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TOPIC 1
TRADE LIBERALIZATION & LABOUR LAW

US REPORT [1]

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There has been relatively little debate in the United States on the reformulation of labor law, even in light of the obvious effects of globalization on American business and industry. Union decline, job losses, and pressure on wages and benefits have all been linked to global competitive pressures. Unlike labor in European nations, however, United State's unions do not have regular and public contact, debate or involvement with the state. A number of scholars have written about the new employment era, calling attention to the failures of the current labor law system and urging change and reform. For the moment, the debate remains primarily in academic circles, especially since, as many have noted.[2] As Cynthia Estlund has written, "for at least another election cycle, the prospect of federal labor law reform of the sort long sought by organized labor and its allies is negligible."[3] Labor unions expect nothing from a Republican

[1] I am indebted to Kristen Houseknecht and Allison Milne, both JD 2006, who provided excellent research for this report.

[2] At a 2005 Association of American Law Schools Section on Labor Relations and Employment Law Program, Ellen Dannin addressed the social and legal transformations necessary to the National Labor Relations Act. In so doing, she began with the comment about the anti-union sentiment of the current Congress: "Amending the statute is not possible. If we take a new law to Congress now, we know just how sympathetic an audience we have there. . . . So seeking to amend the statute does not seem to be a good strategy for the foreseeable future." Proceedings of the 2005 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law, "At Age Seventy, Should the National Labor Relations Act be Retired". 9 EMPL. RTS. & EMPLOY. POL'Y J. 121, 125-26 (2005).

[3] Cynthia Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation, 105 COLUM. L. REV. 319, 319 (2005).

Congress and Administration, and little has been proposed. With labor weak and administrative agencies and governmental departments in conservative hands, even conservatives seem to have had little interest in changing labor law. Even with Democractic majorities in the past, Congress has been generally unable to amend the basic collective labor act, the National Labor Relations Act [NLRA], except in minor ways. As Eric Tucker notes, " The most notable characteristic of American private collective bargaining legislation is that it has not changed in any major respect since at least 1959 and that its basic text dates from 1935 and 1947. Legislative inaction is not the result of a lack of effort, largely on the part of unions, to amend the law. Rather, it is primarily caused by organized employers mobilizing enough support in Congress to block any amendment proposed by labor." [4]

Katherine Stone's recent book deals with changes in work place organization, but, unlike other writings, does not stress globalization issues. In FROM WIDGETS TO DIGITS, Stone describes the "new deal at work" in which the long-standing assumption of long-term attachment between an employee and a single firm has broken down. No longer is employment centered on a single, primary employer. Instead, employees now expect to change job frequently. No longer does an employee derive identity from a formal employment relationship with a single firm; rather, employment identity comes from attachment to an occupation, a skills cluster, or an industry. At the same time, firms now expect a regular amount of churning in their workforces. They encourage employees to look upon their jobs differently, to manage their own careers, and not to expect career-long job security.[5]

Stone describes the current American workforce as being situated between the industrial and digital production eras, with some sectors lingering in the industrial era and others, such as Microsoft and Hewlett Packard, at the cutting edge of the technological revolution, transforming the way all aspects of labor and production are organized.[6] And she notes that the "work arrangements characteristic of the new era place stress on the exiting labor law and employment institutions that were designed for an earlier age."[7] The terms of this new digital production era are:

> the promise of employability security rather than job security; the promise of training rather than lifetime tenure; the promise of opportunities to form networks rather than the promise of promotions; peer group decision making rather than hierarchical supervisor and evaluation; broadly defined projects rather than narrowly defined jobs; and opportunities to exercise bounded discretion rather than top-down, command-and-control authority relations.[8]

The shift from the industrial to the digital era brings with it new expectations and costs. Stone asserts that one cost is job instability – "[l]ong-term job security is a feature of an earlier era, yet without it, many face the likelihood of frequent involuntary job loss throughout their working lives."[9] In commenting directly on global economic pressures, Stone asserts that "a better explanation for the change in the employment relationship and the recasualization of work is that work practices are being adjusted to production requirements. As firms find themselves in a more competitive environment through increased trade and global competition, they have to pay more attention to short-term cots reduction. In addition, the market for corporate control

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[4] Eric Tucker, " Great Expectations" Defeated?: The Trajectory of Collective Bargaining Regimes in Canada and the United States Post-NAFTA," 26 Comp. Labor L. & Pol'y J 97, 137 [2004].

[5] Katherine V. W. Stone, From Widgets to Digits: Employment Regulation for the Changing Workplace 3 (2004).

[6] Stone, supra note 4 at p.6. The first phase was artisanal production, followed by industrial production.

[7] Ibid

[8] Id. at 8.

[9] Id. at 6.

forces firm managers to be responsive to short-term changes in revenues and demand. Part of this responsiveness involves just-in-time production, just-in-time product design, and just-in-time workers.[10]

Stone believes that workers are less likely to have long-term relationships with a single employer, thereby making it easier for employees to lose eligibility for benefits.[11] "In the United States, retirement security, health insurance, and many other benefits assume a long-term employment relationship with a single employer."[12] The status and availability of social security, health insurance, accident and disability insurance, and unemployment insurance all dangle in uncertainty due to the changing employer-employee relationship.

Cynthia Estlund has focused upon the importance of the workplace, for instance, as a location for interaction among members of different groups. She argues that litigation has had a significant impact "on how firms deal with discipline, discharge, and other disputes with employees,"[13] and she asserts that that "[l]itigation by private parties has proven to be a potent stimulus to workplace reform. Estlund believes "[l]itigation has effectively become the primary mode of workplace regulation in some areas, especially under the civil rights laws."[14] She views litigation as essential – "the gigantic sex discrimination class action . . . that is pending against Wal-Mart illustrates this point."[15]

One of the characteristics of present globalization trends is the increase in free trade agreements, and some scholarship in US journals deals with the effect of trade arrangements. In her discussion of U.S. free trade agreements, for instance, Marisa Anne Pagnattaro argues for the promotion of international enforceable labor rights by way of their inclusion and endorsement in the body of these trade agreements.[16] Pagnattaro seeks to illustrate that the promotion of fundamental labor rights allows for fair competition for American workers and supports the right of international workers to enjoy the most basic threshold of workplace standards. U.S. workers and companies should not be pitted against foreign competitors who take advantage of their nation's lack of or failure to enforce labor and employment laws – exploiting workers' lack of bargaining power is not legitimate competition.[17]

Like others, Pagnattaro recommends that provisions in U.S. free trade agreements should track language in International Labor Organization conventions, a development that would use the influence of the U.S. to encourage international recognized labor law standards.[18]

The AFL-CIO's Executive Council issues periodic statements on the situation of American labor. In 2003 it issued the "Crisis in Manufacturing" which called for labor law reform in a number of key areas:

- Stronger labor laws to prevent employer interference and suppression of workers' rights to organize and bargain collectively;

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[10] Id. at 86.
[11] Id. at 6.
[12] Id. at 125
[13] Cynthia Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation, 105 COLUM. L. REV. 319, 335 (2005).
[14] Id. at 377.
[15] Id. at 400.
[16] Marisa Anne Pagnattaro, The "Helping Hand" in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements, 16 FLA. J. INT'L L. 845 (2004).
[17] Id. at 847.
[18] Id. 892-93.

- A quicker and fairer process for determining union representation including card check recognition and employer neutrality;
- Opposition to proposals that weaken workers protections, such as "comp time" proposals that undermine the 40-hour work week, or that prohibit workers from organizing through voluntary card check recognition; and
- Guarantees of meaningful collective bargaining rights and legal protections extended to all workers, regardless of their employment classification.[19]

The AFL-CIO has also advocated international labor law reform such as an international minimum wage and global working condition standards in an effort to create a "foundation on which nations can compete fairly and where standards of living can increase for the benefit of all."[20] The AFL-CIO push for an international minimum wage is thereby in line with its purpose of keeping jobs in the United States. "The corporate drive to take advantage of workers with few rights and limited opportunities not only harms American workers, it drags workers everwhere into a race to the bottom."[21] To combat the outsourcing of American employees, the AFL-CIO suggests a variety of new approaches such as creating tax incentives to keep and create jobs in the U.S. and reforming the guest worker visa programs in order to prevent the exploitation of low wage immigrants in the U.S.[22]

Recently, the Central American Free Trade Accord {CAFTA] narrowly passed despite a spirited labor offensive. Like NAFTA, the Accord recognizes labor rights but does not seek to effectively protect them. With organized labor weak, even conservatives have had little interest in changing labor law.

II. BUSINESS AND LABOR LAW

Question 5

There have not been any significant modifications in federal labor law. A small number of bills have proposed pro-union amendments to the National Labor Relations Act, such as a bill, supported by a significant number of Democrats to aid unions in organizing and strengthen enforcement of the National Labor Relations Act, [23]but no action is likely and no hearings or reports are recorded which address any contemplated changes.

Congress did amend the Overseas Private Investment Corporation Act in 2003.[24] The primary purpose was to reauthorize OPIC in its current role as an insurer for U.S. companies who choose to invest overseas. Some amendments were added to o encourage OPIC to help U.S. companies invest in more minority owned businesses.

Although there has been no significant change in domestic labor and employment law, the administration has revised some labor-related regulations. Arguably, as in the case of new

[19] AFL-CIO, THE CRISIS IN MANUFACTURING ¶¶ 16-20, available at http://www.aflcio.org/aboutus/thisistheaflcio/ecouncil/ec02272003d.cfm? (last visited Sept. 23, 2005).

[20] AFL-CIO, CALL FOR NEGOTIATIONS TOWARD AN INTERNATIONAL MINIMUM WAGE ¶ 4, available at http://www.aflcio.org/aboutus/thisistheaflcio/ecouncil/ec03112004g.cfm? (March 11, 2004).

[21] AFL-CIO, OUTSOURCING AMERICA ¶ 8, available at http://www.aflcio.org/aboutus/thisistheaflcio/ecouncil/ec03112004i.cfm? (last visited Sept. 23, 2005). See also AFLCIO, CORPORATE MYTHS ABOUT SHIPPING JOBS OVERSEAS, available at http://www.aflcio.org/issues/jobeconomy/jobs/outsourcing_myths.cfm? (last visited Sept. 23, 2005).

[22] AFL-CIO, OUTSOURCING AMERICA ¶ 10, available At http://www.aflcio.org/aboutus/thisistheaflcio/ecouncil/ec03112004i.cfm? (last visited Sept. 23, 2005).

[23] S. 842, 109th Congress, 1st Session.

[24] Lexis Congressional Website

regulations affecting the scope of the Fair Labor Standards Act, these actions have weakened protection for workers. It would be difficult, however, to treat these actions as motivated by globalization concerns as opposed to traditional employer interests. Certainly there has been no change in existing law such as NLRA or TITLE 7, the anti-discrimination statute.

III. INTERNATIONAL TRADE AND LABOR LAWS

Questions 6-12

The United States has ratified few UN or ILO conventions. [25] Trade and labor issues, however, have been connected in two ways. First, sections of US trade law make trade preferences conditional on, among other things, adherence to a number of specified labor rights, paralleling some of the core ILO rights. These enactments, referred to as the Generalized System of Preferences [GST], have primarily affected developing countries. Second, multi-nation and bilateral trade agreements have recognized international labor rights.

Despite the low ratification rate for the U.S., American trade law recognizes labor rights as important in its relationships with trade partners. In most cases, the primary labor rights considered are the internationally recognized labor rights set forth by the ILO

Thus, the US Trade and Tariff Act of 1974 permits the US to withdraw trade privileges from countries that fail to respect specified labor rights. The act provides in section 301 that the US Trade Representative [USTR] had discretionary authority to recommend a variety of trade sanctions against nations which, among other things, engaged in practices that "constitute a persistent pattern of conduct denying internationally recognized worker rights." Developing countries must comply with internationally recognized labor rights as a condition to receiving special trade benefits under the Generalized System of Preferences, and those rights include the right to organize and bargain collectively, freedom from forced or compulsory labor, a minimum age for employment of children, and acceptable conditions of work with respect to minimum wages, hours, and occupational safety and health.

