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**A New Approach to International
Labour Disputes and Regional
Trade Agreements**

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Contents

I. Introduction.....	86
II. Labour Rights Matter.....	89
III. The Legal Provisions in RTAs Establish Obligations.....	91
IV. RTAs Provide for Effective Dispute Resolution.....	94
V. In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR.....	96
VI. The Potential for Expanded Dispute Resolution.....	98
VII. Conclusion.....	102

A New Approach to International Labour Disputes and Regional Trade Agreements

Cameron Rempel*

International trade has facilitated the rapid expansion of economies around the world over the past century, but at what cost? Changing economic paradigms and exposure to international competition has led to the explosion of certain domestic industries and the collapse of others. In advanced economies, these growing pains have drawn the spotlight to a singular concern: jobs. The availability of cheap labour in the developing world and the ease with which it can be accessed has fundamentally altered the market landscape, often in challenging ways for workers. In response, critics of the multilateral trade regime have characterized these changing labour dynamics as a function of a flawed approach. A potential route forward through this crisis of identity for trade is to focus on more targeted, regional trade agreements outside of the multilateral context. These agreements often include labour provisions intended to strengthen protections for workers in less developed economies, as well as binding dispute resolution mechanisms. This paper explores the potential for these labour provisions to provide a method of incentivizing stronger labour protections through dispute resolution, and why this might be advantageous.

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Le commerce international a contribué à l'expansion rapide des économies à travers le monde au cours du siècle dernier, mais à quel prix? Les changements de paradigmes économiques et l'avènement de la concurrence internationale ont mené tantôt à l'explosion, tantôt à l'effondrement des diverses industries. Dans les économies avancées, ces problèmes croissants ont braqué l'attention sur un problème particulier : les emplois. La disponibilité et la facilité d'accès à la main-d'œuvre abordable dans les pays en développement ont profondément bouleversé le paysage du marché, ce qui a souvent fait résulter en des défis pour les travailleurs. En réponse à cette situation, les opposants du régime commercial multilatéral ont décrit les changements à la dynamique du marché du travail comme étant fonction d'une approche critiquable. Une solution possible à cette crise d'identité du commerce serait de se concentrer sur des accords commerciaux plus ciblés et régionaux, à l'extérieur du cadre du régime multilatéral. Ces accords incluent souvent, d'une part, des dispositions relatives au travail conçues pour renforcer la protection des travailleurs dans les économies moins développées et, d'autre part, des mécanismes contraignants de résolution des différends. Cet article examine le potentiel qu'ont ces dispositions de fournir une méthode visant à encourager la protection accrue des travailleurs par le biais de la résolution des différends, et il montre en quoi cela pourrait être avantageux.

I. Introduction

“Globalization has not been an unalloyed good. It has deepened the rift between those racing ahead at the top and those struggling to hang on in the middle, or falling to the bottom.”

Former Vice-President of the United States of America, Joe Biden, speaking at the World Economic Forum 2017.¹

Global trade barriers have crumbled over the past century in the pursuit of liberalized trade.² The goal of this global movement is a trade environment with optimal growth potential. In the absence of trade barriers, goods and capital are thought to flow freely as directed by the market, creating the most efficient distribution of resources and rapid growth. This theoretical framework is useful, but oversimplified.³ As global tariffs have dropped, it has become clear that an economic marketplace unrestricted by trade barriers still requires policy intervention to achieve maximum productivity. One of the policy areas that has challenged mainstream thought about the international trade regime from the beginning is labour.

Despite insisting that the International Labour Organization (ILO) is the proper authority to oversee international labour affairs, the World Trade Organization (WTO) has faced increasing pressure to include labour standards in the multilateral trade context.⁴ This integration has been pushed by developed countries, but strongly opposed by developing coun-

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1 Joe Biden, Special Address (Remarks delivered at the World Economic Forum 2017, Davos, 18 January 2017), online: <<http://fortune.com/2017/01/18/joe-biden-speech-world-economic-forum-davos-transcript/>>.

2 WTO, ITC & UNCTAD, *World Tariff Profiles 2015* (Geneva: WTO Publications, 2015). Global trade liberalization was initiated following World War II through ratification of the *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194 [*GATT 1947*], and accelerated after the Uruguay round of trade negotiations with creation of the World Trade Organization (WTO). Reduction of both tariff and non-tariff barriers to trade are WTO priorities given their contribution to trade restrictiveness. See WTO, *World Trade Report 2012. Trade and public policies: A closer look at non-tariff measures in the 21st century* (Geneva: WTO Publications, 2012).

3 On the extent of oversimplification: Patrick Love & Ralph Lattimore, *International Trade: Free, Fair and Open?* (Paris: OECD Publications, 2009). According to Love and Lattimore, greater consideration of complementary policy factors is essential to achieve optimal economic growth.

4 Renee Chartres & Bryan Mercurio, “A Call for an Agreement on Trade-related Aspects of Labor: Why and How the WTO Should Play a Role in Upholding Core Labor Standards” (2012) 37 *NCJ Intl L & Com Reg* 665 at 666. See also Marc Epstein & Karen Schnietz, “Measuring the Cost of Environmental and Labor Protests to Globalization: An Event Study of the Failed 1999 Seattle WTO Talks” (2002) 16:2 *The International Trade Journal* 129.

tries.⁵ Influential pro-labour forces in developed countries, particularly in the United States and the European Union, often pressure foreign governments to agree to labour commitments in trade negotiations because they are concerned that cheap foreign labour will undermine the viability of their own domestic labour.⁶ This concern can be mitigated to some extent if governments negotiate trade agreements that include more stringent labour standards. Unfortunately, the labour priorities of developed and developing countries often conflict. Implementing more rigorous labour standards can require extensive regulatory reform and significant financial commitment. In the process, developing countries also stand to lose an important comparative advantage: lower wages. This is a burden that developing economies have not been prepared to accept in the multilateral context.⁷ In light of these conflicting views within the multilateral trading system, regionalism has emerged as an attractive solution for pursuing the enforcement of international labour standards.

