

# LEVERAGING TRADE AGREEMENTS FOR LABOR LAW ENFORCEMENT: DRAWING LESSONS FROM THE US-GUATEMALA CAFTA DISPUTE

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## ABSTRACT

*The 2017 U.S.-Guatemala dispute (the Dispute) under the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) was the first instance in which a labor law complaint was disputed under the arbitration mechanisms of a free trade agreement. For labor law advocates, it represents a test of how the inclusion of labor law provisions within international trade law instruments will protect transnational labor rights. In reviewing this case from the perspective of transnational labor law, the arbitration panel’s decision demonstrates the many limitations incident to using free trade agreements to pursue the enforcement of labor laws abroad. In particular, the Panel’s narrow formulation of the “affecting trade” requirement in the CAFTA-DR will prove challenging for labor advocates. While the integration of labor provisions in international trade law instruments will likely continue, the effectiveness of such measures does not look positive in light of the Dispute.*

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I. INTRODUCTION

On June 14<sup>th</sup>, 2017, an arbitration panel released its decision in a trade dispute between the United States and Guatemala (the Dispute), related to the latter's obligations under the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) to effectively enforce its labor laws.<sup>1</sup> The United States claimed that Guatemalan authorities allegedly failed to protect laborers' rights of freedom of association, of investigating violent actions against labor organizers, and of effectively enforcing court decisions protecting laborers' rights.<sup>2</sup> These claims were raised with respect to a number of different employment sites involving shipping, agriculture, and textile manufacturing industries.<sup>3</sup> The dispute marked the first time that labor complaints have been disputed in a free trade agreement's (FTA) arbitration proceeding.<sup>4</sup> While the United States was successful in demonstrating that the Guatemalan government had failed to enforce its labor laws on a number of occasions and at a number of enforcement sites, the United States ultimately failed to prove that these actions affected trade between the two countries, and thus lost the dispute.<sup>5</sup>

The Panel's decision offers an ideal moment for labor lawyers to reflect on the pros and cons of utilizing international trade agreements as a means for securing the enforcement of labor laws abroad. Approaching the Dispute as an example of the ongoing transnationalization of labor laws, this Article argues that the Panel's decision illustrates the reasons why FTAs do not offer broadly advantageous opportunities for the transnational enforcement of fundamental labor rights.<sup>6</sup> In particular, the Panel's decision demonstrates the limitations

1. Dominican Republic–Central America–United States Free Trade Agreement, Aug. 5, 2004, 119 Stat 462, 43 I.L.M. 514 [hereinafter CAFTA-DR]. The labor law enforcement obligations of CAFTA-DR are set forth in Article 16.2 of the Agreement.

2. *In re Guatemala – Issues Relating to the Obligations (U.S. v. Guatemala)*, Final Report, CAFTA-DR Arb. Panel (June 14, 2017) [hereinafter *U.S. v. Guatemala*], [https://www.trade.gov/industry/tas/Guatemala%20%20E2%80%93%20Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf](https://www.trade.gov/industry/tas/Guatemala%20%20E2%80%93%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf).

3. *In re Guatemala – Issues Relating to Obligations Under Art 16.2.1(a) of the CAFTA-DR (Guat./U.S.)*, Initial Written Submission of the United States, ¶ 3 (Nov. 3, 2014), [https://ustr.gov/sites/default/files/US%20sub1.fin\\_.pdf](https://ustr.gov/sites/default/files/US%20sub1.fin_.pdf).

4. Paula C. Albertson & Lance Compa, *Labour Rights and Trade Agreements in the Americas*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 474–493 (Adelle Blackett & Anne Trebilcock eds., 2015).

5. *U.S. v. Guatemala*, *supra* note 2, ¶ 594.

6. An expansive treatment of the increasing transnationalization of labor law is offered in the collection of essays in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW (Adelle Blackett & Anne Trebilcock eds., 2016).

that arbitration poses for the participation of labor advocates and the constraints that arise from the “affecting trade” provisions in FTAs.

Part II will introduce the transnational approach to labor law that has proven increasingly popular as labor law advocates and scholars seek innovative ways of ensuring and enforcing labor rights amidst the globalization of production and supply chains. Part III will present the historical development and general characteristics of the CAFTA-DR, in light of the 2002 Trade Promotion Authority Act and broader efforts to include labor provisions within international trade law instruments. Part IV will describe the facts and procedural history of the Dispute, along with the arbitration panel’s holding and reasoning in its final decision. Finally, Part V will discuss the lessons drawn from this first foray into labor dispute resolution through FTA arbitration.

## II. THE TRANSNATIONAL LENS

In 1956, Professor Philip Jessup of Columbia Law School published an essay titled *Transnational Law*, drawing attention to “law which regulates actions or events that transcend national frontiers,” including public international law, private international law, as well as “other rules that do not wholly fit into such standard categories.”<sup>7</sup> Over the decades, a distinct transnational lens has crystallized for analyzing the complex, border-crossing legal phenomena resulting from the globalization of trade, institutions, crime, environmental degradation, and, more generally speaking, societies. In particular, legal scholars use a transnational lens to describe how the actors, norms, and processes involved in legal disputes are re-configured as the disputes shift from a domestic to an international frame.<sup>8</sup>

A transnational lens offers legal scholars a more nuanced analytic framework by which to assess arbitration proceedings, such as the Dispute, under an appropriate international trade agreement. FTAs and the relevant arbitration proceedings may traditionally be assessed through the lens of international public law, emphasizing their status

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7. PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956).

