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CAFTA and International Human Rights in El Salvador: Is the United States Acquiescing to Widespread Workers' Human Rights Violations?

Matthew E. Johnson*

CAFTA UPDATE: STATUS AS OF AUGUST 4, 2005

¶1 This article was primarily written during the fall of 2003 and updated, as seen below, on March 4, 2004. The article was submitted for publication in the late spring of 2004 and has not been substantially altered from that date. However, dramatic changes in the status of CAFTA have occurred quite recently and must be briefly addressed.

¶2 CAFTA was not at the forefront of the political scene or the Bush Administration's agenda through much of the election season in 2004. CAFTA faced a certain amount of resistance, and the administration did not push for its passage during the election season. CAFTA remained out of the public eye for the most part until the summer of 2005 when it came before both the Senate and the House of Representatives for votes. Additionally, the Dominican Republic was added as a party to CAFTA. Thus the agreement is now often referred to as the CAFTA-DR agreement.

¶3 On June 30, 2005 the Senate passed CAFTA by a vote of 54-45. More recently, in the early morning hours of July 28, 2005, the House of Representatives passed CAFTA by a narrow margin of two votes, 217-215. By all accounts the manner in which House passage occurred was quite interesting during the late night hours on Capitol Hill. For a more detailed look at CAFTA's passage in the House of Representatives see Paul Blustein and Mike Allen, *Trade Pact Approved by House*, WASH. POST, July 28, 2005, at A1. The article is also available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/27/AR2005072701195.html>.

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I. INTRODUCTION

¶4 The Bush administration is currently working in conjunction with five Central American countries to develop a free trade agreement (FTA) that will be known as the Central American Free Trade Agreement (CAFTA).¹ The proposed free trade agreement will be between the United States and Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.² The talks began on January 8, 2003 when United States Trade Representative Robert B. Zoellick met with trade ministers from the five Central American countries.³ Most recently the talks have continued in the ninth and final negotiating session in Washington D.C. which began on December 8 and is expected to continue through at least December 16, 2003.⁴ The goal of the Bush administration is to have the agreement finalized by the end of the calendar year, which may be a challenge given the time constraints now facing the negotiators.⁵ If completed, the CAFTA agreement will be the first regional free trade agreement signed by the United States since the creation of an FTA with Chile.⁶ During the recent talks in Houston (the eighth of the nine negotiating sessions), lead negotiators stated that they came to agreements on several of their differences and they have narrowed their differences with regard to important areas of disagreement such as labor.⁷ As one might expect with any free trade agreement, labor is a key issue that must be addressed when assessing the value of CAFTA to all parties involved.

¶5 This paper will examine the effect the Central American Free Trade Agreement will have on the human rights of labor workers in El Salvador. When looking at this issue through the context of international human rights, many pressing questions come to the forefront. Yet one central question goes straight to the heart of the issue: What message is the United States sending with regard to international human rights for workers following the proposed implementation of CAFTA? In order to answer this inquiry, one must examine the role that international treaties play in the development of a free trade agreement such as CAFTA. The International Covenant on Economic, Social and Cultural Rights will be examined not only for what the treaty says, but how it is being treated by the United States (although the U.S. has not ratified the treaty) and El Salvador when addressing the CAFTA labor issues. The International Labour Organization (ILO) and that group's relevant treaties will also be examined.⁸

¹ 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, 723 (2003) (discussing CAFTA).

² *Id.*

³ Rosella Brevetti, *U.S., Five Central American Nations Kick Off FTA Talks, Aim to Conclude by End of Year*, 20 INT'L. TRADE REP. (BNA) 113 (Jan. 16, 2003).

⁴ Jane Bussey, *Pressures Threaten Hemispheric Trade Agreement*, ABERDEEN AMERICAN NEWS, Dec. 12, 2003, available at 2003 WL 59144908.

⁵ Jenalia Moreno, *Negotiators Attempt to Be Flexible*, HOUSTON CHRONICLE, Oct. 23, 2003, at Business 1.

⁶ Bill Hensel Jr. and Jenalia Moreno, *Talks Here May Reshape Central America Trade / Negotiations Expected to Draw Protestors*, HOUSTON CHRONICLE, Oct. 19, 2003, at A1.

⁷ Moreno, *supra* note 5.

⁸ The ILO Declaration on Fundamental Principles and Rights at Work will be discussed, which includes

Additionally, the steps being taken by the United States government to improve workers' human rights in El Salvador will be examined. One will soon see that the Trade Policy Department and the State Department have quite different views of the status of workers' human rights in El Salvador. Also, Human Rights Watch has developed a report regarding the potential effects CAFTA will have on human rights in El Salvador. The goal of examining these various institutions and their outlooks on the international human rights situation for laborers in El Salvador is to help one better understand what message the United States is sending regarding laborers' human rights when it enters into a free trade agreement with a country like El Salvador.

¶6 If the United States enters into CAFTA with El Salvador as a party and does not significantly address the workers' human rights problems in El Salvador, the United States will be effectively acquiescing to widespread workers' human rights violations. This will impliedly render international human rights treaties meaningless, or at least of little importance in the context of the global economy. Furthermore, if the United States chooses to address workers' rights in CAFTA but fails to create a viable standard that uses the customary international law of workers' international human rights, the effect will be similar in that international human rights customs and treaties will be viewed as meaningless.

II. PREVIOUS FREE TRADE AGREEMENTS

¶7 Before one can effectively address the issue of CAFTA and laborers' human rights in El Salvador, it will be beneficial to first gain an understanding of free trade agreements that have been implemented in the last decade. The most notable FTA is the NAFTA agreement with Mexico and Canada. In that particular free trade agreement there was a labor side agreement set up entitled the North American Agreement on Labor Cooperation (NAALC).⁹ Although a labor agreement exists, albeit a side agreement and not part of the main agreement, it has come under much criticism.¹⁰ NAALC has been said to be unclear, unenforceable, and lacking a legitimate remedy for private parties and thus the supposed "obligations" under the agreement turn into voluntary choices rather than binding agreements.¹¹ Another more recent free trade agreement between the United States and Jordan includes labor provisions in the text of the agreement, which is a step in the right direction.¹² In the U.S.-Jordan FTA the parties agreed "to 'strive to ensure' that internationally recognized labor rights on specified topics 'are recognized and protected by domestic law.'"¹³ In theory the Jordan-FTA provides that if the labor standards set out in the agreement are not met then either party could face adjudicatory review, analysis, public exposure, or at the very worst, trade sanctions.¹⁴ Yet the inclusion of the

the eight Fundamental Conventions on Labour.

⁹ North American Free Trade Side Agreement on Labor Cooperation, U.S.-Mex.-Can, Sept. 13, 1993, available at <http://www.tcc.mac.doc.gov/cgi-bin/doiit.cgi?204:64:985248109:176>.

¹⁰ Weiss, *supra* note 1, at 699.

¹¹ *Id.*

¹² Jordan Free Trade Agreement, U.S.-Jordan, Oct. 24, 2000, available at <http://www.tcc.mac.doc.gov/cgi-bin/doiit.cgi?204:64:985248109:301>.

¹³ Weiss, *supra* note 1, at 714.

¹⁴ *Id.* at 718.

“internationally recognized labor rights” is a vast improvement over NAALC which only addressed domestic labor law.¹⁵

¶8 Two more FTAs that are of importance are the U.S.-Chile and U.S.-Singapore agreements. These two agreements are very similar to the Jordan agreement, as they include the requirement to recognize international labor standards.¹⁶ Unfortunately, these two FTAs appear to require that enforcement mechanisms can take place only if domestic labor laws are violated, which digresses from the mentioned international labor standards in the FTAs.¹⁷ The result of the violation of the domestic labor laws by any party would then result in trade sanctions that can be in the form of monetary penalties.¹⁸ Although monetary penalties may force a party into compliance, they can also have the effect of hurting the workers whom they are designed to protect if jobs are lost due to the monetary sanctions. For example: if a monetary penalty is imposed on a party and jobs are reduced in order to cut expenses to pay for the sanction, then the sanction will have the effect of hurting many workers by leaving them unemployed when it is intended to help them.¹⁹ With these agreements only requiring the parties to enforce their own domestic labor laws, workers are vulnerable to inadequate domestic labor laws and a country relaxing their labor laws so as to attract more commercial development in their country. The ultimate result can be serious violations of workers’ human rights.

