# REFERENCE GUIDE TO THE LEGAL FRAMEWORKS AND TRADE AGREEMENTS/NEGOTIATIONS FOR ENFORCING INTERNATIONAL LABOUR STANDARDS AND HUMAN RIGHTS IN THE AMERICAS

**prepared by**

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## INTRODUCTION

With the increasing social and economic impact of globalization and trade agreements, there is growing public concern about the protection and enforcement of labour and human rights standards. The legal systems for protecting labour and human rights have been fundamentally challenged by the forces of globalization which seek to move large volumes of goods, services, information and capital across international borders with low friction and high velocity. Workers who lack capital's mobility advantage are subject to the threat of global capital moving to regions with lower standards.[1]

National labour markets are significantly affected by forces and laws outside the country, including international or regional trade arrangements, the requirements of international financial institutions and transnational corporate business practices. Trade liberalization policies often tend to define social and economic regulation as "trade barriers". These forces are limiting the ability of individual states to exercise control over their labor market policies. Trade agreements negotiated at the transnational level have a profound impact on public policy.

The international business community has had significant success in lobbying nation states to ease, not legislate or not enforce labour and equality protections so as to attract and retain transnational companies and permit local businesses to compete in the global production system. The result has been structural adjustment programmes, privatization of state services, anti-collective bargaining laws and business-friendly export processing zones. For workers and the poor, their greatest asset is their labour. The international labour and human rights community, including the UN, ILO, trade unions and NGOs have spent many years working to develop effective instruments and measures to address this global employment problem. Recently, the world's business community and its trade organizations have begun to realize the importance of developing mechanisms to address labour and human rights inequities which arise as a result of the impact of globalization and free trade. Even when agreement is reached on appropriate mechanisms, the challenge is to implement those instruments so that they offer real protection to workers in this globalized context.

There is considerable debate and research on how labour and human rights protections can be best addressed in a trade context, including whether core labour standards should be negotiated into trade agreements or left to the enforcement procedures of the ILO or other human rights mechanisms in the UN or regional mechanisms such as the Inter-American Commission on Human Rights.

### Purpose of this Reference Guide

As international, regional and domestic governments and institutions along with civil society move to address the important issue of enforcing labour and human rights standards in an era of free

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[1]Arthurs, Harry, "Reinventing Labor Law for the Global Economy: The Benjamin Aron Lecture" (2001) 22(2) Berkeley Journal of Employment and Labour Law at 273.

trade, it is essential that there be a broad understanding of the framework and rules which currently exist to govern conduct in this area. This paper is a reference guide to information on the regulatory framework provisions, mechanisms and agreements/negotiations which are influencing the development of public policies and agreements in the Americas.

As the Table of Contents indicates, Part I of this Guide reviews the International Labour and Human Rights mechanisms, including those of the International Labour Organization, the United Nations, and the World Trade Organization; Part II reviews the Americas Regional Human Rights Mechanism, the Inter-American Court and Commission on Human Rights; Part III reviews various Americas Free Trade Agreements and Negotiations dealing with Labour and social provisions including the North American Agreement on Labour Cooperation (NAALC); the Canada -Chile Agreement on Labour Co-operation (CCALC); the Canada -Costa Rica Agreement on Labour Co-operation (CCRALC); the U.S- Chile Free Trade Agreement; the Central American Free Trade Agreement (CAFTA); and the Free Trade of the Americas Negotiations. Part IV of the Guide reviews other models including the US Jordan Free Trade Agreement, the US-Morocco Free Trade Agreement and the US Trade Promotion Authority legislation. The Guide then appends some important reference documents: Appendix Appendix "A" International Labour Organization Fundamental Workers' Rights Conventions; Appendix"B "United Nations Human Rights Provisions ; Appendix "C" Other Provisions of United States Jordan Free Trade Agreement (USJFTA) ;Appendix "D" Bibliography - Labour and Human Rights Standards and Free Trade; and Appendix "E" Web References for International Instruments and Policy Documents

I have left to a separate paper any analysis of the above-noted provisions.

## PART I - INTERNATIONAL LABOUR AND HUMAN RIGHTS MECHANISMS

### 1) International Labour Organization (ILO)

### a) Core Labour Standards and Conventions

The international consensus on the fundamental rights and fair practices for the world's workplaces is contained in the Conventions and Recommendations of the International Labour Organization ("ILO").[2] As a tripartite UN specialized agency with representatives of employers, workers and governments from 175 countries, the ILO is responsible for the development and enforcement of fair working conditions . ILO standards are developed through negotiations between governments, trade unions and employer representatives in ILO member states.[3] One hundred and eighty Conventions have been adopted in a process which requires a vote of two thirds of the country delegates at the annual International Labour Conference. Once a Convention is ratified by a

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[2] See ILO website for further references - www.ilo.org.

[3] See also ICFTU - Briefing Note, ILO Fundamental Workers' Rights Conventions. Online - www.icftu.org.

country's legislature, then the Convention is binding. The country is required to pass laws which implement the ratified standards. Unlike Conventions which are binding when ratified, Recommendations are not ratified and provide guidance only for the interpretation of the Convention.

The *ILO Declaration on Fundamental Principles of Work and its Follow Up* seta out these core labour standards which are a set of four internationally recognized basic workplace rights and principles;

a. Elimination of all forms of forced or compulsory labour;
b. Effective abolition of child labour with priority to the worst forms;
c. Equal opportunity and non-discrimination in employment; and
d. Freedom of association and the right to collective bargaining.

These basic rights have been repeatedly agreed to in a number of international instruments including the 1948 *Universal Declaration of Human Rights* and the Declaration of the 1995 Copenhagen Summit on Social Development. The Declaration calls on each of the ILO members to comply with the four core standards regardless of whether the country has ratified the relevant Conventions. The core labour standards are also supported by the World Bank which is committed to understanding and incorporating Core Labour Standards in the development of their Country Assistance Strategies.[4]

The four core labour standards relate to one or more of the following ILO Conventions which are described in more detail in Appendix "A" to this paper:

a. *Convention 87 Concerning Freedom Of Association And Protection Of The Right To Organize (1948);*
b. *Convention 98 Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (1949);*
c. *Convention 29 Concerning Forced Or Compulsory Labour (1930);*
d. *Convention 105 Concerning The Abolition of Forced Labour (1957);*
e. *Convention 100 Concerning Equal Remuneration For Men And Women Workers For Work of Equal Value (1951);*
f. *Convention 111 Concerning Discrimination In Respect Of Employment And Occupation (1957);*
g. *Convention 138 Concerning Minimum Age For Admission To Employment (1973).*

**b) ILO Enforcement System**

ILO Conventions are enforced through a requirement for regular reporting along with various complaint procedures.

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[4] See www.wbln0018.worldbank.org.

The reporting system is the primary way in which the Conventions are enforced. Countries who have ratified Conventions must report to the ILO regularly which means every five years for general Conventions and every two years for priority Conventions such as those noted above.[5] The ILO Committee of Experts, composed of independent experts, examines these Government reports annually. These Experts then submit their report on a Government's application of the Conventions and Recommendations to the International Labour Conference where it is discussed by a tripartite committee on standards. Only a limited number of serious cases are discussed by the Conference committee. The Experts' report and the Committee observations are then used to help governments bring their laws and practice into compliance. Countries are also offered ILO technical advisory assistance to bring their laws into compliance. While this reporting and review mechanism only applies to ratified Conventions, the ILO Governing Body can ask a Government for a report on a non-ratified Convention.

A trade union or employer organization has access to directly file a complaint with the ILO alleging that a Government is not observing a ratified Convention.[6] This complaint is then dealt with by a tripartite committee set up by the ILO governing body. This committee reports back to the Governing Body which can adopt conclusions and recommendations.

A government can also file a complaint against another government about the failure to ensure the effective application of a Convention so long as both governments have ratified the Convention at issue. The ILO Governing Body or an ILO Conference delegate can also file a complaint. Government complaints are infrequent. The Governing Body decides whether to refer the complaint for inquiry and report to a Commission of Inquiry composed of eminent experts. The complaining Government must indicate whether its accepts the Commission's recommendations or wishes to refer the complaint to the International Court of Justice.

The tripartite Governing Body Committee on Freedom of Association Committee is responsible for the enforcement of Conventions 87 and 98 and other Trade Union Rights Conventions. The Committee meets and reports to the Governing Body three times a year. It has the power to examine and to adopt conclusions and recommendations on complaints submitted to it.

