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**“Market-driven” promotion of international labour  
standards in Southeast-Asia – the corporatization of  
social justice<sup>1</sup>**

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## 1. Introduction

Labour must never be made a commodity, lest “working poverty” will ultimately undermine the process of wealth creation that serves both as cause and consequence of political stability. This insight is at least more than 150 years old, but it took the international community an economic and political cataclysm to embed it in a global institution, and another one to embed it in the public policies deemed necessary to make economies more interdependent and to fuel the development of nations gaining or regaining sovereignty.

Today, the free interplay of supply and demand – colloquially termed “the market” – is almost universally accepted as the most efficient method for driving economic production worldwide. Labour being a production factor, efficiency is equally served by having it allocated according to market principles, i.e. there where its productivity and return on investment are the highest, so that both profits and wages can be maximized. To the extent that labour markets “fail” to subsume costs to society, public authorities may intervene to allocate liabilities or – better still – spread potential costs over all those likely to incur them through social insurance. Since not all individual employers are likely to accept the cost to society – not to mention the worker and his or her family – of productivity loss and continued medical care resulting from a work-related accident, public authorities will legislate to impose employment injury benefit schemes. The State may even foreclose markets to prevent low-productivity outcomes in the short term, and boost high – or at least sustained - productivity in the longer term. We may be able to find a 10-year old girl to glue our running shoes at half the wage we would have to pay her father, but if she is able to go to regularly attend school for 5 more years instead a full-time job, she may be able to earn 3 times her father’s current labour market value – or at least acquire the relevant literacy to discern toxic from non-toxic glue.

This “case for labour standards” is widely accepted, if not always vigorously pursued, within the confines of national boundaries. Globalization, however, has made it possible to locate or, indeed, relocate production processes and public authorities are less inclined or less capable to allocate liability for the whole range of associated costs to society (labour, environmental etc.). Liberalization of international trade and investment creates at least a potential for stiffer competition between different regimes for regulating the labour market. Hence, one might expect States to protect their regulatory regimes whenever they undertake commitments to provide greater access to their markets for goods (or services) produced under different regulatory regimes, thereby providing domestic and foreign investors a potential incentive to locate production in countries offering more relaxed rules.

Even if one only considers labour market regulation, the present line of reasoning raises two questions. First, is there evidence to support the assertion that lower labour standards attract foreign investment? Secondly, are States applying “social clauses”, i.e. making their commitments to international liberalize trade and investment conditional upon the observance of labour standards?

Both these questions continue to swell an already impressive body of institutional debate and academic research. In recent years, however, a third question has enriched the debate: can markets themselves

make up for “government failure” to correctly allocate the social costs of economic production? The traditional “governance” methods relying on public international law to gradually improve labour standards around the world are increasingly complemented by “market-driven” or “private” initiatives. In essence, these are corporate measures to weed substandard labour practices out of global supply chains, or also to determine the stability of emerging portfolio investment destinations. This “privatization of social justice” raises questions of the sustainability and political and social legitimacy of the measures used to promote compliance with internationally recognized labour standards.

This paper recapitulates the evolution of the “social clause” to date, and examines the gradual diversification of “governance” methods to promote international labour standards with “market-driven” initiatives. It briefly analyzes the experience with three fairly recent initiatives for corporate social responsibility in export-led fast-growth economies in Southeast-Asia: the “Thai Labour Standards” mechanism, which promotes voluntary compliance of Thai exporting companies with a set of labour standards articulated outside the traditional normative frameworks; the “Better Factories Cambodia” initiative, which started out as an ILO project to monitor working conditions in Cambodia’s nascent garment industry but has grown into a multi-stakeholder programme rooting Cambodia’s competitive edge in compliance with international labour standards and national labour law; and Viet Nam’s experience with a World Bank project promoting company codes of conduct. The paper argues that while “market-driven” initiatives play a crucial role in stimulating shopfloor awareness and action on labour standards, they are no long-term replacement for the traditional labour market institutions such as labour law, collective bargaining, trade unions or labour inspection services.

## 2. Social clause – the multilateral dimension

The first genuine attempt to improve labour standards on a global scale, and, as part of that effort, protect these standards against predatory competition occurred in 1919. As part of the post-World-War-I reconstruction, the international community decided to establish a multilateral mechanism that would issue international legislation with a view to shielding certain humanitarian requirements (e.g. protecting children from hard work in industry; protecting women against night work; protecting all workers against exploitative working hours in industry etc.) from international competition).<sup>4</sup> Although the new “International Labour Organization” did not expressly intend to impact upon international trade and investment flows, the Preamble to its Constitution devoted a special paragraph to considering that “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries”.

World War II taught a number of hard lessons. The “conditions of labour ... involving such injustice, hardship and privation to large numbers of people”, which the ILO Constitution sought to improve, did not merely result from short-sighted employers’ exploitative intents, but also from fundamental shortcomings in the economic environment that destroyed job opportunities, and, indeed, from fundamental shortcomings in the political environment that lead to human rights abuses. Mere harmonization of labour

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<sup>4</sup> Mahaim E., *The Historical and Social Importance of International Labour Legislation* in Shotwell J., (ed) *The Origins of the International Labour Organization*, Columbia University Press, 1934 p.5

standards among competing nations would not mend these shortcomings, and, moreover, would soon prove to present an insurmountable challenge with the rapidly growing number of sovereign nations and, concurrently, the rapidly widening levels of development.

The ILO's Declaration of Philadelphia, adopted in 1944 and annexed to the Constitution of 1919, incorporated these lessons by asserting that social justice cannot be achieved without a fundamental respect for human dignity,<sup>5</sup> nor proactive programmes to create conducive conditions,<sup>6</sup> in particular full employment and raising standards of living.<sup>7</sup> The Declaration expressly acknowledged that "national and international policies and measures, in particular those of an economic and financial character" were by no means irrelevant to the pursuit of social justice.<sup>8</sup> It noted in particular that a "high and steady volume of international trade" could contribute to a "fuller and broader utilization of the world's productive resources necessary for the achievement of the objectives set forth in this Declaration".<sup>9</sup>

And so, it was not at all surprising when the "Havana Charter" for an International Trade Organization set about its ambitious plans to expand employment through expanding trade, nor when its Article 7 minced few words providing that "unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory".<sup>10</sup> The author(s) have documented elsewhere how these plans never materialized and how, up until today, efforts to improve labour standards subsequently remained politically divorced from multilateral trade liberalization efforts.<sup>11</sup>

Political and social forces have not given up all multilateral attempts to make further liberalization of international trade and investment conditional upon the observance of certain international labour standards. The ILO Declaration of 1998 had stressed "that labour standards should not be used for protectionist trade purposes, and that ... the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up".<sup>12</sup> This provision responded to fears from developing countries that the developed world was not so much keen to promote fundamental labour standards throughout the world for the sake of these standards, but rather to reduce the developing economies' low-wage advantage, and so protect their own industries.<sup>13</sup>

The WTO Doha Ministerial Declaration reaffirmed the status-quo reached in the Singapore Ministerial Declaration of 1996 and the ILO Declaration of 1998, and took note of work under way in the International

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<sup>5</sup> Declaration of Philadelphia, II (a)

<sup>6</sup> Declaration of Philadelphia, II (b)

<sup>7</sup> Declaration of Philadelphia, III (a)

<sup>8</sup> Declaration of Philadelphia, II (c)

<sup>9</sup> Declaration of Philadelphia, IV

<sup>10</sup> For the full text of the "Havana Charter", see <http://www.worldtradelaw.net/misc/havana.pdf>

<sup>11</sup> De Meyer Tim, 'ILO Fundamental Principles and Rights at Work in Asia Pacific: Emerging Standards for Emerging Markets?' in Cuyvers L. (ed) ;*Globalisation and Social Development: European and Southeast Asian Evidence*, Edward Elgar Publishing Ltd. Glos, 2001 at 133–170.

<sup>12</sup> ILO Declaration on Fundamental Principles and Rights at Work, para. 5

<sup>13</sup> *Trade and Labour Standards – A difficult issue for many WTO member Governments*, Briefing Note for the Doha WTO Ministerial 2001, [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/brief\\_e/brief16\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief16_e.htm)

Labour Organization (ILO) on the social dimension of globalization.<sup>14</sup> The ILO-backed World Commission on the Social Dimension of Globalization published its conclusions in 2004, formally noting that the Declaration's commitment not to call into question the comparative advantage of low-wage countries implied "of course, ... that no country should achieve or maintain comparative advantage based on ignorance of, or deliberate violations of, core labour standards."<sup>15</sup>

This implication, while being presented as a matter of course, articulates a significant dimension of the link between international trade and labour standards. The 1998 Declaration's line of reasoning could be read as follows. Developing countries have lower wages because of lower productivity, lower cost-of-living and a relatively more abundant labour supply. If that gives them a comparative advantage producing and exporting labour-intensive goods, then no labour standards – fundamental or other ones – should alter the equation to the detriment of developing countries. The statement in the World Commission's report implies that the reasoning does not simply end there, but that the conclusion depends on a further consideration. The statement does not take issue with a country's comparative advantage of lower wages because of lower productivity. However, if a country suppresses collective bargaining or makes only lukewarm efforts to promote this market-based wage-setting method, and wages fail to keep pace with productivity improvements as a result, then the country is seeking its comparative advantage in a violation of a fundamental principle, so that its comparative advantage may be called into question.

Interestingly, the concept has now been formally enshrined in a new ILO Declaration, adopted in June 2008.<sup>16</sup> The Declaration's vision is that the main development challenge in these times of globalization is for the world to create decent work for all. Creating decent work is not just about offering men and women hand-to-mouth livelihoods, but also the choice, leverage and platforms to "market" their work or shape economic decisions affecting their lives, and a degree of protection against loss of income. Much in the Declaration is about stressing the indivisibility of "decent work", and so the equal importance of all aspects "decent work"<sup>17</sup>, but the Declaration does go out of its way "noting:

- that freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives; and
- that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage."<sup>18</sup>

Time will tell if this apparent tightening of language will have important consequences for countries in East Asia, where, for example, rights relating to freedom of association and collective bargaining are

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<sup>14</sup> WTO Ministerial Conference Fourth Session, Doha, 9 - 14 November 2001, WT/MIN(01)/DEC/W/1 (Ministerial Declaration), para. 8

<sup>15</sup> World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities For All*, ILO, Geneva, 2004, para. 421

<sup>16</sup> Declaration on Social Justice for a Fair Globalization, adopted by the International Labour Conference on 10 June 2008 ([http://www.ilo.org/public/english/bureau/dgo/download/dg\\_announce\\_en.pdf](http://www.ilo.org/public/english/bureau/dgo/download/dg_announce_en.pdf)).

<sup>17</sup> These aspects are commonly broken down into "four strategic objectives", i.e. promoting employment; developing and enhancing social protection measures; promoting social dialogue and tripartism; and respecting, promoting and realizing fundamental principles and rights at work.

<sup>18</sup> Declaration on Social Justice for a Fair Globalization, I A (iv).

formally recognized for the most part, but not necessarily widely realized. Most, if not all of the national Constitutions of ASEAN member States, for example, formally recognize freedom of association as a fundamental human right, yet only 4 out of 10 have ratified C. 87, while 5 out of 10 have ratified C. 98.<sup>19</sup>

Whatever the future implications, the position appears consistent with a steadily growing body of literature that finds no significant correlation between lowering fundamental labour standards and the ability to attract foreign direct investment. In 2002, Kucera summarized the findings of prior studies of the effects on FDI of labour costs, unions, worker rights, and political and social stability as follows:

The evidence of the effects of labour costs on FDI is mixed, but tends to suggest that higher labour costs negatively affect FDI. ... This is more clearly the case for the two studies that directly control for labour productivity. As to the effects of the presence of unions, the evidence is mixed and inconclusive. ... Regarding worker rights, studies suggest that FDI tends to be greater in countries with stronger worker rights. ... As with worker rights, studies addressing political and social stability suggest that greater stability positively affects FDI.<sup>20</sup>

Already in 2001, Kucera had pointed to the results of a survey among managers of transnational corporations, suggesting that political and social stability and quality of labour – both factors positively correlating with respect for workers' rights – ranked significantly higher among FDI location criteria than the cost of labour.<sup>21</sup>

In one of the first attempts to provide statistical evidence on the relationship between export performance and substandard social conditions, one of the authors used social development indicators relating to the freedom of association, collective bargaining rights, the situation of child labour and gender discrimination, respectively, but controlling and adjusting for the countries' implementation capacity. The correlation found for the period 1990-1995 was negative but not significant which seemed to indicate that, at most, countries might marginally improve their competitiveness by reverting to below capacity social policies<sup>22</sup>.

In 2007, the ILO and WTO secretariats jointly reviewed the available literature on the various correlations between trade and employment with a view to stimulating research in those areas for which there are gaps. The review found little academic support for the view that a high level of unionization and collective bargaining ("FACB rights") leads to an excessive rise in labour costs or to labour market rigidities.<sup>23</sup> Moreover, should governments perceive a short-term gain in labour costs resulting from lax enforcement of fundamental labour standards such as FACB rights, that gain is likely to be off-set in the longer term by

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<sup>19</sup> This is even without taking account of the persistent and sometimes serious issues of application by countries that have ratified either of these Conventions.

<sup>20</sup> David Kucera, *Core labour standards and foreign direct investment*, International Labour Review, Vol. 141 (2002), No. 1-2, 33

<sup>21</sup> David Kucera, *The effects of core workers rights on labour costs and foreign direct investment: Evaluating the "conventional wisdom"*, International Institute for Labour Studies Discussion Paper No. 130, ILO, Geneva, 3.

<sup>22</sup> Ludo Cuyvers & Glenn Rayp: 'Social Dumping and Social Competition in the Global Economy', in Cuyvers, L. & Kerremans, B. (ed), *The International Social Issue*, Intersentia, Antwerp-Groningen, 1998, 32-33.

