International Economic Law Clinic

Social Clauses in Trade Agreements:
Implications and Action Points for the Private Sector in Developing Countries

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1. Table of Abbreviations

Abbreviation	Description
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
CP-TPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CTSD	Committee on Trade and Sustainable Development
CUSMA	Canada-US-Mexico Agreement
DAG	Domestic Advisory Group
FPRW	Fundamental Principles and Rights at Work
FTA	Free Trade Agreement
ILO	International Labour Organization
RRLM	Rapid Response Labour Mechanism
IOE	International Organization of Employers
NAAEC	North American Agreement on Environmental Cooperation
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
T-MEC	Tratado entre México, Estados Unidos y Canadá
USMCA	United States-Mexico-Canada Agreement
WTO	World Trade Organization

2. Executive Summary

Since the 1990s, more free trade agreements have come to include social clauses, which make reference to domestic and international labour standards. As this international legal web continues to grow, so too will the questions and concerns from employers and businesses. This Tradelab report, for the International Organisation of Employers, provides practical guidance for those employers and businesses. It does so by taking the diverse array of actors, the tensions within, and the opportunities set forth by free trade agreements and elaborating upon them using three case studies.

Firstly, the report sets the stage by examining the types of social clauses that currently exist. The report examines the various functions that social clauses serve under free trade agreements and how these provisions can act to supplement the ILO Supervisory

Mechanism for the implementation of labour standards. The report provides an overview of social clauses through time and the various commitments to labour rights that were made from 1919 with the Covenant of the League of Nations, to the 1996 Ministerial Declaration in Singapore that supported the use of trade to promote labour standards.

The report finds that states entering into free trade agreements will conventionally commit to labour standards in one of two ways. They may commit to uphold and ratify ILO fundamental principles and rights, or they may commit to implement (as well as not waiver from) their own national labour laws. In many cases, states commit to both. Understanding commitments under FTAs can help businesses understand their obligations in terms of compliance, and their avenues for advocacy and participation during negotiation. Social clauses can also have monitoring and cooperation provisions, where countries help each other, that can be used to the advantage of businesses. This includes provisions for technical assistance and training, as well as the creation of mechanisms for tripartite stakeholder participation. Finally, labour provisions can include dispute settlement provisions as well as the possibility of sanctions, which can have different implications for businesses based on the specificities of the trade agreement concerned.

Then, the report moves on to the following three case studies regarding the implementation of labour standards at the domestic level. When examining the CAFTA-DR, the EU-Korea FTA, and the USMCA, the report especially focuses on the effects that social clauses may have on the developing country parties, and the private sector in particular.

A historic moment came in the form of the 2011-2017 labour dispute between Guatemala and the United States because it was the first time that labour violations were invoked in a free trade agreement and brought before an arbitration panel. Guatemala was accused by the United States mainly for failing to enforce its own domestic laws. The Panel used two specific thresholds to measure the Guatemalan Government's alleged violations. It ultimately found that Guatemala was not in breach of the CAFTA-DR because Guatemala’s alleged violations were not recurring violations and they did not affect trade. Following on this decision, the report analyses how the government of Guatemala was reformed since the panel decision, especially in respect to the level of efficiency and enforcement in its domestic legal system.

More recently, the introduction of the USMCA marked a milestone in the process of legal enforcement mechanisms of labour clauses. The enforcement tool, referred to as the 'facility-specific rapid response labour mechanism', marked a shift from conventional state-to-state enforcement tools under free trade agreements. The rapid response mechanism can hold individual firms accountable for violating specific labour standards, whereas the older-generation free trade agreements only can hold governments accountable for not upholding their laws. Entering into force in 2020, this mechanism is the most enforceable tool for labour violations ever agreed to by the United States. Despite the challenges presented by the USMCA, this report shows how the FTA can be used to the advantage of employers - focusing specifically on Mexican employers - and how it can create avenues for closer collaboration between governments and employers.

In contrast to the United States, the European Union uses a cooperation-based model for holding its free trade partners accountable to their labour standards. In 2020, when this report was being written, an EU labour complaint under the EU-Korea FTA was being viewed by a panel of experts. The dispute is based on South Korea's alleged failure to make sustained efforts to ratify the ILO's fundamental conventions, specifically, Conventions No. 87 and 98 concerning freedom of association, and Conventions No. 29 and 105 concerning forced labour.

The final chapter of this report elaborates upon lessons learned from the private sectors of Guatemala, Mexico, and Korea when they were navigating through the economic and social effects of their respective situations. Furthermore, this chapter provides best practices and recommendations. The list of concrete action points was consolidated from interviews conducted with various developing country representatives for businesses and employers.

Our key recommendations in this section were as follows:

1. ***Active engagement between employers and its respective employer organization ensures that the employer and business perspective is given substantial formal representation.***
2. ***Employers and employer organizations should apply and participate within domestic advisory groups (DAG) or other civil society mechanisms***
3. ***Businesses are encouraged to refer to fundamental ILO conventions in their code of practice and increase awareness of their practices in line with ILO fundamental conventions.***

4. ***Employers and employer organizations must use their avenues to formally influence the process of negotiating and drafting free trade agreements.***
5. ***Employer organizations must request opportunities from the IOE for 'horizontal' cooperation between employers of both developed and developing countries.***
6. ***Employer organizations must request and make full use of their tripartite schemes, guaranteed by the ILO and by respective free trade agreements.***

These examples can represent wider lessons for how employers may build capacity and ensure compliance in an efficient way. With this practical guidance regarding labour standards in free trade agreements, employers may be able to continue to fulfil the vision of the IOE: to promote free enterprise that is fair and beneficial to both business and society.

3. Introduction

When the President of Mexico approached the Prime Minister of Canada and the President of the United States for talks of signing a free trade agreement, these heads of state were wading into uncharted territory. Their negotiations materialized into the North American Free Trade Agreement (NAFTA), which was the first time that two developed nations signed a trade agreement with an emerging country. NAFTA substantially eliminated most tariffs across the continent. Although there was a general consensus in Mexico in favour of the pact, it received substantial opposition from the United States and Canada. Some opponents feared domestic job losses in industries exposed to trade competition. Others feared that the agreement would spark a race to the bottom regarding social regulations. Thus, the many voices within the three countries reached a compromise. Along with the ratification of NAFTA in 1993 came the signing of two side-agreements, the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC). Although these bodies relied largely on non-binding cooperation and dialogue to uphold their labour and environmental principles, they represented a historic shift in global governance. These social obligations no longer existed under the exclusive scope of the national governments. However. this raised new compliance concerns for developing countries.

Imagine an apparel manufacturer Vestique who runs a small business in the developing country Progressistan. Vestique wishes to expand its trade internationally, and sell its products to developed country Helveticland. Since Progressistan and Helveticland have a bilateral free trade agreement, Vestique believes they are well-positioned to conduct their business in Helveticland. While Vestique itself is currently in compliance with local labour regulations, Vestique discovers that there is an ongoing trade dispute between Progressistan and Helveticland. Helveticland has invoked dispute settlement under the Progressistan-Helveticland trade agreement with regard to the treatment of trade unions in the apparel sector in Progressistan. Vestique is concerned about the future business climate in Helveticland and would like to know how they can participate to address, and overcome the situation.

What are the risks and potential consequences that could arise from this scenario and what can Vestique do

For businesses in developing countries, especially the small and medium ones, the implications of 'social clauses'[1] in trade agreements are increasingly becoming sources of uncertainty when their activities involve international trade. Although there have been academic studies on the topic, as well as some policy recommendations, the business perspective has not been discussed enough. It is critical to consider practical solutions to ensure the full implementation of trade agreements and to ensure trade relations that are beneficial for businesses and society in all countries involved. Thus, this report focuses on that practical perspective: to provide business-focused policy advice to understand, navigate and ensure compliance with any applicable aspects of free trade agreements.

With the proliferation of free trade agreements (FTAs) since 1994, and with the more recent trend of including social clauses in FTAs, adherence by the private sector to social clauses is becoming a prerequisite to engaging in international trade and business. The inclusion of labour standards in trade agreements aims primarily to level the playing field for global competitors and to ensure fair competition, although these also aim at the protection and promotion of human rights and sustainable development through the effective implementation of labour standards. While governments may already have incorporated labour standards in their domestic laws, additional means to monitor their enforcement are created when such obligations are incorporated into a trade agreement. Further, trade agreements might trigger the need to adopt and implement new legislation to effectively implement labour standards, which might have a significant impact on employers and businesses. This report aims at providing practical advice for employers in developing countries represented by the International Organization of Employers (IOE).

This report will provide an overview of social clauses, along with case studies that exemplify the implementation of social clauses at the local level, and give best practice recommendations for businesses to ensure compliance in an effective way. The researched advice is categorized in two: a) how businesses can adapt to, and take advantage of the presence of labour clauses;

[1] 'Social clauses' in trade agreements can mean different things, depending on context. In the report, the term is used exclusively to refer to labour standard provisions.

and b) how to address the challenges caused when labour clauses are enforced by trading partners.

Chapter 4 details this report's methodology and details some of the constraints that were faced. Chapter 5 provides an overview of social clauses. This chapter details the discourse around social clauses, and a brief history of its origins. It further delves into the different elements that are now included within labour provisions in trade agreements, specifically, the main commitments, the provisions on cooperation, dispute resolution and sanctions. We highlight what implications each of these provisions may have for businesses.

Chapter 6 looks at real life examples of three free trade agreements, signed by developing countries with leading markets like the United States and the European Union, that contain social clauses. The trade agreements we use for our case studies include the European Union-Republic of Korea FTA, the Dominican Republic- Central America Free Trade Agreement (CAFTA-DR) and the United States-Mexico-Canada Agreement (USMCA). We believe these three examples can help businesses in other developing countries understand the impact of social clauses more broadly, as well as the compliance concerns that the clauses may present.

Lastly, Chapter 7 compiles first-hand insights from interviews with employers, employer organizations, negotiators and legal officers regarding the implementation of social clauses. The recommendations provided herein are based on a limited set of interviews that have been conducted with legal practitioners and employers and employer organizations, and they thus are highly contextual. To that extent, these may not be universally applicable to all industries, and regions. It will also highly depend on the capacities of the employer and business organisations to provide technical guidance and advice, and depend on the capacities of the enterprises themselves.

On the basis of the case studies and interviews conducted, the recommendations are made with the purpose of providing support to businesses in developing countries to craft their own corporate strategies. At both the domestic and international level, to whom are employers answerable? How can employers comply with that institution's regulations? How might that affect an employer's supply chain or commerce? How might the wider FTA bring opportunities to employers? This report provides resources that can help private sector actors build their capacity for compliance, avoid undue friction, as well as communicate with relevant governing bodies.

Box 1: The ILO Supervisory Mechanism

The ILO provides a supervisory mechanism by way of which it can ensure the application and promotion of international labour standards. The tripartite organization of the ILO that accounts for the voices of governments, employers and workers might be particularly useful for employers and employer organizations to understand. The ILO supervisory mechanisms are categorised into

Regular system of supervision: Examination of periodic reports submitted by ILO member countries on measures taken to implement ILO conventions is undertaken. Workers' and employers' organisations can send observations on these reports in order to bring their comments to the attention of the supervisory bodies.

Special procedures: representations, complaints, and complaints of violation of freedom of association principles can be submitted by workers' or employer organizations.

4. Methodology

To provide an overview of social clauses, Chapter 5 presents academic research on some existing social clauses and some implementation examples. It also includes some practical perspectives derived from interviews to illustrate how these provisions can impact businesses, and to provide best practice examples for participation that are available for employers.

Chapter 6 contains three cases that may be relevant to the IOE and its members. Each case is substantiated with an online survey of key provisions within the trade agreement, the practical implications of their implementation on the basis of some news reports, and content from interviews that were conducted. These case studies have been selected keeping in mind that a diversity of perspectives would better accommodate the needs of the IOE's diverse members.