¶9 The last agreement that needs to be mentioned is the textile trade agreement between Cambodia and the U.S. In this agreement the U.S. has the power to raise limits on the importation of textiles from Cambodia if the labor conditions in the textile industry “substantially comply” with domestic labor laws as well as internationally recognized standards.²⁰ This agreement allows the United States to increase imports, which will benefit the Cambodian economy, if labor rights remain at the necessary levels for international compliance. This serves as a “carrot” for Cambodia, not a “stick,” thus encouraging respect for workers’ international human rights.²¹

¶10 As one can see, there are various ways the U.S. can go about handling labor issues in CAFTA. Yet one item that has yet to be addressed in these previous FTAs is the effect that a state’s relationship to a given treaty has on the FTA.

III. INTERNATIONAL TREATIES : THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE INTERNATIONAL LABOUR ORGANIZATION

¶11 To better examine the international human rights that labor workers in El Salvador do have according to international treaty bodies, one must look to the International Covenant on Economic, Social and Cultural Rights. This United Nations convention was

¹⁵ *Id* at 714.

¹⁶ *Id* at 721.

¹⁷ *Id*.

¹⁸ *Id* at 722.

¹⁹ An alternative that appears to be effective is discussed below with regard to the U.S. textile agreement with Cambodia.

²⁰ Cambodia Bilateral Textile Agreement, U.S.-Cambodia, Jan. 20, 1999, *available at* <http://www.tcc.mac.doc.gov/cgi-bin/doiit.cgi?204:67:9dd4b59f4f58e6d1df96109b881388c51d00960a7bd6f95818585117aeaf210b:381>.

²¹ Carol Pier, *International Trade Deals Can be Tools to Promote Labor Rights*, SALT LAKE TRIBUNE, Aug. 3, 2003, *available at* <http://www.sltrib.com/2003/Aug/08032003/commenta/80760.asp>.

put in force on January 3, 1976.²² El Salvador signed this convention on September 21, 1976, and the formal ratification process was completed on November 30, 1979. Similarly, the United States became a signatory to the convention on October 5, 1977, but has yet to ratify²³ the Convention.²⁴

¶12 The pertinent articles of this convention are found in Part III, Articles 7 and 8. Article 7 grants workers the right to such expectations as fair wages for all people including women, safe and healthy working conditions, and a reasonable limitation of working hours.²⁵ Article 8 guarantees such workers' rights as the right to form trade unions as well as join trade unions and the right to strike if the strike conforms with domestic laws.²⁶ These rights are important given what several groups, including the U.S. State Department, have reported regarding workers' rights in El Salvador.

¶13 Another aspect of international treaty law that is important is the International Labour Organization of which El Salvador and the United States are both members.²⁷

²² International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Jan. 3, 1976).

²³ In order for the United States to ratify the Convention the Senate would have to consent to it by a 2/3 vote, followed by ratification by the President, with the final step being deposit of the treaty with UN treaty depository.

²⁴ Ratification information available at <http://www.ohchr.org/english/countries/ratification/3.htm>

²⁵ International Covenant on Economic, Social and Cultural Rights, Part III, Article 7, *supra* note 22. Pertinent portions of Article 7 state as follows:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

²⁶ International Convention on Economic, Social and Cultural Rights, Part III, Article 8, *supra* note 22. Pertinent portions of Article 8 state as follows:

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

²⁷ About the ILO, <http://www.ilo.org/public/english/about/index.htm> (last visited Nov. 15, 2005).

The ILO was first established in 1919.²⁸ The ILO formulates international labor standards in the form of Conventions and Recommendations that set minimum standards for what the organization has deemed basic human rights.²⁹ In addition to being members of the ILO, both El Salvador and the United States are obligated to respect the eight Fundamental Labour Conventions based on the Declaration on the Fundamental Principles and Rights at Work.³⁰ The eight Fundamental Labour Conventions are:

- Freedom of Association and Protection of the Right to Organize Convention, 1948, (No. 87);
- Right to Organize and Collective Bargaining Convention, 1949 (No. 98);
- Forced Labour Convention, 1930 (No. 29);
- Abolition of Forced Labour Convention, 1957 (No. 105);
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
- Equal Remuneration Convention, 1951 (No. 100);
- Minimum Age Convention, 1973 (No. 138); and
- Worst Forms of Child Labour Convention, 1999 (No. 182).³¹

These fundamental labor conventions and rights for workers are very important to be aware of when discussing CAFTA's effect on the workers' human rights in El Salvador.

IV. INTERNATIONAL WORKERS' RIGHTS IN EL SALVADOR

¶14

Clearly El Salvador has taken the initiative to become a party to several important human rights labor agreements including the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, and the International Labour Organization. Also, the ILO has reported that El Salvador has satisfactory labor laws to meet certain standards and to protect the workers.³² It should be noted that the ILO was only asked to give a comprehensive review of the labor laws that are "on the books" and not to examine the effectiveness or the enforcement of these specified labor laws. If this was the end of the international workers' rights story in El

²⁸ *Id.*

²⁹ *Id.*

³⁰ International Labour Organization, *Declaration on Fundamental Principles and Rights at Work*, 86th Sess. (June 1998), available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT. The ILO Declaration on Fundamental Principles and Rights at Work states with regard to the eight fundamental conventions, "all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions. . . ."

³¹ A summary of each one of the eight conventions is available at <http://www.ilo.org/public/english/standards/norm/whatare/fundam/foa.htm>. It should be noted that although required to abide by the eight fundamental conventions, the U.S. has only ratified numbers 105 and 182 and El Salvador has ratified numbers 29, 87, 98, 100, 105, and 111. See *infra* note 141.

³² INTERNATIONAL LABOUR ORGANIZATION, FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK: A LABOR STUDY, available at <http://www.ilo.org/public/english/dialogue/download/cafta.pdf> (last visited Nov. 15, 2005).

Salvador, then it would seem that the implementation of CAFTA with El Salvador should pose no potential problems for treaty violation, workers' rights, or the United States' view of international human rights. Unfortunately, the story is merely beginning to unfold. One has to look no further than the U.S. State Department to learn of the human rights violations that are prevalent among the working class in El Salvador.

V. EL SALVADOR: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES³³

¶15 In its annual report the State Department sheds light on how the workers' human rights situation in El Salvador is in need of help and repair. The report demonstrates that although international treaties have been signed and adequate labor laws are in place, the reality of the situation is that workers' human rights are often jeopardized by employers or the state, both of whom often have too much power and control over their workers.³⁴ The report outlines a government that is often willing to discuss human rights with various nongovernmental organizations (NGOs), except when the issue to be discussed is workers' rights.³⁵ In addition to failing to discuss workers' rights with NGOs, the Government would not even address the issue with its own Human Rights Ombudswoman's Office, the Procuraduría de Derechos Humanos (PDDH).³⁶ The report outlines a situation in which the elected Ombudswoman, Beatrice de Carrillo, is frustrated with her own government's failure to respond to her agency's information requests, which is required by law.³⁷ Also, de Carrillo has expressed frustration with the government's failure to respond to her recommendations regarding workers' rights.³⁸ The response of the Salvadorian Government is that the PDDH has undermined its own credibility by addressing previously undecided claims that date back many years.³⁹ As a result the government gives little respect to the office of de Carrillo whether the issue at hand is workers' human rights violations or some other human rights violation. During 2002 the situation became so dire that de Carrillo was receiving death threats due to her involvement in several human rights cases that did not involve workers' rights. After de Carrillo reported the death threats to the government, the Attorney General's Office neglected to take action upon these threats.⁴⁰ Because the government did not respond to de Carrillo's reports, it demonstrates the lack of support her office has from the government, regardless of whether the issue is workers' human rights or some other human rights violation.