8. Peer Zumbansen, *Defining the Space for Transnational Law: Legal Theory, Global Governance and Legal Pluralism*, 21 *TRANSNAT'L L. CONTEMP. PROBS.* 305 (2012). Among the more influential contributions to the crystallizing field of transnational legal scholarship is the work of Peer Zumbansen and the Transnational Legal Orders project initiated by Terence C. Halliday and Gregory Shaffer. Halliday and Shaffer define transnational legal orders as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.” See Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 3, 11 (Terence C. Halliday & Gregory Shaffer eds., 2015).

as international treaties between state governments, and the arbitration proceeding as a dispute mechanism for states in disagreement over their obligations in the trade treaties.<sup>9</sup> A transnational lens, however, displaces the state from the center of the analytic frame by including the numerous other local, regional, and international actors—both public and private—that are involved and affected by FTAs. In other words, a transnational frame embeds the FTAs within their broader legal contexts. A transnational lens emphasizes interactional accounts of the multitudinous types of actors and institutions at various levels and sites of governance that are implicated in transboundary legal phenomena<sup>10</sup> The pluralist orientation of the transnational lens, which distinguishes it from a traditional, statist approach to international law, has attracted labor lawyers to FTAs as potential venues to secure transnational enforcement and protection of fundamental labor rights.<sup>11</sup> FTAs offer a tempting venue for labor unions and workers' rights groups to draw attention to systematic rights infringements when domestic courts prove incapable or unwilling to protect labor rights.

Labor law scholars are increasingly concerned about the international labor law framework, centered primarily on the work of the International Labor Organization (ILO), and the rapid adjustments it must go through in order to meet the challenges of economic globalization and produce an effective global enforcement tool for fundamental labor rights.<sup>12</sup> As David M. Trubek observes, "The institutions of the world order do a great deal to foster economic integration but relatively little to offset the negative effects of integration on workers."<sup>13</sup> In

9. For this traditional take on FTAs, see, e.g., David A. Gantz, *Regional Trade Agreements*, in THE OXFORD HANDBOOK ON INTERNATIONAL TRADE LAW 237 (Daniel Bethlehem et al. eds., 2009).

10. Shaffer, *supra* note 8.

11. Albertson & Compa, *supra* note 4. On the pluralist character of transnational legal scholarship see: Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNATL. LEG. THEORY 141 (2010); Gunther Teubner & Peter Korth, *Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society*, in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 23 (Margaret Young ed., 2010).

12. See, e.g., Yossi Dahan, Hanna Lerner & Faina Milman-Sivan, *The International Labour Organization, Multinational Enterprises, and Shifting Conceptions of Responsibility in the Global Economy*, in GLOBAL GOVERNANCE OF LABOUR RIGHTS: ASSESSING THE EFFECTIVENESS OF TRANSNATIONAL PUBLIC AND PRIVATE POLICY INITIATIVES 287 (Axel Marx et al. eds., 2015); FRANCIS MAUPAIN, THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION IN THE GLOBAL ECONOMY (2013).

13. David M. Trubek, *Review Essay: The Emergence of Transnational Labor Law*, 100 AM. J. INT'L L. 725, 725 (2006). For a critical take on the unwillingness of states to enforce domestic labor law under the conditions of globalization, see Harry Arthurs, *Making Bricks Without Straw: The Creation of a Transnational Labour Regime*, in CRITICAL LEGAL PERSPECTIVES IN GLOBAL GOVERNANCE: LIBER AMICORUM DAVID M. TRUBEK 129 (Gráinne de Búrca et al. eds., 2013).

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response, labor law scholars have drawn on a transnational lens to help re-imagine a transnational labor law regime capable of meeting the challenges posed by economic globalization.<sup>14</sup> For Adelle Blackett and Anne Trebilcock, this requires “close scrutiny of transnational chains of production and service provision across national borders, and alternative constructions of networking and forms of organizing.”<sup>15</sup>

The transnational labor law framework is premised on a re-tracing of legal relationships, which goes beyond the inter-state relationships underlying the ILO and FTAs, to also include the multitude of private and hybrid labor governance interactions, which occur across borders. This includes the use of codes of conduct in global supply chains,<sup>16</sup> multi-stakeholder market-driven governance bodies,<sup>17</sup> transnational collective action,<sup>18</sup> and transnational human rights litigation,<sup>19</sup> among many other legal strategies aimed to improve labor conditions with transnational interventions.

In summary, to review the Dispute through the transnational labor law lens requires a consideration of the consequences of FTA arbitration for labor unions, interest groups, and other actors affected by the Dispute. Such an approach emphasizes both the strategic use of the arbitral venue as a potential means for transnational labor enforcement, and the broader goal of achieving social and economic justice for laborers, wherever they work. The case is reviewed with these sensitivities in mind.

### III. LABOR PROVISIONS IN U.S. FTAs AND THE DEVELOPMENT OF CAFTA-DR

The inclusion of labor provisions in FTAs has been a contentious subject both domestically in the United States, as well as at the

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14. Arthurs, *supra* note 13.

