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Article

The Diffusion of Labour Standards: The Case of the US and Guatemala

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Abstract

The number of free trade agreements (FTAs) concluded by the United States of America (US) has grown vastly over the past two decades. While FTAs contribute to increased global competition and as such may also contribute to socially-undesirable practices in the area of working conditions and the environment, the proliferation in FTAs has paradoxically also augmented the potential for making free trade more fair as some of these agreements now include labour provisions. However, the question is whether these trade agreements have also actually diffused internationally recognised labour standards. This article studies the FTA the US signed in 2004 with a number of Central American countries and which, at a later stage, also included the Dominican Republic.¹ This FTA is commonly referred to as CAFTA-DR and includes a chapter on labour standards. The article argues that the effects of the inclusion of labour standards in CAFTA-DR have been limited and therefore should be viewed as an unsuccessful attempt at policy transfer. This is illustrated by the case of Guatemala, a country known for its lack of respect for labour standards and which is currently the subject of a complaints procedure under the CAFTA-DR. It is maintained that this lack of effectiveness is the result of many factors. Among these is the weakness of the labour chapter of CAFTA-DR resulting from the fact that the chapter is the outcome of bargaining processes both within the US and between the US and Guatemala, where symbolic results were valued more highly than actual substance.

Keywords

Guatemala; trade; labour standards; policy diffusion

Issue

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¹ The CAFTA-DR countries were Costa Rica, Honduras, El Salvador, Guatemala, Nicaragua and, at a later stage, the Dominican Republic. In this article I will refer to CAFTA-DR, even in cases where it was technically still limited to the CAFTA countries.

1. The Diffusion of Labour Standards

Linking labour standards to trade has been the subject of much debate since the Second World War. This debate gained momentum in the 1990s. In the context of the 75th anniversary of the International Labour Organization (ILO) in 1994, then Director-General Michel Hansenne emphasised the growing social contradictions brought about by intensified globalisation, necessitating more effective international cooperation. In particular, Hansenne called for increased implementa-

tion of social rights (Hansenne, 1994). After years of discussion within several international settings, it was during the World Summit for Social Development in Copenhagen in 1995 that core labour standards (CLS) were defined as "...including those on the prohibition of forced and child labour, the freedom of association, the right to organize and bargain collectively, and the principle of non-discrimination" (WSSD, 1995).

Defining certain rights as fundamental, thereby attempting to increase ratification and ultimately compliance, was also the subject of discussion within the

ILO (Kellerson, 1998), and in 1998 the ILO took one of its most concrete steps on this when it adopted its Declaration on Fundamental Principles and Rights at Work. The Declaration defines four categories, with associated conventions, whose principles and rights (although not the specific provisions of the conventions) are to be upheld by all member states, regardless of whether they actually ratified these conventions. These categories are: the freedom of association and the effective recognition of the right to collective bargaining (conventions nos. 87, 98); the elimination of forced or compulsory labour (conventions nos. 29, 105); the abolition of child labour (conventions nos. 138, 182); and the elimination of discrimination in respect of employment and occupation (conventions nos. 100, 111) (ILO, 1998). This Declaration proved to be a major step toward limiting the rather complex debate on the large number of labour standards to a ‘take-away’ package consisting of a set of core labour standards that were considered more important than others. This package, hereafter referred to as CLS, was subsequently taken up (partly or as a whole) by other actors to guide the formulation of their own policies, including trade policies (Van Roozendaal, 2012). In short, a consensus developed to include certain “rules” in trade agreements, and this was also reflected in the US’s bilateral and multilateral trade agreements.

Including such standards in trade agreements and developing procedures to achieve compliance to such standards can be seen as a typical form of policy diffusion through trade instruments. In social sciences the transfer and diffusion of policies, institutions² and alike is an important field of study (Busch, Jörgens, & Tews, 2005; Campbell, 2004; De Deugd & Van Roozendaal, 2012; DiMaggio & Powell, 1983; Dolowitz & Marsh, 1996, 2000; Gilardi, 2012). Institutions can be defined as “...formal and informal rules, monitoring and enforcement mechanisms, and systems of meaning that define the context within which individuals, corporations, labor unions, nation-states, and other organizations operate and interact with each other” (Campbell, 2004, p. 1). Studies in this field try to understand how institutions, norms, and policies travel from one level to another, whether it is on a local, national, transnational or international level. In this way, it adds to discussions about convergence and divergence of national responses to globalization. The mechanisms that explain policy diffusion can be anywhere in a spectrum from voluntary to coercive, although they might not always be easy to distinguish and might even be mixed (Dolowitz & Marsh, 2000; Gilardi, 2012). The seminal work by DiMaggio and Powell (1983) stresses uncertainty, coercion and the conformity to norms. As this

² For the purpose of this article, standards are broadly considered to be a form of institutions, and more specifically a form of policy.

article will show, CAFTA-DR is an illustration of how both potentially coercive measures and more voluntary measures may be included in order to get countries to conform to certain labour standards. Whether the use—or the threat of use—of these measures has been successful with respect to transferring labour standards is one of the questions that needs to be answered. Success is defined by Dolowitz and Marsh (2000, p. 17) as “...the extent to which policy transfer achieves the aims set by a government when they engaged in transfer, or is perceived as a success by the key actors involved in the policy area”. Dolowitz and March (2000, p. 17) distinguish three reasons for the failure of policy transfer: uninformed transfer, which is the result of a lack of information about the original circumstances in which a policy thrived; incomplete transfer, which involves a situation where key institutional elements for success in one country are not transmitted to another; and finally inappropriate transfer, which concerns a situation where the context is so different that an institution cannot have the same effects it did in the country of origin. A fourth reason concerns a situation where the sending country is not really interested in policy transfer, but is merely interested in the symbolic value of it (Campbell, 2004, p. 43). When the aim is only symbolic, coercive measures will not be used, which also adds to symbolic adaptation on the receiving side. Nevertheless, as Campbell (2004, p. 43) asserts, such symbolic value may eventually lead to a more substantive institutional change as others can use these symbols to put pressure on an actor.