The President, subject to a few limitations, has the ability to designate the countries that are eligible to receive the trade privileges, as well as which countries will have the privileges revoked. The President is prohibited from granting these rights to any country who does not afford its workers internationally recognized labor rights. The President can also remove GSP status from a previously designated country as a consequence of persistent non-recognition of these factors. However, until now, GSP status has only been removed from a few countries, and each for reasons other than labor concerns.

The statute permits interested parties to file petitions before the GSP Subcommittee, an inter-agency group of trade officials, requesting a review of labor rights performance with GSP status. From 1984 through 1995, according to the OECD, "forty countries have been named in petitions citing labor rights abuses according to GSP law, " although only less than half of these cases were pursued to a formal review stage.[26] GSP preferences have been withdrawn on a number of occasions. Nevertheless, the United States has been accused of using these

[25] The U.S. has ratified fourteen ILO conventions. Twelve of these conventions are in force; these include: the Officers' Competency Certificates Convention, the Shipowners' Liability (Sick and Injured Seamen) Convention, the Minimum Age (Sea) Convention, the Final Articles Revision Convention, the Abolition of Forced Labor Convention, the Tripartite Consultation (International Standards) Convention, the Merchant Shipping (Minimum Standards) Convention, the Labour Administration Convention, the Labour Statistices Convention, the Safety and Health in Mines Convention, and the Worst Forms of Child Labour Convention

[26] OECD, Trade, Employment and Labor Standards: A study of Core Workers' Rights and International Trade (1996). See also, Trebilcock and Howse, "Trade Policy and Labor Standards," 14 Minn. J. Global Trade 261 [2005].

provisions for political purposes unrelated to the protection of labor rights. Thus, only some countries which suppress labor rights have been pressured to change. [27]

Section 301 of the U.S.Trade Act was amended in 1988 to permit the US to retaliate against any trade partner which burdened US commerce by systematically violating workers' rights. The first attempt to use this section occurred in 2004 when the AFL-CIO petitioned to gain higher tariffs against China. The petition reported numerous labor rights violations, including state control of the official labor union and suppression of independent union movements. The Bush administration, however, quickly dismissed the petition, refusing to accept it for review.

In 1995 compliance with internationally labor rights was required as precondition to providing insurance to US investors in foreign countries under the Overseas Private Investment Corporation "Amendment Act of 1985.

The U.S. is party to dozens of economic integration agreements, and recent pacts do address labor issues. The first of these more recent agreements was the 1993 North American Free Trade Agreement (NAFTA). The drafters included labor concerns in a special "side" agreement, called the North American Agreement on Labor Cooperation (NAALC). Since NAFTA, bilateral and multilateral US trade arrangements have included a labor rights section in the main agreement.

As noted, the trilateral North American Free Trade Agreement is supplemented by a labor side agreement, the North American Agreement on Labor Cooperation [NAALC].[28] The NAALC requires in Article 2 that each country "ensure that its labor laws and regulations provide for high labor standards consistent with high quality and productivity workforces, and shall continue to strive to improve those standards in that light." Although the labor rights listed in the agreement parallel ILO standards, the agreement does not set standards external to a member's domestic law. Each country can establish its own standards and, although each nation should strive for the highest standards, no means of enforcement is established for this obligation. More significantly, each party is to enforce its own domestic labor laws, and administrative systems exist to deal with violations of these obligations.

The NAALC, therefore, does not create an overarching labor law that applies to all three countries; instead it requires that each country enforce its own labor law effectively. Although the agreement does not impose any truly enforceable labor standards outside of a party's already existing laws, the NAALC aims to improve working conditions and living standards in each country by encouraging transparency, understanding and cooperation between the three countries. In the agreement, the parties recognize a commitment to the ILO's internationally recognized labor standards. It is also agreed that the countries should each ensure that private parties have access to remedial bodies to enforce the labor law, that proper procedural guarantees are in place to adjudicate labor disputes, and that the country's labor law is published and accessible.

The NAALC established the Commission for Labor Cooperation, which oversees implementation of the agreement, and makes recommendations or elaborations on the articles.

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[27] The US is not alone in being charged with being lax in recognizing nations that do not protect labor rights. The European Commission has recently granted special trade preferences under the European Union's GSP program to countries with poor records including Columbia, Georgia, Moldova, El Salvador, Costa Rica, and Guatemala. Preferences are granted to developing nations that meet various criteria including respect for core ILO Conventions. See www.icftu.org/www/PDF/GSP.pdf [Dec. 21, 2005.

[28] 32 I.L.M. 1499 [entered into force on Jan. 1, 1994].

The Commission addresses differences between the parties, and promotes cooperation between them. The NAALC also provides that each nation may create a National Administrative Office (NAO). The NAOs are set up at the federal government level, and they are the primary vehicle of communication between countries when addressing concerns about the agreement.

Although no supranational legal or trade sanctions can be applied to a country that does not abide by the requirements of the agreement, implementation is available through a complicated three-tiered process of reports and consultations. The potential effectiveness of this process lies mostly in the possibility that negative reports might result in embarrassment and a felt need for explanation. Ultimately, in theory, a fine can be imposed on a party who chronically refuses to cooperate. Many of the core labor rights recognized by the ILO, however, receive lesser review under NAALC procedures. For instance, the "core" labor rights of freedom of assembly and the right to collective bargaining may go no further than a ministerial meeting. Only some rights, i.e., minimum wages, child labor, and occupational health and safety may result in fines or trade sanctions, but the likelihood of any dispute advancing this far seems unlikely.

The agreement provides for several steps to be taken when one party takes issue with another in regard to compliance. First, any NAO may request a consultation with another. Second, aggrieved parties may file a claim with its National Administrative Office [NAO] that another nation is not enforcing its existing standards. Thus, although a nation is not obliged to raise its standards or its level of labor rights or even barred from lowering them, a claim may be filed in another country claiming that a member is not enforcing its own laws. Generally, a report results from this compliant, which can recommend a consultation at the ministerial level. If the disagreement cannot be resolved at the ministerial consultation, any party may request the establishment of an Evaluation Committee of Experts (ECE).

When an ECE is established, it will analyze the practices of each party regarding the issue at hand; not just the practices of the defending party. The issue must be trade related and covered by mutually recognized labor laws. After investigation, the ECE will issue a draft evaluation report containing an assessment, and any conclusions or recommendations. Each party may submit written reviews before a final evaluation report is presented to the Council.

After the report is submitted, if a party still believes there is a continued failure by the other party to address the issues in the report, that party may, again, request consultations with the other. If this consultation still produces unsatisfactory results, either party can request a special session of the council. At the special session, the Council will attempt to resolve the dispute, or it can refer the matter to a more appropriate body. If there are any recommendations made by the council, these can be made public by a 2/3 vote.

If still not resolved, the matter will go to an arbitration panel, where each party will to present it's case. The panel will decide whether there has been a persistent pattern of failure by the defending party in regard to the issue at hand. The panel will make an initial report, which the parties may comment on, and then a final report will be issued, given to the council, and published. If, in the report, the panel decides there was a persistent pattern of failure, the parties should agree on an action plan. Implementation of this action plan will be reviewed, and if this review is unsatisfactory or no action plan was agreed upon at all, the panel may be reconvened.

Should the panel be reconvened, it can either decide that the action plan agreed upon is sufficient to remedy the problem, create a new action plan or the panel may impose a monetary sanction. Where it has been determined that an action plan is not being satisfactorily

implemented, and where the party fails to pay monetary enforcement assessed against it, benefits provided by the NAFTA may be suspended for that party in the amount of the monetary assessment against it.

Thus far, several complaints have been filed, and most have been filed in the US referring to alleged violations of the treaty by all Mexico. Some have progressed to ministerial consultations. Although some reports have presented significant findings, none of the complaints have been pursued beyond this level. Indeed, most complaints have dealt with violations of freedom of assembly, the right to strike and engage in collective bargaining, and the agreement does not provide for further enforcement procedures for these rights as opposed to others. Thus far, ministerial conferences, followed by joint agreements of action programs, have not produced any clear change in the legal practice of the concerned nation.

Michael Trebilcock and Robert Howse note the three governments' "lack of will to hold one another to their NAALC commitments", suggesting that the parties would rather maintain "diplomatic niceties" than really try to resolve issues of workers rights violations, but this will remain to be seen.

Reviews of the process have generally concluded that NAALC has failed to achieve its goals. Although some reports have "led to significant findings an recommendations, ... they have not produced change. Ministerial consultations resulted only in research projects and tri-national conferences. Although these are often informative, they have not directly addressed or resolved worker rights violations documented and proven in NAALC proceedings." [29]

Since NAFTA, US trade agreements have contained similar arrangements, although labor rights have become a part of the trade agreement itself of being located in a "side" agreement. In all US trade agreement with labor provisions, the US promises to enforce the listed labor rights in its own territory—no agreement creates a right of enforcement by one country within another country's territory. There is some capacity for supranational review but, like NAALC, generally only to see if a country is enforcing its own standards. [30]

The provisions of the US-Jordan Free Trade Agreement are similar to those in the NAFTA side agreement: "a party shall not fail to effectively enforce its labor laws... in a manner affecting trade." and the US and Jordan have agreed that disputes concerning these provisions shall not result in the imposition of sanctions. [31] Nevertheless, this was the first US bilateral trade agreement in which the signatories expressly affirmed the commitment to core labor rights states in the ILO's Declaration on Fundamental Principles and Rights at Work. Labor rights violations are to enforced similar to violations for the commercial and trade commitments. The process of enforcement begins with consultations and provides various opportunities for the parties to reach an agreeable resolution. If the matter is not resolved at the end of the process, "the affected party shall be entitled to take any appropriate and commensurate measure." These "measures" are not defined. Noteworthy, however, is that "complaints" may only be filed by one state against the other, thus excluding direct involvement of non-governmental actors.

In addition to reaffirming the countries' commitment to ILO standards, Article 6 specifies that neither party will ignore nor decrease the protections provided by its own labor laws for the

[29] Trebilcock and Howse at 298.
[30] See Sandra Polaski, 10 UC Davis Int'l L. & Pol'y 13 [2003]. See, generally, Alisa DiCaprio, "Are Labor Provisions Protectionist?: Evidence from Nine Labor-Augmented U.S. Trade Arrangements," 26 Comp. Labor L. & Pol'y J 1 [2004].
[31] Trebilcock and Howse at 299.

purpose of encouraging trade from the other party. Essentially, the parties should strive to effectively enforce labor laws "in a manner affecting trade." Like most trade agreements, the phrase "in a manner affecting trade" means that the labor commitments in these agreements only apply in areas where there is actual trade between Jordan and the U.S.

The agreement creates a Joint Committee to settle disputes between parties and to review implementation of the articles. In the event that there is a dispute between parties as to a country's obligations under the agreement, there are four primary steps that can be taken to remedy the situation.

First, the parties should set up a consultation with each other, and each should make a good faith effort to resolve the issue there. If the problem still remains unresolved, the matter is taken to the Joint Committee. If the Joint Committee is unable to reach a satisfactory result, either party can refer the issue to a dispute settlement panel. The panel will compose a report that consists of findings of fact as to whether either party has failed to carry out its obligations. In the event that the report finds someone "guilty," the panel can make recommendations on resolving the issue, although the agreement carefully specifies that any recommendations in the report are not binding. This report is then given to the Joint Committee, who, again, tries to resolve the dispute. Finally, if none of these steps produces a satisfactory result, and the defending party continues its violations, the agreement simply states that the affected party may take whatever appropriate measure it so chooses.

In the case of a dispute of labor rights, an "appropriate measure" can normally include invocation of another international dispute mechanism, a request for ILO intervention, workplace monitoring, or even monetary enforcements or withdrawal of trade benefits. However, Jordan and the U.S. have agreed that disputes over the labor provision of the agreement will never result in the imposition of sanctions by either party.