15. Adelle Blackett & Anne Trebilcock, *Conceptualizing Transnational Labour Law*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 3, 13 (Adelle Blackett & Anne Trebilcock eds., 2015).

16. Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711 (2009).

17. Tim Bartley, *Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Fields*, 31 POL. & SOC'Y. 433 (2003); Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297 (2007).

18. James Atleson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law*, in LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 379 (Joanne Conaghan et al. eds., 2002).

19. A number of cases litigated under the Alien Tort Statute, 28 U.S.C. § 1350, arise, at least in part, out of alleged violations of fundamental labor rights. See, e.g., *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Kiobel v. Royal Dutch Petroleum Co.*, 568 U.S. 108 (2013).

international level. The United States has a long history of including labor requirements in trade-related legislation, such as in the McKinley Act of 1890 and the Tariff Act of 1930.<sup>20</sup> However, the historical approach to mitigating the negative consequences on foreign labor resulting from increased trade was haphazard and incomplete.<sup>21</sup> This historical approach was first counteracted with the inclusion of labor standards requirements in the Generalized System of Preferences in 1984, the trade system used by the United States for its trade relations with developing nations.<sup>22</sup>

Having entered into bilateral FTAs with Israel in 1985,<sup>23</sup> Canada in 1989,<sup>24</sup> and NAFTA in 1994,<sup>25</sup> the United States started to rapidly expand its use of FTAs in the early years of the twenty-first century. In the group of post-2000 FTAs, the United States also attempted to systematize its approach to the inclusion of labor provisions in its international trade agreements.<sup>26</sup> The bilateral FTA with Jordan, signed in October 2000, included the requirement that the signatories establish domestic labor laws and regulations, in a manner “consistent with internationally recognized labor rights,” and that they “shall not fail to effectively enforce [these] labor laws.”<sup>27</sup> Shortly after, in 2002, Congress passed the Bipartisan Trade Promotion Authority Act (BTPAA), establishing a common framework of objectives and principles for negotiating future FTAs.<sup>28</sup> This Act notably codified parity of enforcement in FTAs by requiring equal dispute settlement and enforcement procedures for all objectives, including labor law requirements.<sup>29</sup> It also

20. See Robert A. Rogowsky & Eric Chyn, *U.S. Trade Law and FTAs: A Survey of Labor Requirements*, 1 J. INT. COM. ECON. 113 (2008); Albertson & Compa, *supra* note 4.

21. Rogowsky and Chyn, *supra* note 20, at 115-16.

22. *Id.* at 116-17.

23. Free Trade Area Agreement, Isr.-U.S., Apr. 22, 1985, 24 I.L.M. 653, <https://ustr.gov/trade-agreements/free-trade-agreements/israel-fta/final-text>.

24. Free Trade Agreement, Can.-U.S., Dec. 22, 1987, Jan. 2, 1988, 27 I.L.M. 281, [http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/united\\_states-etats\\_unis/fta-ale/background-contexte.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/united_states-etats_unis/fta-ale/background-contexte.aspx?lang=eng).

25. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993), <https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>.

26. Rogowsky & Chyn, *supra* note 20, at 120-21.

27. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Jordan-U.S., art. VI, ¶¶ 3-4, Oct. 24, 2000, 41 I.L.M. 63; see also Kathleen Claussen, *The Use of Arbitration to Decide International Labor Issues*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 395, 403 (Adelle Blackett & Anne Trebilcock eds., 2015).

28. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801-3813 (2012).

29. *Id.* at § 3802(b)(12)(G) (dispute settlement).

reaffirmed the promotion of the ILO's core labor standards as an overall objective.<sup>30</sup>

In its subsequent series of FTAs, including the CAFTA-DR, the United States used a model text in which only the enforcement of domestic labor laws are enforceable requirements, whereas references to internationally recognized labor rights are only given aspirational status.<sup>31</sup> The CAFTA-DR also utilizes an unequal dispute and enforcement procedure, through which labor-related derogations can only be penalized by fines, while commercial derogations can be penalized by sanctions, leading some to claim that the model text fails to meet the 2002 BTPAA parity requirements.<sup>32</sup> The CAFTA-DR has been subject to criticism for its failure to: require compliance with ILO-consistent labor laws and regulations, prohibit domestic labor law reform lowering protections for workers, include a non-discrimination clause in its Article 16.8 definition of labor laws, and include a ratcheting-up process of increasing labor standards over time, in conjunction with economic prosperity and tariff reductions<sup>33</sup> Indeed, the CAFTA-DR was politically contentious and the House of Representatives barely passed it by just two votes.<sup>34</sup>

Despite the criticism, numerous legal scholars have depicted the CAFTA-DR more optimistically as an "opportunity rather than a hindrance for establishing more comprehensive social politics in [Central America]," even if such an outcome is a necessary or immediate result of the CAFTA-DR.<sup>35</sup> Notably, some authors have pointed towards immediate actions taken by Central American governments to improve their labor laws, including invitations to the ILO for inspections and advice.<sup>36</sup> Yet, it is noteworthy that many of the criticisms levelled towards CAFTA-

30. *Id.* at § 3802(a)(6)-(7) (the overall objectives related to labor), § 3802(b)(11) (the principal objectives related to labor).

