

## COMMENTS

### THE HEAT IS ON IN LATIN AMERICA: THE FUTURE AND IMPLICATIONS OF THE COLOMBIAN FREE TRADE AGREEMENT

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*“The pending U.S.-Colombia Trade Partnership represents a stark moment of truth for the United States, with huge implications for America’s relations with a key regional ally, its influence across Latin America and its efforts to extend freedom and democracy around the world.”<sup>1</sup>*

## I. INTRODUCTION

Whether the Colombian Free Trade Agreement (C-FTA) will ever have an opportunity to make such an impact seems contingent on the future of politics,<sup>2</sup> and the current administration is putting the heat on Congress to pass the agreement. President George W. Bush, eager to pass the C-FTA, planned to force a congressional vote on the measure before the end of his final term in office.<sup>3</sup> The Bush Administration indicated that “it would defy the wishes of Congressional Democrats and force a vote this year on a free trade agreement with Colombia.”<sup>4</sup> However, led by House Speaker Nancy Pelosi, Democrats “defied President Bush in voting . . . to put off consideration of the agreement with Colombia until the speaker decides the time is right.”<sup>5</sup> President Bush criticized the decision of Democrats to set aside a decision on the C-FTA, saying that it is “damaging to our economy, our national

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1. Lawrence J. Haas, *Deal Improves U.S. Economy, Security*, MIAMI HERALD, June 25, 2007, at A21.

2. Steven R. Weisman, *Bush Signals Intent to Force Vote in Congress This Year on Colombian Trade Deal*, N.Y. TIMES, Mar. 13, 2008, at A10.

3. *Id.*

4. *Id.*

5. Carl Hulse, *House Votes to Put Off Trade Deal Bush Sought*, N.Y. TIMES, Apr. 11, 2008, at C1.

security, and our relations with an important ally.”<sup>6</sup> The halt on the C-FTA increases the impact of the 2008 U.S. presidential election on the viability of the C-FTA.<sup>7</sup> President-elect Barack Obama and former candidate Hillary Rodham Clinton joined other members of their party in opposition of the agreement, while Republican nominee John McCain supported the agreement.<sup>8</sup>

The ability to negotiate free trade agreements is an important function of U.S. trade policy,<sup>9</sup> and no issue has been more controversial than the inclusion of worker protection in these agreements.<sup>10</sup> The debate over the passage of a trade area including the United States and Colombia began in 2004, yet an agreement has still not been ratified,<sup>11</sup> attributable at least in part to concerns about the safety of workers in Colombia.

The failure of dispute mechanism processes in trade agreements to provide protections for workers should cause apprehension about the C-FTA.<sup>12</sup> The probability is low that similar provisions will be

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6. *Id.*

7. Weisman, *supra* note 2; Hulse, *supra* note 5.

8. Weisman, *supra* note 2; Hulse, *supra* note 5. These issues were at the forefront of the final presidential debate on October 15, 2008. Presidential Candidates Barack Obama & John McCain, Presidential Debate at Hofstra University (Oct. 15, 2008), available at [http://www.hofstra.edu/pdf/debate/debate\\_transcript.pdf](http://www.hofstra.edu/pdf/debate/debate_transcript.pdf) [hereinafter Presidential Debate]. In this final debate, President-elect Barack Obama said, “we have to stand for human rights and we have to make sure that violence isn’t being perpetrated against workers who are just trying to organize for their rights.” *Id.*

9. See Brandon Petelin, Comment, *The United States and International Trade: The Implications of Noncompliance with Dispute Settlement Panel Rulings*, 23 T.M. COOLEY L. REV. 545, 545 (2006).

10. See Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT’L L.J. 203, 203 (2007).

11. Press Release, Office of U.S. Trade Representative, United States and Colombia Conclude Free Trade Agreement (Feb. 27, 2007) (on file with author) [hereinafter United States and Colombia Conclude Free Trade Agreement].

12. Many operating free trade agreements have been criticized for insufficient protection of laborers within member nations, particularly the North American Free Trade Agreement and the Dominican Republic-Central America Free Trade Agreement. See, e.g., Griselda Vega, Note, *Maquiladora’s Lost Women: The Killing Fields of Mexico—Are NAFTA and NAALC Providing the Needed Protection?*, 4 J. GENDER RACE & JUST. 137, 144-45 (2000); Marisa Anne Pagnattaro, *Leveling the*

sufficient to ensure the safety of workers in the violent climate of Colombia. Despite the struggle of Colombians to unionize and ensure fair labor practices,<sup>13</sup> the C-FTA provisions do not effectively address this concern, instead defaulting to similar labor provisions in other agreements.<sup>14</sup> As such, trade unionists in Colombia will be exposed to the same exploitation and limitations on recourse for labor violations that have plagued workers in other free trade regions.<sup>15</sup> A draft of the C-FTA is complete,<sup>16</sup> and notwithstanding the political turmoil, a free trade agreement between Colombia and the United States seems probable,<sup>17</sup> making the implications and ramifications of a free trade area with Colombia of great consequence for both signatory nations.

The United States is in a unique position to impact the international community through its relationship with trade partners, and a free trade agreement with Colombia may be part of a solution for some of the labor concerns in Colombia.<sup>18</sup> Enhanced dispute resolution processes in the C-FTA could empower the people of Colombia to push for social improvements.<sup>19</sup>

To elucidate the effect the passage of the C-FTA will have on laborers in Colombia, this comment describes the extensive labor-

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*Playing Field: Labor Provisions in CAFTA*, 29 FORDHAM INT'L L.J. 386, 387 (2006) [hereinafter *Leveling the Playing Field*].

13. See *Colombia: Time to Stop the Killing and Persecution of Trade Unionist and Activists*, AMNESTY INT'L, May 1, 2006, <http://www.amnesty.org/en/news-and-updates/feature-stories/colombia-time-stop-killing-and-persecution-trade-unionists-and-a> [hereinafter *Time to Stop the Killing*].

14. Compare North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA], and Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004, [www.ustr.gov](http://www.ustr.gov) (*entered into force* Mar. 1, 2006) (follow "Trade Agreements" hyperlink, then follow "CAFTA-DR" hyperlink, then follow "full text of agreement" hyperlink) [hereinafter CAFTA], with Colombian Free Trade Agreement, U.S.-Colom., <http://www.ustr.gov> (follow "Trade Agreements" hyperlink, then follow "Colombian Free Trade Agreement" hyperlink) [hereinafter C-FTA] (this agreement is a draft version not yet entered into force).

15. See, e.g., Vega, *supra* note 12, at 143.

16. C-FTA, *supra* note 14.

17. See generally United States and Colombia Conclude Free Trade Agreement, *supra* note 11.

18. See *Leveling the Playing Field*, *supra* note 12.

19. *Id.*

related violence against unionists. The historical context of this turmoil presents long-standing evidence of violence against individuals fighting for rights for workers, and continuing offenses against activists exhibits the necessity for safeguards for unionists, discussed in Part II of this comment.

Part III describes the gradual incorporation of labor protections in free trade agreements to show how the United States' attempts to create safeguards for workers in the nations of its free trade partners. Subsequent evaluation of agreements exposes some of the reasons for the failure of these mechanisms, particularly in the North American Free Trade Agreement (NAFTA)<sup>20</sup> and the Dominican Republic-Central America Free Trade Agreement (CAFTA).<sup>21</sup> Reviewing the issues arising from functioning trade agreements and comparing them with the labor and dispute resolution processes in the C-FTA reveals that the C-FTA will not protect Colombian workers who continue to strive for unionization.

Part IV identifies some of the arguments in favor and against the C-FTA, and Part V addresses potential failures of the C-FTA as drafted. Considering these concerns in the context of Colombia allows for a more realistic assessment of the C-FTA as written, and provides evidence that the C-FTA will do more harm than good.

## II. COLOMBIAN LABOR CLIMATE

### A. Labor-Related Violence

Labor activists in Colombia who engage in union activities are targets of violence.<sup>22</sup> Although specific numbers reflecting death tolls vary, many sources agree that "Colombia is the most dangerous country in the world for trade unionists."<sup>23</sup> One source indicates that

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20. NAFTA, *supra* note 14.