Similarly, subsequent free trade agreements [FTAs] which have been adopted or are being negotiated by the Bush administration [Chile, Singapore, Central America, Australia, and Morocco] do not contain an enforceable commitment to respect ILO core labor standards, nor do they generally place labor rights violations under the same dispute resolution mechanism as that used for violations of the commercial provisions. Instead, these FTAs contain only one enforceable labor commitment: each signatory promises to enforce it's own domestic labor law. Generally, there are "no enforceable provisions to present the weakening of labor laws." [32]

The 1999 U.S.- Cambodian Bilateral Textile Agreement is unique in a number of ways.[33] The agreement came about when Cambodia's fledgling textile and apparel market, not yet under the quota system which was already in place among other markets, began to send a substantial share of its goods to the U.S. in the 1990s.[34] At the same time, workers in Cambodia sought the support of labor unions, who in turn sought the support of interested labor unions in the U.S.[35] . Negotiations involving trade and quota issues also stemmed from a GSP complaint filed by the US garment workers' union, UNITE!, and AFL-CIO in 1998. [36]

As a result, the U.S. entered into trade negotiations with Cambodia.[37] Subsequently, quotas were established, but the two countries also entered into an innovative agreement that

[32]Hiatt and Greenfield, "The Importance of Core Labor Rights in World Development," 26 Mich. J. Int'l L. 39, 60 [2004].
[33] Kevin Kolben, Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories, 7 Yale Hum. Rts. & Dev. L.J. 79, 1 (2004).
[34] Sandra Polaski, Cambodia Blazes a New Path to Economic Growth and Job Creation, 51 Carnegie Endowment for Int'l Peace 4 (2004).
[35] Ibid.
[36] Hiatt and Greenfield, at 55.

provided for an increase in these quotas if the Cambodian government achieved “compliance by the apparel factories with national labor laws and internationally agreed labor rights”.[38]

Unlike other US trade agreements, the treaty focused exclusively on one industry. Similarly, the agreement is unique in that uses trade related incentives to enforce workers' rights. The agreement includes a labor rights provision and provides incentives for the Cambodian textile and garment industry to comply with international norms. A novel program was created, administered by the ILO, to combine trade-related incentives to promote and enforce workers' rights with ILO-conducted monitoring of factories. The ILO would engage in factory level monitoring as a substitute or addition to domestic agencies. Furthermore, the ILO would train domestic inspectors and provide assistance in drafting regulations and statutes

According to Kevin Kolben, nearly all of the Cambodian garment factories are owned and operated by non-Cambodians and have moved from location to location seeking low cost production. [39] In addition, the work force is primarily composed of women, and serious violations of labor standards existed such as long hours, forced and unpaid overtime, and violations of health and safety standards as well as infringement of the freedom of association and the right to organize. [40] Standards imposed by Cambodia’s domestic law are not generally enforced, a situation due in part to inadequate inspectors, who receive very low wages or government indifference.

Hiatt and Greenfield assert that this agreement demonstrates a successful linkage of trade and labor rights. Thus, they note that the "the Cambodian union movement, with assistance from the American labor movement, the US government, and the ILO, was able to leverage the annual quota decision which the US makes under the agreement to pressure the Cambodian Ministry of Labor into issuing a regulation that greatly expanded organizing rights."[41]

In addition, the Ministry of Labor in 2002 created a labor arbitration council that gave effect to the provisions of the 1997 Labor Code. The "arbitration process has yielded to garment unions important victories regarding such issues as reinstatement or shop stewards terminated without permission of the Ministry of Labor, paid maternity leave, union dues deduction, and other matters, and "workers in other industries have also achieved substantial victories through arbitration." [42]

According to Sandra Polaski, the program implemented by the ILO to monitor Cambodia’s progress calls for voluntary participation by factories in Cambodia. [43] Only those who volunteer are eligible to benefit from a quota increase. The ILO conducts monitoring in these factories, then publishes its results in credible and highly reputable reports. The reports are to used by the U.S. in determining whether the quotas should be increased, but they would also be available to reputation conscious apparel companies.

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[37] Ibid.

[38] Polaski, supra note 28, at 4.

[39] Kevin Kolben, "Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories," 7 Yale Hum. Rts. & Dev. L.J. 79 (2004).

[40] See John Hall, "Note: Human Rights and the Garment Industry in Contemporary Cambodia," 36 Stan. J. Int'l L. 119 (Winter 2000).

[41] Hiatt and Greenfield, id at 56.

[42] Ibid.

[43] Polaski, supra note 28, at 7.

Thus, Polaski recognizes two major incentives implicit in this system.[44] First, rather than depending on the remote threat of vague trade sanctions, the possible quota increases create positive incentives for the Cambodian government and factories to comply with labor rights. Second, the factories who participate in the program can not only benefit from the quota increase, but they have the opportunity to gain business from those apparel industries abroad who are especially concerned with the labor conditions in the factories they deal with.

The agreement, however, expired at the end of 2004 along with the ending of the WTO's Agreement on Textiles and Clothing. Polaski notes that, although the international textile quota system ended in 2004, Cambodia will continue to benefit from the implementation of this agreement. Even though Cambodia cannot compete with other markets in terms of quantity, cost, and other factors, Cambodia's factories now have a reputation for being labor-conscious. Thus, Cambodia plans to market it's industry as a business niche that is a "safe haven for buyers who care about their reputation".[45]

Finally, the most recently adopted US trade arrangement, the Central American Free Trade Agreement[46] (hereinafter, "the Agreement", or CAFTA), an agreement between the U.S. and the Central American countries. The Agreement was originally drawn up to include only El Salvador, Guatemala, Honduras, and Nicaragua, but the Dominican Republic was later added. Although the Agreement is not yet in force, it was signed by the President of the United States on August 2, 2005[47], and the parties are working towards implementation.[48]

CAFTA includes a labor provision nearly identical to the NAALC, the labor side agreement to the NAFTA. Chapter 16 of the CAFTA first affirms the countries' obligations as members of the ILO, namely: to observe the ILO's internationally recognized labor rights, as listed earlier. As with the NAALC, this agreement only requires that each country enforce it's own labor rights; it does not create an obligation to observe any overarching set of rights (other than the five recognized by the ILO). Chapter 16 specifically demands that none of the countries abuse or weaken protections to its workers for the sake of encouraging trade with any other parties to the agreement. The parties to the CAFTA also agree to provide private parties in their own countries with access to dispute mechanisms, and proper procedural guarantees within those mechanisms.

Aside from some very minor variations, the procedure for disputes between parties to the CAFTA is virtually identical to that provided for in the NAALC. Although the institutions created by the agreement are given different names, they work the same. A Labor Affairs Council oversees implementation of the agreement, and each country is to set up it's own office which will serve as the primary communication vehicle between them.

The grievance procedure, called the Labor Cooperation and Capacity Building Mechanism, outlines the steps that are to be taken when one party feels another is not fulfilling an obligation under the agreement. These steps are the same as in the NAALC. First, the parties are to have a consultation with each other, where they are to make every effort to resolve the dispute. If this does not result in a resolution, the Council can be convened at the request of either party. The Council will make recommendations and will further attempt to assist the

[44] Sandra Polaski, Cambodia Blazes a New Path to Economic Growth and Job Creation, 51 Carnegie Endowment for Int'l Peace 5 (2004).
[45] Id. at 9.
[46] Central American Free Trade Agreement, August 2, 2005, U.S-El.Sal-Guat.-Hond.-Nicar.-Dom. Rep.
[47] www.ita.doc.gov/cafta/index.asp (summary provided under "About CAFTA-DR")
[48] Ibid.

parties in coming to an agreement. In the event the Council is not successful, any party can request the establishment of an arbitration panel.

In a provision unlike any found in the NAALC, this agreement specifies that any interested party who does not join at this point in the dispute will be prevented from disputing an issue later in this proceeding or any other like proceeding, such as in the WTO or another trade agreement, if the issue is substantially similar to the one in this proceeding.

The panel will draft an initial report based on findings and submissions of the parties, and any party can submit comments on this report. The final report, containing any findings or recommendations, will be released to the public.

The implementation of the recommendations in the final report will be accomplished through an action plan agreed to by the parties. However, if no action plan is agreed upon, or a party feels the plan is not being adhered to, there is a detailed provision for the suspension of benefits of the offending party. Essentially, if an action plan is not followed, the parties are to agree on an appropriate amount of compensation to be paid by the offending party. If an amount cannot be agreed upon, or if it is agreed upon but not paid, the complaining party can suspend the benefits of the other party in the amount of the compensation. Either the money will be paid to the complaining party in U.S. dollars, or the Commission can decide that the money will instead go into an appropriate fund.

This provision for suspension of benefits is more detailed and provides more specific procedures for ensuring payment than the NAALC does. But, although it appears to create a more realistic possibility for monetary remedy, it remains to be seen whether the parties will be willing to enforce it.

CAFTA's chapter 16 deals with labor rights and, with some modest differences, as noted above, parallels NAFTA's structure and scope. The entire chapter is included as an appendix, but the critical scope of the agreement is set forth below:

Chapter Sixteen
Labor

Article 16.1: Statement of Shared Commitment

1. The Parties reaffirm their obligations as members of the International Labor Organization(ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration).1 Each Party shall strive to ensure that
such labor principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law.

2. 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 shall 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.

Article 16.2: Enforcement of Labor Laws

1. (a) 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, after the date of entry into force of this Agreement.

(b) Each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.

2. The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in Article 16.8 as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

The Parties recall that paragraph 5 of the ILO Declaration states that labor standards should not be used for protectionist trade purposes.

3. Nothing in this Chapter shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another Party.

Article 16.3: Procedural Guarantees and Public Awareness

1. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to tribunals for the enforcement of the Party's labor laws. Such tribunals may include administrative, quasi-judicial, judicial, or labor tribunals, as provided in the Party's domestic law.

2. Each Party shall ensure that proceedings before such tribunals for the enforcement of its labor laws are fair, equitable, and transparent and, to this end, each Party shall ensure that:
(a) such proceedings comply with due process of law;
(b) any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires;
(c) the parties to such proceedings are entitled to support or defend their respective positions, including by presenting information or evidence; and
(d) such proceedings do not entail unreasonable charges or time limits or unwarranted delays.
3. Each Party shall provide that final decisions on the merits of the case in such proceedings are:
(a) in writing and state the reasons on which the decisions are based;
(b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and
(c) based on information or evidence in respect of which the parties were offered the opportunity to be heard.

4. Each Party shall provide, as appropriate, that parties to such proceedings have the right to seek review and, where warranted, correction of final decisions issued in such proceedings.

5. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.

6. Each Party shall provide that the parties to such proceedings may seek remedies to ensure the enforcement of their rights under its labor laws. Such remedies may include measures such as orders, fines, penalties, or temporary workplace closures, as provided in the Party's laws.

7. Each Party shall promote public awareness of its labor laws, including by:
(a) ensuring the availability of public information related to its labor laws and enforcement and compliance procedures; and
(b) encouraging education of the public regarding its labor laws.

8. For greater certainty, decisions or pending decisions by each Party's administrative, quasi-judicial, judicial, or labor tribunals, as well as related proceedings, shall not be subject to revision or be reopened under the provisions of this Chapter.

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Article 16.8: Definitions
For purposes of this Chapter:
labor laws means a Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:
(a) the right of association;
(b) the right to organize and bargain collectively;
(c) a prohibition on the use of any form of forced or compulsory labor;
(d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and
(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

For greater certainty, the setting of standards and levels in respect of minimum wages by each Party shall not be subject to obligations under this Chapter. Each Party's obligations under this Chapter pertain to enforcing the level of the general minimum wage established by that Party.

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In recent WTO meetings, the US has urged the inclusion of a "social clause". It is unclear, however, whether the current administration, unlike the Clinton government, would take the same position.