Proliferation of regional trade agreements (RTAs) has fundamentally altered the global trade landscape since the early 1990s. As of November 2015, the WTO Secretariat reported 413 RTAs currently in force and has received notification of nearly 200 more.⁸ In this global trade environment, the commitments found in RTAs have become significant trade obligations that operate alongside WTO commitments. Labour-related obligations have also become increasingly common in RTAs. The WTO currently reports that 42 existing RTAs include explicit labour provisions compared with only 4 in 1995.⁹ This increase highlights the willingness of developing countries to include labour provisions outside of the multilateral context, in exchange for market access with sophisticated trading partners like the United States or the European Union. However, despite their increasing prevalence, the

5 See WTO, "Trade and Social Development: A Southern Viewpoint" Summary Report (2002), online: <https://www.wto.org/english/tratop_e/dda_e/summary_report_trade_social_dev-el.doc>.

6 Xenia Matsche & Shane M. Sherlund, "Do Labor Issues Matter in the Determination of U.S. Trade Policy? An Empirical Reevaluation" (2006) 96:1 *The American Economic Review* 405 at 405.

7 Developing countries tend to see the issue of trade and labour standards as a guise for protectionism in developed countries. Specifically, a way to undermine the comparative advantage of developing countries with lower wages. See WTO, "Trade and Labour Standards Subject of Intense Debate" Briefing Note (2017), online: <https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm>.

8 WTO Regional Trade Agreements Information System, online: <<http://rtais.wto.org/UI/publicsummarytable.aspx>>.

9 *Ibid.* For further discussion on the evolution of labour provisions in RTAs up to 2012 see Christian Häberli, Marion Jansen & José-Antonio Monteiro, "Regional Trade Agreements and Domestic Labour Market Regulation," in Douglas Lippoldt, ed, *Policy Priorities for International Trade and Jobs* (Paris: OECD Publications, 2012) 287 at 290. Häberli, Jansen & Monteiro state even the current estimate of 42 is conservative as only agreements reporting the inclusion of labour provisions under the WTO Transparency Mechanism for RTAs are included.

efficacy of these provisions is contested.¹⁰

This paper will initially focus on the motivation for signatories of RTAs to exert labour pressure through international trade law, and discuss the justifications for this approach. A recently concluded and historic dispute under the Dominican Republic-Central America Free Trade Area between the United States and Guatemala is an example of this strategy.¹¹ The case brought against Guatemala under the CAFTA-DR is the first labour dispute brought under a free trade agreement in pursuit of improved labour conditions. Based on current literature and this historic trade dispute, I argue that labour provisions included in many contemporary RTAs—including, for example, the CAFTA-DR and the recently negotiated Canada-European Union Comprehensive and Economic Trade Agreement (CETA)—may present an effective legal means of improving labour conditions and economic growth in states failing to uphold their international legal obligations.¹²

Building on this assessment, I propose that the labour regimes established in RTAs could be strengthened if specialized private actors were allowed to engage in consultations and pursue dispute resolution for labour-related violations. Dispute resolution provisions that bind member states and grant unique recourse to labour and trade unions could provide a more efficient avenue for labour obligations to be realized than the current approach.

It has become the norm for investment chapters in RTAs to include investor-state dispute settlement (ISDS), which grants investors private recourse through arbitration against foreign governments for discriminatory practices. An important advantage of this approach is that it mitigates an element of the politicization inherent in trade relations.¹³ The dispute resolution framework proposed in this paper is similar in form, although it would not come with the same baggage that has become synonymous with ISDS, like indeterminate financial risk and regulatory chill. If a provision was included in the labour chapters of RTAs that grants standing for private labour organizations to initiate consultations and dispute resolution against foreign states, labour violations captured by the agreement could be directly challenged by trade unions or NGOs that have a strong interest in the affected

10 Isao Kamata, “Regional Trade Agreements with Labor Clauses: Effects on Labor Standards and Trade” (2014), La Follette School of Public Affairs Working Paper, Series No. 2014-002 at 28-29.

11 *Dominican Republic-Central America FTA*, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and United States of America, 5 August 2004, online: <<https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>> [CAFTA-DR].

12 *Ibid.* *Comprehensive Economic and Trade Agreement*, Canada, The European Union, 27 October 2016, online <<http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>> [CETA].

13 Canada, Library of Parliament Background Papers, *Investor-State Dispute Mechanisms: What is Their History and Where are They Going?*, by Alexandre Gauthier, Publication No. 2015-115-E (Ottawa, Ontario: 2015).

rights. As multinational corporations expand across the globe, the interests and expertise of labour advocates expands commensurately. The option for expanded dispute resolution proposed in this paper could give labour advocacy a new voice in the international trade landscape.