<sup>23</sup> WTO & ILO (Marion Jansen and Eddy Lee), *Trade And Employment - Challenges For Policy Research*, A joint study of the International Labour Office and the Secretariat of the World Trade Organization, WTO, Geneva, 2007, 65.

lower human capital accumulation, less productive labour relations fostered by social dialogue and less political stability.<sup>24</sup> One study found a positive correlation between FACB rights and export performance:

The paper finds robust relationships between stronger FACB rights and higher total manufacturing exports as well as between stronger democracy and higher total exports, total manufacturing exports and labour-intensive manufacturing exports. The paper finds no robust relationship between FACB rights and labour-intensive manufacturing exports. These results suggest that FACB rights do not harm the export potential of developing countries and may even stimulate it.<sup>25</sup>

Another study found, conversely, that “countries that are more open to trade have fewer rights violations than more closed ones”.<sup>26</sup> The study also noted that the findings for these “process-related standards” did not necessarily apply to “outcome-related standards” (e.g. wage levels). This more cautious finding as regards conditions of work is in turn echoed in a recent OECD conference paper concluding:

“[T]he evidence indicates that MNEs tend to promote higher pay in the countries in which they operate. The positive wage effect tends to be concentrated among workers that are directly employed by MNEs, but there also appears to be a small positive impact on wages in domestic firms participating in the supply chains established by MNEs. These effects are larger in developing than in developed countries, probably because the technology gap between foreign and domestic firms is larger in the former. The evidence about whether MNEs provide non-pay working conditions that are superior to those in domestic firms is more mixed. While working conditions in foreign firms tend to differ from those in comparable domestic firms, they do not necessarily improve following a foreign takeover.”<sup>27</sup>

Commentators of the “social clause” often fail to make the important distinction between “process-related standards” and “outcome-related standards”. One scholar, for example, opposes social clauses in bilateral trade agreements, partially because some of the standards that are invoked (freedom of association typically features amongst them) cannot legitimately lay claim to the universal support they are purported to have. He suggests that, while these standards are valuable, a longer-term strategy should be employed to pursue them, based “promoting rapid growth and spread of democracy”.<sup>28</sup> What tends to be overlooked in this line of argument is that the ability of trade unions and employers’ organizations to represent their members in labour market processes is not primarily an achievement per se, but a provider of democratic legitimacy to the public choices that are being made with respect to the direction and pace of economic growth itself.

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<sup>24</sup> Ritash Sarna, *The impact of core labour standards on Foreign Direct Investment in East Asia (Draft)*, The Japan Institute for Labour Policy and Training, Tokyo, October 2005.

<sup>25</sup> *Ibid.*, 66.

<sup>26</sup> *Ibid.*, 67. (Very) preliminary findings by Yiagadeesen Samy and Vivek H. Dehejia (*Trade and Labour Standards: A Review of the Theory and New Empirical Evidence*, Carleton University, 2007, 39) also suggest that “openness to trade has led to an improvement, not a worsening of (child labour) standards”.

<sup>27</sup> OECD, *The Impact Of Foreign Direct Investment On Wages And Working Conditions*, paper prepared for the OECD-ILO Conference On Corporate Social Responsibility Employment and Industrial Relations: Promoting Responsible Business Conduct in a Globalising Economy (23-24 June 2008, Paris, France)

<sup>28</sup> Arvind Panagariya, *Trade and Labour Standards: A Trade Economist’s View*, Integration & Trade, 2005.

### 3. Social Clause – the plurilateral (regional), bilateral and unilateral dimension

In sum, it would probably be fair to state that multilateral attempts at creating a social floor for globalization have not reached beyond promotional efforts to strengthen national capacity to govern labour markets; declaratory resolve that development is not sustainable without decent work for all; and, more recently, warnings that international competitive advantage must not be sought in violations of fundamental international labour standards. New multilateral rounds for the liberalization of international trade – most recently the Doha round - have stalled, but this has not dented the leverage of the world's major export markets. As a result, bilateral trade agreements and unilateral trade preferences are featuring “social clauses” to exert pressure on labour market governance in developing countries.

#### 3.1 United States

The United States has included labour rights provisions in its regional, bilateral and unilateral trade arrangements.

##### 3.1.1 Regional Arrangements

The first category of trade arrangements that include labour provisions are regional trade agreements the U.S. maintains with its trading partners. In this section, we review the two that have been enacted as of 2008.

###### 3.1.1.1 The North American Free Trade Agreement

In the North American Free Trade Agreement (NAFTA), there is a labour side agreement named the North American Agreement on Labour Cooperation (NAALC). Labour criteria were not included in the original negotiations for NAFTA. Neither Canada nor Mexico was originally prepared to open negotiations on a side agreement on labour issues, but this changed following the presidential elections in the US in 1992.<sup>29</sup>

The labour criteria in the NAALC include eleven: 1. freedom of association and protection of the right to organize, 2. the right to bargain collectively, 3. the right to strike, 4. prohibition of forced labour, 5. labour protections for children and young persons, 6. minimum employment standards, 7. elimination of employment discrimination, 8. equal pay for women and men, 9. prevention of occupational injuries and illnesses, 10. compensation in cases of occupational injuries and illnesses, 11. protection of migrant workers.<sup>30</sup> These are commonly referred to as labour law.<sup>31</sup> Only three of these principles can eventually give rise to a panel ruling that could recommend sanctions: Labour protections for children and young persons, minimum employment standards and prevention of occupational injuries and illnesses.<sup>32</sup>

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<sup>29</sup> Marley S. Weiss, *Labour Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin American, and Beyond*, 37 U.S.F.L.Rev.689, 693(2003).

<sup>30</sup> NAALC, Art. 49.

<sup>31</sup> *Ibid.*

<sup>32</sup> NAALC, Art. 27.

The NAALC does not actually set labour standards for the Free Trade Area but only features a commitment to “promote compliance with and effectively enforce its domestic labour law through appropriate government action”.<sup>33</sup> Unions in all these three countries have not generally been satisfied with the NAALC mechanism.<sup>34</sup>

### 3.1.1.2 The United States-Dominican Republic-Central America Free Trade Agreement (US-DR-CAFTA)

Negotiations for the US-Central America Free Trade Agreement ("CAFTA") were concluded in December 2003. The negotiations included the US, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.<sup>35</sup> The US-CAFTA was signed in May 2004, and the Dominican Republic became an additional party to it in August 2004. Since then, the agreement was officially renamed the “United States-Dominican Republic-Central America Free Trade Agreement” (US-DR-CAFTA).<sup>36</sup>

Chapter 16 of the United States-Dominican Republic-Central America Free Trade Agreement” (US-DR-CAFTA) sets out the Parties’ commitments and undertakings regarding trade-related labour rights. Its provisions are similar to those of the NAALC mechanism, those of other recent U.S. FTAs, including those with Jordan, Chile, Singapore, Australia, and Morocco:<sup>37</sup>

Art 16.1.2 ...each Party shall strive to ensure that its laws provide for labour standards consistent with the internationally recognized labour rights set forth in Article 16.8 and shall strive to improve those standards in that light....

...

Art16.2.2 ...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 labour rights referred to in Article 16.8 as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory....<sup>38</sup>

US-DR-CAFTA’s labour provisions do not require CAFTA countries to amend their labour laws to meet international standards. In fact, the agreement would even authorize CAFTA States to weaken those laws further in order to gain a trade advantage.<sup>39</sup>

Only one obligation is subject to dispute resolution, i.e. the requirement to effectively enforce domestic laws. Fines for labour disputes are capped, and the level of the cap has been criticized for not having any deterrence effect.<sup>40</sup>

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<sup>33</sup> NAALC, Art. 3.

<sup>34</sup> Dicaprio, Alisa, *Are Labour Provisions Protectionist?: Evidence from Nine Labour-Augmented U.S. Trade Arrangements*, Comparative Labour Law & Policy Journal, Vol. 26, No. 1, p.13, Fall 2004, (published October 28, 2005), available at SSRN: <http://ssrn.com/abstract=832404>.

<sup>35</sup> [http://www.bilaterals.org/rubrique.php3?id\\_rubrique=13](http://www.bilaterals.org/rubrique.php3?id_rubrique=13).

<sup>36</sup> Ibid.

<sup>37</sup> Summary of the Agreement, p.20, available at:

[http://www.ustr.gov/assets/Trade\\_Agreements/Regional/CAFTA/Briefing\\_Book/asset\\_upload\\_file74\\_7284.pdf](http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file74_7284.pdf).

<sup>38</sup> US-DR-CAFTA, Chapter 16: Labour.

<sup>39</sup> *Report of the Labour Advisory Committee for Trade Negotiations and Trade Policy (LAC)*, The US-DR-CAFTA, March 19, 2004, available at: [http://www.ustr.gov/assets/Trade\\_Agreements/Regional/CAFTA/CAFTA\\_Reports/asset\\_upload\\_file63\\_5935.pdf](http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/CAFTA_Reports/asset_upload_file63_5935.pdf).

<sup>40</sup> Ibid.

### 3.1.2 Bilateral Arrangements

This category of trade arrangements including labour provisions are bilateral agreements that concluded between the U.S. and other states. The U.S. maintains several bilateral agreements of various forms. Some focus on specific goods such as the U.S.-Cambodia Bilateral Textile Agreement and U.S.-Viet Nam Textile Agreement, while others focus on trade as a whole, such as the U.S.-Jordan FTA and US-Singapore.

#### 3.1.2.1 Bilateral Textile Agreements

##### 3.1.2.1.1 U.S-Cambodia Bilateral Textile Agreement

The U.S-Cambodia Bilateral Textile Agreement signed on January 20, 1999, was the first US bilateral trade agreement that includes labour provisions in it.<sup>41</sup> This labour provision was actually the result of a confluence of several political forces.<sup>42</sup> The American trade unions pressed the Administration and advocated to including enforceable, main-text labour provisions in the trade initiatives.<sup>43</sup> NGOs such as the International Labour Rights Fund and the Lawyers Committee for Human Rights played supportive roles.<sup>44</sup> The agreement requires that

“The Royal Government of Cambodia shall support the implementation of a program to improve working conditions in the textile and apparel sector, including internationally recognized core labour standards, through the application of Cambodian labour law.... the Government of the United States will make a determination...whether working conditions in the Cambodia textile and apparel sector substantially comply with such labour law and standards.”<sup>45</sup>

If the United States makes a positive determination that the Cambodia garment industry were in substantial compliance with Cambodian labour law and international labour standards, the U.S. could increase Cambodia’s export quotas as rewards.<sup>46</sup> To satisfy the requirements of this agreement, a programme was set up and held by the ILO.<sup>47</sup> The ILO provides reports according to its monitoring and these reports are taken into account by the U.S. government and have lead to the increase of export quotas as long as these were in place.

The U.S.-Cambodia Bilateral Textile Agreement is often said to be one of the most successful in outlining labour provisions in trade agreements. But there are also some drawbacks of it. For instance, the ILO

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<sup>41</sup> Kevin Kolben, *Trade, Monitoring, and the ILO: Working To Improve Conditions in Cambodia’s Garment Factories*, 7 Yale H. R & Rev, L.J. 79, 90(2004).

<sup>42</sup> Dicaprio, Alisa, *Are Labour Provisions Protectionist? Evidence from Nine Labour-Augmented U.S. Trade Arrangements*, Comparative Labour Law & Policy Journal, Vol. 26, No. 1, p.9, Fall 2004, (published October 28, 2005), available at SSRN: <http://ssrn.com/abstract=832404>.

<sup>43</sup> Ibid, p.10.

<sup>44</sup> Kevin Kolben, *Trade, Monitoring, and the ILO: Working To Improve Conditions in Cambodia’s Garment Factories*, 7 Yale H. R & Rev, L.J. 79, 90(2004).

<sup>45</sup> Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textiles Products Between the Government of the United States of American and the Royal Government of Cambodia, available at: [http://cambodia.usembassy.gov/uploads/images/M9rzdrcMKGi6Ajf0SIuJRA/uskh\\_textile.pdf](http://cambodia.usembassy.gov/uploads/images/M9rzdrcMKGi6Ajf0SIuJRA/uskh_textile.pdf), Article. 10.

<sup>46</sup> Ibid, Article 4.

<sup>47</sup> <http://www.betterfactories.org/aboutBFC.aspx?z=2&c=1&>.

takes a major role of monitoring labour conditions while the Cambodian Ministry of Labour's inspection capability has not been improved.<sup>48</sup>

#### 3.1.2.1.2 U.S. - Viet Nam Bilateral Textile Agreement

The Agreement Relating to Trade in Cotton, Wool, Man-Made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products between the Governments of the United States of America and the Socialist Republic of Viet Nam (U.S.-Viet Nam Bilateral Textile Agreement) ran from May 1, 2003 to December 31, 2004 and was extended through 31 December 2005.<sup>49</sup> In this Agreement, Viet Nam reaffirms its ILO commitments and agrees to further cooperation with the ILO. Viet Nam agrees to support the implementation of codes of corporate social responsibility.

Unlike the U.S.-Cambodia BTA, the U.S.-Viet Nam Bilateral Textile Agreement did not link labour standards with trade such as export quotas directly on paper but only required Viet Nam's efforts to improve working conditions in the textiles sector.

#### 3.1.2.2 Bilateral Free Trade Agreements

From 1985 to 2008, the United States concluded bilateral free trade agreements with Israel, Canada, Mexico, Jordan, Singapore, Chile, Australia, Morocco, Bahrain, Oman, Peru, Colombia, Panama and South Korea.<sup>50</sup> All these FTAs except those with Peru, Colombia, Panama and South Korea have received U.S. and foreign congressional approval and are or will be in force.<sup>51</sup> Trade promotion authority (TPA), formerly known as "fast-track" authority which authorizes the President to negotiate and conclude free trade agreements was issued in 2002 and expired on June 30, 2007. The TPA is contained in the Bipartisan Trade Promotion Authority Act of 2002 (BTPAA, Title XXI of the Trade Act of 2002, P.L. 107-210).<sup>52</sup> May 10<sup>th</sup>, 2007, a Bipartisan Trade Deal (BTD) was concluded to modify the TPA. The following free trade agreements (FTAs) have been negotiated under the TPA and followed the "Trade Negotiation Objectives" included in the Act: Chile, Singapore, Australia, Morocco, Bahrain and Oman. The FTAs concluded with Peru, Colombia, Panama and South Korea were concluded according to the 2007 BTD with different labour criteria. The labour provisions in the latter FTAs related to the guiding American Act, so this article will classify them into three groups and discuss labour provisions of them separately: FTAs before the TPA, FTAs covered by the TPA and FTAs after the TPA.