This article seeks to explore whether there has been institutional change in Guatemala, that is to say, changes in labour law and practices, as a result of the attempt to transfer certain changes by means of a trade agreement. In other words, did this attempt lead to a convergence of the Guatemalan institutions towards the internationally promoted CLS? As will be illustrated in this article, increasing the political support for the trade agreement was a major aim of including labour standards in it, but this has only had a limited effect. After a brief analysis of the origin of CAFTA’s labour clause and its content, this article will analyse the agreement in terms of its content and its actual effects.³

³ This article is based on an analysis of primary material such as reports from governmental and organisational departments, on a review of literature, and is informed by several conversations with experts working in the (research) field. In addition, US and Guatemalan news sources were used. The main US source concerned Inside U.S. Trade, which was searched online from 2003–2014. The Guatemalan news sources Prensalibre, La Hora, El Periódico and Agencia Guatemalteca de Noticias were searched online from 2000–2014, and articles were retrieved concerning CAFTA.

2. Labour Standards in CAFTA-DR: What Rules Have Been Established?

In 2001, the US explored the possibilities for what later became known as CAFTA-DR. CAFTA-DR's intention was to decrease barriers to trade between the participating countries and thereby increase trade and investment. The agreement was further legitimised by the argument that it would enhance security in the region, as it would support fragile democracies and contribute to alleviating poverty and reducing illegal migration (Ribando, 2005, p. 2). The US promoted CAFTA-DR as an agreement that would serve to "...not only reduce barriers to US trade, but also require important reforms of the domestic legal and business environment that are key to encouraging business development and investment" (US Trade Representative, 2003).⁴

Guatemala, one of the members of the proposed FTA, is notorious for its lack of respect for labour standards. For decades, Guatemalan authorities and employers engaged in the violent oppression of trade unions and workers. This also occurred under civilian governments (Compa & Vogt, 2001, pp. 212-215). The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) argued that "...for several years it has been noting in its observations serious acts of violence against trade unionists which have gone unpunished...", and it shows that between 2007 and the beginning of 2011, 52 trade unionists were "allegedly" killed, while other trade unionists have received death threats, or have in some cases been abducted and tortured (CEACR, 2012).⁵ In numerous observations, the Guatemalan government has been asked to prioritise the protection of trade unionists and to improve the country's justice system in order to resolve crimes against trade unionists (see for example CEACR, 2010, 2011, 2012). The violence against trade unionists is also illustrated in reports from other institutions, such as Human Rights Watch (2011, 2012), despite the optimistic remark in the 2005

⁴ The interest of Guatemala compared to the US in this agreement was very different. The US is Guatemala's most important import and export partner, and since the agreement was signed the importance of the US has increased tremendously in terms of value, from 17% of total exports in 2004 to 42% of total exports in 2012. In terms of imports, Guatemala relied on the US for 34% in 2004, and for 38% in 2012. For the US, the stakes in Guatemala are lower, as Guatemala is not in the top 5 of its export partners, nor of its import partners (WTO International Trade and Market Access Data, 2014). In 2011, it occupied 39th place among US export markets, and 47th among its import markets. The largest export product from the US to Guatemala is oil, the largest import products are knitted apparel, precious stones and fruits and nuts (US Trade Representative, n.d.).

⁵ CEACR makes often use of the word "alleged", for example in reference to murders.

Report of the Working Group of the Vice Ministers Responsible for Trade and Labor in the Countries of Central America and the Dominican Republic that "(t)here has been a marked decrease in reported violence against trade union leaders in 2003 and 2004..." (Report of the Working Group of the Vice Ministers Responsible for Trade and Labour in the Countries of Central America and the Dominican Republic, 2005, p. 41). The International Trade Union Confederation (ITUC) calls Guatemala "(t)he most dangerous country to be a trade unionists" (ITUC, 2013, p. 20).

In addition to the life-threatening dangers to which trade unionists are exposed, they are also confronted with a situation that makes organisation very difficult. Freedom House summarises this as follows: "Roughly three-quarters of the workforce is employed in the informal sector, where workers lack standard labor protections. Anti-union policies include a 25 percent union registration requirement for collective bargaining within a company; a stipulation that strikes need to be supported by 51 percent of the workforce, as well as a broad definition of the "essential services" sectors within which strikes are barred; and extremely weak protections for workers fired for organizing" (Freedom House, 2012, p. 8). Between 1954 and 2014, 97 freedom of association cases were brought to the attention of the ILO on behalf of Guatemalan workers (ILO NORMLEX, 2014a).

Throughout the negotiations of the agreement, labour standards were subject to heated debate in the US. This was no surprise, as not only were labour standards increasingly linked to the subject of trade, but also the issue of violation of labour rights had been a constant presence in the US-Guatemalan relationship for some time, starting with the Generalized System of Preferences (GSP) programme. However, the multiple complaints that had been filed under the 1984 labour clause of the GSP to the government of Guatemala for not respecting labour standards had never resulted in a suspension of benefits, although some argue that the pressure itself led to small improvements (Douglas, Ferguson, & Klett, 2004, pp. 288-291), while others suggest that the threat of sanctions helped to restore democracy in 1993 (Compa & Vogt, 2001, pp. 219-220). That Guatemala was certainly at times sensitive to threats became apparent in 2001, when it was already undertaking reforms and the US effectively threatened to cut off its beneficial market access if it failed to continue to reform its labour law to conform to ILO guidelines (Hall & Thorson, 2010, pp. 56-57).

