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False Hopes: Why a Renegotiated North American Free Trade Agreement Will Violate Conventions 87 and 98 of the International Labor Organization

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**FALSE HOPES: WHY A RENEGOTIATED
NORTH AMERICAN FREE TRADE
AGREEMENT WILL VIOLATE
CONVENTIONS 87 AND 98 OF THE
INTERNATIONAL LABOR ORGANIZATION**

CHARLIE LYONS*

I. INTRODUCTION.....	236
II. BACKGROUND	238
A. THE ILO, ILO CONVENTIONS 87 AND 98, AND THE COMMITTEE ON FREEDOM OF ASSOCIATION.....	238
B. FREEDOM OF ASSOCIATION CASES AGAINST GUATEMALA.....	240
C. THE TPA, NAFTA, AND ITS RELATIONSHIP WITH CAFTA- DR.....	242
D. THE CAFTA-DR LABOR DISPUTE.....	243
III. ANALYSIS	248
A. GUATEMALA IS VIOLATING THE ILO BECAUSE IT IS NOT PROTECTING THE FREEDOM OF ASSOCIATION OR THE RIGHT TO COLLECTIVE BARGAINING.....	249
B. THE PANEL’S INTERPRETATION OF “IN A MANNER AFFECTING TRADE BETWEEN THE PARTIES” VIOLATED THE VCLT BECAUSE IT DID NOT CORRECTLY DETERMINE THE OBJECT AND PURPOSE OF THE CAFTA-DR.....	251
C. THE PANEL’S INTERPRETATION OF “IN A MANNER AFFECTING TRADE BETWEEN THE PARTIES” CREATES AN EVIDENTIARY STANDARD THAT VIOLATES THE ILO BECAUSE THE ILO DOES NOT REQUIRE LABOR	

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VIOLATIONS TO AFFECT CONDITIONS OF COMPETITION	
BETWEEN PARTIES	252
1. The Shipping Companies.....	253
2. The Garment Manufacturers.....	256
3. The Rubber Manufacturer	259
IV. RECOMMENDATION: THE UNITED STATES SHOULD DEFINE AND CLARIFY THE MEANING OF “IN A MANNER AFFECTING TRADE BETWEEN THE PARTIES”	260
V. CONCLUSION.....	262

I. INTRODUCTION

The United States is unable to enforce labor violations under its free trade agreements (FTA) that include labor chapters.¹ Many FTAs include labor chapters to ensure that parties to the agreement promote internationally recognized labor rights and reaffirm commitments to the International Labor Organization (ILO).² Although the United States succeeded in implementing labor chapters into its FTAs, it has unsuccessfully enforced these provisions.³

On August 9, 2011, the United States requested an arbitral panel under Article 20.6.1 of The Dominican Republic-Central American-U.S. Free Trade Agreement (CAFTA-DR) to consider whether Guatemala violated its obligations under Article 16.2.1(a) of the CAFTA-DR.⁴ The CAFTA-DR Panel (Panel) held that, although the

1. See generally Staff of Senator Elizabeth Warren, *Broken Promises: Decades of Failure to Enforce Labor Standards in Free Trade Agreements* (May 18, 2015), <http://www.warren.senate.gov/files/documents/BrokenPromises.pdf> [hereinafter *Broken Promises*] (examining the false promises given by United States Presidents and United States Trade Representatives regarding labor rights enforcement over the past two decades).

2. See, e.g., The Dominican Republic-Central America-United States Free Trade Agreement art. 16.1, Aug. 5, 2004, 119 Stat. 462 [hereinafter *CAFTA-DR*] (“Parties reaffirm their obligations as members of the International Labour Organization.”).

3. *Broken Promises*, *supra* note 1.

4. OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, IN THE MATTER OF GUATEMALA - ISSUES RELATING TO OBLIGATIONS UNDER ARTICLE 16.2.1(A) OF THE CAFTA-DR (2017), <http://trade.gov/industry/>

United States provided sufficient evidence to prove Guatemala failed to effectively enforce its labor laws,⁵ it did not successfully show that Guatemala's failure was "in a manner affecting trade between the Parties."⁶

The Panel's reasoning is problematic because it violated the Vienna Convention on the Law of Treaties (VCLT). Article 31 of the VCLT requires that a treaty be interpreted "in light of its object and purpose."⁷ The Panel did not interpret the phrase "in a manner affecting trade between the Parties" consistent with the agreement's object and purpose because the Panel's interpretation was too narrowly defined and ignored Guatemala's obligations under ILO standards. The provision, "in a manner affecting trade between the Parties," which the Panel incorrectly interpreted, exists in several other United States FTAs⁸ and the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA).⁹ Additionally, the interpretation and application of "in a manner affecting trade between the Parties" violates and undermines the ILO.

Because the decision was the first of its kind interpreting FTA labor provisions, a future panel deciding a labor dispute under a renegotiated NAFTA will likely look to the CAFTA-DR decision for guidance on the meaning of the phrase "in a manner affecting trade between the Parties." Therefore, if a renegotiated NAFTA includes the provision

tas/Guatemala%20%20E2%80%93%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf [hereinafter IN THE MATTER OF GUATEMALA] ("A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.").

5. *Id.* at 143.

6. *Id.* at 169.

7. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

8. *See, e.g.*, United States-Peru Trade Promotion Agreement, U.S.-Peru, art. 17.3, Apr. 12, 2006, 121 Stat. 1455 [hereinafter U.S.-Peru TPA]; United States-Colombia Trade Promotion Agreement, U.S.-Colom., art. 17.3, Nov. 22, 2006, 125 Stat. 462 [hereinafter U.S.-Colombia TPA]; United States-Korea Free Trade Agreement, U.S.-Kor., art. 19.2, June 30, 2007, 125 Stat. 428 [hereinafter U.S.-Korea FTA].

9. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 19 U.S.C.A. § 4201 (West 2016) [hereinafter Trade Priorities Act].

“in a manner affecting trade between the Parties,” it will violate the ILO because the Panel’s interpretive jurisprudence violates the ILO.

This Comment discusses the implications of the CAFTA-DR labor dispute. Part II discusses the ILO, its declaration, and the conventions relevant to the dispute. It gives an overview of the dispute, including its origins and ruling. Part III argues that because Guatemala is violating ILO Conventions 87 and 98, the Panel’s ruling undermines Guatemala’s ILO obligations. The United States will continue to unsuccessfully seek enforcement of labor violations, because the provision at issue in the CAFTA-DR labor dispute exists in other FTAs and will be included in a renegotiated NAFTA.¹⁰ Part IV recommends that the United States change its future FTAs so that it will have greater certainty over the provision’s interpretation. This can be accomplished by using a “for greater certainty” clause.

II. BACKGROUND

A. THE ILO, ILO CONVENTIONS 87 AND 98, AND THE COMMITTEE ON FREEDOM OF ASSOCIATION

Founded in 1919, the ILO’s mission is to bring together “governments, employers and workers . . . to set labour standards, develop policies and devise programmes promoting decent work for all women and men.”¹¹ In 1998, the ILO adopted the Fundamental Principles and Rights at Work, which sets forth a list of fundamental rights that all parties, by signing onto the ILO, must endorse.¹² The rights include: freedom of association, the effective recognition of the right to collective bargaining, and the elimination of discrimination in

10. OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION 12 (Nov. 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf> [hereinafter NAFTA RENEGOTIATION OBJECTIVES].

11. *About the ILO*, ILO, <http://www.ilo.org/global/about-the-ilo/lang-en/index.htm> (last visited Oct. 1, 2017).

12. See *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, ILO, <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm> (last visited July 1, 2018) [hereinafter *ILO Declaration on Fundamental Principles and Rights*] (recognizing that the rise in globalization does not guarantee economic progress for individuals without a set of fundamental labor rights).

respect to employment and occupation.¹³ These rights are adopted in subsequent, detailed conventions discussed below.

