

# THE NEXUS BETWEEN FREE TRADE AGREEMENTS AND THE TRAFFICKING OF HUMAN BEINGS

## INTRODUCTION

After the failure of the 2003 World Trade Organization (WTO) Ministerial meeting<sup>1</sup> in Cancun, Mexico, the Bush Administration emphasized its intention to aggressively pursue bilateral and regional free-trade agreements.<sup>2</sup> As former United States Trade Representative (USTR), Robert Zoellick stated, “[w]e are going to keep trying to open markets one way or the other.”<sup>3</sup> Free trade agreements<sup>4</sup> (FTAs) are important elements of U.S. trade policy, which utilize an approach called competitive liberalization.<sup>5</sup> The Bush Administration views FTAs as part of its strategy to enhance prosperity and stability within the world.<sup>6</sup>

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1. Eugenia McGill, *Poverty and Social Analysis of Trade Agreements: A More Coherent Approach?* 27 B.C. INT’L & COMP. L. REV. 371 (2004). The 2001 Fourth Ministerial Conference of the WTO in Doha, Qatar, recast the agenda and activities of the WTO in terms of developing countries and their concerns. *Id.* at 371–72. It included the adoption of a Work Programme, the Doha Development Agenda (DDA), which suggested several channels through which countries and development institutions could pursue approaches to trade and development. *Id.* Yet, by 2003, when the Fifth Ministerial Conference was to take place in Cancun, little progress had been made on the Doha commitments. *Id.* at 376. Despite great disparity among the countries, the Conference opened on September 10th; however, the chairperson abruptly closed the Conference on September 14th when the participating countries had reached an impasse. *Id.*

2. Ian F. Fergusson & Lenore M. Sek, *Trade Negotiations During the 109th Congress*, in CONG. RESEARCH SERV., ISSUE BRIEF FOR CONGRESS 2 (Jan. 19, 2005), available at <http://fpc.state.gov/documents/organization/42443.pdf> (last visited Apr. 9, 2006).

3. *Id.*

4. Free trade agreements are “arrangements among two or more countries under which they agree to eliminate tariffs and nontariff barriers on trade in goods” while maintaining individual “policies, including tariffs, on trade outside the region.” William H. Cooper, *Free Trade Agreements: Impact on U.S. Trade and Implications for U.S. Trade Policy*, in CONG. RESEARCH SERV., REPORT FOR CONGRESS 5 (Dec. 6, 2005), available at <http://fpc.state.gov/documents/organization/58266.pdf> (last visited Apr. 9, 2006) [hereinafter Cooper, *Free Trade Agreements*].

5. Richard H. Steinberg, *Great Power Management of the World Trading System: A Transatlantic Strategy for Liberal Multilateralism*, 29 LAW & POL’Y INT’L BUS. 205, 211 (1998) (defining competitive liberalization as a “competition between the regional and multilateral processes in which each regional integration effort creates pressure for multilateral results”).

While advocates of competitive liberalization have neither fully specified all of the assumptions nor fully detailed the logic of the approach, the main idea of competitive liberalization seems to be that the widening and deepening of each regional trade arrangement brings otherwise reluctant actors to the multilateral bargaining table because they fear being left out of the alternatives to a multilateral solution . . . .

*Id.*

6. Fergusson & Sek, *supra* note 2, at 3.

FTAs between developed countries may have the power to raise standards of living, to improve working conditions, and to increase environmental protections;<sup>7</sup> however, such agreements between developed and developing countries exacerbate existing deficiencies within the developing nations. Without the proper infrastructure, people within developing countries fall susceptible to exploitation. If countries choose to engage in negotiations, protections need to be built into the framework of the agreement.<sup>8</sup> At a minimum, such protections should include the delineation and enforcement of labor standards, the implementation and enforcement of anti-trafficking laws, and assistance for citizens whose livelihoods are affected by globalization and the transition to market economies.<sup>9</sup> FTAs should also include enforcement mechanisms that can adequately deal with such violations.<sup>10</sup>

The purported goals of FTAs between developed and developing countries are laudable—everyone would like to see democracy furthered, the rule of law upheld, and standards of living raised. These, however, are long-term objectives. Structural changes within developed countries have led to a more service-oriented economy and these countries now outsource much of the labor-intensive sector to developing countries.<sup>11</sup> While proponents of labor rights fear that the search for competitiveness will favor the exploitation of cheap labor in substandard conditions,<sup>12</sup> proponents of FTAs state that over-regulation can create serious market distortions that cause other ripple effects, including job loss and economic stagnation.<sup>13</sup>

The Bush Administration's negotiations of FTAs with several Latin American countries are paradigmatic of this conflict. In Latin America, the number of people living below poverty lines rose from 200 million in 1990 to 224 million in 2004.<sup>14</sup> Nearly one person in ten is out of work and, as of 2003, per capita annual income stood at \$3,580.<sup>15</sup> According to the

7. JOHN J. AUDLEY ET AL., *NAFTA'S PROMISE AND REALITY: LESSONS FROM MEXICO FOR THE HEMISPHERE* 4 (Carnegie Endowment for Int'l Peace 2003).

8. *See infra* notes 103–13 and accompanying text.

9. *Id.*

10. *Id.*

11. Mary Ross Hendriks, *Modern Slavery and the Production of Consumer Goods in a Global Economy: Consumer Choice—Not Law—Will Trigger the Next Diaspora*, 20 T.M. COOLEY L. REV. 431, 433 (2003).

12. José Eduardo Mora, *The War on CAFTA is Just Beginning*, INTER PRESS SERV., Dec. 29, 2004, <http://www.commondreams.org/headlines04/1229-08.htm> (last visited Apr. 9, 2006).

13. Hendriks, *supra* note 11, at 434.

14. Celia W. Dugger, *Supermarket Giants Crush Central American Farmers*, N.Y. TIMES, Dec. 28, 2004, at A1.

15. AUDLEY ET AL., *supra* note 7, at 4.

Inter-American Development Bank, approximately 150 million people, or one out of every three people in Latin America, earn less than two dollars a day.<sup>16</sup> It takes approximately five days for the U.S. economy to produce the combined annual gross domestic product (GDP) of the five Central American countries.<sup>17</sup> Despite such stark economic disparities<sup>18</sup> among the United States and the countries within the Central America-Dominican Republic Free Trade Agreement (CAFTA),<sup>19</sup> the House of Representatives and the Senate passed implementing legislation and President Bush signed the legislation into law<sup>20</sup> in the summer of 2005.<sup>21</sup>

The process of globalization and economic reform in developing countries has created job losses through the disappearance of public sector employment, the decline of traditional industries, and the loss of agricultural competitiveness.<sup>22</sup> In addition, natural disasters,<sup>23</sup> political turmoil, religious persecution, and war have led to increased pressure.<sup>24</sup>

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16. *Id.*

17. Public Citizens Watch, *CAFTA by the Numbers: What Everyone Needs to Know*, <http://www.citizen.org/documents/CAFTAbNumbers.pdf> [hereinafter *CAFTA by the Numbers*].

18. *See id.* As of 2003, the United States had a per capita GDP of \$37,800. *Id.* In contrast, the per capita GDPs were significantly lower in the Central American countries, with Costa Rica enjoying the highest at \$4,100 and Nicaragua bringing in the bottom at \$2,200. *Id.*

19. In January 2003, the United States began negotiations with the five countries composing the Central American Common Market—Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica. Fergusson & Sek, *supra* note 2, at 5–6. The parties signed an agreement in May 2004. *Id.* at 5. Subsequently, the United States began negotiating a FTA with the Dominican Republic that would integrate the Dominican Republic into the FTA with the Central American countries. *Id.* at 6. These negotiations concluded in March 2004. *Id.* That month, the President notified Congress of his intent to sign the FTA with the Dominican Republic and the agreement was signed the following August. *Id.*

20. Pub. L. No. 109-182, 120 Stat. 289 (2005).

21. *See* Cooper, *Free Trade Agreements*, *supra* note 4.

22. Patrick A. Taran & Gloria Moreno-Fontes Chammartin, *International Labour Office, Getting at the Roots: Stopping the Exploitation of Migrant Workers by Organized Crime*, at 3–4 (2003), <http://www.ilo.org/public/english/protection/migrant/download/pom/pom1e.pdf>.

