ILO Research Paper No. 4

International Labour Office

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Usefulness in the context of the sanction-based dimension of labour provisions in US free trade agreements

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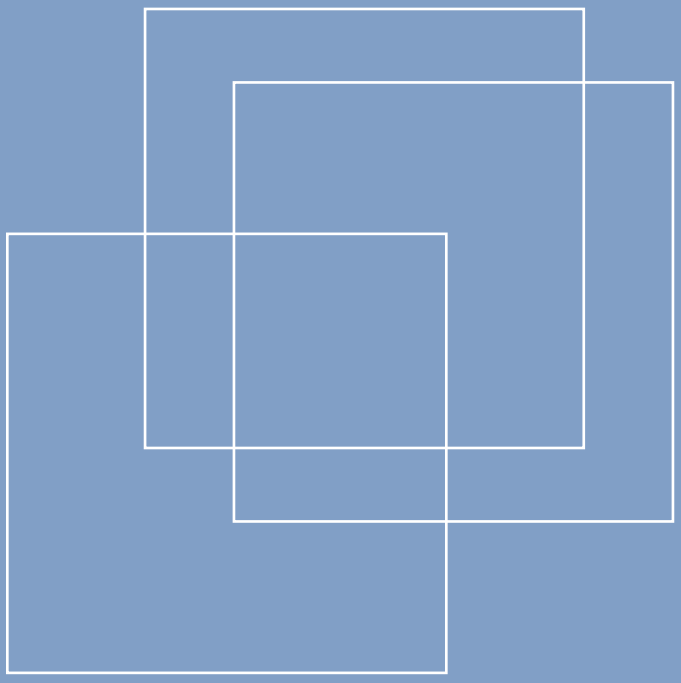

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The comments of the ILO's supervisory bodies: Usefulness in the context of the sanction-based dimension of labour provisions in US free trade agreements

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International Labour Office

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ISSN 2306-0875 (web pdf)

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Acknowledgements

The authors would firstly like to thank Raymond Torres and Uma Rani for their support as well as for their constructive comments on this paper. We would also like to express our appreciation to Franz Ebert, Desirée Leclerc and Xavier Beaudonnet for their useful suggestions on earlier versions of this paper, as well as to the two anonymous reviewers. Finally, we would like to extend our deep gratitude to Cleopatra Doumbia-Henry, for enabling this research project to come through.

The paper has been prepared for research purposes only. Its aim is to help understand how ILO instruments and mechanisms have been used in certain cases, which have emerged as part of bilateral trade arrangements. The authors do not express any views on the validity of the cases in question.

Abstract

This paper looks at recent complaints under the labour chapters of three US trade agreements – the CAFTA-DR, the US-Bahrain and the US-Peru FTAs – and undertakes a preliminary analysis of the use of the comments of the ILO's supervisory bodies in the regulation mechanisms of labour provisions contained in those trade agreements. The paper analyses the way both labour unions and the competent authorities in the United States have used or relied on the comments of the ILO's supervisory bodies in the submission process related to the sanction mechanisms of labour provisions. It also examines the similarities between, on the one hand, the comments of the ILO's supervisory bodies on each country's application of relevant ILO instruments and, on the other hand, the terms of the official submissions by labour unions and the reviews of the competent US authorities. It further highlights the manner in which arguments presented by labour unions in their submissions have relied extensively on the comments of ILO supervisory bodies. The paper concludes by drawing insights as to the possible implications in the future for the ILO in the context of the labour chapters of bilateral or regional trade agreements.

Keywords: free trade agreements and labour rights, ILO supervisory system, international labour standards, trade and labour

JEL classification: F16; K31; K33; J51; J81; J83

1 Introduction

International labour standards, as well as various mechanisms and procedures for supervising the actual implementation of these standards, have been increasingly used internationally as a result of the growing numbers of new actors to which globalization has led. The inclusion of labour provisions with a sanction-based dimension in free trade agreements (FTAs) has been one illustration of this new trend. The number of such agreements has grown significantly in recent years and in fact, in the past two decades, a large number of ILO member States have been involved in bilateral or regional trade agreements that have included labour provisions. While these labour provisions can contain conditional or promotional elements, they also generally provide for mechanisms for the resolution of disputes concerning alleged violations, which may result in sanctions as a last resort. The number of trade agreements with labour provisions that have entered into force and been notified to the World Trade Organization rose from zero in 1990 to 47 in 2011.[1]

Several studies have indeed pointed out the increasing reference to the ILO instruments that define labour standards in trade agreements (amongst others, Polaski, 2004, 2008; Doumbia-Henry, Gravel, 2006; Ebert, Posthuma, 2011). These studies mainly analyse the way these provisions have incorporated ILO instruments, in particular, conventions, which are legally binding international treaties that may be ratified by member States, and since 1998, the ILO Declaration on Fundamental Principles and Rights at Work. In fact, by the end of 2009, 60 per cent of trade agreements in force had made specific reference to ILO Conventions or to the ILO 1998 Declaration. The majority of labour provisions in trade agreements refer to ILO instruments, mostly in the form of a specific reference to the 1998 ILO Declaration or to the principles and rights contained in it (Ebert, Posthuma, 2011).

However, most of these studies have focused on the formal incorporation of ILO standards in FTAs without analyzing the further use and interpretation of these standards in the framework of labour provision mechanisms. Several factors could explain this research gap. Firstly, research tends to show the overwhelming preference for political dialogue in order to overcome compliance gaps. This has therefore limited the cases in which an analysis of the role of the comments of the ILO's supervisory bodies in the decision-making of sanctions was possible (for European Union (EU) Generalised System of Preferences (GSP) cases, see Orbie, Tortell, 2008, 2009a; 2009b; Ebert, Posthuma, 2011; Brandtner and Rosas, 1999; for the North American Agreement on Labour Cooperation (NAALC) see Englehart, 1997). Secondly, sanction mechanisms with regard to labour provisions have so far have been scarcely used. In fact, there are very few cases likely to be analyzed and the most recent cases are still in progress. In the case of the EU GSP, two investigations have led to the withdrawal of trade preferences under the sanction-based labour provisions. The two cases pertained to systematic use of forced labour in Myanmar and systematic violations of workers' freedom of association and the right to collective bargaining in Belarus. Recent studies have shown that the EU's withdrawal of Belarus tariff preferences in 2007 was mainly based on the report of the ILO Commission of Inquiry and the failure of Belarus to implement the relevant recommendations (Orbie, Tortell, 2008; Ebert, Posthuma, 2011).

While it may be too early to draw definitive conclusions on the practical impact of labour provisions in trade agreements, recent complaints under the labour chapters of three US trade agreements – the

[1] See ILO (2012a) *Fundamental principles and rights at work: From commitment to action*, Report VI, International Labour Conference, 101st Session, 2012, pp.100-105.

Central America-Dominican Republic-United States (CAFTA-DR), the US-Bahrain and the US-Peru FTAs – allow for a preliminary analysis of the use of the comments of the ILO's supervisory bodies in the regulation mechanisms of labour provisions contained in those trade agreements. The first such complaint, filed in 2008 CAFTA–DR FTAs concerned the alleged failure of Guatemala to enforce its labour laws effectively, in particular regarding trade union rights.[2] This case led to formal consultations in 2010 and a request to establish an arbitral panel in 2011. A second case under the CAFTA–DR was filed against Costa Rica in 2010 relating to state interference in union affairs, but was withdrawn after the issue had been partly resolved. Two more cases were filed in 2010 and 2011 under the United States trade agreements with Peru and Bahrain. While the Peruvian case concerns the alleged failure of a state authority to enforce national labour law relating to collective bargaining, the case of Bahrain alleges anti-union actions following a series of demonstrations and the Government countermeasures in the first half of 2011.[3]

This paper analyzes the way both labour unions and the competent authorities in the United States have used or relied on the comments of the ILO's supervisory bodies in the submission process relating to the sanction mechanisms of labour provisions. It should be recalled that since its creation in 1919, the mandate of the ILO has included adopting international labour standards, promoting their ratification and application in its member States and the supervision of their application as a fundamental means of achieving its objectives. In order to monitor the progress of member States in the application of international labour standards, the ILO has developed supervisory mechanisms, which are unique at the international level. The ILO's supervisory system as a whole represents a balance between technical instances, whose members are selected for their impartiality, independence, objectivity and expertise (i.e. the Committee of Experts on the Application of Conventions and Recommendations (hereinafter CEACR)), and representative bodies, which are composed of government, worker and employer delegates (in particular the Committee on Freedom of Association (hereinafter CFA) and the Conference Committee on the Application of Standards (hereinafter CCAS)).

Section 2 of this paper studies the labour provisions of three US FTAs in which submissions under labour chapters have been filed and accepted by the US competent authorities. Section 3 examines the similarities between, on the one hand, the comments of the ILO's supervisory bodies on each country's application of relevant ILO instruments and, on the other hand, the terms of the official submissions by labour unions and the reviews of the competent US authorities. It also highlights the manner in which the arguments presented by labour unions in their submissions have relied extensively on the comments of ILO's supervisory bodies in order to document and reinforce the alleged violations contained in the complaints. Finally, it reviews the complaints undertaken by the competent US authorities. Section 4 concludes drawing insights as to the possible implications in the future for the ILO in the context of the labour chapters of bilateral or regional trade agreements.