ILO Convention 87, Freedom of Association and Protection of the Right to Organise, requires parties to allow workers and employers the ability to organize and join organizations for “furthering and defending the interests of workers or of employers.”¹⁴ Furthermore, it states that public authorities should not interfere with the ability to lawfully exercise this right.¹⁵ ILO Convention 98, Right to Organise and Collective Bargaining, requires parties to protect workers by ensuring “adequate protection against acts of anti-union discrimination in respect of their employment.”¹⁶ It emphasizes a worker’s ability to freely join unions without fear that he or she will be dismissed or discriminated against for doing so.¹⁷

In 1951, to increase compliance with Conventions 87 and 98, the ILO established the Committee on Freedom of Association (CFA).¹⁸ The CFA receives freedom of association complaints from employers and workers against their respective governments.¹⁹ If the CFA decides to receive the case, and subsequently finds a violation, it will report on the violation and provide recommendations for the government.²⁰ Next, the CFA will request that the government keep the committee informed.²¹ If the CFA is not satisfied with the government’s progress to give effect to the committee’s recommendations, it may refer the case to the ILO’s Committee of Experts on the Application of Conventions and Recommendations.²²

13. *Id.* at 7.

14. Freedom of Association and Protection of the Right to Organise Convention art. 10, July 9, 1948, 68 U.N.T.S. 17.

15. *Id.* art. 3.

16. Right to Organise and Collective Bargaining Convention art. 1, July 1, 1949, 96 U.N.T.S. 257.

17. *Id.*

18. See *Committee on Freedom of Association*, ILO, <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm> (last visited Oct. 1, 2017).

19. See *id.* (recognizing that the ILO could not effectively address freedom of association complaints without the formation of specialized supervisory body).

20. *Id.*

21. *Id.*

22. Steve Charnovitz, *The ILO Convention on Freedom of Association and its Future in the United States*, 102 AM. J. INT’L L. 90, 96 (2008).

B. FREEDOM OF ASSOCIATION CASES AGAINST GUATEMALA

There are over 100 Freedom of Association cases against Guatemala, nineteen of which are active before the CFA.²³ On May 31, 2002, the Trade Union of Workers of Guatemala (UNSI TRAGUA) brought a complaint against Guatemala to the CFA alleging a multitude of freedom of association violations.²⁴ Among the allegations included assaults, death threats, and intimidation of union members.²⁵ Additionally, the complaint alleged a clear lack of respect for collective bargaining agreements and judicial orders to reinstate dismissed workers.²⁶

In its first report, the CFA concluded that there was great concern for the death threats received by union members.²⁷ Additionally, the CFA concluded that employers dismissed their workers for participating in union activity and that judicial reinstatement orders were not respected.²⁸ The CFA recommended that Guatemala investigate the threats and violence against union members and remedy the dismissal of workers who engaged in union activity.²⁹

The CFA examined the complaint brought by UNSI TRAGUA on eight additional occasions and published a definitive report fourteen years later in 2016.³⁰ The CFA requested that the government provide responses to the assault and death threat allegations against the union members.³¹ The CFA concluded that, because Guatemala provided no evidence to the contrary, the reports of threats and acts of violence

23. *Supervising the Application of International Labour Standards for Guatemala*, ILO, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11100:0::NO::P11100_COUNTRY_ID:102667 (last visited Aug. 10, 2018).

24. *Interim Report - Report No. 330, March 2003*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2907147 (last visited Aug. 10, 2018).

25. *Id.* ¶ 797.

26. *Id.* ¶ 806.

27. *Id.* ¶¶ 816, 823.

28. *Id.*

29. *Id.*

30. *Definitive Report - Report No. 380, October 2016, Case No. 2203*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP_LAINT_TEXT_ID:3301394 (last visited Aug. 10, 2018).

31. *Id.*

against union members were not investigated by the government.³² Additionally, the CFA reasoned that there is a “climate of violence” in Guatemala that serves as an obstacle for union activity.³³ Regarding conditions of violence and anti-union discrimination, the CFA noted that workers’ rights can only be protected in an environment free of violence.³⁴

Reports on Guatemala’s violation of the ILO are not limited to the aforementioned case. Union leader Marco Tulio Ramirez faced anti-union violence and threats for participating in a strike.³⁵ Although Mr. Ramirez reported his fears, the Government of Guatemala failed to provide adequate protection and he was subsequently murdered.³⁶

In other cases of anti-union discrimination, the CFA emphasized that it is the governments’ responsibility to ensure the protection of employees’ rights.³⁷ In CFA case number 1852, the Trade Union Congress (TUC) complained that the United Kingdom interfered with their right to bargain collectively.³⁸ The CFA noted that, although the Government of the United Kingdom stated it has protections in place, it did not supply any information to indicate that in this case, the steel workers did not experience anti-union discrimination and intimidation.³⁹

32. *Id.*

33. *See id.* (noting that the authorities should take adequate steps to reduce the violence and threats perpetrated against union members).

34. *Interim Report - Report No. 333, March 2004, Case No. 2268*, ILO, ¶ 744 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2907867 (last visited Aug. 10, 2018).

35. *See* U.S. DEP’T OF LABOR, PUB. REPORT OF REVIEW OF OFFICE OF TRADE AND LABOR AFFAIRS U.S. SUBMISSION 2008-01 (GUAT.) 10 (2009) <https://www.dol.gov/ilab/reports/pdf/20090116Guatemala.pdf> (last visited Aug. 10, 2018) [hereinafter OTLA REVIEW U.S. SUBMISSION 2008-01 (GUAT.)] (stating that the union leaders indicated they felt threatened when a military unit visited the SITRABI headquarters).

36. *Id.*

37. *See Interim Report - Report No. 304, June 1996, Case No. 1852*, ILO, ¶ 498 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2903671 (last visited Aug. 10, 2018) (calling on the government to take steps to ensure adequate protection from acts of interference and to remedy the impact of such acts).

38. *Id.* (noting that the employer placed grave intimidation on the workers to sign contract arrangements and threatened to dismiss those who did not agree).

39. *Id.*

C. THE TPA, NAFTA, AND ITS RELATIONSHIP WITH CAFTA-DR

The United States successfully implemented requirements that promote internationally recognized labor rights into its FTAs.⁴⁰ Despite this, many criticize the United States' enforcement of these requirements.⁴¹

On May 18, 2017, the United States Trade Representative (USTR), Robert Lighthizer, notified Congress of the Trump Administration's intent to renegotiate NAFTA.⁴² The USTR seeks to bring labor rights into the main text of the renegotiated NAFTA because the labor chapter in the original NAFTA is a side agreement.⁴³ Lighthizer's notification also explained that the Administration will follow the guidelines in the TPA during the course of its negotiations with Mexico and Canada.⁴⁴ Congress passed the TPA in May 2015 to increase expediency and certainty when negotiating FTAs.⁴⁵ Under the TPA, if the President negotiates an FTA according to Congress' objectives and guidelines, in addition to other benefits, Congress will vote on it without subjecting the agreement to an extensive and

40. See *Broken Promises*, *supra* note 1 (stating that the TPP will raise labor standards by adding enforceable requirements for safety and health).

41. *Id.* (explaining that, despite the political rhetoric that labor chapters in FTAs have become stronger, the United States has failed to enforce apparent labor violations).

42. OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, TEXT OF USTR LETTERS TO CONGRESSIONAL LEADERSHIP, <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTA%20Notification.pdf> (last visited Aug. 10, 2018) [hereinafter TEXT OF USTR LETTERS TO CONGRESSIONAL LEADERSHIP].

43. See NAFTA RENEGOTIATION OBJECTIVES, *supra* note 10, at 12 ("Require NAFTA countries to adopt and maintain in their laws and practices the internationally recognized core labor standards as recognized in the ILO Declaration.").