23. *See* AFL-CIO, *Defending the Rights of Immigrant Workers: What Union Members Should Know About . . . Why People Move Between Countries*, <http://www.aflcio.org/issues/civilrights/immigration/upload/MOVE.pdf> [hereinafter *Why People Move*]. According to the AFL-CIO, hurricanes, earthquakes, and famine have contributed to the exodus of people from Central America. *Id.*

In the catastrophic hurricane season of 2005, Hurricane Stan alone left more than 65,000 Salvadorans and 130,000 Guatemalans homeless. Ginger Thompson, *Guatemalan Village Overwhelmed by Task of Digging Out Hundreds of Dead From Mud*, N.Y. TIMES, Oct. 10, 2005, at A13. In Guatemala, the hurricane and the resultant mudslides killed at least 650 people and left three million without electricity, water, and services. *Id.*

24. Taran & Chammartin, *supra* note 22, at 4. *See also* U.S. DEP'T ST., TRAFFICKING IN PERSONS REPORT (June 14, 2004), <http://www.state.gov/documents/organization34158.pdf> (listing additional pressures for migration) [hereinafter TRAFFICKING IN PERSONS].

The supply of victims is encouraged by many factors including poverty, the attraction of a perceived higher standard of living elsewhere, weak social and economic structures, a lack of employment opportunities, organized crime, violence against women and children,

Thus, harsh living conditions within the countries of origin compound traditional migration factors such as changing demographics and technological advances<sup>25</sup> that allow for easier communication and travel.<sup>26</sup> As long as great economic disparities exist between developed and developing countries, people will continue to be “pushed” to migrate.<sup>27</sup>

Simultaneously, factors within developed countries serve to “pull” people to migrate. The demand for cheap, low-skilled labor draws people to jobs within the agriculture, food-processing, construction, semi-skilled or unskilled manufacturing jobs, and low-wage services like domestic work, home health care, and the sex sector.<sup>28</sup> Small to medium-sized companies do not have the resources to move labor-intensive portions of their production overseas.<sup>29</sup> In response, the companies downgrade manufacturing processes, deregulate, and subcontract.<sup>30</sup> These measures have expanded the number of jobs at the bottom of the employment scale.<sup>31</sup> Because the pay is minimal and the jobs are perceived as degrading and dangerous, national workers are often unwilling to take them.<sup>32</sup> The resulting demand provides an impetus for migrant workers, facilitates the incorporation of undocumented workers,<sup>33</sup> and allows unauthorized migrants to find jobs easily.<sup>34</sup> An undocumented Mexican worker will typically find a job within two weeks of his or her arrival in the United States.<sup>35</sup> Furthermore, while FTAs, such as CAFTA, effectively deregulate and integrate goods and services across international borders, countries have not liberalized migration policies.<sup>36</sup> In fact, as the pressure

discrimination against women, government corruption, political instability, armed conflict, and cultural traditions such as traditional slavery.

*Id.* at 19.

25. See *Why People Move*, *supra* note 23 (“Technological advances have erased barriers to job creation and information flow, and rapid changes in transportation and communication technology have made it possible for greater numbers of people to move beyond the country of their birth.”).

26. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need For Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 357 (2001).

27. *Id.* at 358.

28. Taran & Chammartin, *supra* note 22, at 4. See also TRAFFICKING IN PERSONS, *supra* note 24, at 19–20 (“Sex tourism and child pornography have become worldwide industries, facilitated by technologies such as the Internet, which vastly expand choices available to consumers and permit instant and nearly undetectable transactions.”).

29. Taran & Chammartin, *supra* note 22, at 4.

30. *Id.*

31. *Id.* “These jobs are often referred to as the ‘3-D’ jobs: dirty, degrading, and dangerous.” *Id.*

32. *Id.*

33. *Id.*

34. See David R. Francis, *Why the New Jobs Go To Immigrants*, CHRISTIAN SCI. MONITOR, Mar. 10, 2005, at 17 (“In 2003, a total of 13 employers were fined for hiring undocumented employees.”).

35. Taran & Chammartin, *supra* note 22, at 5.

36. *Id.*

to migrate increases, countries like the United States continue to practice tighter border enforcement.<sup>37</sup> This increases the likelihood that people will turn to illegal means of migration.

This Note strives to present both a descriptive and a prescriptive analysis of these concerns, specifically in the context of women's rights, utilizing CAFTA as a paradigm of FTAs between the United States and Latin American countries. Part I of this Note explains FTAs generally and the CAFTA specifically. Part II of this Note examines the "push" and "pull" factors of international migration as linked to globalization and free trade agreements. Part III analyzes the means and ends of illegal migration in relation to free trade agreements, specifically in terms of human trafficking. Finally, this Note concludes by recommending that the United States and other developing countries refrain from entering into FTAs with developing countries until the latter have the proper infrastructure to prevent exploitation and further suffering of indigent and vulnerable people. Alternatively, this Note recommends that, if such agreements are negotiated, they should include specific and detailed provisions to afford the necessary protections.

## I. FREE TRADE AGREEMENTS AND CAFTA

Historically, the United States has negotiated multilateral trade agreements to achieve lower barriers to international trade.<sup>38</sup> However, under the Bush Administration, the United States no longer solely utilizes the multilateral forum in its pursuit of liberalized trade.<sup>39</sup> The slow progress at the WTO and toward the Free Trade Area of the Americas (FTAA)<sup>40</sup> has provided an incentive for the United States to move ahead

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37. See *infra* notes 133–49 and accompanying text.

38. Fergusson & Sek, *supra* note 2, at 1.

39. *Id.* Under the rubric of competitive liberalization, the United States is now involved in a multitude of trade negotiations. *Id.* at 3. In addition to the FTAs approved by the 108th Congress, the United States has several agreements—such as the Free Trade Area of the Americas (FTAA)—under negotiation. The United States is also negotiating a FTA with the Andean countries of Columbia, Peru, Ecuador, and Bolivia and a FTA with Panama. *Id.* at 10.

40. See J.F. Hornbeck, *A Free Trade Area of the Americas: Status of Negotiations and Major Policy Issues*, in CONG. RESEARCH SERV., REPORT FOR CONGRESS 1 (Mar. 12, 2004), available at <http://fpc.state.gov/documents/organization/26394.pdf> [hereinafter Hornbeck, *Free Trade Area*]. Thirty-four countries began discussing the FTAA at the first Summit of the Americas in Miami in 1994. *Id.* Negotiations—projected to be finalized in February 2005—have stalled mainly due to deep differences between the United States and Brazil. *Id.* See also *Many Obstacles Ahead For Resumption of FTAA Talks*, MERCOPRESS, Feb. 7, 2005 (explaining that the USTR has a congressional mandate to negotiate the agreement until mid-2005), <http://www.falklands.com/Detalle.asp?NUM=4923>.

aggressively with bilateral talks.<sup>41</sup> Under trade promotion authority (TPA),<sup>42</sup> several bilateral agreements have recently been negotiated and approved by Congress.<sup>43</sup> In 2002, Congress passed legislation giving the President TPA for the first time since 1994.<sup>44</sup> The proponents of TPA argue that it fosters cooperation between the executive and legislative branches;<sup>45</sup> however, critics claim that it is undemocratic because it does not permit amendments to the negotiated proposal. Critics further question

41. J.F. Hornbeck, *The Proposed U.S.-Panama Free Trade Agreement*, in CONG. RESEARCH SERV., REPORT FOR CONGRESS 5 (Nov. 1, 2005), available at <http://fpc.state.gov/documents/organization/57846.pdf> [hereinafter Hornbeck, *Panama*].

42. See 19 U.S.C. § 3802 (2002). See also Cindy G. Buys & William Isasi, *An "Authoritative" Statement of Administrative Action: A Useful Political Invention or a Violation of the Separation of Powers Doctrine*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 73, 76-77 (2003-2004) (providing a brief history of TPA for international trade agreements).