Lastly, Chapter 7, identifies some of the specific compliance issues faced in practice. Based on the outcome of the interviews of several IOE members as well as legal practitioners,[2] this report lists best practice examples and recommendations that businesses may choose to undertake to comply with social clauses. In order to present the best possible picture, the report has taken into account as many regional and industry level perspectives as possible. However, since interviews have been conducted with only a few stakeholders, this report's Annex contains a sample survey that may be conducted by the IOE with the rest of its member organizations at a later stage.

[2] The interviews conducted were with the following employer organizations, law firms and individuals:

a) Federation of Kenya Employers (Kenya)
b) Mosquero y Ricci (Guatemala)
c) Asociación De La Industria De Vestuario Y Textiles De Guatemala (VESTEX-Guatemala)
d) Fasken (Canada)
e) Korean Enterprises Federation (Korea)
f) Lawyers representing the state of Guatemala in the US-Guatemala trade dispute
g) A former official of the Office of the US Trade Representative
h) Officials of the International Labour Organization.

While interviews were attempted with Mexican and Vietnamese employer organizations, responses are still awaited from the same.

5. The Implications and Opportunities of Social Clauses and the Foundations of their Negotiations

5.1. Backdrop for social clauses

Why social clauses?

From the perspective of several countries, social clauses within trade agreements can provide strong incentives for nations to improve workplace and labour conditions and create a system of international coherence in the context of labour legislation.[3] The ILO has its own supervisory mechanism (see Box 1)[4], and social clauses under an FTA provide an additional mechanism for ensuring compliance with labour standards.

There are various reasons why labour provisions are incorporated within a trade agreement. Social clauses can be utilized for the following reasons:

a) To ensure a level playing field for fair global competition;[5]
b) To create international coherence in labour standards[6] and to promote the protection of human rights;[7]
c) For some, they are used as a tool to support protectionism where businesses in developing countries may be prevented from accessing markets when labour standards are allegedly violated;[8]
d) To involve social partners, i.e., stakeholders during negotiation and implementation;[9] and
e) To strengthen the capacity of domestic institutions in developing countries to better promote their labour standards.[10]

5.2. Social Clauses through Time

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[3] 'WTO | Understanding the WTO - Labour Standards: Highly Controversial' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm> accessed 16 October 2020.

[4] For more information on the ILO Supervisory Mechanism, refer International Labour Organization, Rules of the Game: An Introduction to the Standards Related Work at the ILO (International Labour Office 2019) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_672549.pdf> accessed 12 November 2020.

[5] Jean-Marc Siroën, 'The Use, Scope and Effectiveness of Labour and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements' (European Commission 2008) Contract VC/2007/0638.

[6] 'WTO | Understanding the WTO - Labour Standards: Highly Controversial' (n 2).

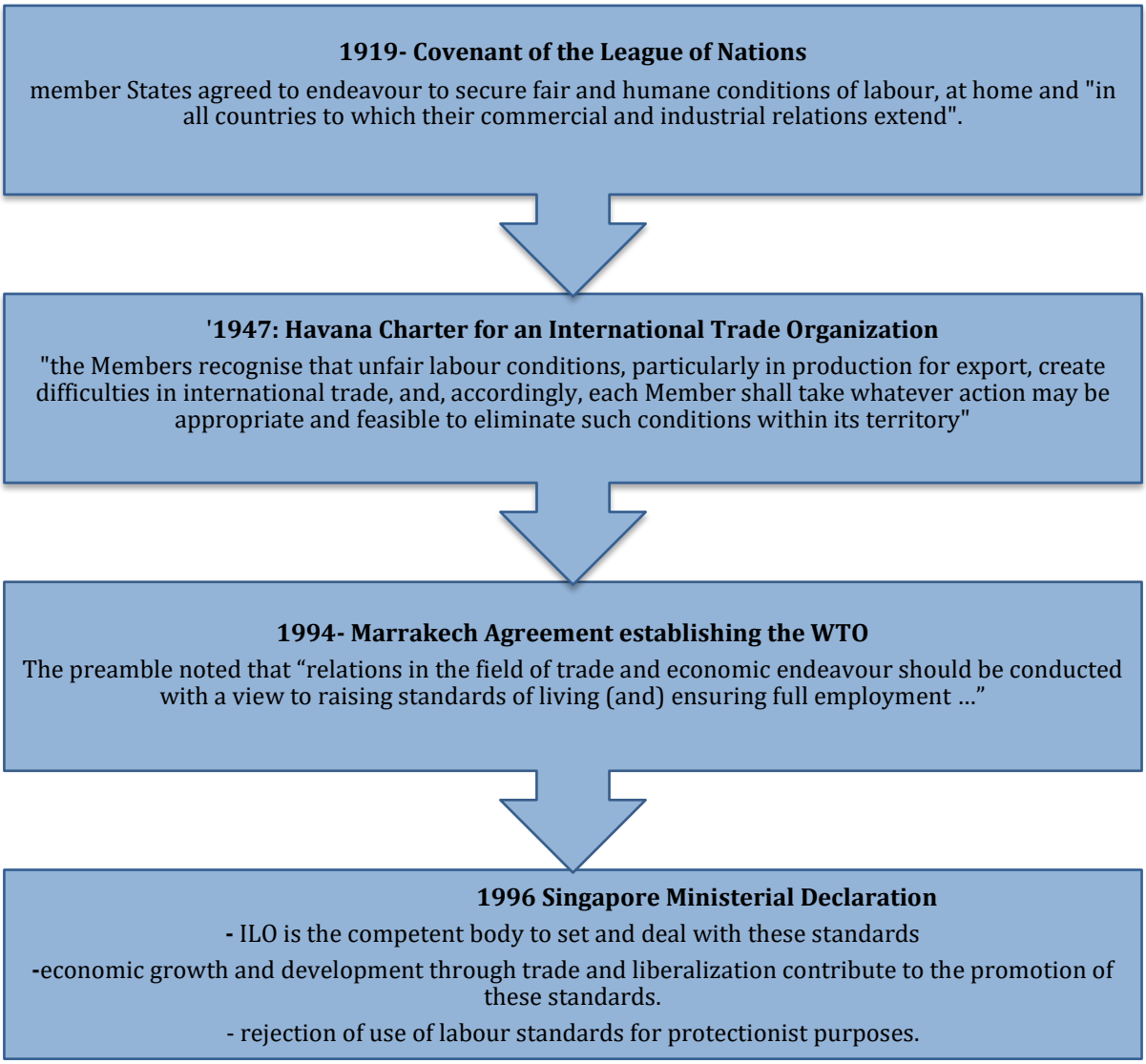
[7] Gary Burtless, 'Workers' Rights: Labor Standards and Global Trade' (Brookings, 30 November 1AD) <https://www.brookings.edu/articles/workers-rights-labor-standards-and-global-trade/> accessed 12 November 2020.

[8] Jagdish Bhagwati, 'Trade Liberalisation and "Fair Trade" Demands: Addressing the Environmental and Labour Standards Issues' (1995) 18 The World Economy 745.

[9] International Labour Organization, 'Assessment Of Labour Provisions In Trade And Investment Arrangements' <https://primarysources.brillonline.com/browse/human-rights-documents-online/assessment-of-labour-provisions-in-trade-and-investment-arrangements;hrdhrd40222016008> accessed 12 November 2020.

[10] Louise Kay, 'Labour-Related Provisions in Trade Agreements: Recent Trends and Relevance to the ILO' 10.

The push for labour standards and the call for 'fair' trade is a long-standing one. The below flowchart indicates a timeline of events where commitments to labour rights were made in some form in various international instruments.[11]



While there was some discussion in the 1999 WTO Ministerial Conference held in Seattle regarding whether labour should be addressed within trade, the stance made in 1996 by the Singapore Ministerial Declaration (which, as noted above, supported the use of trade to promote labour standards) was reaffirmed in 2001 at the Ministerial Summit in Doha.

With time, more trade agreements have begun to incorporate labour provisions. As Figure 1 indicates, over 80% of all trade agreements now have labour provisions. It is necessary therefore, to analyse different types of labour provisions as well as the effectiveness of their enforcement measures, in order to induce better/higher implementation from private sectors.

[11] Please note that the flowchart only provides details of some key events that took place that may have contributed to the introduction of social provisions within trade agreements. For a more comprehensive history, refer Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime' International Labour Review 21.

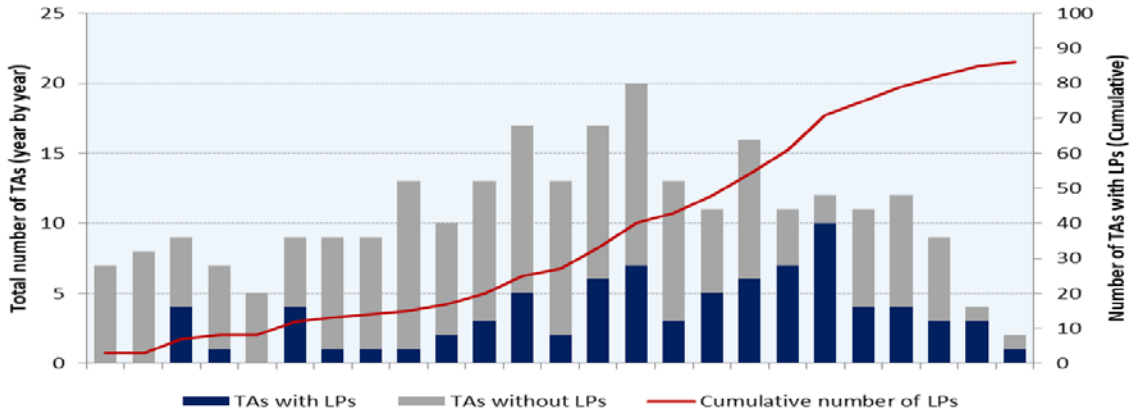


Figure 1.[12]

5.3. Types of Social Clauses

5.3.1. Types of commitments made:

Labour commitments under FTAs are largely structured in two ways:

a) ***Commitment to uphold and ratify ILO fundamental principles and rights***[13]: The principles are considered to be the minimum expectations of rights at work, and an obligation to observe ILO fundamental principles may be present in some form in a labour provision under an FTA, be it by explicit reference to ILO Fundamental Conventions, or by reference to the ILO fundamental principles and rights (See Box 2 below)

b) ***Commitment to implement, as well as not waiver or derogate from national laws implementing labour rights***: An FTA might also require a commitment to effectively enforce domestic labour laws, as well as to not waiver or derogate from domestic labour laws in order to attract trade or investment. Domestic legislation might often prescribe even higher standards than the ILO fundamental conventions. For example, domestic legislation might include provisions relating to occupational health and safety or relating to labour inspectorates or inspection systems.[14]

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[12] Source: ILO Research Department based on WTO RTS-IS database. Internationale Labour Organisation, *Labour Provisions in G7 Trade Agreements a Comparative Perspective* (2019) 7.

[13] For more details, refer Box 2. Source: International Labour Organization, *Fundamental Principles and Rights at Work Fact Sheet* <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-islamabad/documents/publication/wcms_741333.pdf>accessed 12 November 2020.

[14] For example, in the USMCA, under Annex 23-A, Mexico was required to adopt within domestic legislation provisions allowing an independent authority to verify collective bargaining agreements and conduct on-site inspections, prior to the USMCA entering into force. Additionally, under Article 23.3 all parties to the USMCA are required to adopt and maintain statutes "governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health"

Box 2: What are ILO fundamental principles and rights?