¶16 The State Department reported various violations of workers' international human rights. The report cited media reports that stated an NGO named Atlacatl Foundation had registered six cases of workers being terminated after contracting the HIV virus.⁴¹ The

³³ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2002: EL SALVADOR (Mar. 31, 2003), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2002/18331.htm>

³⁴ *Id.*

³⁵ *Id.* at 11.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 12.

report also cited discrimination against women in the workplace in that priority was often given to men for job openings and for promotions.⁴² The report mentions that the Salvadorian Penal Code does establish a penalty for employers for discrimination in labor practices. But the State Department reported that in reality few, if any, complaints are filed for fear of reprisal from the employer.⁴³ The report also noted that in 2000 El Salvador ratified ILO Convention 100, one of the eight Fundamental Labour Conventions previously mentioned above, calling for equal pay for all. But a later study conducted by UNDP stated that men earned 14 percent more than women on average.⁴⁴ Also, indigenous people in El Salvador reportedly earned less in wages than other agricultural workers performing identical jobs.⁴⁵

¶17 Another major problem the report cited concerned the right of association by the workers of El Salvador.⁴⁶ There were countless complaints by workers, some of which were corroborated by the ILO Committee on Freedom of Association (CFA), that the government did not allow workers their right of association.⁴⁷ There were many situations of workers not being allowed to associate, workers being dismissed for attempting to partake in a legal strike, and many strikes were declared illegal despite the fact that they appeared to follow the domestic law.⁴⁸ Not only were strikes often forbidden, but strike leaders and their families have received threatening phone calls stating that they would be hurt if they did not change their strike-provoking activities.⁴⁹ In one instance, the report outlines a strike leader who was threatened in his own home by burglars late in the night who threatened to kill him during the 30 minutes in which they remained in his house.⁵⁰ It was reported that employers were engaging in the practice of dismissing employees who were attempting to form a labor union.⁵¹ The State Department also mentions reports of workers being subjected to illegal pressure advising them not to organize and instances where labor activists were placed on lists of persons who were not to be hired because of their previous involvement with labor unions.⁵²

¶18 The State Department additionally reported that the labor inspectors who were working for the government were prone to corruption and bribery.⁵³ In one case⁵⁴ the monetary settlement was given to a Labor Ministry official to release to the affected employees. This official would not release the payments until the employees signed a letter of resignation. If they did not want to sign the letter of resignation they were given no choice but to wage a lengthy court battle to obtain their payment, which is nearly impossible for many of the low-income workers to endure.⁵⁵ Presumably, the Labor

⁴² *Id.*

⁴³ *Id.* at 13.

⁴⁴ *Id.*

⁴⁵ *Id.* at 15.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 16.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 17.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Often labor disagreements or strikes end up in the courts and some sort of settlement is reached.

⁵⁵ U.S. DEP'T OF STATE, *supra* note 33.

Ministry official was being paid by the employer to tender resignations so that the employer would no longer have to deal with the employees who had organized as a union.

¶19 Another problem area the report addressed was the Export Processing Zones (EPZs) in which around 220 maquilas⁵⁶ are located. The State Department mentioned a report from the International Confederation of Trade Unions (ICFTU) that said some EPZ workers were paid inadequately, they worked through health and safety risks, they worked without being allowed to enact collective bargaining agreements, and women employees were victims of sexual harassment.⁵⁷ The National Labor Committee (NLC), a foreign NGO, reported in June of 2003 that although there are 247 maquilas and over 90,000 workers in the garment industry there is not one single union with a contract for workers' rights.⁵⁸ Additionally, the employees in several plants and factories made complaints of verbal abuse, sexual harassment, and in some situations incurred physical abuse by superiors.⁵⁹ The State Department report also cites situations in which employers were requiring pregnancy tests and those who were pregnant were summarily fired.⁶⁰

¶20 The report also addressed the glaring problem of child labor. The Salvadorian Constitution forbids child labor before the age of 14, and has restrictions on child labor between the ages of 14 and 17. Also, ILO Convention No. 138 and Convention No. 182 are fundamental conventions dealing with child labor that El Salvador is mandated to follow,⁶¹ yet the problem nonetheless exists.⁶² Although all violations of workers' international human rights are deplorable, some may argue that the worst form of workers' human rights violations is the use of child labor. It was reported that more than 75,000 children between the ages of 5 and 13 were working in 2001 and almost 147,000 children between the ages of 14 and 17 were working as well.⁶³ The most common forms of child labor are said to take place in the form of "commercial sexual exploitation, work in garbage dumps, fishing/shell-fish harvesting, sugarcane farming, and fireworks."⁶⁴

⁵⁶ Maquilas are in-bond assembly or processing plants.

⁵⁷ International Confederation of Free Trade Union, *Internationally Recognised Core Labour Standards in El Salvador*, <http://www.icftu.org/displaydocument.asp?Index=991217133&Language=EN> (last visited Nov. 15, 2005).

⁵⁸ National Labor Committee, *School Uniforms Made in El Salvador: The Case of Elder Manufacturing*, (June 2003), <http://www.nlcnet.org/campaigns/uniforms/elsalvador/report.shtml>.

⁵⁹ U.S. DEP'T OF STATE, *supra* note 33, at 18.

⁶⁰ *Id.* at 19.

⁶¹ Convention No. 138 Convention Concerning Minimum Age for Admission to Employment, General Conference of the International Labour Organization, 58th Sess., adopted June 26, 1973 (ratified by 141 countries), *available at* <http://www.ilo.org/public/english/standards/norm/whatare/fundam/childpri.htm> Convention No. 182 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, General Conference of the International Labour Organization, 87th Sess., adopted June 17, 1999 (ratified by 157 countries), *available at* <http://www.ilo.org/public/english/standards/norm/whatare/fundam/childpri.htm>

⁶² U.S. DEP'T OF STATE *supra* note 33, at 19. Children between the ages of 14 and 17 are allowed to receive special permission from the Labor Ministry to work, but only if the employment is "indispensable to the sustenance of the minor and his or her family."

⁶³ *Id.* The numbers listed above are important when considering the document provided by the Office of the U.S. Trade Representative to be discussed later.

⁶⁴ *Id.*

¶21 With regard to the conditions of work, the report states that the minimum wage with benefits that is provided does not provide enough income for the wage earner to maintain a decent standard of living for himself or herself and his or her family.⁶⁵ Many laborers were working longer hours than those allowed by law, with some of the workers paid for their overtime work and others not paid for their overtime work.⁶⁶ In the maquilas some workers reported unhealthy drinking water, bathrooms that were unsanitary, dust control problems, and plants with inadequate ventilation leading to dust problems and excessive heat problems.⁶⁷ Finally, in one specific case in July of 2002, hundreds of employees were evacuated from various different maquilas after showing signs of being subjected to airborne contamination by a toxic substance.⁶⁸ The plant where the substance was suspected of originating was closed to all people, including the Ministry of Labor and Environment inspection teams, for more than 48 hours.⁶⁹ A study later concluded it could not have come from the plant's production activities, but no explanation has yet been given for why the substance was in the maquila or where it came from.⁷⁰

¶22 As one can see, the State Department has compiled a comprehensive document that combines information from other reports and from NGOs that demonstrate widespread violations of workers' international human rights. Violation upon violation listed above is in direct conflict with the International Covenant on Economic, Social and Cultural Rights and several ILO treaties.⁷¹ Clearly the U.S. government, in the capacity of the State Department, is aware of and acknowledges the problems that labor workers in El Salvador face in their plight to achieve workers' human rights. Thus, it appears that the United States has an opportunity to address this problem that includes human rights violations and treaty violations in the approaching CAFTA agreement. Unfortunately for human rights advocates and the labor workers in El Salvador, the Office of the U.S. Trade Representative has a different viewpoint of the situation in El Salvador. Yet before turning to the U.S. government report issued out of the office of Robert Zoellick,⁷² one should examine a recent briefing report by the NGO Human Rights Watch that further exemplifies the problems in El Salvador.

⁶⁵ *Id.* The minimum daily wage is \$4.80 for commercial, industrial, construction, and service employees; \$2.47 for agricultural workers; and \$3.57 for seasonal agricultural workers.