21. CAFTA, *supra* note 14.

22. Carol Pier, *A Pact with the Devil*, BALT. SUN, Apr. 2, 2007, at 11A. "Colombia is a violent country, but its trade unionists are not random casualties. They are especially targeted when exercising their rights to organize and bargain collectively, moments of great potential for change." *Id.*

23. Daniel Kovalik, *War and Human Rights Abuses: Colombia and the Corporate Support for Anti-Union Suppression*, 2 SEATTLE J. SOC. JUST. 393, 398 (2004). See also Editorial, *A Dangerous Job in Colombia*, N.Y. TIMES, July 12, 2006, at A22 [hereinafter *A Dangerous Job in Colombia*]. Although numbers vary,

“[s]ince 1991, 1875 labor activists have been murdered in Colombia, and 184 of those took place in 2002 alone.”<sup>24</sup> The assassination of trade activists in the country is disproportionately high, “account[ing] for 85 percent of all trade union killings in the world.”<sup>25</sup>

The list of those murdered as a result of their pursuit of labor rights reads like a death toll of war. Carmen Cecilia Santana Romaña, young mother of three children and a leader in a national trade union, was assassinated in her home.<sup>26</sup> Two other union leaders, “Jairo Giraldo, of the national fruit-workers union, and Leonidas Silva Castro, of a teachers union” were also murdered.<sup>27</sup> “Héctor Díaz Serrano, a member of the oil workers’ union Unión Sindical Obrera (USO) was shot while he was on his way to work,”<sup>28</sup> “Héctor Alirio Martínez, Leonel Goyeneche and Jorge Prieto . . . were shot and killed,”<sup>29</sup> “Luis Miguel Gómez Porto, President of the peasant farmers’ union SINDEAGRICULTORES and a leader of FENSUAGRO, the agricultural workers’ union was killed.”<sup>30</sup> “[T]he body of Carlos Arciniegas Niño, a former member of the executive council of the National Trade Union of Farm Workers (SINTRAINAGRO), was discovered . . . [he had] been bound and shot three times and his body bore the signs of torture.”<sup>31</sup> These names

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many sources indicate disproportionately high rates of labor-related violence in Colombia. “In the last 20 years . . . some 4,000 labor union organizers, leaders and activists have been assassinated. Human rights groups use lower numbers, but still in the thousands—far more than anywhere else in the world.” *Id.*

24. Kovalik, *supra* note 23, at 398.

25. *Id.*

26. Pier, *supra* note 22.

27. *Colombia: New Killings of Labor Leaders*, HUMAN RIGHTS WATCH, Nov. 7, 2007, <http://hrw.org/english/docs/2007/11/07/colomb17269.htm> [hereinafter *Colombia: New Killings of Labor Leaders*] (“The killers have not been caught and their motives are unknown.”).

28. *Time to Stop the Killing*, *supra* note 13.

29. *Id.*

30. *Trade Unionists Under Attack in Colombia: Defending the Rights of Farmers*, AMNESTY INT’L, May 1, 2007, <http://www.amnesty.org/en/library/asset/AMR23/030/2007/en/dom-AMR230302007en.pdf> [hereinafter *Trade Unionists Under Attack*].

31. *Id.*

represent only a fraction of individuals assassinated because of their union association.<sup>32</sup>

### *B. Colombia: A History of Turmoil*

Violent oppression of labor unionization in Colombia is not a new phenomenon.<sup>33</sup> As early as 1928, oppression of union activities was common in Colombia.<sup>34</sup> One of the more horrifying examples is the 1928 mass execution of United Fruit Company workers engaged in a strike to attempt to enforce their rights as workers.<sup>35</sup> According to reports, “military troops were sent in to end the strike, and ended up opening fire indiscriminately on the crowd of workers, allegedly killing anywhere from a few dozen to three thousand workers.”<sup>36</sup> The bloodshed continued—a few decades later during the 1960s and 1970s, similar reports of the violent murders of union organizers emerged.<sup>37</sup> In the 1980s the violence escalated.<sup>38</sup> Increased activity of

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32. For more information about Colombians assassinated for their union affiliation, see *Colombia: Killings, Arbitrary Detentions, and Death Threats—The Reality of Trade Unionism in Colombia*, AMNESTY INT’L, July 3, 2007, <http://amnesty.org/en/library/asset/AMR23/001/2007/en/domAMR230012007en.pdf>.

33. See *Cong. Testimony on Violence against Trade Unionists and Human Rights in Colombia: Before the H. Comm. on Foreign Affairs, Subcomm. on Int’l Org., Human Rights, and Oversight, and Subcomm. on the W. Hemisphere and Comm. on Educ. and Labor, Subcomm. on Health, Employment, Labor and Pensions, and Subcomm. on Workforce Prot.*, 110th Cong. 1-2 (2007), available at <http://edlabor.house.gov/testimony/062807MariaMcFarlandTestimony.pdf> [hereinafter *Cong. Testimony on Violence*] (testimony by Maria McFarland Sanchez-Moreno, Esq., Principal Specialist on Colombia, Human Rights Watch).

Human Rights Watch has been monitoring the human rights situation in Colombia for nearly two decades. Through our reports we have repeatedly documented abuses committed by Colombian government forces, left-wing guerrillas of the Revolutionary Armed Forces of Colombia (the “FARC”) and the National Liberation Army (the “ELN”), and right-winged paramilitary groups.

*Id.* at 1.

34. *Id.* at 2.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

paramilitary groups coincided with an upsurge of labor union assassinations.<sup>39</sup> Movement of these groups continued to develop swiftly throughout the 1990s, and the groups intentionally attacked labor unionists.<sup>40</sup>

Attacks by other groups in Colombia have also contributed to the historical oppression of labor activists.<sup>41</sup> The Revolutionary Armed Forces of Colombia (FARC) are identified as perpetrators of violence against unionists.<sup>42</sup> In areas where the FARC is particularly active, such as Antioquia and Córdoba, violence against labor unionists is even higher than other areas in the country.<sup>43</sup> The elevated number of attacks is a result of the battle between the FARC and other violent groups, and unionists are a casualty of this war, often as a result of mistaken identity.<sup>44</sup> Colombians are “[c]aught between the security forces who have consistently colluded with and supported paramilitary groups and, on the other side, armed opposition groups, tens of thousands of people have been killed, ‘disappeared’ [sic], tortured or kidnapped, while millions of others have been forcibly displaced.”<sup>45</sup> Colombian labor unionists, historically oppressed, continue to be exposed to violence.<sup>46</sup> This historical oppression is exacerbated by the lack of recourse available through the Colombian government.<sup>47</sup>

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39. *Id.*

40. *See id.* at 2-3.

41. *Id.* at 2.

42. *Id.*

43. *Id.* at 3. For example, “on September 20, 1995, the FARC stopped a bus with twenty-nine banana workers. The FARC forced all the passengers to get off the bus and lie face down on the ground, tying their hands. The group then proceeded to summarily execute twenty-four of the workers.” *Id.*

44. *See id.*

45. *Time to Stop the Killing*, *supra* note 13.

46. *Cong. Testimony on Violence*, *supra* note 33, at 4.

47. *See generally Time to Stop the Killing*, *supra* note 13. *See also Cong. Testimony on Violence*, *supra* note 33, at 5.



### C. Current Political Climate

The hazardous climate for laborers in Colombia persists.<sup>48</sup> According to testimony by the Human Rights Watch Colombian specialist, “Colombia presents the worst human rights and humanitarian crisis in the region.”<sup>49</sup> No other country or region in the world is more dangerous for individuals fighting for freedom of association and labor rights.<sup>50</sup> Throughout various administrations, the Colombian government has made efforts to attempt to shield labor activists but has been unsuccessful.<sup>51</sup> The infiltration of paramilitary groups in the government provides additional evidence that the organizations intended to protect Colombians are intentionally thwarting the efforts of labor activists.<sup>52</sup>

The paramilitaries in Colombia permeate the highest levels of government authority,<sup>53</sup> making their activities even more frightening. For example, “the Colombian intelligence agency’s head from 2002 to 2005 was arrested on charges of conspiring with paramilitaries, including . . . the killing of union leaders and academics.”<sup>54</sup> As many

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48. Various commentators have addressed the continuing dangerous labor climate in Colombia. See, e.g., *Time to Stop the Killing*, *supra* note 13; *A Dangerous Job in Colombia*, *supra* note 23 (“In the last 20 years . . . some 4,000 labor union organizers, leaders and activists have been assassinated. Human rights groups use lower numbers, but still in the thousands—far more than anywhere else in the world.”); Pier, *supra* note 22 (“In Colombia, trade unionists who are not murdered are often threatened, attacked or kidnapped.”); Kovalik, *supra* note 23, at 398; *Cong. Testimony on Violence*, *supra* note 33, at 4; Editorial, *Getting to a Colombia Trade Deal*, N.Y. TIMES, May 29, 2007, at A18 [hereinafter *Getting to a Colombia Trade Deal*] (“Colombia leads the world in the killing of labor activists.”).

49. *Cong. Testimony on Violence*, *supra* note 33, at 1.

50. *Id.* at 4.

51. *Trade Unionists Under Attack*, *supra* note 30.

52. *Time to Stop the Killing*, *supra* note 13 (indicating that labor unionists have been subject to improper persecution).

Over recent years, Amnesty International (AI) has also documented many cases of arbitrary detentions of trade unionists and other social and human rights activists by the security forces. These detentions have often been based solely on the evidence of paid military informers and not on impartial investigations by the judicial authorities.