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<sup>48</sup> Alisa Dicaprio, *Are Labour Provisions Protectionist?: Evidence from Nine Labour-Augmented U.S. Trade Arrangements*, *Comparative Labour Law & Policy Journal*, Vol. 26, No. 1, p.11, Fall 2004, (published October 28, 2005), available at SSRN: <http://ssrn.com/abstract=832404>.

<sup>49</sup> U.S.-Viet Nam Textile Agreement Summary, <http://Viet.Nam.usembassy.gov/sum-textileagr.html>.

<sup>50</sup> [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html)

<sup>51</sup> *Ibid.*

<sup>52</sup> Mary Jane Bolle, *Trade Promotion Authority (TPA) Renewal: Core Labour Standards Issues: A Brief Overview*, Congressional Research Service (CRS) Reports and Issue Briefs, 2007, available at: <http://digitalcommons.ilr.cornell.edu/crs/27>.

### 3.1.2.2.1 FTAs before the TPA: Take U.S.-Jordan FTA as an example

The Jordan Free Trade Agreement (FTA) was signed on October 24, 2000; It took effect as America's third free trade agreement<sup>53</sup> and the first ever with an Arab state.<sup>54</sup> It was the first trade agreement including labour provisions in the main text.

The FTA does not require the parties to bring their labour law into conformity with international labour standards. The two Parties “reaffirm their obligations as members of the International Labour Organization and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.” The agreement requires two parties to “strive to ensure that such labour principles and the internationally recognized labour rights set forth in para. 6 are recognized by protected by domestic law”.<sup>55</sup> According to paragraph 6 of the agreement, labour principles and the internationally recognized labour rights refer 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 labour, 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.<sup>56</sup> Each party shall “strive to ensure that its laws provide for labour standards consistent with the internationally recognized labour rights...and shall strive to improve those standards in that light.”<sup>57</sup> As part of the agreement, the two countries affirm the importance of not waiving or derogating from their labour laws in order to encourage trade, and commit to effective enforcement of their domestic labour laws.<sup>58</sup>

The labour provisions are subject to the same dispute settlement arrangements as the commercial aspects of the agreement.<sup>59</sup> If a party is found to have violated the labour criteria, the other party may take “any appropriate and commensurate measure” to remedy the violation.<sup>60</sup> However, in 2006, an U.S. NGO testified about human trafficking before Congress as follows:

There are an estimated 300,000 foreign guest workers employed in Jordan as domestics, in construction and agriculture, and in factories producing goods for duty-free export to the United States. Many of these guest workers are victims of human trafficking and are being held under conditions of involuntary servitude. Our research focuses on the 36,149 foreign guest workers, mostly from Bangladesh, China, Sri Lanka and India, who work in Jordan’s 114 export factories, over 90 percent of which are foreign-owned.<sup>61</sup>

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<sup>53</sup> Two others are NAFTA and U.S.-Israel FTA.

<sup>54</sup> <http://www.whitehouse.gov/news/releases/2001/09/20010928-12.html>.

<sup>55</sup> Article 6, para.1 of the U.S.-Jordan Free Trade Agreement, available at:

[http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Jordan/asset\\_upload\\_file250\\_5112.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf).

<sup>56</sup> Ibid, Article 6, para.6.

<sup>57</sup> Ibid, Article 6, para. 3.

<sup>58</sup> Ibid, Article 6, para. 2.

<sup>59</sup> Ibid, Article 17.1(a).

<sup>60</sup> Ibid, Article 17.2(b).

<sup>61</sup> Charles Kernaghan (Director National Labour Committee), Hearing on Modern-Day Slavery: Spotlight on the 2006 Trafficking in Persons Report, Forced Labour, and Sex Trafficking at the World Cup, House Committee on International Relations, June 14, 2006, Human Trafficking & Involuntary Servitude, Under the U.S.-Jordan Free Trade Agreement, <http://www.nlcnet.org/admin/media/document/ker061406.pdf>

Since then, Jordan has sought the assistance of the ILO to remedy the situation, and will now become one of the pilot countries in the “Better Work” programme, jointly sponsored by the ILO and the International Finance Corporation (IFC).<sup>62</sup>

#### 3.1.2.2.2 FTAs covered by the TPA: Take U.S.-Australia Free Trade Agreement for example

The labour criteria for “fast track” treatment in the BTPAA include: (1) inclusion of labour rights in the main FTA; (2) effective enforcement of domestic labour law; (3) recognition and protection of internationally recognized labour rights through domestic law;<sup>63</sup> (4) a prohibition against relaxing domestic labour law for the purpose of expanding trade; (5) promoting ratification and implementation of ILO Convention No. 182, the Worst Forms of Child Labour Convention; and (6) parity in enforcement procedures and remedies among labour rights and other rights, including commercial.<sup>64</sup>

All of these FTAs negotiated under the TPA include nearly identical criteria and enforcement mechanism. The FTAs include the FTAs concluded with Chile, Singapore, Australia, Morocco, Oman and Bahrain. This article will take U.S.-Australia FTA for example to discuss its labour criteria and dispute settlement mechanism.

It is required in the U.S.-Australia Free Trade Agreement that:

Art 18.1.2 ... Each Party shall strive to ensure that its laws provide for labour standards consistent with the internationally recognized labour rights set forth in the Article 18.7 and shall strive to improve those standards with the goal of maintaining high quality and high productivity workplace...

...

Art18.2.2 ...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 labour rights referred to in Article 18.7 as an encouragement for trade with the other Party, or as an encouragement for the establishment for the establishment, acquisition, expansion, or retention of an investment in its territory...<sup>65</sup>

But unlike the U.S.-Jordan FTA, in the FTAs covered by TPA only one single labour rights obligation, i.e. the obligation for a government to enforce its own labour laws, is actually enforceable through dispute settlement.<sup>66</sup>

<sup>62</sup> See the press release of 1 February 2008, *IFC and ILO team up to support Jordanian clothing exports through improved labour standards*, <http://www.betterwork.org/public/global/public-files/news-and-press-releases/ifc-and-ilo-team-up-to-support-jordanian-clothing-1>

<sup>63</sup> 19 U.S.C. 3813 (6).

It is defined as “(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 labour;

(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.”

<sup>64</sup> Marley S. Weiss, *Labour Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin American, and Beyond*, 37 U.S.F.L.Rev.689, 702(2003).19 U.S.C. 3802(a)(6)(7)(9), (b)(11), (b)(12)(G), (b)(17)(2002).

<sup>65</sup> U.S.-Australia Free Trade Agreement, Chapter 18: Labour.

<sup>66</sup> U.S.-Australia Free Trade Agreement, Art.18.4.6.

Only one labour provision is subject to dispute resolution, i.e. the requirement to effectively enforce domestic laws.<sup>67</sup> The labour enforcement procedures cap the maximum fine at \$15 million. This amounts to less than 0.08% of U.S.'s total two-way trade in goods with Australia in 2005.<sup>68</sup> Also the possibility of trade sanctions for labour provision violations is reduced compared to commercial provision violations. In commercial disputes, a party can suspend the full original amount of trade benefits (equal to the harm caused by the offending measure) if a monetary assessment (capped at half that value) is not paid. In a labour dispute, the level of trade benefits a party can revoke if a monetary assessment is not paid is limited to the value of the assessment itself, or \$15 million.<sup>69</sup> Finally, for labour disputes, a monetary assessment is automatically paid into a fund to improve labour law administration in the violating country. Some see this as compensating the violator for its failure to effectively enforce its own laws. There are no explicit provisions to prevent a violator from simply shifting its budgeting, and thus no assurance that the assessment will actually provide additional money for enforcement. In addition, even if a government mispends the fine proceeds on measures that do nothing to remedy the violations of workers' rights, trade sanctions cannot be imposed.<sup>70</sup>

### 3.1.2.2.3 FTAs after the TPA

The labour provisions in FTAs, which the U.S. has concluded with Peru, Colombia, Panama and Korea, are different from the others covered by the TPA. This paper will take the Public of Korea as an example to explain the differences.

First, the core labour standards defined in the FTA are different from those in the U.S.-Australia, Chile or Singapore FTA. The fundamental labour rights defined in the U.S.-Australia FTA include: 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 labour, d. labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour, and e. acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.<sup>71</sup> But the core labour standards defined in the U.S.- Korea Free Trade Agreement (KORUS FTA) is: a. freedom of association, b. the effective recognition of the right to collective bargaining, c. the elimination of all forms of compulsory or forced labour, d. the effective abolition of child labour and, for purposes of this Agreement, a prohibition on the worst forms of child labour, and e. the elimination of discrimination in respect of employment and occupation.<sup>72</sup>

Second, the dispute settlement mechanism is different. In KORUS FTA, "to establish a violation of an obligation under Article 19.2.1 a Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation, or practice in a manner affecting trade or investment between the Parties."<sup>73</sup> Whether a Party maintains a statute or regulation "in a manner affecting trade or investment" is subject to some interpretation, which the panelists will presumably supply if and when a labour dispute is

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> U.S.-Australia Free Trade Agreement, Article 18.7.1.

<sup>72</sup> U.S.- Korea Free Trade Agreement, Art. 19.2.1.

referred to dispute settlement.<sup>74</sup> Only a government (i.e. not a trade union) can invoke dispute settlement against the other government for a labour violation under an FTA.<sup>75</sup>

In the KORUS FTA, only one labour provision, i.e. the obligation for a government to enforce its own labour laws, is actually enforceable through dispute settlement. All of the other obligations in the labour chapter are explicitly not covered by the dispute settlement system and are thus unenforceable.<sup>76</sup> The labour enforcement procedures cap the maximum fine at \$15 million and allow Korea to pay those fines to a joint commission to improve labour rights enforcement, and the fine ends up back in its own territory. The provisions thus raise the same questions of effectiveness as for the U.S. – Australia FTA.<sup>77</sup> No rules prevent a government from simply transferring an equal amount of money out of its labour budget at the same time as it pays the fine. And there is no guarantee that the fine will actually be used to ensure effective labour law enforcement, since trade benefits can only be withdrawn if a fine is not paid. If the commission pays the fine back to the offending government, but the government uses the money on unrelated or ineffective programs so that enforcement problems continue un-addressed, no trade action can be taken.<sup>78</sup>

### 3.1.3 Unilateral Preference Programs

The U.S. unilateral preference programs are tools that the U.S. government uses to assist countries usually in the developing world, which is provided through an “enhanced” trading relationship with the United States.<sup>79</sup> Unilateral preference programs do not require reciprocity. Currently, the U.S. Government maintains around five labour-fortified preferences which are discussed below.<sup>80</sup>

#### 3.1.3.1 Generalized System of Preferences (GSP)

The Generalized System of Preferences (GSP) was founded in 1976 and offers duty-free treatment for more than 4,650 products from 144 designated countries and territories throughout the world.<sup>81</sup> The GSP had not originally contained a labour provision when it was enacted in 1976.<sup>82</sup> In the GSP Renewal Act of 1984, a list of five rights that were called “internationally recognized worker rights” was included.<sup>83</sup> It has been renewed periodically since then, most recently in 2006, when President George Bush signed legislation that reauthorized the GSP programme through 31 December 2008.<sup>84</sup>

<sup>73</sup> U.S.- Korea Free Trade Agreement, Art. 19.2.1, footnote 2.

<sup>74</sup> Gantz, David A., The “Bipartisan Trade Deal”, Trade Promotion Authority and the Future of U.S. Free Trade Agreements (July 25, 2008), St. Louis University Public Law Review, (forthcoming) Available at SSRN: <http://ssrn.com/abstract=1186982>.

<sup>75</sup> Bipartisan Trade Deal, Trade Facts, available at:

[http://www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2007/asset\\_upload\\_file127\\_11319.pdf](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file127_11319.pdf).

<sup>76</sup> Report of the Labour Advisory Committee for Trade Negotiations and Trade Policy (LAC), The U.S.-Korea Free Trade Agreement, p.8, April 27, 2007, available at:

[http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Republic\\_of\\_Korea\\_FTA/Reports/asset\\_upload\\_file698\\_12781.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Reports/asset_upload_file698_12781.pdf), p.7.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> [http://www.ustr.gov/Trade\\_Development/Preference\\_Programs/Section\\_Index.html](http://www.ustr.gov/Trade_Development/Preference_Programs/Section_Index.html).

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> 19 U.S.C § 2461 (1976).

<sup>83</sup> GSP Renewal Act of 1984, Pub. L. No. 98-573, 98 Stat. 3019 (1984).

<sup>84</sup> [http://www.ustr.gov/Trade\\_Development/Preference\\_Programs/Section\\_Index.html](http://www.ustr.gov/Trade_Development/Preference_Programs/Section_Index.html).

In designating a beneficiary country, the President must take into account whether such country has taken or is taking steps to give to workers internationally recognized worker rights:

- a. freedom of association,
- b. freedom to organize and bargain collectively,
- c. prohibition on the use of any form of forced or compulsory labour,
- d. a minimum age for the employment of children,
- e. protections for decent working conditions, including a minimum wage, maximum hours of work, and occupational safety and health standards.<sup>85</sup>

A GSP beneficiary must also implement any commitments it makes to eliminate the worst forms of child labour.<sup>86</sup> Urgent measures to eliminate the worst forms of child labour are a mandatory criterion, which each country must commit to before being designated a GSP beneficiary.<sup>87</sup> Internationally recognized workers' rights are discretionary criteria, i.e. that the President takes them into account in determining whether to designate a country as a beneficiary country for purposes of the GSP programme.<sup>88</sup>

The labour criteria in GSP can be invoked annually through a regulatory mechanism designed by the USTR.<sup>89</sup> An interested party may submit a request that the duty-free treatment accorded to eligible articles under the GSP be withdrawn, suspended or limited.<sup>90</sup> From 1984 to 2004, forty-eight countries were the subject of a petition for review. Thirty eight countries were subject to at least one complete review in that period, and thirteen countries had their privileges under the GSP suspended or revoked.<sup>91</sup>

### 3.1.3.2 The African Growth and Opportunity Act

The African Growth and Opportunity Act (AGOA) was enacted in 2000, and also allows duty-free entry of goods from countries in Sub-Saharan Africa.<sup>92</sup> The AGOA embraces the GSP's definition of internationally recognized worker rights: 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 labour, 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.<sup>93</sup> One more "social clause" was added by the Trade and Development Act of 2000 in Section 412, i.e. to carry out commitments undertaken to eliminate the worst forms of child labour, as defined by ILO Convention No. 182.<sup>94</sup>

The President is authorized to designate a sub-Saharan African country as an eligible sub-Saharan African country if the President determines that the country fits with the criteria, including the protection of

<sup>85</sup> 19 U.S.C § 2461 (1984) and 19 U.S.C § 2467.