## 2) United Nations

The various United Nations instruments and mechanisms provide alternate fora for the enforcement of human rights that complement the dispute resolution procedures set out in other ILO and trade agreements.

*The Universal Declaration of Human Rights* (UDHR) ensures the right of everyone to work, protects the choice to join trade unions and further clarifies that working conditions and

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5 See Article 22 of the ILO Constitution.

6 See Article 24 of the ILO Constitution.

remuneration have to be just and favorable.[7] The *International Covenant on Civil and Political Rights* (ICCPR) guarantees the right to freedom of association, including the right to join trade unions.[8] The *International Covenant on Economic Social and Cultural Rights* (ICESCR) contains a comprehensive protection of the right to work. Article 7 provides that the right to work encompasses just and favorable conditions of work and fair remuneration. Fair remuneration is defined as fair pay that enable families to create a decent living, in accordance with the standards set out within the Covenant. Article 8 preserves the right of everyone to join or form a union to protect their social and economic interests as well as the right sets out the right to strike when the right is duly exercised in conformity with the laws of the country.[9]

The *Convention on all Forms of Discrimination Against Women* (CEDAW) deals with the economic, social and political dimensions of women's discrimination. It sets out several employment protections, including, the right to equality of employment opportunities as men, free choice of profession, equal treatment in respect of work for equal value and the right not be discriminated due to pregnancy or family responsibilities.[10] Article 32 of the *Convention on the Rights of the Child* (CRC) protects children against exploitation by mandating that signatory states enforce minimum age standards for admission to employment as well as regulate hours and conditions of employment. The article explicitly provides that States members apply penalties or other sanction in the event of violation.[11]

As well, there are international instruments which address racial and ethnic discrimination in employment. These include the *Declaration on Race and Racial Prejudice*, Article 9, the *International Convention on the Elimination of all Forms of Racial Discrimination* (*CERD*), Articles 4, 5(e)(i), the *Durban Programme of Action on Racism, Racial Discrimination, Xenophobia and Related Intolerance* (*Durban Programme*), Articles 48, 66 and the *Declaration on Race and Racial Prejudice*, Article 9.

**a) Bodies created under the jurisdiction of the UN Charter**

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7 G.A Res.217(iii), UN GAIE, 3d Sess., Supp. No. 13, UN Doc. A/810 at 71 (1948) [hereinafter *UDHR*], See Annex B.

8 16 December 1966, 999 UNTS 171 [hereinafter *ICCPR*], Art 22.

9 16 December 1966, 993 UNTS 3 [hereinafter *ICESCR*], Art 6, 7, 8.

10 G.A Res. 34/180, GAOR, 34th Sess., Supp. No. 46 at 193 (1979) [hereinafter *CEDAW*].

11 G.A Res. 44/25, 20th Sess., (1989) [hereinafter *CRC*].

The Commission on Human Rights and its special procedures examine, report and monitor human rights situations in specific countries or regions. The Commission adopts resolutions and decisions that are aimed at standard setting or dealing with specific human rights situations. The Commission's decisions are informed by fact gathering and monitoring mechanisms such as the Sub-Commission on the Promotion and Protection of Human Rights, the Office of the High Commissioner, as well as extra conventional mechanisms such as working groups, representatives and rapporteurs mandated to report to it on specific issues.

The Economic and Social Council supervises the work of fourteen specialized agencies, as well as functional and regional commissions. The mandate of ECOSOC is to promote higher standards of living, economic and social progress, including full and sustainable employment.

**b) Treaty-based Monitoring and Implementation Bodies:**

The UN human rights treaty bodies are composed of independent experts that monitor the implementation of treaty commitments and obligations. Treaty bodies perform their monitoring functions in various ways, including evaluation of state party reports, consideration of individual complaints and issuance of general comments that focus on specific thematic issue or to clarifying the interpretation of a provision within a treaty. There are seven rights treaty bodies in the UN constellation:

a. Committee on the Elimination of Racial Discrimination (CERD)
b. Committee on Economic Social and Cultural Rights (CESCR) (created in 1985, replacing the ECOSOC as the implementing body)
c. Human Rights Committee (HRC)
d. Committee against Torture (CAT)
e. Committee on the Elimination of Discrimination Against Women (CEDAW)
f. Committee on the Rights of the Child (CRC)
g. Committee on Migrant Workers (CMW)

**c) Complaints Procedures**

A complaint can only be brought against a state that has ratified the treaty as well its complaints system. In the case of ICCPR and the ICERD, this requires ratifying an Optional Protocol. Some treaty bodies have the mandate to consider individual complaints (CERD, HRC, CEDAW and CAT). In order to facilitate accessibility, most complaints processes are quasi judicial and there are no standing requirements to lodge a complaint. Thus, any person that claims to have a right violated under a treaty may bring a complaint forward. If the admissibility prerequisites are fulfilled, the relevant committee considers the submission upon its merits in a closed session

and issues its recommendations. Although not legally binding, these recommendations are considered persuasive authority and have significant political leverage.

**d) State Reports**

Most UN treaties require timely submission of reports on how treaty obligations are being implemented, pursuant to the monitoring provisions set out in the instrument. The state is obliged to provide honest and full disclosure of both the positive and negative implications of treaty enforcement. Treaty bodies may also receive information from civil society organization or other intergovernmental bodies. These reports are reviewed by the relevant supervisory committee in consultation with government representatives and suggestions and recommendations are published in the Committee's "Concluding Observations" to the state.

**3) The World Trade Organization**

The World Trade Organization (WTO) was established in 1995 as a member based institution through which global trade rules are negotiated.[12] At its core are agreements negotiated by member states that set out the legal rules that regulate international commerce.

**a) A Social Clause**

After a decade of disputes and negotiations over the incorporation of a social clause spearheaded by US- based trade unionists and workers' rights advocates, the WTO issued the *Singapore Ministerial Declaration* in 1998.[13]

> We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards, We reject the use of labour standards for protectionist purposes, and we agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTP and ILO Secretariats will continue their existing collaboration.

[12] For further references, see www.wto.org.

[13] WTO, adopted 13 December, 1996, Geneva.

In essence, the Declaration promotes the observance of core labour standards and asserts that economic development and the promotion of labour standards are mutually reinforcing.[14]

### b) Dispute Settlement

The WTO's dispute resolution procedures are guided by the rule of law. Thus, the procedures are structured with clearly defined stages and timetables. Parties that submit to the jurisdiction of the Dispute Settlement Body first undergo a preliminary round of consultation.[15] If cases are not settled at this stage, panels are subsequently established to review a case upon its merits.[16] After a stage of review and meeting with the parties, the panels prepare reports that are issued to the parties and adopted by the Dispute Settlement Body after all rights of review to the Appellate Body have been exhausted.[17] Such rulings are binding upon the parties unless there is unanimous consensus among member states to reject the ruling. The rules make it incumbent upon the losing party to implement the decision, failing which a party is subject to the "principles of retaliation" or sanctions.[18]

### c) WTO's Interpretative Mandate and Human Rights and Labour Norms

Article 3.2 of the Dispute Settlement Understanding obligates the Dispute Settlement Body to interpret the provisions of the WTO according to the customary rules of public international law. Under this aegis, the Dispute Settlement Body has the authority to invoke the provisions of Vienna Convention on the Law of Treaties.[19] Citing the hierarchy of norms established by the Vienna Convention, panels of the Dispute Settlement Bodies have recently begun to craft a

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14 WTO, *Singapore Ministerial Declaration,* para.4 WT/MIN(96)/DEC/W, 13 December, 1996. An earlier draft that was proposed included reference to the Universal Declaration of Human Rights, but this was not included in the final statement. For a discussion, see, Virginia A. Leary, "WTO and the Social Clause- Post Singapore," *European Journal of International Law*, online: www.ejil.org/journal.

15 *Agreement Establishing the World Trade Organization*, Uruguay Round, Annex 2, Dispute Settlement Understanding, 1 January, 1995, at Article 4, online: www.wto.org.