II. Labour Rights Matter

In order to make a case for spending state and private resources to improve labour rights, there must be a justification for upholding these rights. I propose that in addition to a human rights justification there are strong economic justifications for enforcing labour rights in our global economic climate.¹⁴

Robust labour protections contribute to sustainable economic growth by decreasing societal inequality.¹⁵ Although elimination of inequality is not the overarching goal of trade policy, many modern RTAs concluded with developed countries recognize the desirability of labour protections and include them. This recognition is important, as increasingly severe inequality caused by technological change, financial globalization, and shifting labour market dynamics is manifesting undesirable economic effects.¹⁶ In advanced economies, the evidence suggests that higher skill premiums necessitated by modern technology play a major role in shaping labour market dynamics and earning potential.¹⁷ In emerging economies, access to education and ensuring better health outcomes is more central to closing earning gaps.¹⁸

Although the drivers of inequality may be different, significant disparity between middle or low-income earners and high-income earners has a negative effect on economic growth in both developing and developed countries. As such, the effect of widespread income inequality has been the subject of substantial research. Widening income gaps have been correlated with a host of other inequities and with a negative effect on economic growth.¹⁹ As lower-income households are deprived of the ability to access healthcare and education, their ability to realize their societal potential and accrue physical and human capital is compromised. This affects labour productivity relative to societies with a more equitable distribution of resources. An increasing

14 For a discussion of human rights justifications for labour protections see Hugh Collins, “Theories of Rights as Justifications for Labour Law” in Guy Davidov & Brian Langille, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011).

15 See Michael Lynk, “Labour Law and the New Inequality” (2009) 29 *Just Labour: A Canadian Journal of Work and Society* — V.15 — Special Edition 125. Stagnating labour laws and declining unionization levels have all played a role in increasing societal inequality.

16 Era Nable-Norris et. al., “Causes and Consequences of Income Inequality: A Global Perspective”, IMF Staff Discussion Note, (2015) SDN/15/13 at 6. See also, Michael Doyle & Joseph Stiglitz, “Eliminating Extreme Inequality: A Sustainable Development Goal 2015–2030”, (2014) 28:1 *Ethics & International Affairs* at 7.

17 Era Nable-Norris et. al., *ibid* at 28.

18 *Ibid*.

19 Doyle & Stiglitz, *supra* note 16, at 7.

body of low-income earners can also reduce aggregate demand and undermine growth because the wealthy tend to spend a lower fraction of their incomes than lower-income groups.²⁰ These factors result in less productive economies and slower economic growth. Labour provisions in RTAs target basic labour rights and, in accordance with these trends, reduce income disparity by strengthening protections for middle and low-income earners.

An assessment of the relationship between inequality and economic growth must also take into account the financial and social instability caused by systemic inequality. Instability undermines the resiliency of economic growth and the length of growth periods.²¹ This is undesirable because the ability to maintain long-term economic growth, rather than simply stimulate brief periods of activity, is one of the most important contributors to sustainable increases in income and prosperity.²² Inequality disrupts sustainable growth through financial instability as investors increase their holdings of financial assets backed by loans to workers, resulting in rising debt-to-income ratios and financial fragility.²³ These circumstances often foreshadow financial crises, which have significant negative effects on long-term growth as massive amounts of wealth and productivity are lost. It is well established that products of inequality like financial instability, stagnant middle class incomes, and excess political influence of the rich are causally linked to financial crises.²⁴ Inequality is also linked to political instability and conflict resulting in restricted economic activity, as citizens shy away from investment and lose confidence in institutions.

Given the consequences of inequality, a focus on labour rights is economically justified if resources spent strengthening labour rights decrease inequality and allow for more stable and sustained growth. The labour provisions included in many contemporary RTAs protect freedom of association and collective bargaining, prohibit discrimination in respect of employment, and require the development of domestic legislation that governs acceptable minimum wages, hours of work, and occupational health and safety.²⁵ These international labour standards regulate the amount individuals are paid at

20 See Laura Carvalho & Armon Rezai, "Personal Income Inequality and Aggregate Demand" (2016) 40:2 *Camb J Econ*. See also Doyle & Stiglitz, *supra* note 16 at 7.

21 Andrew Berg & Jonathon Ostry, "Inequality and Unsustainable Growth - Two Sides of the Same Coin?" IMF Staff Discussion Note, (2011) SDN/11/08 at 7.

22 *Ibid.*

23 Michael Kumhof & Romain Rancière, "Inequality, Leverage and Crises" (2010) IMF Working Paper WP/10/268 at 3.

24 Era Nablá-Norris et. al., *supra* note 16. Studies suggest that a prolonged period of higher inequality in advanced economies was associated with the global financial crisis in 2008 by intensifying leverage, overextension of credit, and a relaxation in mortgage-underwriting standards, and allowing lobbyists to push for financial deregulation.

25 For example, Article 19.3 of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, 8 March 2018 [CPTPP]; Article 23.3 of the CETA; and Article 16.2 of the CAFTA-DR.

work, how they are treated, and their ability to advocate for better working conditions – essential targets for beginning to tackle income inequality and poor labour productivity.²⁶ In the Canadian context, minimum wages and collective bargaining power have been identified as viable targets for reducing inequality, although it is important to note that any particular factor alone may not deliver the desired results.²⁷ Given that the labour provisions of RTAs oblige states to uphold or strengthen all of their domestic labour obligations, international trade law presents a unique avenue to mitigate the growing instability in our global economic system to some degree. In the current economic and political climate, it is clear why this is desirable.

III. The Legal Provisions in RTAs Establish Obligations

If upholding labour rights has economic utility, the most effective legal tools for realizing these rights must be identified. It is not sufficient to rely exclusively on the protections of domestic law for two reasons: first, the substance of labour law is highly variable between different states; and second, domestic governments and courts are not immune to political influence and cannot always be relied on to enforce their own laws. It is also not sufficient to rely on the international labour regime established by the ILO because the conventions and declarations issued by the organization are aspirational rather than binding. Labour obligations drawn from the ILO standards and incorporated in RTAs present a unique opportunity to uphold international labour laws because they are binding legal instruments that can be leveraged to encourage labour compliance.