The Constitution divides authority over foreign commerce and foreign affairs between the Legislature and the Executive, respectively. While Congress has the power "[t]o regulate Commerce with foreign Nations . . .," the President has the power "to make Treaties," by and with the advice and consent of the Senate . . . . Congress passed the Reciprocal Trade Agreements Act of 1934, which delegated to the President the authority to negotiate and implement international trade agreements for the reciprocal reduction of tariffs. Since the inception of this grant of power . . . Congress has struggled to create an appropriate balance between placing limits on the Executive branch's authority to negotiate trade agreements and giving the Executive branch sufficient authority to project credibility at the negotiating table.

*Id.* (citations omitted).

43. See Fergusson & Sek, *supra* note 2, at 1. The 108th Congress approved four bilateral free trade agreements with Australia, Chile, Morocco, and Singapore. *Id.* The United States is also party to four previous agreements: the U.S.-Israel Free Trade Agreement, the Canada-U.S. Free Trade Agreement, the North American Free Trade Agreement (NAFTA), and the U.S.-Jordan Free Trade Agreement. *Id.* at 1 n.1.

44. See Buys & Isasi, *supra* note 42, at 77-79 (describing the TPA procedures).

[I]n the case of international trade agreements, TPA essentially commits the President to notify, consult with, and subsequently submit the final product of trade negotiations to Congress in exchange for final accelerated approval by Congress. Congress commits to discharge automatically the proposed legislation from committee within a certain number of days, to bar amendments to the proposal, and to limit floor debate. For a trade agreement to be eligible for fast track procedure, the President must give Congress . . . notice prior to negotiating and ultimately signing the trade agreement.

*Id.* (citations omitted). See also Fergusson & Sek, *supra* note 2, at 4. "TPA legislation applies to trade agreements entered into before June 1, 2005, with a possible two-year extension. The 109th Congress may become involved in deciding whether or not to allow this extension." *Id.*

45. See Buys & Isasi, *supra* note 42, at 79 (listing the purported goals of TPA).

First, the fast track procedure allows Congress to reduce the influence of special interest groups on trade legislation, thereby largely preventing controversial trade bills from becoming stalled in Congress. Second, fast track increases the Executive branch's credibility at the negotiating table because the United States' trading partners are assured that any negotiated trade agreement will receive swift and unintrusive consideration from the Legislative branch. Third, fast track gives Congress veto power over any negotiated trade agreement.

*Id.* (citations omitted).

the asymmetrical power<sup>46</sup> the United States wields in negotiations and the effects that FTAs may have on non-participating countries.<sup>47</sup> Additionally, the manner in which the Bush Administration chooses potential partners<sup>48</sup> has been subject to scrutiny.<sup>49</sup>

Proponents expect CAFTA to reinforce stability by providing institutional structures that will support democracy and the rule of law, while critics worry about the pervasive social and economic inequality of the region.<sup>50</sup> More than half of Central America's total population is poor, leading critics to argue that CAFTA will aggravate the extreme inequality of income and wealth.<sup>51</sup> In December 2004, U.S. labor groups petitioned the USTR to investigate the continued eligibility of Costa Rica, Guatemala, El Salvador, and Honduras for generalized system of preferences (GSP)<sup>52</sup> benefits, citing attempts by those countries to diminish labor protections.<sup>53</sup> In March 2005, President Bush, facing a tough battle in Congress over CAFTA, nominated Capitol Hill veteran Rob Portman to be the next USTR.<sup>54</sup> That month, Guatemala became the

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46. See *CAFTA by the Numbers*, *supra* note 17.

47. Hornbeck, *Panama*, *supra* note 41, at 5.

48. See Fergusson & Sek, *supra* note 2, at 3. Several factors are used to assess FTA partners. These include: the country's readiness in terms of trade capabilities; the maturity of its political and legal system and its willingness to implement reforms; the economic benefit to the United States; the country's support of the U.S. trade liberalization goals; the country's compatibility with U.S. foreign and economic policy interests; and congressional or private sector support. *Id.*

49. *Id.* at 2. The U.S.-Canada FTA recognized a bilateral trade relationship between two countries at a similar stage of development. *Id.* NAFTA added a country at a different level of development, thereby giving attention to trade as a lever to encourage economic advancement, and encouraging stability in a geopolitical context. *Id.* The U.S.-Jordan FTA has been interpreted as a reward for Jordan's cooperation in the Middle East peace process. *Id.*

50. J.F. Hornbeck, *The Dominican Republic-Central America-United State Free Trade Agreement (DR-CAFTA)*, in CONG. RESEARCH SERV., REPORT FOR CONGRESS 6 (July 6, 2005), available at <http://fpc.state.gov/documents/organization/50156.pdf> (last visited Apr. 9, 2006) [hereinafter Hornbeck, *DR-CAFTA*].

51. See Mora, *supra* note 12.

52. See Sandra Polaski, *Central America and the U.S. Face Challenge—and Chance for Historic Breakthrough—On Workers' Rights*, at 2 (Feb. 2003), <http://www.carnegieendowment.org/pdf/files/TED-CAFT-and-labor.pdf> (explaining GSP and other trade preference programs) [hereinafter Polaski, *Central America*].

Ongoing labor problems have been such a concern to the United States that Congress has fashioned policy instruments to deal with these abuses through current unilateral trade preference programs . . . [these instruments] all extend market access benefits unilaterally to the Central American countries on the condition that they respect workers' rights . . . . The programs require that recipient countries accord . . . internationally recognized workers' rights to their citizens . . . . If the countries fail to respect these rights, they run the risk of losing the trade preferences for some or all of their products.

*Id.*

53. Fergusson & Sek, *supra* note 2, at 6–7.

54. Doug Palmer, *Bush Picks Portman as U.S. Trade Representative*, REUTERS, Mar. 17, 2005,

third of the seven countries, following Honduras and El Salvador, to ratify CAFTA.<sup>55</sup>

## II. THE FORCES OF INTERNATIONAL MIGRATION

### A. Poverty and Inequality Within the Country of Origin

Poverty and inequality are pervasive in Latin America<sup>56</sup> and women suffer greatly in both areas. The number of women living in poverty has increased disproportionately to the number of men, particularly in developing countries.<sup>57</sup> This global feminization of poverty has become a significant problem in transition economies.<sup>58</sup> Gender-based wage inequities allow for profit gains by corporations and further deepen the global income disparities.<sup>59</sup> Essentially, global integration of production has increased the inequalities between men and women, as exemplified by the wage-gap and gender-based allocation of work.<sup>60</sup> The continuing subordination of women in many societies further exacerbates economic,

available at [http://www.boston.com/news/politics/president/bush/articles/2005/03/17/bush\\_picks\\_portman\\_as\\_us\\_trade\\_rep/](http://www.boston.com/news/politics/president/bush/articles/2005/03/17/bush_picks_portman_as_us_trade_rep/) (“Portman pledged to continue Bush’s ‘bold international trade agenda’ if confirmed by the Senate.”).

55. See *Guatemalans To Step Up Protests*, BBC NEWS, Mar. 15, 2005, <http://news.bbc.co.uk/2/hi/americas/4355999.stm>.

56. In Bolivia, for example, a lack of clean water contributes to the death of every tenth child before the age of five. Juan Forero, *Latin America Fails to Deliver on Basic Needs*, N.Y. TIMES, Feb. 22, 2005, at C2 [hereinafter Forero, *Basic Needs*]. In January 2005, residents in El Alto, Bolivia, protested against Aguas del Illimani Waterworks, a subsidiary of the \$53 billion French Suez. *Id.* at A1. The 750,000 residents of the poverty-stricken city, with an average monthly wage of approximately \$55, could not afford the \$450 hookup fee required by the waterworks company. *Id.* President Carlos Mesa, fearing an uprising similar to the one that toppled his predecessor in 2003, cancelled the waterworks company’s contract and returned responsibility to the State. *Id.* Due to rising tensions, President Mesa offered his resignation in March 2005. Juan Forero, *Free Trade Proposal Splits Bolivian City*, N.Y. TIMES, Mar. 9, 2005 [hereinafter Forero, *Bolivian City*]. Ironically, El Alto is quietly benefiting from trade preferences provided by the United States. *Id.* Such preferences have created both jobs and small business opportunities. *Id.* Thus, a conflict exists between those who maintain that Bolivia needs to enter FTAs and those who believe such agreements would leave Bolivia, South America’s poorest country, even more destitute. *Id.* The situation in Bolivia exemplifies the struggle throughout Latin America. Political leaders have to weigh the need for foreign investment with the demands of their citizens, who are engaged in a popular rejection of transnational companies owning essential services. See Forero, *Basic Needs*, *supra*. In the meantime, 130 million Latin Americans remain uncertain of whether they will get clean water. *Id.*

57. Nandini Gunewardena, *Reinscribing Subalternity: International Financial Institutions, Development, and Women’s Marginality*, 7 UCLA J. INT’L L. & FOREIGN AFF. 201, 210–11 (2002–2003) (quoting U.N. estimates that poverty has become concentrated among women in the developing world over the past thirty years, and women constitute at least seventy percent of the world’s poorest people).