*Id.*

53. Pier, *supra* note 22.

54. *Id.*

as nine of President Uribe's supporters in Congress were implicated by the Colombian Supreme Court as connected to paramilitary groups.<sup>55</sup>

In addition to the barriers to protection that result from the close connection between the government and paramilitary groups, unionists face other dangers compromising their objectives.<sup>56</sup> More recently, paramilitaries have begun to alter intimidation strategies to make union associated violence more problematical to monitor.<sup>57</sup>

According to the Colombian Commission of Jurists, paramilitary groups continue to commit between 800 and 900 selective killings per year throughout the country, a number that has remained roughly unchanged since 1996. In the specific case of trade unionists, the paramilitaries also appear to have shifted their tactics. While they still engage in outright killings, according to the National Labor School, paramilitaries are also resorting more frequently to threats and attacks on immediate family members of trade unionists, which are more difficult to track and are not reported in official statistics.<sup>58</sup>

A strong presence of violence against trade unionists is exacerbated by the lack of accountability for violence perpetrated against them.<sup>59</sup> In addition to the absence of proper law enforcement, the close relationship between violent groups and the government often results in impunity for paramilitary groups, essentially rendering

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55. *Id.* See also Simon Romero & Jenny Carolina Gonzalez, *Union Killings Peril Trade Pact with Colombia*, N.Y. TIMES, Apr. 14, 2008, at A1. "[D]ozens of Mr. Uribe's supporters in Congress and his former intelligence chief are under investigation for ties to paramilitary death squads, which are classified as terrorists by the United States and responsible for some of the union killings." *Id.*

56. See generally *Cong. Testimony on Violence*, *supra* note 33, at 6.

57. *Id.* at 5.

58. *Id.*

One example is that of Hernando Melán, a union leader in a textiles company in Antioquia, who had been recently representing his union in collective bargaining with the company. [A] group of armed men attacked Mr. Melán in his own house, killing Mr. Melán's son, Andres, and seriously injuring his wife and another son.

*Id.*

59. For a discussion on the impact impunity has on laborers in Colombia, see *id.* at 5-6.

them immune from responsibility for violence against union activists.<sup>60</sup> Failure to prosecute perpetrators of violence contributes to the continued offenses against trade unionists.<sup>61</sup> A document published by unions examining 1528 union related murders revealed that only a fraction of those cases were actually prosecuted, and even fewer resulted in convictions.<sup>62</sup> According to Congressional testimony on violence against trade unionists, “[t]he [Colombian] Attorney General’s Office claims that it has obtained convictions in 37 cases of trade unionist killings. But this still represents an impunity rate of more than 98%.”<sup>63</sup> Current processes are insufficient to decrease the violence against labor unionists.<sup>64</sup> In light of these circumstances, the current political climate makes Colombia a formidable place for unionists.<sup>65</sup>

The future for labor unionists is not looking promising.<sup>66</sup> President Uribe’s reelection in May 2006 does not bode well for proponents of change in the region because of the close relationship between the paramilitaries and the President,<sup>67</sup> and he will remain in office until 2010.<sup>68</sup> Even more disconcerting for human rights activists

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60. See generally Pier, *supra* note 22 (“Paramilitary influence may well reach into the country’s highest circles of power.”).

61. See *Trade Unionists Under Attack*, *supra* note 30; see also *Cong. Testimony on Violence*, *supra* note 33, at 5.

62. See *Cong. Testimony on Violence*, *supra* note 33, at 5. “The history in Colombia right now is that labor leaders have been targeted for assassination on a fairly consistent basis and there have not been prosecutions.” Presidential Debate, *supra* note 8.

63. *Id.*

64. See *Time to Stop the Killing*, *supra* note 13. See also *Trade Unionists Under Attack*, *supra* note 30.

65. See, e.g., Pier, *supra* note 22; *Trade Unionists Under Attack*, *supra* note 30; *Cong. Testimony on Violence*, *supra* note 33.

66. See generally *Colombia: Country Outlook*, EIU VIEWSWIRE, Dec. 8, 2007 [hereinafter *Colombia: Country Outlook*].

67. See Simon Romero, *Colombia Chief Hails Democratic and Economic Gains*, N.Y. TIMES, Apr. 23, 2008, at A8 [hereinafter *Colombia Chief Hails Democratic and Economic Gains*]. For example, “[o]n Tuesday an arrest order was issued for Mario Uribe, a second cousin and confidant of the president and a former senator, on charges that he had met with a warlord about electoral campaigns aimed at benefiting the paramilitaries . . .” *Id.*

68. See *Colombia: Country Outlook*, *supra* note 66 (projecting the future for Colombia).

and unionists is the prospect of yet another Uribe term.<sup>69</sup> Although Uribe does not have the opportunity to run again after expiration of his new term under the current constitution, his supporters have suggested modifying the constitution to permit an additional term.<sup>70</sup> Regardless, completion of a free trade agreement with the United States will be at the forefront of Colombia's policy goals,<sup>71</sup> resulting in an opportunity for the United States to create effective processes to protect laborers.<sup>72</sup>

#### D. Colombian Labor Law

The protections in Colombian labor law provide the basis for safeguards in a free trade agreement.<sup>73</sup> Colombia has laws addressing two major labor issues: the freedom to associate and the right to bargain collectively.<sup>74</sup> Under Colombian labor law, citizens are guaranteed the right to participate in union activities, as well as the right to strike.<sup>75</sup> Employers are required to negotiate with trade unions and are barred from impeding union activity.<sup>76</sup> However, the problem in Colombia is not the lack of enforceable laws, but the lack of enforcement that limits the ability of workers to exercise their rights.<sup>77</sup> “[W]hile there [are] some adequate labor laws in Central America, there [are also] systematic barriers to enforcing these laws. Recordkeeping is shoddy, giving workers little chance to make claims against employers . . . and sanctions for violations are weak.”<sup>78</sup>

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69. *Id.* “A negotiated end to the conflict with the Fuerzas Armadas Revolucionarias de Colombia (FARC) is unlikely” in the medium term. *Id.* Additionally, “[Uribe] and his allies are considering amending the constitution to allow him to run for a third term.” *Id.*

70. *See id.*

71. *Id.*

72. *See generally* Kolben, *supra* note 10, at 220.

73. *See, e.g.*, C-FTA, *supra* note 14. In the free trade agreement, each country commits to enforcing its own laws with respect to labor rights. *Id.* art. 17.3.

74. Office of the U.S. Trade Representative, Colombia FTA Facts 1 (Mar. 2008), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Colombia\\_FTA/asset\\_upload\\_file538\\_13717.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Colombia_FTA/asset_upload_file538_13717.pdf) [hereinafter Colombia FTA Facts].

75. *Id.*

76. *Id.*

77. *See supra* Part II.C.

78. Juan Forero, *Report Criticizes Labor Standards in Central America*, N.Y. TIMES, July 1, 2005, at C2.

### III. FREE TRADE AGREEMENTS: INCOMPLETE PROTECTION FOR WORKERS

#### *A. Progression of Labor Protections in Free Trade Agreements*

The issue of labor protections in international trade agreements arose in the 1990s during the political debate about NAFTA, as politicians addressed concerns about possible exploitation of the lower environmental and labor requirements in Mexico—one of the two partners engaged in negotiations.<sup>79</sup> In 1993, then newly-elected President Clinton took over negotiations of the agreement and was adamant that any hemispheric trade agreement signed by the United States include labor protections.<sup>80</sup> The North American Agreement on Labor Cooperation (NAALC) was drafted as an addendum to NAFTA to include “a mechanism for member countries to ensure the effective enforcement of existing and future domestic labor standards and laws without interfering in the sovereign functioning of the different national labor systems . . . an approach that made it novel and unique.”<sup>81</sup> Protection of sovereignty is a major goal under the NAALC.<sup>82</sup> Signatory nations thus rely on a functional system enforcing labor rights within each member nation.<sup>83</sup>

By 2003, more than half-a-dozen free trade agreements included chapters addressing labor protection,<sup>84</sup> signifying a changed standard and an expectation that agreements should include a labor chapter.<sup>85</sup> Subsequent agreements continue to be negotiated with some

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79. See John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. L.A. INT'L & COMP. L. REV. 359, 364 (2004). For general information on more recent developments in international trade, see Gabriella Carias-Green et al., *International Legal Developments in Review: 2006 Business Regulation*, 41 INT'L LAW. 229 (2007).

80. See Vega, *supra* note 12, at 140.

81. Secretariat of the Comm'n for Labor Cooperation, <http://www.naalc.org/naalc.htm> (last visited Sept. 11, 2008).

82. See generally Knox, *supra* note 79.

83. Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 265 (2005).

84. Alisa DiCaprio, *Are Labor Provisions Protectionist?: Evidence from Nine Labor-Augmented U.S. Trade Arrangements*, 26 COMP. LAB. L. & POL'Y J. 1, 2 (2004).