⁶⁶ *Id.* at 20.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See International Covenant on Economic, Social and Cultural Rights, *supra* note 22 and *Declaration on Fundamental Principles and Rights at Work*, *supra* note 30.

⁷² U.S. Trade Representative.

VI. HUMAN RIGHTS WATCH RESEARCH ON WORKERS' HUMAN RIGHTS⁷³

¶23 Human Rights Watch (HRW) conducted a preliminary study on the current labor situation for workers in El Salvador and came to many of the same conclusions as the State Department. HRW found that many obstacles in the Salvadorian labor system prevent the country's workers from exercising their rights guaranteed by International Treaties.⁷⁴ The overall conclusion of the HRW report was that all of the obstacles, when taken together and viewed in a cumulative manner, present a situation where workers' human rights are systematically violated with very little hope for change.⁷⁵ The chance for redress on behalf of the workers is further driven into a state of uncertainty because of the lack of enforcement by the Ministry of Labor of the minimal labor protections that do exist.⁷⁶ As a result, workers in El Salvador will not be able to realize the proper internationally recognized human rights until a substantial change is made in the labor rights system, which could occur if the proper steps are taken when CAFTA is implemented.⁷⁷ While the majority of the information in this section comes from the preliminary report, the final report was recently released on December 4, 2003.⁷⁸ The final report is a more comprehensive showing of the problems outlined in the preliminary report, with the message being clear from the report's title: "Deliberate Indifference: El Salvador's Failure to Protect Workers' Rights."⁷⁹

¶24 HRW states that there are substantial loopholes in the labor laws that allow employers to quite easily avoid their obligations to workers.⁸⁰ Thus, although the ILO concluded that El Salvador had a quality set of labor laws in place, they merely serve as a neatly presented front to systematic violations of workers' human rights.⁸¹ Additionally, these loopholes that HRW reports give rise to a significant treaty violation problem on behalf of El Salvador. By not allowing workers the freedom of association or the right to create and become members of trade unions, El Salvador is not fulfilling its obligation to enact laws protecting these rights.⁸² In terms of El Salvador's ILO obligations, they are bound by Convention Number 87, The Freedom of Association and Protection of the Right to Organize and Convention Number 98, The Right to Organize and Collectively Bargain.⁸³ In addition to the ILO obligations, El Salvador has an obligation in the form

⁷³ Human Rights Watch, *El Salvador's Failure to Protect Workers' Human Rights: Implications for CAFTA: Preliminary Findings of Human Rights Watch Research* (May 2003), <http://hrw.org/backgrounder/americas/salvador050103-bck-htm>. The briefing presents preliminary findings from an eighteen-day fact finding mission to El Salvador by Human Rights Watch in February 2003. The HRW final report was released December 4, 2003, *see infra* notes 78 and 79.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ HUMAN RIGHTS WATCH, *DELIBERATE INDIFFERENCE: EL SALVADOR'S FAILURE TO PROTECT WORKERS' RIGHTS*, (Dec. 4, 2003), <http://hrw.org/reports/2003/elsalvador1203/>. This 111 page report is similar to the preliminary report but is more in-depth regarding certain occurrences and topics.

⁷⁹ Human Rights Watch, *El Salvador: Government Ignores Widespread Labor Abuse*, (Dec. 4, 2003), <http://www.hrw.org/press/2003/12/elsalvador120403.htm>

⁸⁰ *El Salvador's Failure to Protect Workers' Human Rights*, *supra* note 73, at 2.

⁸¹ *FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK: A LABOR STUDY*, *supra* note 32.

⁸² *El Salvador's Failure to Protect Workers' Human Rights*, *supra* note 73, at 2.

⁸³ Convention No. 87 Convention Concerning Freedom of Association and Protection of the Rights to Organise, General Conference of the International Labour Organization, 31st Sess., adopted July 9, 1948

of the international treaties El Salvador has ratified, the International Covenant on Civil Political Rights, the International Covenant on Economic, Social, and Cultural Rights discussed above, and the Protocol of San Salvador.⁸⁴ Unfortunately, as was mentioned previously, these practices place El Salvador in violation of the duty of ILO members to “respect and promote” the fundamental rights enumerated in the ILO Declaration on Fundamental Principles and Rights at work, including freedom of association.⁸⁵ The significant problems that HRW found included poor protections from anti-union suspensions and dismissals, obstacles to union registration, and suspensions to circumvent labor law protections.⁸⁶

¶25 HRW also outlined a comprehensive scenario in which the Ministry of Labor is failing to put into force the current and existing labor laws so as to protect the country’s workers.⁸⁷ The HRW problems that were cited included the failure of government monitored labor inspections to follow the correct procedures, the failure of the Ministry of Labor to allow workers to participate during the inspection visits, the failure to distribute copies of the results of the inspections to workers, and the failure to ensure that inspection orders were enforced and sanctions were imposed.⁸⁸ The briefing paper went on to discuss the Ministry of Labor’s failure to rule on issues within the jurisdiction of the labor inspectorate, the Ministry’s propensity to grant employer requests that are illegal, and the presence of significant obstacles to the registration of labor unions.⁸⁹ Adding to the state of uncertainty for workers’ rights is the fact that there is absolutely no protection or policy in the labor law of El Salvador to protect “whistle-blowers.”⁹⁰ Also, there is no protection for employees who choose to testify against their employers in a labor violations proceeding, which gives virtually no incentive for any reasonable employee to testify against his or her employer.⁹¹ As the HRW report mentions, there are many reforms that could and should take place within the Salvadorian labor situation.

¶26 Currently the situation is one that is often depicted when talking about international human rights issues: on paper the laws appear to be satisfactory and effective, but in practice the situation is far from the utopian picture the laws present. Fortunately for the workers of El Salvador, there is hope in the form of CAFTA. CAFTA has the potential to revamp the current labor system in El Salvador if the agreement contains the proper internationally recognized measures and also contains the necessary enforcement

(ratified by 144 countries), *available at*

<http://www.ilo.org/public/english/standards/norm/whatare/fundam/foa.htm>; Convention No. 98 Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, General Conference of the International Labour Organization, 32nd Sess., adopted July 1, 1949 (ratified by 154 countries), *available at*

<http://www.ilo.org/public/english/standards/norm/whatare/fundam/foa.htm>

⁸⁴ *El Salvador’s Failure to Protect Workers’ Human Rights*, *supra* note 73, at 2. Additionally, on Feb. 10, 1993 El Salvador ratified the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. This treaty is part of the OAS and is available at <http://www.oas.org/juridico/english/Treaties/a-52.html>.

⁸⁵ *ILO Declaration on Fundamental Principles and Rights at Work*, *supra* note 30.

⁸⁶ *El Salvador’s Failure to Protect Workers’ Human Rights*, *supra* note 73, at 2-4.

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* at 4-5.

⁸⁹ *Id.* at 5-7.

⁹⁰ *Id.* at 7.

⁹¹ *Id.*

mechanism.⁹² To gain a better understanding of the Bush Administration's intentions with regard to labor rights and their inclusion in CAFTA, one can first look to the El Salvador Action Plan that was created by the Trade Policy Department of the U.S.

