> Involving the ILO in the monitoring of WTO labor standards would thus allow labor standards to be monitored uniformly and apolitically, while simultaneously allowing each state-party to focus its resources on its own practice and compliance with the agreement.<sup>142</sup> As such, an effective system for monitoring labor rights in the WTO could integrate both the cross-state reporting system of U.S. FTAs and a designation of the ILO as the competent body to monitor labor rights on a supranational level.

### C. *The Dispute Settlement System*

Generally speaking, the U.S. FTA dispute settlement framework relies on a system of cross-state and inter-state complaints,<sup>143</sup> inter-state labor consultations,<sup>144</sup> and the possibility of subsequent hearings be-

138. See *Labour Standards: Supervisory Bodies and Procedures*, ILO, <http://www.ilo.org/global/standards/lang-en/index.htm> (last visited Sept. 8, 2011).

139. Agreement Relating to Trade in Cotton, Wool, Man-Made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products, U.S.-Cambodia, Jan. 20, 1999 [hereinafter U.S.-Cambodia Textile Agreement], available at [http://cambodia.usembassy.gov/uploads/images/M9rzdrzMKGi6Ajf0SIuJRA/uskh\\_texttile.pdf](http://cambodia.usembassy.gov/uploads/images/M9rzdrzMKGi6Ajf0SIuJRA/uskh_texttile.pdf).

140. See Kolben, *supra* note 45, at 249.

141. SANDRA POLASKI, CARNEGIE ENDOWMENT FOR INT’L PEACE, ISSUE BRIEF: HOW TO BUILD A BETTER TRADE PACT WITH CENTRAL AMERICA 7 (2003), available at [http://carnegieendowment.org/pdf/files/TED\\_CAFTA\\_Polaski\\_July\\_2003.pdf](http://carnegieendowment.org/pdf/files/TED_CAFTA_Polaski_July_2003.pdf).

142. For a general discussion of the considerations and factors implicit in delegating monitoring authority to nongovernmental organizations, including issues related to neutrality and credibility, accountability, and the potential erosion of state sovereignty, see Joshua M. Kagan, *Speeding Up the International Community’s Response Time in Addressing Acts of Genocide: Deferring to the Judgment of Nongovernmental Organizations*, 34 INT’L J. LEGAL INFO. 145, 158-68 (2006).

143. U.S.-Peru FTA, *supra* note 114, art. 17.5(5); U.S.-Korea FTA, *supra* note 115, art. 19.5(3); U.S.-Panama FTA, *supra* note 116, art. 16.5(3); U.S.-Colombia FTA, *supra* note 117, art. 17.5(5).

144. NAALC, *supra* note 110, arts. 21, 22; U.S.-Peru FTA, *supra* note 114, art. 17.7(1); U.S.-Korea FTA, *supra* note 115, art. 19.7(1); U.S.-Panama FTA, *supra* note 116, art. 16.7(1); U.S.-Colombia FTA, *supra* note 117, art. 17.7(1).

fore a designated commission<sup>145</sup> and an arbitral panel.<sup>146</sup> As part of the May 10, 2007, “New Trade Policy With America,” labor complaints gained access to the same dispute settlement processes that exist for trade and commercial complaints under each agreement.<sup>147</sup> Thus, this latest development for settlement of labor disputes under U.S. FTAs augurs in favor of including labor disputes within a trade framework’s existing dispute settlement system.

The WTO’s dispute settlement system is widely considered to be the most significant success of its trade framework.<sup>148</sup> WTO Director-General Pascal Lamy has gone so far as to describe it as “the jewel in the crown of the WTO.”<sup>149</sup> One reason for this perceived success is the high degree of state compliance with the dispute settlement body’s decisions.<sup>150</sup> Thus, in light of the strength of the current WTO dispute settlement system and the trend toward adjudicating labor complaints within the general dispute settlement framework, an adjudication of labor standards in the WTO need only involve an inclusion of labor cases within the existing dispute system.