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[2] More generally on CAFTA-DR, see Eliott (2004) and Rodas-Martini (2006).

[3] Two more recent cases, which will not be examined in this paper as they are in their initial stages, have also been filed. The first one was filed on 22 December 2011, alleging that the Government of the Dominican Republic's actions or lack thereof denied workers their rights under Dominican law relating to a set of fundamental rights (freedom of association, forced labour, child labour, collective bargaining, acceptable conditions of work), in violation of the Labour Chapter of the DR-CAFTA. The second one was filed on 26 March 2012, alleging that the Government of Honduras' actions or lack thereof denied workers at factories in the apparel and auto parts manufacturing sectors, plantations in the agricultural sector, and enterprises at the Port of Cortez their rights under Honduran labour law relating to freedom of association, the right to organize, the right to bargain collectively, child labour and acceptable conditions of work.

2 Labour provisions in US free trade agreements and related dispute settlement mechanisms

2.1 Labour provisions in US FTAs

The labour provisions in US bilateral and regional trade agreements are mainly conditional, i. e. labour provisions providing – additionally or exclusively – for incentive or sanction-mechanisms (Ebert, Posthuma, 2011). Since the North American Agreement on Labor Cooperation (hereinafter NAALC) entered into force in 1994, which was the first agreement linking labour provisions with economic sanctions, all US FTAs have incorporated labour provisions. Table 1 shows the scope, the content, and the enforcement mechanisms for the US-Peru, the DR-CAFTA and the US-Bahrain FTAs.

Table 1: Labour provisions in the US-Peru, DR-CAFTA and US-Bahrain FTAs

Name of the FTAs	Date of entry in force	References to ILO Instruments	Scope and content of labour provisions	Enforcement mechanisms
US-Bahrain; DR-CAFTA	2006	ILO 1998 Declaration Convention No. 182	- "Strive to ensure" Core labour standards (except non-discrimination) and minimum working conditions - Enforcement of labour laws in these areas* - No encouragement of trade or investment through weakening of labour law in contravention of the labour principles contained in the agreement.	Fines up to US$ 15 million in the case of non-application of national labour law in these areas (to be paid into a special labour rights fund).
US-Peru	2009	ILO 1998 Declaration Convention No. 182	- Ensure respect of CLS as contained in the ILO Declaration, and enforcement of related national laws* - No weakening of labour law in a manner affecting trade or investment if this contravenes CLS.	Regular trade sanctions or monetary assessment under the regular dispute settlement mechanism of the agreement.

Note: * This applies to the extent that it "affects trade"
Source: Ebert, Posthuma, 2011.

The US-Bahrain FTA and CAFTA-DR use a similar formulation in their respective labour chapters (chapters 15 and 16) (see Table 2). These agreements first state their shared commitments reaffirming, "*their obligations as members of the International Labor Organization* […] *and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998).*"[4]

These two agreements also state that,

> "*each Party shall strive to ensure that such labor principles and the internationally recognized labor rights* […] *are recognized and protected by its law*" [5]

referring to the following rights: a) freedom of association, b) the right to organize and bargain collectively, c) the elimination of all forms of compulsory or forced labor, d) labor protections for

[4] See US-Bahrain FTA (Chapter 15, Art. 15.1) and DR-CAFTA (Chapter 16, Art. 16.1).
[5] Ibid.

children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor, and e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[6] The agreements also affirm that,

> "*each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights* […] *and shall strive to improve those standards in that light.*" [7]

Table 2: Summary of the labour provision contained in CAFTA-DR

Each Party (Chapter 16):
1. Shall not fail to effectively enforce its own labor laws in a manner affecting trade;
2. Shall strive to ensure that ILO labor principles and internationally recognized worker rights are recognized and protected by domestic law;
3. Shall strive to ensure it does not "waive or derogate from" domestic labor law in order to encourage trade or investment;
4. Has the right to establish its own domestic labor standards and adopt or modify its labor laws;
5. Retains the right to exercise discretion in allocating enforcement resources;
6. May not undertake labor law enforcement in the others' territories;
7. Shall ensure procedural guarantees for enforcement of its labor laws;
8. Shall establish Labour Affairs Council of Cabinet-level or equivalent representatives, and an office in its labor ministry to serve as a point of contact for carrying out the Council's work;
9. Shall be guided by a detailed mechanism for cooperative activities and trade capacity building.
10. May request consultations with another party on any matter under the labor chapter.
Sanctions and dispute settlement provisions for violations (Chapter 20):
11. Sanctions under DR-CAFTA labor provisions are authorized only for failure to effectively enforce one's own labor laws through a sustained or recurring course of action or inaction in a manner affecting trade between the Parties. An annual monetary assessment could be imposed for failure of the disputing parties to reach a resolution or failure of the defending country to observe the terms of the agreement.
12. The maximum penalty for such sustained failure is $15 million annually, which shall be paid into a fund established by the DR-CAFTA Free Trade Commission and expended at its direction for appropriate labor initiatives in the defending country including efforts to improve or enhance labor law enforcement. If a country fails to pay the assessment, the complaining country can take other steps to secure enforcement, including suspending DR-CAFTA tariff benefits.

Source: Bolle, 2005

Of these shared commitments, only sustained failure to enforce one's own labor laws is enforceable through binding dispute settlement and ultimately subject to fines or sanctions (Bolle, 2005). The maximum fine in a particular dispute is set at $15 million per year per violation, a sum of which may be directed towards remedying the labor violation. In fact, these fines are to be paid into a fund designed to address the labour rights violations concerned through capacity building mechanisms.

[6] See US-Bahrain FTA (Chapter 15, Art. 15.7) and DR-CAFTA (Chapter 16, Art. 16.8).
[7] See US-Bahrain FTA (Chapter 15, Art. 15.1) and DR-CAFTA (Chapter 16, Art. 16.1).

2.2 The submission process

The labour provisions contained in the US-Bahrain, CAFTA-DR and US-Peru FTAs all establish official processes for receiving complaints, or "submissions" from interested organizations that believe a trading partner is not fulfilling the labor commitments it made (Office of Trade and Labour Affairs (hereinafter OTLA), 2012). According to the OTLA's procedural guidelines, a submission "means a communication from the public containing specific allegations, accompanied by relevant supporting information that another Party has failed to meet its commitments or obligations arising under a labor chapter." [8] Furthermore, the OTLA procedural guidelines provide for a description of the expected formal content of submission:

"The submission shall identify clearly the person filing the submission and shall be signed and dated. It shall state with specificity the matters that the submitter requests the OTLA to consider and include supporting information available to the submitter, including, wherever possible, copies of laws or regulations that are the subject of the submission. As relevant, the submission shall address and explain to the fullest extent possible whether: (a) **The matters referenced in the submission demonstrate action inconsistent with another Party's commitments or obligations under a labor chapter** […], noting the particular commitment or obligation; (b) **there has been harm to the submitter or other persons, and, if so, to what extent**; (c) **the matters referenced in the submission demonstrate a sustained or recurring course of action or inaction of non-enforcement of labor law by the other Party**; (d) **the matters referenced in the submission affect trade between the parties**; (e) **relief has been sought under the domestic laws of the other Party, and, if so, the status of any legal proceedings**; and (f) **the matters referenced in the submission have been addressed by or are pending before an international body**." [9]

The competent authority that administers the labour provisions of US FTAs from the U.S. side is the Division of Trade Agreement Administration and Technical Cooperation (hereinafter "TAATC"). [10] The TAATC reviews submissions alleging that a trading partner has violated the conditions required by the labour chapter of the FTA. The TAATC is also the designated contact point within the OTLA for labour matters under each of the FTAs (with regard to the three cases examined in this paper: see Article 15.4.2 and Annex 15–A of the US-Bahrain FTA, Article 16.4.3 and Annex 16.5 of the CAFTA-DR and Article 17.5.5 and Annex 17.6 of the US-Peru FTA). Within 60 days after the filing of a submission, [11] the OTLA shall determine whether to accept the submission for review. In determining whether to accept a submission for review, the OTLA considers the following elements:

> (a) The submission **raises issues relevant to any matter arising under a labor chapter** […]; (b) a review would **further the objectives of a labor chapter** […]; (c) the submission clearly **identifies the person filing the submission, is signed and dated, and is sufficiently specific to determine the nature of the request and permit an appropriate review**; (d) **the statements contained in the submission, if substantiated, would constitute a failure of the other Party to comply with its obligations or commitments**

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[9] OTLA, *Notice of Procedural Guidelines*, *Op. Cit.*, section F.

[10] The agreements also require the other trade parties to establish national contact points where submissions can be filed.

[11] Unless circumstances as determined by the OTLA require an extension of time.