85. See generally *Leveling the Playing Field*, *supra* note 12.

provisions addressing worker rights,<sup>86</sup> resulting in more frequent incorporation of labor protections into the final text of the treaties.<sup>87</sup> However, like the CAFTA and the C-FTA,<sup>88</sup> many of these labor chapters are structured akin to the NAALC. This results in the same concerns identified by critics of the NAALC—the failure to provide a mechanism for enforcement.<sup>89</sup>

### B. North American Free Trade Agreement

As the first international trade agreement the United States entered into with significant labor protections,<sup>90</sup> NAFTA's labor side agreement, the NAALC, has been subject to extensive criticism regarding its inability to protect workers.<sup>91</sup> One of the barriers to adequate protection is the inefficient dispute resolution process. The NAALC relies on a series of committees and consultations to evaluate issues in the tripartite system;<sup>92</sup> yet it fails to provide any substantial

86. See generally *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2214-15 (2005) [hereinafter *Developments in the Law*]. A few examples include incorporation of “labor chapters in free trade agreements with Singapore and Chile in 2003; with Australia, Bahrain, and Morocco in 2004; and in the Central America Free Trade Agreement (CAFTA) negotiated in 2004 build[ing] on the template of the Jordan free trade agreement.” *Id.*

87. See, e.g., CAFTA, *supra* note 14; NAFTA, *supra* note 14. For information and text of other free trade agreements, visit the Office of the U.S. Trade Representative at <http://www.ustr.gov>.

88. See Brandie Ballard Wade, *CAFTA-DR Labor Provisions: Why They Fail Workers and Provide Dangerous Precedent for the FTAA*, 13 L. & BUS. REV. AM. 645, 651 (2007).

89. See *Developments in the Law*, *supra* note 86, at 2215.

90. Mary Anne Pagnattaro, *The “Helping Hand” in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. INT’L L. 845, 876 n.180 (2004) [hereinafter *The “Helping Hand” in Trade Agreements*] (“The United States was the first country to include a substantial statement on labor in FTAs.”). “When NAFTA went into effect in 1994, it was hailed as groundbreaking for its inclusion of a labor side agreement . . . .” *Id.* See also Vega, *supra* note 12, at 139.

91. Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. LAB. & EMP. L. 529, 541 (2002).

92. NAFTA, *supra* note 14, at 1507-09. The NAALC has a three-tiered process of dispute resolution, beginning with filing the complaint with a National Administration Office (NAO) in a country not party to the complaint. *Id.* at 1507. The NAO can request consultations with other NAO’s and either reject or accept the

remedies for workers.<sup>93</sup> Sanctions are only available if violations are related to child labor or health and safety.<sup>94</sup> Furthermore, the country where the offense was committed is held liable, not the individual or corporation responsible for the offense.<sup>95</sup>

By signing the NAALC, member nations committed to enforce the labor laws existing in their jurisdictions that relate to the labor standards delineated by the agreement.<sup>96</sup> Conceptually, this seems appropriate, particularly because Mexican law has broad protections for laborers; the Mexican Constitution has specific provisions to protect freedom of association and other rights.<sup>97</sup> However, like Colombia where protection of rights by the government is essentially non-existent,<sup>98</sup> protections provided by the Mexican Constitution are largely ignored and Mexican workers suffer.<sup>99</sup> Eliminating barriers to trade without proper safeguards for laborers has resulted in

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claim. Following review by the NAO, any party can request ministerial consultations, and these consultations may conclude options for some types of disputes. *Id.* at 1507. Both the NAO and ministerial consultations seek to create a resolution for the alleged complaint, but no monetary or trade sanctions are available at this level. *See id.* Parties with unresolved complaints can request an Evaluation Committee of Experts (ECE), however “[n]o ECE may be convened if a Party obtains a ruling under Annex 23 that the matter: (a) is not trade-related, or (b) is not covered by mutually recognized labor laws.” *Id.* at 1508.

93. *See The “Helping Hand” in Trade Agreements*, *supra* note 90, at 877 (commenting that “the major shortcoming of [the] NAALC is its lack of enforceability”).

94. Kolben, *supra* note 10, at 217-18.

95. *See generally* NAFTA, *supra* note 14, at 1502.

96. *See Developments in the Law*, *supra* note 86, at 2212-13; *The “Helping Hand” in Trade Agreements*, *supra* note 90, at 876-77. *See also* NAFTA, *supra* note 14, at 1503. The eleven labor principles of the NAALC to be enforced in each signatory nation are: freedom of association and protection of the right to organize, the right to bargain collectively, the right to strike, prohibition of forced labor, labor protections for children and young persons, minimum employment standards, elimination of employment discrimination, equal pay for women and men, prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses, and protection of migrant workers. Secretariat of the Comm’n for Labor Cooperation, *supra* note 81.

97. *The “Helping Hand” in Trade Agreements*, *supra* note 90, at 878.

98. *See Cong. Testimony on Violence*, *supra* note 33, at 5.

99. *The “Helping Hand” in Trade Agreements*, *supra* note 90, at 878.

exploitation of workers and severe economic loss in Mexico,<sup>100</sup> a pattern likely to be repeated in Colombia. Through perpetuation of low wages, Mexican workers are forced to acquiesce to compromised labor protections to find employment, and U.S. laborers are unable to compete with the lower cost of Mexican labor.<sup>101</sup> According to a report on the C-FTA by the Advisory Committee for Trade Negotiations and Trade Policy, “[u]nder NAFTA, U.S. employers took advantage of their new mobility and the lack of protection for workers’ rights in the agreement to shift production, hold down domestic wages and benefits, and successfully intimidate workers trying to organize unions in the [United States] with threats to move to Mexico,”<sup>102</sup> where, like Colombia, organization of unions would not be an issue due to lack of enforcement. Ultimately, under the NAALC there are no trade ramifications for failure to enforce Mexico’s freedom of association laws; prohibition of unionization and the right

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100. *See id.*

101. *See generally* LABOR ADVISORY COMMITTEE FOR TRADE NEGOTIATIONS AND TRADE POLICY, REPORT TO THE PRESIDENT, THE CONGRESS AND THE UNITED STATES TRADE REPRESENTATIVE ON THE U.S.-COLOMBIA FREE TRADE AGREEMENT (2006) [hereinafter LAC REPORT]. “Since NAFTA went into effect, for example, our combined trade deficit with Canada and Mexico grew from \$9 billion to more than \$127 billion, leading to the loss of more than one million job opportunities in the United States.” *Id.* The Committee report was compiled in response to the United States-Colombia Free Trade Agreement. Authority is derived from:

Section 2104(e) of the Trade Act of 2002 (TPA) [which] requires that advisory committees provide the President, the U.S. Trade Representative (USTR), and Congress with reports required under Section 135(e)(1) of the Trade Act of 1974, as amended, not later than 30 days after the President notifies Congress of his intent to enter into an agreement. Under Section 135(e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principle negotiating objectives set forth in the Trade Act of 2002. The committee report must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the relevant sectoral or functional area of the committee.

*Id.* at 3.

102. *Id.*



to associate are not subject to monetary sanctions.<sup>103</sup> Like the C-FTA, NAFTA is at the forefront of political debates about trade.<sup>104</sup> During his campaign, President-elect Barack Obama made a commitment to “renegotiate the terms of NAFTA.”<sup>105</sup>

### C. Central America Free Trade Agreement

Colombia’s neighbors to the north are currently included in a free trade agreement with the United States.<sup>106</sup> “Negotiations for [the CAFTA] between the United States, El Salvador, Guatemala, Honduras, and Nicaragua began in January of 2003.”<sup>107</sup> From the onset of the negotiations, the CAFTA received objections from various sources; most notably human rights organizations that recognized that the CAFTA posed similar problems with respect to workers rights as NAFTA.<sup>108</sup> Much of the controversy surrounding its passage was the structure of the labor component of the agreement, and opponents were concerned it would be inadequate for the CAFTA countries already suffering from lack enforcement of labor protections.<sup>109</sup> Some scholars indicate that “[a]lthough [the] CAFTA contains labor provisions, more comprehensive provisions should have been included . . . .”<sup>110</sup> As with the C-FTA, one of the major concerns in the CAFTA countries was the violent oppression of laborers attempting to exercise the right to associate and organize.<sup>111</sup> Despite objections and over two years after negotiations began, the

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103. See Kolben, *supra* note 10, at 217-18. Kolben criticizes NAFTA dispute resolution process for workers, recognizing “the dispute resolution process may only, in the end, address the very limited question of whether or not a country is enforcing its own domestic labor law in the areas of occupational safety and health, child labor, and minimum wage laws.” *Id.*

104. See Steven Lee Myers, *Next-Door Neighbors Back Bush on Expanding Trade*, N.Y. TIMES, Apr. 23, 2008, at A8.

105. *Id.*

106. Wade, *supra* note 88, at 650.

107. *Id.*

108. See *id.* at 652.

109. See Kolben, *supra* note 10, at 203-04.

110. See *Leveling the Playing Field*, *supra* note 12, at 387.

111. Kolben, *supra* note 10, at 204

CAFTA was signed<sup>112</sup> and it went into effect, resulting in one of the largest free trade sectors in the region.<sup>113</sup>

#### *D. Free Trade Agreement General Provisions*

Beginning with the focus on the concept of state sovereignty protected in the NAALC,<sup>114</sup> subsequent free trade agreements and labor provisions have kept autonomy of each member nation a priority.<sup>115</sup> Labor components of agreements generally include a declaration to commit to improving conditions in each nation,<sup>116</sup> and a provision agreeing to enforcement of the labor laws of each individual nation.<sup>117</sup> The agreements delineate the types of labor laws applicable to the agreement, typically including protections against compulsory and child labor, freedom to associate and bargain collectively, along with health and safety considerations.<sup>118</sup> Dispute mechanisms are established to create a hierarchy of panels before trade sanctions can be imposed.<sup>119</sup> In some agreements, no monetary assessment is available for certain types of violations, such as the failure to enforce

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112. See Wade, *supra* note 88, at 650-51. "The legislation implementing the CAFTA-DR passed in the U.S. House and Senate in July 2005, with President George W. Bush signing CAFTA-DR on August 2, 2005." *Id.*

113. *Leveling the Playing Field*, *supra* note 12, at 386.