As mentioned above, labor obligations under U.S. FTAs require that a state not waive or derogate from the rights included “in a manner affecting trade or investment between the Parties.”<sup>151</sup> This language runs parallel to that in Article I:1 of the WTO’s General Agreement on Trade in Services (GATS) that the GATS “applies to measures . . . affecting trade in services.”<sup>152</sup> In fact, the WTO already has existing caselaw examining the scope and definition of the use of the term “affecting” in such an obligation. In the *Bananas III* case, the WTO

145. NAALC, *supra* note 110, arts. 21(1), 22(1); U.S.-Peru FTA, *supra* note 114, art. 17.7(6); U.S.-Korea FTA, *supra* note 115, art. 19.7(4); U.S.-Panama FTA, *supra* note 116, art. 16.7(6); U.S.-Colombia FTA, *supra* note 117, art. 17.7(6).

146. NAALC, *supra* note 110, art. 29; U.S.-Peru FTA, *supra* note 114, art. 21.6; U.S.-Korea FTA, *supra* note 115, art. 22.9; U.S.-Panama FTA, *supra* note 116, art. 20.6; U.S.-Colombia FTA, *supra* note 117, art. 21.6.

147. See Church Albertson, *supra* note 108, at 496.

148. See Debra P. Steger, *Review of The WTO: Governance, Dispute Settlement and Developing Countries*, 105 AM. J. INT’L L. 186, 186 (2011).

149. Press Release, WTO, WTO Disputes Reach 400 Mark (Nov. 6, 2009), [http://www.wto.org/english/news\\_e/pres09\\_e/pr578\\_e.htm](http://www.wto.org/english/news_e/pres09_e/pr578_e.htm).

150. See, e.g., Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT’L ECON. L. 397, 397 (2007).

151. U.S.-Peru FTA, *supra* note 114, art. 17.2(2); U.S.-Korea FTA, *supra* note 115, art. 19.2(2); U.S.-Panama FTA, *supra* note 116, art. 16.2(2); U.S.-Colombia FTA, *supra* note 117, art. 17.2(2).

152. Article I:1 of GATS specifically states: “This agreement applies to measures by members affecting trade in services.” General Agreement on Trade in Services art. I:1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.

Panel and Appellate Body described the term “affecting” as having a broad scope of application, stating that no measure should be excluded *a priori* as not “affecting” trade, and asserting that a measure may “affect” the supply of a service, regardless of whether it “governs” the supply of a service or “regulates” other matters.<sup>153</sup> In *Automotive Industry*, the Appellate Body reiterated its findings in *Bananas III* and held that whether a measure “affects” trade must be judged according to the facts of each specific case.<sup>154</sup> Finally, in *Gambling and Betting Services*, the Panel found that a prohibition on the supply of services necessarily “affected” trade in those services.<sup>155</sup> Given the experience of the WTO dispute settlement bodies in interpreting this standard, they would be well-equipped to apply the same standard in labor disputes “affecting” WTO provisions.

#### D. *Deterrence, Enforcement, and Remedy Methodology*

In both U.S. FTAs and the WTO system, post-dispute settlement remedies may take three forms: implementation, compensation, or retaliation. Implementation occurs when the party found to be in violation of a trade agreement makes a substantive change to its laws or practice to give effect to the decision of the agreement’s dispute settlement body.<sup>156</sup> For the WTO and U.S. FTAs, implementation may be achieved either by adhering to a mutual decision reached through consultations between the parties or by acceding to a decision of the arbitral panel or other dispute settlement body.<sup>157</sup> However, to date, complaints brought under the NAALC are the only U.S. FTA labor complaints to have reached any form of ministerial implementation

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153. See Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 217, WT/DS27/AB/R (Sept. 9, 1997), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds27\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm).

154. *C.f.* Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 158-67, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds142\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds142_e.htm).

155. See Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm).

156. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 140 (3d ed. 2005).

157. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 21, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; NAALC, *supra* note 110; U.S.-Peru FTA, *supra* note 114, art. 21.15; U.S.-Korea FTA, *supra* note 115, art. 22.12; U.S.-Panama FTA, *supra* note 116, art. 20.14; U.S.-Colombia FTA, *supra* note 117, art. 21.15.7.

agreement.<sup>158</sup> Implementation is generally the preferred result of a dispute, as it is most likely to result in a direct change to the state law or practice which is considered to be violative of the agreement.<sup>159</sup>

In cases where the party in violation cannot or will not implement the dispute settlement body's final decision, compensation—or the awarding of monetary damages to the complaining party—may be ordered as a temporary measure until implementation occurs.<sup>160</sup> Compensation is authorized as a temporary measure in the WTO and in each of the U.S. FTAs.<sup>161</sup> Finally, if a party in violation fails to implement a dispute settlement body's final decision, retaliation—or the suspension of that party's trade concessions—may also be ordered as a temporary measure.<sup>162</sup> In the case of the NAALC, trade benefits may be suspended “where a party fails to pay a monetary enforcement assessment” to the aggrieved party after having been found by the dispute settlement body to be in violation of the agreement.<sup>163</sup> For the WTO and the more recent U.S. FTAs, trade benefits may be suspended both when a state has failed to pay the monetary assessment ordered by the dispute settlement body and when the two parties are unable to agree on the amount of such monetary assessment.<sup>164</sup>

The implementation, compensation, and retaliation mechanisms of the WTO and U.S. FTAs are fairly typical of deterrence and enforcement systems in modern trade agreements. However, all of these mechanisms rely on negative incentives. That is, once the initial trade

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158. See Marley S. Weiss, *Two Steps Forward, One Step Back – or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 743-48 (2003). In addition, the U.S. is presently in the midst of CAFTA labor chapter dispute proceedings with Guatemala for alleged labor violations by that country. On August 9, 2011, the U.S. Government requested the establishment of an arbitral panel under article 20.6 of CAFTA regarding the Government of Guatemala's apparent failure to effectively enforce its labor laws. See Letter from Ron Kirk, U.S. Trade Representative, to Luis Velasquez, Guat. Minister of Econ. (August 9, 2011), available at [http://www.ustr.gov/webfm\\_send/3042](http://www.ustr.gov/webfm_send/3042).

159. See DSU, *supra* note 157, art. 22(1).

160. See TREBILCOCK & HOWSE, *supra* note 156, at 140-41.

161. See DSU, *supra* note 157, art. 22(8); NAALC, *supra* note 110, art. 39; U.S.-Peru FTA, *supra* note 114, art. 21.16; U.S.-Korea FTA, *supra* note 115, art. 22.13; U.S.-Panama FTA, *supra* note 116, art. 20.15; U.S.-Colombia FTA, *supra* note 117, art. 21.16.

162. See TREBILCOCK & HOWSE, *supra* note 156, at 140-41.

163. NAALC, *supra* note 110, art. 41. As in the case of monetary compensation, the suspension of trade benefits is only available under the NAALC for cases alleging violations of the labor standards regarding occupational safety and health, child labor, or minimum wage. *Id.* art. 39(1).

164. See DSU, *supra* note 157, art. 22(2); U.S.-Peru FTA, *supra* note 114, art. 21.16; U.S.-Korea FTA, *supra* note 115, art. 22.13; U.S.-Panama FTA, *supra* note 116, art. 20.15; U.S.-Colombia FTA, *supra* note 117, art. 21.16.

framework and tariff preferences are established by the agreement, state parties can only maintain or lose these preferences. If a state meets its labor obligations under the agreement, there are no additional positive rewards, but if a state fails to meet these obligations there may be negative consequences. In states with deficient labor protections and limited economic resources to devote to remedying those deficiencies, such a negative incentive structure may create an inducement to shirk on monitoring and regulatory duties. Proponents of this theory argue that if labor situations are not adequately monitored, states will be less likely to uncover violations, and hence, less likely to lose their trade preferences under the agreement. Thus, while there may be retributive justifications for using negative incentive enforcement mechanisms in trade agreements, they may also create an impetus for lackluster compliance with the monitoring duties incumbent in the agreement.

