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Nicole Downey Moss

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Labor Violations in Mexico: Can New Trade Agreements Effectuate Change?

Nicole Downey Moss*

Child labor and forced labor remain pervasive problems on Mexican farms. Millions of workers on these farms are forced to work and live in inhumane conditions, only to leave the season's harvest just as poor as they were before. To date, human rights and labor treaties and agreements that Mexico is party to have failed to protect workers. In early 2016, however, negotiations on the Trans-Pacific Partnership ("TPP") concluded and, if ratified, the party-countries claim that the TPP will hold Mexico to higher standards than previously faced because the TPP will link labor rights with trade law. However, this was the hope when Mexico, Canada, and the United States placed the North American Free Trade Agreement ("NAFTA") into force as well. This article will therefore analyze whether the TPP is indeed an improvement on NAFTA and, if so, whether the TPP will work to effectively enforce Mexican labor rights. This article begins with a look at the violations occurring on the farms, followed by a summary of the international human rights laws, international labor laws, and international trade laws that Mexico is already party to. The article also includes an in-depth summary of the labor side-agreement to NAFTA, the

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North American Agreement on Labor Cooperation and how this side agreement compares to the TPP. Lastly, this article examines additional efforts that may be made to uphold labor rights on Mexican farms, including a bottom-up approach that involves both laborers and consumers. Accordingly, this article concludes that the TPP does represent a significant improvement on NAFTA, though it remains to be seen whether this improvement will itself be enough to effectuate change in Mexico.

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I. INTRODUCTION

When walking into a local supermarket and seeing a wide selection of fresh fruits and vegetables, it is nearly impossible to imagine what the “Made in Mexico” sticker on many of those products entails. Though recent investigations have helped to increase awareness,¹ the average consumer typically would not be able to tell that their store-bought vegetables were picked by a poor Mexican farmworker, who lives in a rat-infested camp, making just \$8 to \$12 dollars a day, and being beaten if he tries to escape.² Sifting through red peppers, in search of the best ones, one likewise would not be aware that they were picked by small children, who were pulled out of school and trying to harvest enough to ensure that they would not die of starvation.³ The United States and Mexico have recently announced collaborative plans to increase the safety of the food we eat.⁴ However, the current multilateral agreements concerning the labor rights of those harvesting that food do little, if anything, to protect the workers responsible for the production of our food.

Mexico’s Constitution recognizes basic labor rights.⁵ Additionally, Mexico is a party to North America Free Trade Agreement

¹ Richard Marosi, *Hardship on Mexico’s Farms, a Bounty for U.S. Tables*, LOS ANGELES TIMES (Dec. 7, 2014), <http://graphics.latimes.com/product-of-mexico-camps> [hereinafter *Hardship on Mexico’s Farms*].

² *Id.* (stating “[m]any farm laborers are essentially trapped for months at a time in rat-infested camps, often without beds and sometimes without functioning toilets or a reliable water supply.”).

³ Richard Marosi, *In Mexico’s Fields, Children Toil to Harvest Crops That Make it to American Tables*, LOS ANGELES TIMES (Dec. 14, 2014), <http://graphics.latimes.com/product-of-mexico-children/> [hereinafter *In Mexico’s Fields*].

⁴ *See FDA Builds Closer Ties with Mexico*, U.S. FOOD & DRUG ADMIN. (Oct. 16, 2014), <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm418741.htm>.

⁵ *See* Constitución Política De Los Estados Unidos Mexicanos [C.P.], art. 123, Diario Oficial de la Federación [DOF], 05-02-1917, últimas reformas DOF 2015 (Mex.).

(NAFTA), which, in part, seeks to enforce basic labor rights.⁶ However, the Mexican government has proven unable, or unwilling, to enforce the Constitution's rights,⁷ and the agreements that the country is party to lack sufficient enforcement mechanisms.⁸ This may soon change, however, if the Trans-Pacific Partnership (TPP) goes into effect.⁹ The United States government has claimed that, if this agreement is ratified, labor rights in Mexico, and in other party-countries, will be revitalized.¹⁰

The TPP is a proposed multilateral agreement between the United States and twelve other countries, including Mexico.¹¹ The TPP requires parties to implement and enforce fundamental labor rights recognized by the International Labour Organization (ILO), a specialized agency of the United Nations that is devoted to promoting labor rights.¹² These rights include the elimination of forced labor¹³ and the abolition of child labor.¹⁴ The TPP also requires parties

⁶ See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8, 1992, 32 I.L.M. 289 (1993).

⁷ BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 5 (Dec. 1, 2014), available at http://www.dol.gov/ilab/reports/pdf/TVPRA_Report2014.pdf (finding that at least nine products produced in Mexico were produced by child labor) [hereinafter LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR].

⁸ For instance, agreements put forth by one of the most established organizations for labor rights, the International Labor Organization, "has no sanctioning power or other means of enforcing its standards." See Lance A. Compa, *The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape*, 3 U.S.-MEX. L.J. 159, 160 (1995).

⁹ See *Text of the Trans-Pacific Partnership*, N.Z. FOREIGN AFFAIRS & TRADE (Jan. 26, 2016), <https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership> [hereinafter TPP].

¹⁰ Vivian Dong, *Enforcing Labor Standards Under The Trans-Pacific Partnership*, ONLABOR (Feb. 29, 2016), <https://onlabor.org/2016/02/29/enforcing-labor-standards-under-the-trans-pacific-partnership/> (quoting the U.S. Trade Representative as stating the TPP has "the strongest protections for workers of any trade agreement in history").

¹¹ *TPP: What is it and why does it matter?*, BBC (Jan. 27, 2017), <http://www.bbc.com/news/business-32498715>.

¹² Trans-Pacific Partnership art.19.3(1), available at https://www.mfat.govt.nz/assets/_securedfiles/Trans-Pacific-Partnership/Text/19.-Labour-Chapter.pdf (last visited Mar. 8, 2017).

¹³ *Id.* at art. 19.3(1)(b).

¹⁴ *Id.* at art. 19.3(1)(c).

to commit to have laws governing standards such as minimum wage and hours of work.¹⁵ In the event of a violation of a labor provision, the TPP includes dispute settlement procedures, including possible trade sanctions.¹⁶ Additionally, under the TPP, the United States has negotiated bilateral implementation plans to ensure that specific countries are conforming to the agreement's commitments.¹⁷ These plans currently involve Vietnam, Malaysia, and Brunei Darussalam;¹⁸ however, a parallel plan is currently being negotiated with Mexico.¹⁹

This article will address Mexican farmworkers' current lack of labor rights through a comparative analysis of the mechanisms, in the form of trade agreements, purportedly in place to counteract these issues. Part II of this article will explain how the workers fall into this exploitation and will address their grievances. Part III will analyze the relevant existing international law, including international human rights law, labor law, and global trade law. This section will also briefly address the dispute resolution mechanisms in place within the current agreements in order to provide a background on how they compare to the mechanisms within the TPP. Part IV of this piece will thoroughly analyze the effect of trade liberalization, in the form of NAFTA and the TPP, on the rights of Mexican farmworkers and the enforcement mechanisms in place to ensure that the workers' rights are protected. Finally, Part V will address recommendations for future improvement of these working conditions as well as the third-party mechanisms available to enforce abidance with basic labor rights.

¹⁵ *Id.* at art. 19.3(2).

¹⁶ *See generally* Trans-Pacific Partnership art.28, available at https://www.mfat.govt.nz/assets/_securedfiles/Trans-Pacific-Partnership/Text/28.-Dispute-Settlement-Chapter.pdf (last visited Mar. 8, 2017).

¹⁷ *Summary of the Trans-Pacific Partnership*, OAS (Oct. 5, 2015), http://www.sice.oas.org/TPD/TPP/Negotiations/Summary_TPP_October_2015_e.pdf.

¹⁸ *Id.*

¹⁹ *The Trans-Pacific Partnership*, TPP MADE IN AMERICA, <https://ustr.gov/sites/default/files/TPP-Protecting-Workers-Fact-Sheet.pdf> (last visited Mar. 31, 2017).

II. BACKGROUND

A. *Falling Into the Trap: How and Why Laborers Begin Working on the Farms*

As of 2012, there were almost 168 million children involved in child labor²⁰ and 20.9 million persons involved in forced labor.²¹ Additionally, in 2014, more than 59 types of agricultural goods (fruits and vegetables) were produced by child labor, meaning produced by children under the age of 15.²² Furthermore, over 27 types of agricultural goods were also produced using forced labor.²³ In Mexico specifically, foods such as chili peppers, cucumbers, egg-plants, green beans, and tomatoes have been identified as having been produced using child or forced labor.²⁴ While exact percentages of goods produced using these types of labor are not available, the United States Department of Labor stated that these findings reflected “significant incidences of child labor or forced labor” occurring worldwide.²⁵

Approximately 14.3 percent of Mexico’s population (an estimated 17 million individuals) is employed in agriculture.²⁶ Of those 17 million individuals, three million engage in internal migrant farm work.²⁷ These workers leave impoverished communities in indigenous Mexican states, such as Oaxaca, Hidalgo, and Veracruz, to seek an escape from poverty.²⁸ The workers are enticed to join labor

²⁰ LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR, *supra* note 7, at 1.

²¹ *Questions and Answers on Forced Labour*, INTERNATIONAL LABOUR ORGANIZATION (June 1, 2012), http://www.ilo.org/global/about-the-ilo/news-room/news/WCMS_181922/lang--en/index.htm.

²² LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR, *supra* note 7, at 6.

²³ *Id.*

²⁴ *Id.* at 5.

²⁵ *Id.* at 20.

²⁶ *Mexico: National Socio-Demographic Profile*, ECONOMIC COMM’N OF LATIN AMERICA & THE CARIBBEAN, (2017), http://interwp.cepal.org/cepalstat/Perfil_Nacional_Social.html?pais=MEX&idioma=english.

²⁷ *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, INTER-AM. COMM’N H.R., Report No. 48/13, OEA/Ser.L/V/II ¶ 69, (Dec. 30, 2013), <http://www.oas.org/en/iachr/migrants/docs/pdf/Report-Migrants-Mexico-2013.pdf>. [hereinafter *Human Rights of Migrants Report*]

²⁸ *Id.*

camps through endless advertisements, blaring through storefront speakers, portraying favorable conditions such as three free meals and 100 pesos per day, as well as a solid roof over their head.²⁹ Desperate to improve their current conditions, men, women, and children gather outside and meet with a labor contractor, who transports them to the farms where they will live for the next few months.³⁰ In addition to the three million workers who have already internally migrated to labor on farms, it is estimated that approximately 150,000³¹ new, hopeful workers make this dangerous trip³² every harvest season, traveling by bus, train, or even walking.³³ Once they arrive at the farms, the workers quickly realize that surviving the treacherous journey was just the beginning.