Just as with the GSP, labour standards were included in the CAFTA-DR. Chapter 16, article 1 stipulates that "(t)he Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)....Each party shall strive to ensure that such

labor principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law.” Article 16.2.1(a) conditions that “(a) Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement”. However, 16.2.1(b) provides opportunities to deviate from this. Article 16.8 states that “(f)or purposes of this Chapter: labor laws means a Party’s statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:

- ...a Party’s statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:
- (a) the right of association;
 - (b) the right to organize and bargain collectively;
 - (c) a prohibition on the use of any form of forced or compulsory labor;
 - (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and
 - (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.”

The Chapter furthermore provides for institutional and procedural arrangements, and for mechanisms to support cooperation between the countries involved and to facilitate the development of labour standards.

There are four points to be noted with respect to Chapter 16. The first concerns the specific formulations. The emphasis is on “strive to ensure” that the above-mentioned labour rights are “recognized and protected by its law”. A violation can only be established when it is possible to prove that a country has not strived, or when there is a violation of its own laws that is characterised by “recurring course of action or inaction” and related to goods that are traded between the partners. When these elements are present, the possibility of using sanctions is within reach. While these formulations can be considered rather weak and may even stimulate countries to further weaken them⁶, they do not prevent action. For example, in May 2013 the US requested formal consultations with Bahrain based on having not strived to ensure the protection of labour rights (Letter from Acting United States Trade Representative Marantis, Acting United States Secretary of Labor Harris to the Minister of Industry and Commerce Fakhro and the Minister of Labour Humaidan of Bahrain).

⁶ Elliott (2004, p. 6) has suggested that because of the emphasis on national laws, countries may decide to not improve these national laws.

A second point involves the nature of the rights. The text places the US’s own definition of labour rights (called internationally recognised labour rights) above the ILO’s CLS, as defined the 1998 ILO Declaration. However, the two overlap to a great extent. The main difference between the US Trade Act definition and the ILO Declaration is that the latter does not include a reference to ‘acceptable working conditions’ but does contain a reference to non-discrimination. The US definition thus adds the category of acceptable working conditions (Article 16.8(e)) but fails to include non-discrimination (CAFTA-DR FTA, 2004; US Trade Act, 2002).⁷

Thirdly, the Chapter allows for individuals to make complaints concerning violations, but does not require governments to respond to these complaints in an effective manner. Article 16.4 of the agreement stipulates that all countries need to have a contact point which “...shall provide for the submission, receipt, and consideration of communications from persons of a Party on matters related to the provisions of this Chapter”. This means that countries not willing to activate a specific complaints procedure do not need to and can just establish a contact point for communications of any sort. However, in the US this provision allows citizens to complain if they believe a country is not fulfilling its obligations. Subsequently, the US Department of Labor’s Office of Trade and Labor Affairs will determine whether to accept the complaints or not (Federal Register, 2006).

Fourthly, another point of importance relates to the possibility to use sanctions once a violation of the agreement is alleged. This possibility only applies to Article 16.2.1(a), as article 16.6.7 states that “(n)o Party may have recourse to dispute settlement under this Agreement for any matter arising under any provision of this Chapter other than Article 16.2.1(a)”.⁸ In addition, the potential punishment is also different. Only in such case as a country has failed to enforce its labour laws repeatedly regarding trade of goods between the parties may a fine be imposed which, according to chapter 20 of the same agreement, cannot “...exceed 15 million US dollars annually”, which is put in a special fund to support labour projects. This differs from

⁷ See for an extensive discussion of developments in FTAs, Van Roozendaal and Voogsgaard (2011).

⁸ The limitation as to what part of the agreement the sanction applies to is of course of importance. In the case of Bahrain, which has a similar FTA with the US, it will secure the country from being confronted with sanctions. The US pointed out specifically in its 2013 request for consultations about violations with the country that this will not involve a procedure leading to sanctions, as the request is based on another article (Letter from Acting United States Trade Representative Marantis and Acting United States Secretary of Labor Harris to the Minister of Industry and Commerce Fakhro and the Minister of Labour Humaidan of Bahrain, 2013).

commercial disputes, where no cap is provided (CAFTA-DR FTA, 2004; Bolle, 2014).

When the CAFTA agreement was adopted by the U.S. Senate 2005, it was accompanied by a promise that US\$ 40 million would be made available to support capacity building in both labour and environmental areas over four years (Bolle, 2005, p. 6). This amount increased significantly; between 2006 and 2010, US\$ 142 million was spent on technical assistance in the area of labour (US Trade Representative, 2011a).

3. The Labour Chapter in Context

As demonstrated earlier, the discussion over the link between labour standards and trade is part of a debate on different views regarding the effects of global liberalisation, in which two important viewpoints can be distinguished. On the one hand, there is the perspective that free trade in the long run will lead to economic improvements for all, and only requires regulation to secure this effort. On the other hand, there is the perspective that trade should be more regulated in order to contain the negative effects for those who are less able to defend their interests. The identification of such negative effects can range from domestic job losses to stimulating unacceptable working conditions.

Over the last three decades global free trade has increased, in terms of value, by an average of about 7% annually (WTO, 2013a). The WTO has partly contributed to this increase in trade to some extent through the reduction of tariff barriers under trade agreements (WTO, 2013b, pp. 55-56). In 2014, 379 regional trade agreements, of which the vast majority are FTAs, were in force (WTO, 2014). This process of trade liberalisation has been characterised by what Bergsten calls “competitive liberalisation”, through which countries have shown their increased willingness to ease restrictions on trade and often also investment “...to compete effectively in international markets, rather than simply at home” and “...to compete aggressively for the footloose international investment that goes far to determine the distribution of global production and thus jobs, profits and technology” (Bergsten, 1996). Over the past 20 years, this competition has been facilitated by bilateral and regional trade agreements (WTO, 2014), more than by an international approach. The main reason for this is that it is far simpler to strike an agreement with a small number of countries than with a large number of countries (Bergsten, 1996). This approach of competitive liberalisation through bilateral agreements gained momentum with the negotiation of the North American Free Trade Agreement (NAFTA) in 1993, and was further enhanced through the negotiation of a number of US FTAs in the mid-2000s (Cooper, 2011, pp. 7-9).