<sup>86</sup> 19 U.S.C § 2461.

<sup>87</sup> 19 U.S.C § 2462(b)(2).

<sup>88</sup> 19 U.S.C § 2462(c).

<sup>89</sup> USTR Regulations Pertaining To Eligibility Of Articles And Countries For The Gsp Programme (15 Cfr Part 2007), Sec. 2007.0 Requests for reviews.

<sup>90</sup> Ibid.

<sup>91</sup> USTR, Summary of GSP Cases (2005). Cited from: Alisa Dicaprio, Are Labour Provisions Protectionist?: Evidence from Nine Labour-Augmented U.S. Trade Arrangements. Comparative Labour Law & Policy Journal, Vol. 26, No. 1, p.6, Fall 2004, (published October 28, 2005), available at SSRN: <http://ssrn.com/abstract=832404>.

<sup>92</sup> [http://www.ustr.gov/Trade\\_Development/Preference\\_Programs/Section\\_Index.html](http://www.ustr.gov/Trade_Development/Preference_Programs/Section_Index.html).

<sup>93</sup> The African Growth and Opportunity Act, Sec. 502(b)(2)(G), [http://www.agoa.gov/agoa\\_legislation/agoatext.pdf](http://www.agoa.gov/agoa_legislation/agoatext.pdf).

<sup>94</sup> Ibid, Sec. 502(b)(2)(H).

internationally recognized worker rights and elimination of the worst forms of child labour.<sup>95</sup> As is the case with the GSP, failure to meet the former criteria may not prevent the granting of GSP eligibility if the President determines that such a designation would be in the national economic interest of the United States.<sup>96</sup> It only requires that the President takes into account “the extent to which the country provides internationally recognized worker rights”.<sup>97</sup> Only if a country can not “implement its commitments to eliminate the worst forms of child labour, as defined by the International Labour Organization's Convention 182”,<sup>98</sup> the President should not designate a sub-Saharan African country as eligible.<sup>99</sup>

An annual review of each sub-Saharan African country's progress towards meeting the AGOA eligibility criteria must be conducted by the President. If the President determines that the country is not making continual progress towards meeting the eligibility criteria, he/she must terminate the designation of any beneficiary sub-Saharan African country.<sup>100</sup> Of the 48 countries deemed eligible to apply for AGOA, 36 received beneficiary status. Among them, Angola, Burundi, Congo and Equatorial Guinea were denied membership for reasons including labour abuses.<sup>101</sup>

### 3.1.3.3 Caribbean Basin Initiative (CBI)

The CBI was launched in 1983 through the Caribbean Basin Economic Recovery Act (CBERA) with a view to facilitating the economic development and export diversification of the Caribbean Basin economies. The U.S.-Caribbean Basin Trade Partnership Act (CBTPA) of 2000 substantially expanded the CBI, and currently counts 19 beneficiary countries<sup>102</sup> with duty-free access to the U.S. market for most goods.<sup>103</sup>

The CBERA subjects trade privileges to the following internationally recognized worker rights: 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 labour, 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.<sup>104</sup> These “social clauses” are mandatory conditions for eligibility under the CBERA.<sup>105</sup>

The CBTPA, however, modified the conditions to become discretionary criteria. In the currently effective 2000 CBTPA, the U.S. government is required to evaluate:

<sup>95</sup> 19 U.S.C § 3703, 104 (A)1(f) (2005).

<sup>96</sup> African Growth and Opportunity Act Implementation Guide, available at: [http://www.ustr.gov/assets/Trade\\_Development/Preference\\_Programs/AGOA/AGOA\\_Implementation\\_Guide/asset\\_upload\\_file505\\_6510.pdf](http://www.ustr.gov/assets/Trade_Development/Preference_Programs/AGOA/AGOA_Implementation_Guide/asset_upload_file505_6510.pdf), p. 22.

<sup>97</sup> The African Growth and Opportunity Act, Sec. 211(5)(b)(3), [http://www.agoa.gov/agoa\\_legislation/agoatext.pdf](http://www.agoa.gov/agoa_legislation/agoatext.pdf).

<sup>98</sup> The African Growth and Opportunity Act, Sec. 502(b)(2)(G), [http://www.agoa.gov/agoa\\_legislation/agoatext.pdf](http://www.agoa.gov/agoa_legislation/agoatext.pdf).

<sup>99</sup> Ibid.

<sup>100</sup> The African Growth and Opportunity Act, Sec. 506(a)(2), [http://www.agoa.gov/agoa\\_legislation/agoatext.pdf](http://www.agoa.gov/agoa_legislation/agoatext.pdf).

<sup>101</sup> Alisa Dicaprio, Are Labour Provisions Protectionist? Evidence from Nine Labour-Augmented U.S. Trade Arrangements. *Comparative Labour Law & Policy Journal*, Vol. 26, No. 1, p.9, Fall 2004, (published October 28, 2005), available at SSRN: <http://ssrn.com/abstract=832404>.

<sup>102</sup> These countries are: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago.

<sup>103</sup> [http://www.ustr.gov/Trade\\_Development/Preference\\_Programs/CBI/Section\\_Index.html](http://www.ustr.gov/Trade_Development/Preference_Programs/CBI/Section_Index.html).

<sup>104</sup> 19 U.S.C §2467(4).

<sup>105</sup> Ibid.

- (iii) The extent to which the country provides internationally recognized worker rights, including---
  - (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 labour;
  - (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...<sup>106</sup>

The CBTPA also added the elimination of the worst forms of child labour as a mandatory criterion.<sup>107</sup> The labour criteria in the 2000 CBTPA are the same as in the GSP and AGOA. Recently, the US Trade Representative conducted an extensive review of 24 CBI countries.<sup>108</sup> In considering the eligibility of the 24 CBI countries and dependent territories that have expressed an interest in receiving the enhanced preferences of the CBTPA, the President is required to take into account the existing eligibility criteria of the CBERA, including the labour criteria listed above.<sup>109</sup> The reviews are provided partly for these purposes. This review also provided for the U.S. Government an opportunity to directly engage in improving concerning criteria in the beneficial countries.<sup>110</sup> Improvements occurred in various areas including the protection of internationally recognized worker rights.<sup>111</sup>

#### 3.1.3.4 Andean Trade Preference Act

The Andean Trade Preference Act was enacted in 1991 to combat drug production and trafficking in Bolivia, Colombia, Ecuador and Peru. The Act offers trade benefits to help these countries develop and strengthen legitimate industries. The ATPA was expanded under the Trade Act of 2002, and is now called the Andean Trade Promotion and Drug Eradication Act (ATPDEA). It provides duty-free access to U.S. markets for approximately 5,600 products.<sup>112</sup>

The ATPDEA currently requires the U.S. government to evaluate:

- (iii) The extent to which the country provides internationally recognized worker rights, including
  - (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 labour;
  - (d) a minimum age for the employment of children; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health...<sup>113</sup>

The ATPDEA also requires the elimination of the worst forms of child labour.<sup>114</sup> The President must take the discretionary criteria, including internationally recognized workers' rights described in the statute as

<sup>106</sup> Caribbean Basin Trade Partnership Act of 2000, Title II Pub. L. 106-200, sec. 211.

<sup>107</sup> Ibid.

<sup>108</sup> Seventh Report to Congress on the Operation of the Caribbean Basin Economic Recovery Act, December 31, 2007, p.iii, available at: [http://www.ustr.gov/assets/Trade\\_Development/Preference\\_Programs/CBI/asset\\_upload\\_file373\\_13752.pdf](http://www.ustr.gov/assets/Trade_Development/Preference_Programs/CBI/asset_upload_file373_13752.pdf).

<sup>109</sup> Ibid, p.19.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> [http://www.ustr.gov/Trade\\_Development/Preference\\_Programs/ATPA/Section\\_Index.html](http://www.ustr.gov/Trade_Development/Preference_Programs/ATPA/Section_Index.html).

“factors affecting designation”, into account when determining if a country should benefit from the trade privileges, but he may grant beneficiary status even if the country fails to meet the criteria.<sup>115</sup> Only as regards the elimination of the worst forms of child labour, countries must satisfy the criteria.

The ATPDEA authorizes the USTR to conduct reviews and provide an opportunity for the submission of petitions for the withdrawal or suspension of certain benefits of the programme.<sup>116</sup> The USTR recently reviewed the eligibility of countries and articles under the ATPDEA.<sup>117</sup> Based on the results of the reviews, the USTR has not recommended the withdrawal or suspension of ATPA/ATPDEA benefits based on violations of workers’ rights.<sup>118</sup> However, petitions arguing for partial or total suspension of tariff benefits for failure to meet workers’ rights criteria have been submitted to the USTR. In 2003 and 2004, for example, Human Rights Watch filed such petition arguing that Ecuador’s eligibility should be reviewed. While the USTR has so far not followed the argument, the following excerpt from the petition illustrates its typical character:<sup>119</sup>

“... Ecuadorian employers who engage in anti-union discrimination still face only the threat of minimal fines for violating the law. ... Workers dismissed for union activity have no right to reinstatement; anti-union hiring discrimination and employer interference with workers’ organizations are not explicitly prohibited; the right to form industry- and sector-wide unions is not clearly guaranteed; and a minimum of thirty workers is still required to form a union, despite recommendations that this number be lowered by the International Labor Organization Committee of Experts on the Application of Conventions and Recommendations. In practice, employers continue to take advantage of these shortcomings in the law to violate workers’ human rights by retaliating against workers for engaging in union activity, erecting often insurmountable obstacles to the formation of workers’ organizations, and generally creating a climate of fear that deters workers from exercising their right to freedom of association.

...

Although Ecuador issued an executive decree on subcontractors in October 2004, as discussed below, the decree is so weak that it falls far short of meeting its goal of establishing a regulatory framework to prevent subcontractors from being used to violate workers’ right to organize. ...

In addition, while Ecuador took the laudable step of selecting at least twenty-two child labor inspectors as required by law earlier this year, the number has since fallen to approximately fourteen, due to firings and resignations. Furthermore, as detailed below, the inspectors often are unable to effectively perform their duties and Ecuador continues to demonstrate a lack of commitment to the elimination of harmful child labor. Ecuador has yet to issue implementing regulations, as required by law, for its new Code for Children and Adolescents, adopted over two-and-a-half years ago. It has also failed to amend the Labor Code to conform

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<sup>113</sup> Trade Act of 2002, Title XXXI § 3103(6)b.

<sup>114</sup> Ibid.

<sup>115</sup> Third Report to the Congress on the Operation of the Andean Trade Preference Act as Amended, April 30, 2007, p.16, available at: [http://www.ustr.gov/assets/Trade\\_Development/Preference\\_Programs/ATPA/asset\\_upload\\_file186\\_11132.pdf](http://www.ustr.gov/assets/Trade_Development/Preference_Programs/ATPA/asset_upload_file186_11132.pdf).

<sup>116</sup> Ibid.

<sup>117</sup> Third Report to the Congress on the Operation of the Andean Trade Preference Act as Amended, April 30, 2007, p. 4, available at:

[http://www.ustr.gov/assets/Trade\\_Development/Preference\\_Programs/ATPA/asset\\_upload\\_file186\\_11132.pdf](http://www.ustr.gov/assets/Trade_Development/Preference_Programs/ATPA/asset_upload_file186_11132.pdf). The USTR is currently inviting public comments on its proposal to suspend Bolivia’s designation as a beneficiary country, but the proposal relates to perceived shortcomings in the narcotics cooperation required under the agreement. See [http://www.ustr.gov/assets/Document\\_Library/Federal\\_Register\\_Notices/2008/October/asset\\_upload\\_file375\\_15185.pdf](http://www.ustr.gov/assets/Document_Library/Federal_Register_Notices/2008/October/asset_upload_file375_15185.pdf).

<sup>118</sup> Ibid.

<sup>119</sup> See [http://hrw.org/backgrounders/business/ecuador0905/2.htm#\\_Toc114574864](http://hrw.org/backgrounders/business/ecuador0905/2.htm#_Toc114574864)

with the Code for Children and Adolescents' child labor provisions, though in August 2005, Ecuador's congress and the National Council for Children and Adolescents organized a seminar on such an amendment, whose results may form the basis for a congressional discussion on the issue in upcoming months. Ecuador also continues to fail to adequately fund and implement meaningful social protection measure to prevent child labor and effectively rehabilitate former child workers."

### 3.1.3.5 Section 301 of Trade Act 1974

Section 301 of Trade Act 1974 authorizes the U.S. Trade Representative to take discretionary action if

- 1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and
- 2) action by the United States is appropriate.<sup>120</sup>

Unlike mandatory action, discretionary action can be taken when an act can be found unreasonable even if it does not violate the specific rules of a trade agreement, as long as it is "unreasonable or discriminatory".<sup>121</sup> As amended in 1988, the law provides that

acts, policies, and practices that are unreasonable include, but are not limited to, any act, policy, or practice, or any combination of acts, policies, or practices, which constitutes a persistent pattern of conduct that

- (I) denies workers the right of association,
- (II) denies workers the right to organize and bargain collectively,
- (III) permits any form of forced or compulsory labour,
- (IV) fails to provide a minimum age for the employment of children, or
- (V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers.<sup>122</sup>

Up until now, the USTR has never used Section 301 to investigate worker's rights violation with a view to imposing trade sanctions.<sup>123</sup> The AFL-CIO (the United States' biggest union federation) filed petitions claiming that systematic workers' rights violations in China gave Chinese goods an unfair trade advantage, but the USTR did not pursue the matter and did not impose punitive tariff duties.<sup>124</sup> The USTR argued that the United States had other and more effective mechanisms at its disposal to improve Chinese workers' rights in China.<sup>125</sup> In the USTR's opinion, "a Section 301 investigation will neither shed more light on this problem nor lead to a more effective approach for addressing Chinese workers' rights and labour conditions."<sup>126</sup>

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<sup>120</sup> 19 USCS §2414 (b). The Trade Representative shall take all appropriate and feasible action authorized under subsection (c), subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

<sup>121</sup> Ibid.