The debate over the issue of a 'social clause'- the linking of trade and labor- in the WTO is sharply divided between developed and developing countries. Despite it's record in ratifying labor ILO Conventions, the U.S. has been a strong advocate for the recognition of links between trade and labor rights and the addition of a social clause recognizing the importance of the connection.

Countries urging the recognition of these links generally refer to two GATT articles, which they interpret to allow for the consideration of a social clause in the WTO. Article XX permits governments to restrict trade in order to protect "public morals" and "human life and health". Article XXIII addresses dumping, and advocates of the social clause use this article to argue that suppressed worker rights is equal to social dumping. The U.S., however, has not stressed these GATT provisions, and it is instead advocating the establishment of a "working group" that will address 'internationally recognized labor standards' and their relation to trade within the WTO.

In the WTO's Singapore meeting in 1996, the U.S. encouraged cooperation between the WTO and the ILO. The modest result of the argument for linkage was a one paragraph in the final Declaration of the Conference that essentially affirmed the WTO's willingness to support the ILO. The statement also rejected the use of labor standards for protectionist reasons, but clearly reflected the rejection of a social clause.

Nevertheless, the U.S. again raised the issue at the following WTO conference in Seattle in 1999. The proposal for a "working group" in the WTO remained the same, but this time the U.S. suggested more specific issues to be examined by the group. The issues included "the relationship between trade, core labor standards and social protection, positive trade incentives, trade and forced labor, and trade induced derogation from national labor standards"

Developing countries are in opposition to a 'social clause' in the WTO. These countries see it as a vehicle that will be used by developed countries to promote protectionist policies. It should be noted, however, that the reference to "developing countries" does not necessarily relate to the views of workers or unions in those countries. Currently, the debate continues with the same concerns on both sides.

IV. SOFT LAW AND THE EMERGENCE OF NEW ACTORS

Questions 13-15

Numerous Multinational Enterprises (MNEs) operating from the United States have adopted voluntary codes of conduct relating to a variety of issues including the environment, human rights, and labor. Several of the codes of conduct described below have risen out of public outrage and shaming campaigns; others grew out of the growing self-interest of MNEs to prevent such negative publicity. Some of these codes have resulted in action against contractor firms or even loss of contracts. More recently, attempts have been made to create wider codes which involve multiple companies, NGOs, unions and other groups.

The following lists some noteworthy codes of corporate conduct created by individual MNEs, NGOs, as well as multi-employer groups that are primarily based in the US. There are too many codes of conduct to describe each in full. Therefore, the paragraphs below provide only some examples.

The following brief overviews demonstrate the standard contents of codes of conduct. Further information will highlight instances, if any exist, in which subcontractors or providers found not to be abiding by the code of conduct were excluded from business with the MNE. In the sections discussing the involvement of non-governmental organizations (NGOs), there will also be a discussion of the means of implementing and monitoring the various codes of conduct.

A. MNE CODES OF CONDUCT

Wal-Mart Stores, Inc.

Wal-Mart Stores, Inc.'s code of conduct ("Standard for Suppliers") is available online.[49] This Standard for Suppliers covers the core areas of compensation, hours of labor, forced labor/prison labor, child labor, discrimination/human rights, freedom of association and collective bargaining, as well as a brief section on workplace environment (referring to health and safety conditions for factory employees) and mention of required compliance with immigration laws. Wal-Mart's Ethical Standards Program covers "factories from which Wal-Mart directly sources the product and is the importer of record . . . [and] supplier factories in any of five 'high-risk' categories: apparel, footwear, toys, sporting goods and accessories."[50] As an example of the

[49] WAL-MART, STANDARDS FOR SUPPLIER: SUPPLIER'S RESPONSIBILITIES 27-28, *available at* http://walmartstores.com/Files/SupplierStandards.pdf (last visited Sept. 23, 2005).

[50] WAL-MART, 2004 REPORT ON STANDARDS FOR SUPPLIERS 6, *available at* http://www.walmartfacts.com/docs/2004SupplierStandardsReport.pdf (last visited Sept. 23, 2005

type of language incorporated into Wal-Mart's code of conduct, the text of the section on hours of labor reads:

> Suppliers shall maintain employee work hours in compliance with local standards and applicable laws of the jurisdictions in which the suppliers are doing business. Employees shall not work more than 72 hours per 6 days or work more than a maximum total of working hours or 14 hours per calendar day (midnight to midnight). Supplier's factories should be working toward achieving a 60-hour work week. Wal-Mart will not use suppliers who, on a regularly scheduled basis, require employees to work in excess of the statutory requirements without proper compensation as required by applicable law. Employees should be permitted reasonable days off (at least one day off for every seven-day period) and leave privileges.[51]

Built into Wal-Mart's Standard for Suppliers is a provision reserving the right for the company to inspect supplier factories.[52] Wal-Mart-approved third-party monitors, such as Cal Safety Compliance Corporation, Accordia Global Compliance Group, Bureau Veritas, and Société Générale de Surveillance, conduct supplier factory audits.[53] Wal-Mart's policy is to inspect each supplier factory at a maximum of three times per year or as needed. Suppliers are to pay for the cost of each audit and are obliged to cooperate with any and all requests for the disclosure of information. Typically, Wal-Mart inspectors will take a tour of the facility to inspect for health and safety violations and other visibly recognizable concerns such as child laborers or injured workers. Auditors will also have access to wage and hour documentation, personnel files, legal certificates, etc. Upon completing an audit, the inspector will issue to the factory a color coded identification which is then to determine what further actions are necessary on the part of the factory (i.e. corrective actions) and on the part of Wal-Mart (e.g. follow-up audits, reporting, possible termination of relationship with that factory). Wal-Mart asserts that certain violations of the Standard for Suppliers will not be tolerated, including "violations such as child labor, forced labor, severe abuse of workers and extremely unsafe working conditions."[54]

The Executive Summary of Wal-Mart's 2004 Report on Standards for Suppliers, states that "Wal-Mart auditors and third-party firms conducted more than 12,500 initial and follow-up audits of 7,600 factories providing products to Wal-Mart stores."[55] The Report continues by claiming that Wal-Mart stopped doing business with 1,500 factories due to business decisions based on factory capability issues. Of these factories, only 108 factories were permanently banned from doing business with Wal-Mart, primarily because of child labor violations. In addition, Wal-Mart disapproved a further 1,211 factories as a result of multiple instances of non-compliance with the Standards or [sic] Suppliers.[56]

In spite of these claims, the labor practices of Wal-Mart suppliers have been highlighted in recent television investigations and reports. Recently, two classes of plaintiffs with the

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[51] WAL-MART, STANDARDS FOR SUPPLIER: SUPPLIER'S RESPONSIBILITIES 27, *available at* http://walmartstores.com/Files/SupplierStandards.pdf (last visited Sept. 23, 2005).

[52] WAL-MART, STANDARDS FOR SUPPLIER: SUPPLIER'S RESPONSIBILITIES 28, *available at* http://walmartstores.com/Files/SupplierStandards.pdf (last visited Sept. 23, 2005).

[53] WAL-MART, 2004 REPORT ON STANDARDS FOR SUPPLIERS 26, *available at* http://www.walmartfacts.com/docs/2004SupplierStandardsReport.pdf (last visited Sept. 23, 2005

[54] WAL-MART, 2004 REPORT ON STANDARDS FOR SUPPLIERS 6, *available at* http://www.walmartfacts.com/docs/2004SupplierStandardsReport.pdf (last visited Sept. 23, 2005

[55] WAL-MART, 2004 REPORT ON STANDARDS FOR SUPPLIERS 2, *available at* http://www.walmartfacts.com/docs/2004SupplierStandardsReport.pdf (last visited Sept. 23, 2005).

[56] WAL-MART, 2004 REPORT ON STANDARDS FOR SUPPLIERS 2, *available at* http://www.walmartfacts.com/docs/2004SupplierStandardsReport.pdf (last visited Sept. 23, 2005).

assistance from the International Labor Rights Fund have filed a lawsuit in Los Angeles, California against Wal-Mart Stores, Inc., alleging that the company has not enforced the Wal-Mart's Standard for Suppliers in the factories in which the first group of plaintiffs works.[57] The cases combine tort and contract claims, the latter arguing that the code provides a contract that makes employees of contractors beneficiaries who can enforce the promises made.

Specifically, one group of plaintiffs alleges that they were "not being paid minimum wage, not receiving overtime pay, being locked in factories, being fired for supporting unions and even suffering physical abuse by managers."[58] The plaintiffs argue that Wal-Mart failed in its contractual duty to ensure that its suppliers adhere to the principles as outlined in the Standard for Suppliers. The second group of plaintiffs claims that "Southern California grocery workers were harmed because Wal-Mart's low prices – made possible by alleged substandard overseas factories – force competing grocery chains to cut wages and benefits."[59] This case will significantly address Wal-Mart's responsibility for ensuring that labor conditions in supplier factories adhere to the standards promulgated in the Wal-Mart Standard for Suppliers.

Levi Strauss & Co.

Levi Strauss & Co. is one of the prominent garment industry MNEs operating from the U.S. and was the first "worldwide company to establish a comprehensive ethical code of conduct for manufacturing and finishing contractors working with the company.[60] The Levi Strauss & Co. Global Sourcing and Operating Guidelines address country conditions as well as the conditions that are under the control of the individual business partner.[61] The Levi's Terms of Engagement, to which suppliers are held accountable, address five key areas: ethical standards, legal requirements, environmental requirements, community involvement, and employment standards.[62] Levi's employment standards are as follows:

> We will only do business with partners who adhere to the following guidelines:
>
> Child Labor: Use of child labor is not permissible. Workers can be no less than 15 years of age and not younger than the compulsory age to be in school. We will not utilize partners who use child labor in any of their facilities. We support the development of legitimate workplace apprenticeship programs for the educational benefit of younger people.
>
> Prison Labor/Forced Labor: We will not utilize prison or forced labor in contracting relationships in the manufacture and finishing of our products. We will not utilize or purchase materials from a business partner utilizing prison or forced labor.

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[57] BSR News Monitor: Summary of Article in *The New York Times*, Wal-Mart Sued over Failing to Uphold its Labor Code of Conduct (Sept. 1, 2005), *available at* http://www.bsr.org/CSRResources/News/News.cfm?DocumentID=51245 (last visited Sept. 23, 2005).

[58] BSR News Monitor: Summary of Article in *The New York Times*, Wal-Mart Sued over Failing to Uphold its Labor Code of Conduct (Sept. 1, 2005), *available at* http://www.bsr.org/CSRResources/News/News.cfm?DocumentID=51245 (last visited Sept. 23, 2005).

[59] Gary Gentile, "Lawsuit Targets Wal-Mart Overseas Working Conditions" Sept. 14, 2005 http://www.sfgate.com (last visited Sept. 23, 2005).

[60] Levi Strauss & Co., Social Responsibility/Our Commitment ¶ 4, *available at* http://www.levistrauss.com/responsibility/ (last visited Sept. 23, 2005).

[61] Levi Strauss & Co., Social Responsibility/Global Sourcing & Operating Guideline ¶¶ 2-3, *available at* http://www.levistrauss.com/responsibility/conduct/guidelines.htm (last visited Sept. 23, 2005).

[62] Levi Strauss & Co., Social Responsibility/Global Sourcing & Operating Guideline ¶¶ 10-21, *available at* http://www.levistrauss.com/responsibility/conduct/guidelines.htm (last visited Sept. 23, 2005).

Disciplinary Practices: We will not utilize business partners who use corporal punishment or other forms of mental or physical coercion.

Working Hours: While permitting flexibility in scheduling, we will identify local legal limits on work hours and seek business partners who do not exceed them except for appropriately compensated overtime. While we favor partners who utilize less than sixty-hour workweeks, we will not use contractors who, on a regular basis, require in excess of a sixty-hour week. Employees should be allowed at least one day off in seven.