In Mexico, farms using these exploitative forms of labor export their products to major American brands, such as Whole Foods and Wal-Mart.³⁴ For instance, the farm Agricola San Emilio, in Sinaloa, exports to Andrew & Williamson, an American distribution company located in San Diego.³⁵ The distribution company then provides tomatoes to Darden Restaurants, the owner of popular restaurants such as Olive Garden and Longhorn Steakhouse, and to Wal-Mart.³⁶ Workers at the Agricola San Emilio farm are awoken every day at 3 a.m. to begin their work. They grab coffee, a biscuit, and a few tortillas and head to the fields.³⁷ They receive two other small meals per day: a bowl of soup for lunch and another bowl for dinner.³⁸ At 9 p.m., the workers retreat to their shacks to sleep.³⁹ The next morning, the routine begins again.

²⁹ *Hardship on Mexico's Farms*, *supra* note 1.

³⁰ *Hardship on Mexico's Farms*, *supra* note 1.

³¹ *Id.*

³² *Human Rights of Migrants Report*, *supra* note 27 ¶ 89 (“The trip via the freight train through Mexico is so dangerous that migrants . . . commonly refer to it as ‘*La Bestia*’ or ‘The Death Train,’ because of the danger of falling from or being run over by the train.”).

³³ *Hardship on Mexico's Farms*, *supra* note 1 (“Earlier this year, 25 farm-workers walked 20 miles across a Baja California desert after a contractor left them on the roadside, short of their destination.”).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Hardship on Mexico's Farms*, *supra* note 1.

³⁹ *Id.*

B. *Life on the Farm*⁴⁰

The difference between treatments of produce versus the treatments of workers on the farm is unmistakable. In order to ensure the best harvest, farms conduct mandatory classes on proper picking and require workers to keep their hands sanitized and fingernails trimmed.⁴¹ The workers doing this work leave their families and homes to live in shed-like rooms with concrete floors.⁴² They typically have no beds or other furniture and resort to sleeping on pieces of cardboard.⁴³ The workers in the camps share these rooms with four to six strangers, using tarps as partitions.⁴⁴ The quarters are often rat infested, and mothers must construct makeshift cribs out of netting to protect their babies from scorpions.⁴⁵ Women face the risk of sexual assault or violence on a daily basis.⁴⁶ Children work long hours picking crops, such as short pepper plants, which are “perfectly suited to child pickers.”⁴⁷ If the workers try to leave the camp, they may be captured and beaten by the bosses or threatened with death.⁴⁸

Furthermore, wages are significantly less than required by Mexican federal labor law.⁴⁹ Sometimes they are paid in the form of vouchers redeemable only at the company store.⁵⁰ The wage of 100

⁴⁰ To be clear, it would be presumptive to claim that these conditions persist at every farm in Mexico. However, 15 out of 30 mega-farms surveyed in a recent investigation were shown to use forced labor, while hundreds of small to mid-size farms were shown to use child labor. See *Hardship on Mexico’s Farms*, *supra* note 1; see also *In Mexico’s Fields*, *supra* note 3.

⁴¹ *Hardship on Mexico’s Farms*, *supra* note 1.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *In Mexico’s Fields*, *supra* note 3.

⁴⁶ *Human Rights of Migrants Report*, *supra* note 27, ¶¶ 209-1090.

⁴⁷ *In Mexico’s Fields*, *supra* note 3.

⁴⁸ *Id.*

⁴⁹ *Salarios Mínimos Generales Por Área Geográfica*, SECRETARÍA DEL TRABAJO Y PREVISIÓN SOCIAL, http://www.conasami.gob.mx/pdf/salario_minimo/2016/salarios_area_geo_2016.pdf (last visited Mar. 8, 2017).

⁵⁰ Greg Asbed, *Massive Mexican Slavery Operation Underscores Need for Market Consequences for Human Rights Violations*, HUFFINGTON POST (July 1, 2013), www.huffingtonpost.com/greg-asbed/massive-mexican-slavery-o_b_3528340.html.

pesos a day that the labor contractor promised the workers is revealed to be obtainable only if certain quotas are met.⁵¹ For the elderly or young, these quotas are often impossible to meet.⁵² Additionally, when the harvesting season nears its end, workers at every age struggle to make a decent wage.⁵³ Wages are often illegally withheld until the end of the farmworker's contract in order to ensure that he or she does not leave without the entire crop field being harvested.⁵⁴ Without any money, the worker is often left indebted to the farm's store, which is usually the only place where they can purchase necessities such as water, toilet paper, and food.⁵⁵ Because the farm storeowners do not place price tags on any products, the storeowners are free to decide the price of the item, sometimes charging double of what the stores in town charge.⁵⁶

III. SUMMARY OF INTERNATIONAL AGREEMENTS AND ORGANIZATIONS AFFECTING LABOR RIGHTS

In order to best understand the impact of the Trans-Pacific Partnership on the labor and human rights sector, it is necessary to first analyze the existing law in these fields. Overall, the present treaties and laws have been largely unhelpful to promote labor and human rights in impoverished countries, such as Mexico, as a result of lack of enforcement mechanisms. This section will analyze the current international human rights laws, international labor laws, and then the existing global trade law in order to obtain a background on the importance of the Trans-Pacific Partnership.

⁵¹ Richard Marosi, *Desperate Workers on a Mexican Mega-Farm: "They Treated Us Like Slaves,"* LOS ANGELES TIMES (Dec. 10, 2014), <http://graphics.latimes.com/product-of-mexico-labor/>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Hardship on Mexico's Farms*, *supra* note 1.

⁵⁵ See Richard Marosi, *Company Stores Trap Mexican Farmworkers in a Cycle of Debt*, LOS ANGELES TIMES (Dec. 12, 2014), <http://graphics.latimes.com/product-of-mexico-stores/>.

⁵⁶ *Id.*

A. *International Human Rights Law*

Following World War II, the international community began to focus on upholding international human rights.⁵⁷ In 1959, the Organization of American States (OAS) created the Inter-American Commission on Human Rights (IACHR) to be the monitoring body for human rights.⁵⁸ The IACHR “is a principal and autonomous organ of the Organization of American States (OAS) whose mission is to promote and protect human rights in the American hemisphere.”⁵⁹ The IACHR works to further these ideals by examining complaints or petitions regarding specific cases of human rights violations and then publishing reports on these cases.⁶⁰ In addition, the IACHR conducts visits to countries to investigate human rights violation allegations and makes recommendations to OAS member-states regarding measures they should take to better protect human rights.⁶¹

Mexico is also party to a number of human rights conventions, such as the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, International Covenant on Civil and Political Rights, and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁶² However, human rights conventions largely rely on self-reporting and generally lack enforcement mechanisms. For instance, under the Convention on the Rights of the Child, a ratifying party must agree to “make the principles and provisions of the convention widely known, by appropriate and active means.”⁶³ This Convention

⁵⁷ Yvonne M. Dutton, *Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms*, 34 U. PA. J. INT’L L. 1, 3 (2012).

⁵⁸ *What is the IACHR?*, INTER-AMERICAN COMM’N ON HUMAN RIGHTS, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Mar. 30, 2016).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See Ratification Status for Mexico*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=112&Lang=EN (last visited Mar. 8, 2017).

⁶³ United Nations Convention on the Rights of the Child art. 42, Nov. 20, 1989, 28 I.L.M. 1448.

also establishes a committee⁶⁴ to which the parties will submit reports on measures they have taken to ensure the agreement is adopted in their country.⁶⁵ However, there is nothing in the provisions of this Convention that addresses what occurs if the parties fail to report or fail to uphold the agreement's standards.

Additionally, in 1981, Mexico ratified the American Convention on Human Rights, which states that human rights include the rights to humane treatment⁶⁶ and freedom from slavery.⁶⁷ This agreement requires parties to adopt legislation necessary to uphold the agreement's provisions.⁶⁸ The American Convention on Human Rights also established the Inter-American Court of Human Rights.⁶⁹ The Inter-American Court of Human Rights consists of seven elected judges who have the power to rule that a country violated the American Convention on Human Rights.⁷⁰ However, while the Inter-American Court of Human Rights represents a promising instrument, there are few to no mechanisms to ensure that parties are upholding the judgment.⁷¹

Many human rights agreements simply reflect unfulfilled promises that countries make and often lack the requisite enforcement mechanisms to rectify violations of human rights. Part of the reason some countries ratify these treaties may be because they realize that the cost of committing is low and the consequences of noncompliance are insignificant.⁷² Though some states may treat the minimal enforcement mechanisms as a credible threat, because of the multitude of countries that do not, many human rights conventions fall short of their intended goals.

⁶⁴ *Id.* at art. 43.

⁶⁵ *Id.* at art. 44.

⁶⁶ Organization of American States, American Convention on Human Rights art. 5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

⁶⁷ *Id.* at art. 6.

⁶⁸ *Id.* at art. 2.

⁶⁹ *Id.* at ch. VIII.

⁷⁰ *Id.* at art. 52.

⁷¹ Morse H. Tan, *Upholding Human Rights in the Hemisphere: Casting Down Impunity Through the Inter-American Court of Human Rights*, 43 *TEX. INT'L L.J.* 243, 282 (2008).

⁷² Dutton, *supra* note 57, at 5.

B. *International Labor Law*

International Labor Organization (ILO) is at the forefront of workers' rights. The ILO was founded in 1919 and seeks to give an equal voice to workers, to promote rights at work, and to enhance social protection.⁷³ The ILO has founded a number of conventions since its inception, including the Abolition of Forced Labour Convention⁷⁴ and Workmen's Compensation (Agriculture) Convention.⁷⁵ Mexico ratified the former on June 1, 1959 and the latter on November 1, 1937.⁷⁶ These conventions reiterate the ILO's labor rights⁷⁷ and include mechanisms for handling complaints against parties.⁷⁸ However, like the human rights agreements, the ILO has no sanctioning power or any other mechanism for enforcing its standards.⁷⁹ Instead, violations of ILO conventions may only be remedied through party-to-party dialogue, embarrassing publicity, or other forms of social responsibility and moral forces to persuade the party-violator to rectify the situation.⁸⁰

Much like human rights law, international labor laws lack sufficient enforcement mechanisms to bind parties to the agreements. The ILO wholly relies on "the power of persistent persuasion and the mobilization of shame against governments that fail to live up to

⁷³ *About the ILO*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited Nov. 16, 2015).