<sup>122</sup> 19 USCS §2414 (d) (2).

<sup>123</sup> <http://www.aflcio.org/issues/jobseconomy/globaleconomy/intro301.cfm>.

<sup>124</sup>

[http://www.ustr.gov/Document\\_Library/Press\\_Releases/2006/July/Statement\\_from\\_USTR\\_Spokesman\\_Regarding\\_China\\_Labour\\_Petition.html](http://www.ustr.gov/Document_Library/Press_Releases/2006/July/Statement_from_USTR_Spokesman_Regarding_China_Labour_Petition.html).

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

## 3.2 European Union

### 3.2.1 Bilateral Trade Arrangements

The European Union rejects a sanction-based approach to labour standards.<sup>127</sup> Following the 2001 Communication from the Commission to the Council of Ministers, the European Parliament and the Economic and Social Committee, the Council confirmed the EU's firm opposition to a sanction-based approach and rejected any protectionist intentions.<sup>128</sup> This was again confirmed in the 2003 Council Conclusions following the Commission's communication on promoting core labour standards.<sup>129</sup>

At the same time, the European Union encourages countries to enforce basic labour rights, e.g. ILO core labour standards, through cooperation, social dialogue, etc.<sup>130</sup> The cooperation agreements concluded between the EU and third countries cover economic as well as social cooperation.<sup>131</sup> Since 1992, the agreements concluded between the EU and third countries have included a human rights clause.<sup>132</sup> The clause incorporates core labour standards set out in the ILO 8 fundamental labour Conventions.<sup>133</sup>

The Cotonou Agreement concluded by the EC and the 77 ACP states in 2000 went one step further by including a more specific "social clause". In the provision, the Parties confirms "their commitment to the internationally recognized core labour standards which are defined by the relevant International Labour Organization Conventions, and in particular the freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of worst forms of child labour and non-discrimination in respect to employment".<sup>134</sup> The parties also agreed to enhance cooperation in this area, in particular in the following fields:

1. exchange of information on the respective legislation and work regulation;
2. the formulation of national labour legislation and strengthening of existing legislation;
3. educational and awareness-raising programmes;
4. enforcement of adherence to national legislation and work regulation.<sup>135</sup>

The EU also committed itself to making better use of the Sustainability Impact Assessments of bilateral trade negotiations and agreements.<sup>136</sup>

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<sup>127</sup> Peter Mandelson, *Trade Policy and Decent Work*, Intervention by Peter Mandelson at the EU Decent Work Conference, Brussels, 5 December 2006, p.3, available at: [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_131429.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_131429.pdf).

<sup>128</sup> Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee--- Promoting Core Labour Standards and Improving Social Governance in the Context of Globalization, COM(2001), Brussels, 18.7.2001, p.11, available at: [http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc\\_111234.pdf](http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc_111234.pdf).

<sup>129</sup> [http://trade.ec.europa.eu/doclib/docs/2005/february/tradoc\\_113357.pdf](http://trade.ec.europa.eu/doclib/docs/2005/february/tradoc_113357.pdf).

<sup>130</sup> Ibid.

<sup>131</sup> Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee--- Promoting Core Labour Standards and Improving Social Governance in the Context of Globalization, COM(2001), Brussels, 18.7.2001, p.12, available at: [http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc\\_111234.pdf](http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc_111234.pdf).

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the other Part, Article 50, Trade and Labour Standards.

<sup>135</sup> Ibid.

<sup>136</sup> Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee--- Promoting Core Labour Standards and Improving Social Governance in the Context of Globalization, COM(2001), Brussels, 18.7.2001, p.19, available at: [http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc\\_111234.pdf](http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc_111234.pdf).

Other agreements liberalizing trade follow the cooperation model in encouraging respect for international labour standards. Some agreements include a chapter on social cooperation<sup>137</sup> while others refer to core labour standards established by the International Labour Organization explicitly.<sup>138</sup>

### 3.2.2 Unilateral Trade Arrangement – the GSP

The Generalized System of Preferences (GSP) of the European Union has been in effect since July 1971,<sup>139</sup> granting duty-free access or a tariff reduction to products imported from beneficiary countries.<sup>140</sup> The EU GSP is organized in 10-year cycles, and implemented through Council Regulations.<sup>141</sup> In 2004, the Commission set out the guidelines for the GSP scheme for the period 2006 - 2015.<sup>142</sup> The additional reduction of duties for bringing domestic laws into conformity with certain fundamental ILO Conventions (the so-called GSP+) was introduced in 1998.<sup>143</sup> Use of forced labour or prison labour for producing export goods could give rise to the withdrawal of all preferences (not only the additional reduction).<sup>144</sup>

The European Union now publicly states that part of the primary objective of its GSP is to promote good governance, and that the additional “GSP+” preferences act as an incentive for vulnerable developing countries to ratify and effectively implement a set of key international conventions, including the ILO’s fundamental Conventions.<sup>145</sup>

The 2009 – 2011 Regulation provides for 3 separate GSP arrangements:<sup>146</sup>

- (1) a “GSP” general arrangement which is granted to all 176 beneficiary countries in different degrees;<sup>147</sup>
- (2) a “GSP+” special incentive arrangement offering additional incentives to support good governance; and
- (3) the Everything But Arms arrangement, providing duty-free and quota-free access for 50 least-developed countries.

Countries may apply for GSP+ benefits before the end of October 2008, and must wait to reapply until 2010, if they fail to qualify. To be eligible, a country must have ratified and effectively implemented the

<sup>137</sup> For instance, the EU-Mediterranean Agreement Establishing an Association between the European Community and its Member States, of the one part, and the People’s Democratic Republic of Algeria, of the other part.

<sup>138</sup> E.g. the EU Association Agreement with Chile.

<sup>139</sup> Generalized System of Preferences, [http://ec.europa.eu/trade/issues/global/gsp/index\\_en.htm](http://ec.europa.eu/trade/issues/global/gsp/index_en.htm).

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> *Developing countries, international trade and sustainable development: the function of the Community’s generalised system of preferences (GSP) for the ten-year period from 2006 to 2015* [COM(2004) 461 final - Official Journal C 242 of 29.9.2004]. The current GSP Regulation (980/2005) applying from 2006 to the end of 2008 is the first Regulation implementing the guidelines (Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences). A successor Regulation for the period 2009 – 2011 was adopted in July 2008 (Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, Official Journal L 211 of 6 August 2008).

<sup>143</sup> George Tsogas, *Labour Standards in the Generalized Systems of Preferences of the European Union and the United States*, European Journal of Industrial Relation, Volume 6 No. 3, 349, 360(2000). See also Ludo Cuyvers, *The generalized system of preferences of the European Union, with special reference to Asean and Thailand*, CAS Discussion paper No 18, University of Antwerp, Centre for ASEAN Studies, March 1998, also published as EIAS Briefing Paper 98-04, Brussels : European Institute for Asian Studies.

<sup>144</sup> Ibid.

<sup>145</sup> Fact Sheet - EC Generalized Scheme of Tariff Preferences (GSP) 2009-2011,

[http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc\\_139988.pdf](http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc_139988.pdf), 1

<sup>146</sup> Ibid., 2

<sup>147</sup> Ibid, Article 7.

fundamental ILO Conventions; give an undertaking to maintain the ratification of the Conventions and their implementing legislation and measures; accept regular monitoring and review of its implementation record in accordance with the implementation provisions of the conventions it has ratified.<sup>148</sup>

The Commission keeps under review the status of ratification and effective implementation of the Conventions, and informs the Council if this information indicates that there has been a diversion, by a beneficiary country, from the effective implementation of any of the Conventions. In time for discussion on the next Regulation, the Commission presents, to the Council, a summary report on the status of ratification and available recommendations by relevant monitoring bodies.<sup>149</sup>

The eligibility criteria concerning international labour standards will likely prove to be demanding for countries in East Asia, even if one does not take into account that only countries with poorly diversified economies qualify. Under the current GSP+ regime, which lapses at the end of 2008, only 14 countries qualify for the additional GSP+ preferences,<sup>150</sup> while no less than 176 countries and territories receive the standard preferences.<sup>151</sup> In East Asia, only Cambodia, Indonesia, Mongolia and Thailand have ratified all fundamental labour Conventions. As a least developed country, Cambodia already qualifies for the “Everything But Arms” preferences. Indonesia has “observations” of the ILO Committee of Experts outstanding on several fundamental Conventions.<sup>152</sup> Mongolia qualifies at present and could reapply. The Philippines equally has “observations” outstanding. In comparison, Thailand has “graduated” from EU GSP under the current regime, but will de-graduate for transport equipment.<sup>153</sup> Even if Thailand could prove to have a poorly diversified economy, it would not qualify for GSP+, because it has currently ratified only 5 out of 8 fundamental labour Conventions.

All trade preferences can be temporarily withdrawn, in respect of all or of certain products, originating in a beneficiary country, in case of:

- (a) serious and systematic violations of principles laid down in the conventions listed in Part A of Annex III, on the basis of the conclusion of the relevant monitoring bodies;
- (b) export of goods made by prison labour; .....<sup>154</sup>

If a country seriously and systematically violates fundamental labour standards, its preferences can be withdrawn for 6 months at a time. Where the Commission or a Member State receives information that may justify temporary withdrawal and if there are sufficient grounds for an investigation, it must inform the GSP Committee<sup>155</sup> and request consultations which should take place within a month.<sup>156</sup> The Commission

<sup>148</sup> Council Regulation (EC) 732/2008 of 22 July 2008, Article 8.

<sup>149</sup> Ibid.

<sup>150</sup> Generalized System of Preferences (GSP) 2009-2011 – guide, EUBusiness website – last modified 24 July 2008, <http://www.eubusiness.com/Trade/gsp-2009-2011-guide>.

<sup>151</sup> Fact Sheet - EC Generalized Scheme of Tariff Preferences (GSP) 2009-2011, [http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc\\_139988.pdf](http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc_139988.pdf), 1

<sup>152</sup> “Observations” – as opposed to “direct requests” – are published comments of the ILO supervisory body that are normally reserved for more established or serious gaps in the application of the Convention.

<sup>153</sup> Fact Sheet, 3.

<sup>154</sup> Council Regulation (EC) 732/2008 of 22 July 2008, Article 15.

<sup>155</sup> The Generalized Preferences Committee assists the Commission by examining any matter relating to the application of the GSP Regulation, raised by the Commission or at the request of a Member State. See Art. 27 of Council Regulation (EC) 732/2008 of 22 July 2008.

may decide to initiate an investigation after the consultations and conduct the investigation.<sup>157</sup> After six months monitoring the situation, the Commission may make its decision on temporary withdrawal.<sup>158</sup> The withdrawal permanently enters into force six months after it begins.<sup>159</sup>

In 1997, the EU withdrew its trade preferences from Myanmar because of Myanmar's violation of the ILO Forced Labour Convention, 1930 (No. 29).<sup>160</sup> Belarus has also seen its preferences withdrawn for violations of the Protection of the Right to Organize and Freedom of Association Convention, 1948 (No. 87).<sup>161</sup> The preferences remain withdrawn to date.<sup>162</sup>

#### 4. Thai Labour Standards (TLS)

TLS is a private initiative in the sense that it is the market responding to “government failure” to enforce outcome-related labour standards in Thai workplaces to a level that foreign buyers will feel confident does not carry risks for their brand reputation. The labour standards mechanism, however, is not privately owned nor controlled. Thai Labour Standards promotes voluntary compliance of Thai exporting companies with a set of labour standards, which are issued, reviewed and promoted by the Thai Ministry of Labour.<sup>163</sup> In 2006, the Thai Ministry of Labour in collaboration with the private sector produced the Thai Labour Standards (TLS-8001) under the name “Thai Corporate Social Responsibility.”<sup>164</sup> A Thai Labour Standard Development Bureau was established to “enhance and support to develop the Thai Labour Standard network”, “audit TLS 8001-2003 Certification” and “study and analyse international labour standards”.<sup>165</sup>

The Standard on Thai Corporate Social Responsibility is developed according to the provisions of the Constitution of the Royal Kingdom of Thailand, the provisions of the labour laws on labour protection, labour welfare, labour relations and occupational safety, health and environment, as well as the Conventions of the International Labour Organization and the United Nations. The contents of the Standard also include requirements of other labour standards enforced by domestic and international organizations.<sup>166</sup> The contents of this Labour Standard (TLS-8001) is not so different from other important international standards especially Social Accountability 8000 (SA 8000).<sup>167</sup> It consists of 12 categories, namely general rules, management systems, forced labour, remuneration, working hours, discrimination in the workplace, discipline, child labour, female labour, freedom of association and collective bargaining,

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<sup>156</sup> Ibid, Article 17.

<sup>157</sup> Ibid, Article 18 and 19.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Council Regulation 552/97, Temporary Withdrawing Access to Generalized Tariff Preferences from the Union of Myanmar. Official Journal L 85, 27.3.1997, pp.8,9.

<sup>161</sup> Council Regulation 1933/2006, Temporary Withdrawing Access to the Generalized Tariff Preferences from the Republic of Belarus, art. 1, 2006 O.J. (L 405), pp.35,39.

<sup>162</sup> [http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc\\_139872.pdf](http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc_139872.pdf).

<sup>163</sup> Chokchai Suttawet, *Current Situation of Labour Standards for Trading in Thailand*, available at:

<http://www.udel.edu/fiber/issue2/world/LabourStandards-Thailand.html>.

<sup>164</sup> Ibid.

<sup>165</sup> Available at: <http://tls.labour.go.th/en/index.html>.

<sup>166</sup> TLS-8000, Introduction.