In many countries, including the US, the lowering of trade barriers has given rise to concerns among the

public about the negative effects of trade. While a 2013 poll by Gallup showed that 57% of the Americans view trade as a way to increase US exports and therefore as a potential for economic growth, this was different in the early 1990s, when most Americans viewed trade as a “threat to the economy”. Though the general view on trade became more positive between 1993 and 2005, still more than one-third of the population saw it as a threat. From 2005 until 2011, the number of Americans polled by Gallup viewing trade as a threat actually outnumbered those seeing it as a way to spur economic growth (Jones, 2013), and in particular, polls pertaining to NAFTA show that US citizens became increasingly concerned about its effects. Whereas in 1991 most Americans were still positive about NAFTA, this changed radically in the following years. In 1992, 33% of the public supported NAFTA and in 1993 only 31% (Klamer & Meehan, 1999, p. 76). NAFTA polls in 2008 showed that 53% felt that NAFTA had had negative consequences for the US economy in general (English, 2008). In 2012, a poll showed that only 34% of those surveyed believed that NAFTA had provided benefits for the US economy (Angus Reid Public Opinion, 2012).

While polls may not always show consistent results and may suffer from methodological problems, politicians are sensitive to them (Shapiro, 2011). And what these polls show us is that there is a significant group with a negative perception of the effects of free trade. Due to the conflict between the different governments’ drive to enter into new FTAs, and the negative view of voters, trade has become an important subject of debate in US politics. Despite the fact that trade is not the most important issue, “...it remains an emotional ‘wedge issue’ for the electorate, as it has been for the last 25 years” (Hurd III, 2012, p. 2). In addition, from 1995 onwards trade was caught up in the increasingly hostile and polarised relationships between Democrats and Republicans that was beginning to characterise the US political landscape. While both parties include pro and anti-free trade politicians, the changing relationship and the increasing importance of social issues related to trade has severely restricted bipartisan support for trade (Destler, 2005, pp. 282-290). Destler (2005) convincingly shows that the so-called “trade and ...” issues posed a new challenge to the American trade policy which cut right through the bipartisan deals that had characterised the trade debate before. With the significant decrease in American tariffs during the beginning of the 21st century, social concerns grew under the pressure of economic globalisation, with one of the central issues being the inclusion of labour clauses in US FTAs. During the NAFTA negotiations, President Clinton responded to growing concerns in the Democratic Party about labour (and environmental) standards in Mexico by adding the North American Agreement on Labor Cooperation to NAFTA, which aided the agreement’s adoption. However, trade unions were

not satisfied with the NAFTA side agreement on labour. With the Democratic Party becoming increasingly financially dependent on trade unions, this dissatisfaction translated into strong support for labour issues to be included in, for example, fast-track legislation.⁹ On the other hand, among Republicans and the business community (who were afraid that references to labour might be used to change US domestic laws), the link between labour standards and trade was strongly contested. This resulted in 1997 in the failed attempt of the Clinton Administration to renew fast track legislation (Destler, 2005, pp. 253-271).

In the early 2000s the Bush Administration also proposed fast-track legislation. According to Destler (2005, pp. 290-302), at this time the strong divisions between Republicans and Democrats on the issue had softened a bit, with both sides realising their mutual dependence: The Bush Administration wanted the trade promotion authority (TPA) legislation to support fast-track and many Democrats were only willing to give the much needed support if issues that mattered to them, among which were labour standards, were included. To that end, section 2102(6) of the US Trade Act of 2002 states that the negotiating objectives of the US should be "...to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO (as defined in section 2113(6)) and an understanding of the relationship between trade and worker rights", and this section in turn defines these CLS as "...(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; And (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." The new TPA for Bush did not mean, however, that trade had become uncontroversial. On the contrary, CAFTA-DR encountered much opposition, with one of the issues being, once again, weak provisions on labour standards (Destler, 2005, p. 304).

Already from the moment the negotiations were announced, the AFL-CIO as well as other interest groups had been very critical, and even the US Assistant Trade Representative pointed out in 2003 that getting CAFTA-DR approved by the US Congress would be a close call (Lobe, 2003). Before the CAFTA-DR agreement was concluded, the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC) of the United States Trade Representative (USTR) was requested to give its opinion. This committee, consisting of 58 labour representatives in 2004, was highly critical of the agreement, as illustrated by the following quote:

⁹ Fast Track or Trade Promotion Authority gives the President the opportunity to negotiate trade deals that cannot be amended by Congress anymore: they can just be voted up or down.

"The agreement clearly fails to meet some congressional negotiating objectives, and it barely complies with others. The agreement repeats many of the mistakes of the NAFTA, and is likely to lead to the same deteriorating trade balances, lost jobs, and workers' rights violations that NAFTA has created" (LAC, 2004). LAC found the agreement's labour provisions too weak to make a difference, and feared that the agreement would destroy American jobs. It argued that the provisions in the agreement did not support bringing labour laws up to the level of CLS. The LAC maintained that the GSP, under which Latin American countries could be withheld tariff benefits if they failed to comply with standards, was better equipped to improve labour standards than CAFTA-DR (LAC, 2004). In fact, the emphasis on national labour laws was seen as a major step backwards (AFL-CIO, 2005) and trade unions felt that the sanctioning mechanism, which treats violations of the labour chapter differently than commercial violations, was not in line with the US Trade Act of 2002 (LAC, 2004).