International labour commitments at large are codified in both hard and soft legal instruments. The distinction between these types of instruments lies in the types of obligations they create and the presence, or absence, of an enforcement mechanism. Hard international law refers to precise, legally binding obligations that delegate authority for interpreting or implementing the law.²⁸ In contrast, soft international law refers to legal arrangements that are weakened in obligation, precision or clarity of delegation.²⁹

The primary legal instruments that contain international labour law are conventions and declarations issued by the ILO. These are all characterized as soft sources of international law. Although the ILO has developed a number of soft sources of law that outline minimum labour requirements,

²⁶ Era Nabla-Norris et. al., *supra* note 16 at 30-32.

²⁷ Nicole Fortin et al., “Canadian Inequality: Recent Developments and Policy Options” (2012) 38:2 Canadian Public Policy 121 at 138–140. See also Armine Yalnizyan, “Study of Income Inequality in Canada – What Can Be Done” (Presentation to the House of Commons Standing Committee on Finance, 30 April 2013) [unpublished].

²⁸ Kenneth Abbott & Duncan Snidal, “Hard and Soft Law in International Governance” (2000) 54:3 International Organization 421 at 421.

²⁹ *Ibid* at 422.

they have faced serious issues with compliance and enforcement.³⁰ ILO conventions are only binding if they have been ratified by member states, and the only incentive to comply with the norms set out in these agreements is the provision of technical assistance.³¹ One exception that commits all ILO member states to respect a core set of labour standards is the *Declaration on Fundamental Principles and Rights at Work and its Follow-Up 1998*.³² Released in the aftermath of a 1995 United Nations Social Summit in Copenhagen, the declaration outlines four categories of principles and rights at work that are considered fundamental: (i) freedom of association and collective bargaining; (ii) elimination of forced labour; (iii) elimination of child labour; and (iv) the elimination of discrimination in employment and occupation.³³

The core international labour standards itemized in the *Declaration on Rights at Work* are the primary soft law sources included in RTAs as they apply to all ILO member states, even in the absence of ratification. These four fundamental principles and rights are widely accepted to express international consensus, and are included in the CAFTA-DR with slight modifications:³⁴ Article 16.1(1) states that the parties reaffirm their commitments under the *Declaration on Rights at Work* and must strive to ensure that “internationally recognized labor rights [...] are recognized and protected.”³⁵ Similar to ILO conventions, the commitments taken from the *Declaration on Rights at Work* impose no actionable obligations. In the context of this international labour regime, it is increasingly apparent that hard sources of international labour law are necessary to ensure compliance.

Certain labour provisions included in RTAs can be characterized as hard international law and impose clear obligations. This is why the obligations found in RTAs have a degree of utility that the ILO standards do not. According to a 2009 ILO report, the most widespread labour obligation included in RTAs is “the requirement not to lower the level of protection

30 The most notable of these sources are ILO conventions and declarations. For conventions, see ILO NORMLEX Information System on International Labour Standards, online: <<http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO::>>. For declarations, see ILO Office of the Legal Advisor, online: <<http://www.ilo.org/public/english/bureau/leg/declarations.htm>>.

31 For further discussion of soft legal instruments implemented by the ILO and their shortfalls see Michael Trebilcock, “Trade Policy and Labour Standards: Objectives, Instruments and Institutions” (2001) University of Toronto Law and Economics Research Paper at 14-18.

32 *Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, ILO, 1998, online: <<http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>> [*Declaration on Rights at Work*].

33 *Ibid.* For further detail see United States, Congressional Research Service, *Overview of Labour Enforcement Issues in Free Trade Agreements*, by Mary Jane Bolle, CRS Report RS22823 (Washington, DC) at 1.

34 CAFTA-DR, *supra* note 11, Article 16.8 (this provision modifies the fundamental labour standards taken from the *Declaration on Rights at Work* to include “acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health”). This is a standard modification in trade agreements concluded with the United States. See Bolle *Ibid.*

35 CAFTA-DR, *supra* note 11, Article 16.1(1).

of their national labour law in order to encourage trade and investment.³⁶ Negotiating trade deals between developed and developing economies is difficult because developed countries will push for more stringent labour requirements, but the commitment to at least maintain existing laws is more palatable as it imposes a clear obligation while preserving more autonomy for developing economies to determine the substance of their labour standards. The CAFTA-DR includes a provision of this general form grounding a hard obligation: “A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.”³⁷ Inclusion of the words “shall not” grounds a concrete obligation and transforms the nature of the commitment.

Similar binding provisions are included in the recently released text of the CETA along with additional commitments. As expected, the common obligation of requiring members to enforce their existing labour laws instead of weakening them to encourage trade or investment, is present.³⁸ Building on this foundation, Article 23.3 of the agreement establishes an obligation for member states to adopt and maintain the core labour rights from the *Declaration on Rights at Work* in their statutes and regulations, rather than simply “striving” to recognize them.³⁹ This type of requirement is a step forward for labour protections. A positive obligation to recognize the core labour rights from the *Declaration on Rights at Work* may require member states to modify their domestic legislation rather than simply maintain current labour standards. In addition, Canada and the EU have agreed that their labour laws shall promote health and safety at work, acceptable minimum employment standards, and non-discrimination in respect of working conditions.⁴⁰ These provisions require member states to regulate critical areas of government intervention in the labour market, and could effect significant change for low-income earners in particular. The provision does not stipulate a formula for determining minimum wages or precise occupational health and safety standards, but the mere requirement to promote these objectives may strengthen labour standards, particularly with regard to occupational health and safety.

36 Haberli, Jansen & Monteiro, *supra* note 7. See also ILO, *World of Work Report 2009: The Global Jobs Crisis and Beyond* (Geneva: International Institute for Labour Studies, 2009) at 71.

37 CAFTA-DR, *supra* note 11, Article 16.2(1)(a). The more common form of obligation is also included, but in non-prescriptive language: Article 16.2(2) states “each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in Article 16.8 as an encouragement for trade with another Party.” (emphasis added)

38 CETA, *supra* note 12 at Article 23.4.

39 *Ibid* at Article 23.3(1).