44. See 19 U.S.C.A. § 4201; TEXT OF USTR LETTERS TO CONGRESSIONAL LEADERSHIP, *supra* note 42 ("Our specific objectives for this negotiation will comply with the specific objectives set forth by Congress in section 102 of the Trade Priorities and Accountability Act.").

45. See Daniel J. Ikenson, *Trade Promotion Authority and the Trans-Pacific Partnership: What Lies Ahead?*, CATO INSTITUTE (June 8, 2015), <https://www.cato.org/publications/free-trade-bulletin/trade-promotion-authority-trans-pacific-partnership-what-lies-ahead> (noting that without TPA trade agreements can be amended and debated in Congress for months before approval).

potentially harmful amendment process.⁴⁶

The TPA requires that parties to an FTA adopt and maintain internationally recognized labor rights.⁴⁷ The parties to the agreement should not derogate from implementing internationally recognized labor rights “in a manner affecting trade . . . between the Parties.”⁴⁸ Additionally, in USTR’s renegotiating objectives for NAFTA, part of the labor chapter’s goal is to ensure that “NAFTA countries do not waive or derogate from their labor laws implementing internationally recognized core labor standards in a manner affecting trade . . . between the Parties.”⁴⁹ Despite their inclusion in the United States Government’s trade agenda for NAFTA, these provisions promoting internationally recognized labor standards had no contextual meaning prior to the CAFTA-DR labor dispute.⁵⁰

D. THE CAFTA-DR LABOR DISPUTE

On August 9, 2011, former USTR Ron Kirk requested an arbitral panel to consider Guatemala’s compliance with its obligations under Article 16.2.1(a) of the CAFTA-DR.⁵¹ The provision states: “A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.”⁵² The Panel interpreted the scope of each component of

46. *Id.*

47. *See* 19 U.S.C.A § 4201(a)(6).

48. *Id.* § 4201(10)(A)(ii)(I).

49. *See* NAFTA RENEGOTIATION OBJECTIVES, *supra* note 10, at 12.

50. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, GUATEMALA - ISSUES RELATING TO THE OBLIGATIONS UNDER ARTICLE 16.2.1(A) OF CAFTA-DR, INITIAL WRITTEN SUBMISSION OF GUATEMALA 11, ¶ 63 (2015), <https://ustr.gov/sites/default/files/enforcement/labor/NON-CONFIDENTIAL%20-%20Guatemala%20-%20Initial%20written%20communication%20%202-02-2015.pdf> (last visited Aug. 10, 2018) [hereinafter Initial Written Submission of Guatemala] (noting that the labor dispute is only the second dispute under the CAFTA-DR); *see also* Neal, *Pascrell Statements on Guatemala Labor Report*, CONGRESSMAN RICHARD NEAL, <https://neal.house.gov/media-center/press-releases/neal-pascrell-statements-guatemala-labor-report> (last visited Aug. 10, 2018) (emphasizing the significance of the United States-Guatemala labor dispute and, consequently, the new challenges faced in enforcing labor provisions in FTAs).

51. *IN THE MATTER OF GUATEMALA*, *supra* note 4, at 1.

52. CAFTA-DR art. 16.2.1(a), *supra* note 2.

Article 16.2.1(a) according to Article 31 of the VCLT.⁵³ According to the VCLT, a treaty shall be interpreted in light of its object and purpose using the text of the agreement and any subsequent agreements signed in connection with the original agreement.⁵⁴ Additionally, the Panel considered Conventions 87 and 98 in its determinations.⁵⁵

The Panel reasoned that the object and purpose includes a commitment to promote and enforce internationally recognized workers' rights and to promote competition.⁵⁶ Article 16.8 of the CAFTA-DR defines labor laws as a "Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) the right of association; (b) the right to organize and bargain collectively."⁵⁷

Guatemala first argued that its obligation under Article 16.2.1(a) is limited to the executive body because Guatemala's executive branch is responsible for enforcing its statutes and regulations.⁵⁸ The Panel rejected this claim, reasoning that a party under CAFTA-DR is responsible for its enforcement obligation under Article 16.2.1(a) regardless of which agency of government is responsible for enforcement.⁵⁹ After establishing the object and purpose of the agreement, and determining that Guatemala's obligations apply to all branches of government, the Panel analyzed each provision of Article 16.2.1(a) separately.

First, the Panel interpreted the meaning of "not fail to effectively enforce." The Panel noted that perfect compliance is not necessary,⁶⁰

53. IN THE MATTER OF GUATEMALA, *supra* note 4, at 54.

54. VCLT art. 31, *supra* note 7.

55. IN THE MATTER OF GUATEMALA, *supra* note 4, at 35 ("[T]he Panel can take into account relevant rules of international law in interpreting and applying the CAFTA-DR.").

56. *Id.* at 39.

57. CAFTA-DR art. 16.8, *supra* note 2.

58. IN THE MATTER OF GUATEMALA, *supra* note 4, at 36 (arguing that the judicial branch and other non-executive bodies are not given the power to enforce statutes).

59. *Id.* at 39 (reasoning that such a reading of Article 16.2.1(a) would not be consistent with the object and purpose of the agreement).

60. *Id.* at 44 ("In our view, interpreting the phrase 'effectively enforce' as requiring a Party to achieve perfect compliance by each and every employer would impose an unreasonable burden.").

but that Article 16.2.1(a) requires compliance with labor laws in a manner with which other employers will likely comply.⁶¹ The Panel used this interpretation to determine whether the employers violated the ILO.

The Panel reviewed several employers and arranged them into three groups: the shipping companies, the garment manufacturers, and the rubber producer. Beginning with ITM, a shipping company, the Panel concluded that it failed to enforce its labor laws and that it failed to comply with court reinstatement orders.⁶² ITM unlawfully dismissed workers for participating in a union and a Guatemalan labor court ordered the employees reinstatement.⁶³ However, ITM did not reinstate the workers and the labor court was unable to enforce the orders.⁶⁴

The next shipping company, NEPORSA, committed similar violations. A Guatemalan labor court ordered NEPORSA to reinstate workers that it had unlawfully dismissed.⁶⁵ NEPORSA dismissed the workers for participating in a union and a Guatemalan labor court ordered their reinstatement; however, NEPORSA did not comply and the labor court did not successfully enforce the reinstatement orders.⁶⁶ In the case of ODIVESA, another shipping company, the Panel determined that, even after six years, it had failed to comply with court reinstatement orders.⁶⁷ Furthermore, the court did not refer the case for criminal prosecution, as mandated by Guatemalan law.⁶⁸ The final shipping company, RTM, dismissed workers for participating in union activity and did not pay back wages for the workers it reinstated.⁶⁹

61. *Id.* (emphasizing the notion that if the authorities are effectively remedying violations of the law, other employers will be on notice, and will be more likely to comply with the labor laws).

62. *Id.* at 101.

63. *Id.* at 98.

64. *Id.* at 101 (recognizing that six years had passed since the reinstatement orders were issued and yet the labor courts still had not achieved compliance).

65. *Id.* at 109.

66. *Id.* at 113 (rejecting Guatemala's argument that a worker must appear at a reinstatement proceeding for a court to be obligated to enforce a reinstatement order).

67. *Id.* at 123.

68. *Id.* at 115-16.

69. *Id.* at 128.