<sup>167</sup> Suttawet.

health and safety in the workplace and worker's welfare.<sup>168</sup> In 2004, a total of 304 Thai companies had been certified to the standard, of which 241 were large companies with 200 or more employees.<sup>169</sup> By October 2008, 951 Thai companies had been certified, employing over 940,000 employees.<sup>170</sup>

The TLS incorporate requirements of Thai labour law, e.g.:

1. 5.1.2 The establishment shall provide for and keep a record as evidence demonstrating how the establishment has conformed to the requirements of this standard and for addressing the effectiveness of the management system. The record shall be clearly defined and easily accessible. The record required by law shall be provided in accordance with the form and procedure prescribed by the laws.
2. 5.2.1 (1) Top management shall define and formally declare the policy on social and labour accountability. The policy shall express the intention to: (a) conform to the requirements of this standard, labour laws and other regulations concerned.
3. 5.5.2 For general working conditions, performing overtime work shall be deemed as the right of employee, unless the work is exempted by law.
4. 5.11.2 The establishment shall provide the safe working environment to prevent hazards and reduce risks in accordance with the related laws.

Compared to Thai labour laws, some TLS-8000 standards may higher, e.g.:

1. 5.3.2 The establishment shall not require submission or deposit of identity card or any other personal identity paper from an employee either upon commencing employment or after, nor shall the establishment make it a requirement or a condition of employment to do so unless exempted by law. This is not specified by the Labour Protection Act 1998.
2. 5.4.3 The establishment, at every wage payment, shall provide for employees comprehensive information in writing on the composition of wages and remuneration paid to them. This is not required by the Labour Protection Act 1998.
3. 5.5.2 The establishment shall specify the hours of overtime work (more than 48 normal working hours per week) as not to exceed 24 hours per week in the first year of standard certification, and not to exceed 18 hours per week in the second year and not to exceed 12 hours per week as condition for certification in the consecutive years. Ministerial Regulation No. 3 issued under the Labour Protection Act (B.E. 2541) only requires 33 hours restriction of overtime work per week.<sup>171</sup>
4. 5.6.1 The establishment shall not engage in or support discrimination in hiring, payment of wage and remuneration, providing welfare and opportunity for training and development, promotion, termination of employment or retirement based on nationality, race, religion, language, age, sex, marital status, sexual orientation, disability, trade union membership, political affiliation or personal opinion. Only no discrimination of gender is prohibited in the Labour Protection Law 1998, section 15 and discrimination of

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<sup>168</sup> Social Accountability International (SAI) describes SA8000 as "a comprehensive and flexible system for managing ethical workplace conditions throughout global supply chains" (<http://www.sa-intl.org/index.cfm?&stopRedirect=1>). SA8000 is an "auditable certification standard" containing 9 elements: Child Labour; Forced Labour; Health and Safety; Freedom of Association and Right to Collective Bargaining; Discrimination; Discipline; Working Hours; Compensation; Management Systems.

<sup>169</sup> *Alternatives to Public Sector Inspections: Public-Private Partnerships and Corporate Social Responsibility (CSR)*, Final Report for the Foreign Investment Advisory Service of the World Bank Group, 30 June 2005

([http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/CSR-Alternatives+to+Public+Sector+Insepctions+June+30/\\$FILE/Alternatives+to+Public+Sector+Insepctions+June+30.pdf](http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/CSR-Alternatives+to+Public+Sector+Insepctions+June+30/$FILE/Alternatives+to+Public+Sector+Insepctions+June+30.pdf)), para. 71

<sup>170</sup> <http://tls.labour.go.th/en/index.html>

<sup>171</sup> Ministerial Regulation No. 3 issued under the Labour Protection Act (B.E. 2541), *Government Gazette (English translation)*, 1998-11, Vol. 53, No. 11, p. 347, available at : [http://www.ilo.org/dyn/natlex/natlex\\_browse.details?p\\_lang=en&p\\_isn=53163](http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_isn=53163).

trade union members is prohibited in the Labour Relation Law 1975, Chapter 9.

5. 5.7.3 The establishment shall set up measures to prevent the employees, especially women and young employees, from being sexually harassed by any means -verbal, gesture or physical contact. This is not regulated in the Labour Protection Law 1998.
6. 5.9.1 The establishment shall provide safe working conditions and environment for pregnant employee(s). The protection of pregnant employees is not so comprehensively articulated in the Labour Protection Act 1998 (LPA). The LPA prohibits certain types of work to be performed by pregnant employees (S. 39), and permits a pregnant employee to request a change of duties (S. 42), but does not impose a specific obligation on the employer to provide a safe working environment.
7. 5.12 The establishment shall provide, for all employees, the convenience and adequate welfare and facilities as follows: 1. hygienic toilet and bathroom; 2. hygienic drinking water; 3. first-aid equipment as appropriate; 4. sanitary canteen and place for food storage; 5. dormitory, if provided, shall be equipped with clean and safe basic facilities and be ready for use. This is not regulated in much detail in the Labour Protection Law 1998.

Exporting companies have been encouraged to implement the TLS 8001 and the government offers financial support to companies to improve and meet the standards.<sup>172</sup> The Ministry of Labour provides for two levels of prescription and certification based on companies' compliance with the Thai Labour Standard (TLS 8001):<sup>173</sup>

1. Basic Level. The establishment will be certified with the Thai Labour Standard (TLS 8001), if it complies with requirements No. 5.3 to No. 5.12;<sup>174</sup> and requirements No. 5.1 to No. 5.2 only as regards the documents prescribed by labour law.
2. Completion Level. The establishment will be certified if it complies with all requirements of Thai Labour Standard (TLS 8001) and is prepared to gradually reduce its overtime regime as follows:
  - A. Initiative Phase - the establishment complies with all requirements of TLS 8001, and overtime does not exceed 36 hours per week.
  - B. Generative Phase - the establishment complies with all requirements of TLS 8001, and overtime does not exceed 24 hours per week.
  - C. Progressive Phase - the establishment complies with all requirements of TLS 8001, and overtime does not exceed 18 hours per week.
  - D. Superlative Phase - the establishment complies with all requirements of TLS 8001, and overtime does not exceed 12 hours per week.

The Ministry of Labour has been encouraging Thai export firms to implement TLS-8001 standards for over four years. Throughout this period, the government has offered financial support to firms to improve (about 75,000 baht), inspect and certify (about 75,000 baht) their standards.<sup>175</sup> Since 2007, the Ministry financially supports the efficiency development of TLS 8001 management system for 142 export and export- related enterprises for a period of 4-6 months.

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<sup>172</sup> Ibid.

<sup>173</sup> Available at: <http://tls.labour.go.th/en/index.html>.

<sup>174</sup> Requirements 5.3. to 5.12 deal with the following issues: Forced labour; Remuneration; Working hours; Discrimination; Discipline and penalty; Child Labour; Female employees; Freedom of association and collective bargaining; Occupational safety, health and environment; Welfare (e.g. sanitary facilities and accommodation).

Between 2003 and June 2007, 941 enterprises have received Thai Labour Standard Certification.<sup>176</sup> Among them, 476 enterprises were certified at the completion level, and 465 enterprises were certified at the basic level.<sup>177</sup> The TLS-8001 requires companies to carry out inspections by themselves<sup>178</sup> which raises some doubts of its effect in reality.

There have been a number of problems in the implementation and adherence to Thai labour standards:

1. Comparing with a properly functioning public labour inspection system, TLS's self-monitoring system is less credible to buyers. For instance, international buyers such as EU or the US buyers may trust the ILO's monitoring system in Better Factories Cambodia since the ILO is a third party without interests in it, an international organization with good reputation and trained monitors. But since the TLS only requires companies to inspect themselves, conflicts of interest may be expected. How can we expect the results of inspections to be true or accurate? Without the support of international buyers, what is the motive of Thai companies to comply with TLS especially when the funding offered by the government is cut off? This will make the TLS being disregarded by the companies soon. On the other hand, no other stakeholders such as trade unions or employers take part in the monitoring system although they cooperated with the government to create the standard. Disregarding the voices of stakeholders is perceived to make the TLS less reliable. The TLS is designed to improve labour standards and so on, whether labour standards such as working conditions have been improved should be verified by the workers rather than the company owners themselves. The self-monitoring system of the TLS will make it less reliable than a public labour inspection system.
2. The TLS-8001 does not meet international requirements. Most Thai firms disregard them because the standards and management system vary, if not always much, from the labour standards or codes of conduct of multinational firms' home countries. Local firms still need to follow the labour standards of the client company, so compliance with the Thai standard is a further unnecessary cost.<sup>179</sup> This suggests international buyers have little incentive to recognize and rely on TLS-8001.
3. During the initial promotion of the TLS-8001, the government offered financial support to help firms improve and qualify for the standards. However, in the future, firms will be responsible for the cost of maintaining the standards, and firms do not find this cost worthwhile.<sup>180</sup>
4. The unpopularity of TLS-8001 is also due to over-limiting standards such as employee welfare and the decrement in overtime hours from 36 to 12 hours per week in three years. When firms need to increase their production suddenly due to the amount of orders they receive, they often have insufficient overtime hours to meet the orders.<sup>181</sup> Excessive overtime has long proven intractable in Thailand, as workers request overtime to top up regular wages that are considered inadequate. This should be seen in the context of low trade union density in the private sector (even by Asian

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<sup>175</sup> Suttawet.

<sup>176</sup> Labour built protection for industry: support the Thai Labour Standard (TLS 8001-2546) equally with the international standard, available at: [http://eng.mol.go.th/inform\\_june2807\\_1.html](http://eng.mol.go.th/inform_june2807_1.html).

<sup>177</sup> Ibid.

<sup>178</sup> Suttawet.

<sup>179</sup> Suttawet.

<sup>180</sup> Suttawet.

<sup>181</sup> Suttawet.

standards) and nearly non-existent collective bargaining, leaving wage policy reliant on occasionally adjusted minimum wages.

5. Other problems in the government sector include a limited budget, limited experts, and limited ability to improve the standard due to rules and regulations. Also, the change of governments in Thailand causes the improvement process to slow down or come to a halt.<sup>182</sup>

## 5. Better Factories Cambodia (BFC)

The Better Factories Cambodia programme was established to improve working conditions in Cambodian garment factories according to national and international standards in 2001.<sup>183</sup> It is managed by the International Labour Organization (ILO)<sup>184</sup> and guided by a tripartite Project Advisory Committee with equal representation from the Cambodian government, the Garment Manufacturers Association of Cambodia and the Cambodian trade union movement.<sup>185</sup> The Committee evaluated the Project's monitoring and reporting system, including registration of participating factories, procedures for monitoring visits and reporting on visits, and procedures on reporting overall findings.<sup>186</sup> Better Factories Cambodia represents a convergence of common interests of the industry, international buyers, of the desires of western consumers for sweat-shop free products, and for more and better jobs in one of the poorest countries of the world.<sup>187</sup> It is funded by the US Department of Labour (USDOL), USAID, the Agence Française de Développement (AFD), the Royal Cambodian Government (RGC), the Garment Manufacturers Association of Cambodia (GMAC) and international buyers. The funding enables the project to be self-supporting by 1st January 2009.<sup>188</sup>

BFC grew out of the U.S. - Cambodia Textile Trade Agreement.<sup>189</sup> The Agreement set an export quota for garments from Cambodia to the United States,<sup>190</sup> while seeking to improve working conditions and respect for basic workers' rights in Cambodia's garment sector by promoting compliance with and effective enforcement of Cambodia's Labour Code<sup>191</sup> as well as internationally recognized core labour standards.<sup>192</sup> The improvement in labour standards had to be demonstrated by Cambodia first, and then

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<sup>182</sup> Suttawet.

<sup>183</sup> Ensuring that Working Conditions in the Textile and Apparel Sector of Cambodia Comply with Internationally Recognized Core Labour Stands and the Cambodian Labour Law, p.26, ILO (May 4, 2000) (on file with author). Cite from: Kevin Kolben, Note from the Field: Trade, Monitoring and the ILO, 7 YALE HUM. RTS. & DEV. L.J. 79, 100(2004).

<sup>184</sup> "About Better Factories", available at:

<http://www.betterfactories.org/ILO/aboutBFC.aspx?z=2&c=1>.

<sup>185</sup> *Cambodia And ILO Expand Partnership To Improve Working Conditions In Garment Sector*, Press Release, Wednesday, 9 February 2005. available at: [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD\\_BLOB?Var\\_DocumentID=4656](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=4656).

<sup>186</sup> Ibid.

<sup>187</sup> "About Better Factories".

<sup>188</sup> Ibid.

<sup>189</sup> Don Wells, 'Best Practice' in the Regulation of International Labour Standards: Lessons of the U.S.-Cambodia Textile Agreement, *Comparative Labour Law & Policy Journal*, Vol. 27, No. 3, p. 357, 2006, available at SSRN: <http://ssrn.com/abstract=996876>.

<sup>190</sup> By 9% in 2000 and 2001, 12% in 2002, 14% in 2003, and 18% in 2004. U.S. Embassy Phnom Penh, Cambodia, *U.S.-Cambodia Bilateral Textile Agreement Quota Bonus Decision for 2004*, press release, December 3, 2003, available at: <http://phnompenh.usembassy.gov/wwwwh0060.thml>. The original website is not existing on 2008-8-24. Cited from: Sandra Polaski, *Cambodia blazes a new path to economic growth and job creation*, Carnegie Papers No. 51, 14, October 2004.

<sup>191</sup> Including a minimum wage, a 48 hour work week with not more than two hours overtime per day, 90 days unpaid maternity leave, unpaid sick leave, and compensation for work-related injuries. ILO, *Facts and Figures*, BETTER FACTORIES CAMBODIA (Geneva, 2005), available at:

[http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD\\_BLOB?Var\\_DocumentID=4841](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=4841).