16 Article 6.

17 Article 16.1.

18 Article 22.

19 23 May 1969, UN Doc. A/CONF.39/27 1155 U.NT.S 331, 8 I.L.M 679 (entered into force 27 January 1980).

contextual approach to adjudicating disputes which would then allow for the balancing of social considerations with the traditional economic aims of free trade.[20]

By application of Article 53 and 31(3) (c) of the Vienna Convention, the paramountcy of human rights norms must be taken into account in the interpretation of treaty disputes.[21] Article 53 defines a "peremptory" norm as:

> *one accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".*

The contextualized approach to dispute adjudication has been utilized in several panel decisions. In an Appellate Body ruling regarding import prohibitions on shrimp made operational by the Inter-American Convention on the Protection of Sea Turtles, a case-by-case interpretive approach was used to balance policy objectives and trade rights allocated within the treaty.[22] Appellate Body members acknowledged that the Vienna Convention called for a broad reading of treaty provisions and explicitly called for a search for balance by "locating and marking out a line of equilibrium."[23]

## PART II - AMERICAS REGIONAL HUMAN RIGHTS MECHANISM

### 1) Inter-American Commission and Court on Human Rights

An important venue for bringing forward labour standards issues with a human rights dimension in the Americas is the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights. These Organization of American States' bodies are created under the Inter-American Convention on Human Rights. The Inter-American

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[20] *Supra.*

[21] *Ibid*.

[22] United States- Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India, Malaysia, Pakistan and Thailand) (1998), WTO Doc. WT/Ds58/AB/R (Appelatte Body Report) 38 I.L.M 119.

[23] *Ibid* at 159.

Convention requires signatory countries in North and South America to respect the human rights of all persons in their jurisdiction without discrimination[24].

**a) Inter-American Commission on Human Rights**

The IACHR applies and interprets the substantive law in the following two documents, the American Declaration of the Rights of Man and the American Convention on Human Rights. The Declaration lacks the status of a Convention but is part of customary international human rights law. On the other hand, the Convention as a legal treaty, is enforceable against signatory parties. Both documents form part of the Charter of the Organization of American States as a result of the Protocol of Buenos Aires. The IACHR is composed of seven members elected in a non-governmental capacity by the OAS General Assembly and represents all the OAS members states.

Any person, group of persons or any legally recognized NGO in a member OAS state can submit a "petition" to the IACHR through its Executive Secretariat alleging a violation of the Convention.[25] These instruments bear a number of similarities to the European Convention on Human Rights and the European Court of Human Rights.

The Convention has four parts: 1) the Preamble, 2) State Obligations and Rights Protected, 3) Means of Protection, and 4) General and Transitory Provisions. Chapter Two of Part One dealing with state obligations contains 23 articles setting out the inalienable rights which will be enforced and this includes freedom of association, right to judicial protection and a fair trial, freedom of thought and expression. Chapter Three of Part One dealing with Economic, Social and Cultural Rights includes a provision requiring signatories to take certain economic and political measures as set out in Article 26 which states:

> *The state parties undertake to adopt measures, both internally and through international cooperation especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set for in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.* [26]

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[24] Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Sec.LV11.65,Doc.6, July 1st, 1985, Article 1, p. 26.

[25] IACHR Regulations, Article 26 and 28, 1985 Handbook, p. 125.

[26] 1985 Handbook, p. 38.

With the passage of the Convention, the IACHR took up a dual role as a political organ of the OAS with a power promote and protect human rights in the region as well as an organ of the Convention with the power and duty to supervise human rights in the signatory countries to the Convention. The Commission's functions include:

1) promoting human rights in all OAS member states;
2) advising in the drafting of human rights documents;
3) advising OAS member states;
4) preparing country reports which includes visits to the territories of the states to investigate the status of human rights;
5) mediating disputes over serious human rights problems;
6) handling individual complaints and initiating individual cases on its own motion both regard to state parties and states not parties of the Convention; and
7) participating in the handling of the cases and advisory opinions before the Court.

**b) Inter-American Court on Human Rights**

The Inter-American Court on Human Rights consists of seven judges who may be nationals of any member OAS state.[27] The Court has both a dispute resolution and advisory jurisdiction. The Court settles disputes about the interpretation and application of the Convention through a special procedure designed to handle individual or state complaints. In its advisory jurisdiction, the Court can interpret not only the Convention but any other treaty concerning the protection of human rights in the OAS states. Judgments of the Court are legally binding on the parties but very few cases go to the Court. If a state does not comply with the decision of the Court, the Court may inform and make recommendations to the OAS General Assembly.

**c) Complaint Procedure**

Individual or state complaints start before the Commission. The complainant need not be the victim of the human rights violation. The right of individual petition is a mandatory provision binding all OAS states not just Convention signatories. A state complaint can only be made between states which are Convention signatories. The Commission can also initiate its own complaint. The Commission has the power to request information and with the consent of the government to investigate the facts alleged in the complaint. The Court may consider a case

[27] Steiner, Henry J. & Alston, Philip, *International Human Rights In Context: Law Politics Morals, Second Edition.* (Oxford University Press, 2000), p. 872-873.

referred by either the Commission or by a state party. For the Commission to refer a case, the case must have been admitted to investigation and the Commission's draft report sent to the state party. A state can refer directly to the Court.

## PART III - VARIOUS AMERICAS TRADE AGREEMENTS/NEGOTIATIONS

### 1) North American Agreement on Labour Cooperation ("NAALC")

#### a) Introduction

The North American Free Trade Agreement ("NAFTA") came into effect on January 1, 1994 and opened the borders between Canada, Mexico and the United States for the free trade of goods and services. NAFTA's Preamble provides that the signatories explicitly acknowledge that protecting labour rights "will encourage firms to adopt high productivity competitive strategies" and will "complement the economic opportunities created by NAFTA with the human resource development, labour-management co-operation and continuous learning that characterize high productivity economies." The Preamble refers to the parties' desire to "build on their respective international commitments and to strengthen their co-operation on labour matters."

NAFTA does not incorporate the issue of labour standards in the main body of the agreement, but rather, in a NAALC "side" agreement. Under NAALC, unlike the ILO, governments are placed in a tri-national relationship with each other rather than a vertical supernational relationship accountable to an international body.[28] The NAALC side agreement was signed with the following stated objectives:

a. improve working conditions and living standards in each Party's territory;

b. promote, to the maximum extent possible, the labour principles set out in Annex 1 (see below);

c. encourage co-operation to promote innovation and rising levels of productivity and quality;

d. encourage publication and exchange of information, data development and coordination, and joint studies to enhance mutually beneficial understanding of the laws and institutions governing labour in each Party's territory;

e. pursue cooperative labour-related activities on the basis of mutual benefit;

[28] *Review of the North American Agreement on Labour Cooperation,* Annex 1, Section 1, p. 1,*supra*.

f. promote compliance with, and effective enforcement by each Party of, its labour law; and

g. foster transparency in the administration of labour law. (Article 1)

While NAALC requires signatories to promote the Annex 1 labour principles (see below), there is no explicit requirement for a signatory to legislate the principles. Instead, NAALC specifically recognizes the parties' right to legislate their own domestic standards. Mexico, the United States and Canada did allow the other signing parties the right to scrutinize each other's enforcement of their labour regimes.[29] NAALC's Article 2 states:

*Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic standards, Each party shall ensure that its labour laws and regulations provide for high labour standards , consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.*

**b) Eleven Labour Principles**

NAALC's Annex 1 labour principles flow from internationally recognized labour conventions (eg. ILO and OECD).[30] Two of the eleven labour principles relate to gender-based pay (8) and employment discrimination(7). Three of the principles relate to trade union rights. (1, 2, and 3). The principles are as follows:

1. *Freedom of association and protection of the right to organize. The right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests.*

2. *The right to bargain collectively. The protection of the right of organized workers to freely engage in collective bargaining on matters concerning the terms and conditions of employment.*

3. *The right to strike. The protection of the right of workers to strike to defend their collective interests.*

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29 *Review of the North American Agreement on Labour Cooperation,* Annex 1, Section I, p. 1, *supra*.

30 See Ozay Mehmet submission, p. 36 and Canadian Association of Labour lawyers Submission and Michael Dion Submission www.naalc.org/english/publications.