In 1998, the ILO Declaration on Fundamental Principles and Rights at Work (FPRW) was adopted. Under this declaration, all ILO Member States have an obligation to promote and realise the principles concerning the following fundamental rights under 8 ILO Conventions (ILO Fundamental Conventions), even if they have not ratified these Conventions. The four rights detailed below are identified to be the 'ILO fundamental principles and rights'.

freedom of association and the effective recognition of the right to collective bargaining;

Relevant ILO Conventions:
Freedom of Association and Protection of the Right to Organize Convention (No. 87), 1948
Right to Organize and Collective Bargaining Convention (No. 98), 1949

the elimination of all forms of forced or compulsory labour;

Relevant ILO Conventions:
Forced Labour Convention (No. 29), 1930
Abolition of Forced Labour Convention (No. 105), 1957

the effective abolition of child labour;

Relevant ILO Conventions
Minimum Age Convention (No. 138), 1973
Worst Forms of Child Labour Convention (No. 182), 1999

the elimination of discrimination in respect of employment and occupation

Relevant ILO Conventions
Equal Remuneration Convention (No. 100), 1951
Discrimination (Employment and Occupation) Convention (No. 111), 1958

Box 3: Why are commitments under FTAs important for businesses in developing countries?

✔ **To comply:** Understanding labour commitments made under an FTA can help businesses understand what their obligations are, and consequently what the consequences for failing to meet those obligations could be.
For example, an auto-parts manufacturer in a developing country like Mexico, that trades with the US, might need to ensure that the right to associate and collectively bargain is adequately provided for. Otherwise, an independent panel under USMCA's facility-specific rapid-response mechanism may subject the firm itself to review, creating commercial and reputational hazards.[15]

✔ **To advocate:** If compliance lies at the level of the governments in relation to implementation of labour reforms, or ratification of an ILO Convention, then employers and employer organizations can advocate for such reforms in line with their interests.
For example, employers and employer organizations in the Republic of Korea may wish to advocate for the speedier ratification of the three yet-to-be-ratified ILO Core Conventions, and related labour law reforms, as required under the EU-Korea FTA, in a way that safeguards their interests.

✔ **To negotiate:** If an FTA negotiation is underway, a signatory government may domestically legislate substantial labour reform too. It is important that employers and employers' organizations are able to voice their needs and

[15] See Box 4 below for more details on the facility specific rapid response mechanism.

concerns to their governments before and during the negotiation process.

For example, Kenya is in the process of negotiating an FTA with the US, with the US negotiation principles containing several agendas for labour reform.[16] Prior to negotiations, the Kenyan Ministry of Industrialization, Trade and Enterprise Development consulted and heard from stakeholders (which includes employer organizations such as the Federation of Kenyan Employers) before developing its negotiating objectives and principles.[17]

5.3.2. Monitoring and Cooperation Provisions

Social clauses also include provisions that seek to enhance cooperation and provide space for dialogue. Trade agreements will include obligations to raise public awareness of labour legislation. Cooperation activities include programmes for raising awareness, labour rights training, and technical assistance to trade partners for the implementation of labour provisions. Agreements may vary on the cooperation and capacity building provisions depending on trade partners and concerns regarding particular industries.

Trade agreements can also set up institutional arrangements to facilitate the communication, monitoring and implementation of commitments.

Box 4: How can businesses participate under cooperation provisions across different FTAs?

Since different FTAs have different cooperation provisions, the table below illustrates the avenues available for participation within the ambit of two trade agreements as examples, namely the EU-Vietnam FTA, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP).

Cooperation Provision	**EU-Vietnam FTA**	**CP-TPP**
Advisory groups	Yes, the domestic advisory group (DAG) constituted under the FTA includes within its stakeholders, businesses and employer organizations. The Committee on Trade and Sustainable Development can seek the advice of the DAG.	Yes. A national labour consultative or advisory body which includes representatives of business organisations, must be constituted by the Labour Council, to provide views on matters regarding the labour chapter.
Meetings	The DAG of each party meet annually in a joint forum to conduct a dialogue on sustainable development aspects of trade relations between the Parties.	Discretionary. Subject to agreement by the governments, cooperative activities and participation of stakeholders including employer representatives can occur. Cooperative activities can include social dialogue, including tripartite consultation and partnership. As appropriate, there can be a caucus to further address labour issues.
Submissions to Labour Committees/ Points of	Contains no provision for written submissions to point of contact/other government representatives.	Businesses and employer organizations can make written submissions to the public officials legally designated as the Point of Contact on assistance or conflicts related to the Labour chapter of the agreement.

[16] See Office of the United States Trade Representative, 'United States-Kenya Negotiations: Summary of Specific Negotiating Objectives' <https://ustr.gov/sites/default/files/Summary_of_U.S.-Kenya_Negotiating_Objectives.pdf> accessed 9 November 2020.

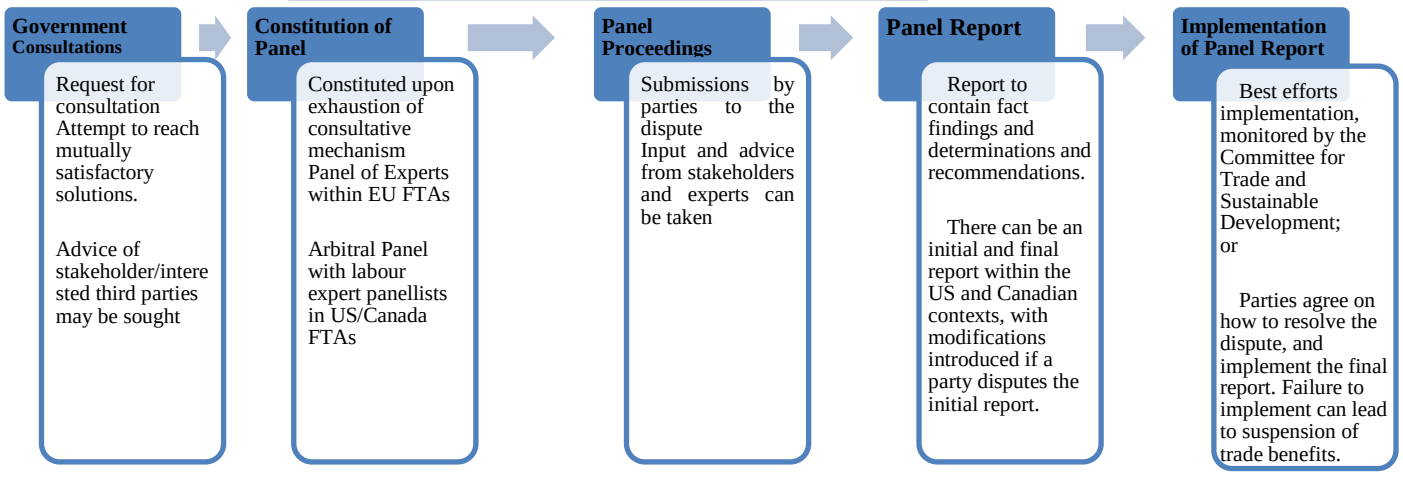
[17] TRALAC TRADE LAW CENTRE, 'Proposed Kenya-United States FTA Agreement: Negotiation Principles, Objectives and Scope' (*tralac*) <https://www.tralac.org/news/article/14690-proposed-kenya-united-states-fta-agreement-negotiation-principles-objectives-and-scope.html> accessed 9 November 2020.

Contact		

5.3.3. Dispute Settlement Mechanisms:

Most social clauses contain provisions for resolution of disputes through dialogue and consultation. It is only once these mechanisms have been exhausted that parties can trigger the formal dispute settlement mechanisms as a last resort. Box 5 gives an indication of how dispute settlement procedure can generally take place. A dispute resolution process that is entirely distinct from the one detailed below is the rapid-response mechanism under the USMCA, discussed later in Chapter 5.[18]

Box 5: The Dispute Resolution Process



[18] Annex 31-A, United States-Mexico Facility Specific Rapid Response Labour Mechanism.

Box 6: What does dispute resolution mean for businesses?

- ✔ **To participate:** The initiation of dispute resolution proceedings can provide avenues for businesses and employer organizations to participate within the proceedings. While private sector actors cannot trigger a dispute resolution mechanism, as a member of an advisory group, they can give advice or provide third party input during proceedings.
- ✔ **To submit evidence:** Since a panel report might contain findings of fact, evidence might be required to be submitted by relevant and concerned businesses and employer organizations. This can be an opportunity for businesses to provide data regarding their labour practices and work done to further social clauses in trade agreements.

5.3.4. Kinds of sanctions:

Types of enforcement of labour provisions vary. The EU leans towards a cooperation-based approach towards social clauses and prefers using state-to-state institutional mechanisms for remedying the situation. On the other hand, free trade agreements with the US or with Canada, may use sanctions as a last resort mechanism. When sanctions are present in a trade agreement, they can take one of two forms:

a) **suspension of trade benefits:** this can take the form of suspension of preferential tariffs, or the prevention of trade altogether, until the violation has been remedied.

b) **monetary assessments**: an amount determined by the arbitral panel will have to be paid by the party against whom a complaint has been made.

So far, there has not been an instance of either type of sanctions being imposed within the context of social clauses within trade agreements.

Box 7: What do sanctions mean for businesses?

Imposing sanctions can come at great cost to a country and the businesses operating within that country. Even in the absence of sanctions, an adverse finding by a constituted panel can have adverse reputational cost and consequences for businesses. The table below indicates how sanctions might apply under different processes under an FTA. The first example is of the facility specific rapid response labour mechanism (RRLM) under the USMCA that permits the initiation of a dispute against a specific factory/plant under a priority sector that may be denying freedom of association rights to its workers. The second example identifies the more generally applicable and common provisions that may be seen within the CP-TPP and the USMCA.[19] The table below indicates how sanctions might apply under different processes under an FTA:

[19] It may be noted that there are systems that might exist in tandem outside of an FTA that provides a unilateral mechanism for the enforcement of labour or other social provisions. The United States and the EU have the Generalised System of Preferences (GSP), wherein trade preferences may be granted or withdrawn on the basis of good or bad behaviour respectively. EU's GSP+ is an example where tariffs are completely slashed for certain countries upon the implementation of certain international conventions relating to human rights, and environmental and labour standards (See 'GSP+' (*Trade Helpdesk*, 19 July 2017) <https://trade.ec.europa.eu/tradehelp/gsp> accessed 22 October 2020.). The flip side of this can be seen in the case of the withdrawal of preferential access to Cambodian exports to the EU due to the latter's concerns

Impact of sanctions under USMCA- facility-specific-rapid-response-labour-mechanism	Impact of sanctions under CPTPP/ USMCA Non-denial-of-rights labour cases
Specific covered facilities in priority sectors, found to be in violation can face sanctions in the form of a) withdrawal of preferential tariffs, b) penalties on goods and services, and c) in extreme cases of repeated violations, denial of entry of goods from the covered facility.[20]	Suspension of trade benefits for trade in all goods and services, of equivalent effect to the violation committed, until the disputing Parties agree on a resolution to the dispute. This can take the form of the withdrawal of preferential tariff treatment. While a complaining party should first seek to suspend benefits in the same sector as that affected by the violation, there is some discretion to apply such a suspension to other sectors, if the complaining party believes that suspension of benefits in the same sector would be impractical or ineffective.
***Example*:** A specific glass manufacturer in Guadalajara might have its preferential tariffs withdrawn for having been found by a Panel to have violated the right of unions to collectively bargain. This isolated sanction would not affect the entire sector. Further, such a sanction might be withdrawn once it is proved that the glass manufacturer has taken action to remedy the issue.[21]	***Example:*** If Mexico does not implement an arbitral panel report, after its finding that Mexican officials failed to enforce domestic child labour laws on the glass manufacture industry,[22] the US might withdraw preferential tariffs from *all* Mexican glass manufacturers. If the US decides that such a measure would be ineffective, it could decide to extend such suspensions to other sectors as well. This temporary restriction would be lifted once Mexico could prove that it resolved the violations by way of elimination of the non-conformity or by the provision of mutually acceptable compensation, or another remedy agreed to by the US and Mexico.[23]

6. Labour Clauses in Practice

6.1. Guatemala vs the United States: Well-Intentioned Social Protection Under CAFTA-DR, a Pathway to the USMCA, or Both?

Box 8: What You Need to Know About the CAFTA-DR Labour Elements

- The CAFTA-DR requires the Parties to *strive* to ensure the adoption and protection of these international rights and obligations by their national laws - but does not give Parties a timeline or deadline for such domestic legislation.[24]
- The CAFTA-DR recognizes the right of each party to establish their own domestic labour standards,

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regarding human rights and labour rights violations within Cambodia (See 'Cambodia Loses Duty-Free Access to the EU Market' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1469> accessed 23 October 2020.). Similarly, in the US context, a very recent introduction has been *The Uyghur Forced Labor Prevention Act (H.R. 6210)*, passed in September 2020, which includes a rebuttable presumption provision that all goods produced or manufactured in Xinjiang (China) are made with forced labour, and thus prohibited under Section 307 of the US's Tariff Act of 1930 (which prohibits the importation of goods made by forced labour).