Wages and Benefits: We will only do business with partners who provide wages and benefits that comply with any applicable law and match the prevailing local manufacturing or finishing industry practices.

Freedom of Association: We respect workers' rights to form and join organizations of their choice and to bargain collectively. We expect our suppliers to respect the right to free association and the right to organize and bargain collectively without unlawful interference. Business partners should ensure that workers who make such decisions or participate in such organizations are not the object of discrimination or punitive disciplinary actions and that the representatives of such organizations have access to their members under conditions established either by local laws or mutual agreement between the employer and the worker organizations

Discrimination: While we recognize and respect cultural differences, we believe that workers should be employed on the basis of their ability to do the job, rather than on the basis of personal characteristics or beliefs. We will favor business partners who share this value.

Health & Safety: We will only utilize business partners who provide workers with a safe and healthy work environment. Business partners who provide residential facilities for their workers must provide safe and healthy facilities.[63]

Levi Strauss & Co. has halted relationships with supplier factories due to non-compliance with Levi's Social Responsibility/Global Sourcing and Operating Guidelines. In 1992, for instance, following embarrassing disclosures of work practices on Saipan, a US protectorate in the Northern Mariana Islands, Levi Strauss canceled its contract with suppliers after auditors inspected factories in light of their terms of engagement questionnaire. Similarly, contracts with suppliers in other countries were also terminated. According to Compa and Tashia Hinchliffe-Darricarrere, Levi Strauss "terminated contracts with thirty suppliers worldwide, and forced reforms in employment practices in over one hundred others." [64]

The Gap, Inc.

Gap Inc.'s Code of Vendor Conduct[65] includes the same general areas of labor rights as those mentioned above (and indeed, many corporate codes of conduct cover these same

[63] LEVI STRAUSS & CO., SOCIAL RESPONSIBILITY/GLOBAL SOURCING & OPERATING GUIDELINE ¶¶ 13-21, *available at* http://www.levistrauss.com/responsibility/conduct/guidelines.htm (last visited Sept. 23, 2005).

[64] Lance Compa and Tashia Hinchliffe-Darricarrere, "Enforcing International Labor Rights through Corporate Codes of Conduct," 33 Colum. J.of Transnat'l Law 662,678-679 (1995).

areas). However, Gap Inc.'s code of conduct contains considerable detail in contrast to those of Wal-Mart and Levi Strauss, as is evident in the selected sections below:

> Wage & Hours
> Factories shall set working hours, wages and overtime pay in compliance with all applicable laws. Workers shall be paid at least the minimum legal wage or a wage that meets local industry standards, whichever is greater. While it is understood that overtime is often required in garment production, factories shall carry out operations in ways that limit overtime to a level that ensures humane and productive working conditions.
> A. Workers are paid at least the minimum legal wage or the local industry standard, whichever is greater.
> B. The factory pays overtime and any incentive (or piece) rates that meet all legal requirements or the local industry standard, whichever is greater. Hourly wage rates for overtime must be higher than the rates for the regular work shift.
> C. The factory does not require, on a regularly scheduled basis, a work week in excess of 60 hours.
> D. Workers may refuse overtime without any threat of penalty, punishment or dismissal.
> E. Workers have at least one day off in seven.
> F. The factory provides paid annual leave and holidays as required by law or which meet the local industry standard, whichever is greater.
> G. For each pay period, the factory provides workers an understandable wage statement which includes days worked, wage or piece rate earned per day, hours of overtime at each specified rate, bonuses, allowances and legal or contractual deductions.
>
> Working Conditions
> Factories must treat all workers with respect and dignity and provide them with a safe and healthy environment. Factories shall comply with all applicable laws and regulations regarding working conditions. Factories shall not use corporal punishment or any other form of physical or psychological coercion. Factories must be sufficiently lighted and ventilated, aisles accessible, machinery maintained, and hazardous materials sensibly stored and disposed of. Factories providing housing for workers must keep these facilities clean and safe.
>
> Factory:
> A. The factory does not engage in or permit physical acts to punish or coerce workers.
> B. The factory does not engage in or permit psychological coercion or any other form of non-physical abuse, including threats of violence, sexual harassment, screaming or other verbal abuse.
> C. The factory complies with all applicable laws regarding working conditions, including worker health and safety, sanitation, fire safety, risk protection, and electrical, mechanical and structural safety.
> D. Work surface lighting in production areas—such as sewing, knitting, pressing and cutting—is sufficient for the safe performance of production activities.
> E. The factory is well ventilated. There are windows, fans, air conditioners or heaters in all work areas for adequate circulation, ventilation and temperature control.
> F. There are sufficient, clearly marked exits allowing for the orderly evacuation of workers in case of fire or other emergencies. Emergency exit routes are posted and clearly marked in all sections of the factory.

[65] THE GAP, GAP INC. CODE OF VENDOR CONDUCT *available at* http://www.gapinc.com/public/documents/code_vendor_conduct.pdf (last visited Sept. 23, 2005).

G. Aisles, exits and stairwells are kept clear at all times of work in process, finished garments, bolts of fabric, boxes and all other objects that could obstruct the orderly evacuation of workers in case of fire or other emergencies. The factory indicates with a "yellow box" or other markings that the areas in front of exits, fire fighting equipment, control panels and potential fire sources are to be kept clear.
H. Doors and other exits are kept accessible and unlocked during all working hours for orderly evacuation in case of fire or other emergencies. All main exit doors open to the outside.
I. Fire extinguishers are appropriate to the types of possible fires in the various areas of the factory, are regularly maintained and charged, display the date of their last inspection, and are mounted on walls and columns throughout the factory so they are visible and accessible to workers in all areas.
J. Fire alarms are on each floor and emergency lights are placed above exits and on stairwells.
K. Evacuation drills are conducted at least annually.
L. Machinery is equipped with operational safety devices and is inspected and serviced on a regular basis.
M. Appropriate personal protective equipment—such as masks, gloves, goggles, ear plugs and rubber boots—is made available at no cost to all workers and instruction in its use is provided.
N. The factory provides potable water for all workers and allows reasonable access to it throughout the working day.
O. The factory places at least one well-stocked first aid kit on every factory floor and trains specific staff in basic first aid. The factory has procedures for dealing with serious injuries that require medical treatment outside the factory.
P. The factory maintains throughout working hours clean and sanitary toilet areas and places no unreasonable restrictions on their use.
Q. The factory stores hazardous and combustible materials in secure and ventilated areas and disposes of them in a safe and legal manner.[66]

Gap Inc. maintains that it does cease working relationships with suppliers that do not comply with its Code of Vendor Conduct. "In its 2004 report, Gap said it revoked approval for 70 factories that violated its code of vender conduct, down from 136 cases in 2003. The retailer rejected 15% of the new factories it evaluated, roughly the same percentage as in the previous year. It inspected 99.9% of its contract factories, compared with 94% in 2003."[67]

Cintas Corporation

Cintas is a Ohio-based uniform rental provider. Its Vendor Code of Conduct[68] covers the usual areas of labor rights (wages and hours, discrimination, child labor, forced labor, health and safety, etc.) though it also includes a section on vendor cooperation with appropriate drug enforcement agencies.

Cintas, like other MNEs, has not been free from criticism of the enforcement on its code of conduct. Unite, the Union of Needletrades, Industrial and Textile Employees, issued a report

[66] THE GAP, GAP INC. CODE OF VENDOR CONDUCT 2-3, *available at* http://www.gapinc.com/public/documents/code_vendor_conduct.pdf (last visited Sept. 23, 2005).
[67] Amy Merrick, *Gap Report Says Factory Inspections are Getting Better*, THE WALL STREET JOURNAL, July 13, 2005, at B10.
[68] CINTAS, VENDOR CODE OF CONDUCT *available at* http://www.cintas.com/company/CODE_OF_CONDUCT.pdf (last visited Sept. 23, 2005).

in 2004 regarding Cintas in which Cintas came under close scrutiny for its outsourcing and subcontracting practices.[69] The well-known risks of outsourcing and subcontracting are that "production standards, quality, and working conditions become harder to control."[70] In order to reduce these risks Cintas, like many other companies, had turned to a voluntary code of conduct in an effort to regularize and ensure certain standards of labor conditions. Unite's exposé demonstrates Cintas' negligent reliance on the word of contractors who claim to adhere to the Cintas Vendor Code of Conduct. In essence, Unite believes that the Cintas Vendor Code of Conduct is a sham, an "attempt to evade responsibility for conditions, and avoid taking proactive measures like rigorous and regular independent monitoring and enforcement."[71] Independent investigate work by Unite revealed that workers were paid less than minimum wage, were refused overtime pay, and had to work off-the-clock to meet quotas or make corrections.[72]

B. NGO CONTRIBUTION

NGOs have played an important part in holding U.S.-based MNEs accountable to social responsibility standards. NGOs have helped to promulgate codes of conduct, issue papers, training, auditing, and other resources for groups of businesses seeking to associate themselves with the image and culture of social responsibility.

Business for Social Responsibility

Business for Social Responsibility (BSR) is a non-profit "global organization that helps member companies achieve success in ways that respect ethical values, people, communities and the environment."[73] Member companies[74] to BSR gain access to "training programs, technical assistance, research and business advisory services – accessible through face-to-face sessions, custom publications and via the Web."[75] It must, however, be noted that there are "no standards for CSR [corporate social responsibility] performance that must be achieved before a company can become a member of BSR."[76] BSR notes that the use of corporate codes of conduct can protect brand reputation, increase reliability, trust, quality and productivity,

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[69] UNITE, CINTAS CODE OF CONDUCT: SAFEGUARDING STANDARDS OR SHIELDING ABUSES? (March 25, 2004).

[70] UNITE, CINTAS CODE OF CONDUCT: SAFEGUARDING STANDARDS OR SHIELDING ABUSES? Executive Summary (March 25, 2004).

[71] UNITE, CINTAS CODE OF CONDUCT: SAFEGUARDING STANDARDS OR SHIELDING ABUSES? Executive Summary (March 25, 2004).

[72] UNITE, CINTAS CODE OF CONDUCT: SAFEGUARDING STANDARDS OR SHIELDING ABUSES? 3-4 (March 25, 2004).

[73] BUSINESS FOR SOCIAL RESPONSIBILITY, ABOUT BSR ¶ 1, *available at* http://www.bsr.org/Meta/About/index.cfm (last visited Sept. 23, 2005). [Business for Social Responsibility's institutional website will hereinafter be referred to as "BSR"].

[74] BSR member companies are as follows: ABB Inc.; Agilent Technologies, Inc.; American Express Co.; Arup; AstraZeneca plc; Ben & Jerry's Homemade Inc.; BP plc; British Telecommunications plc; Brown-Forman Corp.; C&A; Chevron Corp.; Chiquita Brands, Inc.; Cirque du Soleil Inc.; Cisco Systems, Inc.; The Coca-Cola Co.; CSCC; Cutter & Buck, Inc.; Deloitte & Touche LLP; Donna Karan International, Inc.; Eddie Bauer, Inc.; Eileen Fisher, Inc.; Exxon Mobil Corp.; Fannie Mae; Ford Motor Co.; Freeport-McMoRan Copper & Gold Inc.; Gaiam, Inc.; Gap Inc.; Genentech, Inc.; General Electric Corp.; General Motors Corp.; GlaxoSmithKline plc; Hallmark Cards, Inc.; Hanna Andersson Corp.; Hasbro, Inc.; H&M Hennes & Mauritz AB; Hewlett-Packard Co.; The Home Depot, Inc.; IBM; IKEA International A/S; Inco Limited; Johnson & Johnson; La Constancia, s.a.; Levi Strauss & Co.; Li & Fung Limited; Lilly Pulitzer; Liz Clairborne, Inc.; Maersk Sealand; Mattel, Inc.; McDonald's Corp.; Newmont Mining Corp.; Mountain Equipment Co Op; NAMASTA, North American Studio Alliance; NIKE, Inc.; Nordstrom, Inc.; OfficeMax; Oracle Corp.; Patagonia/Lost Arrow Corp.; Perry Ellis International, Inc.; Pfizer Inc.; Phillips-Van Heusen Corp.; Placer Dome Inc.; PMI; The Procter & Gamble Co.; Reebok International Ltd.; Ricoh Corp.; Rio Tinto plc; Roots Canada Ltd.; SAP AG; Sears, Roebuck and Co.; Shell International; Sony Corp.; Staples, Inc.; Starbucks Coffee Co.; Sunbeam Corp.; The Timberland Co.; Tom's of Maine; Toshiba Corp.; Toys "R" Us, Inc.; Unilever; United Parcel Service (UPS); Verizon Communications Inc.; Visteon Automotive Systems; Wal-Mart; The Walt Disney Co.; Yum! Brands. BSR, BUSINESS FOR SOCIAL RESPONSIBILITY MEMBER LIST, *available at* http://www.bsr.org/Meta/MemberList.cfm (last visited Sept. 23, 2005).