In spite of this criticism, 54 members of the U.S. Senate voted in favour of the ratification of CAFTA-DR (with just 45 against) in June 2005. The US trade union federation AFL-CIO was so dissatisfied with this result that it threatened to withhold financial support to Democratic candidates for the House who had voted in favour of the agreement (Inside US Trade, 2005). This threat proved to be unsuccessful, and in July 2005 the U.S. House of Representatives approved CAFTA-DR with 217 in favour and 215 against.¹⁰

Criticism of CAFTA-DR was not restricted to the US, and the agreement was questioned by trade unions and other social groups across borders. Trade unions and other groups representing workers' interests outside the US agreed on the need for the agreement to include a strong reference to labour standards. In Guatemala, a group of bishops from the Latin American region highlighted the lack of public debate on the FTAs¹¹

¹⁰ The combination of the limited effect of this threat and the importance of the AFL-CIO to the Democrats paint a rather conflicting picture of the relationship between the two entities. US trade unions are an important supporter of the Democratic Party, although they have weakened considerably (Warren, 2010). Still, in 2008, Obama received almost 60% of the union-affiliated households' votes and the unions spent about US\$ 400 million on the 2008 election of Democrats (Hananel, 2012). While the AFL-CIO depends on the Democrats to influence policy, having its wishes granted is less than guaranteed. Heany (2012, p. 212) argues that since the 1960, "...labor has received fewer dividends from its relationship with the Democrats". This lack of influence can lead to strange collaborations, such as that of the AFL-CIO and with the Tea Party to stop Obama's new fast-track authority (Bolton, 2014).

¹¹ This conclusion is also supported by the fact the Guatemalan news sources Prens Libre, La Hora, El Periódico and Agencia Guatemalteca de Noticias were searched online and turned up

and the lack of provisions in the agreement that would allow for investment in social development. According to these bishops, CAFTA-DR would confront subsistence farmers with cheap imports from the US. Furthermore, the agreement would not improve labour and environmental standards, with job growth taking place at the expense of labour conditions (McCarrick, Ricard, Imeri, & Chavez, 2004). Trade unions from Guatemala shared these concerns. In 2004 and 2005 trade unions protested against the agreement. The unions feared that it would lead to job losses (El Periódico, 2005a, 2005b; Hansen-Kuhn, 2005). As with unions in the US, Guatemalan unions advocated a labour clause in the agreement. In joint declarations from 2002 and 2003, US and Central American trade unions called for an adjusted trade agreement, which would stress the adherence to the CLS and a strong dispute settlement mechanism (AFL-CIO, n.d.). However, Abrahamson (2007, p. 348) argues that Guatemalan social groups did not have an opportunity to influence the agreement.

This shows that the FTA has been subject to dispute between the trade unions across the two countries on the one hand and the governments in both countries involved on the other. However, while the effects of CAFTA-DR in general and the labour chapter in particular have been part of a public discussion in the US, this was less the case in Guatemala. In the US, the labour provision was a compromise that enabled the passage of the agreement. However, while the agreement drafted was not received with great enthusiasm among the trade unions affected by it, the effects of the labour chapter may have altered this perspective.

4. The Effects of the Labour Provisions

As we have seen above, the origins of the CAFTA-DR labour clause can be traced back to the US domestic political struggle between the Democrats and the Republicans. The inclusion of CLS in all US agreements was an attempt to increase support for these agreements. Nevertheless, even an agreement that is perceived to be flawed may still be praised for its unexpected positive output. As we have seen, the lack of consent of the trade unions with the labour provisions was largely due to a lack of faith in the provisions' effectiveness. Therefore, it is of importance to understand whether these expectations were realised.

There are two ways in which the effects of the trade agreement and its labour standards chapter can be measured. A distinction should be made between the effects of the negotiations leading up to the agreement (pre-ratification effects) and those of the labour provisions specifically in terms of effects on labour law and on labour practices (see also ILO, 2013).

only a limited number of articles dealing with this issue.

4.1. Pre-Ratification Effects

Before CAFTA-DR was officially on the table, Guatemala had already ratified all eight fundamental conventions named in the ILO Declaration (ILO NORMLEX, 2014b) and around 2003 it was making progress in adapting its labour legislation and practices (ILO, 2003, p. 3 [note 3]; US Department of Labor, US Trade Representative, & US Department of State, 2005, pp. 73-97)¹². Around the time the negotiations were launched in 2003, a study conducted by the ILO (at the request of the Central American countries) pointed to a number of problems in the field of labour legislation and labour practices (ILO, 2003, pp. 18-22).

However, while recognising that legal revisions were much needed in areas to prevent discrimination and to establish rules for union election, a 2005 study by US Department of Labor, US Trade Representative and US Department of State maintained that many parts of the conventions related to CLS were "largely in conformity" with Guatemalan law (US Department of Labor, US Trade Representative, & US Department of State, 2005, p. 73). The idea that the problems were mainly limited to implementation and enforcement and not to the laws themselves became part of a heated debate between those supporting a strong labour chapter and those against, leading to accusations that the US Department of Labor had withheld politically unwanted reports which had concluded that the labour legislation in CAFTA-DR countries actually fell significantly short, while the Department claimed that these reports were lacking in quality (Inside US Trade, 2003a; Margasak, 2005). In 2012, however, the Department of Labor recognised the non-existence of recommendations from the Working Group of the Vice Ministers' 2003 report that Guatemala reform its labour law as a "...significant omission..." (US Department of Labor, 2012, p. 18), thereby acknowledging that the legal situation in at least some areas also demanded attention.