Next, the Panel concluded that the garment manufacturers, Avandia, Fribo, and Alianza, also did not comply with court orders of reinstatement.⁷⁰ Avandia reinstated workers to different positions than the ones they were originally working, and Avandia did not pay money owed to the reinstated workers.⁷¹ Similarly, Alianza did not comply with the court reinstatement orders and the court neglected to enforce Alianza's compliance with the orders.⁷² The final garment manufacturer, Fribo, dismissed its employees for attempting to negotiate an agreement regarding its concerns with Fribo.⁷³ Additionally, although Fribo did reinstate workers, as required by the court, it reinstated the employees to lesser paying positions.⁷⁴ The final employer in the CAFTA-DR labor dispute, Solesa, dismissed workers for initiating a conciliation process.⁷⁵

The record showed that employers received court orders to reinstate workers who were dismissed for union activity.⁷⁶ The employers also received fines for failure or refusal to comply with court reinstatement orders.⁷⁷ The employers failed to reinstate the dismissed workers and refused to pay court-ordered fines for non-compliance.⁷⁸ The Panel concluded that Guatemala failed to effectively enforce its labor laws because the courts did not effectively enforce the fines or the reinstatement orders, which signaled to other employers that their non-compliance would occur with impunity.⁷⁹ Next, the Panel determined the phrase "through a sustained or recurring course of action or inaction" to mean a "line of connected, repeated, or prolonged behavior by an enforcement institution or institutions."⁸⁰ Despite this

70. *Id.* at 128, 135-36.

71. *Id.* at 136 (recognizing that Guatemalan courts were unable to enforce reinstatement orders of nine workers for eight months and nine months for two workers).

72. *Id.* at 135.

73. *Id.* at 124.

74. *Id.* (referring to workers' statements indicating that they had been reinstated into employment but into positions with less pay, before being dismissed again).

75. *Id.* at 137.

76. *Id.* at 142.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 145 (determining that each case must be analyzed on a fact by fact basis).

reasoning, the Panel did not make a determination on this issue so that it could analyze and rule on the third issue.⁸¹ Moreover, it noted that the issue is not dispositive of the dispute's outcome.⁸²

The Panel's conclusion that Guatemala's failure to effectively enforce its labor laws was not "in a manner affecting trade" hinged on its interpretation of how the phrases in the provision operated.⁸³ Furthermore, the Panel based its determination on whether the companies in question exported to another CAFTA-DR party, affected labor law enforcement, and conferred a competitive advantage over other CAFTA-DR parties.⁸⁴

The Panel emphasized that a failure to enforce labor laws will not necessarily be "in a manner affecting trade."⁸⁵ It stated that "[a] complainant must demonstrate that labor cost effects reasonably expected in light of the record evidence are sufficient to confer some competitive advantage."⁸⁶ Although the Panel concluded that Guatemala's failure to enforce its laws against one employer, Avandia, "conferred some competitive advantage upon it,"⁸⁷ the Panel held that because this was not a recurring failure, the United States did not show that Guatemala's failure to effectively enforce labor laws was "in a manner affecting trade."⁸⁸

81. *Id.* ("[W]e accept on an arguendo basis that the instances of failed enforcement in question constitute a sustained or recurring course of action or inaction.").

82. *Id.*

83. *Id.* at 168-69 ("[W]hichever way [the facts] are viewed, one of the prongs of an Article 16.2.1(a) claim has not been met.").

84. *Id.* at 150-51 ("We consider whether (1) at the relevant time the enterprises in question exported to one or more of the CAFTA-DR Parties in a competitive market or competed with imports from one or more of the CAFTA-DR Parties; (2) what effects, if any, failures to effectively enforce labor laws had on any of these enterprises; and (3) whether any such effects conferred some competitive advantage on any such enterprise or enterprises.").

85. *See id.* at 62-63 (noting that a failure to enforce labor laws affects trade when an employer engaged in trade gains a competitive advantage over other employers as a result of its failures).

86. *Id.* at 161.

87. *Id.* at 167.

88. *See id.* at 167-69 ("For failure . . . to effectively enforce labor laws to constitute a breach of Article 16.2.1(a), the failure . . . must be through a sustained or recurring course of action or inaction, and in a manner affecting trade . . . In this case, although we have found . . . that Guatemala's failures to effectively enforce its

III. ANALYSIS

Because Guatemala is violating Conventions 87 and 98, the CAFTA-DR labor dispute effectively absolves Guatemala from failing to uphold its ILO obligations. Specifically, the Panel's interpretation of "in a manner affecting trade between the Parties" violates the ILO because Guatemala is bound by the ILO's declaration and conventions regardless of whether or not Guatemala is engaging in trade.⁸⁹ The Panel's ruling is significant because its reasoning will likely be applied in future labor disputes.⁹⁰ Accordingly, because the Panel's interpretation violated the ILO, any subsequent FTAs that require labor violations to be "in a manner affecting trade" will violate the ILO.

The ILO Declaration and Conventions 87 and 98 are applicable to this analysis because Guatemala is a party to the ILO and ratified both conventions in 1952.⁹¹ Accordingly, Guatemala is obligated to fulfill its commitments regardless of the CAFTA-DR.⁹²

Furthermore, the Panel interpreted the provision "in a manner affecting the Parties" incorrectly under the VCLT because it did not accurately define the object and purpose of the agreement.⁹³ Finally,

labor laws constitute a sustained or recurring course of action or inaction, we have not found any evidence of such course itself having an effect on trade").

89. *ILO Declaration on Fundamental Principles and Rights*, *supra* note 12 (declaring that parties have an obligation to promote and protect the internationally recognized rights set out in the declaration and the respective ILO conventions).

90. *See Definitive Report – Report No. 330, March 2003, Case No. 2194*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP_LAINT_TEXT_id:2907043 (last visited Oct. 22, 2017) ("The Committee recalls that any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement and expects that in the future the public authorities will fully safeguard the right to collective bargaining in the public sector.").

91. *Ratifications for Guatemala*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102667 (last visited Aug. 10, 2018).

92. *See Definitive Report – Report No. 330, March 2003, Case No. 2934*, *supra* note 90 (providing that Guatemala has "ratified the Freedom of Association and Protection of the Right to Organise Convention . . . and the Right to Organise and Collective Bargaining Convention").

93. *See IN THE MATTER OF GUATEMALA*, *supra* note 4, at 109 (noting that the CAFTA-DR Panel will use the VCLT's rules of interpretation during its analysis).

the Panel's decision violates the ILO because it creates an evidentiary standard not required to prove a labor violation.

A. GUATEMALA IS VIOLATING THE ILO BECAUSE IT IS NOT
PROTECTING THE FREEDOM OF ASSOCIATION OR THE RIGHT TO
COLLECTIVE BARGAINING

Guatemala is in violation of its obligations to the ILO and Conventions 87 and 98 because complaints brought against it clearly demonstrate freedom of association violations.⁹⁴ The complaints detail numerous instances of anti-union violence and many workers have been unlawfully dismissed without reinstatement.⁹⁵ For example, in many reports workers did not have the opportunity to defend their interests as employees because they were fired for doing so.⁹⁶ Furthermore, despite Guatemala's obligation under Article 2 of Convention 87, workers were dismissed for participating in union activity.⁹⁷

Guatemala violated the ILO because it did not adequately protect union leaders Pedro Zamora's and Marco Tulio Ramirez's right to organize and participate in a union.⁹⁸ Although the CFA reiterates that union rights can only be protected in an environment free of violence

94. See generally *Complaints Procedures: Freedom of Association Cases (Guatemala)*, ILO, http://www.ilo.org/dyn/normlex/en?f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102667 (last visited Aug. 10, 2018) (illustrating the vast amount of complaints brought against Guatemala).

95. See *IN THE MATTER OF GUATEMALA*, *supra* note 4, at 101, 109 (noting that Guatemalan labor courts were unsuccessful in enforcing the reinstatement orders even after six years, and that "NEPORSA had wrongfully dismissed 40 stevedores in retaliation for participating in a union"); see also *Definitive Report - Report No. 380, October 2016, Case No. 2203*, *supra* note 30.

96. See *IN THE MATTER OF GUATEMALA*, *supra* note 4, at 109 (indicating that not only did the NEPORSA wrongfully dismiss 40 stevedores in retaliation for their participation in a union, but NEPORSA also failed to reinstate the workers).

97. *Id.* at 101.