VII. EL SALVADOR'S NATIONAL ACTION PLAN FOR TRADE CAPACITY BUILDING: MEETING THE CHALLENGE OF *GLOBALIZATION*⁹³

¶27 The National Action Plan for Trade Capacity Building (Action Plan) was designed to "define, prioritize, and articulate the country's trade-related capacity building needs."⁹⁴ The report is fairly comprehensive, but the important section of the report that will be addressed here is the section titled "Labor Issues."⁹⁵ The Labor Issues section begins by outlining the duties and obligations of the Ministry of Labor, which include such obligations as overseeing the implementation of International Conventions and monitoring labor policies.⁹⁶ The plan states that "El Salvador is an active participant in the international efforts to protect[sic], respect and promote labor rights in multilateral forum [sic] specialized in labor issues, such as the International Labor [sic] Organization."⁹⁷ The report further adds that during the current administration of President Flores there has been a concerted effort to update and increase the strength of the labor functions of the Salvadorian government.⁹⁸

¶28 The plan then turns its focus to the apparently large amount of support El Salvador has received from other nations to improve its labor situation through the Ministry of Labor.⁹⁹ The language used in the plan is extremely general and leaves out details on many of the issues such as what the specific improvements are. The plan does mention that the support has allowed the Ministry of Labor to "improve their planning, assess their needs, exchange information, and develop[sic] a more strategic and integrated approach to modernizing the labor ministries of the region."¹⁰⁰ As one can see, the language is general and does not explain the value the support has had for workers' international human rights. The Plan does not quantify the amount of support given and because the plan does not measure the effect it might be having, one is left with little guidance as to what concrete improvements have been made. One can look to USAID and see that in the fiscal year of 2002 \$100 million was given in support to El Salvador, but much of that aid was given for an Earthquake Recovery Program and no mention is made of workers' rights improvements.¹⁰¹ Similarly, the Inter-American Development

⁹² Human Rights Watch, US: Protect Labor Rights in CAFTA, (May 1, 2003), <http://www.hrw.org/press/2003/05/salvador050103.htm>

⁹³ U.S. TRADE POLICY DEPARTMENT AND EL SALVADOR MINISTRY OF ECONOMY, NATIONAL ACTION PLAN FOR TRADE CAPACITY BUILDING: MEETING THE CHALLENGE OF GLOBALIZATION (July 2003), available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/asset_upload_file586_3359.pdf?ht=naoinal%20action%20plan%20for%20trade%20capacity.

⁹⁴ *Id.* at 3.

⁹⁵ *Id.* at 12.

⁹⁶ *Id.* at 12.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ USAID/El Salvador, <http://www.usaid.gov/sv/> (last visited Nov. 15, 2005).

Bank (IADB) has given substantial support to El Salvador, but again there is no mention of funds for workers' human rights or labor improvements in the loan dispersal description.¹⁰² While the language in the Action Plan is terribly generic and can be classified as unhelpful, the glaring problem with the plan is that it fails to even mention the international workers' rights violations that exist in El Salvador. Basically, the specific offices of the two governments involved¹⁰³ in creating this plan for El Salvador have absolutely ignored the truth of what is occurring and opted to discuss what minor improvements may have occurred recently.

¶29 The report does recommend areas where improvement should be made¹⁰⁴ but in no way recognizes or acknowledges the workers' rights violations that are well documented by both NGOs and the U.S. State Department. In the area of industrial relations and fundamental rights in the workplace the plan does propose certain improvements such as increased education programs for employers and workers on trade union rights and collective bargaining.¹⁰⁵ The plan also proposes training programs for employers and employees on the proper procedures for collective bargaining.¹⁰⁶ The plan recommends the implementation of a mediation training program for Ministry of Labor officials and alternative dispute capabilities.¹⁰⁷

¶30 In the area of occupational safety and health the plan discusses the recent progress El Salvador has made.¹⁰⁸ The plan then theorizes that additional funding in this area would reduce accidents and dangerous exposures in the workplace environment.¹⁰⁹

¶31 The plan makes recommendations in the area of training and labor marketing information systems. It also touches on the very important issue of child labor. The plan notes that the administration of Presidential Flores has committed to an ILO program¹¹⁰ titled the "International Program on the Elimination of Child Labour" (IPEC) to eliminate child labor on a so-called "time-bound."¹¹¹ The plan goes on to note that El Salvador is quite proud of the steps they have taken to eliminate child labor. Thus far under the plan approximately 6,000 children have been removed from work zones that are classified as hazardous.¹¹² Also, 2,500 families have received support of some sort for income generating alternatives.¹¹³ Plans are currently in line to remove another 10,000 children

¹⁰² INTER-AMERICAN DEVELOPMENT BANK, INTER-AMERICAN DEVELOPMENT BANK ANNUAL REPORT 2002, at 18, *available at* <http://www.iadb.org/EXR/ar99/ar2002/eng3.pdf> (last visited Nov. 15, 2005).

¹⁰³ The U.S. Trade Policy Department and the Salvadorian Ministry of Economy are the two offices involved in creating the report.

¹⁰⁴ NATIONAL ACTION PLAN FOR TRADE CAPACITY BUILDING, *supra* note 93, at 13.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ IPEC's goal is to work progressively towards the elimination of child labor by increasing individual countries' abilities to address child labor problems. IPEC also strives to create a global movement to combat child labor. INTERNATIONAL LABOUR OFFICE INTERNATIONAL PROGRAMME ON THE ELIMINATION OF CHILD LABOUR, IPEC ACTION AGAINST CHILD LABOUR 2002-2003: PROGRESS AND FUTURE PRIORITIES (Jan. 2004), *available at* http://www.ilo.org/public/english/standards/ipec/publ/download/implementation_2003_en.pdf.

¹¹¹ NATIONAL ACTION PLAN FOR TRADE CAPACITY BUILDING, *supra* note 93, at 13.

¹¹² *Id.*

¹¹³ *Id.*

from the work environment and place them in educational systems.¹¹⁴ The plan calls on the United States to lend more support in the area of the elimination of child labor if it is to become a reality in El Salvador.¹¹⁵ Yet one must remember that these numbers represent only a very small minority of the actual number of child workers in El Salvador. Thus, these actions are commendable, but they place only a small dent in a massive problem because there are still over 200,000 child workers.

¶32 These proposed upgrades are commendable and should be implemented as the plan suggests. Specifically, the child labor steps taken are positive and it appears from the plan that the two parties have the right mentality. Yet if one recognizes these proposals for what they really appear to be, one can see they accomplish very little. This plan is written through the eyes of the Salvadorian government and refers to the government in the first person using such words as “we” and “our.” Although the language is affectionate towards workers’ rights and it appears to be an issue the government is concerned with, one can look back to the extremely contradictory reports from the State Department and Human Rights Watch. It is painfully obvious that the Salvadorian government has a tremendous amount to gain from CAFTA and a tremendous amount to lose if workers’ rights violations become an issue that holds up negotiations. Thus, this Action Plan is, for lack of a better term, written in as rosy a way as possible so as to appease a somewhat less informed audience who may be concerned about workers’ rights in El Salvador. Some may argue that this viewpoint is too cynical given the circumstances, but one cannot help but observe the glaring discrepancies in the workers’ human rights climate as seen through the eyes of the three institutions previously discussed. Given that the U.S. Trade Policy Department is unwilling to acknowledge the substantial workers’ human rights violations, where does that leave CAFTA?

VIII. THE POTENTIAL OF CAFTA

¶33 Following the eighth round of negotiations in Houston regarding CAFTA, the parties had diminished their disagreements on the topic of labor.¹¹⁶ Currently it still remains difficult to predict where the labor issue will go¹¹⁷ in terms of what labor issues will be included in the agreement and what requirements will be made of the Central American countries with regard to international workers’ human rights. Despite the uncertainty, there has been substantial discussion about the possible ill effects an FTA can have if it does not properly address labor. It has been argued that a treaty that fails to include satisfactory labor provisions will allow large commercial companies to search for the location where they can pay the lowest possible wage for labor intensive jobs.¹¹⁸ Another problem that faces El Salvador as CAFTA looms is that the country’s wealth is controlled by a small number of families who stand to benefit greatly from the agreement.¹¹⁹ Their

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Moreno, *supra* note 5.

¹¹⁷ The negotiations are taking place behind closed doors and are not open to the public.

¹¹⁸ Bradley Meacham, *Central American Pact Pushed*, SEATTLE TIMES, Oct. 22, 2003, at Business and Technology 1.

¹¹⁹ Bill Hensel Jr., Jenalia Moreno, and Peggy O’Hare, *Protests Over Free Trade Treaty Focus on Lost Jobs*, HOUSTON CHRONICLE, Oct. 20, 2003, at A6.

support may increase the agreement's level of acceptance in El Salvador while laborers may be negatively affected by the provisions of CAFTA.¹²⁰

¶34 It has been established that there are substantial workers' human rights violations in El Salvador and that CAFTA has the potential to either remedy the situation, allow it to continue, or in the worst case scenario, allow the problems to deteriorate. When searching for an indication of what the administration may include in terms of workers' human rights, one can look to the statutes to see what language must be included in the FTA.