31. Compare CAFTA-DR, *supra* note 1, art. 16.2(1)(a) (the requirement that a "Party shall 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 Parties"), with art. 16.2(2) (the aspiration that "each Party shall strive to ensure that it does not waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in Article 16.8").

32. *Id.* arts. 20.16-17. See also Marianne Hogan, *DR-CAFTA Prescribes a Poison Pill: Remediating the Inadequacies of Dominican Republic-Central American Free Trade Agreement Labor Provisions*, 39 SUFFOLK UNIV. LAW REV. 511, 530 (2006).

33. Hogan, *supra* note 32, at 512-13.

34. *Id.* at 531.

35. Peter Abrahamson, *Free Trade and Social Citizenship: Prospects and Possibilities of the Central American Free Trade Agreement (CAFTA-DR)*, 7 GLOBAL SOC. POL'Y 339, 351 (2007).

36. Rogowsky & Chyn, *supra* note 20, at 129-33.

DR were subsequently dealt with in 2007 by the so-called May 10<sup>th</sup> Agreement between the bipartisan Congressional leadership and the G.W. Bush Administration which set a common framework for pending FTAs which require them to include: a prohibition on the lowering of standards, an enforceable commitment to maintain laws and practices consistent with the ILO Declaration, limitations on enforcement discretion, parity of dispute and enforcement mechanisms.<sup>37</sup>

It remains to be seen whether this latest attempt to standardize the use of labor provisions in international trade agreements will prove more effective than the previous attempts and persist despite the trade sentiments of the Trump Administration.<sup>38</sup> Although the media has emphasized the Trump Administration's negative stance towards U.S. FTAs, since his inauguration, the United States has only taken action to formally withdraw from the Trans-Pacific Partnership Agreement (TPP), announced ten days after President Trump's inauguration,<sup>39</sup> and to open renegotiation of the NAFTA.<sup>40</sup> It is noteworthy that other U.S. FTAs have not been subject to the same level of scrutiny as the NAFTA. While the Trump Administration has not taken any actions with regard to the Transatlantic Trade and Investment Partnership (T-TIP) as of October 2017, it appears that negotiations between the United States and the European Union (EU) will remain difficult until the details of the United Kingdom's terms of exit from the EU become more certain.<sup>41</sup> Given that the TPP and T-TIP Agreements were projected to include extensive labor chapters, these developments appear

37. OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, TRADE FACTS: BIPARTISAN TRADE DEAL 1, 1-2 (2007).

38. OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S TRADE POLICY AGENDA 7 (2017) (demonstrating how the Trump Administration has diverged from the trade policies of recent administrations and claiming that multilateral agreements, in particular, have failed to improve U.S. economic interests).

39. OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, *The United States Officially Withdraws from the Trans-Pacific Partnership* (Jan. 30, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP>.

40. Letter from Robert E. Lighthizer, Office of the U.S. Trade Rep., Exec. Office of the President, to Charles E. Schumer, U.S. Senator, 1 (May 18, 2017) (on file with the Office of the U.S. Trade Representative).

41. OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, *U.S.-EU Joint Report on T-TIP Progress to Date* (Jan. 17, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/us-eu-joint-report-t-tip-progress-0> (released just days before President Trump's inauguration); See Daniel Boffey, *Hopes of EU-US Trade Agreement Put on Ice, Say Brussels Sources*, GUARDIAN (Jun. 5, 2017), <https://www.theguardian.com/business/2017/jun/05/hopes-of-eu-us-trade-agreement-put-on-ice-say-brussels-sources> (describing the challenges of T-TIP negotiations amid Brexit).



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to freeze development of the U.S. approach to include labor provisions in FTAs, for the time being. Likewise, initial reports from the NAFTA renegotiation process suggest that labor provisions will not feature as a major issue.<sup>42</sup>

### IV. THE MATTER OF GUATEMALA – ISSUES RELATING TO THE OBLIGATIONS UNDER ARTICLE 16.2.1(A) OF THE CAFTA-DR

In April 2008, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and six Guatemalan worker organizations filed a submission with the U.S. Office of Trade and Labor Affairs (OTLA) alleging that the Guatemalan government violated its obligations to enforce its domestic labor laws under Article 16.2 of CAFTA-DR.<sup>43</sup> In particular, the submission claims that the Guatemalan government failed to ensure the workers' right to the freedom of association by routinely failing to ensure that labor inspectors had access to factories, frequently ignoring violations reported by labor inspectors, failing to enforce the court judgments requiring that workers be reinstated and compensated after unfair dismissals, and failing to effectively investigate and prosecute the murders of union leaders.<sup>44</sup> These initial complaints were raised with respect to five different sites of employment: the Port Authority for the Port of Quetzal (Empresa Portuaria Quetzal), a collection of banana plantations in eastern Guatemala, the INPROCSA fruit and vegetable processing and packaging plant, the Avandia SA garment factory, and the Fribo SA garment factory.<sup>45</sup> As the dispute carried on, a number of additional employment sites were included in the dispute, although the types of violations remained within the same categories of: unfair dismissal cases and the government's failure to force reinstatement, violent acts taken against union leaders and members the government's failure to sufficiently

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42. OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, *Trilateral Statement on the Conclusion of the Third Round of NAFTA Negotiations* (Sep. 27, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/september/trilateral-statement-conclusion-1>.