⁷⁴ See International Labour Organization, Abolition of Forced Labor Convention 1957, Jan. 17, 1959, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105.

⁷⁵ See International Labour Organization, Workmen's Compensation (Agriculture) Convention, 1921, Feb. 26, 1923, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C012.

⁷⁶ *Ratifications for Mexico*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102764 (last visited Nov. 16, 2015).

⁷⁷ See generally International Labour Organization, Abolition of Forced Labor Convention 1957, Preamble, Jan. 17, 1959, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105; see generally International Labour Organization, Workmen's Compensation (Agriculture) Convention, 1921, Preamble, Feb. 26, 1923, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C012.

⁷⁸ *Applying and Promoting International Labour*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm> (last visited Mar. 8, 2017).

⁷⁹ Compa, *supra* note 8, at 160.

⁸⁰ *Id.*

the obligations they have voluntarily undertaken.”⁸¹ Because of the ILO’s lack of sanctioning power, labor laws may be most effective when coupled with trade laws, as discussed below.

C. Global Trade Law

Global trade law provides regulations and customs for trade between countries. Historically, international trade agreements left out provisions governing labor rights or human rights.⁸² Thus, trade law and human rights or labor rights were in distinct spheres. Developing countries especially resisted linkage because of the comparative advantage that they have in cheap labor and production.⁸³

Currently, the World Trade Organization (WTO) is the only global international organization dealing with trade between nations.⁸⁴ The WTO’s formal institution was the result of an overhaul of an international agreement, the General Agreement on Tariffs and Trade (GATT), and was established on January 1, 1995.⁸⁵ It is composed of 164 country-members, including Mexico.⁸⁶ The WTO is a negotiating forum and provides a place for member-governments to sort out trade disputes.⁸⁷

For purposes of this paper, the most relevant agreement within the WTO is the Agriculture Agreement.⁸⁸ This agreement allows

⁸¹ James Mercury & Bryan Schwartz, Article, *Creating the Free Trade Area of the Americas: Linking Labour, the Environment, and Human Rights to the FTAA*, 1 ASPER REV. INT’L BUS. & TRADE L. 37, 46 (2001) (citing J.M. Vogelsson, *American Bar Association Section of International Law and Practice Report the House of Delegates*, 30 INT’L LAW 653, 660 (1996)).

⁸² Thomas Cottier & Alexandra Caplazi, *Labour Standards and World Trade Law: Interfacing Legitimate Concerns* 17, available at http://www.humanrights.ch/upload/pdf/000303_cottier_caplazi.pdf (“It would seem that arguments against linking trade and social standards have prevailed so far.”).

⁸³ *Id.*

⁸⁴ *What is the WTO?*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Nov. 16, 2015).

⁸⁵ *What is the World Trade Organization?*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Nov. 16, 2015).

⁸⁶ *Members and Observers*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 16, 2015).

⁸⁷ *What is the WTO?*, *supra* note 84.

⁸⁸ Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 410.

governments to support their agricultural economies while improving market access and export subsidies.⁸⁹ The objective of the agreement is to create a fair and market-oriented agricultural trading system.⁹⁰ To do so, the agreement requires a reduction of the volume of, and expenditures on, subsidized exports.⁹¹ Additionally, the agreement requires the countries to reduce trade-distorting domestic subsidies.⁹² Notably, however, the Agriculture Agreement does not offer any labor protections for agricultural workers.

In the event of a dispute rising from the Agreement, a member-government may file a complaint against another member-government. Under the WTO's dispute resolution procedures, which include the establishment of a tribunal-like panel, dispute resolutions should occur within one year and three months of the initial complaint.⁹³ However, no sanction or recommendation is binding upon the violating country.⁹⁴ The only potential mechanism for enforcement under the WTO is for the complaining country to raise import duties ("within certain limits"),⁹⁵ which can only be done after WTO authorization and only for a "reasonable period of time."⁹⁶ Additionally, because the WTO addresses trade issues rather than labor, this loose enforcement mechanism cannot be applied to violations of any labor law or international labor agreement.

⁸⁹ *Agriculture: Fairer Markets for Farmers*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm (last visited Nov. 16, 2015).

⁹⁰ Carmen G. Gonzalez, *Institutionalizing Inequality: the WTO, Agriculture and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 438, 468(2002).

⁹¹ *Id.* at 452-53.

⁹² *Id.*

⁹³ *Settling Disputes: A Unique Contribution, How Long to Settle a Dispute?*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Nov. 16, 2015).

⁹⁴ *Settling Disputes: A Unique Contribution, The Case Has Been Decided: What Next?*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Nov. 16, 2015).

⁹⁵ *Id.*

⁹⁶ *Id.*

IV. A COMPARATIVE ANALYSIS OF NAFTA AND THE TPP

A. The North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) is a tri-lateral agreement between the United States, Mexico, and Canada.⁹⁷ These three countries negotiated this agreement in an effort to improve free trade by eliminating barriers to trade and promoting conditions of fair competition.⁹⁸ For the United States, the impetus for NAFTA began in 1984 after the passing of the Trade and Tariff Act under President Ronald Reagan.⁹⁹ This Act grants the President the power to negotiate free trade agreements.¹⁰⁰ It also restricts Congress' power to change negotiating points in agreements and instead only permits final congressional approval or disapproval.¹⁰¹ Five years after the Trade and Tariff Act was passed, the United States and Canada entered into the Canada-U.S. Free Trade Agreement,¹⁰² which was the first agreement in North America to establish free trade between two nations through the "elimination of barriers to trade in goods and services."¹⁰³ Four years after entering into this agreement, however, NAFTA effectively suspended the Canadian agreement.¹⁰⁴ President George H.W. Bush, Mexican President Carlos Salinas de Gortari, and Canadian Prime Minister Brian Mulroney signed NAFTA on December 17, 1992 and it entered into force on January 1, 1994.¹⁰⁵ Trade among the NAFTA countries has tripled

⁹⁷ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

⁹⁸ See *id.* at art. 102.

⁹⁹ Jillian S. Hishaw, *Mississippi is Burning Georgia's Peaches Because Alabama is no Longer a Sweet Home: A Legislative Analysis of Southern Discomfort Regarding Illegal Immigration*, 58 S.D. L. REV. 30, 36 (2013).

¹⁰⁰ *Id.*

¹⁰¹ Kimberly Amadeo, *History of NAFTA and Its Purpose*, THE BALANCE (Feb. 6, 2015), <https://www.thebalance.com/history-of-nafta-3306272>.

¹⁰² Hishaw, *supra* note 99, at 36.

¹⁰³ United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, § 2, 102 Stat. 1851.

¹⁰⁴ North American Free Trade Agreement Implementation Act of 1993, Pub. L. No. 103-182, § 107, 107 Stat. 2057.

¹⁰⁵ *About the Agreement*, FOREIGN TRADE INFORMATION SYSTEM, <http://www.sice.oas.org/trade/nafta/naftatce.asp> (last visited Apr. 5, 2016).

since the agreement's signing¹⁰⁶ and has thus substantially expanded Mexican trade.¹⁰⁷ However, the trade agreement itself, as almost all trade agreements at this time did, failed to provide provisions that would protect labor rights. Instead, labor rights are addressed in the North American Agreement on Labor Cooperation (NAALC), a corollary to NAFTA.¹⁰⁸

a. North American Agreement on Labor Cooperation

The NAALC was proposed by the United States¹⁰⁹ in order to substantiate NAFTA's initial goal to "protect, enhance and enforce basic workers' rights."¹¹⁰ Public attention concerning the lack of labor provisions in NAFTA materialized during the campaign of President Bill Clinton, who agreed to go further with NAFTA only if parallel accords on labor rights were negotiated with Mexico and Canada.¹¹¹ The negotiations for the NAALC began on March 17, 1993 in Washington D.C.¹¹² Interestingly, during these negotiations, Mexico adamantly refused to classify labor standards as "obligations" and proposed that they instead be considered "objectives."¹¹³ This was because Mexican leaders believed that a country should not be required to "harmonize their labor standards to [sic] those of another country."¹¹⁴ Though this could have been a warning to the United States and Canada that Mexico was not prepared to uphold labor rights, after about five more months of negotiations, the three countries signed the agreement on September 14, 1993¹¹⁵ and it entered into force on January 1, 1994.¹¹⁶

¹⁰⁶ *Myths vs. Reality*, NAFTANOW.ORG, http://www.naftanow.org/myths/default_en.asp (last visited Nov. 16, 2015).

¹⁰⁷ Jorge G. Castañeda, *The View From Mexico*, FOREIGN AFFAIRS (Dec. 6, 2013), <https://www.foreignaffairs.com/print/1113214>.

¹⁰⁸ North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 13, 1993, 32 I.L.M. 1499 [hereinafter NAALC].

¹⁰⁹ NAALC, *supra* note 108.

¹¹⁰ NAFTA, *supra* note 97, at Preamble.

¹¹¹ Compa, *supra* note 8, at 162.

¹¹² Mark J. Russo, *NAALC: A Tex-Mex Requiem for Labor Protection*, 34 U. MIAMI INTER-AM. L. REV. 51, 58 (2002).

¹¹³ *Id.* at 58-59.

¹¹⁴ *Id.* at 59 (quoting MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA 196 (2000)).

¹¹⁵ NAALC, *supra* note 108, at 1499.

¹¹⁶ NAALC, *supra* note 108, at 1514.

The NAALC, as a labor side-agreement, was the first of its kind.¹¹⁷ The purpose of the NAALC is to “improve working conditions and living standards in each Party’s territory.”¹¹⁸ However, this general goal did not include specifications as to how to meet it. For instance, the NAALC did not set a minimum wage by which the parties had to abide. Instead, it broadly provided that “each Party shall ensure that its labor laws and regulations provide for high labor standards”¹¹⁹ and that “[e]ach Party shall promote compliance with . . . its labor law.”¹²⁰ This broad requirement provided little guidance as to what a country needed to do in order to abide by the NAALC. Another goal of the NAALC is to “promote, to the maximum extent possible, the labor principles set out in Annex 1.”¹²¹ Annex 1’s guiding labor principles consist of:

1. Freedom of association and protection of the right to organize
2. The right to bargain collectively
3. The right to strike
4. Prohibition of forced labor
5. Labor protections for children and young persons
6. Minimum employment standards
7. Elimination of employment discrimination
8. Equal pay for women and men
9. Prevention of occupational injuries and illnesses

¹¹⁷ Maria T. Guerra & Anna L. Torriente, *The NAALC and the Labor Laws of Mexico and the United States*, 14 ARIZ. J. INT’L & COMP. L. 503, 503 (1997).