> **under a labor chapter** […]; (e) **the statements contained in the submission or available information demonstrate that appropriate relief has been sought under the domestic laws of the other Party, or that the matter or a related matter is pending before an international body**; and (f) **the submission is substantially similar to a recent submission and significant, new information has been furnished that would substantially differentiate the submission from the one previously filed.**" [12]

According to the OTLA's procedural guidelines, if the OTLA accepts a submission for review, "*it shall promptly provide written notice to the submitter, the relevant Party, and other appropriate persons, and promptly publish in the Federal Register notice of the determination, a statement specifying why review is warranted, and the terms of the review*." [13] Concerning US FTAs,[14] the OTLA has accepted six submissions, three of them being analyzed in this paper (Table 3):[15]

Table 3: Submissions under labour chapters of US FTAs

Parties targeted by the submission	US FTA	Date of acceptance	Submitters	Alleged Violations	Situation of the Submissions
Guatemala	DR-CAFTA	06/12/2008	AFL-CIO, STEPQ, SITRABI, Coalition of Avandia Workers, SITRAFRIBO, SITRAINPROCSA, and FESTRAS	Collective bargaining Freedom of Association Acceptable conditions of work	Establishment of an arbitral panel
Bahrain	US-Bahrain	06/10/2011	AFL-CIO General Federation of Bahrain Trade Unions	Non-discrimination	Submission under review
Peru	US-Peru	07/19/2011	SINAUT	Collective bargaining	Submission under review
Dominican republic	DR-CAFTA	02/22/2012	Father Christopher Hartley	Right of association; Collective bargaining Forced or compulsory labor, Child labor; Acceptable conditions of work	Submission under review

Source: OTLA

Guatemala: On June 12, 2008, the OTLA accepted a submission from the American Federation of Labor and Congress of Industrial Organizations (hereinafter "AFL-CIO") and six Guatemalan labour unions, alleging that the Government of Guatemala failed to effectively enforce its domestic labor laws with regard to freedom of association, the right to organize and bargain collectively, and acceptable conditions of work, and therefore violated the labour chapter of the CAFTA-DR.

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12 OTLA, *Notice of Procedural Guidelines*, *Op. Cit.*, section G.

13 OTLA, *Notice of Procedural Guidelines*, *Op. Cit.*, section G.

14 This paper examines acceptance of submissions for review related to US FTAs, with the exception of the submissions made under the NAALC. It should nevertheless be pointed out that ILO reports and instruments have also been referred to in the NAALC complaints.

15 The three other submissions concern Costa Rica (which was withdrawn) and the Dominican Republic and Honduras (recently lodged).

Bahrain: On June 10, 2011, the OTLA accepted for review a submission from the AFL-CIO, with a statement from the General Federation of Bahrain Trade Unions, alleging that the Government of Bahrain has violated the Labour Chapter of the US-Bahrain FTA by failing to fulfill its obligations and commitments with regard to the right of association, generally, and in particular with regard to non-discrimination against trade unionists.

Peru: On July 19, 2011, the OTLA accepted a submission from the Peruvian National Union of Tax Administration Workers (hereinafter "SINAUT") alleging that the National Superintendence of Tax Administration (hereinafter "SUNAT"), an executive branch agency of the Government of Peru, has failed to comply with Peru's labor laws in violation of the Labour Chapter of the US-Peru FTA.

According to the procedural guidelines of the OLTA, within 180 days of the acceptance of a submission for review, unless circumstances as determined by the OTLA require an extension of time, the OTLA shall issue a public report (OTLA, 2012). The first two public reports issued to this date by the OTLA concern the accepted submission against Guatemala and Peru. Two other submissions have been accepted and the review process is currently in progress. The OTLA has notified submitters involved in the submission under the labour chapter of the US-Bahrain FTA that it has extended the period of review. The report includes a summary of the proceedings, any findings concerning the alleged violations and recommendations.

3 Case studies

3.1 Guatemala

On 23 April 2008, AFL-CIO, along with six Guatemalan unions – the Union of Port Quetzal Company Workers (STEPQ), the Union of Izabal Banana Workers (SITRABI), the Union of International Frozen Products, Inc. Workers (SITRAINPROCSA), the Coalition of Avandia Workers, the Union of Fribo Company Workers (SITRAFRIBO), and the Federation of Food and Similar Industries Workers of Guatemala (FESTRAS) – filed an official complaint with the USDOL/OTLA, alleging violations of the Labour Chapter of CAFTA-DR. The complaint was the first of its kind under the labour provisions of the trade agreement. The complaint detailed five individual cases in which the Guatemalan Government allegedly failed to effectively enforce its labor laws and to fulfill its international commitments to respect workers' rights. Against this background, an analysis will be made of the comments of the ILO's supervisory bodies related to the application by the Government of Guatemala of Convention Nos. 87 and 98, and of the submission under the labour chapter of the CAFTA-DR will be provided. The recommendations contained in the public report released by the OTLA after the review period will also be examined in the light of the assessment done by the ILO's supervisory bodies regarding Guatemala's compliance with Conventions 87 and 98.

3.1.1 The assessment of the ILO's supervisory bodies concerning the application of Conventions 87 and 98 by Guatemala[16]

Since 1990, in the context of the ILO's regular supervisory system, the case of Guatemala has been examined 18 times by the Conference Committee on the Application of Standards (Table 4): seventeen relating to the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) and one relating to the Right to Organize and Collective Bargaining Convention, 1949 (No. 98). Furthermore, since 1999, the Conference Committee has discussed every year the application of Convention 87 (except in 2003), highlighting the continued gaps in compliance with regard to freedom of association and collective bargaining.

Table 4: Examination by the Conference Committee on the Application of Standards of the case of Guatemala concerning compliance with Conventions 87 and 98 (1990-2011)

1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
C 087	-	-	C 087	-	C 087	C 087	C 087	-	C 087	C 087
2001	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**
C 087	C 087	C 098	C 087	C 087	C 087	C 087	C 087	C 087	C 087	C 087

Source: NORMLEX

In 2011, the Conference Committee recalled the "*deep concern*" of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) concerning different issues: serious acts of violence, including the murder of trade unionists and threats against them; legislative provisions and practices incompatible with the rights embodied in Convention 87; and problems concerning the composition of the national tripartite commission. The Conference Committee also noted, "*the slowness and ineffectiveness of criminal procedures in relation to acts of violence, the excessive delays in judicial procedures and the lack of independence of the judicial authorities, all of which was giving rise to a serious situation of almost total impunity.*" [17] The Conference Committee also highlighted in its conclusions that, despite having received specific technical assistance from the ILO, "*there had been no significant progress in the legislative reforms called for by the Committee of Experts for many years*," noting moreover, "*the lack of clear and effective political will of the Government.*" [18]

In addition, since 1990, the CEACR has made seventeen observations concerning the application of Convention 87 and fourteen observations related to Convention 98 (Table 5). The CEACR pointed out different issues related to the application of these Conventions such as legislative problems, acts of violence against trade unionists and specific problems in the maquila sector.

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[16] For a brief description of the ILO supervisory system in general, and more specifically of the Conference Committee on the Application of Standards, the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association, see ILO(2011 *Rules of the Game – A brief introduction to international labour standards* - available at www.ilo.org/global/normes

[17] See *ILCCR Observation on Convention No. 87* (Guatemala, 2011), record of proceedings, Part II, p. 26.

[18] Ibid., Part I, p. 42.

Table 5: Observations of the CEACR on the application of Conventions 87 and 98 by Guatemala (1990-2011)

1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
-	C 087	-	C 087	C 098	C 087	C 087	C 098	C 087	C 087	C 087
-	C 098	-	-	-	-	-	-	-	C 098	-

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
C 087	C 087	C 087	C 087	C 087	C 087	C 087	C 087	C 087	C 087	C 087
C 098	C 098	C 098	C 098	C 098	C 098	C 098	C 098	C 098	-	C 098

Source: NORMLEX

In its last observation published in early 2012, the CEACR recalled that, "*for several years it has been noting in its observations serious acts of violence against trade unionists which have gone unpunished.*" [19] These acts of violence are ranging from, "*murders, death threats and acts of intimidation to abductions, torture and armed assault using firearms or knives*." [20]

The Committee on Freedom of Association also pointed out with concern that the allegations presented in the cases before it were,

> "*extremely serious and include numerous murders of trade union leaders and members, one disappearance, acts of violence (sometimes also against the families of trade union members), threats, physical harassment, intimidation, the rape of a family member of a trade unionist, obstacles to granting legal personality to unions, the dissolution of a union, criminal proceedings for carrying out trade union activities, and major institutional failings with regard to labour inspection and the functioning of the judicial authorities, which have created a situation of impunity in labour matters (for example, excessive delays, lack of independence, failure to comply with reinstatement orders issued by the courts) and in criminal matters (for example, Case No. 2445 and two more recent Cases Nos. 2609 and 2859) relating to numerous acts of anti-union violence presented to the Committee on Freedom of Association.*" [21]

Table 6: Cases regarding Guatemala before the Committee on Freedom of Association

Active	Follow-up	Closed
12	5	70

[19] Ibid.
[20] Ibid.
[21] Ibid.