43. AFL-CIO et al., Public Submission to the Office of Trade & Labor Affairs (OTLA) Under Chapters 16 (Labor) and 20 (Dispute Settlement) of the Dominican Republic-Central America Free Trade Agreement DR-CAFTA 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 (April 23, 2008), <https://www.dol.gov/ilab/reports/pdf/GuatemalaSub.pdf>.

44. *Id.* For a thorough account of the pre-arbitration proceedings, see also Albertson & Compa, *supra* note 4, at 480–84.

45. AFL-CIO et al., *supra* note 43, at 2-3.

investigate the violent acts, and refusal of employers to bargain with unions and the government's failure to ensure the protection of the workers' rights to collectively bargain.<sup>46</sup>

Following visits by the OTLA to Guatemala to review the conditions of labor law enforcement in the country, the U.S. Department of Labor (DOL) issued a report in January 2009 recommending that the OTLA reassess conditions in Guatemala in six months' time, effectively passing the decision-making over to the Obama Administration.<sup>47</sup> In July 2010, the United States formally requested consultations with Guatemala pursuant to Article 16.6.1 of the CAFTA-DR.<sup>48</sup> In May 2011, after initially failing to come to an agreement on an enforcement plan, the United States requested a meeting of the Free Trade Commission under Article 20.5.2 of CAFTA-DR, elevating the severity of the Dispute, and subsequently called for the installation of an arbitration panel in August 2011.<sup>49</sup> The panel was put on hold while the two parties finally came to an agreement on an enforcement plan in 2013.<sup>50</sup> In September 2014, the United States re-invoked the installation of an arbitration panel, claiming that Guatemala had failed to meet key commitments in the enforcement plan.<sup>51</sup> A panel was established with a member chosen by the United States (Mr. Theodore R. Posner), a member chosen by Guatemala (Mr. Fuentes Destarac, later replaced by Professor Ricardo Ramírez Hernández) and a jointly chosen neutral member (Professor Kevin Banks of Canada).<sup>52</sup> Between November 2014 and April 2015, initial submissions and rebuttals from the two parties were filed.<sup>53</sup> Eight non-governmental entities also provided submissions on April 27,

46. U.S. v. Guatemala, *supra* note 2, at 98-142.

47. Albertson & Compa, *supra* note 4, at 481.

48. Letter from Ron Kirk, Office of the U.S. Trade Rep., Exec. Office of the President & Hilda L. Solis, U.S. Sec'y of Labor, to the Honorable Erick Haroldo Coyoy Echeverría, Guatemala Ministry of Economy & the Honorable Edgar Alfredo Rodríguez, Guatemala Ministry of Labor and Social Protection (July 30, 2010) (on file with the Office of the U.S. Trade Representative).

49. Letter from Ron Kirk, Office of the U.S. Trade Rep., Exec. Office of the President, to the Honorable Luis Velásquez, Guatemala Ministry of Economy (May 16, 2011) (on file with the Office of the U.S. Trade Representative).

50. OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, MUTUALLY AGREED ENFORCEMENT PLAN BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE GOVERNMENT OF GUATEMALA (Apr. 25, 2013), <https://ustr.gov/sites/default/files/04292013%20Guatemala%20Enforcement%20Plan.pdf>.

51. U.S. TRADE REP., *United States Proceeds with Labor Enforcement Case Against Guatemala*, (Sep. 18, 2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/September/United-States-Proceeds-with-Labor-Enforcement-Case-Against-Guatemala>.

52. U.S. v. Guatemala, *supra* note 2, ¶ 4.

53. *Id.* ¶ 15-32.

2015.<sup>54</sup> A hearing occurred on June 2, 2015, and the final report of the panel was released on June 14, 2017.<sup>55</sup>

It is noteworthy that the United States heavily relied on statements made by individuals directly involved in the disputed circumstances, or having intimate knowledge of the circumstances.<sup>56</sup> For the purposes of their protection, their identities remained anonymous. The United States frequently used these anonymous statements to provide evidence related to the (in)action of courts and other enforcement authorities, and thus linked them to publicly available court decisions.<sup>57</sup> To certify the authenticity of the anonymous statements and the veracity of their connections to the respective court documents, the United States unilaterally requested the Secretary General of the International Centre for Settlement of Investment Disputes to review the redacted and original versions of the statements.<sup>58</sup> The Panel expressed frustration at this unilateral action,<sup>59</sup> and ruled that the probative value of these statements would depend on the specifics, corroboration, contemporaneity, and verifiability of the statements.<sup>60</sup>

The extensive reliance on anonymous statements also effected the participation of NGOs in the proceeding. Although a number of NGOs provided written submissions to the Panel, they were limited to providing general background and contextual information about the Dispute because the NGOs were incapable of knowing which specific individual cases were being presented by the United States.<sup>61</sup> Given that Chapter 20 Rules of Procedure for CAFTA-DR disputes require the written submissions of NGOs to be considered “only to the extent that they address issues of fact and law directly relevant to any legal or factual issue under its consideration,” the Panel was unable to consider any of the submissions provided by these parties.<sup>62</sup>

A. *Whether Guatemala Failed to Effectively Enforce Its Labor Laws*

Regarding the substance of the Dispute, there were two key components to the Dispute upon which the Panel had to decide: whether

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54. *Id.* ¶ 26.