[20] USMCA Annex 31-A, Clause 10 (Remedies), para 2, 3 and 4.

[21] USMCA Annex 31-A, Clause 10 (Remedies), para 6.

[22] USMCA Article 31.19, para 2, "*In considering what benefits to suspend pursuant to paragraph 1: (a) a complaining Party should first seek to suspend benefits in the same sector as that affected by the measure or other matter that was the subject of the dispute;"*

[23] USMCA Article 31.18, para 2.

[24] CAFTA-DR. *CAFTA-DR Final Text*. 5 Aug. 2004. Labour Chapter.

while also requiring each party to *strive* to ensure that its laws provide for labour standards consistent with internationally recognized labour rights.

- The CAFTA-DR requires that parties "must 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.[25]

6.1.1. A Chronology of Events

Guatemalan labour unions collaborated with the AFL-CIO in 2008 to bring the Guatemalan government to an arbitration panel.[26] The AFL-CIO began the successful process by proposing to the U.S. Ministry of Labour to formally submit the complaint. Thereafter, the United States accused the Government of Guatemala of 1) not upholding the international labour standards of freedom of association and collective bargaining and 2) not enforcing Guatemalan domestic labour inspection and penalties on violators. The two Parties - the United States and Guatemala - sent a series of Written Submissions to a panel.

[25] CAFTA-DR. Article16.2.1(a)

[26] The full final submission from the AFL-CIO is available to access in the bibliography.

i. Violations Invoked and Steps Taken

Guatemala's alleged violations where it had failed to effectively enforce its labour laws related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work were concerning:

1) its failure to secure compliance with court orders; and
2) its failure to conduct inspections and impose the respective penalties; and
3) its failure to register unions or institute conciliation processed in time.

For the first claim regarding compliance with the courts, the Panel looked through court orders that imposed penalties on employers for blocking workers' ability to organize and bargain. These orders mandated the reinstatement of the workers. The Panel examined evidence concerning eight employers, and whether government officials took the substantial steps necessary to enforce those court orders.

For the second claim regarding inspections and penalties, the Panel assessed the actions of government officials enforcing the Guatemalan Labour Code. The United States presented evidence concerning five employers.

For the third claim, the Panel raised procedural concerns, making the issue outside of the Panel's terms of reference, and jurisdiction. The Panel further highlighted temporal concerns, wherein two of the three instances of failure to register trade unions in a timely manner took place after the United States submitted its panel request.

ii. CAFTA-DR's Two Thresholds: The Panel did not find Guatemala's alleged labour violations to be 'recurring' or 'affecting trade'.

The Panel found that government officials did not comply with one of the eight court orders examined during the case. This single employer in question was involved in activity 'affecting trade.' However, the Panel saw this case as an isolated incident. It could not incriminate Guatemala for 'sustained or recurring' violations to the law.

The Panel also found that, in one of the five instances regarding the conducting of inspections, government officials failed to enforce the Labour Code. However, the Panel did not consider this case to be 'affecting trade'. Furthermore, the discrete violation could not constitute a 'sustained or recurring course of action or inaction.'

In one case, the United States was unable to show that the labour breach was in a matter affecting trade. But, in *both* cases, the United States was unable to show that the labour breaches were recurring. Since the United States' evidence did not reach these thresholds, their accusations did not hold. Sanctions could not be imposed on Guatemala.

Box 9: Potential Sanctions[27]

- If a Party fails to enforce its labour laws and is sanctioned, the maximum fine they must pay is $15 million.
- However, this amount may be repaid to the country in violation in order to implement capacity building assistance and consultation.
- If the fine is not paid within 60 days, the complainant Party may impose trade sanctions.

6.1.2. Direct Impacts of the Dispute on Guatemalan Employer Fribo SA

Although the allegations against the following Guatemalan employer did not prove that Guatemala was in violation of the CAFTA-DR, both the Guatemalan employer and Guatemalan government faced indirect repercussions. In 2004, American model, actor, and television host Daisy Fuentes released the Daisy Fuentes Clothing line in partnership with Kohl's Department Store in the United States. In addition to apparel, her designer hair care, fragrances, and other beauty products sell $300 million at Kohl's per year.[28]

Daisy Fuentes Clothing was being sewn at Fribo SA factory in Guatemala throughout 2007. Workers had submitted complaints about unpaid leave - an act considered unlawful by worker unions. Upon receiving this news, Fuentes and Kohl's stopped their operations in June of that year and pulled their goods from the Fribo factory.[29] The employer lost investments from the American private sector actors. Since the private sector (Kohl's Department Store) is at the liberty to conduct its internal business, the decision to pull investment out of Fribo SA was swift.

VESTEX, the Guatemalan Association for the Apparel and Textile Industry, reported in an interview that its position during the case was "to request Guatemalan authorities to promptly intervene in the conflicts that arose at Fribo SA so that the workers' labour rights could be

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[27] Wade, Brandie Ballard. "CAFTA-DR Labor Provisions: Why They Fail Workers and Provide Dangerous Precedent for the FTAA." Law and Business Review of the Americas, vol. 13, no. 3, 2007, p. 645.

[28] Brodesser-Akner, Taffy. "Adding Glitter to Eyeglass Frames." New York Times, 5 Aug. 2011; Just-Style.com. "Guatemala: Daisy Fuentes Blouses Made in Sweatshop?"

[29] *Www.Just-Style.com*, 19 June 2007; Business-HumanRights.org. *Daisy Fuentes Clothing Sewn in Guatemalan Sweatshop*. 18 June 2007, www.business-humanrights.org/.

complied with, and to require judicial authorities to apply the necessary preventive measures upon the company."
As a result, "the industry was not affected in a direct way by the case due to VESTEX's immediate stance in requesting the application of the law."

However, VESTEX added that "any conduct contrary to compliance with the law coming under international scrutiny, even informal, affects the reputation of any sector in the country in general."

In fact, the textile industry did suffer from "the reduction of contracts from U.S. clients already while the controversy was being only elucidated, and this happened at the mere (warning) threat of a sanction."

Not only did Fribo SA as an employer feel repercussions from its American private sector counterparts, but the Guatemalan government soon faced scrutiny from its public counterpart - the U.S. government. In collaboration with the American-based AFL-CIO, six Guatemalan labour unions filed a 'public submission' to the U.S. Department of Labour to bring Guatemala to an arbitration panel. This submission claimed that labour inspectors made several attempts to conduct an inspection at the factory; Fribo SA had obstructed each of these attempts, and the government inspectors were not enforcing Fribo SA's mandate to pay paid-leave wages.[30]

Fribo SA was one of seventy other separate instances that the U.S. Department of Labour cited in their legal case in April 2008. The Government of Guatemala, on account of the Guatemalan Ministry of Labour, was found guilty of failing to effectively enforce its labour laws in this one instance with Fribo SA. However, the evidence found against Fribo SA by the arbitration panel represented a minority. All employers brought before the Panel, except for Fribo SA and one other, were not found in violation of labour laws. As previously stated, the Panel saw Fribo SA's violation as an isolated incident. It did not constitute a 'sustained or recurring course of action or inaction' by the Government of Guatemala.[31]

Although Fribo SA was found by the Panel to be in violation of the Guatemalan Labour Code, the onus was ultimately on the Guatemalan labour inspectors for failing to enforce the code.

[30] You may reference the AFL-CIO's final submission for their evidence and reasoning for these allegations.
[31] The legal argument for these two thresholds can be carefully examined on pages 47 and 65 of the final report of the arbitration panel.

Labour violations by private actors are domestic issues, which are to be sorted out by domestic courts, not arbitration panels. Therefore, although employers may not be held directly responsible for their actions under free trade agreements, their governments could be.

6.1.3. Lessons Learned: the Guatemalan Government Engages Internationally in Labour Issues

In response to the labour dispute, the Guatemalan government agreed with the United States in 2013 to implement a Comprehensive Labour Enforcement Plan ("Plan"). The reforms intended to strengthen channels of domestic cooperation for a more functional and transparent tripartite system of labour governance.

Box 10: Guatemalan Reforms Since the Dispute[32]

- The Labour Ministry can transfer cases to the courts in 5 days, rather than the original 6 months.
- Courts are required to adopt and impose the Labour Ministry's fine recommendations, unless that fine is unreasonable.
- A database for labour cases is implemented to make quicker and more efficient the domestic court system.
- A "Verification Unit" is established within the Judiciary, used to verify timely compliance by employers with labour court orders.
- The Labour Ministry conducts annual inspections of exporting companies to confirm compliance with labour laws and reject new applications for benefits received from labour law violators.
- The private sector participates in ILO meetings more actively now than before the dispute to better present their best practices to the ILO.

With regard to the Plan, however, VESTEX commented that "the textile industry was greatly affected due to the resulting over-legislated requirements to be able to operate and export from Guatemala, making the registration of companies, business administration and export excessively complex.

This caused the country to cease to be attractive for new investments and prejudged compliance on the part of companies."

Employers in developing countries should lobby their governments to create transparent and fair court systems. Funds that are allocated in trade agreements for capacity building and technical assistance, often funded by developed trade partners like the United States, should be used by developing country governments for these labour related purposes. Otherwise, their allocation would turn into a missed precious opportunity.

[32] The Government of the United States and the Government of Guatemala. Mutually Agreed Enforcement Action Plan. 25 Apr. 2013.

It is important to note that these lessons learned will only become more relevant for developing countries in the coming years, as labour standards of the future are poised to become higher. The USMCA, which we will explore in the next section, has higher labour standards and an institutionalized tool that makes the standards much more enforceable. In contrast to this Guatemala case, the USMCA will be able to hold employers and private sector actors (within priority sectors) directly accountable for their actions related to labour standards. This new generation of trade agreement is a substantial evolution from trade agreements of the early 2000s, like the CAFTA-DR.

VESTEX strongly recommends that employers and their organizations "promote alternative methods of conflict resolution and support the strengthening of the administration of justice." Administrative and judicial strength grants the ability to resolve labour disputes internally, at the domestic level rather than at the international one. When a dispute goes out in the international light, "the most immediate consequence is seen in main commercial partners stopping the placement of contracts in the country at stake." Therefore, according to VESTEX, "countries - developing ones in particular - should work on their capacity to resolve labour conflicts, and employers can contribute by strengthening the dialogue with workers and their trade unions." Capacity to resolve labour conflicts internally is "a guarantee of protection for investments, employment and ultimately the economy."

6.1.4. Guatemalan Employers Across Sectors Are Gradually Adopting Best Practices

Private sector actors still made reforms after the historic dispute, even though the Guatemalan government (and not the private sector) was the party held directly responsible for their actions under the CAFTA-DR free trade agreement. The poor international reputation that the Guatemalan market gained regarding labour relations reduced the willingness of the international community to trade with Guatemalan employers. Even though many businesses were punished through no fault of their own in this manner, several business practices changed after 2008. Anacafe was one such employer.

Anacafe - the National Association of Coffee - was one of many employers directly targeted in the dispute. Some farms affiliated with Anacafe were inspected in 2008 and were found to be in violation of two labour standards - paying minimum wage and following safety and health

standards. After a second inspection, proper adjustments were made.[33] During the case, the United States was unable to provide evidence that Guatemalan inspectors had done otherwise. In addition, the United States was unable to establish any violation of labour law enforcement by inspectors of other sectors, such as coffee farms, farms of other produce, and manufacturing plants.