IX. BIPARTISAN TRADE PROMOTION ACT¹²¹

¶35 The Bipartisan Trade Promotion Act grants the president the authority to negotiate and enter into trade agreements with foreign nations.¹²² These trade agreements cannot be amended by Congress.¹²³ Congress' only power with regard to a trade agreement negotiated by the Executive Branch is to either reject or approve the FTA.¹²⁴ The Bipartisan Trade Promotion Authority (TPA) has certain objectives that are instructive with regard to international human rights. Section 3802(a) outlines the objectives of the United States when negotiating free trade agreements. Subsection six states one of the objectives is "to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO (as defined in section 3813(6) of this title)¹²⁵ and an understanding of the relationship between trade and worker rights."¹²⁶ Subsection seven states another objective is "to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade."¹²⁷ Subsection nine then adds an objective "to promote universal ratification and full compliance with ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor [sic]."¹²⁸ Later subsections of section 3802 describe in depth the principal negotiating objectives of the United States with respect to labor and the environment.¹²⁹ Subsection (b)(17) further describes the

¹²⁰ *Id.*

¹²¹ This Act was signed into law on August 6, 2002 by President Bush.

¹²² Human Rights Watch, Labor Rights and Trade: Guidance for the United States in Trade Accord Negotiations, <http://www.hrw.org/press/2002/10/laborrights-bck.htm> (last visited Nov. 15, 2005).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Bipartisan Trade Promotion Authority, 19 U.S.C. § 3802(a)(6) (2002). The Bipartisan Trade Promotion Authority defines "Core Labor Standards" as "(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age of employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." 19 U.S.C. § 3813(6) (2002). One should note that these five labor standards, although they include aspects of the eight ILO Fundamental Conventions on Labour, are not the same standards as the ILO Conventions despite the fact that ILO membership requires the United States to abide by the eight fundamental conventions.

¹²⁶ Bipartisan Trade Promotion Authority, 19 U.S.C. § 3802(a)(6) (2002).

¹²⁷ Bipartisan Trade Promotion Authority, 19 U.S.C. § 3802(a)(7) (2002).

¹²⁸ Bipartisan Trade Promotion Authority, 19 U.S.C. § 3802(a)(9) (2002). Note that ILO Convention No. 182 is one of the eight Fundamental Conventions on Labour.

¹²⁹ See 19 U.S.C. § 3802(b)(11), *supra* note 126.

government's position on the worst forms of child labor.¹³⁰ Section 3813 of the TPA defines the Core Labor Standards.¹³¹ Clearly Congress was concerned with international human rights and workers' rights when it granted the president the authority to negotiate FTAs. The TPA is important in that it outlines specific objectives for labor rights. Yet critics argue that the TPA has many problems on its face.¹³² For example, the TPA does not require that parties "strive to ensure" that domestic labor laws comply with the international labor standards.¹³³ Also, the TPA does not require parties to "strive to improve" those domestic laws.¹³⁴ Both of these previous goals are stated in the recently completed Jordan-FTA.¹³⁵ Rather, the Act simply and vaguely states that parties should "promote respect for worker rights."¹³⁶ Thus, if the TPA is the standard that is followed, there is still leeway for El Salvador to neglect to enforce their current labor standards as the government chooses to do currently.

¶36 The TPA provides a quality starting point for workers' international human rights. Yet for CAFTA the provisions need to be stronger in order to change the current situation in El Salvador in which the government fails to enforce its current laws. While the TPA provides objectives that must be met, it does nothing to address the violation of international treaties and international law with regard to human rights violations.

X. EL SALVADOR AND INTERNATIONAL LAW

¶37 Based on the findings of the State Department, Human Rights Watch and other NGO groups that have been discussed, El Salvador is in violation of several of the treaties to which it is a party. Yet the enforcement mechanisms of these treaties do not allow for quick and rapid remedy, or often any remedy at all, for the victims of the treaty violations.¹³⁷

¶38 One can also argue that El Salvador is in violation of customary international law for laborers' human rights. But, this then gets into the issue of whether labor standards are customary international law. Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation."¹³⁸ One

¹³⁰ See 19 U.S.C. § 3802(b)(17), *supra* note 126.

¹³¹ 19 U.S.C. § 3813(6), *supra* note 126.

¹³² Labor Rights and Trade, *supra* note 122, at 6.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ The ILO has a system for enforcement that includes a regular system of supervision, special systems for supervision, and ad hoc mechanisms. The ILO states that thousands of cases of improvement have been documented involving issues ranging from basic civil rights principles to conditions of work, but these mechanisms have great difficulty addressing each violation. International Labour Organization, *How Are International Labour Standards Enforced?*, <http://www.ilo.org/public/english/standards/norm/enforced/index.htm> (last visited Nov. 15, 2005). With the "Protocol of San Salvador," *see infra* note 148, come two enforcement mechanisms through the OAS, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. While both enforcement mechanisms have potential for success in the human rights field, they currently are not capable of addressing or eliminating each and every human rights violation that occurs within the OAS states. Inter-American Commission on Human Rights, *What is the IACHR?*, <http://www.cidh.oas.org/what.htm> (last visited Nov. 15, 2005).

¹³⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987). Comment (b) discusses how the "practice of states" can be analyzed while comment (c) states that there

can argue that the ILO Fundamental Principles and Rights at Work have become international law. The Declaration on the ILO Fundamental Principles in Geneva in June of 1998 is intended to create universal rights that apply to citizens and parties in all states, thus creating international law.¹³⁹ As of now, all member states of the ILO are to abide by the eight fundamental conventions, even if the state has not ratified all eight of the conventions.¹⁴⁰ It should be noted that while the ILO Declaration mandates observance by all state parties, the U.S. has only ratified Numbers 105 and 182 while El Salvador has ratified numbers 29, 87, 98, 100, 105, and 111.¹⁴¹ Although the ILO has declared the eight fundamental conventions binding, it is not clear that all states abide by these conventions. As one can see with El Salvador, they do not abide strictly by all of the eight conventions. Thus, prong one of the customary international requirement of a general practice of state observance can be argued either way. Furthermore, the second prong of *Opinio Juris* can also be debated as there are many ILO states that have yet to ratify the eight conventions. The question arises whether the ILO can declare customary international law even when states have not ratified all of the conventions. But one can argue that these state parties are submitting to customary law because of their membership status with the ILO. That being said, there are probably few states that promote the practice of violating workers' human rights, so it is possible it could be considered customary international law. At this point in history it might be safe to say that it is not entirely clear whether or not workers' international human rights are customary international law.

¶39

Another issue to examine with regard to International Law is the precedent set out by the United States entering into an FTA with El Salvador that is in violation of several treaties. Is it a factor that El Salvador's laws appear to comply with the international treaties to which they have become state parties? When looking at the ILO Constitution with regard to Conventions, there is no reference to state obligations with regard to other member states.¹⁴² The United States law appears to also be in agreement with the treaties El Salvador is a party to, so it may not be an issue with regard to international law.¹⁴³

must be *Opinio Juris*. Comment (c) states that "for a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*)"

¹³⁹ International Labour Organization, ILO Declaration on Fundamental Principles and Rights at Work: About the Declaration, http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN (last visited Nov. 15, 2005).

¹⁴⁰ *Id.*

¹⁴¹ International Labour Organization, Ratifications of the ILO Fundamental Conventions (Nov. 21, 2003), <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?lang=EN>.

¹⁴² INTERNATIONAL LABOUR ORGANIZATION, CONSTITUTION, Ch. II, Art. 19, § 5 (1919), available at <http://www.ilo.org/public/english/about/iloconst.htm#a19p5>. This Constitution only addresses a member state's obligation to attempt to ratify a convention and does not stipulate how a member state should treat other states in violation of a given convention.