58. *Id.* at 211.

59. *Id.* at 212.

60. Aiko Joshi, *The Face of Human Trafficking*, 13 HASTINGS WOMEN’S L.J. 31, 34 (2002).

educational, and work disparities.<sup>61</sup> Their lack of job skills, education, and land or capital increases the likelihood that women in developing countries will be exploited.<sup>62</sup>

According to the International Organization for Migration, women's place in current international migratory flows is changing both quantitatively and qualitatively.<sup>63</sup> Women now account for a growing percentage of migrant populations, and they are now migrating independently.<sup>64</sup> Together, these two factors comprise the feminization of migration.<sup>65</sup> Latin America was the first region of the developing world to record parity in the number of female and male migrants.<sup>66</sup> In 2000, women constituted slightly more than half of the five million migrants in the region.<sup>67</sup>

In addition to women, agriculture and rural farmers tend to shoulder the effects of globalization, and agricultural subsidies are often an obstacle to overcome in FTAs. On this point, NAFTA is illustrative. The Mexican agriculture sector has suffered net losses in trade with the United States.<sup>68</sup> Employment within this sector has declined sharply, as United States exports of subsidized crops such as corn, have depressed agricultural prices in Mexico.<sup>69</sup> The rural poor have been hit hardest by the adjustment to NAFTA and they have been forced to adapt without adequate government support.<sup>70</sup>

Small farmers in Central America have also suffered under globalization. Supermarket chains owned by global corporations, such as Ahold, Wal-Mart, and Carrefour, revolutionized food distribution in less than a decade and have now begun to transform food growing.<sup>71</sup> In the 1990s, these supermarkets went from controlling ten to twenty percent of the market in the region to dominating it; by contrast, this transition took

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61. *Id.* at 35.

62. *Id.* at 37–38.

63. Robert G. Paiva, Statement to the Permanent Observer to the United Nations to the 23rd Special Session of the General Assembly (June 9, 2000), <http://www.un.org/womenwatch/daw/followup/beijing+5stat/statements/omi9.htm>.

64. *Id.*

65. *Id.*

66. Hania Zlotnik, Migration Policy Institute, The Global Dimensions of Female Migration (Mar. 1, 2003), <http://www.migrationinformation.org> (search “Zlotnick”; follow “The Global Dimensions” hyperlink) (last visited Apr. 9, 2006).

67. *Id.*

68. AUDLEY ET AL., *supra* note 7, at 12.

69. *Id.*

70. *Id.*

71. Dugger, *supra* note 14, at A1, A10.

fifty years in the United States.<sup>72</sup> Small farmers cannot compete with the quality or consistency provided by the global chains. The megastores, with their lower prices and greater choice and convenience, have brought unanticipated and daunting challenges to millions of struggling small farmers.<sup>73</sup>

The danger posed by the dominance of these megastores is that increasing numbers of small farmers will follow the channels of migration to the shantytowns of their country's cities or to the United States.<sup>74</sup> Rural households increasingly depend on remittances from household members who migrate.<sup>75</sup> The Inter-American Development Bank estimates that migrants sent more than \$45 billion to Latin America and the Caribbean last year in remittances, exceeding foreign investment and official development assistance for the third year in a row.<sup>76</sup> Thus, developing countries must confront the challenges posed by rural-urban migration and the increasing dependence upon remittances from overseas migrant workers.<sup>77</sup>

Traditional patterns of unequal treatment for women persist within the CAFTA countries. In Guatemala, for example, sexual harassment is not illegal.<sup>78</sup> Discrimination is a serious problem in the *maquila* sector in Guatemala, where sexual harassment and physical abuse are common.<sup>79</sup> Women workers are almost exclusively not unionized due to intimidation and threats of reprisal.<sup>80</sup> In the Dominican Republic, over forty percent of the women working in export processing zones (EPZs) report harassment.<sup>81</sup> Subcontracting and other forms of flexible work also make

72. *Id.* at A10.

73. *Id.* at A1.

74. *Id.* at A10.

75. AUDLEY ET AL., *supra* note 7, at 21

76. Ginger Thompson, *Mexico's Migrants Profit From Dollars Sent Home*, N.Y. TIMES, Feb. 23, 2005, at A10 ("Mexico—where people compete with oil as the country's chief export—received some \$17 billion in remittances, almost twice the amount of just four years ago.").

77. Joan Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT'L & COMP. L. REV. 47, 47 (1998).

78. U.S. DEP'T ST., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GUATEMALA (Feb. 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41762.htm> [hereinafter COUNTRY REPORTS: GUATEMALA].

79. Int'l Lab. Rts. Fund, *Written Testimony Regarding the Central American Free Trade Agreement (CAFTA)* (Mar. 2002), [http://www.laborrights.org/publications/CAFTA\\_testimony.pdf](http://www.laborrights.org/publications/CAFTA_testimony.pdf) [hereinafter *Written Testimony*].

80. *Id.* at 13–14.

81. Lourdes Pantaleon, Int'l Lab. Rts. Fund, *Sexual Harassment in the Export Processing Zones of the Dominican Republic*, at 7 (May 2003), available at <http://www.laborrights.org/projects/women/DR%20report.pdf> [hereinafter *Sexual Harassment*].

it difficult for women to organize against abuse.<sup>82</sup> Women are doubly affected by an industrial hierarchy that reinforces culturally-based discrimination.<sup>83</sup> In El Salvador, women suffer from cultural and societal discrimination and have fewer economic opportunities; specifically, women are not accorded equal respect or stature in traditional male-dominated sectors such as agriculture and business.<sup>84</sup>

### *B. Working Conditions Within the Country of Origin*

These conditions provide vast opportunities to exploit the workforce<sup>85</sup>

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82. *Id.* at 1.

83. *Id.*

Women work under conditions that violate their rights, working between 56 and 80 hours per week, and earning an average weekly salary of twenty-five dollars. Textile factories, which account for 57% of the factories in the EPZs, have a system of operations that assigns production quotas, but these quotas are unreachable in an eight hour work day, which leads women to work overtime with no extra pay just to receive the base salary every week.

*Id.* at 4 (citations omitted).

84. U.S. DEP'T ST., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EL SALVADOR (Feb. 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41760.htm> [hereinafter COUNTRY REPORTS: EL SALVADOR].

85. Children also suffer under exploitative situations. Child labor remains ubiquitous throughout Central America. The State Department recently reported that in each of the Central American countries, child labor remains a serious problem. U.S. DEP'T ST., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (Feb. 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41586.htm> [hereinafter COUNTRY REPORTS]. The ILO documented widespread child labor in various sectors of the Salvadoran economy. See *Written Testimony, supra* note 79. It estimates that there are over 400,000 minors engaged in some form of child labor, including domestic employment, sugar cane cutting and harvesting, fishing, sorting garbage or various forms of street work. *Id.* at 7–8.

According to the ILO, 19% percent of the 21,508 children performing domestic service in El Salvador are between 10 and 14 years of age, with the remaining 81% percent between the ages of 14 and 19. However, children often enter the world of domestic work between 9 and 12 years of age. As such, these children are responsible for washing clothes, ironing, housecleaning, cooking and serving of food . . . . [T]he children engaged in this work quickly suffer physically, psychologically and socially . . . . Over half of the children surveyed also showed signs of moderate malnutrition . . . . Many reported frequent beatings by their employer . . . . Many young girls are also the victims of sexually [sic] abuse by their male employers . . . . Of all forms of child labor in El Salvador investigated by the ILO, sugar cane harvesting exemplifies child labor in its worst forms . . . . Boys are primarily responsible for cutting or burning cane, which involves the use of dangerous instruments such as curved knives, machetes, hoes, shovels, hooks and fumigation equipment. The hands and arms of the majority of boys are covered with cuts and bruises . . . . Additional hazards include prolonged exposure to the sun and the inhalation of ash from the burning cane.