VESTEX believes that it is crucial for employers to rely on and contribute to solid employers' organizations. In turn, these organizations should strive to "foster a culture of legality through industry-wide law enforcement programs, and provide legally exact advice". Furthermore, they should participate in architectures capable of representing the private sector as a whole, such as CACIF in Guatemala. According to VESTEX, the success of CACIF in recent years stems precisely from its representativity of employers from a variety of sectors, together with its ability to coordinate interests and demands coming from different employers and to solve labour issues pertaining to different industries.

By implementing a high level of organization, employers can effectively show evidence, to the Guatemalan government and international law panels alike, of their legal compliance to labour standards. Employers in the coffee industry, palm industry, sugar industry, and many others have run corporate social responsibility campaigns since the beginning of the dispute. Employer organizations, such as CACIF, are highly organized groups that consult Guatemalan employers to implement social responsibility practices.[34] Sector level organizations, such as Anacafe of the coffee industry or Grepalma of the palm industry, now communicate directly with their American trade partners to promote their transparent labour practices. This kind of horizontal engagement is vital to the sustained profitability of Guatemalan economic sectors.

6.2. The Innovative USMCA May Lead to a World of Higher and More Enforceable Labour Standards.

6.2.1. The USMCA in Context

The United States-Mexico-Canada Agreement (USMCA), which is also referred to as CUSMA (in Canada) or T-MEC in Mexico, is the successor to NAFTA, and consequently the

[33] During the case, Guatemala contended that "[a] few farms were required to make adjustments, which they did." The Panel concluded in its argument, "the United States has not established a prima facie case that Guatemala failed to conduct proper inspections or failed to follow up on labor law violations discovered during inspections" (189).

[34] 'Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras' (*CACIF*) <https://www.cacif.org.gt/> accessed 4 December 2020.

North American Agreement on Labour Cooperation (NAALC). The USMCA entered into force on July 1, 2020.[35]

The passage of the USMCA received bipartisan support within both chambers of Congress within the United States. Meanwhile, for Mexico, the government at the time felt pressure to agree to the presented deal, due to the fact that there would shortly be a different government in place - one less inclined towards signing the agreement. There was additional pressure for Mexico to accept the presented deal during negotiations, as the only other alternative would have been no deal at all.[36] As a result, it may be observed that labour requirements under the USMCA are more comprehensive than those contained in its counterparts, be it the CP-TPP, the NAALC or the CAFTA-DR.

Box 11: What You Need to Know About the USMCA's Labour Elements

- Under the Labour chapter[37] of the USMCA, all parties are required to adopt and maintain the ILO Core Standards within their domestic legislations.
- Apart from the ILO Core Standards, parties are also required to maintain in their legislation governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.
- An Annex to the USMCA[38] required Mexico to adopt comprehensive labour legislation that grants the effective recognition of the right to collective bargaining as a pre-condition before the USMCA enters into force.
- A new system of dispute resolution has been introduced titled the 'Facility-Specific Rapid Response Labour Mechanism'. Under this, a party to the Agreement can initiate a dispute against individual facilities ("Covered Facility") in some priority sectors which have failed to effectively provide its workers with the right to collective bargaining.
- For assuring compliance with labour laws, a variety of actions are to be undertaken by the Parties to the USMCA, ranging from appointment and training of inspectors, monitoring labour compliance, and expeditiously initiating and implementing remedies and sanctions.

6.2.2. Direct Impact: Employers can use developed country businesses in their supply chains to build more collaborative supplier relationships

[35] While NAFTA is the predecessor to the USMCA, the USMCA's origins may be more firmly traced back to provisions in the proposed TPP, which later became the CP-TPP.

[36] Based on information obtained from an interview with a former USTR official.

[37] Chapter 23, USMCA

[38] Chapter 23-A USMCA.

Box 12: Key Requirements under the USMCA for the auto-industry

The USMCA, which entered force in 2020, mandates the following requirements to automakers across the trade region if they want their products to benefit from zero-duty trade.

- 70-75% of their vehicles are made with North American content,
- to have at least 70% of their steel and aluminium purchases to originate in North America, and
- to ensure 40% to 45% of their vehicle content (depending on the type of vehicle) be made by workers earning at least $16 per hour.[39]

"It is going to require lots of information from suppliers—not to provide actual wages but certify they pay more than $16 an hour," said American Automotive Council (AAPC) President Matt Blunt about the USMCA.[40] The AAPC, which lobbies for automobile giants such as GM, Ford Motor Co., and Fiat Chrysler Automobiles, was present for a Center for Automotive Research webinar on June 16, 2020. Blunt noted that American companies were seeking out Mexican suppliers that were able to provide proper documentation that verified compliance with USMCA. Mexican factories that produce vehicles covered by the USMCA, for example, must file a certification with the U.S. Customs and Border Protection that verifies compliance with the high-wage labour requirement.[41] Such legal compliance has become essential to the stability of American business strategies. Mexican employers ought to leverage this and seek assistance from their American partners and use their legal resources to build Mexican compliance capacity.

AAPC President Blunt expressed appreciation for the six-month period that allows actors to come under compliance with the USMCA. He stressed the importance of this flexibility due to the possibility for some companies "to make a mistake through no fault of their own." With American, Canadian, and Mexican companies now more closely connected - not just by supply chain - but by law enforcement, employers across borders have a vested interest in building and sharing capacity.

However, some companies may still choose to forgo these regional content and labour content requirements, opting instead to pay a tariff to export their Mexican-produced cars to American or Canadian markets. Another option, as highlighted later in Section 6.2.4, would be to use this rule to incentivise employers to prefer the Mexican labour market for these skill sets, as

[39] Stuart, Owen. "StackPath." Www.Industryweek.com, 12 Oct. 2018, www.industryweek.com/the-economy/article/22026500/how-will-the-shift-from-nafta-to-usmca-affect-the-auto-industry.

[40] Garsten, Ed. "USMCA Trade Deal Is Now In Force–And Mandating Higher Wages, More Paperwork." Forbes, 1 July 2020, www.forbes.com/sites/edgarsten/2020/07/01/usmca-is-now-in-force-mandating-higher-wages-more-paperwork/?sh=759877af2d7c.

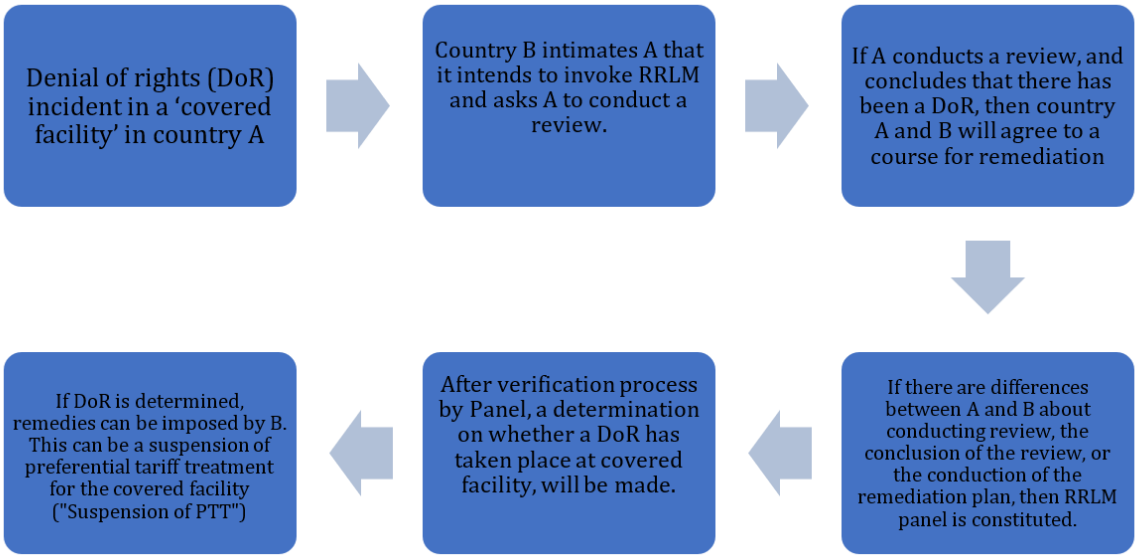
[41] 'USMCA Web-Based Hotline | U.S. Department of Labor' <https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca/hotline> accessed 4 December 2020.

opposed to the United States, where the cost of such specialised labour could be much higher.[42]

Box 13: Guidance for Employers

- may take the assistance of their American counterparts on the supply chain in order to comply with the USMCA with more ease.
- Employers may also contact the Labour Attaché that is stationed at a U.S. Embassy or a Mexican Consulate for resources regarding capacity building and USMCA compliance.

6.2.3. USMCA Enforces Labour Standards by Ensuring Partner States Comply with Their Own Domestic Laws.[43]



Box 14: Illustration of the USMCA Rapid Response Labour Mechanism (RRLM)

It must be noted that the RRLM has not yet been triggered, and therefore its implications may only be understood in theory at this point. Regardless, under the USMCA, Mexico is obligated to uphold the labour standards present in Mexico's domestic legislation, and a dispute can still be raised against Mexico for its failure to *effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the parties* (to the USMCA). Furthermore, for specific sectors where freedom of association and collective bargaining rights have been denied, unlike NAFTA (USMCA's predecessor), allegations of violations to these labour standards can be investigated at *the*

[42] *ibid.*

[43] The below flowchart only attempts to illustrate in brief how the rapid response labour mechanism might work. A more detailed overview can be obtained at https://www.akingump.com/a/web/dnxTcheQWxAFX7RHqqi8N9/high-level-overview-of-the-rrlm-process-v3.pdf.

factory-level with the RRLM tool.[44] In these cases too, a Mexican company does not have to be benefitting from preferential tariff treatment (PTT) as a pre-condition for the trigger of the RRLM mechanism.[45]

However, given that RRLM mechanism has not yet been initiated, there are certain issues that lack clarity. For instance, it is uncertain whether determinations of first-time violations against companies who do not claim PTT will result in penalties being imposed, or a denial of entry to goods, sanctions that are otherwise imposed on second- or third-time offenders (See Box below). Additionally, it is also unclear what remedies would apply to nontraded goods or services.[46]

Box 15: Potential Sanctions

- The complainant government may suspend beneficial tariff treatment for goods produced at the factory guilty of the violation.
- If there has been a prior determination of a violation, apart from suspension of beneficial tariff treatment, an unspecified 'penalty' may be imposed on the factory guilty of the violation.
- If the factory is found in violation at least twice before, then the government could deny entry of goods entirely at the border.

However, employers and workers can attempt to resolve disputes by accessing a variety of resources to attempt to resolve disputes before resorting to international panels or the rapid response tool. In furtherance of the USMCA entering force in 2020, Mexico enacted historic labour reforms domestically.[47] On May 1st, 2019, the Mexican government implemented new, independent institutions for registering unions and collective bargaining agreements. New and impartial labour courts were established to adjudicate disputes. As stakeholders in these reforms, employers gained access to these institutions to move toward legal compliance as well as defend themselves in a court of law. The recognition and utilization of these legal institutions can and should work to the benefit of employers.

6.2.4. The USMCA may also provide some tools that Mexican Employers can use to their advantage.

[44] USMCA, Chapter 31 (Dispute Settlement).

[45] It must be noted that the only requirement for a facility in an identified priority sector to be considered 'covered' under the RRLM mechanism is that it is producing a good or service that is either a) traded between the parties to the USMCA, or b) competes in the territory of one party with the goods or services produced by another party.

[46] 'The USMCA's Facility-Specific Rapid Response Labor Mechanism: Are You Ready for It?' (*Akin Gump Strauss Hauer & Feld LLP*) <https://www.akingump.com/en/news-insights/the-usmcas-facility-specific-rapid-response-labor-mechanism-are-you-ready-for-it.html> accessed 6 January 2021.

[47] Carrie Kahn, 'Will NAFTA 2.0 Really Boost Mexican Wages?' NPR.org (17 October 2018) <https://www.npr.org/2018/10/17/657806248/will-nafta-2-0-really-boost-mexican-wages> accessed 4 December 2020.