4. *Prohibition of forced labour . The prohibition and suppression of all forms of forced or compulsory labour, except for types of compulsory work generally considered acceptable by the Parties, such as compulsory military service, certain civic obligations, prison labour not for private purposes and work exacted in cases of emergency.*

5. *Labour protection for children and young persons. The establishment of restrictions on the employment of children and young persons that may vary taking into consideration relevant factors likely to jeopardize the full physical, mental and moral development of young persons, including schooling and safety requirements.*

6. *Minimum employment standards. The establishment of minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements.*

7. *Elimination of employment discrimination. Elimination of employment discrimination on such grounds as race, religion, age, sex or other grounds, subject to certain reasonable exceptions, such as, where applicable,* bona fide *occupational requirements or qualifications and established practices or rules governing retirement ages, and special measures of protection or assistance for particular groups designed to take into account the effects of discrimination.*

8. *Equal pay for women and men. Equal wages for women and men by applying the principles of equal pay for equal work in the same establishment.*

9. *Prevention of occupational injuries and illnesses. Prescribing and implementing standards to minimize the causes of occupational injuries and illnesses.*

10. *Compensation in cases of occupational injuries and illnesses. The establishment of a system providing benefits and compensation to workers or their dependents in cases of occupational injuries, accidents or fatalities arising out of, linked with or occurring in the course of employment.*

11. *Protection of migrant workers. Providing migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions.*

**c) Requirement of Signatories to Enforce Domestic Labour Law**

Specific action which signatory governments are required to take to ensure the enforcement of their domestic labour law is stated in Article 3 as follows:

> *Each Party shall promote compliance with and effectively enforce its labour law through appropriate government action, subject to Article 42, such as:*
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> *a. appointing and training inspectors;*
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> *b. monitoring compliance and investigating suspected violations, including through on-site inspections;*
>
> *c. seeking assurances of voluntary compliance;*
>
> *d. requiring record keeping and reporting;*
>
> *e. encouraging the establishment of worker-management committees to address labour regulation of the workplace;*
>
> *f. providing or encouraging mediation, conciliation and arbitration services; or*
>
> *g. initiating, in a timely manner proceedings to seek appropriate sanctions or remedies for violations of its labour law.*[31]

Governments are also required to ensure that private parties have access to enforcement procedures. Article 4 states:

> *1. Each party shall ensure that persons with a legally recognized interest under a law in a particular matter have appropriate access to administrative , quasi-judicial, judicial labour tribunals for the enforcement of the party's labour law.*
>
> *2. Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:*
>
> *a. its labour law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and*
>
> *b. collective agreements*

[31] Article 3 , NAALC, *supra*.

NAALC provides for procedural guarantees in the labour law enforcement process in each country as a direct obligation over and above the requirement to comply with domestic labour law. These guarantees include the following:

> *Each party shall ensure that its administrative, quasi-judicial, judicial and labour tribunals proceedings for the enforcement of its labour laws are fair, equitable and transparent and to this end, each Party shall provide that:*
>
> *a. such proceedings comply with due process of law;*
>
> *b. any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires;*
>
> *c. the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and*
>
> *d. such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.* Article 5

**d) NAALC Institutions**

NAALC is implemented through the following bodies: [32]

**(i) <u>Trinational Institutions</u>**

1. Commission on Labour Cooperation - This body consists of a Ministerial Council and a Secretariat. The Council, composed of the Parties' Labour Ministers, is the governing body. It sets the priorities for cooperative activities as well as the approval of the Secretariat's research and reports. The activities are carried out under three headings - occupational safety and health, employment and labour training and labour legislation and workers' rights. The Parties' labour Ministers carry out Ministerial Consultations.

2. Secretariat - This is the Commission's working body which assists in the carrying out of its functions. (Article 13) The Secretariat is also responsible for independent long term research activities. (Article 14)

[32] Article 10, NAALC, www.naalc.org.

**(ii) National Institutions**

3. National Administrative Offices - Mexico, Canada and the US each have an NAO or Section which is a department of their respective Labour Ministries. The NAO sets up rules for the handling of public communications and reviews.

4. National Advisory Committee - This Committee, consisting of members of the public including representatives of business and labour, is there to advise on the implementation and further elaboration of the Agreement. (Article 17)

5. Governmental Committee - This Committee consisting of representatives of federal and state or provincial governments is there to advise on the implementation and further elaboration of the Agreement (Article 17). Only Canada and Mexico have set up this Committee.

**(iii) Ad Hoc Committees**

6. Evaluation Committee of Experts (ECE - Article 23). This Committee is to provide an independent analysis of a country's patterns of practice in the enforcement of its occupational health and safety or other "technical labour standards". No ECE has been set up to date.

7. Arbitral Panels - (Article 29) - This is the only stage which has any enforcement mechanism. As it is only set up after an ECE process, no panel has been formed to date.

**e) Enforcement Mechanisms**

NAALC is primarily designed to encourage governments to enforce their own labour laws. Resolution of differences under NAALC is encouraged through cooperative and consultative procedures, namely the Ministerial Consultations and the consultations between the NAOs and the evaluation services provided by the ECEs.[33] Arbitration panels are only used as a matter of last resort once all consultative activities are exhausted and unsuccessful.

The Labour Principles are not all equal when it comes to enforcement. While Consultations may be carried out with respect to all the Annex 1 Labour Principles (the 1st Tier), an ECE can

[33] *Review of the North American Agreement on Labour Cooperation,* Annex 1, Section II, p.1, *supra*.

only be set up to deal with the last 8 Labour Principles (the 2nd Tier) which are defined as the "Technical Labour Standards". This prevents the first three Labour Principles, freedom of association, protection of the right to organize and the right to collective bargaining from getting to the ECE stage. Sanctions can only be applied in limited circumstances by the Arbitral Panel for 3rd Tier level Labour principles, namely violations that involve labour by minors, work safety and health issues or minimum salary questions. In addition, the Arbitral Panel is further circumscribed by the need to find a discernible long term pattern of omissions or violations which is "trade related" and the requirement that all three countries have corresponding laws concerning the violation. [34]

### (i) Submission of Public Communications

There is no individual or group right to enforce NAALC's terms. An individual or group does not have the right to compel a hearing into a complaint and to obtain redress. Individuals must convince their respective National Administrative Office to take their case forward. [35]

While in general it is the countries themselves who are in charge of implementing the agreement, there is an opportunity for public individuals or groups , whether union, employer or otherwise to submit to the various NAOs for their consideration "communications" or submissions on issues with respect to the enforcement of labour legislation in one of the countries. Article 16(3) states:

> *Each NAO shall provide for submission and receipt, and periodically publish a list of public communications on labour law matters arising in the territory of another party. Each NAO shall review such matters, as appropriate, in accordance with domestic procedures.*

All three countries have a procedure for individuals or groups to file submissions to the NAO claiming violations of labour laws in another country and the governmental agencies' failure to enforce the laws. The inquiry only uses evidence to determine if there is a problem in the enforcement process not to adjudicate and provide a remedy for the individual wrong. Of the submissions to date, all have been submitted to the US NAO except for one which was submitted to the Mexican NAO.

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34 See Bensusán, Graciela, p. 16, *supra*

35 Christine Elwell, Queen's University, Kingston, Ontario, Commission for Labor Cooperation, *Review of the North American Agreement on Labor Cooperation*, online: Commission for Labor Cooperation, www.naalc.org/english/publications/review_annex1_3.htm p. 32 (last modified August 3, 1999)

The general procedure is as follows:

1. The group or individual files the complaint alleging a violation of a country's labour laws and the failure to enforce that law. The NAO decides whether the submission meets the criteria for acceptance.

2. If the NAO decides to accept the submission, it obtains further information from those filing the submission, from the other country's NAO, the employers named in the submission and canvasses available research. The purpose of the review is to obtain information to assist the NAO to better understand and publicly report on the particular Government's promotion of compliance with and effective enforcement of its labour law.

3. The NAO issues a Public Report of Review which summarizes all the information concerning the event and conditions giving rise to the submission. It describes the applicable labour law, the enforcement mechanisms and the findings as to the practices and problems in the enforcement of the relevant labour law.

4. If there are serious violations, the NAO Report may recommend that Ministerial Consultations take place. This may result in a Ministerial Agreement to address the problem. In the Canadian context with a split government labour law jurisdiction, decisions are made after consulting the Canadian Inter-Governmental Committee. A public hearing or meeting is possible but not required. The United States holds a public hearing. The Mexican NAO states that public hearings are not appropriate as they are "adversarial" and not appropriate to a consultative procedure. The purpose of the hearing is to gather information for the NAO Report and not to adjudicate rights. [36]

### (ii) Ministerial Consultations

In order to get to the ECE stage, the Ministerial Consultation stage must be completed. (Article 23). To date, Ministerial Consultations have been reactive rather than proactive despite the broad wording of Article 22 and have only taken place on a NAO recommendation following submission of a public communication.