*Id.* at 8–9.

Guatemala has the second-highest rate of child exploitation, after Ecuador, with thirty-four percent of children between the ages of seven and fourteen working. *Id.* at 17. Pervasive poverty and overall unemployment create pressures on families to encourage children to earn supplemental income. U.S. DEP'T ST., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: DOMINICAN REPUBLIC (Feb. 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41758.htm> [hereinafter COUNTRY REPORTS: DOMINICAN REPUBLIC]. Child labor often takes place in the informal economy—in small

and violate workers' rights.<sup>86</sup> The struggle for the protection of workers from the abuses of employers during the Industrial Revolution within the United States is well-documented. Labor reform led to the current protections that most American workers enjoy today. Yet tragedies, such as the Triangle Shirtwaist Factory fire<sup>87</sup> are still occurring in other parts of the world. For example, in May 1993, over two hundred women died in a fire in the Kader toy factory in Thailand,<sup>88</sup> and at least three other fires happened that year in Asian factories with similarly deplorable conditions.<sup>89</sup>

The similarities between the Triangle Shirtwaist Factory and the current conditions in the Mexican *maquiladoras* are just as striking.<sup>90</sup>

businesses, clandestine factories, sugarcane fields, and sexual exploitation. *Id.* For example, indigent Haitian families will arrange for Dominican families to "adopt" and employ their children in exchange for monetary payment or a supply of clothes and food. *Id.* In many cases, this results in a kind of forced labor or indentured servitude for children and adolescents. *Id.*

86. See generally Polaski, *Central America*, *supra* note 52 (analyzing the negotiations between the United States and the Central American countries for a free trade agreement).

Nowhere are the deficiencies of present-day Central America—and the opportunities for progress through a well-constructed free trade agreement—more apparent than in the area of workers' rights, labor law, and labor institutions. Central America has been the scene of continuing abuses of workers' rights. These abuses include the ongoing suppression of workers' right to organize in export-processing zones, physical threats, beatings, kidnappings, and even assassinations of trade union leaders.

*Id.*

87. See generally The Triangle Factory Fire Online Exhibition (Feb. 21, 2002), <http://www.ilr.cornell.edu/trianglefire>. In 1911, a fire at the Triangle Shirtwaist Company in New York City resulted in the death of over 140 employees. *Id.* The majority of these employees were Italian and Jewish immigrant women, some as young as fifteen years old. The women worked for low wages for long hours in unsanitary and dangerous factory conditions. *Id.* After the fire, public outrage fueled the empowerment of the International Ladies' Garment Workers' Union, which led a campaign for an investigation. *Id.* Within a month of the fire, the governor of New York appointed the Factory Investigating Commission, which conducted a series of statewide hearings. *Id.* The Commission's Preliminary Report was presented in 1912. *Id.* It determined that industry had neglected the care, health, and safety of employees:

It is because of this neglect of the human factor that we have found so many preventable defects in industrial establishments, such a large number of workshops with inadequate light and illumination, with no provision for ventilation, without proper care for cleanliness, and without ordinary indispensable comforts . . . .

*Id.* The hearings resulted in the passage of important factory safety legislation. *Id.*

88. Michael A. Pangelinan, Note and Comment, *Lives Lost to the Overseas Toy Industry: A Call for Action*, 16 LOY. L.A. INT'L & COMP. L. REV. 735, 735 (1994). The Kader factory maintained no fire alarms or sprinklers and only had a few fire extinguishers. *Id.*

89. *Id.* at 737.

90. *Maquiladoras* generally refer to large foreign-owned factories where workers perform assembly work on components imported from other countries. Nicole L. Grimm, Comment, *The North American Agreement on Labor Cooperation and Its Effects on Women Working in Mexican Maquiladoras*, 48 AM. U.L. REV. 179, 182 (1998). The finished products are shipped back to the original country for sale. *Id.*

Mexico has an abundance of labor;<sup>91</sup> approximately one million workers, predominately women, work in *maquiladoras*.<sup>92</sup> The workers receive low wages for working long hours in unsafe conditions, and rights to association and organization are discouraged.<sup>93</sup> The situation for Mexican workers in the *maquiladoras* exemplifies the typical situation for most women workers in the EPZs. In addition to long hours in crowded, unsanitary and unsafe conditions, the women are also subject to sexual predation and gender violence.<sup>94</sup> Trade liberalization and the rise of export-oriented industries, particularly in manufacturing, rely on female wage labor.<sup>95</sup> Yet, women in developing countries generally receive lower pay than men for the same work; at best, women average fifty to eighty percent of wages earned by their male counterparts.<sup>96</sup> Furthermore, female workers do not enjoy the same benefits and are the first to be laid off in times of economic difficulty.<sup>97</sup> To aggravate the situation, women have a difficult time gaining access to freedom of association and the right to bargain collectively.<sup>98</sup> Thus, shrinking opportunities for legitimate

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91. See AUDLEY ET AL., *supra* note 7, at 14.

Very high population growth rates through the mid-1970s translated into a demographic bulge in the workforce through the late 1990s . . . . In addition, during the 1980s and 1990s, women joined the workforce at increasing rates, in part because of the decline in the reproductive rate, but also out of the need to support household incomes during recurrent economic crises. Overall, the Mexican labor force grew from 32.3 million immediately before NAFTA to 40.2 million in 2002, meaning that Mexico needed almost a million jobs a year simply to absorb the growth in labor supply.

*Id.*

92. Grimm, *supra* note 90, at 183.

93. *Id.* Although the women who work in the *maquiladoras* could have benefited from NAFTA and its labor side agreement, the National American Agreement on Labor Cooperation (NAALC), their needs were not fully addressed by the agreement. *Id.* at 182. Mexican women did not have meaningful representation during the formation of the NAALC primarily because of the “public-private” dichotomy that exists between gender-defined roles in Mexican culture. *Id.* at 185. Typically, Mexican women control the “private” realms of home, domestic life, and child-rearing, while men control the “public” areas of government and economic activity, and provide financial support for their wives and children. *Id.* at 185–86. Since Mexican women frequently have more difficulty finding employment in the public sphere, the jobs that they are able to obtain are often low-wage and exist in areas of economic activity that draw little recognition. *Id.* at 187. Women, then, are generally confined to low visibility jobs that offer few opportunities for articulating women’s concerns in a male-dominated public forum such as international law. *Id.* at 188.

94. Gunewardena, *supra* note 57, at 212.

95. See Bama Athreya, *Trade is a Women’s Issue*, FOR. POL’Y IN FOCUS (Dec. 1, 2002), <http://www.fpif.org/fpif.txt/1037>. The World Development Report estimates that women constitute seventy to ninety percent of workers in EPZs worldwide. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

employment affect women disproportionately and act as a catalyst for women's migration.<sup>99</sup>

Human rights proponents argue for the linkage of worker's rights protections to trade promotion vehicles in order to insure that workers in developing countries are not denied the protections available to workers in the United States.<sup>100</sup> Labor protections are also needed to help "level the playing field" against low-wage foreign competition.<sup>101</sup> However, some business interests argue that worker rights provisions in trade promotion vehicles are a disguised form of protectionism.<sup>102</sup> Some critics also see such provisions as an infringement on national sovereignty or an unfair imposition of rich country standards on developing countries.<sup>103</sup> In fact, it has only been a little over a decade since labor rights provisions were first included in a trade agreement, the NAFTA-linked NAALC.<sup>104</sup>

Parties to a trade agreement decide whether existing national or international standards will be used to establish the level of protection for workers' rights.<sup>105</sup> The International Labour Organization (ILO) sets international labor standards and nearly all countries are member states.<sup>106</sup> Representatives of employers and trade unions worldwide are also parts of the ILO.<sup>107</sup> A member state is only obligated to observe most ILO standards if it has actually ratified the particular convention.<sup>108</sup> However, all member states, by virtue of the ILO membership, have an obligation "to respect, to promote, and to realize, in good faith" the four fundamental labor rights identified in the 1998 Declaration on Fundamental Principles

99. Taran & Chammartin, *supra* note 22, at 4.

100. Mary Jane Bolle, *Free Trade Agreements with Singapore and Chile: Labor Issues*, in CONG. RESEARCH SERV., REPORT FOR CONGRESS 1 (Aug. 13, 2003), <http://fpc.state.gov/documents/organizational/22880.pdf>.