The requirement that 40% to 45% of vehicle content must be made by workers earning at least $16 per hour might appear to be somewhat daunting for Mexico, given that low-skill workers in the auto industry in Mexico currently earn between 3 and 4 USD per hour.[48] However, as T-MEC negotiator Jesús Seade has noted, this could also convert to an area of opportunity for Mexico. Since it is only a percentage of workers who have to work for $16 an hour, employers could decide to allocate that salary to engineers, skilled personnel and administration. This could, in turn, provide better employment opportunities within Mexico, and perhaps incentivise employers to prefer the Mexican labour market for these skill sets, as opposed to the United States, where the cost of such specialised labour could be much higher.[49]

Employers can also utilise the employer training and the four-years' worth of technical assistance that the USMCA offers. The USMCA implementing legislation includes the allocation of $180 million over four years for USMCA-related technical assistance projects. These projects can help employers build their capacity and improve awareness about adherence to labour standards. For example, for the sugarcane and tobacco sector, the *Senderos: Sembrando Derechos, Cosechando Mejores Futuros* initiative might help improve private sector compliance with standards on child labour, forced labour, occupational safety and health.[50] More recently, the US Department of Labor announced new grants to the tune of USD 20 million to help educate stakeholders, conduct outreach regarding labour rights and implementation as well as generate sustained, data-driven dialogue amongst stakeholders (including employers and employer organizations).[51]

6.2.5. Lesson Learned: Social clauses can foster strong collaboration between governments and employers.

With the onset of the USMCA, the need for close collaboration between employers and the government is growing. Since individual employers and their factories or plants may face the consequences of non-compliance, it has become more crucial for governments to help employers ensure compliance. Since the introduction of the USMCA, we can see that this has, in fact, been taking place in Mexico. The Mexican government has been extremely proactive

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[48] Dainzú Patiño, 'Cuándo Vendrán Los Mejores Salarios En México Gracias al T-MEC?' *Expansión* (10 July 2020) <https://expansion.mx/economia/2020/07/10/cuando-vendran-los-mejores-salarios-gracias-t-mec> accessed 4 December 2020.

[49] *ibid.*

[50] 'Senderos: Sembrando Derechos, Cosechando Mejores Futuros | U.S. Department of Labor' <https://www.dol.gov/agencies/ilab/senderos-sembrando-derechos-cosechando-mejores-futuros> accessed 4 December 2020.

[51] 'U.S. Department of Labor Announces $20 Million in New Grants to Support USMCA Implementation, Bringing the 2020 Total to Nearly $50 Million | U.S. Department of Labor' <https://www.dol.gov/newsroom/releases/ilab/ilab20201216> accessed 7 January 2021.

in terms of raising awareness on the consequences of the USMCA for Mexican businesses. For example, the business coordinating council in Mexico (Consejo Coordinador Empresaria (CCE)) has provided a self-diagnosis toolkit for Mexican employers to check if they are compliant with labour criteria under the USMCA. The toolkit consists of a set of questions that employers can answer about their labour practices to help them better understand the areas where compliance might become an issue under the USMCA.[52]

Along similar lines, the Government of Mexico has also set up a T-MEC consultation centre where employers can make enquiries about concerns or questions they have regarding the USMCA.[53] Furthermore the CCE has been organizing several workshops and seminars for ensuring that employers can build strategies for complying with labour provisions prior to the USMCA's entry into force.[54]

Box 16: Guidance for Employers

- Employers can utilise the tools and resources offered by their local government to strengthen and build their own compliance mechanisms.
- Employers must be willing to collaborate with the government to understand where there may be issues in compliance.

6.3. South Korea's Dispute Under Their FTA with the EU

Box 17: What You Need to Know About the EU-Korea FTA Labour Elements

- The EU-Korea FTA requires the Parties to adopt the ILO Conventions and protect international labour rights, specifically: a)the freedom of association and collective bargaining; b) the elimination of forced or compulsory labour; c) the effective abolition of child labour; and d) the elimination of discrimination in respect of employment and occupation.
- As the EU countries were already in compliance with the 8 fundamental ILO Conventions, the Agreement places responsibility on the Korean government to adopt these ILO rights and obligations.
- However, the EU-Korea FTA does not specify a timeline for compliance or for dispute resolution in case of non-compliance.

6.3.1. The FTA and its Dispute Resolution Mechanisms

The EU - South Korea free trade agreement (FTA) was signed in 2009, provisionally applied starting from 2011 and entered into force in late 2015. The agreement was the most

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52 'Cuestionario-T-MEC -Mecanismo Laboral de Respuesta Rápida (MLRR)' <https://www.ccetmec.mx/wp-content/uploads/2020/08/Cuestionario-T-MEC-MLRR-FINAL-03082020.pdf> accessed 4 December 2020.

53 Centre de Consulta T MEC Secretaria de Economia, 'Https://Docs.Google.Com/Forms/d/e/1FAIpQLSc2pv3C0PgcthVpXZH-McfD1eppQDjuPGvrDww-8keNZ6TlVA/Viewform?Usp=embed_facebook' (*Help Form*)

54 'CCE - TMEC | Herramientas Para El Sector Empresarial' (*CCE - TMEC | Herramientas para el sector empresarial*) <https://www.ccetmec.mx/> accessed 4 December 2020.

comprehensive one the EU had ever negotiated up until that point: it was part of the EU's new generation of FTAs, comprising a Trade and Sustainable Development chapter.
Under this chapter, a reserved dispute resolution procedure was identified, under articles 13.14 (government consultations) and 13.15 (panel of experts).

According to Article 13.14, a party may request consultations with the other party by written request, after which "consultations shall commence promptly".[55] The Committee on Trade and Sustainable Development (CTSD) may be convened, at the request of a party. CTSD may seek advice from Domestic Advisory Group(s) (DAGs) from either or both parties. Parties may seek advice from DAGs, which may also communicate with the parties or the Committee on their own initiative. After 90 days from a request for consultations, a party may request the convening of the panel of experts in order for it to examine the matter that has not been satisfactorily addressed through government consultations. Within 90 days of the last expert being selected, the panel of experts presents a report to the parties, who must make their best efforts to implement advice or recommendations contained in the report. Implementation of the panel recommendations will be monitored by the CTSD.

Article 13.16 prevents issues relating to the Trade and Sustainable Development chapter (including labour issues) to go through the dispute settlement mechanism generally provided for in the FTA. As labour issues, and therefore social clauses belonging to the Trade and Sustainable Development Chapter, parties can only rely on government consultations and the panel of experts. Furthermore, the conclusions of the panel of experts do not bind the parties nor impose sanctions.

6.3.2. A Chronology of Events

On December 17, 2018 the European Commission initiated a procedure under article 13.14 against the South Korean government over labour issues.[56]
On July 4, 2019 the European Commission convened the panel of experts, making South Korea a major global test case. In fact, it is the first time that the EU has gone as far as to convene a panel of experts for one of the 74 countries with which it has FTAs.[57]

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[55] EU-South Korea Free Trade Agreement, Article 13.14, paragraph 1.
[56] European Commission, 'Republic of Korea – Compliance with Obligations under Chapter 13 of the EU – Korea Free Trade Agreement Request for Consultations by the European Union' <https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf> accessed 4 December 2020.
[57] European Commission, 'Republic of Korea – Compliance with Obligations under Chapter 13 of the EU – Korea Free Trade Agreement Request for the Establishment of a Panel of Experts by the European Union' <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2095> accessed 23 October 2020.

Lee Sung-wook, a law professor at Ewha Womans University, said in 2019 that "while [the EU] can't punish [South Korea] based on the FTA alone, we can anticipate sanctions as South Korean companies operating in the EU are heavily affected."[58]
Non-FTA sanctions South Korea could face from the EU include the deferment of South Korean investment by EU businesses and intensified customs procedures for South Korean exports. Ryu Mi-gyeong, director of the Korean Confederation of Trade Unions (KCTU), said: "What we've discovered here is that the government and employers have been wrong in implying that since the EU has been demanding efforts to ratify core conventions, the dispute procedures can be resolved simply through those efforts."[59]

Initially, the panel was supposed to deliver its report by the end of March 2020;[60] however, due to the COVID-19 pandemic, the publication of the report has been further postponed.

6.3.3. Violations invoked and steps taken

The dispute initiated by the EU focuses on the failure on the part of the South Korean government to ratify four out of eight core conventions from the International Labour Organization (ILO), as it had instead pledged to do in the FTA. South Korea has not ratified Conventions No. 87 and 98 concerning freedom of association or Conventions No. 29 and 105 concerning forced labour.

More specifically, the EU sees the following as problematic:[61]

- the excessively narrow scope of the "worker" concept in the Trade Union Act, which excluded individuals in "special employment" categories;
- the denial of legal recognition to trade unions admitting members who are not workers;
- the arbitrary operation of a trade union establishment reporting system;
- judicial practices punishing peaceful strikes as criminal "obstruction of duties."

Therefore, the whole dispute appears not to be solvable through the simple ratification of the ILO core conventions. In June 2019 (one month before the escalation of the dispute on the part of the EU), the South Korean government announced ratification motions for three out of four conventions (not including No. 105) to the National Assembly, accompanied by amendments

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[58] Jeon Jong-hwi, 'S. Korea to Become Global Test Case in Its Trade Dispute with the EU' <https://www.bilaterals.org/?s-korea-to-become-global-test-case> accessed 4 December 2020.
[59] '[News Analysis] S. Korea to Become Global Test Case in Its Trade Dispute with the EU' (5 July 2019) <http://english.hani.co.kr/arti/english_edition/e_international/900670.html> accessed 4 December 2020.

[60] European Commission, 'Procedural Information Related to EU-Korea Dispute Settlement on Labour'.
[61] Jong-hwi (n 57).

to the Trade Union and Labour Relations Adjustment Act (TULRAA).[62] Nevertheless, the EU went on with convening the panel of experts after concluding that the motions' passage in the National Assembly was politically uncertain. When ratification motions and legal amendments presented in June 2019 expired, the South Korean government submitted them again to the National Assembly in June 2020, to facilitate continued discussions.[63]

The ruling party, which favourably views the ratification of the ILO Fundamental Conventions holds the majority in the National Assembly: as such, the government positively expects that in-depth discussion on ratification of the fundamental conventions and amendment of relevant laws will take place in the 100-day plenary session of the National Assembly that began on September 1.[64] The South Korean government has declared that it will actively support discussion at the National Assembly to achieve the goal of passing all the amendments and ratification bills within this year.[65]

Box 18: Potential Sanctions

- No sanctions are provided for under the Trade and Sustainable Development chapter.
- A specific dispute settlement mechanism, the maximum escalation of which is the convening of a panel of experts, is provided for under the Trade and Sustainable Development chapter.

6.3.4. The automobile industry suffers from unstable labour relations

South Korea is the fifth largest producer of passenger cars in the world.

Its automobile industry accounts for 13% of manufacturing output, generates 12% value added, and contributes to about 12% of total employment in South Korea. In 2018, the number of automobile companies in South Korea was 4'724, employing around 351'300 people. The largest South Korean automobile companies include Hyundai, Kia Motors, GM Korea and SsangYong Motor Company.

Approaching the end of 2020, domestic automobile sales — which had been relatively intact amid the COVID-19 pandemic — have been showing signs of contraction with the coronavirus becoming resurgent across the country.

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[62] Weong Jung Kim, Do Hyung Hee and Paul Cho, 'Recent Amendments to the Trade Union and Labor Relations Adjustment Act and the ILO Conventions - Kim & Chang' <https://www.kimchang.com/en/insights/detail.kc?sch_section=4&idx=20802> accessed 4 December 2020.

[63] Panel of Experts Proceeding Established Under Article 13.15 of the Korea-EU Free Trade Agreement. Contents of the Hearing of 8 and 9 October 2020.

[64] *ibid*.

[65] *ibid*.