[75] BSR, BSR DETAILS ¶ 2, *available at* http://www.bsr.org/Meta/about/bsrdetails.cfm (last visited Sept. 23, 2005).

[76] BSR, BSR MEMBERSHIP FREQUENTLY ASKED QUESTIONS ¶ 1, *available at* http://www.bsr.org/Meta/MembershipFAQ.cfm (last viewed Sept. 23, 2005).

strengthen legal compliance, reduce future risk and liability, reduce negative publicity and increase the ability to respond to crisis.[77] Yet, BSR does "not advocate one standard or a single solution over another"[78] and it provides no certification of its members. BSR does provide a variety of resources to its members. Among the many resources are guides related to the United Nations Global Compact entitled, "Building the UN Global Compact Principles into Business: A Practical Integration Guide" and "Raising the Bar – Creating Value with the UN Global Compact," aimed at translating the Compact's principles into day-to-day examples for managers.[79]

BSR provides the following descriptions of various "consensus standards developed and agreed to by coalitions of companies and, in some cases, other stakeholder groups":

> Ethical Trading Initiative (ETI): This UK-based system began as a multi-stakeholder initiative in 1998, involving NGOs, companies, and unions to promote good practices in the use and implementation of codes. Members agree to adhere to a Base Code of conduct and to share their experiences with other ETI members. Participants include The Body Shop, Chiquita International Brands, Debenhams, Marks & Spencer, Pentland Group, Safeway Stores.
> Fair Labor Association (FLA): FLA members agree to adopt a Workplace Code of Conduct and monitoring protocol. This code is applied by companies in the FLA and has served as the basis for codes developed by other, non-participating companies. Participants include adidas, Eddie Bauer, Liz Claiborne, Nike, Nordstrom, Phillips Van Heusen, Polo Ralph Lauren, and Reebok.
> Social Accountability 8000 (SA 8000): Social Accountability International (SAI) has developed a global standard for ethical sourcing, the Social Accountability 8000 (SA 8000). This factory certification system seeks to create an auditable code of conduct that can be applied across various industries. It includes a provision for wages to meet the "basic needs" of workers. Participating companies include Avon, Cutter & Buck, Dole Food, Eileen Fisher, Otto Versand, and Toys R Us.
>
> Worldwide Responsible Apparel Production: Founded by the American Apparel Manufacturers Association, this code of conduct program is geared towards factories directly and provides education, auditing, and certification.[80]

A Business for Social Responsibility news summary reports that a group of retailers, including companies such as Gap Inc., H&M Hennes & Mauritz AB, Industria de Diseña Textil, SA, John Cotton Group Ltd., Karstadt Quelle AG, Levi Strauss & Co., Littlewood Ltd., Marks & Spencer Group plc, NIKE Inc. and Wal-Mart Stores, Inc. have come together to sign an agreement with Bangladesh.[81] This agreement came at a time when Bangladesh feared the loss

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[77] BSR, CODES OF CONDUCT ¶¶ 4-7, *available at* http://www.bsr.org/CSRResources/IssueBriefDetail.cfm?DocumentID=50303 (last visited Sept. 23, 2005).
[78] BSR, BSR AS A GLOBAL RESOURCE ¶ 3, *available at* http://www.bsr.org/Meta/MembershipPartner.cfm (last visited Sept. 23, 2005).
[79] BSR, CSR RESOURCES ¶¶ 14-17, *available at* http://www.bsr.org/CSRResources/index.cfm (last visited Sept. 23, 2005).
[80] BSR, CODES OF CONDUCT ¶¶ 24-27, *available at* http://www.bsr.org/CSRResources/IssueBriefDetail.cfm?DocumentID=50303 (last visited Sept. 23, 2005).
[81] BSR NEWS MONITOR: SUMMARY OF ARTICLE IN *ETHICAL PERFORMANCE*, RETAILERS STRIKE DEAL WITH BANGLADESH OVER LABOR CONDITIONS (Sept. 1, 2005), *available at* http://www.bsr.org/CSRResources/News/News.cfm?DocumentID=51244 (last visited Sept. 23, 2005).

of jobs due to the termination of the U.S. textile quota system.[82] The agreement between the retail companies and Bangladesh ensured that the companies would not pull out of the country on the condition that labor rights there improve.[83] The mutually-beneficial arrangement is intended to proceed in the following way:

> To ensure success, the Bangladeshi government has crated a National Forum on Social Compliance charged with developing a national strategy to improve the management skills of factory supervisors, raise awareness and train managers and staff on workplace rights. The Forum will also establish procedures for conflict resolution in factories and standardize health and safety guidelines. The retailers will monitor improvements through factory audits and expect to see improvements in productivity and quality as well as a reduction in their own reputational risk as a result of the effort.[84]

The premise of this arrangement is certainly not new – the protection of labor rights in factories which source to American companies bolsters the image of said companies. This particular group of companies hopes to make similar agreements with Sri Lanka and Lesotho in the near future.[85]

Fair Labor Association

The Fair Labor Association (FLA) is a "non-profit organization combining the efforts of industry, non-governmental organizations (NGOs), colleges and universities to promote adherence to international labor standards and improve working conditions worldwide."[86] Sixteen companies participate in the rigorous Code of Conduct implementation, monitoring, and remediation under the FLA.[87] A number of collegiate licenses have also joined the FLA.[88] FLA participating companies are committed to ensuring that the factories that manufacture the companies' products adhere to the FLA Code of Conduct.[89] Companies must submit to both internal and independent external monitoring of the supplier facilities. Internal monitoring includes the following:

> Inform workers of their rights under the Code – orally, by posting the Code standards in facilities, and through other activities to educate workers; [e]stablish relationships with local labor and human rights NGOs and unions to assist in

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[82] BSR News Monitor: Summary of Article in *Ethical Performance*, Retailers Strike Deal with Bangladesh over Labor Conditions (Sept. 1, 2005), *available at* http://www.bsr.org/CSRResources/News/News.cfm?DocumentID=51244 (last visited Sept. 23, 2005).

[83] BSR News Monitor: Summary of Article in *Ethical Performance*, Retailers Strike Deal with Bangladesh over Labor Conditions (Sept. 1, 2005), *available at* http://www.bsr.org/CSRResources/News/News.cfm?DocumentID=51244 (last visited Sept. 23, 2005).

[84] BSR News Monitor: Summary of Article in *Ethical Performance*, Retailers Strike Deal with Bangladesh over Labor Conditions (Sept. 1, 2005), *available at* http://www.bsr.org/CSRResources/News/News.cfm?DocumentID=51244 (last visited Sept. 23, 2005).

[85] BSR News Monitor: Summary of Article in *Ethical Performance*, Retailers Strike Deal with Bangladesh over Labor Conditions (Sept. 1, 2005), *available at* http://www.bsr.org/CSRResources/News/News.cfm?DocumentID=51244 (last visited Sept. 23, 2005).

[86] Fair Labor Association, Welcome ¶ 1, *available at* http://www.fairlabor.org (last visited Sept. 23, 2005). [The Fair Labor Association's institutional website will hereinafter be referred to as "FLA"].

[87] Adidas-Salomon; Asics; Eddie Bauer; GEAR for Sports; Gildan Activewear; Liz Claiborne, Inc.; New Era Cap Company, Inc.; Nike; Nordstrom; Outdoor Cap; Patagonia; Phillips-Van Heusen; Puma; Reebok; Top of the World; Zephyr Graf-X, Inc. FLA, Participating Companies in the Fair Labor Association, *available at* http://www.fairlabor.org/all/companies/index.html (last visited Sept. 23, 2005).

[88] *See* Appendix x.

[89] FLA, The FLA Process ¶ 3, *available at* http://www.fairlabor.org/all/transparency/process.html (last visited Sept. 23, 2005).

> identifying situations of noncompliance with the Code; [t]rain company monitors about the Code standards, applicable local and international laws, and effective monitoring techniques; [p]rovide workers with a confidential reporting channel with which to report noncompliance to the company; [c]onduct periodic announced and unannounced factory visits, worker and management interviews, and audits of wage, hour and other employee records; and [e]stablish means of remediation to correct and prevent noncompliance with the Code standards.[90]

Accredited external monitors are charged with the responsibility of conducting announced and unannounced visits to participating FLA facilities.[91] "In conducting an FLA monitoring visit, the Monitor is responsible for investigating the extent to which a factory is in compliance with the FLA Code, which includes the Code benchmarks and any applicable national or local law pertaining to the Code."[92] Monitors assess facility conditions through information gathered from labor NGOs and unions, confidential work interviews, interviews with management, interviews with union representatives where applicable, a visual inspection of the facility, and a review of records.[93] The Monitors deliver an immediate evaluation to the factory management. More thoroughly and detailed reporting instruments are delivered to the participating company and FLA soon after the audit, and areas of FLA Code of Conduct noncompliance and remedial actions are documented on Tracking Charts.[94] For instance, if a Monitor found that exits were not clearly marked, in violation of national health and safety laws and FLA Code of Conduct health and safety standards, such a finding would be incorporated into the Monitor's report along with recommended corrective action. If the facility addressed the finding by installing clear exit signs over appropriate doorways, a picture might be taken of this improvement and sent to the Monitor. The Monitor would update all corrective actions on the Tracking Chart and thereby evaluate the progress of a particular factory.

To capture some of the issues that might arise out of the use of the FLA's Workplace Code of Conduct, one may look at the section on Hours of Work within the Code. It states, Except in extraordinary business circumstances, employees shall (i) not be required to work more than the lesser of (a) 48 hours per week and 12 hours overtime or (b) the limits on regular and overtime hours allowed by the law of the country of manufacture or, where the laws of such country do not limit the hours of work [in the United States, for example], the regular work week in such country plus 12 hours overtime and (ii) be entitled to at least one day off in every seven day period.[95]

Questions develop as to whether a situation rises to the level of an "extraordinary business circumstance" or whether, on the other hand, there is a regular practice of excessive overtime work for employees. Another example of the sorts of situations Monitors are confronted with is

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[90] FLA, THE FLA PROCESS ¶ 5, *available at* http://www.fairlabor.org/all/transparency/process.html (last visited Sept. 23, 2005).

[91] FLA, THE FLA PROCESS ¶ 6, *available at* http://www.fairlabor.org/all/transparency/process.html (last visited Sept. 23, 2005). Independent and impartial external monitors may be "local civil society organizations, research institutions, professional auditing and compliance firms, [or] investigative agencies." FLA, MONITORING ¶ 6, *available at* http://www.fairlabor.org/all/monitor/accredproc.html "Monitoring" (last visited Sept. 23, 2005).

[92] FLA, THE FLA PROCESS ¶ 8, *available at* http://www.fairlabor.org/all/transparency/process.html (last visited Sept. 23, 2005).

[93] FLA, THE FLA PROCESS ¶ 9, *available at* http://www.fairlabor.org/all/transparency/process.html (last visited Sept. 23, 2005).