114. See generally Secretariat of the Comm'n for Labor Cooperation, <http://new.naalc.org/index.cfm?page=148> (last visited Mar. 1, 2008).

115. See Kolben, *supra* note 10, at 221. Labor provisions still prioritize sovereignty, and have not been modified, with the exception of "slight variations in their dispute settlement remedies, and other small differences." *Id.*

116. See, e.g., CAFTA, *supra* note 14, art. 16.1.

117. *Id.*

118. See, e.g., *supra* text accompanying note 96; CAFTA, *supra* note 14, art. 16. For the purpose of the CAFTA agreement, a labor law is any provision related to:

- (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor; (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

*Id.* art. 16.8.

119. See, e.g., CAFTA, *supra* note 14, art. 20 (Chapter 20 addresses the dispute resolution process and caps monetary sanctions at \$15 million).

freedom of association and collective bargaining rights,<sup>120</sup> both of which are subject to violent oppression in Colombia.<sup>121</sup>

### *E. The Provisions of the Colombian Free Trade Agreement*

An agreement with Colombia to liberalize trade has been drafted as a bilateral accord with the United States.<sup>122</sup> The agreement is criticized for protecting businesses instead of providing for labor safeguards, and taking a step back from some of the more progressive agreements that include more extensive dispute settlement procedures available to workers.<sup>123</sup> The Labor Advisory Committee for Trade Negotiations and Trade Policy (LACTNTP) disparaged policy makers for failure to prioritize labor protections in the agreement, acknowledging the dangerous conditions for workers in Colombia.<sup>124</sup> In its report to the President, Congress, and the U.S. Trade Representative, the LACTNTP stated:

Unfortunately, labor was not a focus during the two years of intense negotiations and thus did not result either in an improved labor chapter, an agreement to change a single labor law, or a commitment to take truly effective measures to prevent the murder of or threats to trade unionists and end impunity for those labor-related crimes.<sup>125</sup>

The agreement follows the trend of other multinational trade agreements, including similar provisions that exist in other operational agreements.<sup>126</sup>

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120. See Knox, *supra* note 79. “[T]he only claims a party may bring to formal NAALC dispute resolution are those concerning ineffective enforcement of a party’s occupational safety and health, child labor, or minimum wage labor standards.” *Id.* at 368-69.

121. See *A Dangerous Job in Colombia*, *supra* note 23.

122. United States and Colombia Conclude Free Trade Agreement, *supra* note 11.

123. See LAC REPORT, *supra* note 101, at 5.

124. *Id.* at 6.

125. *Id.*

126. See generally NAFTA, *supra* note 14; CAFTA, *supra* note 14. For information and text of other free trade agreements, visit the Office of the U.S. Trade Representative at <http://www.ustr.gov>.

### 1. *The Labor Chapter of the Agreement*

Chapter 17 of the C-FTA sets out the expectations for the protection of labor rights.<sup>127</sup> The labor principles in the agreement require that each nation agree to “adopt and maintain in its statutes and regulations” five fundamental categories of worker rights.<sup>128</sup> Specifically, the chapter protects the right to associate freely and bargain collectively, and also prohibits forced and child labor and employment discrimination.<sup>129</sup> Although the agreement obligates Colombia and the United States to enforce their own laws domestically, it also specifically prohibits intervention of each nation in the enforcement of labor laws of other nations.<sup>130</sup>

### 2. *Procedural Guarantees*

In addition to setting out the types of labor rights protected under the C-FTA, Chapter 17 also establishes general requirements and guarantees for dispute procedures.<sup>131</sup> When a violation of one of the labor provision occurs, “[e]ach Party shall ensure that persons with a legally recognized interest in a particular matter have appropriate access to tribunals for the enforcement of the Party’s labor laws.”<sup>132</sup> The structure and member profile of the tribunal is left to the discretion of each nation, and each country is responsible for “ensur[ing] that proceedings before such tribunals for the enforcement of its labor laws are fair, equitable, and transparent . . . .”<sup>133</sup> Other requirements include adherence to due process procedures, along with the option for named parties to participate in the process.<sup>134</sup> Decisions of the tribunal must be written and made available to the public, with exceptions at the discretion of the tribunal.<sup>135</sup> The agreement also

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127. C-FTA, *supra* note 14, art. 17.

128. *Id.* art. 17.2.

129. *Id.* art. 17.2(1)(a)-(e).

130. *Id.* art. 17.3.

131. *Id.* art. 17.4.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

specifies requirements for appeal of a decision of the tribunal.<sup>136</sup> Like the first tribunal, panel members on appeal must be disinterested in the matter.<sup>137</sup>

Finally, the free trade agreement includes a guarantee that each member nation will strive to encourage understanding and education about the labor laws in existence in each state.<sup>138</sup> This includes instructing the public about their rights and access to recourse for non-compliance and eliminating obstruction of access to information.<sup>139</sup>

### 3. *Dispute Resolution Process*

Not unlike the free trade agreements that preceded it,<sup>140</sup> the C-FTA creates a multi-tiered dispute resolution process involving various tribunals empowered by the agreement. In order to initiate the process and file a complaint pursuant to the agreement, a written request must be delivered to the contact point selected by each nation.<sup>141</sup> The request signifies the commencement of Cooperative Labor Consultations (CLCs) between the nations.<sup>142</sup> The CLCs are required by the agreement to begin “promptly after delivery of the request.”<sup>143</sup> Although no other parties are compelled to participate, each nation is permitted to consult anyone its sees fit.<sup>144</sup> The CLCs present parties with the opportunity to resolve the issue without a third party, and any resolution is voluntary.

If there is no solution when the CLCs are concluded, the next option of dispute resolution includes delivering another written document to the designated nation that requested assembly of the Labor Affairs Council (LAC).<sup>145</sup> The LAC’s authority is derived from the agreement, and the only specification concerning membership is

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136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See supra* Part III.D.

141. C-FTA, *supra* note 14, art. 17.7.

142. *Id.*

143. *Id.*

144. *Id.* (stating that “a Party may request cooperative labor consultations with another Party”).

145. *Id.*

that the representatives be “cabinet-level or equivalent representatives” of the nations.<sup>146</sup> The LAC must “promptly convene” to settle the dispute. However, unlike the CLCs, if the issue is not resolved within sixty days and parties have exhausted the options available under Chapter 17, they are entitled to remedies beyond the labor chapter of the free trade agreement.<sup>147</sup>

Movement from the labor chapter to the dispute settlement section of the free trade agreement allows complainants the opportunity to submit a written request<sup>148</sup> to the Free Trade Commission (FTC) and both nations.<sup>149</sup> The FTC members must be cabinet-level representatives from the U.S. Trade Representative (USTR) and Colombia’s Ministro de Comercio, Industria y Turismo.<sup>150</sup> Upon receipt of the request, the FTC must meet within ten days, “unless it decides otherwise,” to facilitate resolution.<sup>151</sup> The FTC may consult outside experts during the process, but is limited to “recourse to good offices, conciliation, or mediation . . . or mak[ing] recommendations” for the parties.<sup>152</sup>

If the FTC does not convene after seventy-five days after the complaint is filed or if a resolution is not achieved within thirty days despite participation of the FTC, a party may request assembly of a three-member arbitral panel.<sup>153</sup> The complainant must submit a written request to the other parties, after which a panel will be assembled.<sup>154</sup> Each nation is required to identify potential panelists, each of whom must be objective, independent of member nations, and knowledgeable in areas relevant to the agreement.<sup>155</sup> Within 120 days of panel section, an initial report must be issued.<sup>156</sup> This report must

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146. *Id.* art. 17.5.

147. *Id.* art. 17.7.

148. *Id.* art. 21.5. At this level, the written request must also include the issues at hand, as well as a legal basis for the complaint. *Id.*

149. *Id.*

150. *Id.* art. 20, annex 20.1.