¹⁴³ Both states are ILO member states and are members of various ILO treaties and conventions, including several of the eight fundamental conventions. Although the U.S. is not a party to the International Covenant on Economic, Social and Cultural Rights, if it were it seems federal law clearly complies with the terms of the treaty. If the scenario were such that U.S. federal law was in conflict with a treaty to which the U.S. was a state party, the "Last in Time Rule" would apply. Yet courts also use three specific rules to avoid conflicts between treaties and federal laws: (1) The Rule of the Charming Betsy Case, (2) the Clear Statement Rule *Cook v. U.S.*, and (3) The *Franklin Mint Corp.* Rule.

¶40 The General Comments of the United Nations Economic and Social Council (ECOSOC) state that the Covenant on Economic, Social, and Cultural Rights gives the state parties flexibility to give effect to the rights recognized in the Covenant.¹⁴⁴ Yet the General Comment adds, “this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant.”¹⁴⁵ Given the evidence presented above regarding the Salvadorian government’s unwillingness to protect workers’ human rights, one can effectively argue that not only has the Salvadorian government violated the Covenant, but the government has also proceeded to act contrary to the stipulations set out in the ECOSOC General Comments on the Covenant.

¶41 It is beneficial to note one case in particular that dealt with the Covenant on Economic, Social and Cultural Rights, *The Government of the Republic of South Africa et al. v. Grootboom*.¹⁴⁶ In this particular case citizens of South Africa were suing the government using the Covenant to support their claim because they were living in appalling conditions and were then evicted and left homeless. The question that arises in a case of this nature is whether there are absolute protections in the Covenant that would allow a citizen to call on a court to protect their rights. In this case the court used the Covenant as well as the South African Constitution to support their position that the state had a duty to provide certain standards for the plaintiffs.¹⁴⁷ Given this precedent of using the Covenant as support for a domestic legal opinion, although only binding in South Africa, one could argue that El Salvador has an obligation to abide by the terms of the Covenant despite the fact that they claim to be working toward compliance. Whether a ruling of this nature would come from a Salvadorian Court is up for debate. As was previously mentioned, there seems to be a certain level of corruption within the government. Yet it is possible that such treaties as the Protocol of San Salvador will have an effect on the courts in El Salvador and the court(s) would be inclined to use such a treaty in the same fashion the Constitutional Court of South Africa did, but to protect workers’ human rights.¹⁴⁸ Rather than predicting what a court in El Salvador will do when faced with this issue, the solution can be obtained if the United States seizes the opportunity presented by CAFTA to improve the workers’ rights in El Salvador.

¹⁴⁴ U.N. Committee on Economic, Social, and Cultural Rights, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 54, U.N. Doc. HRI/GEN/1/Rev.6, (May 12, 2003), available at <http://www.unhcr.ch/tbs/doc.nsf>.

¹⁴⁵ *Id.*

¹⁴⁶ *The Government of the Republic of South Africa v. Grootboom*, Case CCT 11/00, (Oct. 4, 2000) (S. Afr.), available at <http://196.41.167.18/uhtbin/hyperion-image/J-CCT11-00>.

¹⁴⁷ *Id.* at 24-26, para. 29-31. When discussing general comment ten of the Covenant the court stated, “It is clear from this extract that the committee considers that every state party is bound to fulfil [sic] a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights. . .”

¹⁴⁸ The Protocol of San Salvador is a treaty among the state parties of the Organization of American States. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”, Nov. 17, 1988, available at <http://www.oas.org/juridico/english/Treaties/a-52.html>. See also *supra* note 84.

XI. CONCLUSION

¶42 With CAFTA the United States has a phenomenal opportunity to remedy the situation for workers in El Salvador if the negotiators choose to make workers' international human rights a priority. The agreement must contain language that requires El Salvador to be diligent and effective in enforcing the country's labor laws. Preferably the language will require El Salvador to abide by the international treaties that are relevant, including the eight fundamental conventions, and will include an effective enforcement mechanism. The FTA must hold El Salvador accountable for workers' human rights violations if they continue to occur as is the practice today. The FTA must also allow for effective enforcement mechanisms.

¶43 One effective measure for CAFTA would be to include language similar to that found in the U.S.-Cambodia agreement. The effect of a measure that serves as a "carrot" for the five Central American countries would be that each country will strive to have higher labor standards in order to obtain access to more of the U.S. marketplace.¹⁴⁹ By offering more economic prosperity to El Salvador, theoretically there will be an incentive to increase the Salvadorian government's respect for labor rights. The U.S.-Cambodia agreement was extended beyond its initial three years because the U.S. government believes there was progress in the area of substantially complying with international labor standards and rights based on the reward system of increased export quotas that is in place.¹⁵⁰ It should be noted that the extension of the agreement and the positive reporting is coming from the Office of the U.S. Trade Representative, which was criticized in an earlier section of this analysis for not being entirely forthcoming. Yet another portion of the U.S. Trade Representative release states that the ILO has two projects underway helping Cambodia continue to implement its internationally compliant labor laws.¹⁵¹ One could feasibly argue that with the "carrot" system in place and the help of the ILO, workers' rights can benefit from FTAs.

¶44 In order to prevent a reversion to diminished labor standards or a continuation of the current problems in El Salvador, CAFTA must also include provisions that domestic laws meet international standards and that they must not be altered to a lower standard to attract additional trade or investment.¹⁵² Not only must these provisions call for international standards with regard to labor standards, but there should be sufficient language to require El Salvador to put in place the proper enforcement mechanisms to curtail the current practice of workers' rights violations. The entire labor establishment may be in need of revamping, but if that is what is needed to ensure workers' human rights, it must be included in CAFTA.

¶45 It has been argued that if the United States chooses to merely duplicate the language from the Chile and Singapore FTAs, those provisions will not be sufficient to solve the problem in El Salvador.¹⁵³ Another solution that has been recommended is a

¹⁴⁹ Pier, *supra* note 21.

¹⁵⁰ U.S. Trade Representative, U.S.-Cambodian Textile Agreement Links Increasing Trade with Improving Workers' Rights (Jan. 7, 2002), http://www.ustr.gov/Document_Library/Press_Releases/2002/January/US-Cambodian_Textile_Agreement_Links_Increasing_Trade_with_Improving_Workers'_Rights.html.

¹⁵¹ *Id.*

¹⁵² Pier, *supra* note 21.

¹⁵³ U.S.: Protect Labor Rights in CAFTA, *supra* note 92.

phase-in type system for tariff benefits where the benefits of tariff reduction cannot be realized until a country such as El Salvador demonstrates progress toward respecting workers' human rights.¹⁵⁴

¶46 Currently there is a movement within Congress to include sufficient labor rights provisions in CAFTA to protect human rights. In a letter earlier this year to President Bush a group of 23 Representatives in Congress called for CAFTA to “bolster and not diminish the U.S. commitment to strengthening enforcement of internationally-recognized core labor rights”¹⁵⁵ The letter specifically discusses the U.S.-Cambodia textile agreement and the success it has had thus far.¹⁵⁶ The Representatives recommended that CAFTA include similar provisions that allow for benefits of the FTA to be either accelerated or delayed based on the implementation and enforcement of labor laws and what level of success is being achieved when it comes to workers' internationally recognized human rights. Also, the letter specifically states that “asking these countries to enforce weak [labor] laws simply is not enough.”¹⁵⁷ The question that remains to be answered is whether the negotiators working for the Bush administration will heed the Representatives' advice or whether they will allow an agreement to be implemented that does not properly address workers' rights.