101. *Id.*

102. *Id.*

103. Human Rts. Watch, *Labor Rights and Trade: Guidance for the United States in Trade Accord Negotiations*, <http://hrw.org/press/2002/10/laborrights-bck.htm> (last visited Apr. 9, 2006) [hereinafter *Labor Rights Report*].

Such concerns can be addressed through a two-tiered approach. First, trade agreements should establish strict and absolute requirements to uphold core civil and political labor rights that countries are already obliged to meet. Second, trade agreements should include requirements for the progressive realization of economic and social labor rights that take into account countries' particular socioeconomic circumstances.

*Id.*

104. Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 U.C. DAVIS J. INT'L L. & POL'Y 13, 25 (2003) [hereinafter *Polaski, Protecting Labor Rights*].

105. *Id.* at 16.

106. *Id.* at 16–17.

107. *Id.* at 17.

108. *Id.*

and Rights at Work.<sup>109</sup> These core labor standards include: freedom of association and the right to organize and bargain collectively, non-discrimination in employment, freedom from forced labor, and a minimum age of employment for children and an end to the worst forms of child labor.<sup>110</sup> ILO members must ensure that their domestic labor legislation fully protects these core labor standards. The United States does not include freedom from employment discrimination in labor-trade provisions; however, the United States does add the right to acceptable conditions of work with respect to minimum wages, hours, and health and safety.<sup>111</sup>

The governments of the Central American countries have accepted international obligations to respect labor rights.<sup>112</sup> They are all member states, and as such are bound by the 1998 ILO Declaration on Fundamental Principles and Rights at Work.<sup>113</sup> Yet, none of these countries are in compliance with the ILO's core labor standards.<sup>114</sup> One of the most critical problems that workers face in Central America is the inability to unionize.<sup>115</sup> According to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Central American labor laws do not provide "effective and rapid" procedures for prosecuting acts of anti-union discrimination as required by the ILO.<sup>116</sup> Furthermore, the remedies available in the laws are so weak that they fail to "prevent or effectively redress" anti-union discrimination.<sup>117</sup> Thus, employers suspend

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109. See Labor Rights Report, *supra* note 103.

110. Polaski, *Protecting Labor Rights*, *supra* note 104, at 17.

111. *Id.* at 16.

112. See AMER. FED'N OF LAB. CONG. OF INDUS. ORG. (AFL-CIO) & UNION OF NEEDLETRADES, INDUS. TEXTILE EMPLOYEES (UNITE!), CENTRAL AMERICA: LABOR RIGHTS AND CHILD LABOR REPORTS PURSUANT TO THE TRADE ACT OF 2002, SECTION 2102(C)(8)-(9), at 3 (June 5, 2003), available at <http://www.aflcio.org/issues/jobseconomy/globaleconomy/battle/upload/CAFTA.pdf> [hereinafter AFL-CIO REPORT].

113. *Id.*

114. See *CAFTA by the Numbers*, *supra* note 17.

115. See AFL-CIO REPORT, *supra* note 112. A Guatemalan labor law requires written proof of the will of twenty or more workers to form a union, thereby creating a written disclosure of pro-union activists and an imposition of a literacy requirement. *Id.* at 8. See also *Written Testimony*, *supra* note 79. Less than three percent of the Guatemalan labor force is unionized. *Id.* at 13. Honduran law prohibits more than one trade union in a single enterprise, institution, or establishment. *Id.* at 18. In Nicaragua, workers in Free Trade Zones (FTZs) who attempt to unionize face continuous harassment. *Id.* at 74. Under Nicaraguan law, employers can fire union organizers by paying them double the normal severance pay. *Id.* at 20. In Costa Rica, strikes are allowed in the public sector so long as a judge determines that the strike would not affect essential services. *Id.* at 24. However, there are no existing criteria to determine which sectors belong to this category, and there have only been two legal strikes in the last fifty years. *Id.*

116. AFL-CIO REPORT, *supra* note 112, at 4.

117. *Id.* at 4-5.

and dismiss organizers with impunity throughout the region.<sup>118</sup> Onerous procedural requirements for calling a strike violate workers' right to organize by making it difficult or impossible to carry out a legal strike.<sup>119</sup> Labor law enforcement is very weak in EPZs, and employers in the *maquila* sector frequently use intimidation, mass dismissals, and plant closings to discourage unionization.<sup>120</sup>

The deep integration that CAFTA would foster requires a strengthening in workers' rights. While the GSP and other instruments have not solved the basic problem of the lack of rights and rule of law for workers in the region, they have addressed the most egregious violations of rights.<sup>121</sup> A free trade agreement, however, would eliminate these existing policy instruments because it would replace the unilateral preference programs and expand market access.<sup>122</sup>

Each party in existing labor-trade agreements enforces the commitment to protect the agreed upon labor rights in its own territory.<sup>123</sup> Furthermore, many of these agreements do create some system for supranational review if a country is alleged to have failed to carry out its obligations.<sup>124</sup> In order for labor rights provisions to be effective, though, the parties to the agreement, nongovernmental organizations, trade unions, companies, and other interested members of the public, must be able to submit allegations of non-compliance to an independent, non-political oversight body.<sup>125</sup>

The NAALC, for example, establishes a three-tiered enforcement structure, with each tier holding increasingly more punitive enforcement mechanisms to address non-compliance.<sup>126</sup> Experience with the NAALC, however, demonstrates that it is unrealistic to expect governments to police each other with respect to labor rights.<sup>127</sup> Almost ten years after the NAALC's entry into force, no government has allowed a case to pass to tier two or tier three.<sup>128</sup> "Complaints should immediately fall under the jurisdiction of an independent, non-political body, which, in turn, should

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118. *Id.* at 5.

119. *Id.* at 12.

120. *Written Testimony*, *supra* note 79, at 15.

121. Polaski, *Central America*, *supra* note 52, at 2.

122. *Id.*

123. Polaski, *Protecting Labor Rights*, *supra* note 104, at 17.

124. *Id.*

125. Labor Rights Report, *supra* note 103.

126. *Id.*

127. *Id.*

128. *Id.*

decide whether to proceed with an investigation, consultation, or arbitration, assess a penalty or order sanctions.”<sup>129</sup>

There is little chance that free trade agreements will be negotiated without any labor provisions. The Trade Act of 2002 spells out some general negotiating objectives on labor. Yet, given the challenges of the Central American countries, FTAs such as CAFTA should include specific provisions that accelerate or delay benefits for each country and sector on the basis of whether the country and sector have met the agreement’s obligations with respect to workers’ rights.

### III. THE MEANS AND ENDS OF ILLEGAL MIGRATION

#### A. *Migration and Immigration Control*

The U.S. Census Bureau estimates that the immigrant community in the United States is comprised of thirty-one million people.<sup>130</sup> The Bureau estimates that nearly seven million of these immigrants are undocumented; however, other researchers estimate that number to be as high as eleven million.<sup>131</sup> While immigration accounts for seventy-five percent of population growth in the United States,<sup>132</sup> the U.S. immigration policy continues to practice tighter border enforcement. In December 2004, for example, Congress authorized the hiring of 2,000 additional Border Patrol agents.<sup>133</sup> In the 261-mile stretch of border known as the Tucson sector, there were eighty-one assaults, including nine shootings, against Border Patrol agents from October 2004 to February 2005.<sup>134</sup> Over 1500 people have died trying to enter the United States since 1998.<sup>135</sup> During the 2002-2003 fiscal year, Border Patrol reported that 346 people died along the 2000-mile border with Mexico.<sup>136</sup>

Critics claim that restrictive border policies have turned the once relatively simple, albeit illegal, border crossing into a more complex

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129. *Id.*

130. CTR. FOR IMMIGR. STUD., CENSUS RELEASES IMMIGRANT NUMBERS FOR YEAR 2000 (June 4, 2002), <http://www.cis.org/articles/2002/censuspr.html>.