98. See *Interim Report - Report No. 304, June 1996, Case No. 1852*, *supra* note 37, ¶ 496 (noting that it is the government's responsibility to ensure respect for the freedom of association).

and threats,⁹⁹ similar to Case No. 1852,¹⁰⁰ Pedro Zamora faced anti-union discrimination and reported his concerns to the Government of Guatemala. However, he did not receive adequate protection and was murdered.¹⁰¹ Additionally, Guatemala violated the freedom of association when, following Mr. Zamora's murder, the executive committee of the union received inadequate protection from the Government of Guatemala.¹⁰² Guatemala's inadequate protection was evident from the lack of resources it provided.¹⁰³

Threats of violence and intimidation also occurred against SITRABI union leader Marco Tulio Ramirez.¹⁰⁴ The Government of Guatemala violated Conventions 87 and 98 when it did not adequately

99. See *Interim Report - Report No. 333, March 2004, Case No. 2268*, *supra* note 34, ¶ 744 (noting that a union can only freely exercise their rights in an environment in which the authorities are not repressive and where basic human rights are respected).

100. See *Interim Report - Report No. 304, June 1996, Case No. 1852*, *supra* note 37, ¶ 481; see also Right to Organise and Collective Bargaining Convention art. 2(1), *supra* note 16 ("Workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.").

101. See OTLA REVIEW U.S. SUBMISSION 2008-01 (GUAT.), *supra* note 35 ("The Solidarity Center wrote letters to President Berger . . . and the Minister of Labor, Rodolfo Colmenares, specifically requesting measures be taken to guarantee the security . . . of STEPQ union leaders.").

102. See U.S. DEP'T OF LABOR, PUB. REPORT OF REVIEW OF U.S. SUBMISSION 2016-02 (COLOM.), i, 28 (2017), https://www.dol.gov/sites/default/files/documents/ilab/PublicReportsofReviewofUSSubmission2016-02_Final.pdf ("The ILO has repeatedly recognized that a failure to effectively and expeditiously address threats and violence against labor activists and leaders constitutes a violation of the freedom of association.").

103. See OTLA REVIEW U.S. SUBMISSION 2008-01 (GUAT.), *supra* note 35, at 8 (providing evidence regarding police delays in arriving and inspecting the crime scene, as well as failures to properly handle evidence in the case to support the allegation that Guatemalan authorities failed to conduct serious investigations); see also *Interim Report - Report No. 316, June 1999, Case No. 1773*, ILO, ¶ 492, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP_LAINT_TEXT_ID:2903023 (last visited Oct. 22, 2017) (reinforcing that it is the obligation of the Government to take all appropriate measures to ensure that the freedom of association can be exercised).

104. See OTLA REVIEW U.S. SUBMISSION 2008-01 (GUAT.), *supra* note 35, at 10 ("On September 23, 2007, Marco Tulio Ramirez, a SITRABI union leader and younger brother of SITRABI's Secretary General, was killed on the Bandegua company plantation.").

prevent or prosecute anti-union violence against SITRABI.¹⁰⁵ SITRABI merely exercised its right to peacefully protest the terms of a collective bargaining agreement,¹⁰⁶ actions that are protected by the ILO; however, Guatemala violated the participants' rights when the Government of Guatemala did not take the situation seriously.¹⁰⁷

Contrary to the protections of Convention 98, workers were dismissed for participating in a union and employers bribed their employees not to join a union.¹⁰⁸ When a government does not effectively enforce the laws, not only is it violating its obligations under the ILO, it signals to others that rights to freedom of association, to organize, and to collective bargaining will not be enforced.¹⁰⁹

B. THE PANEL'S INTERPRETATION OF "IN A MANNER AFFECTING
TRADE BETWEEN THE PARTIES" VIOLATED THE VCLT BECAUSE IT
DID NOT CORRECTLY DETERMINE THE OBJECT AND PURPOSE OF
THE CAFTA-DR

The Panel's interpretation of "in a manner affecting trade between the Parties" violated the VCLT because it did not accurately reflect the agreement's object and purpose, particularly the agreement's labor chapter.¹¹⁰ The VCLT's rules of treaty interpretation require that the

105. See *Effect Given to the Recommendations of the Committee and the Governing Body – Report No. 326, November 2001, Case No. 2027*, ILO, ¶ 176, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002_COMPLAINT_TEXT_ID:2905282 (last visited Oct. 22, 2017) (noting that in order to respect freedom of association the Government must defend the rule of law).

106. See *Right to Organise and Collective Bargaining Convention art. 1*, *supra* note 16 ("Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.").

107. See *OTLA REVIEW U.S. SUBMISSION 2008-01 (GUAT.)*, *supra* note 35, at 10 (providing that the wave of anti-union violence resulted from the Government of Guatemala's failure to prevent or prosecute the same).

108. *Id.* at 19.

109. *IN THE MATTER OF GUATEMALA*, *supra* note 4, at 150 (noting that when employers commit violations with impunity, a spillover effect occurs where other employers commit violations with the knowledge that they will not be held accountable).

110. Compare *id.* at 56 (limiting the objective of Article 16.2.1(a) of the CAFTA-DR to "promoting fair conditions of competition in the free trade area"), with CAFTA-DR art. 16.1, *supra* note 2 ("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

treaty or agreement be read in light of its object and purpose and that the whole document and related documents should be considered.¹¹¹ Despite these guidelines, the Panel narrowed its interpretation of the provision to one purpose: “To promote conditions of fair competition in the free trade area.”¹¹² This interpretation violates the VCLT because it does not account for the purpose of the labor chapter,¹¹³ the preamble of the CAFTA-DR,¹¹⁴ nor the ILO’s mandate.¹¹⁵

The Panel’s VCLT application is the starting point for explaining why the provision violates the ILO. Had the Panel considered the whole text of the agreement, it would have considered Guatemala’s ILO violations in its ruling. However, the Panel considered Guatemala’s failures only to the extent that it affected the conditions of competition. The Panel’s standard for proving a CAFTA-DR labor violation was not the same for proving an ILO labor violation.

C. THE PANEL’S INTERPRETATION OF “IN A MANNER AFFECTING
TRADE BETWEEN THE PARTIES” CREATES AN EVIDENTIARY
STANDARD THAT VIOLATES THE ILO BECAUSE THE ILO DOES NOT
REQUIRE LABOR VIOLATIONS TO AFFECT CONDITIONS OF
COMPETITION BETWEEN PARTIES

Each employer in the CAFTA-DR labor dispute engaged in activity that violated Conventions 87 and 98.¹¹⁶ If the ILO reported on the

Follow-Up (1998) (ILO Declaration).”).

111. IN THE MATTER OF GUATEMALA, *supra* note 4, at 54 (“The rules of interpretation set forth in the VCLT . . . require that the words of the Agreement be interpreted according to their ordinary meaning in context and in light of the object and purpose of the CAFTA-DR.”).

112. *Id.* at 51.

113. CAFTA-DR art. 16.1, *supra* note 2 (“The Parties reaffirm their obligations as members of the International Labour Organization (ILO).”).

114. *Id.* at Pmb1. (“PROTECT, enhance, and enforce basic workers’ rights and strengthen their cooperation on labor matters” and “BUILD on their respective international commitments on labor matters”).

115. *Report in Which the Committee Requests to be Kept Informed of Development – Report No. 300, November 1995, Case No. 1973*, ILO, ¶ 263, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP_LAINT_TEXT_ID:2903233 (last visited Oct. 22, 2017) (“[T]he membership of a State in the International Labour Organization carries with it the obligation to respect in national legislation freedom of association principles and the Conventions which the State has freely ratified”).