Although the ILO report had prompted the country to make further improvements (Report of the Working Group of the Vice Ministers Responsible for Trade and Labor in the Countries of Central America and the Dominican Republic, 2005, p. 40), actions to strengthen inspections or improve labour legislation were not a formal condition for the US to get the agreement ratified. In fact, the inclusion of such a condition in FTAs only became customary in 2006. Nevertheless, in the case of CAFTA-DR, there was an understanding that before the agreement was signed, the member countries would improve their legislation and practices (ILO, 2013, pp. 36-37). As noted before, that such concerns

¹² Labour legislation was adapted in areas related to issues raised in the ILO (ILO, 2003, p. 3 [note 3]); and under the GSP (US Department of Labor, US Trade Representative, & US Department of State, 2005, p. 75).

were brought forward was mainly related to the negative public stance in general, and of trade unions in particular, on free trade. Different representatives from the Democratic Party emphasised that the agreement would lack enough support to pass if labour standards were not included in a meaningful way, that is, going beyond the formulation of “enforcing own labour standards” (Inside US Trade, 2003b; Inside US Trade, 2003c). In response to this, the US Trade Representative promised to not conclude “(n)egotiations on labor provisions in the agreement...until the U.S. was satisfied that the labor standards in the Central American countries ‘were up to the level that we’re satisfied with’, and Central Americans make a commitment to implement that standard...” (Inside US Trade, 2003d).

What this level entailed exactly remained unclear. On the one hand, this put pressure on the CAFTA-DR countries to undertake action, while on the other hand it left plenty of room to manoeuvre for the CAFTA-DR countries. These countries responded to this “challenge” by requesting that the Inter-American Development Bank support an assessment of the situation in their countries and come up with proposals to improve the situation (Inside US Trade, 2004). The resulting Report of the Working Group of the Vice Ministers Responsible for Trade and Labor in the Countries of Central America and the Dominican Republic (2005) optimistically noted that “(s)ignificant progress has been made in assuring that the Guatemalan constitution and labour code contain full protections for the fundamental rights of the ILO” (p. 40) and emphasised the developments made in the different countries. In Guatemala, this ranged from proposals (such as “steps taken” to improve labour inspections, proposed budget increases for labour ministry) to completed reforms such as a decentralisation of courts and the protection from exploitative work by children (p. XIII). At the same time, it recognised that there was a lot left to be desired. For example, there was a lack of compliance with the laws, there remained limitations to the Ministry of Labour’s ability impose fines in cases of labour standards violations, inspectors were politically appointed, court decisions were delayed, and there was slow progress in reforming legislation on gender discrimination (Report of the Working Group of the Vice Ministers Responsible for Trade and Labor in the Countries of Central America and the Dominican Republic, 2005, pp. 40-47). Of interest were the matters that were not mentioned. What remained undiscussed in this report were legal issues that inhibited the full ability of workers to organise themselves (such as requirements for whom could be elected or for when union could be established) and the high number of (death) threats against trade unionists and the general anti-union culture.

The latter points were rather hard to neglect, and were addressed in the 2005 report of the US Department of Labor, US Trade Representative and US De-

partment of State, which was drafted to inform the decision-making process on the ratification of CAFTA-DR. While the report did mention the lack of protection of workers to exercise their rights and the (death) threats against trade unionists, it also uncritically established that “...the Special Prosecutor’s Office has investigated 141 cases involving trade unionists, 46 of which were filed in 2004. The large majority of cases were found to be without merit by judges or by the Special Prosecutor’s Office”¹³ (p. 82) and “(i)n June 2004, the Government of Guatemala reported positively to the ILO that, since 2001, efforts had been made to ensure that labor rights were respected in the country as effectively as possible, producing a decline in acts of violence against trade unionists...No murders of trade unionists related to their trade union activity were reported in 2003 or 2004” (pp. 82-83). While indeed the US Department of State’s human rights reports for 2003 and 2004 used quite neutral language on the work of the Special Prosecutor’s Office, the 2009 report started to notice the limitations in the office’s capacity to deal with the large number of cases. Others argued in 2012 that the problem was not limited to size, as the Special Prosecutor “...refused repeatedly to investigate crimes against trade unionists, unilaterally determining, without investigation, that the individual or family was attacked and/or assassinated for non-union activity” (US Leap, n.d.).

In sum, the CAFTA-DR negotiations did stimulate Guatemala to reflect on its development in terms of labour standards, and efforts that had already been undertaken continued. However, as no specific reforms were formulated as a condition to the ratification of the agreement in the US, it did not lead to major changes. Research by Heintz and Luce (2010, pp. 24-25) on the legal requirements and the practices in area of Freedom of Association and Collective Bargaining shows some improvement during the years before the ratification of the agreement, but only when the strength of the changes on certain criteria is weighted. All other measurements show no improvement. The CIRI database, which reports on changes in labour practices in workers’ rights¹⁴, did not report an improvement between 2003 and 2005 (Cingranelli & Richards, 2013a).

4.2. *Effects of the Agreement*

Legal problems exist in Guatemala when labour laws are measured against international fundamental labour rights, such as in relation to conditions for establishing a union or striking. For years, CEACR requested the

¹³ The full name is the Special Prosecutor’s Office for Crimes against Unionists and Journalists.