3.1.2 The complaint lodged by trade unions under Chapter 16

As stated in the public complaint to the OTLA, submitted by the AFL-CIO and six Guatemalan unions:

> "*This petition sets forth several serious and repeated failures by the Government of Guatemala to effectively enforce its own labor laws and outlines ways in which the Government is falling short of its commitment to "respect, promote and realize" core workers' rights, as outlined in the ILO Declaration on Fundamental Principles and Rights at Work.*" [22]

According to the public submission, the Government of Guatemala has violated three provisions of Chapter 16 of CAFTA-DR:

> **"Article 16.1: Statement of Shared Commitment**
> The Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration). Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law."
>
> **"Article 16.2: Enforcement of labour laws**
> (a) A Party shall not fail to effectively enforce its labor laws, through recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement."
>
> **"Article 16.3: Procedural Guarantees and Public Awareness**
> Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to tribunals for the enforcement of the Party's labor laws. Such tribunals may include administrative, quasi-judicial, judicial, or labor tribunals, as provided in the Party's domestic law."

3.1.3 The comments of the ILO's supervisory bodies on the specific cases presented in the public submission

Case 1: The Union of Port Quetzal Company Workers (STEPQ)

The first case presented in the public submission concerned freedom of association and collective bargaining. According to the public submission, "the employer: a) failed to bargain in good faith as required by law, b) unlawfully dismissed union members and subsequently failed to reinstate workers pursuant to a judicial order, and c) attempted to form a management- dominated union in order to displace the STEPQ as the legally recognized bargaining agent. The Government failed to effectively enforce the law as to each of these violations." [23] The submission also raised the issue of violence against trade unionists through the case of the assassination of Pedro Zamora, secretary general of the

[22] See the Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 16 (Labor) and 20 (Dispute Settlement) of the DR-CAFTA concerning the failure of the Government of Guatemala to effectively *enforce its labor laws and comply with its commitments under the ILO Declaration on Fundamental Principles and Rights at Work*, (p. 2).

[23] See *Public Submission…, Op. Cit.,* p. 2.

STEPQ. According to the complaint, "some evidence suggests that the Government may also have had some involvement in the assassination of the union's General Secretary, Pedro Zamora. The assassination of Mr. Zamora is a serious criminal offense. Further, his murder also violated his right to free association, as well as the associational rights of the members of the union. The Government has failed to adequately investigate the death threats toward, and the assassination of, Mr. Zamora. The Government has also failed to adequately investigate death threats against other members of the union." [24]

As stated above, the application of Conventions 87 and 98 by the Government of Guatemala has been discussed seventeen times since 1990 in the framework of the supervisory system of the ILO. The ILO's supervisory bodies have highlighted the continuous violations regarding these two fundamental Conventions. More specifically, the ILO's supervisory bodies have pointed out on numerous occasions the legal problems and practical obstacles to collective bargaining, the anti-union discrimination practices (dismissals of trade unionists, failure to reinstate unlawfully dismissed trade unionists) and the practice to encourage the establishment of a management-dominated union in order to hamper the actions run by trade unions in the workplace.

With regard to restrictions to the right to bargain collectively, the CEACR has made fifteen observations since 1989 in relation to the application by Guatemala of Convention 98. Concerning anti-union practices, the CEACR had identified as early as 2002 the recurring problems of the excessive delays in procedures for the reinstatement of unlawful dismissals of trade unionists:

> *"the Committee […] referred to the failure to comply with final court decisions ordering the reinstatement in their jobs of workers dismissed for trade union activities. […] The Committee hopes that, as a result of the tripartite debate announced by the Government on this subject, measures will soon be adopted to ensure rapid and effective compliance with judicial decisions ordering the reinstatement in their jobs of workers dismissed for trade union activities and that effective penalties will be established for failure to comply with such decisions*." [25]

Furthermore, in its most recent observation published in 2012, the CEACR recalled that,

> *"for many years it has been referring to the following problems of serious restrictions on the exercise of trade union rights in practice: the excessive delays in procedures for the reinstatement of trade unionists in accordance with rulings by judicial bodies and the utilization of amparo proceedings (for the protection of constitutional rights); […]; the failure to comply with orders for the reinstatement of dismissed trade unionists; the slowness and ineffectiveness of procedures to impose penalties for breaches of labour legislation […]."* [26]

While 40 per cent of the alleged violations of these rights pertain to anti-union discrimination, 17.7 per cent specifically concern the dismissals of union representatives or workers affiliated to a union.[27] In addition, the complaints presented by trade unions to the CFA show the recurring issue of illegal dismissals of trade unionists and the problem of their reinstatement.[28] Concerning the practice known

[24] See Public Submission…, Op. Cit., p. 2.
[25] See CEACR Observation on Convention No. 98 (2002)
[26] See CEACR Observation on Convention No. 98 (2011)
[27] See CFA cases in NORMLEX database.
[28] See the following CFA cases: Case No. 2203 (2002), Case No. 2230 (2002), Case No. 2241 (2002), Case No. 2241 (2002), Case No. 2259 (2003), Case No. 2295 (2003), Case No. 2298 (2003), Case No. 2339 (2004), Case No. 2339 (2004), Case No. 2341 (2004), Case No. 2361 (2004), Case No. 2361 (2004), Case No. 2390 (2004),

as "solidarismo", several allegations contained in CFA cases concern situations in which pro-management organizations or groups of workers are created. [29]

Finally, concerning violence against trade unionists, the ILO's supervisory bodies have highlighted serious violations of civil liberties, including murders, abductions, disappearances, threats, arrests and detentions of trade union leaders and members, as well as other acts of anti-union harassment and intimidation, violations of freedom of assembly and of freedom of expression. The ILO's supervisory bodies have particularly documented the issue related to the physical security of trade unionists. On several occasions, the CFA has noted with concern that,

> *"the allegations presented in the cases before it are extremely serious and include numerous murders of trade union leaders and members, one disappearance, acts of violence (sometimes also against the families of trade union members), threats, physical harassment, intimidation, the rape of a family member of a trade unionist, obstacles to granting legal personality to unions, the dissolution of a union, criminal proceedings for carrying out trade union activities, and major institutional failings with regard to labour inspection and the functioning of the judicial authorities, which have created a situation of impunity in labour matters (for example, excessive delays, lack of independence, failure to comply with reinstatement orders issued by the courts) and in criminal matters (for example, Case No. 2445 and two more recent Cases Nos. 2609 and 2859) relating to numerous acts of anti-union violence presented to the Committee on Freedom of Association."* [30]

Furthermore, the ILO High-Level mission, which visited Guatemala from 9 to 14 May 2011, documented the problems of violence: "Alleged murders of trade union leaders and members over the past five years: 2007: 12; 2008: 12; 2009: 16; 2010: 10; and 2011: two up to the month of May (a few days after the mission, a trade union leader of the SITRABI was murdered). **Death threats, abductions, raids**, etc., alleged over the past three years: in **2008**, eight death threats, two attacks against the homes of trade union leaders, a raid against trade union premises and a raid against the home of a trade union leader, and two attempted murders of trade union leaders; in **2009**, 17 death threats against trade union leaders and executive committees, eight cases of physical assault against trade union leaders and members; an attack against trade union premises and an attack against the home of a trade union leader; and a temporary abduction of a trade union leader; and in **2010**, four death threats, an attempted murder of a trade union leader, an abduction, involving torture and the rape of a trade union leader, an attack against trade union premises, an attack against the home of a trade union leader, and physical assault against a trade union leader." [31]

The ILO's supervisory bodies have also extensively discussed the specific issue raised by the petitioners concerning the death of Pedro Zamora. For instance, CFA case No. 2540 (2007) relates to this specific issue. In March 2011, the CFA regretted that the Guatemalan Government had sent limited information on developments in the criminal proceedings relating to the murder of trade union official Pedro Zamora.

Case No. 2413 (2005), Case No. 2445 (2005), Case No. 2540 (2007), Case No. 2550 (2007), Case No. 2568 (2007), Case No. 2609 (2007), Case No. 2709 (2009), Case No. 2768 (2010), Case No. 2811 (2010).

[29] See for instance CFA Cases Nos. 2540 (2007) and 2179 (2002).

[30] See *CEACR* Observation *on Convention No. 87* (Guatemala, 2011), which quotes the relevant CFA report.

[31] Report of ILO High-Level mission, May 2011.