But enforcement mechanisms based on negative incentives are not the only option in trade frameworks. The aforementioned U.S.-Cambodia agreement employed what can be described as an enforcement system based on positive incentives.<sup>165</sup> Under that agreement, Cambodian textile and apparel imports into the United States could be increased from their base annual quota of 6% up to 14% per year if Cambodia was adjudged to be in compliance with its labor obligations.<sup>166</sup> This approach has been considered a success by every party involved in the agreement—both governments, private firms, and workers in Cambodia’s apparel sector—and has led to significant and widespread improvements in wages, working conditions, and respect for workers’ rights.<sup>167</sup> Rather than creating an incentive for lackluster monitoring of labor standards, this system would create an impetus for states to both adhere to their labor obligations and to carefully monitor the implementation of those obligations. States would strive to prove their compliance and earn further tariff reductions. Moreover, by delegating some of these monitoring duties to the ILO, as discussed above, states need not incur an increased economic burden.

While the U.S.-Cambodia agreement was based on textile import quotas, such a positive incentive structure could be applied to tariff-based trade agreements and frameworks as well. It must be noted, however, that the MFN obligation of the GATT requires states to both

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165. See U.S.-Cambodia Textile Agreement, *supra* note 139.

166. See Trebilcock & Howse, *supra* note 37, at 299-300.

167. Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 U.C. DAVIS J. INT’L L. & POL’Y 13, 21 (2003).

(1) accord the same “advantage, favour, privilege or immunity” granted to one state to all states and (2) do so immediately and unconditionally.<sup>168</sup> A graduated positive incentive structure would appear on its face to violate this obligation, as (1) states with sub-par labor rights records would not be granted the same treatment as other states and (2) even for those states which are respecting labor rights, tariffs would be reduced only gradually. Thus, in order for a system of graduated positive incentives to fit within the WTO framework, a specific exception should be carved out for labor rights. As discussed above, there may not be a need for an explicit exception for including labor rights in the WTO, as the Article XX exceptions could already be interpreted to include such considerations. However, in order to advance labor rights through the use of positive incentives, and to do so unambiguously, a specific exception would be preferable. Such an exception need not require lengthy amendments or supplements to existing WTO legal texts. The addition of a clause denoting the permissibility of “measures necessary to promote labor rights and designated labor standards” to the current Article XX exceptions would be sufficient. As such, labor rights could be incorporated into the existing WTO legal framework without requiring significant changes to the current system.

#### IV. CONCLUSION

Whether to prevent a “race to the bottom,” promote human rights, or foster the growth of a middle class, labor standards should be seen as an integral and necessary part of the international trade process. While the ILO has demonstrated its ability to define, evaluate, and monitor international labor rights, it lacks the enforcement capabilities to ensure that these rights are respected in practice. A history of state compliance with the decisions of the WTO dispute settlement body, on the other hand, makes its enforcement system “the jewel in the crown of the WTO.” By opening the WTO dispute settlement system to labor complaints which affect trade among state parties, the WTO could go far towards truly making free trade fair trade. Moreover, given the existing precedents and exceptions within the WTO system, integrating labor standards would not require a massive overhaul; a single clause added to the Article XX exceptions or a dispute body interpretation of the existing exceptions would be sufficient.

Various free trade agreements have already demonstrated at the regional and bilateral levels that labor rights can be addressed in a

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168. See GATT, *supra* note 7, art. I:1.

meaningful way as part of the fair trade agenda. As the largest trade organization in the world, and having the most developed dispute resolution system, the WTO is realistically the only venue through which the trade-labor linkage can adequately be addressed on a global level. If the world community is serious about promoting an agenda centered on fair trade—in which the benefits of world economic integration are shared by all and the human rights of workers producing goods are placed on par with the market access rights of consumers purchasing those goods—then integrating labor rights into the WTO provides the opportunity to do just that.