116. IN THE MATTER OF GUATEMALA, *supra* note 4, at 142.

complainants' allegations, it would rule that Guatemala violated its obligations under the conventions it ratified.¹¹⁷ Despite the CAFTA-DR's labor chapter specifically noting that its purpose is to promote and reaffirm the Party's ILO obligations,¹¹⁸ the Panel's decision established an evidentiary standard that is not required by the ILO to prove a labor violation.¹¹⁹ If the Panel correctly interpreted the provision "in a manner affecting trade between the Parties" in light of the agreement's object and purpose, it would have held that Guatemala, by virtue of the employers' actions, violated its obligation under Article 16.2.1(a) of the CAFTA-DR.¹²⁰

1. The Shipping Companies

The first group of employers, the shipping companies, violated Conventions 87 and 98 because they dismissed workers for exercising their union rights.¹²¹ Guatemala did not adequately protect former ITM employees' freedom of association and right to bargain collectively because ITM dismissed fourteen employees for participating in a union¹²² and refused to comply with court reinstatement orders.¹²³ Guatemala violated its obligations because, under the ILO, it is the government's responsibility for ensuring and protecting the conventions that the government voluntarily ratified.¹²⁴ Therefore, because Guatemala did not protect the rights afforded under Conventions 87 and 98, it did not comply with its ILO obligations.

Similarly, Guatemala violated Convention 87 and 98 when it did not effectively enforce the reinstatement orders issued to NEPORSA.¹²⁵ Although a labor court concluded that NEPORSA had

117. See *Complaints Procedures: Freedom of Association Cases (Guatemala)*, *supra* note 94.

118. CAFTA-DR art. 16.1, *supra* note 2.

119. IN THE MATTER OF GUATEMALA, *supra* note 4, at 150-51; *Definitive Report - Report No. 330, March 2003, Case No. 2194*, *supra* note 90, ¶ 791.

120. IN THE MATTER OF GUATEMALA, *supra* note 4, at 142-43.

121. *Id.*

122. *Id.* at 98.

123. *Id.* at 101.

124. See *Interim Report - Report No. 304, June 1996, Case No. 1852*, *supra* note 37, ¶ 492 ("The ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government.").

125. See IN THE MATTER OF GUATEMALA, *supra* note 4, at 113.

dismissed forty workers for participating in union activity and issued reinstatement orders, NEPORSA did not comply, which violates the principles of freedom of association.¹²⁶ Despite Guatemala's argument that its obligation to enforce its labor laws, including the freedoms of association and collective bargaining, is limited to the executive branch,¹²⁷ the CFA held that when a party ratifies an ILO convention, its judicial branch is equally responsible for protecting workers from anti-union discrimination.¹²⁸ Therefore, because the Guatemalan courts did not effectively enforce its orders of reinstatement against NEPORSA, Guatemala violated the freedoms of association and collective bargaining.¹²⁹

In addition, Guatemala violated Conventions 87 and 98 when it did not effectively enforce court reinstatement orders against ODIVESA in a timely manner.¹³⁰ Another example of Guatemala's failure to enforce its labor laws with respect to freedom of association and collective bargaining is a reinstatement order for an ODIVESA worker, still unenforced after six years.¹³¹ Furthermore, although mandated by Guatemalan law, reinstatement orders against ODIVESA were not submitted for criminal prosecution or additional fines.¹³² It is the responsibility of the judicial authorities of state parties to carry out the laws as they relate to protecting and implementing ILO Conventions 87 and 98.¹³³ Because the Guatemalan courts did not do

126. *Interim Report – Report No. 334, June 2004, Case No. 2239*, ILO, ¶ 391, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP_LAINT_TEXT_ID:2907493 (last visited Oct. 22, 2017).

127. *See* IN THE MATTER OF GUATEMALA, *supra* note 4, at 36.

128. *See Interim Report – Report No. 318, November 1991, Case No. 1991*, ILO, ¶¶ 269, 271, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2904960 (last visited Oct. 22, 2017).

129. *Effect Given to the Recommendations of the Committee and the Governing Body – Report No. 326, November 2001, Case No. 2027*, ILO, ¶ 176, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002_COMPLAINT_TEXT_ID:2905282 (last visited Oct. 22, 2017) (“Respect of the law reigns as the only way of guaranteeing respect for and protection of individuals.”).

130. *See* IN THE MATTER OF GUATEMALA, *supra* note 4, at 123.

131. *Id.*

132. *Id.* at 115-16; *Effect Given to the Recommendations of the Committee and the Governing Body – Report No. 326, November 2001, Case No. 2027*, *supra* note 105, ¶ 175.

133. *Report in Which the Committee Requests to be Kept Informed of Development – Report No. 313, March 1999, Case No. 1952*, ILO, ¶¶ 295, 299,

so, Guatemala violated the ILO.¹³⁴

Finally, Guatemala violated the principles of freedom of association when RTM, the last shipping company in the CAFTA-DR dispute, dismissed twelve workers for attempting to form a union.¹³⁵ The ILO holds that anti-union discrimination, including dismissing workers for forming, joining, participating in a union, or participating in union activities, constitutes a violation of freedom of association.¹³⁶ Additionally, despite court orders, RTM failed to reinstate the workers and it did not pay back wages for the unlawful dismissals, as required by the ILO.¹³⁷

The Panel's analysis and holding relies on its interpretation of "in a manner affecting trade between the Parties." Despite the apparent freedom of association and the right to collective bargaining violations, in regards to the shipping companies, Guatemala did not violate its labor obligations under CAFTA-DR. Because Guatemala did not violate its labor obligations under CAFTA-DR, despite the numerous ILO violations, the provision "in a manner affecting trade between the Parties" violates the ILO.

The Panel required the United States to show proof that a shipping company conferred a competitive advantage from Guatemala's failure to enforce its labor laws;¹³⁸ however, the ILO does not require such a showing.¹³⁹ If the ILO does not permit an employer to violate the freedom of association based on an economic necessity argument,¹⁴⁰ it

http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP_LAINT_TEXT_ID:2904540 (highlighting the autonomous role of the judiciary when reinstating trade union officials).

134. *Effect Given to the Recommendations of the Committee and the Governing Body – Report No. 326, November 2001, Case No. 2027, supra* note 105, ¶ 175.

135. See *IN THE MATTER OF GUATEMALA, supra* note 4, at 128.

136. *Interim Report – Report No. 337, June 2005, Case No. 2388, ILO*, ¶¶ 1314-15, 1359, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP_LAINT_TEXT_ID:2909153.

137. *Interim Report – Report No. 328, June 2002, Case No. 2068, ILO*, ¶ 208, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP_LAINT_TEXT_ID:2905658.

138. *IN THE MATTER OF GUATEMALA, supra* note 4, at 152.

139. *Definitive Report – Report No. 330, March 2003, Case No. 2194, supra* note 90, ¶ 791.

140. See *Report in Which the Committee Requests to be Kept Informed of Development – Report No. 335, November 2004, Case No. 2303, ILO*, ¶ 1371,

certainly would not permit an employer to discriminate against unionists to evade costs associated with protecting the freedom of association. Furthermore, unlike the ILO, the Panel required the United States to provide evidence that a shipping company's failure to protect its employees' union rights would affect the costs of other shipping companies.¹⁴¹ This evidentiary requirement is not mandated by the ILO because the purpose of Conventions 87 and 98 is to ensure and protect workers' and employers' right to establish and join organizations, not to protect the financial losses of a business.¹⁴²

2. *The Garment Manufacturers*

Similar to the shipping companies, the garment manufacturers¹⁴³ violated Conventions 87 and 98 because they did not comply with court reinstatement orders and did not adequately compensate dismissed workers.¹⁴⁴ First, Avandia, in addition to its unlawful dismissal of eleven workers,¹⁴⁵ violated the ILO because of the lengthy delay to carry out the reinstatement orders.¹⁴⁶ The ILO holds that unlawful dismissals should be remedied quickly so that the employees' union rights are not violated and that the inaction does not constitute a "denial of justice."¹⁴⁷ Furthermore, when an unlawfully dismissed worker is reinstated, he or she must be reinstated without loss of pay.¹⁴⁸ Regarding the nine workers that the Guatemalan labor

http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0:NO:50002:P50002_COMP_LAINT_TEXT_ID:2908304.