151. *Id.* art. 21.5.

152. *Id.*

153. *Id.* art. 21.6. *See also id.* art. 21.9 (stating that panels consist of three members).

154. *Id.* art. 21.6.

155. *Id.* art. 21.7-21.8.

156. *Id.* art. 21.13.

include a determination of whether a nation failed to adhere to the free trade agreement, as well as recommendations for resolution of the dispute at a party's request.<sup>157</sup> Parties have fourteen days to submit written comments or request for clarification of the report, and after consideration of any responses and within thirty days of the initial report, the panel must submit a final report.<sup>158</sup> Fifteen days after the final report is provided to the parties, it must be released to the public.<sup>159</sup>

Although the labor chapter of the C-FTA includes resolution procedures tailored toward disputes that arise between signatory nations, it does not provide options for individuals to allege a country's failure to enforce one of the fundamental labor rights.<sup>160</sup> However, the dispute resolution chapter of the agreement advises nations to promote utilization of alternative dispute resolution processes to settle issues between private parties.<sup>161</sup> Member nations are encouraged to aid in facilitation of these processes, and are required to "provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards."<sup>162</sup> Like the labor chapter, this process is geared toward "settlement of international commercial disputes between private parties in the free trade area,"<sup>163</sup> and not for submission of citizen complaints.

#### IV. THE CONTROVERSY OF THE COLOMBIAN FREE TRADE AGREEMENT

Since negotiations between Colombia, Peru, and Ecuador for the Free Trade Agreement of the Americas (FTAA) began in May 2004,<sup>164</sup> concerns about the lack of labor rights enforcement in

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157. *Id.*

158. *Id.* art. 21.13-21.14.

159. *Id.* art. 21.14.

160. *See generally id.* art. 17.

161. *Id.* art. 21.21.

162. *Id.*

163. *Id.*

164. *See United States and Colombia Conclude Free Trade Agreement, supra* note 11.

Colombia have been an obstacle to entering into a free trade area.<sup>165</sup> Aggressive pursuits of a free trade area with Colombia have been ongoing, and White House efforts to secure an agreement have been extreme.<sup>166</sup> The U.S. Labor Department is responsible for “block[ing] the release of reports that harshly criticized labor standards in the region.”<sup>167</sup> In 2006, efforts centered on passage of the FTAA were refocused to support a bilateral trade agreement with Colombia, and by February 2006, the USTR announced that a bilateral agreement was pending.<sup>168</sup> During a visit to the United States shortly after his election, Colombian President Alvaro Uribe met with President George W. Bush to discuss an agreement, with the caveat that the Colombian government agree to strengthen protection for labor unionists.<sup>169</sup>

As of May 2007, the potential for successful passage of the C-FTA looked promising.<sup>170</sup> By November of the same year, however, the debate over the Colombian free trade agreement was still at the forefront of a bipartisan debate in Congress and completing an agreement by the end of the year looked unlikely.<sup>171</sup> Despite voting for passage of other similar trade agreements in Latin America, Democrats were hesitant to support the C-FTA because of labor issues.<sup>172</sup>

#### A. *Pro-Agreement Arguments: More Trade Will Lead to More Rights*

Proponents of a free trade agreement with Colombia include various organizations and businesses.<sup>173</sup> An alliance of almost 800

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165. See Steven R. Weisman, *Trade Accords Reopens a Rift by Democrats*, N.Y. TIMES, Nov. 9, 2007, at A1 [hereinafter *Trade Accord Reopens a Rift by Democrats*].

166. See Forero, *supra* note 78.

167. *Id.*

168. See *A Dangerous Job in Colombia*, *supra* note 23.

169. *Id.*

170. See *Getting to a Colombia Trade Deal*, *supra* note 48.

171. See *Trade Accord Reopens a Rift by Democrats*, *supra* note 165.

172. See *id.*

173. See Tory Newmyer & Kate Ackley, *Puttin' on the Ritz*, ROLL CALL, Feb. 11, 2008, available at [http://www.rollcall.com/issues/53\\_92/kfiles/22026-1.html](http://www.rollcall.com/issues/53_92/kfiles/22026-1.html). The Boeing Co., FedEx Corp., Wal-Mart Stores, Inc., and the U.S. Chamber of



organizations, known as the Latin American Trade Coalition (LATC), showed its support for the C-FTA by pushing lawmakers towards an agreement.<sup>174</sup> The LATC advocates that the agreement supports U.S. policy goals and benefits domestic agriculture, industries, and the work force.<sup>175</sup> According to the LATC, a free trade region with Colombia would encourage protection of labor unionists and economic growth.<sup>176</sup>

A free trade agreement with Colombia would lend strength to the Colombian government by protecting and developing the perceived progression the nation has made to suppress violence against unionists.<sup>177</sup> Advocates of the C-FTA argue that assassinations of unionists have decreased in the past year, resulting in almost a seventy-five percent reduction in murders since Uribe took office.<sup>178</sup> Supporters indicate that conditions are still improving, and human rights violations and violent attacks on unionists and their families are continuing to decline.<sup>179</sup> Leaving Colombia without the option to trade with the United States will make protecting human rights more challenging. As the Colombian government attempts to dismantle paramilitary groups, displaced soldiers and instability in the region could trigger a resurgence of violent activity.<sup>180</sup> The C-FTA proponents argue that minimizing trade barriers supports the Colombian government and results in increased job opportunities and other work for displaced paramilitaries,<sup>181</sup> therefore decreasing the likelihood that soldiers will again resort to violence.

Proponents of the C-FTA blame Democratic opposition for failure to codify an agreement by perpetuating false assessments of labor

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Commerce were among the businesses that supported a U.S.-Colombia trade agreement. *Id.*

174. Peter Cohn, *Business, Labor Step Up Efforts on Colombia Agreement*, CONGRESS DAILY, Feb. 8, 2008.

175. See Newmyer & Ackley, *supra* note 173; see also Cohn, *supra* note 174.

176. See Cohn, *supra* note 174.

177. See Juan C. Zapata, Op-Ed., *Trade Pact Would Benefit All Sides*, S. FLA. SUN-SENTINEL, Nov. 5, 2007, at 29A.

178. See Cohn, *supra* note 174. See also Romero & Gonzalez, *supra* note 55.

179. See Zapata, *supra* note 177.

180. See *id.*

181. See *id.*

conditions in Colombia.<sup>182</sup> An article featured in a Florida newspaper accuses Democrats of “com[ing] together to launch an underhanded campaign of misinformation, political threats and personal attacks on President Alvaro Uribe.”<sup>183</sup> In responses to request by Democrats, Colombia agreed to include more labor standards, yet a resolution has not been achieved.<sup>184</sup>

### *B. Anti-Agreement Arguments: No Trade Without Rights*

Led by labor unions, opposition to a free trade agreement originates from the unrelenting and prolonged violence against Colombians who attempt to protect their rights as workers.<sup>185</sup> The concern stems from the perception that the free trade agreement, as written, does not incorporate procedures that would be effective in Colombia.<sup>186</sup> Linda Chavez-Thompson, Executive Vice-President of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), indicated that before the concept of an agreement can even be considered, improving current conditions to create protections for workers attempting to associate must occur.<sup>187</sup> Whereas supporters of the C-FTA indicate decreased violence in the region signifies conditions in Colombia are improving and a trade agreement is appropriate,<sup>188</sup> opponents disagree. Along with the AFL-CIO, the United States Labor Education in the Americas Project reported that forty more people were assassinated as a result of their union activity in 2007,<sup>189</sup> a stark contrast to the perception of an improvement.

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182. *See id.*

183. *Id.*

184. *Id.*

185. Cohn, *supra* note 174.

186. *See id.* (“Colombia must address this life-and-death crisis effectively before we can even begin discussion of a trade agreement.” (quoting Linda Chavez-Thompson, AFL-CIO Executive Vice-President)). *See also* LAC REPORT, *supra* note 101.

187. *See* Cohn, *supra* note 174.

188. *Id.*

189. *Id.* Cf. Romero & Gonzalez, *supra* note 55 (stating that thirty-nine members were killed in 2007, but that “400 union members have been killed since 2002”).