[94] FLA, THE FLA PROCESS ¶ 10, *available at* http://www.fairlabor.org/all/transparency/process.html (last visited Sept. 23, 2005).

[95] FLA, WORKPLACE CODE OF CONDUCT ¶ 8, *available at* http://www.fairlabor.org/all/code/index.html (last visited Sept. 23, 2005).

where disciplinary action is used as a threat to coerce employees to "volunteer" for overtime work. In each case where there is a risk noncompliance, Monitors' notes are carefully recorded and his/her observations are verified through multiple sources. If an employee complains that the disciplinary system obliges him/her to work overtime hours, then the Monitor would likely evaluate time records and pay careful attention to the wording of the disciplinary policy in the employee handbook in order to verify and corroborate the employee's testimony.

An important question is whether subcontractors who have been held in breach of the FLA Code of Conduct have been excluded as suppliers. The FLA's policy is that companies should not pull production from factories that are found to be noncompliant with the standards; instead, companies are obliged to work with factories to improve conditions and protect the rights of the workers responsible for manufacturing their products. In cases where the factory is unwilling or unable to meet the requirements of the FLA Workplace Code of Conduct, the FLA recognizes that the company reserves the right to terminate its business relationship with the factory.[96]

The FLA emphasizes the transparency so as to encourage "NGOs, Consumer, labor and human rights groups, colleges and universities, students, workers and the public at large . . . to see the results of truly independent evaluations of the ethical conduct of brand-name companies."[97]

NGOs are involved at various levels within the FLA. The FLA NGO Network seeks to inform groups on FLA developments.[98] Local NGOs and unions have a number of different roles to play in the implementation and monitoring of labor conditions: 1) monitoring facility conditions; 2) training on preventative and remedial action; 3) reporting complaints and violations of the FLA Code of Conduct; 4) verifying, through worker interviews, factory inspection and document review, that improvements have been made in the facilities; 5) consulting with external monitors about local conditions; and 6) providing legal aid and counsel to workers.[99]

Joint Initiative on Corporate Accountability and Workers' Rights

A variety of NGOs (religious, human rights-related, and others) have corporate responsibility guidelines.

> The Interfaith Center for Corporate Responsibility (ICCR), a coalition for religious investors that assists shareholders in advancing resolutions on global labor issues, has developed a set of "Principles for Global Corporate Responsibility" recommending standards on human rights, labor rights, the environment and sustainable community development. . . .
> The Workers Rights Consortium (WRC) grew out of a U.S. university campus movement to force licensed university products to be made in accordance with a code of conduct. The WRC's code of conduct is noted for having both the typical provisions of most codes, as well as special language on women's rights in particular.

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[96] FLA, THE FLA PROCESS ¶ 15, *available at* http://www.fairlabor.org/all/transparency/process.html (last visited Sept. 23, 2005).
[97] FLA, THE FLA PROCESS ¶ 2, *available at* http://www.fairlabor.org/all/transparency/index..html (last visited Sept. 23, 2005).
[98] FLA, NGOS IN THE FLA ¶ 4, *available at* http://www.fairlabor.org/all/ngo/index.html (last visited Sept. 23, 2005).
[99] FLA, NGOS IN THE FLA ¶ 7-14, *available at* http://www.fairlabor.org/all/ngo/index.html (last visited Sept. 23, 2005).

> The Netherlands-based Clean Clothes Campaign, a consortium of European trade unions, human rights groups and development organizations, has created a model code of conduct for the apparel, footwear, and accessories industries. The code requires the payment of a living wage, and includes provisions on freedom of association.[100]

The FLA collaborates with some of the above groups in the Joint Initiative on Corporate Accountability and Workers' Rights (Jo-In). The FLA, the Clean Clothes Campaign,[101] the Ethical Trading Initiative,[102] the Fair Wear Foundation,[103] Social Accountability International (SAI),[104] and the Worker Rights Consortium[105] are all part of Jo-In. The Jo-In, headquartered in the United Kingdom and funded by the European Commission and the United States Department of State,[106] was formed in response to the frustrating multiplicity of codes of conduct. There was a felt need for cooperation and a cohesive strategy to make the use of codes of conduct as effective as possible. Among the six organizations that form Jo-In, there is a shared belief that "codes of conduct can only make an effective and credible contribution to this effort [of improving working conditions in global supply chain], if their implementation involves a broad range of stakeholders, including governments, trade unions, employers' associations and civil society."[107] The organizations also share three primary efforts: "to maximize the effectiveness and impact of multi-stakeholder approaches to the implementation and enforcement of codes of conduct, by ensuring that resources are directed as efficiently as possible to improving the lives of workers and their families; to explore possibilities for closer co-operation between the organizations; [and] to share learning on the manner in which voluntary codes of labour practice contribute to better workplace conditions in global supply chains."[108]

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[100] BSR, Codes of Conduct ¶¶ 29-31, *available at* http://www.bsr.org/CSRResources/IssueBriefDetail.cfm?DocumentID=50303 (last visited Sept. 23, 2005).

[101] The Clean Clothes Campaign is a European-based effort to raise awareness and mobilize consumers, pressure companies to take responsibility, promote solidarity actions, lobby and take legal action. Joint Initiative on Corporate Accountability and Workers' Rights, Clean Clothes Campaign, *available at* http://www.jo-in.org/pub/partic-ccc.shtml (last visited Sept. 23, 2005). [The Joint Initiative on Corporate Accountability and Workers' Rights' institutional website will hereinafter be referred to as "Jo-In"]. The Clean Clothes Campaign website is available at: www.cleanclothes.org.

[102] The Ethical Trading Initiative is "an alliance of companies, non-governmental organizations . . . and trade union organizations working together to identity and promote good practice in the implementation of codes of labour practice." Jo-In, Ethical Trading Initiative, *available at* http://www.jo-in.org/pub/partic-eti.shtml (last visited Sept. 23, 2005). "[M]ember companies are committed to ensuring that the ETI Code is implemented in their supply chains, and to measuring and reporting to ETI on progress in doing so." *Id.* ETI also "promotes and shares good practice through seminars, publications, the ETI website [www.ethicaltrade.org], international conferences, an on-line workbook and training programmes." *Id.*

[103] The Fair Wear Foundation is an "initiative of business associations in the garment sector, trade unions, and non-governmental organizations." Jo-In, Fair Wear Foundation, *available at* http://www.jo-in.org/pub/partic-fwf.shtml (last visited Sept. 23, 2005).

[104] SAI "works to improve workplaces through the implementation of the international workplace standard, SA8000, the associated Guidance and verification system, and training of managers, auditors and workers." Jo-In, Social Accountability International, *available at* http://www.jo-in.org/pub/partic-sai.shtml (last visited Sept. 23, 2005). SAI conducts audits and accredits qualifying organizations. *Id.* The SAI website is available at: www.cepaa.org.

[105] The Workers Rights Consortium is a "non-profit organization created by college and university administrations, students and labor rights experts." Jo-In, Workers Rights Consortium, *available at* http://www.jo-in.org/pub/partic-wrc.shtml (last visited Sept. 23, 2005). The Workers Rights Consortium "assists in the enforcement of manufacturing Codes of Conduct adopted by colleges and universities to ensure factories producing goods bearing their names respect the basic rights of workers." *Id.* The Workers Rights Consortium website is available at: www.workersrights.org.

[106] Jo-In, About Us ¶ 6, *available at* http://www.jo-in.org/pub/about.shtml (last visited Sept. 23, 2005).

[107] Jo-In, About Us ¶ 2, *available at* http://www.jo-in.org/pub/about.shtml (last visited Sept. 23, 2005).

[108] Jo-In, About Us ¶¶ 3-5, *available at* http://www.jo-in.org/pub/about.shtml (last visited Sept. 23, 2005).

A Draft Code of Labour Practice (Draft Code), available through Jo-In's website,[109] highlights the shared commitments as well as the divergent practices of the six organizations. This Draft Code opens by establishing minimum standards for which the companies assume responsibility, including numerous International Labour Organization Conventions as well as the Universal Declaration of Human Rights, the United Nations Convention on the Rights of the Child and the United Nations Convention to Eliminate All Forms of Discrimination Against Women.[110] In the document's purpose statement, the Jo-In drafters establish the aims, aspirations and limitations:

> The provisions in this Code of Labour Practice constitute minimum standards only. One of the purposes of this Code is to promote strong local governance of the employment relationship at the point of production in accordance with international labour standards, the relevant national legislation and collective agreements governing production facilities in the garments sector.
>
> This Code is a private mechanism for regulating labour practices and promoting respect for international labour standards in supply chains in the garment sector. It is not a substitute for international intergovernmental cooperation or international labour standards. Nor is it a substitute for national law and the enforcement thereof or for systems of industrial relations (involving trade unions and collective bargaining). Where national and other applicable law and the workplace standards in this Code address the same issue, the provision that is the highest workplace standard will apply.
>
> Notwithstanding the above, the provisions in this Code assume that companies in the supply chain comply with the law and that work is performed in the context of a legally recognized employment relationship, or by persons who are legally recognized as self-employed. Where this is not the case, measures should be taken to bring the employment relationship within the legal and institutional framework since this Code should in no way be regarded as a substitute for, or replacement of, national law and national institutions.[111]

Another noteworthy emphasis of this Draft Code is on companies' entire supply chains, including direct employees, suppliers, licensees, contractors, subcontractors, and independent subcontractors; "It encompasses all workers in the supply chain regardless of their employment status."[112] In the evolution of codes of conduct, there has been growing awareness that the rights available under the codes must extend to and protect workers in all aspects of production. The rights addressed in the Draft Code relate to freedom of association, the right to collectively

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[109] JO-IN, DRAFT JO-IN CODE OF LABOUR PRACTICE, *available at* http://www.jo-in.org/ (last visited Sept. 23, 2005).

[110] JO-IN, DRAFT JO-IN CODE OF LABOUR PRACTICE 1-2, *available at* http://www.jo-in.org/ (last visited Sept. 23, 2005). Note that the OECD Guidelines for Multinational Enterprises, the ILO Declaration on Fundamental Principles and Rights at Work, the ILO Tripartite Declaration of Principles on Multinational Enterprises and Social Policy, and the United Nations' Global Compact are not mentioned in the Draft Code.

[111] JO-IN, DRAFT JO-IN CODE OF LABOUR PRACTICE 2, *available at* http://www.jo-in.org/ (last visited Sept. 23, 2005).

[112] JO-IN, DRAFT JO-IN CODE OF LABOUR PRACTICE 2, *available at* http://www.jo-in.org/ (last visited Sept. 23, 2005). The FLA's posture is similar: "Any Company that determines to adopt the Workplace Code of Conduct also shall require its licensees and contractors and, in the case of a retailer, its suppliers to comply with applicable local laws and with this Code in accordance with the Principles of Monitoring and to apply the higher standard in cases of differences or conflicts." FLA, WORKPLACE CODE OF CONDUCT ¶ 10, *available at* http://www.fairlabor.org/all/code/index.html (last visited Sept. 23, 2005).

bargain, prohibition of forced labor, prohibition of child labor, non-discrimination, wages, working hours, health and safety conditions, the employment relationship, and abuse.[113]

The Draft Code calls for implementation of several different levels – "commitment to the Code and communication thereof, a management system, international monitoring, worker education and training, independent verifications, a complaints mechanism and public reporting."[114] Each of the six different companies, however, has included its own position concerning and processes for implementation, monitoring and verification in the annexes that follow the Draft Code.[115] So, though the goal of Jo-In is to facilitate cooperation and communication among the various groups, there is still a good deal of flexibility in the way that the codes of conduct principles are implemented and enforced.

[113] JO-IN, DRAFT JO-IN CODE OF LABOUR PRACTICE 3-7, *available at* http://www.jo-in.org/ (last visited Sept. 23, 2005).
[114] JO-IN, DRAFT JO-IN CODE OF LABOUR PRACTICE 7, *available at* http://www.jo-in.org/ (last visited Sept. 23, 2005).
[115] JO-IN, DRAFT JO-IN CODE OF LABOUR PRACTICE 6-18, *available at* http://www.jo-in.org/ (last visited Sept. 23, 2005).