¹¹⁸ NAALC, *supra* note 108, at art. 1.

¹¹⁹ *Id.* at art. 2.

¹²⁰ *Id.* at art. 3.

¹²¹ *Id.* at art. 1.

10. Compensation in cases of occupational injuries and illnesses

11. Protection of migrant workers¹²²

In order to ensure that these labor principles are promoted, the parties agreed to each establish a National Administrative Office (NAO) that would serve as a point of contact between the national governments.¹²³ Each NAO is charged with bringing labor complaints to the NAALC's Commission on Labor Cooperation and has the duty to review the labor laws in each country to evaluate whether a party has failed to comply with its obligations under the NAALC.¹²⁴

b. Dispute Resolution under the NAALC

Dispute resolution under the NAALC is extremely complex and burdensome, mostly because of the Agreement's complicated categorization of the above eleven labor principles.¹²⁵ The NAALC divides the principles into three groups: (1) Principles 1, 2, and 3;¹²⁶ (2) Principles 4, 7, 8, 10, and 11;¹²⁷ and (3) Principles 5, 6, and 9.¹²⁸ Out of the three groups, this paper will only address Groups 2 and 3. Specifically, when comparing the NAALC to the TPP, this paper will cover violations of the prohibition of forced labor, labor protections of children and young persons, and minimum employment standards, as these issues represent the largest reported problems occurring on Mexican farms. Under all three groups, however, in the event of an alleged violation, the NAALC allows parties to talk with one another and to "establish consensual work programs to address the problem."¹²⁹

¹²² *Id.* at annex 1.

¹²³ NAALC, *supra* note 108, at art. 16.

¹²⁴ Sarah Lowe, Comment, *The First American Case Under the North American Agreement for Labor Cooperation*, 51 U. MIAMI L. REV. 481, 492 (1997).

¹²⁵ *Id.* at 489.

¹²⁶ *Trading Away Rights: The Unfulfilled Promise of NAFTA's Labor Side Agreement*, 1 HUMAN RIGHTS WATCH viii (Apr. 2001), available at <https://www.hrw.org/reports/2001/nafta/nafta0401.pdf> [hereinafter *Trading Away Rights*].

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 16.

Beyond these permitted discussions, the NAALC treats alleged violations differently based on which group the violation falls under. For instance, a violation of a principle in Group 1 is not subjected to an independent review procedure.¹³⁰ Thus, if the United States wanted to bring a claim against Mexico for violating workers' right to collectively bargain, the United States' only option to address this grievance would be to establish discussions and possible work programs with Mexico in order to resolve the dispute. On the other hand, the NAALC gives alleging parties more options to address a violation of a principle in Group 2. In the event of a violation of any of the principles in this group, the NAALC permits a grievance to go to an Evaluation Committee of Experts,¹³¹ further discussed below. Finally, the NAALC allows the most intervention for an allegation of a violation of any of the principles in Group 3. Under this group, alleging parties are able to initiate discussions, to take their grievance to an Evaluation Committee of Experts, or to bring the complaint to an arbitral panel.¹³² If a violation of a principle in Group 3 is found, the violating party may also face sanctions.¹³³ However, violations of principles in Groups 1 and 2 are not subjected to these sanctions and countries are not permitted to bring the complaint to an arbitral panel.

c. Post-Consultation Dispute Resolution for Groups 2 and 3

If a dispute is not resolved through the initial permitted consultations discussed above, a party may then request the establishment of an Evaluation Committee of Experts (ECE).¹³⁴ The ECE is comprised of three individuals with expertise in labor matters and who are prohibited from taking instructions from any party.¹³⁵ Within 120 days after it is established, the ECE must present a draft report of the dispute.¹³⁶ This report contains an assessment of the dispute,

¹³⁰ *Id.* at viii.

¹³¹ *Trading Away Rights*, *supra* note 126.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Russo, *supra* note 112, at 65.

¹³⁵ NAALC, *supra* note 108, at art. 24.

¹³⁶ *Id.* at art. 25.

the ECE's conclusions, and practical recommendations when appropriate.¹³⁷ Then, 60 days after this draft report, the ECE must present a final report to the NAALC's Commission on Labor Cooperation.¹³⁸ Importantly, the ECE can only conduct assessments and investigations of the issues and make recommendations. None of these recommendations are binding on a party.

After the ECE process, if the dispute involves a violation of any of the principles listed in Group 3, a Party may request another consultation with the other Party, but only if there "has been a persistent pattern of failure by that other Party to effectively enforce such standards."¹³⁹ Within 60 days of this request, if the Parties fail to resolve the issue, a Party may then request a special session with the Commission on Labor Cooperation, which will seek advice from technical advisors and then attempt to mediate and make recommendations.¹⁴⁰

If this third attempt of reconciliation does not resolve the issue within 60 days, the Commission on Labor Cooperation may then establish an arbitral panel ("the Panel") after a two-thirds vote of the Parties.¹⁴¹ The Panel is to consist of 45 willing individuals who have expertise in labor law, dispute resolution under international agreements, or other relevant professional experience.¹⁴² Within 180 days after the last panelist is selected,¹⁴³ the Panel must present findings of fact and its determination as to whether there has been a persistent pattern of failure to the disputing parties, with a final report being presented within 60 days of the initial report.¹⁴⁴ If the complained-against Party fails to implement the plan presented by the Panel, the panel may impose a fine.¹⁴⁵ If the Party further fails to pay this assessment, the Panel may suspend the Party's NAFTA benefits, but only "in order to collect what is necessary to pay the assessment."¹⁴⁶

¹³⁷ *Id.*

¹³⁸ *Id.* at art. 26.

¹³⁹ *Id.* at art. 27.

¹⁴⁰ Russo, *supra* note 112, at 67.

¹⁴¹ NAALC, *supra* note 108, at art. 30.

¹⁴² *Id.* at art. 30.

¹⁴³ *Id.* at art. 36.

¹⁴⁴ *Id.* at art. 37.

¹⁴⁵ Russo, *supra* note 112, at 69.

¹⁴⁶ Frank H. Bieszczat, *Labor Provisions in Trade Agreements: From the NAALC to Now*, 83 CHI.-KENT. L. REV. 1387, 1392 (2008).

This lengthy and complicated process allows about 1225 days from the initial complaint to a formal sanction for noncompliance.¹⁴⁷

Though nongovernmental actors (NGOs) are permitted to bring a complaint to a government, the NAALC leaves the government with the sole right to raise the complaint internationally.¹⁴⁸ Notably, no complaint filed through the NAALC has advanced beyond the initial consultation level.¹⁴⁹ Though the NAALC requires that domestic labor laws be enforced, Mexico maintains a “hands-off” approach to enforcement of these laws.¹⁵⁰ Additionally, there has been little effort on the part of the United States and Canada to verify accusations of lack of enforcement.¹⁵¹ Of the three cases that were brought under the NAALC against Mexico, not one went further than the Ministerial Consultation stages and the government parties simply established reach-out programs to “resolve” the issues.¹⁵²

Though the agreement was unprecedented in terms of a trade agreement with labor provisions, the NAALC has largely failed in its goal to protect labor rights. There are a few possible reasons for this failure. One reason could be that the dispute resolution procedures are so lengthy and complicated that would-be complaining parties simply do not have the time or patience to figure out the system and keep the complaint alive. Another possibility is that the United States and Canada have turned a blind eye to Mexico’s violations in fear of retaliation or political discourse between the countries. Third, the NAALC may fall short simply because reports of violations fail to thoroughly address the issues and do not provide enough information to justify an assessment of sanctions against a country. Finally, and perhaps the most pessimistically, the NAALC

¹⁴⁷ See Garvey, J., *Trade Law and Quality of Life—Dispute Resolution under the NAFTA Side Accords on Labor and the Environment*, AMERICAN JOURNAL OF INTERNATIONAL LAW, 89(2), 439-453, available at <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/trade-law-and-quality-of-life-dispute-resolution-under-the-nafta-side-accords-on-labor-and-the-environment/2AE0B9BAFD5E6C889CB9D384C39952B7>.

¹⁴⁸ John H. Know, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. L.A. INT’L & COMP. L. REV. 359, 374 (2004).

¹⁴⁹ Russo, *supra* note 112, at 53.

¹⁵⁰ *Id.* at 109.

¹⁵¹ *Id.*

¹⁵² *Id.*

may have failed because the United States and Canada simply refrain from bringing complaints because they have feel that they have nothing to gain from enforcing the labor rights of Mexican workers.

B. Trans-Pacific Partnership

The Trans-Pacific Partnership (TPP) is a recently negotiated treaty that aims to improve international trade between the United States and eleven other Pacific Rim nations, including Mexico.¹⁵³ Though newly elected U.S. President Trump withdrew from the treaty, the remaining countries have continued discussions.¹⁵⁴ The TPP's thirty chapters address state-owned enterprises, intellectual property protection, environmental protection, and protection of labor rights.¹⁵⁵ In terms of labor rights, the TPP's purpose is to protect workers and to promote transparency in negotiations between countries.¹⁵⁶

The precursor to the TPP was a 2002 tripartite agreement between New Zealand, Chile, and Singapore and later joined by Brunei Darussalam in 2005.¹⁵⁷ In February 2008, the United States joined the negotiations in order to improve trade relationships with Pacific Rim countries.¹⁵⁸ Seven countries were later invited: Australia, Peru, and Vietnam in 2008, Malaysia in 2010, Canada and Mexico in 2012, and finally Japan in 2013.¹⁵⁹ Notably excluded from the negotiations was China, though the country remains a leader in international trade.¹⁶⁰

¹⁵³ T Rajamoorthy, *The Origins and Evolutions of the Trans-Pacific Partnership (TPP)*, GLOBAL RESEARCH (Nov. 10, 2013), <http://www.globalresearch.ca/the-origins-and-evolution-of-the-trans-pacific-partnership-tpp/5357495>.

¹⁵⁴ Herald Muñoz, *Trade After the Trans-Pacific Partnership*, THE NEW YORK TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/opinion/trade-after-the-trans-pacific-partnership.html>.

¹⁵⁵ David A. Gantz, *The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim*, 33 ARIZ. J. INT'L & COMP. L. 57, 60 (2016).