141. *IN THE MATTER OF GUATEMALA*, *supra* note 4, at 155.

142. Right to Organise and Collective Bargaining Convention art. 1, *supra* note 16; Freedom of Association and Protection of the Right to Organise Convention art. 11, *supra* note 14.

143. The garment manufacturers include Avandia, Fribo, and Alianza.

144. *See IN THE MATTER OF GUATEMALA*, *supra* note 4, at 128-35.

145. *Id.* at 156-57.

146. *Id.* at 136 (noting that when a country takes eight months to reinstate nine workers and nine months to reinstate two workers, it is not effectively enforcing its labor laws).

147. *Effect Given to the Recommendations of the Committee and the Governing Body – Report No. 338, November 2005, Case No. 1890*, ILO, ¶ 179, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP_LAINT_TEXT_ID:2904028.

148. *Report in Which the Committee Requests to be Kept Informed of Development – Report No. 327, March 2002, Case No. 2125*, ILO, ¶ 780, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP

court ordered to be reinstated, Avandia reinstated two of the workers to lesser paying jobs.¹⁴⁹ Although Avandia reinstated the workers, it violated the ILO because it did not reinstate the employees in a timely manner nor did it adequately compensate the workers.¹⁵⁰

Fribo violated the ILO in numerous ways when it dismissed workers for attempting to form a union and did not give back pay to the dismissed employees.¹⁵¹ Furthermore, Fribo violated the ILO when it fired workers for initiating a collective bargaining agreement.¹⁵² Additionally, because the ILO holds that intimidation serves to threaten one's freedom to join an organization, Guatemalan officials violated the Right to Organise when it urged workers to accept a lower salary.¹⁵³ Workers' rights cannot be protected and promoted when the government itself is intimidating workers from exercising their rights.¹⁵⁴

The final garment manufacturer in the CAFTA-DR dispute, Alianza, committed similar ILO violations relating to the freedom of association and the right to collective bargaining.¹⁵⁵ The United States provided evidence that a Guatemalan labor court found that Alianza dismissed workers for initiating a collective agreement with their employer.¹⁵⁶ Alianza's actions violated the ILO because an employer cannot dismiss workers for merely participating in union activities.¹⁵⁷ Furthermore, the ILO holds that firing an employee for presenting issues to its employer that the employee wishes to resolve cannot be

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149. See *IN THE MATTER OF GUATEMALA*, *supra* note 4, at 135.

150. *Effect Given to the Recommendations of the Committee and the Governing Body – Report No. 338, November 2005, Case No. 1890*, *supra* note 147, ¶ 179.

151. See *IN THE MATTER OF GUATEMALA*, *supra* note 4, at 136.

152. *Id.* at 124.

153. *Report in Which the Committee Requests to be Kept Informed of Development – Report No. 302, March 1996, Case No. 1826*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP LAINTEXT_ID:2903491.

154. *Interim Report – Report No. 304, June 1996, Case No. 1852*, ILO, ¶ 492, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP LAINTEXT_ID:2903491 (“The ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government.”).

155. See *IN THE MATTER OF GUATEMALA*, *supra* note 4, at 131-35.

156. See *id.* at 131.

157. See *id.*

grounds for dismissal and constitutes a violation of the freedom of association.¹⁵⁸ Despite Avandia, Fribo, and Alianza's apparent and repeated violations of the freedom of association, the Panel concluded that the employers had not violated the labor chapter of the CAFTA-DR.¹⁵⁹

Similar to the shipping companies, although the garment manufacturers committed "obvious"¹⁶⁰ freedom of association violations, the Panel reasoned that the garment manufacturers did not violate their obligations under Article 16.2.1(a) because the failures did not occur "in a manner affecting trade between the Parties."¹⁶¹ The Panel imposed an evidentiary requirement on the United States that is not required by the ILO: proof that the garment manufacturers engaged in trade between the CAFTA-DR Parties.¹⁶² The ILO does not restrict complaints from being submitted only from parties engaged in trade with particular countries.¹⁶³ Under the ILO, a state party cannot argue that an agreement signed with other countries justifies violating the ILO.¹⁶⁴ Therefore, even if the garment manufacturers did not engage in trade between the CAFTA-DR Parties, the businesses still violated the ILO because they did not protect the freedom of association and the right to collective bargaining.¹⁶⁵

Next, the Panel's application of "in a manner affecting trade between the Parties" to the garment manufacturers violated the ILO because it disregarded the ILO's requirements for reinstating workers.¹⁶⁶ The ILO requires that unlawfully dismissed workers be

158. *Report in Which the Committee Requests to be Kept Informed of Development – Report No. 330, March 2003, Case No. 2158*, ILO, ¶ 838, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP_LAINT_TEXT_ID:2906864.

159. *IN THE MATTER OF GUATEMALA*, *supra* note 4, at 169-70.

160. *Id.* at 159 ("It is obvious that the workers at Avandia, Fribo and Alianza who were unlawfully dismissed for seeking to organize a union and then denied any legal remedy were directly deprived of the ability to join and participate in a union.").

161. *Id.* at 164-65.

162. *See id.* at 150-51.

163. *Committee on Freedom of Association*, ILO, http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_087814.pdf.

164. *Definitive Report – Report No. 330, March 2003, Case No. 2194*, *supra* note 90, ¶ 791.

165. *IN THE MATTER OF GUATEMALA*, *supra* note 4, at 156, 161.

166. *Report in which the Committee Requests to be Kept Informed of*

reinstated without loss of pay;¹⁶⁷ however, the Panel introduced a requirement that the failure to give dismissed workers back pay must have conferred a competitive advantage on the employer in relation to other businesses.¹⁶⁸ The Panel acknowledged the garment manufacturers' ILO violations, but reasoned that, because the United States had not proved the violations were "in a manner affecting trade between the Parties," it did not violate Article 16.2.1(a).¹⁶⁹

3. *The Rubber Manufacturer*

The final employer, Soleasa, a major rubber manufacturer, violated the ILO because it did not comply with court reinstatement orders and it did not protect the right to collective bargaining.¹⁷⁰ In the Panel's final analysis, it examined Solesa's labor violations and the effects, if any, on trade.¹⁷¹ Similar to the garment manufacturers, Solesa violated the ILO when it dismissed employees for initiating a collective bargaining negotiation with Solesa.¹⁷² Additionally, Solesa did not abide by court reinstatement orders nor did the courts adequately enforce these orders.¹⁷³ This violated the ILO because respect and compliance of the rule of law must be maintained to ensure respect for the freedom of association.¹⁷⁴ Furthermore, because the court reinstatement orders were not enforced, it signaled to other employers that labor laws would not be enforced.¹⁷⁵

Development – Report No. 332, November 2003, Case No. 2201, ILO, ¶ 548, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP_LAINT_TEXT_ID:2907110 (requesting governments to reinstate workers that were dismissed for exercising their union rights).

167. *See Report in Which the Committee Requests to be Kept Informed of Development – Report No. 327, March 2002, Case No. 2125, supra note 148, ¶ 777.*

168. *IN THE MATTER OF GUATEMALA, supra note 4, at 158.*

169. *Id.* at 156-57, 167-70.

170. *Id.* at 141-42.

171. *Id.* at 165-67.

172. *Id.* at 137.