40 *Ibid* at Article 23.3(2).

The labour provisions present in many contemporary RTAs are prime targets for leverage because they preclude certain conduct with the threat of dispute resolution and trade sanctions. Increasingly stringent labour requirements suggest that these standards could have significant impact in the global trade environment.

IV. RTAs Provide for Effective Dispute Resolution

The most effective way to achieve compliance with a binding trade obligation is to proceed to dispute resolution and receive a ruling from the relevant tribunal. The dispute resolution frameworks established under RTAs allow for this if labour provisions are violated.

In most countries, ratification is required in order for international treaties to have domestic legal force. Furthermore, entry into force of the treaty as between the signatory parties is often made contingent on a certain threshold of ratification by the signatories.⁴¹ Once ratification is complete, binding obligations contained in the treaty are actionable if there is a dispute resolution forum to challenge violations. As most states in the world are members of the WTO, there is recourse to multilateral dispute resolution if a treaty violation is captured by WTO law. The choice of forum to pursue a complaint is often left up to the complainant through the inclusion of “fork in the road” provisions.⁴² If an obligation is contained in both an RTA and the multilateral system, a complaining member can choose to bring a claim through either the WTO dispute resolution system or the dispute resolution framework established by the RTA. Once the choice is made, the complaining member foregoes the right to bring similar claims under the non-selected forum; however, there are many obligations found in RTAs that are not covered by the multilateral regime of the WTO. If an obligation is not contemplated by WTO law, in order to enforce that specific treaty obligation there must be a dispute resolution body with the power to grant remedies under the RTA itself. A common example is the requirement not to lower labour protections in order to encourage trade and investment. The WTO Agreement does not mandate domestic labour standards and does not limit the situations where it is acceptable to alter existing standards. As a result, any complaint related to labour violations must be brought within the dispute settlement framework established by an RTA that contains those obligations.

⁴¹ For example, Article 3 of the CPTPP, which provides that the agreement will only enter into force 60 days after the date on which at least six or at least 50 per cent of the number of signatories have notified of ratification.

⁴² Claude Chase et al., “Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?” (2013), World Trade Organization Working Paper, ERS-2013-07 at 21.

The division between multilateral WTO dispute settlement and dispute resolution under RTAs is controversial. Some interpretations of WTO legal authority assert that the WTO Dispute Settlement Body only has jurisdiction to apply a narrow definition of WTO law outlined in the *Final Act of the Marrakesh Agreement*,⁴³ while others suggest the definition of WTO law should be expanded to include general principles of treaty interpretation and the rules of public international law binding all states.⁴⁴ In certain WTO disputes, particularly *Brazil - Measures Affecting Imports of Retreaded Tires*,⁴⁵ the Panel and Appellate Body have considered obligations grounded in RTAs, but integration of these dispute resolution systems has not occurred. Despite the existence of a live discussion about the jurisdiction of the Dispute Settlement Body, there has been no formal expansion. As a result, it is essential for RTAs to include provisions establishing effective dispute resolution mechanisms in order to ensure that treaty obligations are enforceable.

Most contemporary RTAs include dispute resolution clauses based on a quasi-judicial model similar to that of the WTO.⁴⁶ This model involves the establishment of a Panel to resolve disputes in a party-driven, adversarial context. Panels are dissolved following resolution of the specific dispute and, unlike WTO dispute settlement, there is rarely recourse to appeal. The quasi-judicial form of dispute resolution has proven to be effective for settling WTO disputes and providing certainty when states commit to multilateral liberalization. The potential costs of retaliation incentivize the resolution of disputes and provide the primary assurance for governments committing to trade liberalization treaties.⁴⁷ Therefore, when negotiating international agreements, and before trade concessions are made, it is critical for governments to be confident that treaty obligations will be upheld and that they can

43 *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 15 April 1994, 1867 UNTS 14 [*Final Act of the Marrakesh Agreement*]. Under this interpretation, jurisdiction of the DSB includes only the core documents and authority associated with them rather than allowing the definition to encompass general principles of law and rules of public international law. This broader definition would allow the DSB to consider obligations under RTAs in conjunction with WTO obligations.

44 Armand Mestral, "Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship" (2013) 16:4 *J Intl Econ L* 777 at 823.

45 WTO, *Brazil - Measures Affecting Imports of Retreaded Tires* (2007), WTO Doc WT/DS332/AB/R (Appellate Body Report), online: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm>. Both the Panel and Appellate Body considered the decision of an arbitral tribunal constituted under an RTA. The decision of the tribunal was argued to be a rational basis for a ban on retreaded tires under the meaning of the WTO law: specifically the *GATT 1947* Article XX chapeau. *GATT 1947 supra* note 2.

46 Chase, *supra* note 41 at 49.

47 Chad Brown, "On the Success of GATT/WTO Dispute Settlement" (2004) 86:3 *The Review of Economics and Statistics* 811 at 822.

be enforced with concrete sanctions.

Similar to most RTAs, the CAFTA-DR creates a standard forum for dispute resolution based on the quasi-judicial model. Following failed consultations, a request for an arbitral Panel can be made to rule on the dispute and determine the proper remedy.⁴⁸ Removal of the measures in violation is the preferred remedy to eliminate non-conformity or nullify impairment with the least trade disruption. However, failure to implement the Panel's initial recommendations can result in temporary trade sanctions, or a schedule of monetary payment.⁴⁹ Chapter 29 of CETA establishes a similar dispute resolution system with the same remedies available for non-compliance.⁵⁰ Pre-requisite criteria for monetary compensation or the application of trade sanctions are detailed in Article 29.14: if a Party in violation does not comply with the Panel's ruling, the complaining Party may impose trade sanctions or receive compensation.⁵¹ Trade sanctions generally involve the suspension of benefits under the agreement, and ideally are matched to the level of impairment caused by the initial violation. This system of remedies is flexible, and allows Parties the opportunity to reach a mutually acceptable solution before providing for retaliatory remedies.