Case 2: The Union of Izabal Banana Workers (SITRABI)

The second case presented in the submission also deals with serious violations of Conventions 87 and 98. According to the complaint:

> *"a) the employer failed to adhere to the terms of the collective bargaining agreement, particularly on various wage-related provisions, b) several union officers were threatened and assaulted, and c) a union officer was murdered on company property, which was guarded at all times by the employer. The murder of the union officer violated his individual right to free association, as well as the association rights of the members of the union. The Government also failed to launch an adequate investigation into the death threats and murder."* [32]

Apart from the issues already mentioned above, the second case presented in the submission highlights the recurring problems of collective bargaining in Guatemala. This case was submitted in 2007 to the CFA (Case No. 2609). The complainant organization alleged the murder of a trade union leader on the premises of an enterprise in the banana industry; the entry of armed soldiers into SITRABI trade union headquarters and the interrogation of workers; the persecution and harassment of the SITRABI General Secretary; the harassment and intimidation of workers, the threats to their physical safety and the dismissal of workers following the establishment of the Southern Banana Workers' Union (SITRABANSUR); the disappearance of a SITRABANSUR official; the dismissal of officials of the Trade Union of Judiciary Workers. In its interim report of March 2012, the CFA expressed "*its deep concern at the gravity of this case, given the numerous murders, attempted murders, assaults and death threats, kidnappings, harassment and intimidation of trade union officials and members, and also the allegations of blacklisting and the climate of total impunity. The Committee deeply regretted that the Government only provided a partial reply in respect of the allegations made*." [33]

Case 3: The Federation of Food and Similar Industries Workers of Guatemala (FESTRAS) and The Union of International Frozen Products, Inc. Workers (SITRAINPROCSA)

The enterprise INPROCSA processes and packages fruits and vegetables at its plant in Chimaltenango. The processed goods are subsequently exported both to the United States and Europe. In this case, several violations to labour rights were underlined in the complaint. According to the public submission, the employer,

> "*a) refused to bargain with the legally recognized union, b) illegally suspended and then dismissed two elected officers of the union, c) undertook a campaign to illegally dismiss certain union members, and d) sold the factory to another owner, which then refused to recognize the existing union. The government failed to enforce the law as to any of these violations by the employer.*"[34]

The complaint highlights several violations of domestic law: duty to bargain, dismissals of union officials, anti-union retaliation, failure of new company to retain INPROCSA workers and recognize existing union, failure to contribute to social security system and failure to pay adequate severance payments. While the ILO's supervisory bodies had the occasion to comment on the violations linked to Conventions 87 and 98, the violations concerning the failures to contribute to social security and pay adequate severance payment could not be taken up by the CEACR since Guatemala has not ratified the ILO instruments related to social security (Conventions No. 102 and 157).

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[32] See Public Submission…, Op. Cit., p. 2.
[33] CFA Case No. 2609, interim report, March 2012; NORMLEX database.
[34] See Public Submission…, Op. Cit., p. 3.

Case 4: The Coalition of AVANDIA Workers

AVANDIA S. A. is an apparel factory, known as "maquila". The ILO's supervisory bodies have commented on the continued violations of labour rights in the apparel and textile industry in Guatemala for several years. In fact, the CEACR has provided a special paragraph concerning the maquila sector in the observations made in relation with Convention 87. According to the public submission regarding the coalition of Avandia workers, the employer,

> "*a) dismissed and then blacklisted worker representatives who participated in a factory compliance program sponsored by Avandia and the Jones Apparel Group, b) dismissed the founding members of the Coalition of Avandia Workers (a precursor to a union), and c) dismissed the founding members of a second worker coalition. The Government has failed to force the employer to reinstate any of these workers, all of whom were unlawfully dismissed.*" [35]

The petitioners have denounced several violations: dismissal for the participation in the establishment of a union, unjust dismissal and threats against trade unionists. As stated above, the ILO's supervisory bodies have extensively commented on these violations of international labour standards. For many years, the CEACR has been taking note of comments submitted by trade union organizations on serious problems of compliance with Convention 87, in particular with regard to trade union rights in the export processing sector. In addition, the ILO High-Level mission that visited the country in 2008 discussed the issue of freedom of association and collective bargaining in the maquila sector indicating that,

> "*according to the Ministry of Labour and Social Insurance, there are seven collective agreements in the export processing sector, but only two of them date from 2007. The remainder date from 2003 or even before. With regard to trade union membership, according to the administrative authorities, there are six unions and a membership of 562 in the export processing sector, which employs around 200,000 workers. In the view of the executive committee of the trade union movement, there are only two unions in this sector. Whatever the correct figure, there is clearly only a minimum level of trade union activity and collective bargaining in export processing zones and hence a problem in applying Conventions Nos. 87 and 98.*" [36]

Case 5: Union of FRIBO Company Workers (SITRAFRIBO)

Fribo S.A. is a garment factory located in Chimaltenango. In this case, according to the public submission the employer, "*a) dismissed 40 workers, 36 of whom were either participating in a union drive or supported it; and b) failed to contribute to the social security fund, which prevented the workers from receiving health care. The Government has neither ordered the reinstatement of the workers nor compelled the company to contribute to the national health care system.*" [37]

As noted previously, the CEACR and the CFA have repeatedly commented on similar allegations, in particular concerning the failure to comply with reinstatement orders issued by the courts. In its conclusion of 2011, the Conference Committee on the Application of Standards, *"…emphasized the need to apply effectively, and without delay, court orders for the reinstatement of dismissed trade unionists."* [38]

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[35] See Public Submission…, Op. Cit., p. 3.
[36] CEACR Observation on Convention No. 87 (Guatemala, 2011)
[37] See *Public Submission…, Op. Cit.,* p. 3.
[38] *ILCCR Observation on Convention No. 87* (Guatemala, 2011)

3.1.4 The OTLA's public report

On 12 June 2008, the OTLA accepted the submission issued by the AFL-CIO and the six Guatemalan unions, stating that it met the criteria for acceptance. Although the findings and recommendations issued in the public report of the OTLA do not mention explicitly the comments of the ILO's supervisory bodies, the report does mention that the OTLA reviewed relevant materials from the ILO supervisory mechanisms, including cases filed with the CFA and observations made by the CEACR, and the content of the public report is consistent with the analysis made in recent years by the supervisory bodies of the ILO.[39] The findings of the OTLA report regarding issues raised in the complaints are presented in Table 7.

Table 7: Findings of the OTLA report

Administrative Measures

1) According to Article 281 of the Labor Code, the Ministry of Labor has the authority to carry out inspections. It appears that in several instances detailed in this report, the Ministry of Labor was unable to effectively carry out this function. In three of the cases, labor inspectors were denied entrance a total of 12 times. Reviewing only the documents in our possession, the OTLA determined that Avandia refused entry to labor inspectors twice, INPROCSA refused entry three times, and Fribo S.A. refused entry seven times. The IGSS inspection power also appears to be limited. In the Fribo S.A. case alone, the IGSS made six attempts to meet and review payroll information at the factory, and never obtained access.

2) The Ministry of Labor lacks authority to sanction labor law violations. As a purely administrative agency, it relies on the courts to enforce compliance. Interviewees indicated that the courts did not share documents with the Ministry of Labor upon request because, once referred to the judicial system, these cases were no longer subject to the Ministry of Labor's jurisdiction. This suggests that the Ministry of Labor and its inspectors cannot effectively track whether their findings have been upheld. For example, in the INPROCSA case, the Constitutional Court ruled that it was not "logical" that employers fired union organizers as a result of 'lack of work' or 'lack of materials,' and overruled the labor inspectors' findings. The Ministry of Labor was unaware of this court ruling. Thus, their inspectors could continue to issue findings that the Constitutional Court has already found to be illogical.

Judicial Measures

3) It falls within a Guatemalan court's jurisdiction to enforce its own orders. If the employer does not comply with a court order, the court is to certify the case so it can proceed to a criminal court for prosecution of the employer for failure to comply with the order.

4) Based on our document review, the OTLA found that in four of the five cases included in this submission, 11 court orders were not complied with. In the Avandia case, there were seven court orders not complied with; in the INPROCSA case, there were two court orders not complied with; in the Fribo case, there was one court order not complied with; and in the STEPQ case, there was one court order not complied with.

These findings suggest serious problems with respect to the enforcement of court orders, most notably protective orders against retaliatory firing and reinstatement orders following unlawful dismissals of union members.

Violence Against Trade Unionists

[39] See Public Report of review of OTLA U.S. Submission (Guatemala), January, 16, 2009, p. 4.

5) The OTLA recognizes that the murders in the STEPQ and SITRABI cases occurred within the context of a high level of violent crime in Guatemala, affecting not only the labor sector, but the country as a whole.

6) The OTLA acknowledges that initial investigation of the Government of Guatemala indicate that the homicides were not directly linked to the union leaders' activities, but understands that the investigation is ongoing. Until the perpetrators have been convicted there cannot be any certainty with respect to their motive. Nonetheless, when a union leader is violently attacked with total impunity, the crime's impact can reach beyond the individual and cast a shadow of fear upon others, weakening the right of association and collective bargaining.

Inter-Agency Coordination

7) Limits on the Ministry of Labor's enforcement powers and the enormous challenges facing the Guatemalan judicial system appear to have created challenges for the enforcement of domestic labor laws. The OTLA believes that some of these problems could be addressed through improved inter-agency coordination, specifically coordination designed to enforce court orders and ensure access to the worksite by the relevant executive agencies.

8) The recently reactivated Multi Institutional Commission on Labor Relations in Guatemala (Commission) may provide a forum to address the issues outlined in the submission in a comprehensive and coordinated way. On November 6, 2008, the Ministry of Labor, the Ministry of Economy, the Ministry of Public Security (*Ministerio de Gobernación*), the Ministry of Justice (*Ministerio Público*), and the Ministry of Foreign Relations, met and reactivated this Commission, established by a Presidential decree on August 13, 2003.

9) As part of this coordination, the Ministry of Economy could play a critical role in a comprehensive response to certain issues highlighted in this report. Currently, the Ministry of Economy registers companies for tax exemptions and other benefits under Decree 29-89 and Decree 65-89. The Office of Industrial Policy at the Ministry of Economy provides these benefits only after it has certified that the company is exporting its product, is employing workers according to the national labor laws, and has paid the social security tax. It currently has approximately 640 companies registered to receive these benefits. The Ministry of Economy has used this ability to suspend (or threaten the suspension of) tax privileges in the past, but not for several years.