### (iii) Evaluation Committee of Experts

[36] *Review of the North American Agreement on Labour Cooperation,* Annex 1, Section III, p. 1-2, *supra*

The Evaluation Committee of Experts can only be set up at the request of a Party Government and following a Ministerial Consultation which has not resolved a matter (Article 23). As noted above, no Evaluation Committee has yet been set up. The ECE cannot deal with disputes concerning the first three Labour Principles, freedom of association, protection of the right to organize and the right to collective bargaining. These principles were the subject of the vast majority of the consultations on public communications to date. The parties are to establish co-operative arrangements with the ILO to draw on its expertise and experience for purpose of implementing Article 24(1) which is the roster of experts required for the Evaluation Committee of Experts. The ECE stage is to be "consultative" and "non-adversarial" (see Part IV and Article 23).

### (iv) Arbitration Panels

If the matter is not resolved at the ECE stage, the submission goes to a government-to-government dispute settlement where an arbitral panel is established to review the allegations as well as to recommend solutions. In order to get to the arbitral panel stage it is necessary to go through the ECE process. An arbitration panel has never been established.

Only three of the Labour Principles can be addressed by an arbitration panel - health and safety, child labour and minimum wage. This is the only stage which has any enforcement mechanism, i.e. an action plan and a monetary assessment. If the arbitration panel's recommendations are not implemented, monetary sanctions may result which are to be paid by the offending country into a fund to be used to improve its enforcement in its territory. If monetary sanctions are not paid, NAFTA benefits may be suspended. The assessment is enforceable by Canada in its domestic courts and by Mexico and the United States through trade sanctions. [37]

## f) Comparison of NAALC to the NAFTA Enforcement Mechanisms

The principle NAFTA dispute settlement mechanisms are found in Chapters 11, 14, 19 and 20. Chapter 11 investment disputes are determined under the Agreement's dispute provisions. Chapter 19 provides for binational panel review of anti-dumping (AD), countervailing duty (CVD) and final injury determinations as well as the power to review amendments made by either Canada, the United States or Mexico to their anti-dumping or countervailing duty law. Chapter 20 dispute provisions relate to interpretation or application disputes including those relating to the Chapter 14 financial services provisions.

[37] Articles 38-41, NAFTA

The following is an examination of the dispute resolution processes for Chapter 11 and Chapter 19. A NAFTA investor who alleges that a host government has breached its investment obligations under Chapter 11 may, at its option, have recourse to one of the following impartial arbitral mechanisms:

1. the World Bank's International Center for the Settlement of Investment Disputes (ICSID);
2. ICSID's Additional Facility Rules; or

the rules of the United Nations Commission for International Trade law (UNCITRAL rules).

Alternatively, the investor may choose the remedies available in the host country's domestic courts. Final awards by Chapter 11 arbitration tribunals are enforceable in domestic courts. Under Chapter 19, a signatory government may request that an amendment to another party's anti-dumping or countervailing duty statute be referred to a panel for a declaratory opinion on whether the amendment is consistent with the GATT (General Agreement on Tarriffs and Trade) and the NAFTA. Article 1904, provides for the establishment of panels to review anti-dumping and countervailing duty statutes and make final determinations.

To implement the provisions of Chapter 19, the Parties have adopted common Rules of Procedures. Unlike the delays experienced under NAALC, the NAFTA Article 1904 Panel Rules are designed to result in final panel decisions within 315 days of the date on which a request for a panel is made. Within the 315 day period, strict deadlines have been established relating to the selection of panel members, the filing of briefs and reply briefs and the setting of the date for Oral Argument. Based on these Rules, a detailed timeline is established for each Chapter 19 panel review.

Article 1904 also provides for an "extraordinary challenge procedure" where in defined circumstances, a participating Party can appeal a panel's decision to a three-member committee of judges or former judges. The committee is to make a prompt decision to affirm, vacate, or remand the panel's decision. Under Article 1905, a three-member special committee may be established to review allegations of one Party that the application of another Party's domestic law has interfered with the proper functioning of the panel review system.

### 2) Canada-Chile Agreement on Labour Co-operation (CCALC)

Canada and Chile signed the Canada Chile Free Trade Agreement as a follow up to NAALC and to ease Chile's eventual inclusion in regional agreements. Effective June 7, 1997, this Agreement also included a labour side agreement, Canada-Chile Agreement on Labour Co-operation ("CCALC"). The agreements are very similar, using the same 11 labour principles

and providing for similar consultation, co-operation and review procedures with Ministerial Consultations and Evaluation Committee of Experts.

### 3) Canada-Costa Rica Agreement Agreement on Labour Co-operation (CCRALC)

The Canada-Costa Rica Free Trade Agreement which was ratified by Canada in December, 2001 failed to be ratified by the Costa Rican Parliament before it dissolved on April 30, 2002. The Costa Rican FTA also had a labour side agreement, the Canada-Costa Rica Agreement on Labour Co-operation ("CCRALC" ).

The CCRLALC was negotiated using the CCALC as a starting model but with a new approach of incorporating the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*. While the administrative and dispute structure had been more streamlined than NAALC or CCALC, the CCRALC took a step forward and permitted the ILO Fundamental labour principles to go forward to the dispute resolution stage. The remedy power was broadened from a fine to allow an order for "reasonable and appropriate measures." Although there are still many problems with the CCRALC, it will not in any event be put in place unless the CCRFTA is ratified at some point by Costa Rica. The Costa Rica Parliament just recently failed to ratify the agreement which makes its future uncertain.

### 4) U.S - Chile Free Trade Agreement

On June 6,2003, the U.S and Chile concluded the U.S- Chile Free Trade Agreement. The labor provisions in both agreements are similar and are perceived to be an amalgamation of features in both the NAALC and U.S-Jordan agreements.[38] The main focus of the agreement is on enforcement of each parties' own labour laws in trade related sectors.

Like the U.S -Jordan Agreement, labour obligations are entrenched within the main bodies of the agreements and provide that violations of labour commitments are subject to the same dispute resolution mechanisms and procedures as commercial disputes. Only parties to the agreement can file a complaint to the Free Trade Commission. A matter is arbitrated only if it cannot be resolved through a preliminary consultation process. A panel of labour experts is appointed for the arbitration and is conferred with the power to prepare a report. Article 22 states that non compliance with a ruling can lead to the suspension of tariff concessions or the imposition of a monetary fine. Since there is no hierarchy of labour standards, unlike NAALC,

[38] Kimberly Ann Elliot, " Working Paper: Labour Standards and the Free Trade Area of the Americas," Institute for International Economics: 2003 at p. 17.

monetary fines continuously accrue if the matter is unresolved and trade retaliation is an enforcement option.[39]

Article 18 of the U.S-Chile Agreement sets out the substantive rights and commitments of the parties. This includes:

1) A reaffirmation of obligations as members of the ILO, in particular commitments under the *ILO Declaration on Fundamental Principles and Rights at Work* and the *Follow-Up*.

2) A reaffirmation that the parties will strive to ensure that the internationally recognized labour rights are protected by its laws including:

   -The right of association

   -The right to organize and bargain collectively

   -Prohibition on the use of forced or compulsory labour

   -Minimum Age of employment for children and the prohibition and elimination of the worst forms of child labour

   -Acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

3) Recognition that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labour laws.

4) Commitment to effectively enforce labour laws. Each signatory party retains the right to exercise discretion with respect to prosecutorial, investigatory, regulatory and compliance matters. This discretion encompasses the reasonable right to any course of action or inaction with respect to enforcement, if it results from a *bona fide* decision regarding the allocation of resources.

5) Ensuring that persons with legally recognized interests under domestic law have appropriate access to tribunals for the enforcement. The signatory parties are also obliged to ensure that appropriate remedies are available for parties who seek to pursue their rights in such tribunals.

39 *Ibid*.

## 5) Central America Free Trade Agreement (CAFTA)

In February, 2004, the Bush administration announced to Congress its intent to sign the Central American Free Trade Agreement, culminating a two year process of negotiations between the U.S and the four Central American states: Costa Rica, El Salvador, Guatemala and Honduras. CAFTA is the first agreement that my undergo "fast track" approval, an authority granted to the Bush administration in 2002.[40]

Articles 16.1 and 16.8 reaffirm the parties' obligations under the ILO Declarations and the core internationally recognized labour rights, mirroring the substantive right provisions of the U.S –Chile FTA. Labour rights are enforced through the agreement's general dispute resolution mechanism, much like the U.S –Chile FTA as well. Article 16.7 mandates that the parties maintain a roster of labour experts that will serve as panelist for disputes.