131. See AFL-CIO, *Defending the Rights of Immigrant Workers: What Union Members Should Know About Immigration In the United States*, <http://www.aflcio.org/issues/civilrights/immigration/upload/IMMIG.pdf> [hereinafter *What Union Members Should Know About Immigration*].

132. CTR. FOR IMMIGR. STUD., *supra* note 130.

133. *Lou Dobbs Tonight* (CNN television broadcast Feb. 3, 2005) (transcript on file with author).

134. *Id.*

135. Rebecca Smith et al., *Low Pay, High Risk: State Models for Advancing Immigrant Workers’ Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 598 (2004).

136. *Id.*

system of illegality.<sup>137</sup> Professional smugglers have become a necessity and the cost of smuggling has increased.<sup>138</sup> Approximately 100 organizations in Mexico, aided by the corruption of some government and police officials, provide smuggling services to Mexicans, Ecuadorians, and Guatemalans trying to migrate across the border.<sup>139</sup> In some regions, imposition of tighter border controls and restrictions on movement have cut across traditional routes and patterns of labor and trade migration.<sup>140</sup> Thus, critics contend that tighter border controls have neither halted migratory flows nor reduced the number of workers crossing borders.<sup>141</sup> Yet heightened immigration enforcement has had other dramatic effects. Operations on the southern border have channeled migrants into remote and desolate locations where thousands have died from exposure and thirst or as the victims of human smugglers.<sup>142</sup> The enforcement of closed borders has not been able to stifle the economic, social, and political pressures that fuel international migration;<sup>143</sup> rather, it has only succeeded in putting more pressure on those who migrate to use irregular migration channels.<sup>144</sup> Simultaneously, American citizens who are becoming more frustrated by what they view as the federal government's inability to police the southern border are turning to self-help measures.<sup>145</sup>

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137. Friedrich Heckmann et al., *Transatlantic Workshop On Human Smuggling*, 15 GEO. IMMIGR. L.J. 167, 169 (2000).

138. *Id.* at 169–70.

139. *Id.* at 170.

140. Taran & Chammartin, *supra* note 22, at 5.

141. *Id.* See also James C. McKinley, Jr., *At Mexican Border, Tunnels, Vile River, Rusty Fence*, N.Y. TIMES, Mar. 23, 2005, at A8 (describing the conditions under which migrants cross the border).

At night, migrants strip to their underclothes and slip into the fetid water of New River, a polluted waterway that smells of feces, chemicals and all other manner of putridity. They float by silently in clusters amid odd patches of white foam caused by detergents, while Border Patrol agents watch from the shore, waiting to see where they will try to get out and run. “They know we won’t go into that water after them,” said one agent, who did not give his name. “It’s not worth the risk.” Others vault the wall, falling to the ground on the other side then sprinting to a waiting car, or cross the frigid desert highlands or the sweltering Sonoran desert.

*Id.*

142. Smith, *supra* note 135, at 598 (explaining that, in 2002, eight migrants were murdered over eight months in Arizona purportedly for not being able to afford to pay for their entry into the United States). See also Ralph Blumenthal, *Smuggling Trial in Texas Focuses on Truck Driver’s Role in Death of 19 Immigrants*, N.Y. TIMES, Mar. 13, 2005, at 24 (describing the case against Tyrone Williams, the truck driver of the tractor trailer in which nineteen of seventy-four illegal immigrants died of suffocation, heat, and dehydration).

143. Symposium, *Law and the Border: Open Borders?*, 51 UCLA L. REV. 193, 200–01 (2003).

144. Taran & Chammartin, *supra* note 22, at 5.

145. For example, the Minuteman Project involved approximately 750 volunteers patrolling the U.S.-Mexico border in Arizona in April 2005. David Kelly, *Minutemen to Pull Volunteers From Border Watch*, L.A. TIMES, Apr. 21, 2005, at 12. The volunteers deemed the Project such a success

### *B. Migration, Immigration, and Human Trafficking*

Human smuggling and human trafficking<sup>146</sup> remain the starkest testimony to the fact that restrictive immigration policies fail.<sup>147</sup> Several factors contribute to the trafficking infrastructure, including globalization, the widening socioeconomic gap between developing and developed countries, the increase in poverty, unemployment, and the lack of equal opportunity.<sup>148</sup> Furthermore, trafficking can be linked to existing migration patterns and the immigrant community infrastructure that have emerged from the lack of safe and legal means of migration to the United States.<sup>149</sup>

The U.S. State Department estimates that 14,500 to 17,500 people are trafficked into the United States each year.<sup>150</sup> Worldwide statistics depict an even grimmer reality.<sup>151</sup> The United Nations estimates that human trafficking generates over nine billion dollars in annual revenue.<sup>152</sup> Victims are considered cheap products that can be reused,<sup>153</sup> that is, unlike

that they expanded their operations to target illegal immigrants inside U.S. borders. Nicole Gaouette, *Border Activists Draw Line in Suburbs*, L.A. TIMES, Nov. 28, 2005, at A1.

The Minuteman Project has also inspired similar efforts to patrol the U.S.-Canada border. Jerry Seper, *U.S.-Canadian Coalition to Check Border Crossing*, WASH. TIMES, June 17, 2005, at A13.

146. Human smuggling and human trafficking are two distinct phenomena. See *TRAFFICKING IN PERSONS*, *supra* note 24, at 18.

Smuggling is generally understood to be the procurement or transport for profit of a person for illegal entry into a country. But the facilitation of illegal entry into or through a country is not, standing alone, trafficking in persons, even though it is often undertaken in dangerous or degrading conditions. Trafficking victims, on the other hand, have either never consented or, if they initially consented, their consent has been negated by the coercive, deceptive, or abusive actions of the traffickers . . . . The key component that distinguishes trafficking from smuggling is the element of fraud, force, or coercion.

147. Taran & Chammartin, *supra* note 22, at 6.

148. Mohamed Y. Mattar, *Monitoring the Status of Severe Forms of Trafficking in Foreign Countries: Sanctions Mandated Under the U.S. Trafficking Victims Protection Act*, 10 BROWN J. WORLD AFF. 159, 161 (2003).

149. FREE THE SLAVES & HUMAN RTS. CTR., HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES 14 (Sept. 2004), available at [http://www.hrcberkeley.org/download/hidden\\_slaves\\_report.pdf](http://www.hrcberkeley.org/download/hidden_slaves_report.pdf) [hereinafter HIDDEN SLAVES].

150. *TRAFFICKING IN PERSONS*, *supra* note 24, at 23.

151. Hendriks, *supra* note 11, at 431–32.

The United Nations (U.N.) estimates that each year there are 4 million people being procured, sold, purchased, or trafficked into labor, begging, and prostitution, many of whom are children as young as five years old. Anti-Slavery International and the International Labour Organization (ILO) both estimate that over 8 million of the children in the world are slaves. Further, 111 million children under the age of fifteen work in hazardous conditions . . . . The ILO estimates that 246 million children are exploited for their labor . . . .

*Id.* (citations omitted).

152. *TRAFFICKING IN PERSONS*, *supra* note 24, at 14.

153. Jennifer L. Enck, Note, *The United Nations Convention Against Transnational Organized*

drug dealers, who sell their commodities only once, brothel owners get a continuous return on their investment.<sup>154</sup> Furthermore, traffickers keep their costs low and profits high by withholding food, wages, adequate shelter, and health care from their victims.<sup>155</sup> Given the low overhead and the high profit, human trafficking is quickly becoming the transnational criminal enterprise<sup>156</sup> of choice.<sup>157</sup> Traffickers violate the rights of victims,<sup>158</sup> as well as border, immigration, and labor laws.<sup>159</sup>

Of the 600,000–800,000 people trafficked each year, eighty percent are female and seventy percent of those females are trafficked for sexual exploitation.<sup>160</sup> The devalued position of women in certain societies provides an impetus to seek a better life,<sup>161</sup> and therefore, they become vulnerable to false promises of good jobs and higher wages, often working in domestic servitude,<sup>162</sup> or as dancers, factory workers, restaurant

*Crime: Is It All That It Is Cracked Up To Be?*, 30 SYRACUSE J. INT'L L. & COM. 369, 374 (2003).