Hyundai Motor sold 2.24 million vehicles from January to August this year, down 21.4 percent from a year earlier. The company also logged a 3.9 percent growth in domestic sales during the cited period, but faced a 26.8 percent decline in exports. Renault Samsung sold 84'157 vehicles from January to August this year, down 26.6 percent from a year earlier. It enjoyed a 28.6 percent increase in domestic sales as its new crossover XM3 enjoys popularity, but saw its export plunging by 73.4 percent amid the global market downturn and setbacks in securing production volume for exports. GM Korea sold 228'417 vehicles from January to August this year, down 20.6 percent from a year earlier. Domestic sales increased 10.7 percent from the same period a year earlier, but exports plunged by 26.9 percent during the same period. The company has now been posting losses for six consecutive years.

Growing uncertainties weigh down the South Korean automobile industry due to the slowdown in overseas markets in addition to trade unions' wage negotiations. In the case of GM Korea, the company's labour union decided on October 29 to launch regular strikes and to refuse work after hours until an annual wage deal is concluded with management, after 20 failed rounds of negotiations since July.[66] The COVID-19 pandemic has already disrupted 60'000 units of GM Korea's output in the first six months of 2020, and an additional 1'700 units have been disrupted by labour unrest. "Domestic carmakers avoided the worst situation in the first half as sales within the country were intact," a car company official said. "However, as the pandemic became resurgent and tax benefits end, they are losing domestic momentum while exports remain tepid. As uncertainties loom large, continued labour disputes will drag down carmakers' competitiveness further."[67]

6.3.5. Amendments to the TULRAA Aim to Respond to Key Issues under ILO, but Face Opposition on Grounds of National Particularities

However, present labour tensions in South Korea do not relate exclusively to the protracted negotiations for wages. Issues related to collective bargaining are at the heart of the South Korean labour movement, and their relevance is and will be boosted by the ongoing dispute with the EU. The dispute is built on the Korean government's failure to ratify the ILO Fundamental Conventions. Legal amendments to the TULRAA, advanced by the South Korean government, are meant to address key issues from the ILO Conventions and imply substantial changes within labour-management relations, including (but not limited to) union

[66] Nam Hyun-Woo, 'Labor Dispute Amplifies Uncertainties for Domestic Carmakers' *The Korea Times* (7 September 2020) <http://www.koreatimes.co.kr/www/tech/2020/12/419_295631.html> accessed 4 December 2020.

[67] All statistics in section 6.3.4. have been retrieved from Statista. Statista. Automotive industry in South Korea – Statistics & Facts. 31 Aug. 2020. https://www.statista.com/topics/5249/automotive-industry-in-south-korea/

membership, selection of union officers, wage calculation for full-time union officers, and bargaining method.

Amendments to TULRAA[68]

- Unemployed/terminated workers will be allowed membership within a trade union, regardless of the form/structure of the trade union.
  - However, the scope of union activities carried out by members who are unemployed/terminated must not cause any disruption to the efficient operation of the business.
- Union officer eligibility may be determined by the union's bylaws. However, eligibility for company-based unions will be limited to union members who are employees of the company.
- The provision prohibiting payment of wages to a full-time union officer will be removed.
  - A full-time union officer will be allowed to engage in union operation/management activities within the maximum paid time-off limit to improve labour-management relations and activities set forth under the law - including negotiations/bargaining, grievance handling, and industrial safety and health activities - without a reduction in wages.
  - The employer's consent or collective bargaining agreement to provide compensation to a full-time union officer beyond the paid time-off limit will be void.
  - A Time-Off System Deliberation Committee will be established within the Economic, Social and Labour Council.
- The employer will be obliged to faithfully bargain with each trade union it consented to separately bargain with without any discrimination.
  - The state and local governments will encourage labour and management to freely select bargaining methods (depending on the company, industry, location, etc.) as necessary.
- Occupation of major facilities or parts of such facilities will be prohibited, to preserve both the employer's right to manage facilities and the trade union's right to strike
- The effective period of collective bargaining will be increased from two years to three years.
- The assistance of union operation expenses within a certain limit will be allowed (exemption to unfair labour practice) as long as the assistance is not likely to infringe upon the union's independent operation.

South Korean trade unions typically take up the form of company-wide unions, whereas European trade unions more frequently organise into sector/industry-wide unions.[69]
Employers in South Korea claim that potential changes to the TULRAA - such as the ones concerning union membership for the unemployed/terminated, union officer eligibility and payment of wages for full-time union officers - would be more reflective of the European labour reality, rather than of the South Korean one.

Therefore, employers and their organizations, in their submissions to the panel of experts now handling the dispute, have emphasized the differences between the South Korean present labour market conditions and the European one, stressing the need for more sensitive design of the amendment, considering also the consequences that the ratification of the ILO conventions will bring about.

[68] Kim, Hee and Cho (n 50).

[69] Based on details shared in an interview with the Korea Enterprises Federation.

For instance, employers' organizations highlight the need for an improved system in the management of labour relations, in order to achieve stability and move forward to a legislative improvement that keeps up with international labour standards.

6.3.6. South Korean Employers Have the Potential of Playing a Role in Stabilizing Labour Relations and Protecting Their Status in the International Market

In South Korea, where the automobile sector represents 17% of national industrial employment and 16% of EU automobile imports, the FTA with the EU contributed to shifting competitive conditions in the local auto market, with an influx of imports from the EU, particularly of larger cars. The erosion of South Korean auto manufacturers' profits, to be partially traced back to the FTA, is likely to create adverse impacts for workers in more insecure, low-paid jobs in the sector, especially those located in the lower tiers of the production network.

There is partial evidence that, at least in South Korea, the FTA with the EU has worsened employment prospects, with consequences on labour rights for workers, without effectively boosting protection for the latter.[70]

At the moment, labour relations in South Korea are marked by tension, as well as by a gradual tendency for trade unions within specific industries to come together into larger umbrella organizations (such as the Korean Confederation of Trade Unions - KTCU). This is the case, for example, of the automobile industry, with the trade unions for Hyundai, Kia Motors and GM Korea joining the KTCU. Such a strategy boosts the individual and collective power of trade unions, enabling them to more coherently and act collaboratively to influence the government and to potentially boycott the social dialogue when their claims are not fully received.

Employers should follow a gradual strategy similar to the one adopted by trade unions in advocating for their common interests, by coming together and/or efficiently coordinating, in order to enhance their ability in pushing all social partners to stay at the negotiating table, rather than leaving it. Such a strategy, when persistently pursued, strengthens the likelihood of a compromise eventually coming out of the negotiating table, and promotes more peaceful, stable and systematized labour relations. As a result, the preparation time needed by different

[70] Based on details shared in an interview with the Korea Enterprises Federation.

industries in South Korea to adapt to the changes potentially resulting from the government's ratification of the ILO conventions will be reduced.

South Korea is part of the first dispute initiated by the EU against a country with which it has an FTA. Given that the dispute is focused on the alleged South Korean failure to "make sustained and continued efforts towards ratifying the fundamental ILO Conventions", it is significant for South Korea to provide evidence of its ongoing, concrete efforts towards ratification, in order not to lose its reputation in the international market.
If South Korea is able to show its ability to stand up to the terms of the FTA with the EU, also through employers' action, it will receive important reputational benefits, and these benefits will in turn be enjoyed by employers - a desirable outcome for a country with significant exporting industries such as the automobile sector.

7. Recommendations

7.1. Recommendations and Best Practice Examples for Employers in Developing Countries

A. Active engagement between employers and its respective employer organization ensures that the employer and business perspective is given substantial formal representation.

Employer organizations across different countries provide several avenues for businesses to participate when it comes to the implementation of social clauses. This can take several forms, but the most fundamental avenues open when 1) a new FTA is being considered and then negotiated, 2) the FTA is implemented, and 3) disputes are being resolved. At the stage of negotiations for a trade agreement, governments tend to rely on employers' organizations to provide balanced and well-rounded perspectives on employer demands, and the conditions that employers may be willing to accept. This can be seen in the case of Kenya, where the Kenyan government has been actively seeking feedback from the Federation of Kenyan Employers during its ongoing FTA negotiations with the US. Participation during implementation includes activities that facilitate compliance with obligations linked with or derived from the agreement. As illustrated in Chapter 4 with the CAFTA-DR, EU-Korea FTA, and USMCA, the governments of FTA parties often fund capacity building and technical assistance training to assist employers as they adapt to labour law reform. Employers organizations can therefore provide an important contribution by centralizing such information and making it available to its members, as well as channelling any special needs they may

have, which could be addressed either at the negotiation stage or through the provision of targeted assistance.

Similarly, at the time of dispute settlement, arbitral panels or a Panel of Experts will seek the position of the local employers' organizations employer organizations with respect to the issues at hand. For example, during the ongoing trade dispute between the EU and Korea, the Korean Enterprises Federation had provided their opinion to the panel of experts that has been constituted to determine the dispute. Employers can thus make their views heard through these platforms. They can provide a very valuable means to ensure that private sector voices are taken into account.

Outside of trade negotiations and trade disputes, an employers' organization can also be a resource base for employers. They may provide an avenue to share and learn from other employers. For example, CACIF (the Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations) in Guatemala,[71] not only offers several corporate social responsibility initiatives, but also provides guidance to employers on compliance with labour standards. CACIF also provides formal training on occupational health and safety standards, which are general best practices not specifically set out in the CAFTA-DR. It also uses its communication channels to facilitate interactions and networking opportunities between local and foreign business representatives.

B. Apply and participate within domestic advisory groups (DAG) or other civil society mechanisms

Under several trade agreements, the strong engagement of local and national social partners is crucial for all matters that have to do with industrial relations and employment. Preserving tripartism and respecting it without undue interference is key. DAGs have been set up, as mandated by some trade agreements. DAGs are formal platforms that can be used to evaluate publicly whether the respective government has implemented and complied with their trade agreement obligations. Such social dialogue that influences the government is crucial to employer interests because governments are ultimately negotiating on the behalf of their employers. Further, DAGs can provide for a cooperative structure or 'neutral ground' where dialogue can take place between parties- governments, workers, and employers - who may otherwise be in conflict. This recommendation is not exclusive to international dialogue, as important tripartite structures also exist at the national level. The views of employers on matters relating to labour standards may be relayed to the responsible national authorities.

[71] For more details, refer to the CACIF website,

The involvement of other stakeholders, who are not constituents of the tripartite scheme, can also enrich discussions and approaches of very specific topics, such as global supply chain related challenges. For example, large businesses may collaborate with small individual businesses within their network to facilitate social dialogue. As facilitators of an 'ethical cooperation model', a strong party within a supply chain may work within their private networks to help resolve any conflicting issues that may exist between employees or management.[72] This method could be said to have been successfully incorporated in Costa Rica, with the intervention of a Norwegian importer. However, a similar mechanism can be evolved by local businesses with respect to partner organizations within their unique respective supply chains.

C. Businesses are encouraged to refer to fundamental ILO conventions in their code of practice and increase awareness of their practices in line with ILO fundamental conventions.

Although addressed to ILO Member States, the eight ILO Fundamental Conventions and the 1998 Declaration and its principles are being taken up by other bodies. They now form a reference point in the United Nations Guiding Principles on Business and Human Rights, are referenced in the OECD Guidelines for Multinational Enterprises, constitute the four labour principles of the United Nations Global Compact and in many labour chapters of trade agreements. Companies are also referring to ILO Fundamental Conventions or the 1998 Declaration in their corporate codes of conduct and human rights policies, as well as supply chain policies and Corporate Social Responsibility statements to show their commitment with the fundamental issues covered by those Conventions and the 1998 Declaration.

The most representative national employers' organisations, which are IOE members, have a key role in assisting on the one hand governments to ensure that national law and practices are in line with fundamental ILO conventions and the 1998 ILO Declaration. If the national legal framework is not in conformity with these conventions and the Declaration, this can trigger disputes and can have an impact on business and the overall competitiveness of the economy. On the other hand, the most representative national employer organizations have a key role to play in encouraging businesses to reference those conventions in their codes of conducts, human rights policies and supply chain policies and showcase how their practices and policies are aligned with those Conventions and the Declaration.