Article 16.2 defines the labour rights that are subject to dispute resolution procedures of the agreement. Disputes can only be brought if a country fails to enforce its own laws and if the violation affects trade between the party *and* is a "recurring course of action or inaction.

## 6) Free Trade of the Americas Negotiations (FTAA)

### a) Introduction

At the 1994 Summit of the Americas, the Organization of American States launched the effort to create the Free Trade Areas of the Americas ("FTAA"). To carry out that mandate, the OAS established a Trade Unit which works with the Inter-American Development Bank, the United Nations Commission on Latin America and the Caribbean ECLAC as part of the Tripartitie Committee in support of the negotiation of the FTAA.[41]

### b) COSATE & ORIT

[40] *Trade Act of 2002*, Sec. 2105(a)(1)(A), (C). *The Trade Act of 2002* requires the President to notify Congress at least ninety days prior to entering into a free trade agreement. Once Congress receives the accord, however, it cannot amend the text and can only vote to approve or reject it as submitted. For a more detailed discussion, see Human Rights Watch, "Cafta's Weak Labour Rights Protections: Why the Present Accord Should be Opposed," March 2004. Online: www.hrw.org.

[41] See www.sice.oas.org/Tunit.

The OAS structure includes the Inter-American Labour System ("ILS"). That system is headed by the above-noted Conferences of the Labour Ministers of the Americas. Trade Union participation in the ILS occurs through COSATE, the trade union consultative body of the ILS.

In its Report to the XII Conference of the Labour Ministers of the Americas on October 17-19, 2001, COSATE called for a commitment on the part of the OAS governments to the creation of decent work as the "flexibilization of labour policies" have threatened the core rights of workers. In October, 2001, COSATE and the OAS Labour Ministers had a joint session and issued a statement recognizing the ILO Declaration as an integral part of the decent work agenda. COSATE has stressed the importance of ensuring an ongoing commitment to genuine social dialogue and the providing of appropriate resources to the trade union movement to ensure it can effectively participate in the FTAA process.[42]

This Inter-American Regional Organization of Workers ("ORIT") is a regional organization of ICFTU. It represents the labour movement in the Americas. ORIT has called upon the America's governments to recognize it as the permanent participant in any FTAA talks.[43]

**c) Quebec City Summit and Plan of Action**

Since 1994, there have been numerous meetings and summits to carry forward this process and the summits have been followed by Declarations of Principles which have referred to the social dimension of the trade negotiations.[44]

The Quebec City Plan of Action (Part 11 - Labor and Employment) is the most important of these declarations. It recognizes the basic rights of workers as well as promoting equal opportunities and improving working conditions in the hemisphere. Governments also agreed to:

- develop new mechanisms to increase the effectiveness of projects designed to build the capacity of smaller economies and their institutions to implement labour laws and standards effectively and to foster equality of (particularly with respect to gender) in strategies to provide employment, training and human resource development; and

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[42] Report of COSATE to the XII Conference of the Labour Ministers of the Americas on October 17-19, 2001.

[43] Bensusán, Graciela, p. 12, supra.

[44] Rowlinson, Mark, "Labour Standards in Trade Agreement in the Americas - United Steelworkers of Americas.

- promote and protect the rights workers, in particular those of working women and take action to remove structural and legal barriers as well as stereotypical attitudes to gender equality at work addressing, among other things, gender bias in hiring, working conditions, harassment, discrimination in social protection benefits, women's occupational health and safety and unequal pay and conditions.

At the 2001 Quebec Summit of the Americas, the "Peoples' Hemispheric Agreement" was proposed as an alternative to the Free Trade Area of the Americas (FTAA) by the Peoples' Summit, a continent wide grouping of civil society organizations forming the Hemispheric Social Alliance.[45] This Agreement proposes the Workers' Right Clause of ORIT which includes the creation of a working group on labour and social issues as part of the FTAA negotiating structures. It proposes an enforcement mechanism using the complaints-based procedure of the ILO's Committee on Freedom of Association referred to earlier in this paper. This body has the expertise in the field of monitoring the application of international labour standards. This could result in a business losing privileges under the trade agreement if fundamental workers' rights are not respected.[46] The Agreement provides that the first step is for countries to pass laws based on the ILO core standards and then to "harmonize the regulation upwards". [47]

The Quebec City Plan of Action referred labour matters to the Inter American Conference of Ministers of Labour ("IACML"), a body of the OAS that is composed of Ministers of Labour of all countries participating in the Summit of Americas process. Two working groups have been assigned by the IAMCL to address labour issues: 1) the first group is to examine the labour dimensions of Summit process and the development of common hemispheric standards. 2) the second group is looking at the needs and capacities of labour administration in the hemisphere.

**d) United States 2003 Proposal**

The United States in 2003 presented a concrete proposal to deal with labour norms in the FTAA process. Highlights of this proposal are as follows:

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45 "Continental Integration and the Americas- Alternatives for the Americas - Towards an Agreement between the Peoples of the Continent - Second Peoples Summit, Quebec City, April, 2001.

46 Continental Integration, p. 15, *supra*.

47 Continental Integration, p. 16, *supra*.

1. The FTAA nations, as members of the International Labour Organization, will recognize their obligations to comply with Declaration of Fundamental Rights of 1988. In addition, they will guarantee the compliance with national labour laws.
2. No nation will allow non-compliance of the national labour laws as a strategy to affect trade among them.
3. The FTAA nations agree not to promote trade or to attract investments through weakening or reducing the social protection included in their respective labour laws.
4. In case of violation of this item, the provision of Chapter XX (Dispute Settlement Procedures) will be applicable.
5. Every nation will be entitled to enquire any other about compliance with national labour laws.
6. A cooperative mechanism will be established to promote enforcement and compliance of national labour laws, including, the following areas: (1) fundamental rights; (b) worse forms of child labour; (c) labour administration; (d) labour inspection; (e) labour tribunals; (f) labour relations; and (g) hours of work, minimum wage, health and safety.
7. The United States will define the national laws, the federal laws and regulations approved by the Congress – excluding state laws and regulations.
8. In case of non- compliance, any member state can require arbitration.
9. The arbitrator may impose fines on the violators. The value of the fines will be calculated taking into account: (a) the impact of the violation on trade; (b) the persistence and duration of the violation; (c) the reasons of non-compliance; (d) the degree of non-compliance; (e) the efforts made by the nation to comply; (f) other factors.
10. The maximum value of the fine will be US$ 15 million per case and country involved in a bilateral dispute.
11. The fine is not paid, tariff measures will be applied.[48]

These provisions generally follow the US- Chile model.

**e) Miami 2003 Summit**

In the 2003 Miami summit, many of the countries in the Americas, led by Brazil, made it clear that they were not prepared to agree to a hemispheric trade agreement which would include such labour provisions which they believed would cede control over their labour regulation to

[48] Rowlinson, Mark, "Labour Standards in Trade Agreement in the Americas - United Steelworkers of Americas.

a hemispheric body. Various of these parties agreed to proceed with "framework" only discussions for a FTAA.

## PART V - OTHER MODELS

### 1) The U.S. - Jordan Free Trade Model

#### a) Introduction

The U.S. - Jordan Free Trade Agreement ("USJFTA") effective December 17, 2001 just at the end of the Clinton Administration is the third American trade agreement, following NAFTA and the bilateral trade agreement with Israel. Unlike prior trade agreements, the USJFTA was the first free trade agreement to include labour and environmental standards in the main body of the agreement thereby making these provisions subject to the same dispute resolution mechanism as the agreement's other trade provisions. Furthermore, it provides that trade should not be at the expense of workers' rights and environmental standards[49]. Further provisions concerning this agreement are set out in Appendix "C" to this paper.

The USJFTA's Preamble states that a purpose of U.S. - Jordan trade relations is "with a view to raising living standards and promoting economic growth, investment opportunities, development, prosperity, employment and the optimal use of resources in their territory". The preamble also includes specific statements linking trade with labour standards and the environment:

> "Recognizing the objective of sustainable development, and seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development;
>
> ...
>
> "Desiring to promote higher labour standards by building on their respective international commitments and strengthening their co-operation on labour matters; and
>
> "Wishing to promote effective enforcement of their respective environmental and labour law;"

#### b) Enforcement of the Labour Provisions

[49] Article 5 and 6

The U.S-Jordan Agreement specifically states that the parties reaffirm their obligations as members of the ILO and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. Article 6 then requires that "the Parties shall strive to ensure that such labour principles and the internationally recognized labour rights... are recognized and protected by domestic law" (emphasis added). These rights 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. 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.