Source: OTLA, 2008

Concerning the **administrative measures**, the findings contained in the OTLA's report appear to be similar to the ones made by the ILO's supervisory bodies in its own analysis of the Guatemala case. In this regard, it bears noting that since 2002, the CEACR has made six observations on the application of Convention 81 on labour inspection, focusing on several issues such as the conditions of service, the professional code of ethics and the training of labour inspectors, human resources, financial and material means of the labour inspectorate, the coverage of supervision needs and the effectiveness of penalties' application where breaches or violations were observed. In addition, an analysis of the situation relating to Guatemalan labour inspection carried out by the ILO in September 2008 also pointed out several deficiencies with regard to labour inspection. The ILO prepared an action plan in November 2008 for the implementation of the recommendations arising from this analysis. In 2011, the CEACR asked the Government to provide information related to the penalties for obstructing labour inspectors in the performance of their duties.[40] Furthermore, the ILO's supervisory bodies have extensively documented the lack of authority of the Ministry of Labour to sanction labour law violations.

Concerning the **judicial measures**, the findings contained in the report of the OTLA also appear to

[40] See CEACR Observation on Convention No. 81 (Guatemala, 2011).

correspond to the ones made by the ILO in recent years. In this regard, the lack of enforcement of court orders has been pointed out by the ILO's supervisory bodies for many years. The CEACR has repeatedly asked the Guatemalan Government to provide information concerning the enforcement of court orders, in particular protective orders against retaliatory firing and reinstatement orders following unlawful dismissals of union members.

Concerning the **issue of violence against trade unionists**, once again the findings contained in the report of the OTLA seemed to be consistent with the comments and recommendations formulated by the ILO's supervisory bodies. In fact, since 2001, the CEACR has regularly pointed out that the exercise of freedom of association can, "*be exercised only in a climate which is free of violence and pressure.*" [41] In 2002, the CEACR commented on the issue of murders, acts of violence and death threats against trade unionists: "*The Committee note*[d] *with concern that in their comments on the application of the Convention, the trade union organizations refer to serious acts of violence against trade unionists. Furthermore, various cases before the Committee on Freedom of Association (Cases Nos. 1970 and 2179) confirm the existence of a high number of murders, acts of violence and death threats against trade unionists.*" [42] The CEACR also pointed out the need to "*improve the effectiveness of penal investigations of acts of violence against trade unionists.*" [43]

As early as 2002, the CEACR had identified not only the obstacle of violence and pressure on the daily exercise of union rights but also the importance of effective criminal investigations.[44] The public report suggested "*several concrete actions which the Guatemalan Government could take to support its progress*" (OTLA, 2009, p. iv). Three OTLA recommendations dealt with cases of **violence against trade unionists**. The public report highlighted the following steps, which have been also pointed out by ILO's supervisory bodies:

- Enforce outstanding arrest warrants in the murders of union members and conduct criminal proceedings.
- Advance the investigation of pending cases of violence against trade unionists and issue/enforce arrest warrants as warranted.
- Strengthen the Special Prosecutor's Unit for Crimes against Trade Unionists (e.g., hiring additional staff, and establishing an electronic case management system that would allow searches for crimes related to the same union in previous years).

In relation with the **Inter-Agency Coordination issue**, the ILO's supervisory bodies have encouraged on numerous occasions the Guatemalan Government to strengthen the administrative and judicial system in order to facilitate the enforcement of labour laws. In the aftermath of comments formulated by the CEACR, the Government of Guatemala implemented institutional reforms. According to information provided by the Guatemalan Government,

> "*the Office of the Prosecutor-General has been restructured and, under Agreement No. 49-2011 of 20 May 2011 to amend Agreement No. 37-2010 containing the regulations governing the structure and functioning of the Human Rights Department of the Prosecutor's Office, it has established a*

[41] CEACR Observation (2001) concerning the application of the Convention No. 87.
[42] CEACR Observation (2002) concerning the application of the Convention No. 87.
[43] Ibid.
[44] Ibid.

> *Special Prosecutor's Office to investigate offences against trade unionists. These changes will appear in the Prosecutor-General's classification of posts and salaries. The Supreme Court of Justice has also made important changes in the way it operates, specifically with regard to labour issues, for which a new management model has been adopted that seeks to separate administrative from judicial functions, in order to focus expert resources on judicial matters and assign administrative matters to appropriately trained staff. All labour courts are accordingly now housed in a single building, which will streamline and expedite the services provided. The measures described above call for close coordination between the institutions responsible for administering justice, so as to cover every aspect of the protection of workers' rights."* [45]

In addition, after the ILO's supervisory bodies commented on the issue of coordination between different institutions involved in the regulation of labour law in the apparel sector, the Government of Guatemala provided information regarding the following steps it had taken:

> "*Pursuing its systematic and integrated approach, and in order to strengthen the enforcement of labour legislation in the country, the Government has signed an Inter-Institutional Framework Agreement for the Exchange of Information between the Ministry of Economy and the Ministry of Labour and Social Welfare (Decree 29-89 of the Guatemalan Congress), whereby the general labour inspectorate keeps a single centralized registry (part of the Integrated Labour System) of all entities entitled to the benefits conferred under the aforementioned Decree 29-89 for the Development of Export Processing Zones (maquilas). As a result, it is now possible to cross-check the information that is used in the labour inspectorate's enforcement of labour laws. This is reinforced by the Directorate of Trade and Investment Services of the Ministry of Economy which, through its Industrial Policy Department, verifies that enterprises make proper use of the benefits to which they are entitled.*" [46]

In light of the above, it bears noting that the report of the OTLA has identified several issues which have been discussed extensively over the years by the ILO's supervisory bodies. While the OTLA's report might not refer specifically to the comments made by the ILO's supervisory bodies on Guatemala in recent years, the OTLA's report does mention that it had reviewed relevant materials from the ILO supervisory mechanisms, the similarities in the analysis and assessment of these two bodies is striking.

3.2 Bahrain

The US-Bahrain FTA entered into force on 11 January 2006. On 21 April 2011, the OTLA received a public submission from the AFL-CIO, with a statement from the General Federation of Bahraini Trade Unions. The submission alleged that the Government of Bahrain had violated the Labor Chapter of the US-Bahrain FTA (Chapter 15) by failing to fulfil its obligations and commitments with regard to the right to organize, and in particular concerning non-discrimination against trade unionists (OTLA, 2012). On 10 June 2011, the OTLA accepted the submission for review. The OTLA has met with the submitters and the Government of Bahrain as part of its efforts to prepare a public report. On 9 December 2011, the OTLA notified the submitters and the Government of Bahrain of the fact that it had decided to extend its period of review.

[45] See ILCCR Observation concerning the application of Convention No. 87 (2011).
[46] See ILCCR Observation concerning the application of Convention No. 87 (2011).

3.2.1 The assessment of the ILO's supervisory bodies concerning the respect for principles of freedom of association and the application of Convention 111 by Bahrain

The Government of Bahrain has ratified five Fundamental Conventions (Conventions Nos. 29, 105, 111, 138 and 182). While the Conference Committee on the Application of Standards has so far never discussed the application of ratified conventions by Bahrain, the CEACR has repeatedly made comments on Bahrain's application of Convention 111 (see Table 8), focusing on legislative problems related to sex discrimination and migrant workers situation. Several complaints have been lodged before the CFA (Table 9) and it has dealt with legislative issues regarding freedom of association, including the right to strike, and anti-union discrimination practices. In the most recent complaint examined by the CFA (case no. 2882), the allegations concerned serious violations of freedom of association, including massive dismissals of members and leaders of the General Federation of Bahraini Trade Unions (GFBTU) following their participation in a general strike. There were also threats to the personal safety of trade union leaders, arrests, harassment, prosecution and intimidation, as well as interference in the GFBTU internal affairs. In its interim conclusions of June 2012, the CFA, while expressing its concern on a number of issues related to the right to organize and violence against trade unionists, welcomed the tripartite agreement signed by the parties whereby they committed to continue their efforts to ensure the full reinstatement of workers in both public and private sectors who had been dismissed following their actual or suspected participation in political activities.[47]

Table 8: Observations by the CEACR on the application of Convention 111 by Bahrain (2000-2011)

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
-	-	-	C 111	-	C 111	-	C 111	C 111	C 111	-	-

Source: NORMLEX

Table 9: Cases regarding Bahrain before the Committee on Freedom of Association

Active	Follow-up	Closed
1	1	6

Since the beginning of mass demonstrations in Bahrain in early 2011, the ILO has been monitoring the situation regarding the violations of civil liberties and ILO High-Level missions have visited the country. The complaint issued by the AFL-CIO in the framework of the U.S.-Bahrain Free Trade Agreement falls within this context.

[47] See case no. 2882, June 2012, NORMLEX database.

3.2.2 The complaint lodged by trade unions under Chapter 15 of the US-Bahrain FTA

According to the public submission presented by the AFL-CIO, the Government of Bahrain has violated the following provision of Chapter 15 of the US-Bahrain FTA.[48]

Article 15.1: Statement of Shared Commitment

The Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up* (1998) (ILO Declaration). Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 15.7 are recognized and protected by its law.