Given that the vast majority of RTAs include a dispute resolution framework and increasingly include labour requirements that multilateral agreements do not, they have the potential to be an effective legal instrument for pursuing labour compliance at a state level.

V. In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR

As an example of the strategy discussed in the previous section, a labour dispute was recently concluded under a trade agreement between the United States and Guatemala. On September 18, 2014, the United States announced it would be proceeding with a labour enforcement case against Guatemala under the CAFTA-DR.⁵² The case was brought by the United States in response to allegations made by American and Guatemalan labour unions that Guatemala was failing to uphold its domestic labour obligations in violation of Article 16.2.1(a) of the CAFTA-DR;⁵³ specifically, the right of

⁴⁸ CAFTA-DR, *supra* note 11 at Article 20.6.

⁴⁹ *Ibid*, Article 20.16. Suspension of benefits under the agreement equivalent to the violation is the available trade remedy.

⁵⁰ CETA, *supra* note 12 at Chapter 29.

⁵¹ *Ibid* at Article 29.14(3).

⁵² Overview available from the Office of the United States Trade Representative: online:<<https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr>>.

⁵³ CAFTA-DR, *supra* note 11, Article 16.2.1(a). This article states "A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement."

association, the right to organize and bargain collectively, and acceptable conditions of work.⁵⁴ Although consultations and political negotiation play an important role in the resolution of international disputes, dispute resolution provides a decisive route to pursuing compliance. This dispute marks a milestone as it is the first time the United States, or any country, has brought a labour dispute past the stage of consultations under a trade agreement.⁵⁵

Article 16.2.1(a) provides that “A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties.”⁵⁶ Specific allegations against Guatemala included a failure to enforce court orders requiring employers to reinstate and compensate workers after wrongful dismissal, failure to conduct inspections and impose penalties for violations, and failure to register unions and initiate conciliation processes within the time prescribed by law.⁵⁷ Guatemala rebutted the allegations primarily on the basis that the United States failed to provide sufficient evidence that these violations have actually occurred.⁵⁸

The CAFTA-DR dispute between the United States and Guatemala was recently concluded and the final report of the Panel was released on June 14, 2017. The dispute turned on the Panel’s determination of whether each specific labour violation constituted a sustained course of action or inaction that also affected trade between the parties. Although the United States presented sufficient evidence to establish that labour violations had occurred, the Panel dismissed the claim and concluded that there was insufficient proof in each case that the violations were a sustained course of action or inaction, or that trade between the parties was affected.⁵⁹

54 Allegations of the United States are outlined in their initial submission to the Panel: *In the Matter of Guatemala - Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (2014), at para 4, online: <<https://ustr.gov/sites/default/files/US%20Initial%20Written%20Submission.pdf>> [*US Initial Submission - Issues Relating to Obligations under the CAFTA-DR*].

55 Franz Ebert & Anne Posthuma, “Labour provisions in trade arrangements: current trends and perspectives” in *European Commission-International Institute for Labour Studies Discussion Paper Series* (Geneva: International Institute for Labour Studies, 2011) at 22. There have been a number of consultations initiated under the North American Agreement on Labour Cooperation (NAALC) associated with the North American Free Trade Agreement (NAFTA) but none have proceeded past the initial stages. *Ibid.*

56 *CAFTA-DR*, *supra* note 11, Article 16.2.1(a).

57 *US Initial Submission - Issues Relating to Obligations under the CAFTA-DR* *supra* note 22, at 17.

58 Response of Guatemala to the US initial submission: *Guatemala – Issues relating to the obligations under Article 16.2.1(a) of CAFTA-DR* (2015), at 1, online: <<https://ustr.gov/sites/default/files/enforcement/labor/NON-CONFIDENTIAL%20-%20Guatemala%20-%20Initial%20written%20communication%20%202-02-2015.pdf>> [*Guatemala’s Initial Response - Issues Relating to Obligations under the CAFTA-DR*].

59 *CAFTA-DR, In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (2017), Final Report of the Panel at 201, online: <[https://www.trade.gov/industry/tas/Guatemala – Obligations Under Article 16-2-1\(a\) of the CAFTA-DR June 14 2017.pdf](https://www.trade.gov/industry/tas/Guatemala-Obligations-Under-Article-16-2-1(a)-of-the-CAFTA-DR-June-14-2017.pdf)>.

Although the United States failed to establish the alleged violations in this case, the approach has now been tested and the arguments have been considered. The panel report clarified the requirements of this common labour provision for the first time, and discussed the evidentiary requirements at length.⁶⁰ Using this interpretive guide, future cases can proceed with a clearer understanding of what needs to be proved, and how to go about proving it. For example, Guatemala and the United States advanced very different interpretations of the phrase “affecting trade between the parties.” Guatemala proposed a narrow interpretation that required the complaining party to provide evidence of a trade distortion and connect the alleged violation to that trade effect, while the United States proposed a broad definition that simply required proof of a bearing or influence on cross-border economic activity or competitive conditions.⁶¹ The Panel clarified the standard and concluded that there must be proof of a competitive advantage conferred on any employer or employers engaged in trade between the parties.⁶² This clarification is useful for parties bringing future disputes even though the decision is not binding on future arbitral panels.

The existence of this dispute demonstrates that labour enforcement is becoming a relevant element of international trade relationships through the provisions included in RTAs. Given the growing prevalence of labour provisions, these types of disputes may pave the way for increased standardization of international labour laws. Further, if dispute resolution leads to the removal or modification of domestic practices that violate international labour provisions, it has the potential to improve working conditions for a significant number of people and contribute to the mitigation of growing inequality.