¶47 Additional letters were sent to U.S. Trade Representative Robert Zoellick.¹⁵⁸ One letter from House Minority Leader Nancy Pelosi said that CAFTA must address “the serious problem of the region's lower labor standards and enforcement capacity.”¹⁵⁹ A separate letter was sent by eight Senators including Max Baucus to Zoellick that called for “labor chapters that ‘suit realities in Central America.’”¹⁶⁰ This letter appears to acknowledge and bring attention to the realities the State Department documented and expose the Action Plan for its nonchalant disregard for the realities of the situation in El Salvador. This letter also alluded to the fact that CAFTA will set the stage for many FTAs to come before Congress in the coming years and it should properly address important issues such as labor rights.¹⁶¹

¶48 If the United States does not seize this opportunity to create, protect, and enforce workers' human rights in El Salvador, the end of the problem will not be in sight. This agreement has the potential to be very beneficial for workers in El Salvador. Furthermore, with a Free Trade Agreement of the Americas¹⁶² looming in the not too distant future, the U.S. has the opportunity to lay the groundwork for drastic human rights improvements across the Americas if CAFTA takes a strong stance on workers' human

¹⁵⁴ *Id.*

¹⁵⁵ Letter to President Bush from 23 members of Congress (May 13, 2003), *available at* http://www.wola.org/economic/cafta_dearcol_may13_03.htm. The letter was sent by Representatives George Miller, Evan, McGovern, DeFazio, Kaptur, Delahunt, Sanders, Hinchey, Baldwin, Olver, Solis, Filner, Rush, Slaughter, Michaud, Stark, Grijalva, Waxman, R. Brady, Schakowsky, Kucinich, Doggett and Woolsey.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Jeffrey Sparshott, *Americas Trade Accord Moves Ahead; Key Issues Still Unresolved*, THE WASHINGTON TIMES, Oct. 25, 2003 at C10.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² The goal of this FTA is to include the entire Western Hemisphere and it is targeted for completion in 2005.

rights. If the United States chooses to include provisions without teeth in CAFTA, they will be effectively acknowledging and allowing severe workers' international human rights to be violated. With the knowledge the State Department has of the violations, the administration cannot argue that the situation is any different than the reality that exists in El Salvador for workers. Unfortunately, the Action Plan for El Salvador attempts to do just that: cover up an otherwise problematic labor situation in El Salvador. With the economy becoming more and more global as each day passes, the United States must use its economic power and leverage to increase workers' human rights. Given the massive role that the United States plays in the global economy, recognizing and striving to improve workers' international human rights should be one of the goals of the U.S. government and the Office of the U.S. Trade Representative when creating FTAs.

¶49 As recently as October 25, 2003 it has been reported that the parties involved in the CAFTA negotiations have made progress in their talks regarding labor issues.¹⁶³ Although the information as to the exact provisions of the agreement was not made available, the chief negotiator for the United States, Regina Vargo, stated that the FTA would call for countries to "effectively enforce their own labor laws."¹⁶⁴ This language may seem sufficient on its face, but the inclusion of reference to international treaties is also important. Additionally, there must be an enforcement mechanism in place to ensure that El Salvador is applying and abiding by its own domestic laws. As is current practice, although the Salvadorian laws may appear sufficient, they simply are not enforced, and the resulting harm effects the workers the laws are designed to protect.

¶50 Again, the details of the provisions are not public, but the initial indication is not positive. If CAFTA only requires El Salvador to enforce its own labor laws, what will prevent El Salvador from continuing its current practices? How will the labor climate change for the better? As reported by the State Department and Human Rights Watch, El Salvador currently says it enforces its domestic labor laws, but in reality this is not occurring. As of now, it seems the U.S. is going to acquiesce to this practice by the Salvadorian government of not respecting workers' international human rights. Fortunately there is one more negotiating session currently underway which could allow for changes in the labor provisions in order to improve the requirements of the governments of the Central American countries including El Salvador.

¶51 CAFTA, if all goes as planned, will go before Congress by next summer, which will put it in the middle of the election season.¹⁶⁵ This will politicize the issue dramatically as the presidential election approaches. Representative Kevin Brady of Texas recently stated that it will be a very close vote as to whether Congress passes the FTA.¹⁶⁶ Thus, it is possible that the agreement will be voted down because there are not sufficient provisions and measures to ensure proper international labor human rights are respected and enforced. As of now, one can only wait to see what the provisions will be and what effect they will have on the workers' international human rights situation in El Salvador.

¹⁶³ Bill Hensel Jr. and Jenalia Moreno, *Central American Free Trade Agreement / Progress Kindles Optimism*, HOUSTON CHRONICLE, Oct. 25, 2003 at Business 1.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

XII. CAFTA UPDATE: STATUS AS OF MARCH 1, 2004

¶52 Given that the current status with CAFTA remains a fluid situation, there are certain developments that should be addressed. In December of 2003 CAFTA was concluded and the agreement was then made available to the public.¹⁶⁷ In late January the United States and Costa Rica reached an agreement regarding CAFTA and Costa Rica became the fifth and final Central American country to join CAFTA.¹⁶⁸ Unfortunately, the language of the agreement lacks the necessary force required to address the problem of workers' human rights in El Salvador. The agreement in Chapter Sixteen on Labor states, "The parties affirm their full respect for their Constitutions. Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws, each Party will *strive to ensure* that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in Article 16.8 and shall strive to improve those standards in that light." (Emphasis added.)¹⁶⁹ The agreement also states, "The Parties reaffirm their obligations as members of the International Labor [sic] Organization (ILO) and their commitments under the ILO *Declaration on Fundamental Principles and Rights at Work and Its Follow-Up (1998)*."¹⁷⁰ While the agreement's language may appear sufficient, it is readily apparent that El Salvador does not correctly enforce the nation's labor laws and the direct result is the violation of workers' human rights. The United States has missed an opportunity to create change in the area of labor rights on an international scale.

¶53 Fortunately, the process has not yet concluded. President Bush is expected to submit CAFTA to Congress sometime this summer and it must pass through Congress on an up or down vote; there will be no amendments.¹⁷¹ It has been suggested that the agreement will not pass in the House of Representatives this year because of opposition from Democrats and a lack of support from Republicans.¹⁷² Opposition is occurring for several different reasons, including the lack of strong language regarding labor laws. Michigan Representative Sander Levin, the Senior Democrat on the House of Representatives' Ways and Means Committee, has expressed great concern about the labor stipulations and has stated that the treaty will be "politically unsaleable to workers in the United States who have to compete with suppressed workers in other countries."¹⁷³ Levin has threatened to throw out CAFTA unless changes are made and "meaningful labour agreements" are placed in the agreement, by which he apparently means penalties and possible fines for violating the agreed upon labor standards.¹⁷⁴ Representative Levin has also stated, "CAFTA will not pass in the United States Congress in 2004 if core labor

¹⁶⁷ Office of the U.S. Trade Representative, *CAFTA-DR Final Text*, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

¹⁶⁸ *Id.*

¹⁶⁹ *Central American Free Trade Agreement*, Draft. Chapter Sixteen, Article 16.1(2), January 28, 2004, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file320_3936.pdf.

¹⁷⁰ *Id.* at Article 16.1(1).

¹⁷¹ Keith Koffler and Martin Vaughan, *GOP Sources Say CAFTA Unlikely to Pass in This Session*, CONGRESS DAILY, Feb. 19, 2004, 2004 WL 61704047.

¹⁷² *Id.*

¹⁷³ *Capitalism in the Raw—Free Trade in Central America*, THE ECONOMIST, Jan. 24, 2004, 2004 WL 62016635.

¹⁷⁴ *Id.*

rights are not included in the trade agreement.”¹⁷⁵ Additionally, the loss of jobs to foreign countries has become a heated political question this election year, and further “outsourcing” will definitely become an issue when CAFTA is put before Congress for a vote. It has been reported that Republican aides to Congressional members at the staff level have indicated that the White House has been notified that CAFTA is unlikely to pass this year.¹⁷⁶ Given all the apparent opposition, from a labor rights standpoint and because of other issues previously discussed, it appears that the United States will have another opportunity to adequately address the workers’ human rights issue in El Salvador. Because this is an election year and job loss and unemployment are likely to be key issues in the election, one can only hope that the attention and public pressure is enough to cause the U.S. government to properly address workers’ international human rights in El Salvador before a final version of CAFTA is put into place.

¹⁷⁵ Emad Mekay, *Trade: Unions and Rights Groups Assail U.S.—Central American Pact*, INTER PRESS SERVICE, Dec. 11, 2003, 2003 WL 66986759.

¹⁷⁶ Koffler, *supra* note 171.