While each Party has the right to establish its own labour laws, each party "shall strive to ensure" that the laws are consistent with the above internationally recognized labour rights. Article 6 also states that "it is inappropriate to encourage trade by relaxing domestic labour laws. Accordingly, 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 as an encouragement for trade with the other Party" (emphasis added).

Finally, Article 6 recognizes that co-operation between the two countries provides enhanced opportunities to improve labour standards. Therefore, a Joint Committee established under the USJFTA to supervise the proper implementation of the trade agreement and to review the trade relationship between the parties, will consider any such issues raised by a party as it relates to the improvement of labour standards.

It should be noted that the language employed in the protection of the of labour rights - i.e. "shall strive to ensure" - may be contrasted to the intellectual rights provisions where the language is mandatory in requiring that domestic laws "shall ensure" that infringers face civil

and prosecutorial consequences for violations.[50] While the USJFTA allows the U.S. or Jordan the exercise of discretion to set its own enforcement priorities when enforcing its labour laws, it does not afford the same discretion to domestic authorities in the enforcement of the intellectual property rights provisions. The intellectual property rights enforcement provisions are mandatory.

Furthermore, unlike the other enforcement provisions, to make a case under the dispute resolution process, a country must establish proof of a "sustained or recurring course of action or inaction" regarding a labour law that directly affects trade.[51]

**c) Transparency**

Under Article 15 which establishes the Joint Committee discussed above:

> *"Recognizing the importance of transparency and openness, the Parties reaffirm their respective practices considering the views of interested members of the public in order to draw upon a broad range of perspectives in the implementation of this Agreement."*

In addition, the U.S. and Jordan have entered a Memorandum of Understanding on Transparency in Dispute Settlement under the Agreement between the United States and Jordan on the Establishment of a Free Trade Area. This Memorandum of Understanding states that "recognizing that transparency in the administration of international trade agreements fosters public understanding of international trade and strengthens the international trading system", the parties agree:

a. to solicit and consider the views of members of their respective public in order to draw upon a broad range of perspectives;
b. any submission to the Dispute Settlement Panel shall be made available to the public within ten (10) days of the date of submission;

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[50] For example, see the Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights under the Agreement between the United States and Jordan on the Establishment of Free Trade Area, paragraph 3 whereby Jordan agrees to raise its domestic criminal penalties to JD 6,000 in order to meet its obligation to ensure that statutory maximum fines are sufficiently high to deter future acts of infringement, as required in Article 4.25 of the FTA.

[51] Article 6.4.

c. oral presentations before the Dispute Settlement Panel shall be open to members of the public;

d. the Dispute Settlement Panel shall accept and consider *amicus curiae* submissions of individuals, legal persons, and non-governmental organizations with an interest in the outcome of the dispute; and

e. the Dispute Settlement Panel shall release its report to the public at the earliest possible time.

All of the above is contingent on the understanding that there is nothing in the USJFTA or the Memorandum of Understanding which requires the disclosure of confidential information to the public, a party, a non-governmental organization, or a panel.

### 2) U.S - Morocco Free Trade Agreement

The U.S – Morocco Free Trade Agreement was signed on 15 June, 2004. Many of the labour rights commitments contained therein are substantially similar to the U.S – Chile/Singapore model. The only substantive modifications are with regards to the institutional arrangements established to oversee the implementation of the commitments.

### 3) US Trade Promotion Authority Legislation

The United States Congress has passed *Trade Promotion Authority* legislation [52] This law sets out the objectives which are to guide US trade negotiations in free trade agreement negotiations. The objectives include directives on labor-related matters including seeking provisions which promote respect for workers' rights consistent with the core labour standards of the ILO; strive to ensure parties do not waive protections set out in domestic labor laws as part of trade agreements and promote universal ratification of ILO Convention 182 on the Worst Forms of Child Labour. The objectives also include objectives to ensure that a party does not fail to enforce its labor laws and that parties strengthen their capacity to enforce labor standards through treating principal negotiating objectives, including labor issues equally with respect to dispute settlement and equivalent procedures and remedies. [53]

[52] 116 Stat.994, Pub.Law 107-210 (Aug.6, 2002)

[53] Karesh, Lewis, "The North American Agreement on Labor Cooperationand Labor Provisions of US Free Trade Agreements, September, 2004.

## APPENDIX "A"

## INTERNATIONAL LABOUR ORGANIZATION FUNDAMENTAL WORKERS' RIGHTS CONVENTIONS

Convention 87 Concerning Freedom Of Association And Protection Of The Right To Organize (1948) - ratified by 123 states.

This Convention guarantees the right of all workers' to form and join organisations of their own choosing. These organisations have the right to draw up their constitutions and programmes, elect their representatives, and to organise their administration and activities in full freedom. The public authorities are to refrain from any interference in the exercise of these rights. Workers' organisations have the right to form federations and to affiliate internationally and must not be liable to administrative suspension or dissolution.

Convention No. 98 Concerning The Application Of The Principles Of The Right to Organize And To Bargain Collectivelv (1949) - ratified by 141 states.

Convention 98 guarantees to workers' protection against acts of anti-union discrimination, such as dismissal, and against external interference in the operation of their organisations, such as attempts to place unions under employer domination. It also requires appropriate measures to be taken to promote voluntary collective bargaining to regulate the terms and conditions of employment.

Convention 29 Concerning Forced Or Compulsory Labour (1930) - ratified by 150 states.

This Convention requires ratifying states to suppress the use of forced labour in all its forms in the shortest possible time. Five categories of work are excluded from the definition of forced labour. (Compulsory military service, certain civic obligations, prison labour, work exacted in case of emergency, and minor communal services.) Illegal exaction of forced labour is made a penal offence.

Convention 105 Concerning The Abolition of Forced Labour (105) - ratified by 135 states.

This Convention requires the suppression of any form of forced or compulsory labour in five defined cases:

- as a form of political coercion or education or as a punishment for holding or expressing political views;
- as a means for mobilising labour for economic development;
- as a means of labour discipline;
- as a punishment for participation in strikes; as a means of racial, social, national or religious discrimination.

Convention 100 Concerning Equal Remuneration For Men And Women Workers For Work of Equal Value (1951) - ratified by 137 states.

This requires the promotion and application of the principle of equal remuneration for men and women workers for work of equal value. That principle is to apply to all forms of pay or other emolument arising from employment and may be enforced by law or by collective agreement and through appraisal of jobs on the basis of the work performed.

Convention 111 Concerning Discrimination In Respect Of Employment And Occupation (1957) - ratified by 132 states.

This requires ratifying states to declare and pursue a national policy aimed at eliminating all forms of discrimination in employment and occupation. It identifies criteria of prohibited discrimination as race, colour, sex, religion, political opinion, national extraction, social origin, and any other that has the effect of nullifying or impairing equality of opportunity or treatment. The scope of the Convention encompasses access to vocational training and to employment and terms and conditions of employment.

Convention 138 Concerning Minimum Age For Admission To Employment (1973) - ratified by 71 states.

This requires the setting of a national minimum age for access to employment which cannot be less than 15 years except in countries whose economy and educational facilities are insufficiently developed, in which case it cannot be less than 14 years. Minimum age for employment in, nationally defined, hazardous employment can be no less than 18 years, or 16 years where special protection measures are in place. The Convention allows for some types of employment to be excluded from its coverage, and for light work to be undertaken from 13 years (or 12 where economic and educational facilities are insufficiently developed) on condition that safeguards concerning health and school attendance are observed.

**APPENDIX "B"**

**UNITED NATIONS HUMAN RIGHTS PROVISIONS**

## Universal Declaration on Human Rights

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Article 23

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

Everyone, without any discrimination, has the right to equal pay for equal work.

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

## International Covenant on Civil and Political Rights

Article 22

Everyone shall have the right to freedom of association with others, including the right to form trade unions for the protection of his interests.

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

**International Covenant on Economic, Social and Cultural Rights**

**PART III**

Article 6

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take the appropriate steps to safeguard this right.

The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve economic, social and cultural development and full productive employment under conditions safeguarding political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

a) Remuneration which provides all workers, as a minimum, with:

   (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

   (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

b) Safe and healthy working conditions;

c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay as well as remuneration for public holidays.