VI. The Potential for Expanded Dispute Resolution

Currently, violations of the labour provisions in international trade agreements can only be challenged by states parties to that agreement, not private actors. Despite this barrier, the labour dispute between the United States and Guatemala was only brought in response to activism on the part of labour unions from those countries. Trade and labour unions are specialized organizations that advocate in many different forums. As a result, they can be well positioned to challenge governments on labour issues and advance the rights of workers. On this basis, I propose that expanded dispute resolution under RTAs that would allow specialized private actors like trade

60 *Ibid* at 79-93. A particular issue in this dispute was the effect of redactions on the probative value of evidence. In order to protect the identity of workers who had given statements the United States redacted a number of documents and Guatemala argued none of the redacted evidence should be accorded probative value. This argument was rejected by the Panel.

61 *Ibid* at 50-54.

62 *Ibid* at 62.

and labour unions to bring claims against foreign governments, rather than simply participating in an amicus role, could provide a further incentive for states to comply with their labour obligations. The proposed framework is similar in form to ISDS in that organizations based in one state would have standing to initiate consultations and arbitration against a foreign state, with the aim of holding that foreign state to its labour commitments under the relevant agreement.

The dispute resolution chapters in current RTAs allow states parties to bring claims against other states parties for non-conformity with treaty obligations, but preclude private actors or organizations from doing the same.⁶³ Private actors in one state are affected by the failure of a foreign state party to comply with labour obligations, and are often the first to notice detrimental effects. Loose or unenforced labour standards in foreign countries provide businesses with an attractive alternative to more rigorous and expensive standards at home, but under the current framework private actors must convince their host government to advocate on their behalf in the international trade forum to address these disparities. Dispute resolution provisions generally provide for non-governmental parties to attend hearings and make written submissions to the arbitral panel, but do not permit them to bring claims.⁶⁴ The ability to participate as a third party is useful in support of a claim, but by the time a dispute is brought detrimental effects may have been felt for years, which calls into question the efficacy of the current framework. Further, petitioning governments to mobilize in defence of private actors can be time consuming and resource intensive if the actor in question is not of strategic significance for the government.

The history of the CAFTA-DR dispute between the United States and Guatemala showcases these difficulties. In April 2008, the American Federation of Labour and Congress of Industrial Organizations (AFL-CIO) and 6 Guatemalan labour unions filed a public submission with the United States Office of Trade and Labour Affairs detailing the Guatemalan government's failures to implement the labour obligations found in Chapter 16 of the CAFTA-DR. The submission presents full factual accounts of the alleged violations, including specific evidence of the government's failure to safeguard labour rights or investigate extreme acts of violence, and a brief legal analysis of the CAFTA-DR provisions at issue.⁶⁵ The AFL-CIO, Guatemalan Labour Unions, and the International Trade Union Confederation remained involved in an amicus role after the commencement of consultations and

63 See CAFTA-DR, *supra* note 11, Chapter 20 and CPTPP, *supra* note 25, Chapter 28. Dispute resolution chapters grant the ability for a "Party" to the agreement to request consultations and the subsequent establishment of a Panel to settle disputes.

64 See CAFTA-DR, *ibid*, Article 20.11 and TPP, *ibid*, Article 28.14.

65 Public submission to the Office of Trade and Labour Affairs: Concerning the of the Government of Guatemala to Effectively Enforce its Labour Laws and Comply With its Commitments Under the ILO Declaration on Fundamental Principles and Rights at Work (2008), online: <<http://www.dol.gov/ilab/reports/pdf/GuatemalaSub.pdf>>.

submitted written opinions to the arbitral Panel in the course of the dispute.⁶⁶ These private actors played a central role in petitioning the United States government to bring the dispute, and the substance of their public submission to the Office of Trade and Labour Affairs provided valuable evidence for the dispute to move forward. Given their level of involvement in the formal process as it exists already, it is likely that these specialized labour advocates would be motivated and equipped to initiate consultations and arbitration under the existing legal framework of RTAs.

As a useful comparison, one forum where private actors have been granted the ability to bring claims against foreign governments is ISDS. As ISDS has become more prevalent in trade and investment agreements it has attracted controversy.⁶⁷ ISDS protects foreign investors by establishing an impartial dispute resolution framework based on international standards. This has clear advantages over being subject to the whims of domestic courts. The goal of this dispute resolution framework is to provide assurance for businesses operating across borders and increase the flow of investment between states; however, after years of implementation many governments face an increasing amount of arbitration claims from foreign investors that prompt regulatory chill and draw substantially on their resources.⁶⁸ This has predominantly resulted from a generous interpretation of provisions related to indirect expropriation of property, and fair and equitable treatment.⁶⁹

The problems that have arisen from the ISDS framework are significant, but unique to ISDS. Private dispute resolution concerning labour obligations in RTAs would not come with the same baggage. The labour provisions included in most contemporary RTAs encourage governments to legislate and enforce their laws rather than promote regulatory chill. As such, the large and unpredictable damage awards of ISDS would be avoided and would not present an unknown financial threat if dispute resolution under RTAs was expanded as this paper proposes.

If governments sign and ratify trade agreements with labour requirements like the ones in many contemporary RTAs, they have committed to enforcing those obligations domestically. Claims of non-conformity

66 Submissions of Non-Governmental Entities: *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of CAFTA-DR* (2015), online: <<https://ustr.gov/sites/default/files/enforcement/DS/Submissions%20of%20NonGovernmental%20Entities.pdf>>.

67 See Gauthier, *supra* note 11. For further analysis see David Gaukrodger & Kathryn Gordon, “Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community” (2012) OECD Working Paper on International Investment.