<sup>192</sup> US-Cambodia Textile Agreement Article 10B, "The implementation of a programme to improve working conditions in the textile and apparel sector, including internationally recognized core labour standards, through the application of Cambodian labour law.", available at: [http://www.bilaterals.org/article.php3?id\\_article=387](http://www.bilaterals.org/article.php3?id_article=387).

the commercial reward followed by the US.<sup>193</sup> ILO, whose technical assistance was requested by both governments, prepared a project proposal, the result of which is Better Factories Cambodia.<sup>194</sup>

In order to achieve the basic objective of the project - improving working conditions in Cambodia's textile and apparel sector, an independent monitoring system is run by the ILO and factories voluntarily registered.<sup>195</sup> The programme will be monitored by the ILO monitors<sup>196</sup> visiting to check working conditions without announcement in advance.<sup>197</sup> The key monitoring steps include:<sup>198</sup> registration,<sup>199</sup> unannounced visits,<sup>200</sup> report preparation,<sup>201</sup> report published in the IMS<sup>202</sup>,<sup>203</sup> objections and Corrective Action Plans (CAPs),<sup>204</sup> follow-up visits.<sup>205</sup>

Better Factories Cambodia monitors over 500 separate items from a checklist that has been endorsed by the government as well as by employers and unions involved in the garment industry.<sup>206</sup> In the six months before 30 April 2008, 200 factories out of a total of 326 active factories were monitored.<sup>207</sup> The project's monitoring covers core international labour standards as well as provisions of the Labour Law (1997) and executive ministerial decrees regarding wages, hours of work, contracts of employment, leave, occupational safety and health, welfare and labour relations.<sup>208</sup> Two kinds of reports are provided after monitoring: confidential factory reports on the findings at each factory, and publicly available "synthesis reports" with overviews of monitoring results.<sup>209</sup> The confidential reports provide factory managers with the findings including suggestions for improvement.<sup>210</sup> Suggestions are specific, touching on issues as diverse as child labour, freedom of association, employee contracts, wages, working hours, workplace facilities, noise control and machine safety.<sup>211</sup> After time for discussion and follow-up action, the monitors again visit the factory to check progress. The findings from the monitoring are made public through

<sup>193</sup> Sandra Polaski, *Cambodia blazes a new path to economic growth and job creation*, Carnegie Papers No. 51, p.16, October 2004.

<sup>194</sup> Ensuring that Working Conditions in the Textile and Apparel Sector of Cambodia Comply with Internationally Recognized Core Labour Stands and the Cambodian Labour Law, 26, ILO (May 4, 2000) (on file with author). Cited from: Kevin Kolben, *Note from the Field: Trade, Monitoring and the ILO*, 7 YALE HUM. RTS. & DEV. L.J. 79, 91(2004).

<sup>195</sup> Although factory registration was voluntary, only registered factories were eligible for export quotas. Don Wells, 364. Up until 2008-8-24, 309 operating factories are registered with *Better Factories Cambodia*. Registration means that the ILO and the participating factory sign a Memorandum of Understanding (MOU) outlining their duties and responsibilities. The factory agrees to provide ILO monitors with full access to the factory premises at all times. The factory also agrees that ILO monitors will interact freely with shop stewards, union representatives and factory workers, both inside and outside the factory premises.

See <http://www.betterfactories.org/monitoring.aspx?z=5&c=1>.

<sup>196</sup> Up until 24 April 2008, there are 12 monitors now. Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> Monitoring Process Brochure, p.2, available at:

<http://www.betterfactories.org/resourcedet.aspx?z=7&iddoc=95&c=1>.

<sup>199</sup> Manufacturer registers with the programme and gets basic information about the monitoring process.

<sup>200</sup> Unannounced monitoring visit takes place during which meetings are held with management, shop stewards, union leaders, and workers, documents are reviewed and the workplace is observed.

<sup>201</sup> Documentary evidence provided by the manufacturer is reviewed, and the report is repaired.

<sup>202</sup> The IMS is a totally computerized system for collecting, storing and analyzing data. It enables the generation of reports tailored to user needs, and provides enhanced security, easy access to information, and greater transparency. The IMS brochure, available at: [http://www.betterfactories.org/content/documents/1/IMS%20Brochure%20\(en\).pdf](http://www.betterfactories.org/content/documents/1/IMS%20Brochure%20(en).pdf).

<sup>203</sup> If the project manager approves the report, the report is made available for the manufacturer and any authorized third parties, such as buyers in information management system (IMS).

<sup>204</sup> Manufacturer can post objections and Corrective Action Plans (CAPs) and/or request clarification on issues of concern.

<sup>205</sup> Next monitoring visit expected within six months time, with a possibility of additional single-issue ad hoc checks at any time.

<sup>206</sup> IMS brochure, available at:

[http://www.betterfactories.org/content/documents/1/IMS%20Brochure%20\(en\).pdf](http://www.betterfactories.org/content/documents/1/IMS%20Brochure%20(en).pdf).

<sup>207</sup> ILO BFC, *Twentieth Synthesis Report On Working Conditions In Cambodia's Garment Sector*, 30 April 2008, 2 ([http://www.betterfactories.org/content/documents/1/20th%20Synthesis%20Report%20Final%20\(EN\).pdf](http://www.betterfactories.org/content/documents/1/20th%20Synthesis%20Report%20Final%20(EN).pdf))

<sup>208</sup> Ibid.

<sup>209</sup> Don Wells, 364.

<sup>210</sup> "About Better Factories".

<sup>211</sup> Ibid.

synthesis reports. Factories are named and their progress on implementation is identified in all reports made after the second visit.<sup>212</sup> According to the ILO, the synthesis reports played a significant role in the U.S. government's decisions about annual quota increases.<sup>213</sup>

What is more, Better Factories Cambodia is creating services to help the industry improve working conditions, whilst at the same time improving quality and productivity.<sup>214</sup> A range of training opportunities and resources, such as the Modular Training Programme and Single Issues Seminars, are being progressively offered to the industry.<sup>215</sup>

Among the achievements of the BFC we can mention:

1. The Better Factories Cambodia initiative has grown into a multi-stakeholder programme rooting Cambodia's competitive edge in compliance with international labour standards and national labour law.<sup>216</sup>
2. The IMS provides a world-first information management system for monitoring and reporting. The IMS streamlines and integrates the data collected during factory monitoring visits on working conditions and labour standards.<sup>217</sup> By managing the data in this manner, Better Factories Cambodia can help factories improve their business performance. Since the information is managed electronically, Better Factories Cambodia can automatically generate reports for individual factories as well as for groups of factories or the entire industry, showing their compliance and progress, while making suggestions for improvement.<sup>218</sup> The IMS also benefits international buyers since the electronic information management system can "provide better quality, easy-to-read reports; provides convenient, on-line access to factory reports; generates tailored reports comparing compliance levels for selected factories; reduces duplicative monitoring and cuts costs."<sup>219</sup> Other stakeholders, such as the employers' organization (CAMFEBA), trade unions and the public, also benefit from the IMS, because the IMS can "contribute to the garment industry's sustainability, provide online access to timely, user-friendly information, increase the transparency of monitoring and reporting and generate analytical data".<sup>220</sup>

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<sup>212</sup> Ibid.

<sup>213</sup> Don Wells, p.364. Decisions are made by the Committee on the Implementation of Textile Agreements, an interagency group comprised of representatives from the U.S. Departments of State, Labour, Commerce, and Treasury, and the Office of the U.S. Trade Representative.

<sup>214</sup> "About Better Factories".

<sup>215</sup> Ibid.

<sup>216</sup> Consider e.g. the following observation on the end of textile quotas: "Cambodia ... could be quite adversely affected. Garments contribute 76 percent of exports and all of manufacturing employment, but are closely correlated with those sub-categories where China is presently most quota constrained. Productivity levels are less than in China, offsetting lower wage levels. The industry is also hampered by longer lead times and a limited domestic textiles production capacity. One potential comparative advantage however is Cambodia's adherence to ILO monitored Core Labour Standards, which are viewed favorably by some classes of buyers. Cambodia and a number of other Least Developed Countries have also asked for preferential duty-free access to the U.S. market, which otherwise imposes a 15 percent duty on garment imports from WTO members." World Bank, *East Asia Update 2004*, 23

<sup>217</sup> IMS Brochure.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

3. There is substantial evidence that the programme has benefited garment workers in Cambodia. For instance, employment in the garment industry more than quadrupled from 79,000 in 1998 before the agreement to over 350,000 in April 2008.<sup>221</sup> On the other hand, reports and surveys provide evidences of significant improvement in compliance with several labour standards.<sup>222</sup> Research in 1999, before the UCTA came into effect, disclosed that labour standards were “largely unchecked” and “[l]ack of enforcement, rather than inadequacy of existing legislation, pose[d] the greatest obstacle to guaranteeing basic rights to workers in the garment industry in Cambodia”.<sup>223</sup> By contrast, after several years of UCTA quota incentives and ILO monitoring, a World Bank survey of international buyers found that Cambodia’s labour standards compliance ranked ahead of all its regional competitors.<sup>224</sup> Also according to the 8<sup>th</sup> synthesis report of Better Factories Cambodia, on the whole, while a few factories made “little effort to improve”, in most factories progress has been made in improving working conditions.<sup>225</sup> The growth of the garment sector and the democratic transition in Cambodia also has prompted the emergence of an active trade union movement in the country<sup>226</sup>. A September 2004 survey of trade unions in Cambodia estimated total union membership in the country at 337,000, of whom 83% are women. The largest number of union members and unions are found in the garment industry, where 10 union federations compete for members.<sup>227</sup>
4. According to a 2004 World Bank survey of Cambodia’s top 15 buyers which account for 45 per cent of the Cambodian garment industry’s exports in the textile and garment sector, 9 buyers intend to increase sourcing in Cambodia and 6 intend to continue sourcing at the same level even after the quota period.<sup>228</sup> The strong majority, 78.6%, of respondents felt that voluntary certification/audit schemes would be of major or critical importance when they consider sourcing post quotas in 2005. Good labour standards rated first out of 12 possible country-specific reasons to source from a country.<sup>229</sup>
5. Buyers think improved labour standards have positive effects on:
  - accidents;
  - workforce productivity;
  - product quality;
  - worker turnover;

<sup>221</sup> ILO, Facts and Figures, Better Factories Cambodia (Geneva, 2005).

<sup>222</sup> ILO BFC, *Twentieth Synthesis Report On Working Conditions In Cambodia’s Garment Sector*, 30 April 2008 ([http://www.betterfactories.org/content/documents/1/20th%20Synthesis%20Report%20Final%20\(EN\).pdf](http://www.betterfactories.org/content/documents/1/20th%20Synthesis%20Report%20Final%20(EN).pdf))

<sup>223</sup> John A. Hall, *Human Rights and the Garment Industry in Contemporary Cambodia*, Stanford Journal of International Law, Vol. 36, No. 1, 119, 126 (2000), available at SSRN: <http://ssrn.com/abstract=926407>.

<sup>224</sup> Foreign Investment Advisory Service (World Bank), *Cambodia: Corporate Social Responsibility and the Apparel Sector Buyer Survey Results (Dec. 2004)*, available at [http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/Cambodia+Buyer+Report+Final/\\$FILE/Cambodia+Buyer+Survey+Report+Final.pdf](http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/Cambodia+Buyer+Report+Final/$FILE/Cambodia+Buyer+Survey+Report+Final.pdf).

<sup>225</sup> ILO, Eighth Synthesis Report on the Working Conditions Situation in Cambodia’s Garment Sector, July 2008, p. 89, available at <http://www.betterfactories.org/content/documents/1/8th%20Synthesis%20Report%20-%20English.pdf>.

<sup>226</sup> The garment and textile sector is the most FDI penetrated sector in Cambodia, with the largest share of FDI coming from China and the ASEAN countries. See Ludo Cuyvers, Reth Soeng and Daniël Van Den Bulcke, *The contribution of MNEs to economic success in small open economies: the case of Cambodia*, CAS Discussion paper No 58, University of Antwerp, Centre for ASEAN Studies; January 2008

<sup>227</sup> Cambodia: Corporate Social Responsibility & the Apparel Sector Buyer Survey Results, Foreign Investment Advisory Service (World Bank Group), Washington, December 2004, available at: [http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/Cambodia+Buyer+Survey+Report+Final/\\$FILE/Cambodia+Buyer+Survey+Report+Final.pdf](http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/Cambodia+Buyer+Survey+Report+Final/$FILE/Cambodia+Buyer+Survey+Report+Final.pdf).

<sup>228</sup> <http://www.betterfactories.org/content/documents/WB%20survey.pdf>.

- absenteeism;
- the quality of applicants for jobs.<sup>230</sup>

Buyers rated countries' compliance with labour standards as follows:<sup>231</sup>

Cambodia labour standards # 1 3.65 (moderate-good)

Thailand labour standards # 4 3.13 (moderate-good)

China labour standards # 8 2.87 (poor-moderate)

Viet Nam labour standards # 8 2.64 (poor-moderate)

Bangladesh labour standards # 8 2.35 (poor-moderate)

6. Perhaps the most significant achievement of BFC to date is that ILO and IFC have embarked on a joint programme to bring the experience in Cambodia to scale with pilot projects in Viet Nam, Jordan and Lesotho.<sup>232</sup>

Better Factories Cambodia is complemented by an ILO Labour Dispute Resolution Project (LDRP) with funding from the US Department of Labour and USAID.<sup>233</sup> The LDRP helped establish Cambodia's first national Arbitration Council and has developed an agreed National Strategy on Labour Dispute Prevention and Settlement in Cambodia.<sup>234</sup> It is a key element in the promotion of the Cambodian garment industry to international buyers concerned with compliance issues.<sup>235</sup> Since its establishment in May 2003 until June 30, 2007, 402 cases have been filed with the Secretariat of Arbitration Council, the vast majority of these cases were settled successfully with a settlement agreement or arbitral award.<sup>236</sup>

## 6. Viet Nam

From April 2000 to November 2003, the World Bank ran a programme<sup>237</sup> to explore the potential roles of the public sector within developing countries to encourage and strengthen CSR.<sup>238</sup> It has been based on activities and dialogue on specific sectoral or thematic issues in Viet Nam as well as in three other countries (Angola, El Salvador and The Philippines), plus commissioned research on cross-cutting themes.<sup>239</sup>

The programme in Viet Nam aimed to strengthen the government role in promoting CSR in Viet Nam, in particular through codes of conduct. In this way, the World Bank thought to be able to enhance the government's strategic planning for Vietnamese business competitiveness within a globalizing economy

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid.