The LACTNTP, one of the most diverse Congressional committees, submitted a report to the President, Congress, and the USTR in October 2006 outlining recommendations for engaging in a free trade area with Colombia.<sup>190</sup> The LACTNTP advised against signing the agreement.<sup>191</sup>

The labor provisions of the Colombia FTA, as with all of the other FTAs negotiated by the Bush Administration, will not protect the fundamental human rights of workers in either country. Rather, the provisions represent a big step backwards from the Jordan FTA and our unilateral trade preference programs, including the Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (as amended by the Andean Trade Promotion and Drug Eradication Act), which currently apply to Colombia. The complete lack of effective measures is particularly troubling given the well-documented violations of trade union rights in Colombia, up to and including the torture and murder of trade unionists by state actors or paramilitary groups that enjoy, at the very least, the tacit support of the [Colombian] military.<sup>192</sup>

The LACTNTP report analogized the provisions in the C-FTA to those in NAFTA, “which has cost the [United States] more than one million jobs, allowed violations of core labor standards to continue, and resulted in numerous challenges to laws and regulations designed to protect the public interest.”<sup>193</sup> Opponents of the agreement fear its passage will result in the same problems plaguing laborers in existing free trade regions.<sup>194</sup>

#### V. MODIFYING FREE TRADE AGREEMENTS TO IMPROVE LABOR PROTECTIONS

As businesses continue to grow globally, so does the need for international trade agreements to govern these international

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190. LAC REPORT, *supra* note 101.

191. *See id.* at 3.

192. *Id.*

193. LAC REPORT, *supra* note 101, at 5.

194. *Id.* at 7.

transactions.<sup>195</sup> The Bipartisan Trade Promotion Authority Act of 2002 (BTPAA),<sup>196</sup> eliminates some of the obstacles to creating a free trade area by authorizing the President to enter into bilateral and regional trade agreements requiring “only an up or down vote without amendment from both houses of Congress.”<sup>197</sup> Proponents of the BTPAA argue that new agreements provide the opportunity for “effective enforcement of labor rights and the creation of a viable labor relations system [that] would improve business productivity and national economic performance.”<sup>198</sup> The BTPAA recognizes that “[t]rade is critical to the economic growth and strength of the United States and to its leadership in the world. Stable trading relationships promote security and prosperity.”<sup>199</sup>

By decreasing political obstacles to presidential negotiation of free trade agreements, the BTPAA<sup>200</sup> makes labor provisions a priority when negotiating agreements pursuant to this authority. The BTPAA sets labor goals akin to those present in most trade agreements, and includes the same provisions against forced labor, protecting union related activity, and promoting health and safety.<sup>201</sup> One of the BTPAA’s “principal negotiating objectives” is to “strengthen the capacity of [the] United States trading partners to promote respect for

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195. See generally Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801-13 (2002).

196. *Id.*

197. Kolben, *supra* note 10, at 219. The BTPAA provides the President authority that is “commonly known as ‘fast track.’” *Id.*

198. *Id.* at 207. For an in-depth analysis of the impact of the BTPAA on worker rights provisions in free trade agreements, see Carol Pier, *Workers’ Rights Provisions in Fast Track Authority, 1974-2007: An Historical Perspective and Current Analysis*, 13 IND. J. GLOBAL LEGAL STUD. 77 (2006).

199. Bipartisan Trade Promotion Authority Act § 3801(b)(1) (2002).

200. *Id.*

201. See Bipartisan Trade Promotion Authority Act § 3813. The core labor standards for purposes of the agreement are:

- (A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

*Id.*

[the] core labor standards,”<sup>202</sup> and the provisions allow for integration of the types of mechanisms existing in the NAALC that have failed laborers in the past.<sup>203</sup>

Utilizing free trade agreements as part of a plan to protect laborers in other countries through more comprehensive protections is feasible.<sup>204</sup> Policy modification, achieved by deviating from standard labor chapters historically included in international trade agreements, is practical<sup>205</sup> and imperative to stimulate improvement of labor rights protections in countries like Colombia. Requiring integration of more powerful dispute mechanisms accessible to laborers into agreements makes this issue a focus during negotiations, and encourages innovative solutions and creative problem solving.<sup>206</sup> Although many operating trade agreements are devoid of functional enforcement systems to protect workers, a free trade agreement with modified provisions is an essential part of any plan targeted at improving international labor standards.<sup>207</sup>

#### *A. Serious Problems with the Colombian Free Trade Agreement*

Vague provisions that have failed to provide enforceable remedies for workers in previous agreements permeate the C-FTA. Proliferation of unclear language and non-specific requirements throughout, paired with the noticeable absence of a process for private party complaints,

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202. *Id.* § 3802(b)(11)(C); see also MERRITT R. BLAKESLEE & CARLOS A. GARCIA, *THE LANGUAGE OF TRADE* (3d ed. 2000), available at <http://usinfo.state.gov/products/pubs/trade> (defining core labor standards as “human rights agreed by the International Labor Organization and other groups to include freedom of association, the right to organize and bargain collectively, a prohibition on forced labor, a prohibition on discrimination in employment, and a prohibition on exploitive child labor.”).

203. See generally Barry LaSala, *NAFTA and Worker Rights: An Analysis of the Labor Side Accord After Five Years of Operation and Suggested Improvements*, 16 *LAB. LAW.* 319, 320 (2001) (discussing the failures of the agreement to protect workers).

204. See generally Kolben, *supra* note 10, at 203, 209 (discussing the theory of “trade and labor linkage” which includes multiple options for improving labor standards abroad via free trade agreements).

205. See generally Kolben, *supra* note 10, at 209, 224.

206. See *Developments in the Law*, *supra* note 86, at 2202-03.

207. See Kolben, *supra* note 10, at 224.

renders the agreement ineffective protect worker rights. As drafted,<sup>208</sup> both the labor and dispute resolution chapters are devoid of any provision for citizens to submit complaints of violations of the fundamental labor rights delineated in the agreement.<sup>209</sup> This is particularly problematic in Colombia, where workers are already suffering because of government failure to support worker rights.

### *1. Unenforceable Procedural Guarantees*

Although the labor chapter of the C-FTA includes a section with procedural guarantees for labor dispute management, ambiguity hinders the ability of these procedural assurances to be enforced, and the progressive concepts, such as public awareness,<sup>210</sup> have no schedule for enactment. There are multiple occurrences of imprecise language that compromise the functionality of the agreement. Chapter 17 identifies a group of fundamental labor rights that are applicable to all procedures in the chapter.<sup>211</sup> In the first guarantee, both nations are obligated to provide “that persons with a legally recognized interest . . . have appropriate access to tribunals.”<sup>212</sup> However, the agreement neglects to define what qualifies as appropriate access. The review process also poses interpretation problems. Each nation is required to provide access to a review of a tribunal decision “as appropriate,”<sup>213</sup> yet there is no instruction regarding how a review is to be conducted or identification of who manages the review process. Lack of specificity allows each nation to determine whether access to its tribunals is appropriate, increasing the likelihood for inconsistencies and confusion. The agreement does not provide any standard for the tribunal. Individuals are promised “access to tribunals for the enforcement of the Party’s labor laws,”<sup>214</sup> but, in Colombia, attempts to utilize this provision could be perilous for unionists who have been historically abused for attempting to assert labor rights.

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208. See generally C-FTA, *supra* note 14.

209. *Id.* art. 17.3.

210. *Id.* art. 17.4.

211. *Id.* art. 17.2.

212. *Id.* art. 17.4.

213. *Id.*

214. *Id.*

Each nation can determine whether the tribunal is a “quasi-judicial, judicial, or labor tribunal”<sup>215</sup> with no requirement of consistency between nations. There are also no qualifications for panel members.<sup>216</sup> The influence the paramilitary groups have over the Colombian government could also transfer to the government-managed panels, rendering this provision ineffective to protect workers.

Each nation is responsible for conducting “fair, equitable, and transparent” public tribunal proceedings that “comply with due process of law.”<sup>217</sup> However, there are no guidelines in the agreement to help nations ensure that a procedure meets due process requirements. The potential for public proceedings could aid in improving labor rights in Colombia, but unfortunately the tribunal can close proceedings “where administration of justice otherwise requires.”<sup>218</sup> Again, substantial evidence of a relationship between Colombian officials and the paramilitary<sup>219</sup> should generate concern about the potential abuse of these types of provisions. However, clarification of terms would not be sufficient to resurrect this chapter, because there is no enforcement mechanism for any of the provisions. Even if a failure to provide one of the procedural guarantees is identified, there is no recourse for individuals.

The final guarantee in Chapter 17 is the commitment of each nation to “promote public awareness of its labor laws” by “ensuring the availability of public information related to . . . enforcement and compliance procedures” and “encouraging education of the public.”<sup>220</sup> However, without timelines or plans for implementation of the public awareness provision of the agreement, there is no guarantee it will be executed.

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215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *See supra* note 67 and accompanying text.

220. C-FTA, *supra* note 14, art. 17.4.

## 2. *Absence of Dispute Resolution Process for Workers*

The only evidence that drafters considered that a Party other than Colombia or the United States might have a complaint arising pursuant to the free trade agreement in the C-FTA labor chapter is the guarantee that “persons with a legally recognized interest” must have access to tribunals.<sup>221</sup> Beyond the access to tribunals as mentioned in the labor chapter, there are no additional instructions about the private party complaint process. It is unclear whether separate tribunals are necessary to address issues brought by interested persons, or if these types of complainants follow the dispute process in the labor chapter.