68 Gaukrodger & Gordon, *ibid* at 7.

69 Gauthier, *supra* note 11 at 5. Indirect expropriation can be defined “as a measure or series of measures of a Party that has an effect equivalent to direct expropriation without formal transfer of title or seizure.” A loose interpretation of indirect expropriation has been criticized for allowing foreign companies to bring claims against governments for restricting their profits. Fair and equitable treatment has been criticized for its variability from one arbitral panel to the next, and a corresponding uncertainty as to what level of treatment states must afford foreign investors.

brought by private actors would incentivize governments to enforce the labour laws already in place and craft new legislation in line with international legal obligations. Rather than frustrate domestic legislative agendas, this would simply encourage compliance with terms that have already been agreed upon. More importantly, the main remedy sought for non-conformity with labour standards is conformity rather than compensation. ISDS awards take the form of monetary damages or restitution of property, which are distinctly different from the remedies sought for non-conformity with treaty provisions.⁷⁰ Claims of non-conformity brought by private actors may indicate that governments should amend labour legislation, but would generally require governments to enforce existing laws with state machinery rather than pay large damages awards. Similar to the current dispute resolution paradigm, trade sanctions on the part of the host state could provide a final incentive. These differences support the viability of this proposed approach as concerns related to ISDS have deepened in recent years.

In addition to the fact that many of the complaints currently leveled at ISDS would not be raised by this proposed framework, dispute resolution initiated by private actors has several clear advantages over the current paradigm of state-to-state dispute resolution. Specialized labour organizations are more proximate to the workers who feel the effects of non-conformity with labour standards. They are also well equipped to gather evidence of violations through careful monitoring of domestic conditions. Furthermore, they serve a niche function as labour advocates. Governments must balance all of the interests at stake in trade affairs and non-conformity with labour obligations may not be their highest priority. Often it is not. Labour organizations are specialized to perform a particular function, and their interests are becoming increasingly globalized. These types of organizations expended substantial effort to convince the United States government to advocate on their behalf in the dispute with Guatemala—allowing labour and trade unions to bring claims themselves would cut out the middleman and allow consultations and disputes to be brought more swiftly. Finally, the most significant advantage of this mechanism is that it would provide an impartial dispute resolution system based on international standards. Trade and labour organizations always have the option of domestic courts to bring claims of domestic labour violations; however, domestic courts can lack transparency, impartiality and effectiveness.⁷¹ Arbitral panels constituted by the parties are expert tribunals that can be selected to have knowledge of the subject matter at issue, and can have less potential bias than domestic courts. With these benefits in mind, an international legal regime that realizes the benefits of private actors consulting closely with governments, and attempts to minimize the potential abuses, could be a balanced and effective step

⁷⁰ See CAFTA-DR, *supra* note 11, Chapter 10, Article 10.26.

⁷¹ Gauthier, *supra* note 15 at 1.

forward.

A further consideration is that the types of entities granted standing under this proposed framework would have to be defined and limited in some manner. Organizations like the American Federation of Labour clearly have the resources and expertise to engage in dispute resolution at this level, but a form of certification process may be required to ensure that the specialized organizations granted standing have the competence to pursue consultations and arbitration with foreign states.

As described above, the framework would be similar to ISDS in that entities based in one state would have standing to initiate claims against foreign governments who are party to the relevant agreement. This limitation would throttle the number of claims, and potentially restrict them to more systemic violations that begin to manifest undesirable labour effects in partner states. Labour organizations have the option and societal acumen to initiate claims in domestic courts if labour laws are not being upheld. If these efforts fail, petitioning organizations in partner countries could provide a further option. This was the reality with the dispute between the United States and Guatemala, and the dispute resolution framework proposed by this paper would expedite the process.

This paper presents a novel suggestion for expanded dispute resolution under RTAs. Although the expansion may alter the traditionally political nature and tone of certain trade disputes, the potential benefits are substantial in an economic system that is experiencing the growing pains of globalization. There are both economic and human rights justifications for upholding the core labour rights outlined by the ILO, and these rights are increasingly codified in regional trade law. When considering how to best realize labour rights in the existing legal regime, new mechanisms for holding states to their international obligations must be explored.

VII. Conclusion

The WTO has been widely criticized for failing to consider issues beyond trade liberalization. Labour is one such area seen by many as inseparable from trade governance, and therefore within the responsibility of the WTO. This was made clear at the failed 1999 global trade round in Seattle. Failure of the negotiations was largely attributed to the massive, violent protests fuelled by environmental and labour groups which shut down the city.⁷² Since this outcry, there has been a trend towards synergy of these disciplines outside of the multilateral trade framework.

Many RTAs have successfully included controversial labour provisions and represent a promising avenue to realize international labour commitments through state action. These provisions include binding obligations

⁷² See Epstein & Schnietz, *supra* note 4 at 134.

that are not present in the core labour standards stipulated by the ILO, and for this reason, RTAs offer a uniquely enforceable legal instrument for challenging labour violations on an international scale.

The potential for labour protections to offer economic utility is rarely emphasized. The prospect of short-term economic growth is tantalizing, and compromises to long-term stability are often made, sometimes inadvertently, in favour of more immediate outcomes. As yet, the possibility for transnational labour protections to play a role in facilitating long-term economic growth has not been explored with any vigour in the trade context. This paper proposes that they may have a degree of utility.

Labour and trade unions are uniquely equipped to challenge government enforcement of labour provisions in RTAs, and are motivated to do so if compliance will level the economic playing field trade agreements purport to create. This expansion of dispute resolution provisions would allow for violations to be challenged more swiftly and with less political impact. If the intent of RTAs is to ground meaningful obligations, then all attempts should be made to refine the mechanisms in place to realize those obligations.