APPENDIX

CAFTA CHAPTER 16

Article 16.1: Statement of Shared Commitment

1. The Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration).1 Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law.
2. 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 shall 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.

Article 16.2: Enforcement of Labor Laws

1.
(a) 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, after the date of entry into force of this Agreement.
(b) Each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.
2. The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in Article 16.8 as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.
The Parties recall that paragraph 5 of the ILO Declaration states that labor standards should not be used for protectionist trade purposes.
3. Nothing in this Chapter shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another Party.

Article 16.3: Procedural Guarantees and Public Awareness

1. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to tribunals for the enforcement of the Party's labor laws. Such tribunals may include administrative, quasi-judicial, judicial, or labor tribunals, as provided in the Party's domestic law.
2. Each Party shall ensure that proceedings before such tribunals for the enforcement of its labor laws are fair, equitable, and transparent and, to this end, each Party shall ensure that:
   (a) such proceedings comply with due process of law;
   (b) any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires;

(c) the parties to such proceedings are entitled to support or defend their respective positions, including by presenting information or evidence;

and (d) such proceedings do not entail unreasonable charges or time limits or unwarranted delays.

3. Each Party shall provide that final decisions on the merits of the case in such proceedings are:

(a) in writing and state the reasons on which the decisions are based;

(b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public;

and (c) based on information or evidence in respect of which the parties were offered the opportunity to be heard.

4. Each Party shall provide, as appropriate, that parties to such proceedings have the right to seek review and, where warranted, correction of final decisions issued in such proceedings.

5. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.

6. Each Party shall provide that the parties to such proceedings may seek remedies to ensure the enforcement of their rights under its labor laws. Such remedies may include measures such as orders, fines, penalties, or temporary workplace closures, as provided in the Party's laws.

7. Each Party shall promote public awareness of its labor laws, including by:

(a) ensuring the availability of public information related to its labor laws and enforcement and compliance procedures;

and (b) encouraging education of the public regarding its labor laws.

8. For greater certainty, decisions or pending decisions by each Party's administrative, quasi-judicial, judicial, or labor tribunals, as well as related proceedings, shall not be subject to revision or be reopened under the provisions of this Chapter.

Article 16.4: Institutional Arrangements

1. The Parties hereby establish a Labor Affairs Council, comprising cabinet-level or equivalent representatives of the Parties, or their designees.

2. The Council shall meet within the first year after the date of entry into force of this Agreement and thereafter as often as it considers necessary to oversee the implementation of and review progress under this Chapter, including the activities of the Labor Cooperation and Capacity Building Mechanism established under Article 16.5, and to pursue the labor objectives of this Agreement. Unless the Parties otherwise agree, each meeting of the Council shall include a session at which members of the Council have an opportunity to meet with the public to discuss matters relating to the implementation of this Chapter.

3. Each Party shall designate an office within its labor ministry that shall serve as a contact point with the other Parties, and with the public, for purposes of carrying out the work of the Council, including coordination of the Labor Cooperation and Capacity Building Mechanism.

Each Party's contact point shall provide for the submission, receipt, and consideration of communications from persons of a Party on matters related to the provisions of this Chapter, and shall make such communications available to the other Parties and, as appropriate, to the public.

Each Party shall review such communications, as appropriate, in accordance with domestic procedures. The Council shall develop general guidelines for considering such communications.

4. Each Party may convene a new, or consult an existing, national labor advisory or consultative committee, comprising members of its public, including representatives of its labor and business organizations, to provide views on any issues related to this Chapter.

5. All decisions of the Council shall be taken by consensus. All decisions of the Council shall be made public, unless otherwise provided in this Agreement, or unless the Council otherwise decides.

6. The Council may prepare reports on matters related to the implementation of this Chapter, and shall make such reports public.

Article 16.5: Labor Cooperation and Capacity Building Mechanism

1. Recognizing that cooperation on labor issues can play an important role in advancing development in the territory of the Parties and in providing opportunities to improve labor standards, and to further advance common commitments regarding labor matters, including the principles embodied in the ILO Declaration and ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) (ILO Convention 182), the Parties hereby establish a Labor Cooperation and Capacity Building Mechanism, as set out in Annex 16.5. The Mechanism shall operate in a manner that respects each Party's law and sovereignty.
2. While endeavoring to strengthen each Party's institutional capacity to fulfill the common goals of the Agreement, the Parties shall strive to ensure that the objectives of the Labor Cooperation and Capacity Building Mechanism, and the activities undertaken through that Mechanism:
   (a) are consistent with each Party's national programs, development strategies, and priorities;
   (b) provide opportunities for public participation in the development and implementation of such objectives and activities;
   (c) take into account each Party's economy, culture, and legal system.

Article 16.6: Cooperative Labor Consultations

1. A Party may request consultations with another Party regarding any matter arising under this Chapter by delivering a written request to the contact point that the other Party has designated under Article 16.4.3.
2. The consultations shall begin promptly after delivery of the request. The request shall contain information that is specific and sufficient to enable the Party receiving the request to respond.
3. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter, taking into account opportunities for cooperation relating to the matter, 16-5 and may seek advice or assistance from any person or body they deem appropriate in order to fully examine the matter at issue.
4. If the consulting Parties fail to resolve the matter pursuant to paragraph 3, a consulting Party may request that the Council be convened to consider the matter by delivering a written request to the contact point of each of the other Parties.2
5. The Council shall promptly convene and shall endeavor to resolve the matter, including, where appropriate, by consulting outside experts and having recourse to such procedures as good offices, conciliation, or mediation.
6. If the matter concerns whether a Party is conforming to its obligations under Article 16.2.1(a), and the consulting Parties have failed to resolve the matter within 60 days of a request under paragraph 1, the complaining Party may request consultations under Article 20.4 (Consultations) or a meeting of the Commission under Article 20.5 (Commission – Good Offices, Conciliation, and Mediation) and, as provided in Chapter Twenty (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter. The Council may, as appropriate, provide information to the Commission on consultations held on the matter.
7. No Party may have recourse to dispute settlement under this Agreement for any matter arising under any provision of this Chapter other than Article 16.2.1(a).
8. No Party may have recourse to dispute settlement under this Agreement for a matter arising under Article 16.2.1(a) without first pursuing resolution of the matter in accordance with this Article.
9. In cases where the consulting Parties agree that a matter arising under this Chapter would be more appropriately addressed under another agreement to which the consulting Parties are

party, they shall refer the matter for appropriate action in accordance with that agreement.

Article 16.7: Labor Roster

1. The Parties shall establish within six months after the date of entry into force of this Agreement and maintain a roster of up to 28 individuals who are willing and able to serve as panelists in disputes arising under Article 16.2.1(a). Unless the Parties otherwise agree, up to three members of the roster shall be nationals of each Party, and up to seven members of the roster shall be selected from among individuals who are not nationals of any Party. Labor roster members shall be appointed by consensus, and may be reappointed. Once established, a roster shall remain in effect for a minimum of three years, and shall remain in effect thereafter until the Parties constitute a new roster. The Parties may appoint a replacement where a roster member is no longer available to serve.

2 For purposes of paragraphs 4, 5, and 6, the Council shall consist of the cabinet-level representatives of the consulting Parties or their high-level designees.

2. Labor roster members shall:

(a) have expertise or experience in labor law or its enforcement, international trade, or the resolution of disputes arising under international agreements;
(b) be chosen strictly on the basis of objectivity, reliability, and sound judgment;
(c) be independent of, and not affiliated with or take instructions from, any Party;
(d) and comply with a code of conduct to be established by the Commission.

3. Where a Party claims that a dispute arises under Article 16.2.1(a), Article 20.9 (Panel Selection) shall apply, except that the panel shall be composed entirely of panelists meeting the qualifications in paragraph 2.

Article 16.8: Definitions

For purposes of this Chapter: labor laws means a Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:

(a) the right of association;
(b) the right to organize and bargain collectively;
(c) a prohibition on the use of any form of forced or compulsory labor;
(d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor;
(e) and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

For greater certainty, the setting of standards and levels in respect of minimum wages by each Party shall not be subject to obligations under this Chapter. Each Party's obligations under this Chapter pertain to enforcing the level of the general minimum wage established by that Party. statutes or regulations means:

(a) for Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua, laws of its legislative body or regulations promulgated pursuant to an act of its legislative body that are enforceable by action of the executive body;
(b) and for the United States, acts of Congress or regulations promulgated pursuant to an act of Congress that are enforceable by action of the federal government.

Annex 16.5

Labor Cooperation and Capacity Building Mechanism

Organization and Principal Functions

1. The Labor Affairs Council working through each Party's contact point shall coordinate the activities of the Labor Cooperation and Capacity Building Mechanism. The contact points shall meet within six months after the date of entry into force of this Agreement and thereafter as

often as they consider necessary.
2. The contact points, together with representatives of other appropriate agencies and ministries, shall cooperate to:

(a) establish priorities, with particular emphasis on those subjects identified in paragraph 3 of this Annex, for cooperation and capacity building activities on labor issues;
(b) develop specific cooperative and capacity building activities in accordance with such priorities;
(c) exchange information regarding each Party's labor laws and practices, including best practices, as well as ways to strengthen them;
(d) and seek support, as appropriate, from international organizations such as the

International Labor Organization, the Inter-American Development Bank, the World Bank, and the Organization of American States, to advance common commitments regarding labor matters. Cooperation and Capacity Building Priorities
3. The Mechanism may initiate bilateral or regional cooperative activities on labor issues, which may include, but need not be limited to:

(a) fundamental rights and their effective application: legislation and practice related to the core elements of the ILO Declaration (freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labor, the effective abolition of child labor, and the elimination of discrimination in respect of employment and occupation);
(b) worst forms of child labor: legislation and practice related to compliance with ILO Convention 182;
(c) labor administration: institutional capacity of labor administrations and tribunals, especially training and professionalization of human resources, including career civil service;
(d) labor inspectorates and inspection systems: methods and training to improve the level and efficiency of labor law enforcement, strengthen labor inspection systems, and help ensure compliance with labor laws;
(e) alternative dispute resolution: initiatives aimed at establishing alternative dispute resolution mechanisms for labor disputes;
(f) labor relations: forms of cooperation and dispute resolution to ensure productive labor relations among workers, employers, and governments;
(g) working conditions: mechanisms for supervising compliance with statutes and regulations pertaining to hours of work, minimum wages and overtime, occupational safety and health, and employment conditions;
(h) migrant workers: dissemination of information regarding labor rights of migrant workers in each Party's territory;
(i) social assistance programs: human resource development and employee training, among other programs;
(j) labor statistics: development of methods for the Parties to generate comparable labor market statistics in a timely manner;
(k) employment opportunities: promotion of new employment opportunities and workforce modernization;
(l) gender: gender issues, including the elimination of discrimination in respect of employment and occupation; and
(m) technical issues: programs, methodologies, and experiences regarding productivity improvement, encouragement of best labor practices, and the effective use of technologies, including those that are Internet-based. Implementation of Cooperative Activities

4. Pursuant to the Mechanism, the Parties may cooperate on labor issues using any means they deem appropriate, including, but not limited to:

(a) technical assistance programs, including by providing human, technical, and material resources, as appropriate;
(b) exchange of official delegations, professionals, and specialists, including through study visits and other technical exchanges;
(c) exchange of information on standards, regulations, and procedures, and best practices, including pertinent publications and monographs;
(d) joint conferences, seminars, workshops, meetings, training sessions, and outreach and education programs;
(e) collaborative projects or demonstrations; and
(f) joint research projects, studies, and reports, including by engaging independent specialists with recognized expertise.

Public Participation

5. In identifying areas for labor cooperation and capacity building, and in carrying out cooperative activities, each Party shall consider the views of its worker and employer representatives, as well as those of other members of the public.