¹⁵⁶ TPP *supra* note 9, at art. 19.

¹⁵⁷ Rajamoorthy, *supra* note 153.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See generally Ming Du, *Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement*, 18 J. INT. ECONOMIC LAW 407 (2015). For further reading on the relationship between the TPP and China, see *id.*

The TPP aims to protect labor rights, while improving working conditions, and to strengthen cooperation between the Parties on labor issues.¹⁶¹ Article 19 of the TPP requires all Parties to adopt and maintain the fundamental labor rights as recognized by the ILO.¹⁶² Article 19.3 states that these labor rights consist of:

- (a) Freedom of association and the effective recognition of the right to collective bargaining;
- (b) The elimination of all forms of forced or compulsory labour;
- (c) The effective abolition of child labour, a prohibition on the worst forms of child labour and other labour protections for children and minors;
- (d) The elimination of discrimination in respect of employment and occupation; and
- (e) Acceptable conditions of work with respect to minimum wages, hours, of work, and occupational safety and health.¹⁶³

Not only must Parties adopt and maintain laws in order to ensure that these rights are protected,¹⁶⁴ they must also promote public awareness of their labor laws and compliance procedures.¹⁶⁵ Furthermore, Parties are forbidden from weakening protections given in each Party's labor laws in order to encourage trade.¹⁶⁶ To hold Parties accountable, the TPP also requires other Parties to discourage the importation of goods from sources using forced or compulsory labor.¹⁶⁷

While the TPP, like NAFTA, only allows claims to be brought by countries, it does require each country to ensure that individuals have the ability to address their grievances within their respective

¹⁶¹ TPP, *supra* note 9, at preamble.

¹⁶² TPP, *supra* note 9, at art. 19.3.

¹⁶³ *Id.*

¹⁶⁴ TPP, *supra* note 9, at art. 19.

¹⁶⁵ *Id.* at art. 19.8.

¹⁶⁶ *Id.* at art. 19.4.

¹⁶⁷ *Id.* at art. 19.6.

countries. Article 19.8 requires each Party to allow an individual with standing to have access to an “impartial and independent tribunal for the enforcement of the Party’s labour laws.”¹⁶⁸ These proceedings must be fair, adhere to due process, and give access to remedies in the event that they are needed.¹⁶⁹ However, these proceedings only affect a country’s labor rights and not their obligations to the other party-countries of the TPP.

To monitor whether labor rights are being upheld within each country, the TPP established a Labour Council.¹⁷⁰ The Labour Council is composed of senior government officials, chosen by each Party, and is required to meet every two years.¹⁷¹ The Labour Council’s duties involve discussing issues of mutual interest, facilitating public participation and awareness of the implementation of Chapter 19, and overseeing the general work program.¹⁷² The Labour Council is also required to work with what the TPP established as “Contact Points” of each country.¹⁷³ These Contact Points are offices or individual officials, designated by each Party, who facilitate communication between the Parties and assist and report to the Labour Council.¹⁷⁴ The Contact Points also act as a means for communication with their respective country’s public and have the power to “develop and implement specific cooperative activities bilaterally or plurilaterally.”¹⁷⁵

a. Dispute Resolution under the TPP

As with the NAALC, cooperation between the TPP Parties is necessary to implement and enforce labor standards.¹⁷⁶ Additionally, like the initial dispute resolution mechanisms in the NAALC, Parties may deliver a written request to the other Party’s Contact Point in order to initiate discussions concerning an alleged violation.¹⁷⁷ If the issue is resolved during these discussions, the Parties

¹⁶⁸ *Id.* art. 19.8.

¹⁶⁹ TPP, *supra* note 9, at art. 19.8.

¹⁷⁰ *Id.* at art. 19.12.

¹⁷¹ *Id.*

¹⁷² *Id.* at art. 19.12.

¹⁷³ *Id.* at art. 19.13.

¹⁷⁴ TPP, *supra* note 9, at art. 19.13.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at art. 19.10.

¹⁷⁷ *Id.* at art. 19.11.

document the outcome and make a report of it available to the public.¹⁷⁸

However, if the issue fails to be resolved, the Parties are permitted to engage in labor consultations.¹⁷⁹ It is unclear exactly how these consultations would differ from the initial discussions, other than the requirement that labor consultation procedure must follow a specific timeline and that other Parties are informed of these consultations. To initiate a labor consultation, the requesting Party must include specific information that allows the responding Party to reply, and then must distribute the labor consultation request to the other Parties' Contact Points.¹⁸⁰ The responding Party then must reply no more than a week later and distribute its response to the other Contact Points.¹⁸¹

Parties must begin labor consultations no later than 30 days after this response.¹⁸² In these consultations, the Parties must provide enough information to allow an examination of the issue in its entirety.¹⁸³ To accomplish this, either Party may request independent experts or may request the presence of the other Party's government officials or agencies with expertise in the matter.¹⁸⁴ After examining the issue, the Parties must "make every attempt to arrive at a mutually satisfactory resolution of the matter."¹⁸⁵ In the event that they do not resolve the issue through these formal consultations, the Parties are able to turn to formal "Dispute Settlement," given in Article 28 of the TPP.¹⁸⁶ However, the formal Dispute Settlement process is only available if the Parties were unable to resolve the issue within 60 days after the date of receipt of the initial request.¹⁸⁷ This is an interesting requirement because it seems as though a Party could simply procrastinate on the labor consultations in order to avoid going through a formal Dispute Settlement.

¹⁷⁸ *Id.*

¹⁷⁹ TPP, *supra* note 9, at art. 19.15

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ TPP, *supra* note 9, at art. 19.15.

¹⁸⁵ *Id.*

¹⁸⁶ *See generally id.* at art. 28.

¹⁸⁷ *Id.* at art. 19.15.

Regardless, under Dispute Settlement procedures, the complaining-Party may request the creation of a panel, consisting of three people, in order to fully address the failed issue at hand.¹⁸⁸ When this occurs, both Parties must appoint a panelist within 20 days and agree on an appointment for a panel chair within 35 days.¹⁸⁹ These panelists must be objectively chosen, must be independent of any Party, must have expertise in the law or the resolution of disputes, and must comply with a laid out code of conduct.¹⁹⁰

The panel's purpose is to objectively assess the matter and make findings and recommendations for the resolution of the dispute,¹⁹¹ using past WTO reports as persuasive, but not binding, precedent.¹⁹² The panel must hold an initial hearing, which must be available to the public, and file an initial report no later than 150 days after the final panelist is appointed.¹⁹³ This report must include findings and determinations, as well as the reasoning thereof.¹⁹⁴ No later than 30 days after this initial report, the panel must present a final report to the Parties, which must be released to the public within 15 days after receiving the final report.¹⁹⁵

Finally, this final report must be implemented within a "reasonable time," which the TPP states is no later than 15 months from receipt of the final report, though the Parties may agree on a shorter or longer time depending on the circumstances.¹⁹⁶ In the event that the responding Party fails to implement the terms of the final report's recommendations within 30 days, the complaining Party is authorized to use "trade retaliation" (suspension of benefits or payment of a monetary assessment).¹⁹⁷ The suspension should entail the same subject matter that was in dispute, but may entail different subject matter in the event that the grievance is severe enough.¹⁹⁸ However, though these foreign sanctions can be imposed, "nothing in the

¹⁸⁸ TPP, *supra* note 9, at art. 28.9.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*, at art. 28.10.

¹⁹¹ *Id.* at art. 28.2.

¹⁹² *Id.*

¹⁹³ TPP, *supra* note 9, at art. 28.16.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at art. 28.17.

¹⁹⁶ *Id.* at art. 28.18.

¹⁹⁷ *Id.* at art. 28.20.

¹⁹⁸ TPP, *supra* note 9, at art. 28.20.

Agreement can require the United States or other Parties to change a law or regulation” domestically.¹⁹⁹

C. Comparing NAALC and the TPP

The Obama Administration argued that the TPP was a significant improvement on NAFTA²⁰⁰ and agreed that, “[p]ast trade agreements haven’t always lived up to the hype.”²⁰¹ Though the NAALC helped to bring attention to labor rights by being the first trade agreement to include labor provisions,²⁰² it inevitably proved to be inefficient because of its lack of effective enforcement mechanisms.²⁰³ Another shortcoming of the NAALC is its over-reliance on governmental action.²⁰⁴ As discussed below, this does not seem to be completely alleviated by the TPP. In concluding this, it is necessary to first analyze how the protections of labor rights differ under each agreement, and whether the enforcement mechanisms of the TPP will be more successful in protecting those rights.

a. Forced Labor and Child Labor

Both Annex 1 of the NAALC²⁰⁵ and Article 19 of the TPP²⁰⁶ prohibit forced labor. However, they differ as to their protections of child labor. The NAALC states that each party must have “labor protections” for children and young persons as one of the standard labor principles, which are simply “guiding principles” and do not “establish common minimum standards for their domestic laws.”²⁰⁷

¹⁹⁹ *Id.*

²⁰⁰ *Upgrading the North American Free Trade Agreement (NAFTA)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/TPP-Upgrading-the-North-American-Free-Trade-Agreement-NAFTA-Fact-Sheet.pdf> (last visited Mar. 9, 2017).

²⁰¹ THE WHITE HOUSE PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/issues/economy/trade> (last visited Mar. 31, 2017).

²⁰² Ranko Shiraki Oliver, *Mexico’s Dilemma: Workers’ Rights or Workers’ Comparative Advantage in the Age of Globalization?*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 195, 226 (2012).

²⁰³ NAALC, INT’L LABOR RIGHTS FORUM, <http://old.laborrights.org/creating-a-sweatfree-world/changing-global-trade-rules/naalc> (last visited Mar. 9, 2017).

²⁰⁴ Bieszczat, *supra* note 146, at 1394.

²⁰⁵ NAALC, *supra* note 108, at Annex 1(4)-(5).

²⁰⁶ TPP, *supra* note 9, at art. 19.3(1)(b)-(c).

²⁰⁷ NAALC, *supra* note 108, at Annex 1.

The TPP, on the other hand, provides for the *abolition* of child labor,²⁰⁸ rather than simply child labor “protections.” The specific requirement for parties to maintain regulations that effectively abolish child labor in the TPP, rather than simply stating that the country must protect against child labor as the NAALC does, helps to clarify the obligations of the signing parties.