The complaint sets forth facts related to the Government of Bahrain's violation of its commitments under the 1998 ILO Declaration, and specifically regarding the rights of freedom of association and non-discrimination.

According to the public submission, the Government of Bahrain has violated several fundamental rights in the wake of the peaceful mass pro-democracy protests, which emerged on February 14, 2011. The complaint highlights the violent repression of the protest:

> "*several people were reported killed, some by live rounds, and hundreds sustained injuries. Public security forces continued the attacks into the following day, using live rounds against protestors and mourners, leaving more dead and wounded*." [49]

On February 15, the GFBTU urged the Government to open an investigation into the acts of repression and called for a national dialogue to address several concerns, including job creation and fair wages. In the following weeks, demonstrations continued while harsh repression by State security forces persisted. In this context, the King of Bahrain declared a "*three-month state of emergency under Article 36(b) of the Constitution which prohibits most forms of public assembly and speech related to such assembly, as well as to prohibit the operation of non-governmental organizations, political societies and unions*." [50]

The GFBTU issued a call for a general strike, which lasted until March 22. Several organizations denounced the brutal repression.[51] The complaint refers to several violations to the right of freedom of association: the prohibition of trade union activity by means of the declaration of state of emergency, the shutting down of the union's website, the retaliatory arrests and dismissals, "*all of which are related to union leader and member participation in peaceful strikes over political, social and economic rights*." [52]

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[48] See the Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 15 (Labor) of the US-Bahrain FTA.
[49] Ibid, p. 4.
[50] Ibid, p. 4.
[51] For instance, Human Rights Watch reported the arbitrary detention of activists, human rights defenders, defense lawyers and doctors.
[52] See the Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 15 (Labor) of the US-Bahrain FTA, p. 8.

The submission presented by the AFL-CIO is referring to several statements made by the ILO's Director-General in the aftermath of the decision to implement a state of emergency. The complaint highlights the swiftness of the ILO's reaction, first concerning the limitations to civil liberties related to the implementation of the state of emergency as well as concerning the repression of trade union activity.

Concerning the state of emergency:

"The Director-General of the International Labor Office, Juan Somavia, expresses his grave concern at today's declaration of a state of emergency in Bahrain. This constitutes a serious setback to civil liberties, including the rights to legitimate trade union action. In the current volatile situation it is even more urgent to intensify efforts towards the dialogue that has started between the Government of the Kingdom of Bahrain and the key actors of society." [53]

Concerning State repression and restrictions to union activity:

"All this information is extremely alarming, in particular as the GFBTU has called on workers to return to work and had been given assurances by State officials that they will not face any punitive measures for their participation in strikes. Indeed, the GFBTU had taken a constructive attitude in inviting the workers to return to work in the interest of the national economy and to allow for conditions that would strengthen for a national dialogue." [54]

"It is a matter of deepest concern that resort to discriminatory action in contradiction with ILO Conventions would, in addition to violating the basic rights of Bahraini workers, undermine the conditions for genuine and successful dialogue." [55]

Apart from the ILO reaction to the events in Bahrain, the complaint also extensively refers to the comments of the Committee on Freedom of Association regarding the prohibition and restriction of trade union activity. In particular, the petitioners quoted the CFA's Digest of Principles and Decisions to reinforce the complaints against the Bahraini Government. For instance, the submission referred to several comments made by the CFA concerning the right to freedom of association with regard to the violations perpetrated by the Government of Bahrain:

Concerning the state of emergency:

"The ILO Committee on Freedom of Association has been clear that a state of emergency does not give a government carte blanche to suspend the activity of trade unions." [56] On this particular point, the submission underlines that the state of emergency declared by the King on March 15 should not serve as a basis to prevent peaceful strikes protesting the Government of Bahrain's social and economic policy.[57]

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[53] ILO (2011), The crisis in Bahrain must be solved through national dialogue, Statement by the ILO Director-General, March 15th, cit. in the Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 15 (Labor) of the US-Bahrain FTA, p. 6.

[54] ILO (2011), ILO Director-General sounds alarm on situation of workers in Bahrain, April 5th,, cit. in the Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 15 (Labor) of the US-Bahrain FTA, pp. 6-7.

[55] Ibid.

[56] ILO CFA Digest(1996), paragraph. 193, cit. Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 15 (Labor) of the US-Bahrain FTA, p. 9.

[57] Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 15 (Labor) of the US-Bahrain FTA, p.8

Concerning the exercise of the right to strike:

"The ILO Committee on Freedom of Association has repeatedly explained that unions may strike for reasons other than purely industrial disputes, including government economic and social policy." [58] On this point, the submission underlines that the numerous statements and the basis of the strike called by the GFBTU explicitly referenced social and economic demands, to be resolved through a process of social dialogue – which the Government rejected.[59]

Concerning the climate of fear and violence:

"The right of freedom of association cannot be exercised in a climate of fear." [60] On this point, the submission stresses that the Government of Bahrain has created such a climate through prohibiting public assembly, arbitrary arrests and surrounding the GFBTU's premises.[61]

In addition, the complaint stated that the targeted dismissal of workers who had engaged in protest which was in part political in nature violated the principles on non-discrimination and ILO Convention No. 111. As stated in the complaint, "*Convention 111 is clear that workers must not suffer discrimination based on political opinion. In many cases, workers have been told at the time they were fired that the dismissals were due to participation in strikes and/or in participation in pro-democracy rallies*." [62] As of early December 2012, the submission was still under review by the OTLA.

3.3 Peru

On 29 December 2010, the OTLA received a submission from the SINAUT. The submission alleged that SUNAT, an executive branch agency of the Government of Peru, had failed to comply with Peru's labour laws related to collective bargaining, in violation of the Labor Chapter of the U.S. Peru Trade Promotion Agreement (Chapter 17) (OTLA, 2012). On 19th July 2011, the OTLA accepted the submission for review and issued a Federal Register notice on its decision on 26th July 2011. The OTLA, after having initiated contacts with the submitters and the Government of Peru as part of its efforts to prepare a public report with findings and recommendations on the allegations contained in the submission, delivered its Public Report on 30th August 2012. The main allegation against the Peruvian Government concerned restrictions on the right to bargain collectively. For its part, the CEACR had commented on numerous occasions on the application of Conventions 87 and 98 by Peru, while the other ILO's supervisory bodies had also discussed allegations similar to those contained in the submission.

3.3.1 The assessment of the ILO's supervisory body concerning the application of Conventions 87 and 98 by Peru

Since 1990, the application of Conventions 87 and 98 by the Government of Peru has been examined three times by the Conference Committee on the Application of Standards (Table 10). During the last individual case examined in 2001, the Conference Committee recalled that there were serious

[58] ILO CFA Digest, paragraph. 526, cit. Public Submission …, p. 8.
[59] Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 15 (Labor) of the US-Bahrain FTA, p.8
[60] ILO CFA Digest, paragraph. 44, cit. Public Submission …, p. 8.
[61] Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 15 (Labor) of the US-Bahrain FTA, p.8
[62] Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 15 (Labor) of the US-Bahrain FTA, p.9

discrepancies between national legislation and practice and Convention 98 with respect to the inadequate protection against interference in trade union affairs, delays in judicial proceedings related to act of anti-union discrimination, and restrictions on collective bargaining both in the public and private sector.[63]

Table 10: Examination by the Conference Committee on the Application of Standards of the case of Peru concerning compliance with Conventions 87 and 98 (1990-2011)

1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
C 087	C 087	-	-	-	-	-	-	-	-	-
-	C 098	-	-	-	-	-	-	-	-	-

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
-	-	-	-	-	-	-	-	-	-	-
C 098	-	-	-	-	-	-	-	-	-	-

Source: NORMLEX

Table 11: Observations of the CEACR on the application by Peru of Conventions 87 and 98 (1990-2011)

1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
C 087	C 087	C 087	-	C 087	C 087	C 087	C 087	C 087	C 098	C 087
-	C 098	C 098	-	C 098	C 098	-	C 098	C 098	-	C 098

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
C 098	C 087	-	C 087	-	C 087	-	C 087	-	C 087	-
-	C 098	-	C 098	-	C 098	-	C 098	-	C 098	-

Source: NORMLEX

For its part, the CEACR has made thirteen observations each on Peru's application of both Conventions 87 and 98 since 1990 (Table 11). The last observation on Convention 87 made by the CEACR pointed out several legislative problems concerning categories of workers excluded from the scope of exercise of the right to form associations and organizations for the defence of their interests.[64] Additionally, the last observation on the application of Convention 98 highlighted the issue related to the length of judicial proceedings regarding complaints of acts of anti-union discrimination or interference.[65]

Moreover, several cases submitted to the CFA (Table 12) have highlighted various breaches of freedom of association and the right to collective bargaining in Peru such as refusal to negotiate collective

[63] See CEACR Observation on Convention No. 98 (Peru, 2001). Since then, a legislative reform of 2003 addressed, and partially solved some of these issues.
[64] See CEACR Observation on Convention No. 87 (Peru, 2010).
[65] See CEACR Observation on Convention No. 98 (Peru, 2010).