<sup>232</sup> <http://www.betterwork.org/public/global/public-files/news-and-press-releases/better-work-promoting-labour-standards-through>.

<sup>233</sup> Cambodia, LABOUR DISPUTE RESOLUTION, available at:

[http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ProjectDetails?var\\_Language=EN&var\\_ID=204](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ProjectDetails?var_Language=EN&var_ID=204).

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> [http://www.arbitrationcouncil.org/eng\\_awardanddigest.php](http://www.arbitrationcouncil.org/eng_awardanddigest.php).

<sup>237</sup> The programme ran under the title *Strengthening developing country governments' engagement with Corporate Social Responsibility*.

<sup>238</sup> Nigel Twose and Tara Rao, *Strengthening Developing Country Governments' Engagement with Corporate Social Responsibility: Conclusions and Recommendations from Technical Assistance in Vietnam*, Final Report, the World Bank, p.1, December 2003, available at:

<http://siteresources.worldbank.org/INTPSD/Resources/Vietnam/VietnamFinalDec03.pdf>.

<sup>239</sup> Twose and Rao.

and at a time when Viet Nam was preparing for WTO membership.<sup>240</sup> The U.S. – Viet Nam bilateral agreement referred to earlier had already provided evidence that Viet Nam was more averse to formal “social clauses” than Cambodia. Stakeholders in the priority export sectors had to be “prepared” for the expectations that they were about to meet from buyers and consumers in export markets. The programme chose the apparel and footwear sectors in Viet Nam, given their importance to the national economy, their demonstrated susceptibility to market-based CSR pressures, and their urgent need to adapt to a quota-free world post 2005.<sup>241</sup>

The broad objectives of this technical assistance included:<sup>242</sup>

1. To build enough awareness about CSR among key government officials (representing government ministries and agencies concerned with social and economic policies) to engage in a discussion about government roles in strengthening CSR;
2. To explore and identify realistic and appropriate government roles for strengthening CSR in Viet Nam using labour standards and the footwear industry as a case study;
3. To support the government in stimulating a broad dialogue with key stakeholders in key export sectors about proposed government roles in strengthening CSR.

The study was carried out by the Vietnamese Institute for Labour, Sciences and Social Affairs (ILSSA, a “think tank” associated with the Ministry of Labour, Invalids and Social affairs or MOLISA), coordinated with the Advisory Group as stakeholder representatives, to ensure common understanding and enhanced ownership of the research process and outcomes.<sup>243</sup> The World Bank shouldered the costs of the programme and provided technical assistance with the research.<sup>244</sup>

Key activities implemented under this Programme of Technical Assistance included:

1. Multi-stakeholder Seminars on CSR (Ho Chi Minh City and Hanoi). The programme offered chances to policymakers, enterprises and related organizations to attend symposia and dissemination workshops, which were targeted to provide information on CSR-related labour standards relevant to footwear and textile enterprises. Workshops were held in the North (Hanoi) and in the South (Ho Chi Minh City).<sup>245</sup>
2. Establishment of a multi-sectoral Advisory Group. A CSR Advisory Group was formed counting amongst its members the World Bank, ILO, representatives of VITAS and LEFASO, VGCL, VCCI, the international buyers (e.g. Nike and Adidas),<sup>246</sup> legal consulting companies (Global Standards, Baker Mc. Kenzie), and NGOs. The Advisory Group was designated to support the study and assist the

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<sup>240</sup> Twose and Rao, p.12.

<sup>241</sup> Twose and Rao, p.12.

<sup>242</sup> Ibid. Also see Twose and Rao, p.11.

<sup>243</sup> Twose and Rao, p. 11.

<sup>244</sup> The World Bank and ILSSA Programme of Technical Assistance: Corporate Social Responsibility in Vietnam, SUMMARY, available at: <http://siteresources.worldbank.org/INT/PSD/Resources/Vietnam/VietnamCSRTASummary.pdf>.

<sup>245</sup> MOLISA and ILSSA, *Study on Corporate social responsibility labour-related practices*, Final Report, February 2004, 1 and 2 available at: [http://siteresources.worldbank.org/INT/PSD/Resources/Vietnam/Vietnam\\_ILSSA.pdf](http://siteresources.worldbank.org/INT/PSD/Resources/Vietnam/Vietnam_ILSSA.pdf).

<sup>246</sup> The acronyms stand for the Vietnam Textile and Garment Association (VITAS), the Vietnam National Leather and Footwear Association (LEFASO), the Vietnam General Confederation of Labour (VGCL – the national trade union centre or mass organization responsible for mobilizing workers), and the Vietnamese Chamber of Commerce and Industry (VCCI – the only nation-wide organization representing employers).

Government in broadening public dialogue in this regard.<sup>247</sup>

3. Research to support further study of proposed public sector roles to strengthen CSR. The research focused on footwear and textile companies. This labour-intensive industry is a major employer, and directly affected by consumer expectations in an open international trading system. The objective of the research was to identify the challenges/barriers and opportunities in CSR's implementation, and to help the Government plan strategically for improved business competitiveness.<sup>248</sup>

According to the research, most Vietnamese textile and footwear companies passively implemented their buyers' codes, rather than proactively seeking increased market share through CSR practices.<sup>249</sup> Suppliers commonly work with more than one buyer, and therefore implement more than one code, with the number ranging from 2 to 6 at any one time.<sup>250</sup>

The supporting research analyzed barriers to CSR awareness and implementation within a sample of enterprises (based on ownership, scale and location) and amongst key stakeholders.<sup>251</sup> The research revealed the following barriers and challenges.<sup>252</sup>

1. There are wide variations in awareness and understanding of CSR among and within Vietnamese firms.
2. The implementation of multiple buyers' CSR Codes of Conduct, or CoCs, by a single Vietnamese supplier is creating inefficiencies. Interesting is that the researchers propose to resolve the problem of multiple rule compliance by the labour administration (i.e. MOLISA) encouraging buyers to collaborate when it comes to setting and monitoring rules.<sup>253</sup> This appears most impractical. First, labour administrations have a much more straightforward jurisdiction over local companies operating on their territory than over foreign entities with a fleeting presence in the countries. Secondly, promoting collaboration in individualized trading environments is likely to require a much higher level of public resources than the traditional adoption and enforcement of labour law. Thirdly, such collaboration does not resolve the "social and economic legitimacy" deficit which is such a prominent concern embedded in international labour standards: if employers and workers are not involved at the earliest possible stage in the making of the rules that will ultimately govern them, chances that the rules eventually adopted will be both viable and supported are seriously compromised.
3. Differences between national labour law and the codes of conduct resulted in firm-level confusion. Codes of conduct would fairly unanimously require freedom of association, while Vietnamese law provides for state-sponsored trade union monopoly. Vietnamese law caps overtime in the footwear, leather and garment industry at 300 hours a year. Most factories, however, require their employees to work between 450 – 600 hours of overtime a year. Often, employees themselves request to work overtime, not only to earn the additional wages, but also to reduce subsistence expenditure.<sup>254</sup> At the same time, SA8000, for example, permits a more flexible ceiling of 12 hours of overtime a week

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<sup>247</sup> MOLISA and ILSSA Final Report, p.2.

<sup>248</sup> MOLISA and ILSSA Final Report, p.2.

<sup>249</sup> Twose and Rao, p.16.

<sup>250</sup> Ibid.

<sup>251</sup> Twose and Rao, p.1.

<sup>252</sup> Ibid.

<sup>253</sup> Twose and Rao, p. 17.

<sup>254</sup> Twose and Rao, p. 17.

(resulting in a much higher annual cap).

4. Inconsistencies in national regulations create inefficiencies in code of conduct implementation, relating to e.g. wage rate, benefits and employment conditions.
5. Unequal access to financial and technical resources is creating CSR disparities at enterprise level, especially for small and medium-size enterprises (SMEs).
6. Shifting, anonymous, complex supply chains inhibit longer-term commitment to CSR.
7. The lack of transparency over current CSR practices is hindering potential market rewards.

Based on the research findings in Viet Nam, and comparable work in the other three countries in this programme, the World Bank made six recommendations to the Government of Viet Nam.<sup>255</sup> One of the recommendations calls for partially for synergies between public labour inspection services and private compliance monitoring agencies (particularly with a view to discerning violation patterns), partially for a division of labour, i.e. the public labour inspection services focusing on companies not reached by private codes of conduct:

“5. MOLISA should seek learning opportunities for its labour inspectorate through improved collaboration with the private sector monitors and auditors associated with CSR codes, both for-profit and not-for-profit. This could include data sharing, with buyers providing aggregated data from their CoC monitoring, which would reveal useful patterns of violation patterns and trends. It could also include information sharing on inspection techniques. The Labour Inspectorate should be fully briefed on the comparative analysis of the national labour code and CSR codes, and able to offer advice and support to Vietnamese firms in dealing with these matters, maintaining the sanctioning power of inspectorates, but shifting the focus to technical assistance for those firms that are developing their own CSR benchmarks and improvement plans. MOLISA should pilot joint visits for its inspectors with those of CoC inspectors, to reduce the time burden on enterprises of multiple visits, and to increase learning opportunities for MOLISA inspectors and for the private inspectors. MOLISA should re-prioritize the workload of its inspectorate, with less emphasis on those enterprises that are subject to regular robust monitoring and inspection through CoCs, and more on those enterprises that are not involved with any CoC and typically have far lower labour standards.”

The Government of Viet Nam drew relatively different conclusions from its experience. It recognized that CSR and meeting expectations with respect to socially responsible production were now part and parcel of doing business on a global scale; that CSR could actually contribute to greater awareness of labour law and legal principles; and could even reduce the burden on labour inspection services. Considering the potential burden on financial and human resources, and the barriers to international trade that CSR could present, it concluded that the Government should not promote codes of conduct.<sup>256</sup> At any rate, since most codes of conduct referred to standards enshrined in Vietnamese labour law, efforts were better spent on promoting compliance with the law.<sup>257</sup>

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<sup>255</sup> Twose and Rao, pp.2,3.

<sup>256</sup> MOLISA and ILSSA, 2004, 58.

<sup>257</sup> MOLISA and ILSSA, 2004, 45 and 59.

In an evaluation of CSR public-private inspection arrangements overseen by public authorities, the International Finance Corporation (IFC) concluded that supporting these alternative initiatives is the way for Governments to go, for a number of simple reasons:

- Respond to stretched and limited public sector budgets in general, and enforcement activities in particular;
- Bring the expertise and capacity from the non-public sector that governments may lack in order to enhance the effectiveness, efficiency, transparency and accountability of conventional inspection approaches;
- Obtain greater marketplace credibility than provided by conventional public sector inspections, and
- Reduce systemic failures in sector-based inspections due to compliance costs for firms and corruption.<sup>258</sup>

The evaluation readily admits that the arrangements “are also more complex to manage, they [are] dependent on a degree of cooperation among participants that may vary over time, and they raise accountability and legality issues.” In addition, the alternative arrangements require public efforts to build the capacity of third party certifiers, and public oversight to ensure that the authority is not misused (e.g. in the case of collusion).<sup>259</sup> Finally, the effectiveness and credibility of the arrangements depend on public transparency as regards the operation of the arrangement; accessibility of companies to the arrangement; and accountability of the initiative.<sup>260</sup> All these concerns call for a legislative framework that does not necessarily undermine the voluntary character of the arrangement,<sup>261</sup> and, of course, “a well-respected and easily accessible judicial system”.<sup>262</sup>

It is easy to see the benefit that may be derived from private inspection initiatives complementing fledgling public efforts. However, the success of these private initiatives, in particular when brought to scale, appears to depend very much on the very factors that influence the effectiveness of public inspections, and even to add a layer of complexity. At the same time, other issues such as the political legitimacy of domestic labour standards and of their evenhanded enforcement, at least in principle, do not appear any closer to a resolution.

## 7. Conclusions

1. The demand for accountability as to how countries govern their labour markets and how companies operating on those markets treat their workforces remains high. No sooner is accountability at one level found wanting, or new, mostly complementary levels are being explored.
2. At the multilateral level of public rule-making, there is a declaratory consensus that certain fundamental labour standards must be promoted, and that their violation makes countries’ comparative advantage in the international trading order illegitimate. Exactly what that means for trade preferences remains a moot point.

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<sup>258</sup> Alternatives to Public Sector Inspections: Public-Private Partnerships and Corporate Social Responsibility (CSR), Final Report for the Foreign Investment Advisory Service of the World Bank Group, 30 June 2005, para. 105, accessible at ([http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/CSR-Alternatives+to+Public+Sector+Insepctions+June+30/\\$FILE/Alternatives+to+Public+Sector+Insepctions+June+30.pdf](http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/CSR-Alternatives+to+Public+Sector+Insepctions+June+30/$FILE/Alternatives+to+Public+Sector+Insepctions+June+30.pdf)). Interesting

is that IFC does not seem to have formally endorsed the evaluation, keeping an “arm’s length” from its conclusions.

<sup>259</sup> MOLISA and ILSSA, 2004, para. 107 and 108.

<sup>260</sup> *ibid.*, para. 111

<sup>261</sup> *ibid.*, para. 112

<sup>262</sup> *ibid.*, para. 118

3. The United States and the European Union each make consistent bilateral attempts to make trade preferences subject to the observance of labour standards or, put differently, have them “contribute to good governance”. There is some uniformity in the standards selected (in particular the fundamental standards), but not in the extent to which assessment defers to multilateral procedures (i.e. ILO “supervisory procedures”), and sanction-based enforcement is generally avoided.
  4. Partially, but not exclusively in response to such bilateral pressures, a variety of private initiatives have sprung up to induce the short-term changes on the shopfloor that more traditional public governance systems have failed to bring about. While in many cases, these private initiatives make essential contributions to increased awareness both of legal provisions and of global market expectations, and foster immediate improvements with respect to outcome-related labour standards (e.g. regular payment of wages), their success in the longer term appears to depend on the same governance institutions that process-related labour standards aim to improve: participatory decision-making for the labour market (e.g. tripartite consultations to ensure a uniform set of informed and viable labour standards) and on the labour market (e.g. market-based, negotiated terms and conditions of employment); and respect for the rule of law.
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