¹⁴ CIRI uses the American definition, excluding discrimination but including minimum working conditions (Cingranelli & Richards, 2013b, p. 65).

amendment of legal provisions, for example with respect to conditions imposed on the establishment of industry-wide unions, the requirements for being elected as a trade union leader, and limitations on the right to strike (CEACR, 2013). However, when reviewing the US Department of State's Country Reports on Human Rights Practices between 2005 and 2013, no reports of *de jure* improvements were made. In addition, the CIRI database shows that between 2005 and 2011 the labour standards situation in Guatemala was rated at the lowest level and no improvements were made that altered that daily practice. According to the US Department of Labor (2012, pp. 16-25), in the period 2005–2010, Guatemala was the only CAFTA-DR country that decreased its labour law enforcement budget and decreased the number of labour inspectors. This report concludes that "(s)ome countries have provided increased resources, training, and infrastructure for their inspectorates. Unfortunately, other countries, most notably Guatemala, lag behind" (US Department of Labor, 2012, p. 25). While the country did establish more courts with labour jurisdiction, enforcement of court orders was noted as an "ongoing problem". More positive developments were noted in terms of "promoting a culture of compliance" and in battling the worst forms of child labour (such as increasing the compulsory education age) (US Department of Labor, 2012, pp. 26-35), but the effects of these efforts should not be overestimated. For example, effects in terms of child labour are unclear from other sources, such as the Human Rights Reports of the US Department of State (between 2005–2013) and the Reports on the Worst Forms of Child Labor of the US Department of Labor (between 2005–2011). Only the study by Heintz and Luce (2010, pp. 30-33) shows some improvement in area of Freedom of Association and Collective Bargaining when the strength of the changes is weighted.¹⁵

The above shows that the CAFTA-DR did not have a strong effect on labour standards practices. It also seems that the threat of sanctions has also not made a difference thus far. The possible execution of this threat became more tangible in 2008, when the AFL-CIO and six Guatemalan trade unions filed a complaint against Guatemala. The core of the complaint is that the Guatemalan government seriously and repeatedly failed to enforce its own domestic labour laws. All five of the individual cases cited in the complaint included references to matters also included in ILO conventions

¹⁵ There are a few reasons to be cautious about this result and the result in the pre-ratification phase, as mentioned earlier. The authors employ different kinds of measurements, and the vast majority show no improvement in the case of Guatemala. At the same time the authors argue (p. 33) that in countries with weak labour standards to begin with, this type of measurement may put too much weight on small improvements (Heintz & Luce, 2010).

87 and/or 98, among which was the murder of a representative of banana workers. The complaint requested the US government invoke the consultation mechanism which the FTA foresees, and, if necessary, also the dispute mechanism (AFL-CIO et al., 2008).

The Office of Trade and Labor Affairs (OTLA) of the US Department of Labor accepted the complaint about 7 weeks later. The findings of OTLA were not to be misunderstood; the Guatemalan Ministry had send out inspections to the facilities, but the inspectors were simply denied entrance. When courts took over cases, the Ministry was not informed about the outcomes, and the rulings of the courts were not complied with on a regular basis. The report concluded with some specific recommendations on how to improve the failing system and announced that it would look at progress six months later, but felt at the time that formal consultations with Guatemala were unwarranted (OTLA, 2009). One of the effects of the complaint was that the Guatemalan government sent inspectors to two of the factories subject to complaints and anti-union activities and workers were ordered to be reinstated, which had a long-term effect in only one case (ILO, 2013, p. 53). According to Vogt (2014, p. 137), such minor progress actually made it more difficult for the US to request consultations, as the Guatemalan government was demonstrating good will.

Just after the OTLA report, excluding the recommendation for formal consultations, was published, the Obama Administration came to office, but no immediate action was undertaken. This changed in 2010, when the US filed its first labour rights case ever under an FTA, thereby requesting formal consultations (US Trade Representative, 2010). That year, important FTAs with Panama, Colombia, Peru and Korea were pending and the Obama Administration wanted to pass them through Congress. Even though, as a result of a 2007 compromise between the Democrats and the Republicans, these four agreements are equipped with a labour chapter much stronger than the other agreements, some members of the House of Representatives, mainly Democrats, were not supportive of these FTAs (Cooper, 2010; Liberto, 2011).¹⁶ Some therefore argue that Obama, pursuing a free trade agenda, filed the complaint against Guatemala to show that he is willing—albeit at a slow pace—to follow up on the labour aspects of the FTAs, making the Democrats and the trade unions more willing to accept the pending trade deals (Council on Hemispheric Affairs, 2010). This was needed, as Democrats held the majority in both the House and the Senate in 2010.

¹⁶ As in 2007 Democrats had a majority in US Congress and demanded a stronger commitment to labour standards in trade agreements, these FTAs contain stronger language on labour standards (Destler, 2007).

The official reasons put forward by the US for filing this case were the “failures to investigate alleged labor law violations”, and the lack of enforcement measures being taken once a problem presented itself. Specifically violence against trade union leaders, freedom of association, the right to organise, and collective bargaining are mentioned. The official US government press release also mentions that these violations create disadvantages for the US (US Trade Representative, 2010). The letter written by the US Trade Representative and the US Secretary of Labor states that “(t)he United States also has grave concerns about the problem of labor-related violence in Guatemala, which is serious and is apparently deteriorating” and it lays the fault with the Guatemalan government, stating that “(t)he concerns of the United States include apparent failures by the Government of Guatemala to respond adequately to protect those threatened with violence and apparent failures to adequately investigate and prosecute such crimes” (Letter from US Trade Representative Kirk and US Secretary of Labor Solis, 2010).