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[72] For more information on the ethical cooperation model, see the Bama and Dole example cited in Martens, Deborah and Gansemans, Annelien. Forthcoming. Labour governance initiatives in the Costa Rica–EU pineapple supply chain and their impact on social dialogue, in Dealutre, Guillaume, Echeverria Manrique, Elizabeth and Fenwick, Colin (eds), *Decent work in a globalized economy: Lessons from public and private initiatives* (ILO).

D. ***Employers and employer organizations have avenues to formally influence the process of negotiating and drafting free trade agreements.***

Private actors can manifest the full potential of this opportunity to voice their interests regarding labour standards to their respective governments through various ways. First, employers can send submissions to their governments. For example, Kenya is currently negotiating a free trade agreement with the United States. The Kenyan Business Federation was in the process of submitting a position paper (at the time of interview) to their government, detailing how the private sector has adhered to domestic labour standards - and continues to advocate for a culture of compliance. The Kenyan Business Federation has argued that these best practices have put the developing country in a strong strategic position to negotiate the labour chapter of the trade agreement with the United States. Kenya envisions building a mutually beneficial relationship with the United States in which Kenya ensures that the U.S. commits to defending and raising its international labour standards as well. Such best practices could provide leverage for Kenya to negotiate substantial commitments on other fronts.

Secondly, a more formalised process of consultations can be requested by employer organizations. Aside from writing submissions and position papers, government and business representatives from various sectors may meet and engage with each other. At its best, such consultations can even extend to the stage where negotiations are taking place. This can take the form of the 'room next door' where governments can consult with business stakeholders that are seated in the room next door to where trade negotiations are taking place, a strategy that has been actively pursued by Mexican employer organizations in the past.[73] A seat at the room next door often requires government invitation, and thus employer organizations should consult their government representatives for transparent guidelines and necessary procedures.

E. Request opportunities from the IOE for 'horizontal' cooperation between employers of both developed and developing countries.

Since business and labour practices can be very different in developed and developing countries, there often exists an information gap between the two when it comes to understanding different labour practices and their implementation. It was found in a study that EU officials had a limited understanding of local labour issues in trade partners when they

[73] Lynn Brezosky, 'Q&A with Mexican NAFTA Negotiator Moises Kalach' *ExpressNews.com* (4 February 2018) <https://www.expressnews.com/business/national/article/Q-A-with-Mexican-NAFTA-negotiator-Moises-Kalach-12552575.php> accessed 4 December 2020.

negotiated and implemented FTA labour provisions.[74] This lack of common understanding between two distinct local contexts can lead to a divergence of interpretation regarding labour standards or a divergence in their practical implementation.

For example, trade union systems can vary how they implement collective bargaining rights. Industry-level trade unions in Germany may not be comparable in design or function to the enterprise-level trade unions in the Republic of Korea, or to the system of solidarismo[75] that is present in Costa Rica. Therefore, employers and employer organizations may use the IOE - as a sort of network - in order to create avenues for cooperation and dialogue between businesses in various countries. Since the role of the IOE is to coordinate the interests of business stakeholders from across the world, the organization's expertise may be beneficial for facilitating the exchange of diverse business perspectives.

Employers should also make use of the cooperation provisions that exist within a free trade agreement. For instance, the USMCA mandates the U.S. Department of Labour to fund several projects to help Mexican employers understand and comply with the labour reforms in Mexico. It is important to note that cooperation provisions written in the law, like this one, are usually structured on a state-to-state basis. Thus, employers and employer organizations can advocate with their *governments* to organise workshops, study tours and other interactive mechanisms. Employers in developing countries can use these tools to interact with stakeholders from partner countries, allowing both parties to become familiar with local contexts and highlight constraints that developing country businesses face. This also presents an opportunity for businesses to learn about best practices by business partners that could be incorporated into their own operations.

F. ***Request and make full use of their tripartite schemes, provided by the ILO and by respective free trade agreements.***

As the only tripartite U.N. agency with government, employer, and worker representatives, the International Labour Organization (ILO) provides a unique forum for its Member States to freely and openly debate and find consensus on labour standards and policies. This model is also replicated at national levels so that all three stakeholders may come together to shape an

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[74] Harrison, Smith et al, *Free Trade and Global Labour Governance: The European Union's Trade Labour Linkage in a Value Chain World* (Routledge 2020).

1. [75] While *solidarismo* as a practice has been much criticised, it serves here as simply an example of how different countries might have different forms of adoption of labour standards, based on their circumstances and constraints. For more information regarding *solidarismo*, refer 'Revista Envío - Solidarismo: Anti-Unionism in Sheep's Clothing' <https://www.envio.org.ni/articulo/2910> accessed 4 December 2020.; 'Solidarism - CONASOL' <https://conasol.cr/quienes-somos/que-es-solidarismo/> accessed 4 December 2020.

environment conducive to competitive and sustainable enterprise that simultaneously advances the rights of workers and citizens.

For example, under the USMCA, the government of Mexico is required to designate a Mexican Point of Contact, who is responsible for communicating with the public regarding labour matters. This person, under the Ministry of Labour, cooperates directly with American legislators, regulators, employers, unions, and the American Point of Contact. The Point of Contact is essential for the appropriate agencies of government to work together - and not in their silos - to develop and implement cooperative activities. These activities include improving labour inspection systems, promoting productivity in SMEs, directing tripartite consultation, and addressing employment assistance schemes.

8. Conclusion

Free trade agreements with labour provisions grew from four in 1995 to eighty-six in 2019. The private sector in developing countries has had to build capacity to comply with this international expansion. The struggle to adapt supply chains and commerce to this international order has often come at the hands of international and domestic legal institutions that do not properly communicate to private actors about changes in the law and best practices for compliance. Chapter 5 laid out the landscape of these legal institutions, as well as the key labour provisions in FTAs, and its effect on employers.

Chapter 6, examines three real-life examples of developing countries changing their laws in order to comply with international treaty obligations. Those trading with the United States can learn from Guatemala’s historic dispute settlement case initiated by the United States under the CAFTA-DR free-trade agreement. Though it was proved that the Guatemalan government failed to enforce its labour laws in unique instances, the United States could not prove that Guatemala’s had a history of sustained or recurring non-compliance. While some argue that the FTA was not binding enough, others argue that Guatemala practiced satisfactory labour governance. Guatemalan employers then resorted to engaging with courts in an organized way and implementing best practices. We discuss the impact the dispute had to employers in Guatemala and how their legal institutions have improved through the course of, and in the aftermath of the dispute.

The next section discussed Mexico’s obligations under the USMCA and its novel “rapid response” system. The USMCA, which entered into force in 2020, has arguably the strongest labour provisions ever written because its “rapid response” system is an institutionalized and

enforceable mechanism. Though its effectiveness remains to be seen, the USMCA is poised to communicate with and assist businesses in the trade region with capacity building - but also can lead to the imposition of sanctions if labour disputes arise. The case study also highlights the possible indirect benefits that the USMCA can provide for employers in Mexico, and how it has helped bring the Mexican government and employers closer, and created new avenues for collaboration.

For those trading with the European Union, we took a look at Korea's dispute. The EU model has taken an international leadership stance by tying its treaty obligations to International Labour Organization standards. The EU has raised a dispute against Korea in 2019 on account of the Korean legislature - claiming that the government failed to swiftly pass legislation that enforces the ratified ILO standards.

Chapter 7 provided practical recommendations that will aid private sector actors in legally complying with social clauses. Insight was obtained from practicing employers within a diverse set of countries who shared their experiences learning to comply with labour standards.

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10. Annex 1

✔ Next Steps-A Survey for Employer Organizations

As a result of the research carried out for the preparation of this report, it is recommended that, as a next logical step to further nuance the findings of this study, a broader survey is conducted among IOE's member organisations. Since this report and the input collected from employers and employer organizations was limited to the interviews conducted, such a survey could provide a more holistic image of the concerns faced by the private sector regarding social clauses in FTAs. The below list of questions may be forwarded to IOE member organizations in order to take a more comprehensive survey of the issues that employers face in the implementation of labour provisions. While the interviews conducted for this report contained similar questions, the questions were more specifically tailored to the organization being interviewed. The questions given below, on the other hand are more general in nature, and could be asked to all of IOE member organizations.

1. **Which of the following labour standards do you find difficult to implement, or have faced issues with, even after implementation? (mark all that apply)**
   - Freedom of association and collective bargaining (issues with trade unions
   - Elimination of child labour
   - Elimination of forced or compulsory labour
   - Discrimination at the workplace
   - Equal remuneration for men and women for work of equal value
   - Payment of minimum wages
   - Number of working hours (8 in a day/48 in a week)
   - Organizing systems of labour inspections
   - Taking measures ensuring occupational safety and health

2. **What could be some of the causes for the constraints concerns you face when it comes to implementing labour standards**?
   - Lack of financial resources
   - Lack of information and guidance on implementation
   - Lack of incentive due to limited implementation of labour legislation
   - Prevalence of bad actors that make financial benefits by failing to uphold labour standards
   - Absence of avenues for coordination between workers and employers, or between employers and government
   - Others (please specify)

3. **What kind of platforms does the government provide for employers or employer organisations to participate in policy making processes regarding trade and employment matters? (check all that apply)**
   - There are no such platforms
   - The government/relevant ministries hold meetings with key business organizations as required
   - We make submissions to the government, and request meetings

- The government/relevant ministries invite opinions and calls for input through their website
- The government holds open consultations with employers prior to introducing policy changes
- The government holds annual/semi-annual meetings with employers to discuss their concerns or issues with existing policies/laws.

4. **On a scale of 1-5, how aware would you say your employer members are knowledgeable of the implications of social clauses in trade agreements with respect to their businesses (what their obligations are, what the consequences of non-compliance could be, etc)?**
   - 1 (I am unaware)
   - 2 (my knowledge is limited to the obligations placed by domestic laws)
   - 3 (somewhat aware. I know my obligations under domestic laws, and the existence of trade agreements but I am not sure what social clauses are there)
   - 4 (quite aware, I know my obligations under domestic law, and my obligations under social clauses under trade agreements, but I am not sure what its consequences could be)
   - 5 (very aware, I know my obligations under domestic law and under international agreements, as well as the costs of non-compliance)

5. **Does the government provide capacity building sessions for employers with respect to implementing social clauses in trade agreements at the time when reforms are being introduced?**
   - Yes
   - Sometimes, but there needs to be more such sessions
   - No

6. **What tripartite institutions (including representation from workers, employers and government) has the government set in place in the context of trade?**
   - We have domestic advisory groups pursuant to trade agreements
   - We have national level tripartite committees
   - We have national and state level tripartite committees
   - We do not have any tripartite institutions
   - Either because we do not have any tripartite institutions or because the current ones are dysfunctional, we engage directly with the ILO

7. **If you have tripartite institutions, how regularly do meetings take place?**
   - Annually
   - Once every six months
   - Every three/four months, or more frequently
   - It depends on when the government decides to convene meetings

8. **If you have tripartite institutions, on a scale of 1-5, how strongly would you rate business participation within these institutions?**
   - 1 - no participation
   - 2 - participation is rare
   - 3 - participation could be better
   - 4 - participation is strong, but it is limited to certain big business, or the same set of employers who regularly attend
   - 5 - participation is strong and includes diverse employer representation

9. **What kind of assistance do you think you need in order to be able to better implement social clauses in trade agreements such as the ones mentioned above in question 1?**
    - Funding from the government
    - Capacity building initiatives (workshops, seminars etc)
    - A change in laws or its implementation
    - Other (please specify)

10. Could you give examples of industries in your country which have been able to consistently comply with social clauses in trade agreements? Conversely, could you give examples of industries that find it difficult to ensure compliance?

    _____

11. What advice do you give to your members with respect to the implementation of labour provisions under FTAs? And what awareness campaigns does your employer organization run?

    _____

12. What advice do you give to your members to ensure that they protect their rights as stakeholders when FTA negotiations are underway?

    _____