According to the agreement, the first step of the dispute resolution process in the labor chapter begins with the CLCs.<sup>222</sup> The consultation is a non-facilitated negotiation designed for participation by member nations and encourages resolution of the issue between Parties to the agreement, but does not account for private party disputes.<sup>223</sup> The most obvious evidence of this is the consistent use of the term “Party.”<sup>224</sup> Use of the term Party as a proper noun in the context of the agreement exclusively refers to Colombia and the United States. This is particularly prevalent in the articles of the labor chapter.<sup>225</sup> The use of the term Party in the description of the consultation process and the procedures that follow the agreement tend to exclude non-Party participants, but no other access to dispute procedures exist in the agreement. Moreover, because completion of the CLCs is a prerequisite to obtaining access to other dispute processes, private party complaints must begin with the CLCs.<sup>226</sup>

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221. *Id.*

222. *Id.* art. 17.7.

223. *See id.*

224. *See generally id.* Throughout the text of the agreement, there are references to the Parties. In the text of the agreement, “Parties” refer to the nations party to the agreement: Colombia and the United States. *Id.*

225. *Id.* art. 17.

226. *See id.* art. 17.7.

If the consulting Parties fail to resolve the matter . . . a consulting Party may request that the Council be convened to consider the matter . . . . No Party may have recourse to dispute settlement under this Agreement for a matter arising under this Chapter without first seeking to resolve the matter in accordance with this Article.



In order to initiate the CLCs, a complaint is filed with a Party and the CLCs must begin “promptly after delivery of the request.”<sup>227</sup> However, with no enforcement mechanism or indication of what constitutes prompt action, an individual is susceptible to intentional delay of initiation of the process by a Party. Adding to this problem is the absence of recourse for delaying the CLC initiation. This is particularly disconcerting for unionists in Colombia where failure of the Colombian government to enforce labor laws is common.<sup>228</sup> This possibility of intentional delay poses another problem: access to other dispute resolution processes is only available after consultations have occurred,<sup>229</sup> and any postponement of a consultation has the effect of impeding the progress of a complaint.

Once the CLCs are convened, individual parties may be subject to other disadvantages because they may not have access to the same resources available to Colombia and the United States. The consultations permit Parties to confer with “any person or body they deem appropriate” during the process, with no limitations on cost, qualifications for experts, or requirement of equal access to the results of consultations or persons consulted.<sup>230</sup> This provides further evidence that this section was not created with individual complainants in mind, and results in an unfair advantage for nations.

Finally, the CLCs only provide the opportunity for participating Parties to “arrive at a mutually satisfactory resolution”<sup>231</sup> of the conflict. Although the CLCs might be appropriate for disputes arising between Colombia and United States, this negotiation tactic is not appropriate when private parties are involved.

Subsequent steps in the labor chapter and dispute resolution chapters of the agreement pose similar problems for individual workers attempting to resolve a labor issue pursuant to the trade agreement. Assurances of speedy access to more detailed processes in Chapter 21 are undermined by language that leaves broad discretion

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*Id.* “A consulting Party may also request in writing a meeting of the Commission where consultations have been held pursuant to Article 17.7 . . .” *Id.* art. 21.5.

227. *Id.* art. 17.7.

228. *See, e.g., Trade Unionists Under Attack, supra* note 30.

229. *See supra* text accompanying note 226 and p. 190.

230. C-FTA, *supra* note 14, art. 17.7.

231. *Id.*

with the tribunal. For example, if no resolution is achieved through the CLCs and intervention of the LAC is insufficient, the dispute can proceed to the FTC.<sup>232</sup> The FTC is compelled to meet within ten days of the request, “[u]nless it decides otherwise.”<sup>233</sup>

The dispute management chapter of the agreement includes a provision that on its surface may seem like a viable option for non-Party grievances. The Alternative Dispute Resolution Article of the agreement provides that both nations must “encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.”<sup>234</sup> Settlement of disputes under this article only applies to “international commercial” conflicts between “private parties.”<sup>235</sup> This naturally excludes complaints that do not arise from an international commercial transaction, but also eliminates applicability when both parties are not private, such as a dispute between an individual and a member nation.

### *B. Augmenting the Columbian Free Trade Agreement to Improve Protections*

The C-FTA is in need of significant revisions. If implemented as written, unionists will not be provided any protection in the agreement. Although modification of the agreement could be a valuable tool to stimulate change in Colombia by providing protections and processes that are viable, this alone is insufficient to remedy the problems facing Colombian workers.<sup>236</sup>

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232. *Id.* art. 21.5.

233. *Id.*

234. *Id.* art. 21.21.

235. C-FTA, *supra* note 14, art. 21.21.

236. Changing the text of free trade agreements alone is insufficient to resolve the problem of labor rights violations internationally. Other options for improving labor conditions abroad, coupled with increased protections in free trade agreements, will result in a more comprehensive solution to labor concerns. Although alternatives to free trade agreement modification are beyond the scope of this comment, there are various examples of proposals for improving labor rights protections. *See, e.g.,* Kolben, *supra* note 10 (discussing the failure of free trade agreements to provide adequate protection for laborers abroad, proposing private regulation as a potential option for human rights protections); *see also* Annette Burkeen, *Private Ordering and Institutional Choice: Defining the Role of*

### 1. Clarify Ambiguity

The deficiency of clear terms in the C-FTA makes the prospect of enforcing the agreement daunting. Providing more detailed requirements and standards throughout the labor and dispute resolution chapters would result in a more operable agreement. For example, the section defining the role of the tribunal could be improved by identifying core qualifications or standards such as geographic location requirements, tribunal physical availability, number of tribunal members, and access to the tribunal through other channels of communication. Similarly, establishment of credentials for tribunal members is necessary to add validity to the dispute process. Even minimal requirements setting education and relevant expertise standards for panel members, coupled with language considerations, would help facilitate a more effective and fair process. The establishment of standards and definitional terms throughout the agreement would minimize the likelihood of abuse and confusion resulting from ambiguity, and would help to create consistency between tribunals. The C-FTA should include a tribunal or panel to handle procedural issues under the agreement. This entity would be responsible for monitoring the dispute resolution process to protect the procedural guarantees. Inclusion of complaint procedure to review alleged procedural failures is another safeguard that would ensure that the standards of the agreement are enforced.

### 2. Create Process for Citizen Dispute Submissions

The C-FTA has no terms governing a dispute process for laborers in Colombia. Keeping in mind the dangerous conditions for laborers attempting to exercise their rights to unionize under existing Colombian law,<sup>237</sup> it is especially important to provide recourse under the free trade agreement. Allowing private persons to lodge

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*Multinational Corporations in Promoting Global Labor Standards*, 6 WASH. U. GLOBAL STUD. L. REV. 205 (2007) (discussing the role of multinational corporations in creating and maintaining international labor standards); Christian Barry & Sanjay G. Reddy, *International Trade and Labor Standards: A Proposal for Linkage*, 39 CORNELL INT'L L.J. 545, 546-47 (2006) (discussing the potential for linking labor standards to the right to trade internationally and the implications for the international business community).

237. See *supra* Part II.A-C.

complaints under this agreement and establishing a process to address such complaints will make the enforcement of labor laws more effective. This adjustment in terms of the C-FTA will allow the United States to play a role in promoting labor rights enforcement in Colombia. With the significant incidents of violence against labor unionists in Colombia, any dispute process designed to provide for citizen complaints should include a few key components. Unionists must be able to utilize the dispute resolution processes without fear of retaliation. Permitting anonymous submissions or providing protection to complainants are possible ways to shield unionists from harm. Additionally, it is important to ensure that complaint proceedings are equitable; under the current trade agreement nations are free to consult any experts they want in dispute proceedings,<sup>238</sup> and citizen complainants should be afforded that same option.

## VI. CONCLUSION

Engaging in liberalized trade with Colombia creates a new connection between the United States and Colombian laborers. Once ensconced in a free trade region with Colombia, the role of the United States cannot be that of a detached observer. Agreeing to create a special trade relationship with Colombia will create greater accountability for the United States with regards to labor-related violence in Colombia.<sup>239</sup> In the context of the historically violent oppression of labor unionists in Colombia and the reoccurring failures of free trade agreements to protect laborers in the nations of our free trade partners, changes to the C-FTA are essential.

It is not the concept of the free trade agreement with Colombia that is flawed, but the guidelines provided by the C-FTA to govern trade transactions. Additionally, changing the C-FTA is not a complete resolution to the labor rights violations occurring in Colombia. However, adjustments to the C-FTA signify that the United States recognizes the perilous climate for workers in Colombia, and denotes a commitment to take a more active role in supporting enforcement of labor rights. The impact of the C-FTA extends beyond the implications of how it may fail workers in Colombia. Making

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238. C-FTA, *supra* note 14, art. 17.7.

239. *Id.* art. 17.

alterations to the C-FTA to increase the strength of the agreement's worker rights protections may change the provisions in future trade agreements. Starting with free trade agreements, the United States has the ability to effectuate positive social change within the nations of its free trade partners.

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