However, the consultations did not have the desired result. The US government tried to come to an agreement, this time through the CAFTA-DR Free Trade Commission, but this also had no result as the Guatemalan government did not agree to changes in the law that would allow labour inspectors to impose sanctions on employers when in violation of labour law or to make employers in the export zones put money in a fund to cover the cost of workers’ compensation when factories closed (Vogt, 2014, p. 138). A few months later, the US Trade Representative called for the creation of an arbitration panel (US Trade Representative, 2011b), which was established at the end of 2012, but it took until November 2014 for the first submission to be filed (Initial Written Submission of the United States, 2014). In the meantime, activities were undertaken to settle the conflict. In April 2013, the two governments signed an action plan that included detailed steps that Guatemala had to undertake in order to correct the lack of labour law enforcement. The plan included commitments on information exchange between different ministries, the establishment of an electronic system to track court decisions, police assistance for inspectors when inspecting work sites, resources for labour inspectors, the right of labour inspectors to issue fine recommendations and shorten the timeframe for handling a case, increasing compliance with labour standards in the export sector, and making sure that companies would be withheld benefits if they do not adhere to labour law (Enforcement Plan, 2013). That the commitments were made at all was, according to Vogt, probably the result of the fact that the workers’ delegation to the ILO had requested the establishment of a Commission of Inquiry in order to investigate com-

plaints in the area of Freedom of Association and the Right to Organise (Vogt, 2014, pp. 138-139).¹⁷

After having already granted Guatemala in October 2013 six months to fulfil its commitments (Vogt, 2014, p. 139), the Guatemalan government once again got an extension of four months from the US at the end of April 2014. The Guatemalan trade unions and AFL-CIO responded furiously to this. They argued that the Guatemalan government shows unwillingness to solve the problems by not amending its laws, not enforcing the law, and not adhering to major points in the enforcement plan, such as with regard to the frequency and role of labour inspectors, non-compliance with court orders, sanctioning authorities of the ministry, and so forth (letter from AFL-CIO and Guatemalan unions, to the US Trade Representative Froman, US Secretary of Labor Perez, the Ministro de Trabajo y Previsión Social Solorzano and the Ministro de Economía de la Torre, 2014).¹⁸ In September 2014, the US decided that Guatemala’s efforts were not substantial enough, and in November 2014 the US submitted its concerns to the Panel, arguing that Guatemala had not enforced its own labour laws and that this had affected trade between the US and Guatemala in more than 400 cases (Initial Written Submission of the United States, 2014; US Trade Representative, 2014). This shows that, even though it took the Obama Administration a long time to act upon the labour chapter in the agreement, it eventually did proceed with this. Again, other factors than the intention to strengthen labour standards may have played a role, such as the Trans-Pacific Partnership (TPP) which is currently being negotiated and is viewed critically by the Democrats for the same reasons that the other FTAs were (Committee on Education and the Workforce, 2014).

5. Understanding the Weak Attempt to Forced Diffusion of CLS

This article argues that the effects of the inclusion of labour standards in the CAFTA-DR have been—until now—insignificant and that this can be understood as a case of an attempt at forced diffusion which has failed. The weak formulation of the provisions and sanction mechanism in the labour chapter, combined with the limited action undertaken, suggest that initial support for the inclusion of labour standards was mainly symbolic. Given the weak language and the lack of action that followed, it seems that both countries accepted the inclusion of labour standards in the FTA

¹⁷ In December 2014 no Commission had yet been established (ILO, 2014).

¹⁸ Nevertheless, according to a recent ILO study, the complaint and its aftermath have made some Guatemalan and US companies anxious for their exports, calling upon the Guatemalan government to act and resolve the issue (ILO, 2013, pp. 53).

without a clear intention to act upon it. Guatemala was not committed to changing its labour laws and, particularly, practices, but the CAFTA-DR agreement forced the country to address the issues raised by the agreement. On the basis of the long history of the country failing to protect workers, the government's lack of commitment did not come as a surprise. While officially being categorised as a democracy by Polity IV (2014), Isaacs (2010, p. 115) argues that in Guatemala "...today's political class has mastered the art of deception. Politicians may follow democratic practices that sometimes yield positive outcomes. Yet they do not provide truly representative or responsible governance". She paints a grim picture of a country torn apart by decades of civil war, which has created a society where violence has penetrated everyday life; a weak and political legal system which does not defend justice but sustains impunity; the takeover of political parties by elites, the military and criminals; a left-wing opposition not strong enough to counter vested interests or defend the interests of highly impoverished population; and the shimmering hope that this would change with the election of Colom in 2007 long gone. The US Department of State notes that although Guatemala is a multiparty constitutional republic with free and fair elections, it is also characterised by "...widespread institutional corruption, particularly in the police and judicial sectors; police and military involvement in serious crimes such as kidnapping, drug trafficking, and extortion; and societal violence, including often lethal violence, against women" (US Department of State, 2013, p. 1). Recent events even indicate a turn for the worse.¹⁹

Under these circumstances, the lack of political incentive in the US to actually transfer labour standards until recently has not helped to improve the situation. As noted, the Bush Administration saw the inclusion of a labour clause in CAFTA-DR first and foremost as an attempt to make the agreement more acceptable to the Democrats and to get it ratified by the US Congress. Because of this, the agreement lacks real teeth, with its emphasis on national standards and including only a limited fine for the violation of a restricted part of the agreement. In short, the institutional change framed was one of a symbolic nature, as both the Bush Administration as the Guatemalan government were forced to deal with the issue of labour standards, but were not supportive of it. While on paper the FTA definitely had some coercive features that would enable it to go beyond being symbolic, no measures were taken to actually enforce the labour chapter. Only with the arrival of the Obama Administration has this symbolic

¹⁹ The highly acclaimed Attorney General who been responsible for the (later overturned) conviction for genocide of former President, General Montt, has been forced to resign and has been replaced with an Attorney General connected to Montt's political party (Isaacs, 2014).

nature led to an attempt to change matters more substantively. It remains to be seen, however, what the effects of such attempt will be. The question is whether the available measures are enough to force an unwilling country to change its institutions and its politics in such a fundamental way.

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Conflict of Interests

The author declares no conflict of interests.

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