Additionally, in regard to forced labor and child labor, though the NAALC only requires countries to enforce their own existing labor laws,²⁰⁹ the TPP commits all parties involved to the ILO’s standards on labor and requires them to adopt laws in adherence to ILO’s fundamental labor rights.²¹⁰ Furthermore, unlike the NAALC, the TPP specifically forbids weakening protections to drive down prices and therefore encourage trade amongst the countries.²¹¹ Finally, the TPP furthers these workers’ rights by requiring parties to commit to discourage importation of goods that are produced by forced labor or child labor.²¹² This requirement holds all parties accountable in eliminating child or forced labor.

b. Minimum Employment Standards

Both Annex 1 of the NAALC²¹³ and Article 19 of the TPP²¹⁴ protect minimum employment standards for workers, including minimum wage and overtime pay. However, only the TPP requires the parties to establish regulations concerning hours of work,²¹⁵ while the NAALC simply leaves those standards to be bargained for under the protection of the labor principle of the right of workers to bargain collectively.²¹⁶ This important difference places responsibility on the party, rather than placing the burden on workers to fight for minimum standards, because it requires the party to adopt new

²⁰⁸ TPP, *supra* note 9, at art. 19.3(c).

²⁰⁹ Oliver, *supra* note 202, at 226 (explaining that the NAALC is “weak and non-invasive because it does not require its members to adopt any new worker laws or conform to international standards to be followed by all members”).

²¹⁰ TPP, *supra* note 9, at art. 19.3.

²¹¹ *Id.* at art. 19.4.

²¹² *Id.* at art. 19.6.

²¹³ NAALC, *supra* note 108, at Annex 1(6).

²¹⁴ TPP, *supra* note 9, at art. 19.3(2).

²¹⁵ *Id.*

²¹⁶ NAALC, *supra* note 108, at Annex 1 (stating that terms and conditions of employment fall under the right to bargain collectively).

regulations in the event that those minimum standards are not being effectively enforced. This is important because, though Mexico already has laws in place that govern these issues, the system is in dire need of reform or at the very least, implementation. To combat this, the United States' commentary to the TPP stated that Mexico's plan to implement a new system is forthcoming, an agreement that is discussed further below.²¹⁷ This commitment to address already-present issues is wholly absent from the NAALC.

c. Dispute Resolution

The clarity of the TPP's dispute resolution mechanisms likewise improves upon the NAALC's provisions. While the NAALC provides complicated tiers and different procedures to bring a dispute under each tier,²¹⁸ the TPP provides the same mechanisms to resolve any labor dispute under Article 19.²¹⁹ As discussed above, dispute resolution must be completed within 37 days of an initial complaint²²⁰ or, if the parties choose to invoke Article 28, the process must be completed within 215 days.²²¹ This timeline is a significant improvement on the 1225-day dispute resolution procedure that may occur under the NAALC timeline.²²²

While the NAALC relies on country parties themselves to resolve a dispute,²²³ the TPP provides an independent tribunal, in the form of a panel, which is available if parties are unable to settle disputes.²²⁴ This independent tribunal consists of three panelists who must have expertise in "law, international trade, other matters covered by this agreement, or the resolution of disputes arising under

²¹⁷ See *The Trans-Pacific Partnership*, *supra* note 19.

²¹⁸ *Trading Away Rights*, *supra* note 126, at ix-1.

²¹⁹ TPP, *supra* note 9, at art. 19.15 (stating that any Party is permitted to request labor consultations with another Party regarding any provision in Article 19).

²²⁰ *Id.*

²²¹ TPP, *supra* note 9, at art. 28.17.

²²² Jack I. Garvey, *Current Development: Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 A.J.I.L. 439, 444 (1995).

²²³ Bieszczat, *supra* note 146, at 1394.

²²⁴ *Dispute Settlement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-15> (last visited Mar. 9, 2017).

international trade agreements.”²²⁵ The panelists must also be independent of, and not affiliated with, any party, and chosen “strictly on the basis of objectivity, reliability, and sound judgment.”²²⁶ The existence of an objective third party to settle disputes is critical to ensuring that complaints are properly dealt with and that sanctions or recommendations further the purpose of the TPP.²²⁷ Under the NAALC, countries had little to no outside pressure to resolve disputes and were dissuaded to enforce the Agreement lest the complained-against Party filed a retaliatory action against the complaining-Party.²²⁸ Under the TPP, however, many more countries are party to the agreement, and thus it is possible that there may therefore be more pressure amongst the parties to uphold the agreement. Additionally, the most noticeable difference between the TPP and the NAALC is that, under the TPP, countries may now enforce trade sanctions against one another in the event of a violation of the labor provisions.

Finally, all written dialogues, labor consultations, and Panel decisions must be made available to the public under the TPP.²²⁹ This allows interested members of the public to have access to records of how their country handles a dispute, or what, if any, action they take against a party in clear violation of the Agreement’s labor provisions. This requirement furthers transparency and accountability, as public awareness places outside pressure on the Party.²³⁰

D. Does One Agreement Supersede the Other?

Because Mexico and the United States are parties to NAFTA and, assuming Mexico and the United States may be parties to the TPP or to a substantially similar agreement, it is imperative to analyze whether such an agreement will supersede NAFTA and thus the NAALC. If not, countries that are party to both treaties would be inclined to treaty shop depending on which agreement’s dispute mechanisms would result in a more favorable outcome.

²²⁵ TPP, *supra* note 9, at art. 28.10.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Bieszczat, *supra* note 146, at 1394.

²²⁹ TPP, *supra* note 9, at art. 19.10.

²³⁰ See Bieszczat, *supra* note 146, at 1397 (explaining that enforcement may rely “on strong and continued public pressure”).

The United States' commentary to the Article specifically states that the TPP's labor chapter will "broaden or improve upon NAFTA."²³¹ Article 1 of the TPP addresses concerns of overlapping agreements.²³² The Agreement provides that, in the event of a discrepancy between agreements, Parties must request consultations with another Party to discuss the inconsistency and attempt to reach a "mutual satisfactory solution."²³³ This solution would likely be a mutual decision determining under which treaty the parties agree to seek dispute resolution.

However, a footnote in Article 1.2 explicitly states, "[f]or purposes of application of this Agreement, the Parties agree that the fact that an agreement provides more favourable treatment of . . . *persons* than that provided for under this Agreement *does not mean* that there is an inconsistency within the meaning of paragraph 2."²³⁴ This means that even if the TPP provides more stringent standards in terms of labor rights than NAFTA/NAALC, or another treaty that Mexico is party to, Mexico and a complaining-Party are under no obligation to discuss the inconsistency between the agreements and do not have to attempt to reach a mutual satisfactory solution.

This issue is addressed later in the TPP Article 28. Under the TPP's Choice of Forum provision, the Parties agree that in the event a dispute arises under both the TPP and under another international trade agreement (such as NAFTA), the *complaining* Party chooses which forum to use to settle the dispute.²³⁵ Additionally, the Article provides that once the complaining Party chooses the forum and once they have requested the establishment of a panel, "the forum selected shall be used to the exclusion of other fora."²³⁶ Thus, while the TPP will not effectively supersede NAFTA or the NAALC, Mexico must still implement the labor standards outlined in the TPP and, if a dispute arises, a Party may choose TPP over NAFTA and the NAALC (or another agreement) to resolve the issue. Because the TPP has stricter labor standards, it is likely that a Party would choose the TPP over NAFTA. Additionally, the complainant-Party will

²³¹ TPP, *supra* note 9, at art. 19.

²³² *Id.* at art. 1.

²³³ *Id.* at art. 1.2.

²³⁴ *Id.* at art. 1.2(2) n.1 (emphasis added).

²³⁵ TPP, *supra* note 9, at art. 28.4.

²³⁶ *Id.*

likely choose the TPP because of its stronger method of recourse to resolve the issue through more methodical dispute resolution procedures.

E. Will the TPP Effectuate Change?

Trade agreements in the past have ultimately failed at protecting labor rights,²³⁷ and complaints relating to labor rights have rarely been filed.²³⁸ The main issue for Mexican farmworkers is that Mexico does have rather strong labor laws, yet they have rarely been enforced.²³⁹ Article 123 of the 1917 Mexican Constitution contains a compilation of workers' rights.²⁴⁰ This Article was codified as federal law in 1931 and has been supplemented by an extensive labor decree, the Mexican Federal Labor Law of 1970.²⁴¹ Rights granted to workers through Article 123 include maximum work schedules of six eight-hour workdays per week for blue-collar workers.²⁴² Additionally, the Article establishes that the minimum age to work is sixteen-years-old.²⁴³ These provisions fit within the labor standards required by both the NAALC and the TPP. However, though the NAALC's purpose was to help protect these rights, the Agreement was ineffective in fulfilling this goal—mostly as a result of its onerous enforcement provisions and its inability to impose effective sanctions.²⁴⁴ Between the NAALC's entry into force, only

²³⁷ Leonard Bierman & Rafael Gely, *NAFTA at Age One: A Blueprint for Hemispheric Integration?: II. The Labor Side Agreement: The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 CONN. J. INT'L L. 533, 561 (stating that “the NAALC is in many respects a quite limited document. The Agreement itself is a sort of administrative agreement, with no real force of law.”).

²³⁸ Franz Christian Ebert, *Labour Standards in Mega-Regional Trade Agreements: the Case of TPP and TTIP* 27 (Nov. 20, 2015) (Max Planck Institute for Comparative Public Law and International Law, Working Paper), available at <http://ssrn.com/abstract=2696713>.

²³⁹ Oliver, *supra* note 202, at 213.

²⁴⁰ *Id.* at 213 (citing STEPHEN ZAMORA ET AL., *MEXICAN LAW* 415-16 (2004)).

²⁴¹ *Id.* at 202.

²⁴² *Id.* at 203.

²⁴³ *Id.* at 204 (citing *Mexico's Labor Market and Laws: Mexico Business*, MEXCONNECT (Jan. 1, 2006), www.mexconnect.com/articles/196-mexico-s-labor-market-and-laws).

²⁴⁴ *Id.* at 227.