Article 8

a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those security or public order or for the protection of the rights and freedoms of others;

b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

c) The right of trade unions to function freely, subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

d) The right to strike, provided that it is exercised in conformity with the laws of the particular country

**Convention on the Rights of the Child**

Article 32

States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

a) Provide for a minimum age or minimum ages for admission to employment;

b) Provide for appropriate regulation of the hours and conditions of employment;

c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article

## Convention on the Elimination of All Forms of Discrimination Against Women

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

a) The right to work as an inalienable right of all human beings;

b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

d) To provide special protection for women during pregnancy in type

**Racial and Ethnic Discrimination Instruments**

See also the *Declaration on Race and Racial Prejudice*, Article 9, the *International Convention on the Elimination of all Forms of Racial Discrimination* (*CERD*), Articles 4, 5(e)(i), the *Durban Programme of Action on Racism, Racial Discrimination, Xenophobia and Related Intolerance* (*Durban Programme*), Articles 48, 66 and the *Declaration on Race and Racial Prejudice*, Article 9.

# APPENDIX "C"

# OTHER PROVISIONS OF THE UNITED STATES JORDAN FREE TRADE AGREEMENT (USJFTA)

## Enforcement Provisions of the Economic Provisions of the USJFTA

The economic enforcement provisions of the U.S. - Jordan FTA include the following:

a. the most up-to-date international standards for copyright protection.[54] In addition, the enforcement of intellectual property rights includes provisions that require both countries to provide their respective judicial authorities the power to order the infringer to pay the rights holder damages.[55] As well, each country is required to ensure that its statutory maximum fines are sufficiently high to deter future acts of infringement[56] and power is provided to authorities to initiate criminal actions and border measure actions without the need of a formal complaint by a private party or rights holder[57];

b. that the parties shall refrain from existing practices of not imposing customs duties on electronic transmissions and imposing unnecessary barriers on electronic transmissions, including digitized products[58];

c. provides for dispute settlement panels to issue legal interpretations of the USJFTA and produce non-binding reports if the two countries fail to resolve the dispute through direct consultations. If the party is still unable to resolve the dispute after the panel issues its recommendations, the affected country is authorized to take appropriate measures.[59] The dispute resolution process in the USJFTA should not be construed to authorize a

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54 Article 4.1 and 4.29

55 Article 4.24.

56 Article 4.25. See also, the Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights under the Agreement between the United States and Jordan on the Establishment of Free Trade Area, paragraph 3 whereby Jordan agrees to raise its domestic criminal penalties to JD 6,000 in order to meet its obligation under Article 4.25 of the FTA.

57 Article 4.26.

58 Article 7.

59 Article 17.

party to apply a measure that is inconsistent with the Party's obligations under the WTO Agreement.[60]

## Enforcement of the Environmental Provisions

Article 5 of the USJFTA provides for similar provisions with respect to environmental issues as are provided for in the labour area including the establishment of a U.S. - Jordanian Joint Forum on Environmental Technical Co-Operation for ongoing discussion of environmental priorities, and identifies environmental quality and enforcement as areas of initial focus.[61] The U.S. and Jordan has agreed to consult with and consider the views of interested members of the public in carrying out the work of the Joint Forum. The Joint Committee established under the USJFTA is responsible for the implementation of the provisions relating to the environment.

## Dispute Resolution Mechanisms

### Joint Committee

Article 15 establishes a Joint Committee to supervise the implementation of the trade agreement and to review the trade relationship of the parties. The functions of the Joint Committee includes reviewing the general functioning of the USJFTA; reviewing the results in light of experience gained during its functioning and its objectives, and considering ways of improving trade relations between the parties, facilitating avoidance and settlement of disputes; and discussing opportunities to improve labour standards.

The Joint Committee is composed of representatives from each state and led by the United States Trade Representative and Jordan's Minister primarily responsible for international trade, or their designees. The Joint Committee is also mandated to establish and delegate responsibilities to *ad hoc* and standing committees or working groups, and seek the advice of non-governmental persons or groups. The Joint Committee establishes its own rules of procedures and must meet at least once a year. All decisions are made by consensus.

### Consultation and Dispute Settlement

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60 Article 1.4.

61 See United States - Jordan Joint Statement on Environmental Technical Co-Operation.

The USJFTA provides that every attempt shall be made to interpret and apply the USJFTA based on mutual agreement of the parties.[62] Where a matter cannot be settled, it is dealt with under Article 17 which sets out the dispute settlement mechanism whenever

a. a dispute arises concerning the interpretation of the agreement;

b. a party considers that the other party has failed to carry out its obligations under the agreement; or

c. a party considers that measures taken by the other party severely distort the balance of trade benefits accorded by the agreement or substantially undermine the USJFTA' s fundamental objectives.

Disputes about the interpretation or application of the labour standards fall under Article 17. The steps in the dispute settlement process are as follows:

a. Consultation: The parties shall attempt to arrive at mutually agreeable resolution through consultation by submitting a request for consultation. [63]

b. Joint Committee: If there is no resolution through consultation within 60 days of submitting the request for consultation, either party may refer the dispute to the Joint Committee which will convene to attempt to resolve the dispute.[64]

c. Dispute Settlement Panel: If the matter is not resolved at the Joint Committee within 90 days after the dispute was referred to it, or within such other period as the Joint Committee has agreed, either party may refer the matter to a dispute settlement panel composed of three members: each party will appoint one member and the two appointees will select the third member to act as chair.[65]

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62 Article 16.

63 Article 17.1(a) and 17.1(b).

64 Article 17.1(b).

65 Article 17.1(c).

d. Dispute Settlement Panel's Report: Within 90 days after the chair is appointed, the Panel will present a report containing findings of fact and its determination as to whether either party has failed to carry out its obligations under the FTA or whether a measure taken by either party severely distorts the balance of trade benefits accorded by the FTA. If the panel makes such a finding, it may, at the request of the parties, make recommendations for resolution of the dispute. The report of the panel is non-binding.[66]

e. Report Referred to Joint Committee: After the Panel has presented its report, the Joint Committee shall endeavour to resolve the dispute within 30 days, taking the report into account, as appropriate.[67]

f. No Resolution: If the Joint Committee is unable to resolve the matter, the affected party is entitled to "take any appropriate and commensurate measure".[68] The FTA does specify the form that this action should take; however, the party taking action may not act in a manner that is inconsistent with the WTO obligation. It is not clear whether trade sanctions are appropriate and commensurate measures.

The USJFTA dispute resolution procedure does not preclude a party from bringing a complaint under any other applicable dispute settlement mechanism under an agreement to which both parties are governed, but whichever mechanism is selected, that mechanism shall have exclusive jurisdiction over the matter.[69] If one of these mechanisms fails for procedural or jurisdictional reasons to make findings of law or fact, then the party is not prevented from invoking another mechanism with respect to the same claim.[70]

The USJFTA also provides at Article 18.1 that neither party may provide for a right of action under its domestic law against the other party on the ground that a measure of the party is inconsistent with the agreement.

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66 Article 17.1(d).

67 Article 17.2(a) and 17.1(b).

68 Article 17.2(b).

69 Article 17.1(e)(i).

70 Article 17.1(e)(ii).

## APPENDIX 'D'

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## APPENDIX "E"

## WEB REFERENCES FOR INTERNATIONAL LABOUR AND HUMAN RIGHTS INSTRUMENTS AND POLICY DOCUMENTS

### International Human Rights Instruments

*Convention on the Elimination of All Forms of Discrimination against Women (CEDAW*):
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*ILO Declaration on Fundamental Principles and Rights at Work*:
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*International Covenant on Economic, Social and Cultural Rights (ICESCR)*:
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*International Covenant on Civil and Political Rights (ICCPR)*:
http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

*International Convention on the Elimination of all Forms of Racial Discrimination (CERD)*:
http://www.unhchr.ch/html/menu3/b/d_icerd.htm

*Universal Declaration of Human Rights:*

http://www.unhchr.ch/udhr/lang/eng.htm

### International Policy Instruments

*Beijing Declaration and Platform for Action*:
http://www.un.org/womenwatch/daw/beijing/platform/declar.htm

*Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action ("Beijing +5 Resolution"):* http://www.un.org/womenwatch/daw/followup/ress233e.pdf

*Declaration on Race and Racial Prejudice*: http://www.unhchr.ch/html/menu3/b/d_prejud.htm

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