agreements, unlawful transfer or initiation of disciplinary proceedings against trade union officials, dismissals of trade union affiliates and officials, anti-union discrimination practices, legal restrictions on the right to strike, bad faith in collective bargaining, etc.[66]

Table 12: Cases regarding Peru before the Committee on Freedom of Association

Active	Follow-up	Closed
14	19	119

3.3.2 The content of the submission

The complaint submitted by SINAUT concerns allegations of obstacles to collective bargaining in the public sector (tax administration). The submission extensively relies on conclusions and recommendations of the CFA in order to document and establish violations of the right to collective bargaining. In fact, the petitioners refer to the conclusions of the CFA to highlight ("evidence […] that the right to effective collective bargaining has been affected"). [67] The submission refers both to the conclusions and recommendations of the CFA concerning Case No. 2690 as a result of a complaint from the Autonomous Confederation of Peruvian Workers (CATP) dated 11 November 2008. The submission first refers to the recommendation formulated by the CFA:

> *"The Committee highlights that the impossibility of negotiating wage increases in a permanent manner contravenes the principle of free and voluntary negotiation contained in Convention 98 and requests the Government to promote appropriate mechanisms for the Union of SUNAT Workers (SINAUT-SUNAT) and the National Superintendency of Tax Administration (SUNAT) to be able to enter into a collective bargaining agreement in the near future. The Committee requests the Government to keep it informed in that respect."* [68]

Secondly, the submission refers extensively to the conclusions reached by the CFA in that case:

> The CFA "is aware that the collective bargaining in the public sector demands the verification of the resources available in the different public companies or organizations, that such resources are contingent upon the budgets of the Government and that the term of the collective agreements in the public sector does not always coincide with the effectiveness term of the State Budget Law, which may pose difficulties" (paragraph 944);
>
> **b)** "if by virtue of a stabilization policy a government considers that wage rates cannot be freely set through collective bargaining, such restriction should be applied as exception measure, be limited to what is necessary, it should not exceed a reasonable period and it should include appropriate guarantees to protect the workers' standard of living" (paragraph 45) (stabilization policy, by the way, does not exist and is not necessary in Peru nowadays, which is a country with high economic growth);

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[66] See, amongst others, the following CFA cases: Case No. 2826 (2010), Case No. 2816 (2010), Case No. 2813 (2010), Case No. 2856 (2011), Case No. 2825 (2010). NORMLEX database.

[67] See the Public Submission to the Office of Trade & Labor Affairs (OTLA) under Chapters 17 (Labor) of the US-Peru, (p. 4).

[68] CFA case 2690 (2009), NORMLEX database.

> **c)** "are consistent with the Convention, those legislative provisions that enable the Congress or the competent body in budgetary matters to set a wage range that serves as basis for negotiations, or to establish a fixed global budgetary "allocation" under which the parties may negotiate the clauses of pecuniary or regulatory nature (for example, the reduction of work time or other arrangements in terms of employment conditions, the regulation of wage increases based on the different levels of remuneration, or the establishment of measures to stagger readjustments), or even the provisions that confer on the public authorities that have been attributed financial responsibilities, the right to take part in the collective bargaining together with the direct employer, to the extent that they leave significant space for collective bargaining; and that authorities should give priority, to the extent possible, to collective bargaining as a mechanism to determine officers' employment conditions; if it was not possible due to the circumstances, this type of measures should be applied during limited periods and be intended to protect the most affected workers' standard of living. In other words, **there should be equitable and reasonable commitment between, on the one hand, the need to preserve to the extent possible the parties' autonomy in the negotiation and, on the other hand, the governments' duty to take the measures necessary to overcome their budgetary difficulties." (paragraph 945);**
>
> **d)** and, therefore, **"the Committee highlights that the impossibility of negotiating wage increases in a permanent manner contravenes the principle of free and voluntary negotiation contained in Convention 98, and requests the Government to promote appropriate mechanisms for the parties to be able to enter into a collective bargaining agreement in the near future**." (paragraph 946) [69]

Finally, the petitioners referred again to the recommendation formulated by the CFA:

> Based on the foregoing, the CFA requests the Peruvian Government **"to promote appropriate mechanisms for the Union of SUNAT Workers (SINAUT-SUNAT) and the National Superintendency of Tax Administration (SUNAT), to be able to enter into a collective bargaining agreement in the near future"**, considering that **"the impossibility of negotiating wage increases in a permanent manner contravenes the principle of free and voluntary negotiation contained in Convention 98." (paragraph 948)**[70]

As stated above, it can once again be seen that the submission presented to the OTLA by SINAUT alleging serious compliance gaps by the Government of Peru regarding the right to bargain collectively has relied heavily on previous conclusions and recommendations reached by the CFA in case no. 2690. And as in the case of Guatemala, although the findings and recommendations issued in the public report of the OTLA of 30 August 2012 do not quote explicitly the comments of the ILO's supervisory bodies, the report does mention that the OTLA reviewed relevant materials from the ILO supervisory mechanisms, including cases filed with the CFA and observations made by the CEACR, and the content of the public report is consistent with the analysis made in recent years by the supervisory bodies of the ILO.[71]

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[69] Ibid.
[70] Ibid.
[71] See Public Report of review of OTLA U.S. Submission (Peru), August 30, 2012, p. 3.

4 Concluding remarks

The inclusion of labour provisions in the framework of bilateral or multilateral trade agreements and the explicit reference to ILO's international labour standards in those agreements has become a reality in the past decade. While it is still probably too early to draw definitive conclusions on the concrete impact of these labour provisions, some interesting findings emerge from the recent complaints under the labour chapters of three US trade agreements that have been analyzed in this paper.

At the outset, in the case of Guatemala, and even more so in the cases of Peru and Bahrain, the petitioners have made extensive use of the comments, decisions and recommendations of the ILO's supervisory bodies regarding compliance by these countries with ILO instruments. [72] It is interesting to note that while the petitioners could have used other sources such as court decisions at the national level, decisions of the Inter-American Court of Human Rights or other reports from NGOs, it appears from the submissions that in fact, the assessment made in recent years by the ILO's supervisory bodies on these three countries through the work of the CEACR, the CFA and the Conference Committee on the Application of Standards has been the main source of information on which the petitioners have built their cases on.

As for the OTLA – the US authority in charge of reviewing these submissions - its report on the Guatemala and Peru cases indicated that it had reviewed relevant materials from the ILO's supervisory mechanisms, including cases filed with the CFA and observations made by the CEACR. The review of complaints undertaken by the competent US authorities appear to be consistent with the findings of the ILO's supervisory bodies. [73] Therefore, the assessment of the labour rights situation in a country by the ILO's supervisory bodies can be used as a useful source of information for the petitioners in order to build their cases and can be taken into account by the reviewers of the complaints. In all cases, the ILO expertise feeds the practical implementation of labour provisions with reliable information and legal knowledge on the labour rights situation at the domestic level.

International labour standards continue to be a universal reference for a growing number of actors that are trying to ensure respect for labour rights on the international scene. Through its multiple applications, international labour standards and the work of its supervisory system have become an important tool for denouncing excessive inequalities in the world of work and for regulating labour relations, conditions and disputes, thereby earning greater respect for the values upheld by the ILO.

More generally, in the context of bilateral and regional trade agreements, the question arises as to what could be the multilateral future for the setting and supervising of international labour standards, and, in the specific cases examined in this paper, the use of the comments of ILO's supervisory bodies in the framework of complaint mechanisms of labour provisions in US FTAs does raise the issue of what role the ILO could play in the future in this regard? The question has in fact arisen of possible ILO involvement in the settlement of disputes on the application of labour provisions since some recent agreements do explicitly envisage such a role for the ILO. In this context, it should be recalled that in

[72] In fact, the recent case filed against the Government of the Dominican Republic is even more explicit as it solely quotes from comments and reports of ILO bodies to document the alleged violations in its submission to the OTLA.

[73] This paper, which is purely a research piece, should in no way be seen or used as a way to interfere in the ongoing process regarding the three submissions which have been lodged and accepted for review by the US Office of Trade and Labor Affairs.

the framework of the recent discussion on the Strategic Objective of Fundamental Principles and Rights at Work that took place during the June 2012 International Labour Conference, the ILO was "encouraged to strengthen its analytical and research work and, upon request, provide assistance to Members who wish to promote strategic objectives jointly within the framework of bilateral or multilateral agreements, subject to their compatibility with ILO obligations." [74] Strategic vision and evolving research will be essential in this area in the coming years.

Finally, it should be stressed that although labour standards are increasingly featured in economic integration and market liberalization agreements, the great task still pending is the full and appropriate application of those standards. Yet, compliance with labour standards and other social accomplishments are essential prerequisites for moving towards development with social justice. In an environment that promotes democracy and market-oriented economies, as the CAFTA-DR, US-Bahrain and US-Peru FTAs are intended to do, there is no trade-off between labour rights and development; indeed, they are mutually reinforcing. Respect for labour rights, whether through free trade agreements, in the context of regional integration or at a more global level, can make a significant contribution to a fair globalization in which economic development and social justice may progress hand in hand.

[74] See Fundamental principles and rights at work: From commitment to action, Recurrent discussion under the ILO Declaration on Social Justice for a Fair Globalization and the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, ILC, 101st Session, 2012.

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