40 complaints have been filed between 1994 and 2015,²⁴⁵ with 24 being directly filed against Mexico; however, no case has ever passed beyond Ministerial Consultations.²⁴⁶ Though the NAALC requires Mexico to enforce its own labor laws, the requirement has failed to be effectively enforced, mostly due to lack of reporting on labor violations based on “the traditional weakness of Mexican unions and the nature of the average Mexican worker.”²⁴⁷ Most Mexican farmworkers have come from disadvantaged regions and are largely ignorant of their rights and the labor laws in the country.²⁴⁸

Like the NAALC, the TPP’s labor provisions only allows for actions to be brought by Parties, meaning States. While this is typical for labor agreements, it is clearly not enough. As stated above, a glaring shortcoming of the NAALC was the over-reliance on governmental action, which would also be the case for the TPP without an avenue for individuals or NGOs to bring claims. Frustratingly, while the TPP does not allow outside organizations to bring labor claims, it does allow outside organizations to bring intellectual property claims. Under Article 18 of the TPP, investors are permitted to bring disputes under intellectual property rights. Companies and investors will be permitted to challenge regulations and government actions through a TPP claim—without any governmental intervention to bring the suit.²⁴⁹ The question remains as to why investors have the option to bring a TPP claim, yet labor organizations, such as AFL-CIO, and farmworkers, are unable to. It seems as though investors get real relief, while workers must depend on the good graces of a government.

To be sure, however, the signing of the TPP will not transform the nature of the average Mexican farmworker nor will they automatically become informed of their labor rights and begin to demand them. Indeed, though these rights were loosely addressed through

²⁴⁵ Ebert, *supra* note 238, at 27.

²⁴⁶ Oliver, *supra* note 202, at 226 n. 236 (citing MARY JANE BOLLE, CONG. RESEARCH SERV., 97-861, NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATE 17 (Oct. 9, 2001)).

²⁴⁷ *Id.* at 229.

²⁴⁸ *Id.*

²⁴⁹ *FACT SHEET: Investor-State Dispute Settlement (ISDS)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> (last visited April 5, 2017).

NAFTA, the number of children employed in child labor still had the slowest rate of decline in the Latin and Central American regions while NAFTA was in force.²⁵⁰ It is clear then that NAFTA fell short of its goal to eliminate child labor, though it should be noted that Mexico is but one country in the aforementioned region. However, the TPP does seem to improve upon the faulty framework of the NAALC and is, if nothing more, a step in the right direction for Mexican farmworkers. This is evidenced by the differing standards, accountability requirements, and enforcement procedures of the TPP. For instance, not only is Mexico required to maintain the ILO's labor rights within its own laws, other Parties are now *required* to hold the country accountable if it fails to do so. Each Party to the TPP is required to discourage importation of goods from Mexico that are produced through forced labor or child labor, "through initiatives it considers appropriate."²⁵¹ It remains to be seen whether countries will do this at the expense of having to then import likely more expensive goods; however, the transparency provisions of the TPP may induce outside pressure from the Party's constituents. Under the TPP, Parties are now required to allow the public to submit grievances regarding labor rights.²⁵² Once a Party receives such a submission, the Party must make the submission, and the results of its considerations, public.²⁵³ These transparency and accountability mechanisms do provide hope that Parties will uphold their responsibilities and obligations under the TPP.

Additionally, while sanctions for violating NAALC obligations have failed to be effective,²⁵⁴ the TPP's ability to effectuate change through possible trade sanctions provides a more concrete method of enforcing TPP obligations. This ability of the TPP is unprecedented for Mexico in regard to labor rights and allows a direct hit on a violating country's economy.²⁵⁵

²⁵⁰ INTERNATIONAL LABOR ORGANIZATION, *Marking Progress Against Child Labour: Global Estimates and Trends 2000-2012*, 28 (2013), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_221513.pdf

²⁵¹ See TPP, *supra* note 9, at art. 19.16.

²⁵² *Id.* at art. 19.8.

²⁵³ *Id.*

²⁵⁴ Bieszczat, *supra* note 146, at 1393.

²⁵⁵ *Labor, TPP MADE IN AMERICA*, <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Labour-1.pdf> (last visited Mar. 31, 2017).

Finally, and perhaps the most promising, was the purported establishment of a bilateral implementation plan between the United States and Mexico to ensure labor reform and cooperation thereof.²⁵⁶ As stated above, because U.S. President Trump withdrew from the TPP, the below bilateral plans serve as an example of how trade agreements could affect labor in regions that direly need a change. This implementation plan would have been subject to the same dispute resolution mechanisms that the rest of the Agreement entails, including possible trade sanctions.²⁵⁷ Mexico's plan was said to follow the commitments that the United States had already made with Vietnam, Malaysia, and Brunei Darussalam. The already-negotiated plans with those countries included allowing independent unions and requiring the countries to enforce prohibitions on forced labor.²⁵⁸ Essentially, the plans required these countries, which either lack labor laws or lack effective enforcement mechanisms, to implement or revise laws to rectify the issues. These changes were to have been made before the countries were allowed to export goods duty-free to the United States.²⁵⁹ Additionally, the plans gave the United States the right to "withhold or suspend tariff reductions" for the country in the event that the country did not comply with the agreement within five years.²⁶⁰

Mexico's plan was purported to reform "its system for protecting collective bargaining and union representation rights."²⁶¹ Additionally, if Mexico's plan followed that of the aforementioned countries, implementation of this plan will enable the United States to monitor and report on the progress of Mexico's reform and withhold

²⁵⁶ *Id.* (stating "Mexico is in the process of developing parallel reforms including concerning its system for protecting collective bargaining and union representation rights.").

²⁵⁷ *See id.* ("The commitments in the implementation plans are subject to TPP dispute settlement procedures, meaning they are fully enforceable and backed by trade sanctions.").

²⁵⁸ *Id.*

²⁵⁹ The Editorial Board, *Pacific Trade and Workers Rights*, NEW YORK TIMES (Nov. 21, 2015), <http://www.nytimes.com/2015/11/22/opinion/sunday/pacific-trade-and-worker-rights.html>.

²⁶⁰ *Labour: New Features*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Labour-1.pdf> (last visited April 5, 2017).

²⁶¹ *Id.*

tariff reductions in the event that it was not successful.²⁶² In regard to the current issues occurring on Mexican farms, the surveillance of the United States in ensuring that Mexico implements the provisions of the TPP seemed to be promising. If the Mexican plan had modeled the Vietnam, Malaysia, and Brunei Darussalam plans, the Mexican government would have been required to enforce its existing laws on minimum working age requirements and maximum work schedules. Additionally, as discussed further below, the TPP, through this plan, would have given workers the protection they need to establish effective unions. This would give the workers a platform to shed light on the atrocities that they face on the farms.

While these plans seemed promising, the question remains as to whether they would have been abided by and, if not, whether the United States would have done anything about it. Interestingly, the United States recently faced a similar issue in 2014. Stemming from an allegation that Guatemala failed to effectively enforce its own labor laws, on August 9, 2011, the United States requested the establishment of an arbitral panel under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).²⁶³ The two countries agreed to suspend the implementation of the arbitral panel pending negotiations of and implementation of an Enforcement Plan (similar to the above-discussed plans).²⁶⁴ The plan was signed in April 2013.²⁶⁵ However, because Guatemala had still not met the requirements of the Enforcement Plan seventeen months later, the United States chose to proceed with the dispute settlement process.²⁶⁶ This case marked the first and only time the United States has brought a case against another country for a labor violation under a free trade agreement.²⁶⁷

²⁶² *Id.*

²⁶³ *United States Proceeds with Labor Enforcement Case Against Guatemala*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/September/United-States-Proceeds-with-Labor-Enforcement-Case-Against-Guatemala> (last visited Dec. 10, 2015).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Q&A: The Trans-Pacific Partnership*, HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2016/01/12/qa-trans-pacific-partnership> (last visited Dec. 12, 2015).

In sum, the problem does not rest with the TPP. The provisions of the Agreement are the strictest that Mexico has ever been party to and the dispute resolution mechanisms provide a more methodical and time-sensitive manner to address labor violations. However, the problem largely rests with party-countries that fail to enforce agreements. While this problem will likely remain, the recent case against Guatemala provides hope that the United States is ready to begin enforcing provisions of their labor agreements. Hopefully then, under the TPP, the United States or other party-countries will feel prepared to enforce possible violations against Mexico.

V. ADDITIONAL RECOMMENDATIONS

While the TPP sets a higher bar for labor rights than other free trade agreements have, it is naïve to believe that the new agreement will completely resolve the outstanding labor issues occurring on Mexican farms. Though there is likely no end-all solution, utilizing a bottom-up approach would help generate outside pressure from consumers (the demand side of business), unions, and individual workers (the supply side of business) on the Mexican government and the farm-owners.²⁶⁸ A bottom-up approach utilizes education of workers and consumers to place pressure on the suppliers and government and could aid in enforcing Mexico's new obligations under the TPP by holding the country accountable for its agreements.

Generating Pressure from the "Supply Side"

As previously explained, many, if not all, of the workers on Mexican farms come from impoverished regions and are largely uneducated. Unfortunately, this leaves the enforcement of workers' labor rights in the hands on the farm-owners or the government. The farm-owners have little reason to ask their employees to work fewer hours (in order to meet the maximum hours worked law) or to increase their employees' wages (as doing so would decrease the amount of money going to the owner himself). Additionally, until the Mexican government agrees to an implementation plan with the United States under the TPP, it is unlikely that they will begin to enforce their labor laws because they have not done so previously.

²⁶⁸ Oliver, *supra* note 202, at 230, n. 267.

Thus, in order to institute this bottom-up approach, it is imperative that the workers become educated and form unions and NGOs to push for their rights.

This is not out of reach for Mexican farm workers. For instance, in June of 2015, a group of farmworkers organized a strike in Baja California that resulted in wage increases of up to 50% as well as the securing of government-required benefits.²⁶⁹ The strike, initiated in part by labor leaders who had experience with farm labor unions in the United States, lasted for about three months and caused about \$80 million in losses to the industry.²⁷⁰ Though somewhat successful, many workers remain frustrated with the system.²⁷¹ Continuing to ensure that labor standards are upheld, and fighting for labor rights beyond minimum wage and benefits, will require further persistence and determination on the part of the workers.