55. *Id.* ¶ 37.

56. *Id.* ¶ 231.

57. *Id.* ¶¶ 237-246.

58. *Id.* ¶ 247.

59. *Id.* ¶¶ 260-62.

60. *Id.* ¶ 246.

61. *Id.* ¶ 234.

62. *Id.* ¶ 234.

Guatemala failed to enforce its domestic labor laws as required by CAFTA-DR, and whether that failure resulted in effects on trade. For the first question, the United States alleged that Guatemala failed to effectively enforce its labor laws, as required per Article 16.2 of the CAFTA-DR, “through a sustained or recurring course of action or inaction.”<sup>63</sup> In particular, the United States pointed to Guatemala’s failure to “compel compliance with court orders to reinstate and compensate workers unlawfully dismissed in the course of union organizing activities and conciliation proceedings, and to impose sanctions for such unlawful dismissals,” as well as its failure to “conduct proper investigations in response to *bona fide* complaints of employers’ violations of laws related to acceptable conditions of work” and for “not conducting inspections properly so as to determine whether an employer has violated Guatemalan labor laws or failing to impose penalties upon discovering violations.”<sup>64</sup> The latter complaints regarding investigations played a minor role in the Panel’s decision and will not be reviewed in detail here.<sup>65</sup> These claims arose with regard to eight employers, most of which involved stevedores and other maritime workers, or garment and textile workers.<sup>66</sup> Guatemala, for its part, alleged that the United States did not provide a factual basis for its claims in failing to produce sufficient evidence to meet the burden of proof, and thus *prima facie* failed to make a case.<sup>67</sup>

With respect to whether Guatemala failed to effectively enforce its labor laws, the Panel found that in each of the eight employment contexts raised by the United States, Guatemala had indeed failed to effectively enforce reinstatement orders from courts for workers who were unfairly dismissed due to involvement in labor organizing activities and/or orders to compensate unfairly dismissed workers the back pay they were owed by their employers.<sup>68</sup> The Panel decided that, through recourse to a combination of statements from the dismissed workers, statements from local worker organizations familiar with the dismissals, and local court orders, the United States sufficiently met the burden of proof with regards to each employer, though not necessarily for each of

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63. *Id.* ¶ 219.

64. *Id.*

65. With respect to complaints made about the conduct of investigations, the US did not produce sufficient evidence to convince the panel that Guatemala had failed to enforce its laws in these instances. *Id.* ¶¶ 592-93.

66. *Id.* ¶ 286.

67. *Id.* ¶ 220.

68. *Id.* ¶¶ 285-86.

the dismissed workers.<sup>69</sup> The unenforced reinstatement orders in question ranged from periods of eight months to periods in excess of four years.<sup>70</sup>

B. *Whether Guatemala's Failure to Effectively Enforce Its Labor Laws Affected Trade Between the Parties*

The second issue addressed by the Panel was whether the instances in which Guatemala failed to effectively enforce its labor laws affected trade between the parties. The United States claimed that the eight employers directly discussed in the Dispute saved costs by evading compensation of their workers and avoiding the costs associated with unionized workers.<sup>71</sup> In addition, the United States also claimed that indirect effects on trade resulted through cost reductions experienced by clients of the stevedoring companies enjoying labor cost reductions, and through sector-spillovers caused by the modified conditions of compensation that arose when the specific employers discussed in the Dispute saved costs on labor.<sup>72</sup> For its part, Guatemala again claimed that the United States failed to provide sufficient evidence to substantiate its claims, arguing that the U.S. case for this question of the dispute was “completely theoretical” in nature.<sup>73</sup>

The Panel decided in favor of Guatemala, arguing that the theoretical argument of the United States would require the Panel to stray too far from the ordinary meaning of “affecting trade” in so far that it necessarily implies that “all failures to effectively enforce such laws would be in a manner affecting trade to the extent that they affected employers engaged in trade.”<sup>74</sup> Instead, the Panel insisted that the language of Article 16.2.1(a) must be interpreted to mean that the disputed actions “must change conditions of competition by conferring a competitive advantage upon an employer engaged in trade” and, thus, such competitive advantage must be demonstrated as being reasonably expected in the circumstance.<sup>75</sup> However, with regards to one of the incidents in the Dispute—that pertaining the employer Avandia—the Panel found that the facts surrounding the dismissal would necessarily result in the conferral of a competitive advantage, despite additional evidence

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69. *Id.* ¶ 426-8.

70. *Id.* ¶¶ 405, 382.

71. *Id.* ¶ 446.

72. *Id.* ¶ 447.

73. *Id.* ¶ 448.

74. *Id.* ¶¶ 478-79.