173. *Id.*

174. *Effect Given to the Recommendations of the Committee and the Governing Body – Report No. 326, November 2001, Case No. 2027, supra note 105, ¶ 176.*

175. *See Report in Which the Committee Requests to be Kept Informed of Development – Report No. 302, March 1996, Case No. 1852, supra note 154, ¶ 492; Comments of the United States on the Written Views Submitted by the Non-Governmental Entities, USTR (May 11, 2015), https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US%20NGE%20Comments.pdf*

Similar to the shipping companies and the garment manufacturers, Solesa committed apparent ILO violations but did not violate Article 16.2.1(a) because its violations were not “in a manner affecting trade between the Parties.”¹⁷⁶ The Panel’s application of the provision violates the ILO because it ignores the labor violations and instead bases its conclusion on one fact: that the United States did not provide proof that Solesa engaged in trade with the CAFTA-DR parties.¹⁷⁷ The ILO does not require that a violation occurs only between certain state parties.¹⁷⁸ Rather, the ILO holds that it is the responsibility of the government to implement and give effect to the ILO declaration and the declarations it signed onto.¹⁷⁹ The Panel’s analysis and conclusion regarding Solesa’s freedom of association violations rests on the determination that Solesa did not export to a CAFTA-DR country.¹⁸⁰

IV. RECOMMENDATION: THE UNITED STATES SHOULD DEFINE AND CLARIFY THE MEANING OF “IN A MANNER AFFECTING TRADE BETWEEN THE PARTIES”

The United States should propose a detailed definition of the provision “in a manner affecting trade between the Parties” so that its application in future trade agreements will not violate the ILO. Although not binding, international arbitration panels often look to other international fora for guidance.¹⁸¹ The CAFTA-DR labor dispute effectively undermines the ILO because it absolved Guatemala of its

(last visited Oct. 22, 2017) (“[N]on-compliance of certain companies can have a spillover effect on a whole sector.”).

176. IN THE MATTER OF GUATEMALA, *supra* note 4, at 166-67 (reinforcing the notion that ILO requires violations to confer a competitive advantage to be prosecuted).

177. *See id.* at 150-51.

178. *Committee on Freedom of Association*, *supra* note 18 (“Complaints may be brought against a member state by employers’ and workers’ organizations.”).

179. *ILO Declaration on Fundamental Principles and Rights*, *supra* note 12.

180. *See* IN THE MATTER OF GUATEMALA, *supra* note 4, at 166-67; *see also Definitive Report – Report No. 330, March 2003, Case No. 2194, supra* note 90.

181. *See, e.g.,* IN THE MATTER OF GUATEMALA, *supra* note 4, at 18 (“[W]e will take into account, where appropriate, WTO Appellate Body and dispute settlement panel reports.”); *SD Myers v. Can., Partial Award*, 40 I.L.M. 1408, ¶ 244 (Nov. 12, 2000) (relying on a WTO appellate body decision for guidance on the meaning of the concept of “like products”).

apparent labor violations and it signals to other United States FTA partners that labor violations will be difficult to enforce.¹⁸² The ILO has unequivocally stated that additional agreements signed onto by ILO parties cannot justify labor violations.¹⁸³ However, the CAFTA-DR labor dispute holds otherwise. Therefore, the United States should clarify and define the meaning of “in a manner affecting trade between the Parties” using a greater certainty clause. This clause will allow the United States to have greater control over what constitutes a labor violation in its FTAs.

Despite the Panel’s interpretation of the provision “in a manner affecting trade between the Parties,” the United States can, in the course of negotiating future FTAs, define how it interprets the provision. The parties to an FTA can mutually agree that their understanding of “in a manner affecting trade between the Parties” is not how the Panel interpreted it. A mutually agreed-upon interpretation of an FTA provision occurred in 2001.¹⁸⁴

The United States and Canada agreed on the interpretation of certain provisions in Chapter 11 of NAFTA.¹⁸⁵ The agreement served to “clarify and reaffirm the meaning” of its provisions.¹⁸⁶ Previous Chapter 11 disputes created many interpretation issues regarding the meaning and scope of the phrases “international law” and “fair and equitable treatment.”¹⁸⁷ The Free Trade Commission (FTC) issued a note of interpretation to clarify the meaning of these terms. Subsequently, the notes of interpretation were used in future arbitral panels.¹⁸⁸ Although some argued that it was controversial to issue the

182. IN THE MATTER OF GUATEMALA, *supra* note 4, at 166-67.

183. *Definitive Report – Report No. 330, March 2003, Case No. 2194, supra* note 90, ¶ 792.

184. NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, GOV’T OF CAN. (July 31, 2001), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng> (examining the interpretation of “access to documents” and “minimum standard of treatment in accordance with international law” in U.S. FTAs).

185. *Id.*

186. *Id.*

187. Charles Brower, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT’L L. 347, 351 (2006).

188. *Id.* at 349.

interpretation,¹⁸⁹ it is better to clarify the meaning of a provision than to allow disputes to go on without certainty of what a provision means. Although the note of interpretation is unique, clarifying provisions is not uncommon.

For greater certainty clauses are used in many United States FTAs to clarify what a given provision means. The United States should clarify the meaning of “in a manner affecting trade between the Parties” using a for greater certainty clause. Therefore, if the United States included a for greater certainty clause, it would clarify the meaning and intended application of the provision for future labor dispute panels.

V. CONCLUSION

The United States-Guatemala labor dispute under Article 16.2.1(a) of the CAFTA-DR is the first labor dispute initiated under an FTA. It is also the first time an arbitral panel interpreted the labor chapter in United States’ FTAs. Although the CAFTA-DR references several times that one of its objectives and purposes is to enhance, protect, and promote internationally recognized labor rights, the CAFTA-DR dispute effectively undermines the agreement’s objective because of the Article 16.2.1(a) provision “in a manner affecting trade between the Parties.” The dispute’s outcome makes enforcing international labor standards more difficult.

The three groups of businesses committed several serious ILO violations including the unlawful dismissal of workers and the failure to reinstate employees despite court orders. The Panel recognized and acknowledged these failures, but it did not conclude that Guatemala violated its obligations under Article 16.2.1(a). Rather, it reasoned that the failures were not “in a manner affecting trade between the Parties,” defined as conferring a competitive advantage as a result of the failures. The Panel’s interpretation violated the VCLT and the ILO.

The interpretation given to “in a manner affecting trade between the Parties” violated the VCLT because it did not take into account the object and purpose of the whole agreement in its analysis. The interpretation violated the ILO because it established an evidentiary

189. *Id.*

requirement for proving a labor violation not required by the ILO. The CAFTA-DR Panel made clear that Guatemala violated the ILO, but it required the United States to show that the employers gained a competitive advantage from their actions.

The Panel's holding has grave implications. First, the holding undermines the ILO. ILO members are obligated to adhere to the obligations set out in the ILO declaration and in the ILO conventions it ratified. However, the Panel's reasoning effectively excuses Guatemala's ILO violations. In addition, because the meaning given to "in a manner affecting trade between the Parties" violates the ILO, several other United States FTAs, including a renegotiated NAFTA, will violate the ILO. The provision and the CAFTA-DR labor chapter act as a template for FTA negotiations. Because arbitral panels look to other international tribunals for guidance on the meaning of a term, a future labor dispute panel will look to the CAFTA-DR labor dispute for guidance on the application of "in a manner affecting trade between the Parties." Therefore, because the Panel violated the ILO when it interpreted the provision, future labor dispute panels will also violate the ILO. Subsequently, the United States should explicitly define the provision so that it will no longer violate the ILO.

The United States and Canada clarified the definition of Chapter 11 of NAFTA in 2001. In its agreement, the United States and Canada explained its understanding and interpretation of the phrases "international law" and "fair and equitable treatment." The United States could use a for greater certainty clause in the renegotiated NAFTA to clarify the standard for proving a labor violation. Although the United States contends that its FTAs contain strong labor provisions, the CAFTA-DR labor dispute suggests otherwise. If the United States is to keep its commitment to enforcing labor rights, it should clarify the meaning of "in a manner affecting trade between the Parties" because the provision violates the ILO and future FTAs that include the provision will also violate the ILO.