As one example on the effectiveness of determination within worker education and unions, in the wake of a similar situation that the Baja California workers faced, a group of workers in Florida collectively formed a NGO, called the Coalition of Immokalee Workers (CIW) in 1993.²⁷² At that time, wages of workers on Florida's tomato fields were declining and forced labor was the norm.²⁷³ After discussing what could be done to implement change, the workers effectuated "three community-wide work stoppages with intense public pressure- including an unprecedented month-long hunger strike" by 1998.²⁷⁴ Notably, this organization was formed through the dedication of the workers themselves and had no intervention or help from the government or legal system in its inception.²⁷⁵ Additionally, as a result of this pressure on Florida farm owners, the CIW secured raises of 13-25% across the industry and obtained political and social awareness and respect.²⁷⁶ As of 2015, the CIW has

²⁶⁹ Richard Marosi, *Baja Farmworkers Win Raises, Benefits in Landmark Deal*, LOS ANGELES TIMES (June 5, 2015), <http://www.latimes.com/world/mexico-americas/la-fg-baja-farm-labor-20150604-story.html>.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *See generally About CIW*, COALITION OF IMMOKALEE WORKERS, <http://www.ciw-online.org/about/> (last visited Mar. 9, 2017).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

worked with food giants such as Taco Bell, Burger King, and Chipotle, all of which have agreed to abide by the CIW's standards, including "improv[ing] wages and working conditions for Florida tomato pickers in its supply chains."²⁷⁷

Additionally, the CIW has created the Fair Food Program, "which uses farmworkers' legal rights as a baseline and then establishes crucial additional protections"²⁷⁸ Through this program, the CIW provides critical worker-to-worker education that educates farmworkers of their rights.²⁷⁹ The CIW also provides a 24-hour complaint line and complaint investigation and resolution process, giving the workers a protected way to file complaints before the issue escalates.²⁸⁰ Additionally, under the Fair Food Program, farms are subjected to independent audits in order to ensure that the farms are complying with the Program's standards.²⁸¹ Finally, as further discussed below, the Fair Food Program is able to provide "enforcement through market consequences," holding the farm directly accountable for their actions.²⁸²

Ideally, new provisions in the TPP will help to provide these Mexican farmworkers with the ability to form these unions or NGOs. Notably, the purported main goal of the implementation plan was to develop reforms concerning its system for protecting collective bargaining and union representation rights.²⁸³ Additionally, the TPP requires countries to promote public awareness of its labor laws.²⁸⁴ Knowing that they have the capability to exercise their rights could give farmworkers the power they need to form a NGO. This NGO could mirror the CIW and further aid in implementing change across the farms. If the farmworkers were to model the CIW, as they seem to be beginning to do with the help of farmworkers previously working in the United States, there could be enough pressure, by these NGOs, on the government to effectuate change.

²⁷⁷ *About CIW*, *supra* note 272.

²⁷⁸ Greg Asbed & Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers*, 16 U. PA. J.L. & SOC. CHANGE 39, 45 (2013).

²⁷⁹ *Id.* at 46.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Labor: New Features*, *supra* note 260.

²⁸⁴ TPP, *supra* note 9, at art. 19.8.

A cross-border alliance would not be unprecedented. For instance, in 1994, Mexico's Authentic Labor Front and the United States-based United Electrical, Radio, and Machinist Workers ("UE") joined forces to file a petition to the United States government, in order to pressure the United States to file a claim against Mexico.²⁸⁵ While this petition was ultimately deemed insufficient to substantiate a claim that Mexico was violating NAFTA, it showed the power of NGOs to influence the government to initiate claims. These cross-border alliances are important, however, because Mexican farmworkers cannot bring a claim against Mexico and because it is unlikely that they would be large enough or persuasive enough to pressure another country to bring a claim against Mexico. Similar to the UE petition, a cross-border alliance may have the scope and effectiveness to pressure a country, such as the United States, to file a claim against Mexico under the stricter TPP standards.

Unfortunately, farmworkers would be starting on a much worse footing than the farmworkers who started CIW. While the CIW was established in response to wage and working hour issues, a Mexican NGO would be responding to repeat and egregious child labor, forced labor, and deplorable working conditions. Additionally, though they have been done before, cross-border alliances are an optimistic, and rather unlikely, hope for farmworkers because the workers are restricted to remaining in their camps when these violations are occurring. Realistically, Mexican laborers have many obstacles to overcome before a farmworker NGO would be large enough and powerful enough to join with a United States NGO—let alone to effectuate change. However, if successful, this bottom-up approach on the supply-side leaves the Mexican government pressured to protect its export economy and thus to respond to the labor violations—a huge step in the right direction for the protection of the workers' rights.

Generating Pressure from the "Demand Side"

In order to support the farmworkers protesting on the supply-side, consumers must continue demanding their food coming from

²⁸⁵ Jonathan Graubart, *Politicizing a New Breed of "Legalized" Transnational Political Opportunity Structures: Labor Activists Uses of NAFTA's Citizen-Petition Mechanism*, 26 BERKELEY J. EMP. & LAB. L. 97, 110-11 (2005).

Mexico be ethically sourced—something that began to occur as a result of June’s strike.²⁸⁶ Consumer-driven enforcement mechanisms demand socially responsible products and help to present “labor rights as human rights.”²⁸⁷ A main element of the consumer-driven model is the assumption that consumers will pay extra for decent working conditions.²⁸⁸ A survey conducted by the National Bureau of Economic Research found that consumers were willing to pay more for goods produced under decent working conditions and that they would require a steep discount in order to buy products produced in poor conditions.²⁸⁹ With enough consumer demand, producers have to would race to the top to compete with other companies for public favor and consumer money.²⁹⁰

Awareness of the exploitation of these workers should invoke strong reactions within consumers, and thus elicit strong demand, once they are educated on the horrific conditions occurring at the farms they purchase food from. This awareness would not spread by the TPP, but rather through exposés of the conditions, such as the aforementioned investigation conducted by Richard Marosi of the Los Angeles Times.²⁹¹ This revolution will come slowly, but organizations have already been formed in the United States with the aim of educating consumers on what exactly it takes to produce their produce. For instance, as described above, the Fair Food Program has promoted awareness of farm conditions across the United States. Similar organizations such as Fair Trade USA²⁹² have been instrumental in educating consumers and workers alike about farmworkers’ labor rights.²⁹³ As a third-party auditor of farms, Fair Trade

²⁸⁶ *Id.*

²⁸⁷ Andrew Herman, *Reassessing the Role of Supplier Codes of Conduct: Closing the gap Between Aspirations and Reality*, 52 VA. J. INT’L. 445, 470 (2012).

²⁸⁸ Valkyrie Hanson, Note, *A Social Label for Social Dialogue: A Proposal to Improve Working Conditions for Women in the Guatemalan Apparel Industry*, 10 GEO J. GENDER & L. 125, 160 (2009).

²⁸⁹ *Id.*

²⁹⁰ Jessica Karbowski, *Grocery Store Activism: A WTO Compliant Means to Incentivize Social Responsibility*, 49 VA. J. INT’L L. 727, 749 (2009).

²⁹¹ *Hardship on Mexico’s Farms*, *supra* note 1.

²⁹² See generally *About Fair Trade USA*, FAIR TRADE USA, <http://fairtrade-usa.org/about-fair-trade-usa> (last visited Mar. 9, 2017).

²⁹³ See generally *Impact*, FAIR TRADE USA, <http://fairtradeusa.org/what-is-fair-trade/impact> (last visited Mar. 9, 2017).

USA's core values include ensuring a democratically run farm, fair working conditions (including a strict prohibition of forced and child labor), and sustainable wages.²⁹⁴ Once a product is approved by the organization, a sticker is placed on the product for consumers to see that it has met the program's standards. This program utilizes consumer awareness and a demand-side approach to affecting the decisions on companies regarding where to purchase their goods from and strives to bring about "a social movement that brings strength, hope and real choice to the world's consumers."²⁹⁵ Whenever a consumer purchases a product with a label such as this, the consumer is effectively using his buying power to "vote in favor of socially responsible production."²⁹⁶ These third-party auditors are critical, because promises from companies and retailers to purchase products from ethical sources have largely fallen short without any third party watching over them.²⁹⁷

The main issues with this approach are a possible lack of consistency and a question of effectiveness.²⁹⁸ Because these labels and information systems are given by the private sector, it is often difficult for a consumer to know whether the information is based on independent evaluation or rather on a specific manufacturer's subjective claim.²⁹⁹ Additionally, the necessity of an individual evaluation of each company wishing to be labeled as socially responsible is a costly endeavor for the evaluator. This requires both consumer awareness and consumer demand to remain high enough to prefer products produced under decent conditions to such a degree that the consumer remains willing to pay a higher cost for the product.³⁰⁰ In the event of a collapse of consumer demand for these ethically sourced goods, it would be necessary to reevaluate how to ensure that goods are being produced through socially responsible means.

²⁹⁴ *Mission/Values*, FAIR TRADE USA, <http://fairtradeusa.org/about-fair-trade-usa/mission> (last visited Mar. 9, 2017).

²⁹⁵ *Id.*

²⁹⁶ Karbowski, *supra* note 289, at 729.

²⁹⁷ Rachel Abrams, *Retailers like H&M and Walmart Fall Short of Pledges to Overseas Workers*, THE NEW YORK TIMES (May 31, 2016), http://www.nytimes.com/2016/05/31/business/international/top-retailers-fall-short-of-commitments-to-overseas-workers.html?_r=0.

²⁹⁸ *Id.* at 740.

²⁹⁹ *Id.*

³⁰⁰ Herman, *supra* note 287, at 466.

VI. CONCLUSION

The violations of labor rights occurring on Mexican farms, some of which export to American corporations, represent an egregious treatment of workers in a country that is party to numerous free trade, labor, and human rights agreements. The presence of forced labor, child labor, and utter lack of enforced minimum employment standards stands in clear violation of the ILO's fundamental labor rights. Until the recent TPP, however, many of those agreements lacked provisions on labor rights and, when they did, they lacked sufficient enforcement mechanisms. These agreements therefore ultimately failed to protect workers. The newly negotiated TPP, on the other hand, binds Mexico to adhere to the fundamental labor rights outlined in the TPP. With the power of other parties to now enforce trade sanctions upon the country, it is likely that this agreement will effectuate at least part of the labor revolution that is so needed in Mexico.

In regard to the labor provisions and dispute resolution mechanisms stated in the TPP, the twelve countries established an unprecedented agreement that aims to protect vulnerable workers in all party-countries. While it remains to be seen whether the consultations and dispute resolution procedures will be used or will even work, the new agreement certainly reflects movement towards a more just treatment of Mexican farmworkers. Even if the TPP fails to be ratified in every country, the agreement sets a new precedent for future agreements to include fully enforceable labor provisions.

Finally, outside pressure on governments is critical to ensuring that countries are fulfilling their commitments. Thus, implementing change will be most successful when mixing the TPP's new guidelines with a bottom-up approach, from both workers and consumers, placing pressure on the Mexican government and food corporations alike. This worker-driven and consumer-driven enforcement, when paralleled with a free trade agreement that includes stronger labor protection such as the TPP, will result in an undeniable pressure upon the government and farm-owners to establish new protocols for dealing with labor rights in the country.