75. *Id.* ¶¶ 479-80.

demonstrating such an advantage.<sup>76</sup> In this instance, Avandia dismissed all nine workers who constituted the provisional executive committee of a union in the process of formation.<sup>77</sup> The severity of this action led the Panel to rule that a competitive advantage was inevitable:

Dismissal of union leaders on this scale in response to an attempt to initiate collective bargaining necessarily sends a message to an employer's workforce that the employer is prepared to inflict significant economic harm on those who seek to bargain collectively with it, and deprives workers seeking to bargain collectively of their leadership.<sup>78</sup>

Despite this finding with regards to the dismissal of workers by Avandia, the Panel still did not find Guatemala in breach of Article 16.2.1(a). According to the Panel, the dismissal action and failure to enforce reinstatement orders constituted an isolated incident, and thus did not meet the standard of being a "sustained or recurring course of action or inaction."<sup>79</sup> Thus, in summary the Panel found that "[t]he United States has proved that at eight worksites and with respect to 74 workers Guatemala failed to effectively enforce its labor laws by failing to secure compliance with court orders, but not that these instances constitute a course of inaction that was in a manner affecting trade."<sup>80</sup>

## V. DISCUSSION

The Panel's decision in the Dispute offers a first demonstration of an attempt to enforce labor laws transnationally via obligations created in FTAs. As such, it provides a moment for transnational labor scholars to weigh the utility and limitations that such a "hard" enforcement mechanism, like this arbitration decision, might offer.<sup>81</sup> It also provides a first look at how arbitration panels will define the meaning of key terms like "effectively enforce" and "affecting trade," the interpretations of which will affect the utility of free trade agreement mechanisms for enforcing labor laws.<sup>82</sup> While the discussion below seeks to estimate the utility of this "hard" enforcement mechanism, it is fairly certain that the

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76. *Id.* ¶ 487.

77. *Id.* ¶ 402.

78. *Id.* ¶ 487.

79. *Id.* ¶ 504.

80. *Id.* ¶ 594.

81. Claussen, *supra* note 27, at 404.

82. Albertson & Compa, *supra* note 4, at 484.

numerous softer dispute mechanisms within free trade agreements, such as consultation and mediation procedures, will continue to be popular mechanisms to enforce labor laws across borders.<sup>83</sup> The following discussion will elaborate three key lessons learned from the Dispute: the emphasis on procedural elements of enforcement over the substance of the allegedly violated labor rights, the particular challenge posed by the panel's interpretation of the "affecting trade" provision in CAFTA-DR, and the participation opportunities of labor unions and NGOs.

*A. Procedure Over Substance: Missing the Mark on Freedom of Association Rights*

Labor law scholars have long maintained that the protection of freedom of association and the right to collective bargaining are key instruments to ensure the broader enforcement of labor laws in the workplace.<sup>84</sup> The underpinning argument is that an empowered and organized workforce is the optimal watchdog and monitor of labor law violations, more capable of identifying and acting on violations in the workplace from which labor inspectors and private monitors are too often shielded.<sup>85</sup> The failure to include enforceable obligations to protect the ILO's standards associated with these two fundamental labor rights is particularly frustrating for labor rights advocates.

Reviewing the Panel's decision in the Dispute, it is evident that the CAFTA-DR's focus on the enforcement of domestic labor laws can prove distracting from the protection of internationally recognized fundamental labor rights. Much of the fact-finding and complaints in the Dispute revolved around which actions local Guatemalan courts took to enforce the reinstatement of unfairly dismissed workers and their compensation of missing wages.<sup>86</sup> Questions regarding the length of time in which courts should be expected to have enforced reinstatement orders overshadowed the more general, implicit finding of the widespread violations of internationally-recognized fundamental rights to the freedom of association and collective bargaining.<sup>87</sup>

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83. *Id.* 480-501 (noting that there have been a number of complaints regarding labor law enforcement under the CAFTA-DR which were resolved through 'softer' mechanisms).

84. JILL ESBENSHADE, *MONITORING SWEATSHOPS: WORKERS, CONSUMERS, AND THE GLOBAL APPAREL INDUSTRY* 202 (2004).

85. *Id.* at 198-200.

86. *U.S. v. Guatemala*, *supra* note 2, §IV(B)(2)(b).

87. *Id.* ¶¶ 484-85.

In summary, for advocates wishing to attain justice for the unfairly dismissed workers at the eight worksites reviewed in the Dispute, the Dispute was largely successful. However, the decision proves disappointing for those seeking an explicit confirmation about widespread violations of fundamental labor rights in Guatemala. Domestic procedural injustice, e.g. lengthy delays in the holding of court hearings and the enforcement of court orders, carried more emphasis than the substantive violation of international labor rights, to the extent which these two categories can be separated.

B. *The Challenge of the “Affecting Trade” Threshold*

Disputing labor rights violations in the context of FTAs will inevitably require a transformation of the dispute to fit the concerns and principles of international trade law. This dispute was transformed primarily through the requirement that trade between the parties is affected through “a sustained or recurring course of action or inaction,” which fails to effectively enforce domestic labor laws.<sup>88</sup> The Panel’s interpretation of this requirement—the first attempt of its kind—will likely prove consequential for subsequent attempts to use FTAs for labor law enforcement.

As noted above, the Panel dismissed the U.S. argument that any instance of unfair dismissal and unpaid wages necessarily affects trade insofar that the employers save costs that they would have otherwise have incurred directly, as wage payments, or indirectly, as costs derived from a unionized workforce.<sup>89</sup> While the formulation of the requirement in the CAFTA-DR arguably necessitated such an interpretation by the Panel, it nevertheless illustrates how limiting the use of FTAs can be for achieving social justice in these types of cases.<sup>90</sup> Not only is it necessary to prove that trade has been affected, it must also be demonstrated that the effects on trade arose out of reoccurring or sustained action or inaction.<sup>91</sup> Such a narrow formulation of the enforceability of labor law provisions in this FTA allow for blatant and systematic violations of the freedom of association to be tolerated. This arises, in part, because the Panel implicitly interpreted “recurring or sustained action or inaction” to be measured in a single work context, rather than more broadly across an industry.<sup>92</sup> The Dispute clearly identified both instances of

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88. CAFTA-DR, *supra* note 1, at art. 16.2(1)(a).

89. U.S. v. Guatemala, *supra* note 2, ¶¶ 478-79.

90. *Id.* ¶¶ 479-480.

91. *Id.* ¶ 594.

92. *Id.* ¶ 504.



## LESSONS FROM THE US-GUATEMALA CAFTA DISPUTE

reoccurring action or inaction, as well as instances of sustained action or inaction, of the Guatemalan courts that failed to protect workers involved with unionization activities from unfair dismissal.<sup>93</sup> Yet, the Panel did not find the “reoccurring or sustained” threshold to be met within the specific instance of Avandia, the only instance to have affected trade according to the Panel, which was a key determination that led to Guatemala winning the Dispute.

### C. *The Role of Labor Unions and NGOs*

Lastly, the inclusion of labor provisions in FTAs offers opportunities for labor unions and labor rights advocates to take part in disputing alleged violations of labor rights. While the FTAs are formal agreements among national governments, this case demonstrates how a transnational coalition of labor unions can initiate disputes. Notably, the Dispute began with an action by the coalition of United States and Guatemalan labor unions and workers’ organizations.<sup>94</sup> Such a transnational coalition of worker interests is precisely the kind of opportunity which labor advocates have been seeking to foster. It demonstrates how the integration of labor rights into international trade law can offer an alternative venue when domestic courts systematically fail to protect workers raising complaints. It also illustrates how this can serve as a mechanism for uniting labor rights advocacy efforts across borders rather than pitting labor groups against each other, as is too often the result of offshoring and outsourcing of manufacturing and production.<sup>95</sup>

Yet, despite the initial collaboration of U.S. and Guatemalan labor groups, the elevation of the Dispute to the “hard” stage of arbitration ultimately limited the participation opportunities of labor advocates, unions and NGOs. As noted previously, due to the nature of fact finding in this case and the anonymity required for those willing to provide information about working conditions in the respective employment sites, the written submissions of labor unions and advocacy groups were ultimately useless in the proceedings. While this does not signify that their inclusion in the Panel’s decision would have resulted in a different outcome, there is nevertheless good reason to remain critical of the participatory closure which resulted as this dispute transformed from

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93. *Id.* §IV(B)(3).

94. Abrahamson, *supra* note 35, at 345.

95. Atleson, *supra* note 18; Ashwini Sukthankar, *Global Organizing and Domestic Constraints*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 37 (Adelle Blackett & Anne Trebilcock eds., 2016).

local, domestic disputes into a case of international arbitration. The institutional mechanisms for protecting anonymity while guaranteeing procedural fairness and participatory opportunities for affected communities had not been sufficiently elaborated in the CAFTA-DR, an unsurprising consequence of integrating labor law provisions into international trade law instruments.<sup>96</sup> This shortcoming will need to be addressed before FTAs can provide stable venues for enforcing labor law obligations.

## VI. CONCLUSION

This Article of the Dispute under Article 16.2 of CAFTA-DR has argued that the use of FTA arbitration to enforce labor laws transnationally comes with significant limitations for labor rights advocates. In its ruling, the Panel found numerous instances in which the courts' reinstatement compensation orders for workers unfairly dismissed for their involvement with unionization efforts went unenforced for unreasonable amounts of time. Despite these numerous failures, the Panel concluded that the United States had not proved that Guatemala's failure to enforce its labor laws through recurring or sustained action resulted in effects on trade between the two countries. The Panel's narrow interpretation of what it means to "affect trade" through "recurring or sustained action or inaction" creates a significant barrier for labor advocates looking to use the labor provisions in CAFTA-DR to enforce labor laws in countries with poor labor rights protections.

While this is the first arbitration decision regarding labor law requirements in FTAs, the destiny of similar arbitration tools may depend on the FTA in question. Importantly, FTAs signed by the United States since 2007 have included much firmer commitments to international labor rights, and as such they could prove easier venues for labor law enforcement disputes. Until more arbitration decisions are available to compare, we can rest assured that the softer dispute mechanisms of FTAs from both before and after 2007 will continuously be used to pressure governments transnationally into improving their protection of labor rights.

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96. A recent speculative discussion about the possible future use of international arbitration in the context of FTAs and investment treaties for settling labor disputes overlooks any procedural challenges that the sensitive nature of fact-finding in labor law cases would pose for arbitration. See Claussen, *supra* note 27, at 400.