154. See Kathryn E. Nelson, Comment, *Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches*, 24 HOUS. J. INT'L L. 551, 556 (2002). Even a small bordello can gross over \$200,000 per month. *Id.*

155. Enck, *supra* note 153, at 374.

156. *Id.* at 375 (“Thus, this transnational criminal activity has become a huge business network contributing to an illegal economy, which the International Monetary Fund estimates at between three and five percent of the world’s gross national product.”).

157. *Id.* at 374.

158. See LeRoy G. Potts, Jr., *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking In Persons*, 35 GEO. WASH. INT'L L. REV. 227, 228–30 (2003) (enumerating the violations under the Universal Declaration of Human Rights).

Traffickers abuse virtually the entire spectrum of rights protected in the Universal Declaration of Human Rights. By their acts, traffickers deny that all persons are born free and equal in dignity and rights; they deny their victims freedom of movement, freedom of association . . . . Traffickers profit from arbitrary detention, slavery, rape, and cruel, inhuman, and degrading treatment. They regularly violate any human right that gets in the way of a profit. Most fundamentally, traffickers do not respect any of these rights, because they view their victims as objects, chattel to be bought and sold as needed.

*Id.*

159. *Id.* at 229.

160. TRAFFICKING IN PERSONS, *supra* note 24, at 23.

161. Enck, *supra* note 153, at 372; See also Ali Miller & Alison N. Stewart, *Report From the Roundtable on the Meaning of “Trafficking in Persons”: A Human Rights Perspective*, 20 WOMEN’S RTS. L. REP. 11, 15–16 (1998).

The low political and socio-economic status of women world-wide, the devaluation of women’s work in general, the misogynistic taboos and double standards associated with sex, and the negative consequences and implications for women sex workers within the culture and the community, are all likely to contribute to women being exploited for sexual labor and services in the first place, and trapped in such exploitive situations, regardless of how they entered, in the second place.

*Id.*

162. See HIDDEN SLAVES, *supra* note 149, at 15 (explaining that this form of forced labor is fueled by the demand for cheap, exploitable labor, the lack of legal protections in the domestic service sector, and the absence of monitoring of work conditions).

workers, sales clerks, or models.<sup>163</sup> These women often reach international borders with false documentation and, upon arrival, are forced into prostitution or other forms of forced labor and threatened with physical harm if they try to escape.<sup>164</sup> The victims of forced prostitution work under inhumane conditions.<sup>165</sup> They remain vulnerable to exploitation once they have reached the country of destination because they are unfamiliar with the environment, have an illegal or non-national status, generally do not speak the language, and have been separated from family and community.<sup>166</sup> Furthermore, the victims do not have legal identity<sup>167</sup> or access to justice.<sup>168</sup>

In the United States, human trafficking has become a significant foreign policy issue.<sup>169</sup> Two highly publicized cases<sup>170</sup> led to the enactment of the 2000 Victims of Trafficking and Violence Prevention Act (VTVPA).<sup>171</sup> Under the VTVPA, the United States must monitor the status of severe forms of trafficking in foreign countries and the respective government responses.<sup>172</sup> The United States primarily uses sanctions as a tool to pressure foreign governments to take the necessary measures to eradicate the practice.<sup>173</sup> Notably, the VTVPA also creates two new types of visas: the T-visa and the U-visa.<sup>174</sup> The T-visa specifically protects

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163. Enck, *supra* note 153, at 372.

164. *Id.*

165. See Nelson, *supra* note 154, at 555 (describing the deplorable conditions).

Most must work ten to eighteen hours a day, for at least twenty-five days each month. They cannot leave the brothels, or even their rooms; often they are chained to their beds. Women are forced to service about ten customers per day, without the privilege of negotiating which clients they will take and which acts they will perform.

*Id.*

166. Miller & Stewart, *supra* note 161, at 15.

167. See HIDDEN SLAVES, *supra* note 149, at 15 (“U.S. labor law does not define household workers as ‘employees’ under the National Labor Relations Act (NLRA), thus denying them certain protections and restricting their ability to organize for better wages and working conditions.”).

168. Miller & Stewart, *supra* note 161, at 15.

169. See Mattar, *supra* note 148, at 159.

170. See Joshi, *supra* note 60, at 38–40.

171. See Ivy C. Lee & Mie Lewis, *Human Trafficking From a Legal Advocate’s Perspective: History, Legal Framework and Current Anti-Trafficking Efforts*, 10 U.C. DAVIS J. INT’L L. & POL’Y 169, 179 (2003).

172. See Mattar, *supra* note 148, at 159.

173. *Id.*

To achieve this purpose the U.S. State Department issues an annual report, documenting government efforts to eliminate trafficking in persons. The TVPA creates a set of minimum standards for the elimination of severe forms of trafficking in persons and sets forth criteria for evaluating serious and sustained efforts made by foreign governments to meet such standards . . . . It also classifies countries according to their compliance with the minimum standards set forth in the TVPA.

174. Lee & Lewis, *supra* note 171, at 179.

victims of trafficking in persons, while the U-visa protects non-citizens who have suffered severe abuse as a result of certain criminal activity, including trafficking.<sup>175</sup> While these two visas are not without criticism,<sup>176</sup> it is undeniable that they provide protection and aid to victims. First, both visas remove the threat of deportation; but, in addition, the T-visa offers comprehensive social service benefits for victims who cooperate with law enforcement.<sup>177</sup>

Through the VTVPA, the United States instituted a framework for dealing with the perpetration of the crime of trafficking and for providing assistance to its victims. Yet, while trafficking is ubiquitous in Central America, those countries do not have the same protections. In fact, the U.S. State Department reports that the trafficking of women and children remains a serious problem within all of the Central American countries.<sup>178</sup> Although most of the countries have some laws prohibiting trafficking in some aspects, comprehensive legislation that addresses all forms of trafficking generally does not exist.<sup>179</sup> Furthermore, formal mechanisms specifically designed to aid trafficked victims are sparse.<sup>180</sup> In most cases, the countries simply do not have the resources to devote to the prevention of trafficking, the protection for victims, and enforcement mechanisms.<sup>181</sup>

According to the State Department's 2005 *Interim Report*, for example, the Dominican Republic has made inadequate progress in implementing strategies to combat trafficking.<sup>182</sup> Dominican women and girls are trafficked for sexual exploitation to other Central American countries, the Caribbean, Western Europe, and North and South America.<sup>183</sup> Additionally, Haitians are trafficked to the Dominican Republic to work as

175. *Id.*

176. *Id.* at 182–83.

One compelling critique is that the T- and U-visa categories improperly create new immigration categories for a group of immigrants who ought to be categorized as asylees and granted relief accordingly. According to this critique, trafficking victims are rightly understood as asylees, because they are the victims of human rights abuses who require refuge in the United States . . . . A related critique of the T- and U-visa scheme is that it falls short of its humanitarian goals because it is too heavily centered on the needs of law enforcement.

*Id.*

177. *Id.*

178. See COUNTRY REPORTS, *supra* note 85.

179. *Id.*

180. *Id.*

181. *Id.*

182. COUNTRY REPORTS: DOMINICAN REPUBLIC, *supra* note 85.

183. *Id.* Experts believe that 15,000 Dominicans were trafficked for prostitution in 2003.

forced labor in the sugar cane harvests.<sup>184</sup> Experts estimate that 2,500 to 3,000 Haitian children are trafficked into the Dominican Republic annually and that fifty to sixty Haitian children are trafficked into the country each week.<sup>185</sup> Many of these children are girls as young as twelve, who are brought into the country to work as prostitutes.<sup>186</sup> Nongovernmental organizations (NGOs) estimate that there are hundreds of alien smuggling and trafficking rings operating within the Dominican Republic.<sup>187</sup> While the Dominican Republic has established anti-trafficking police and prosecutor units, these groups generally provide ineffective law enforcement.<sup>188</sup> Due to resource constraints, the country lacks a comprehensive victim protection policy and has no comprehensive policy on the prevention of trafficking.<sup>189</sup> The other countries within CAFTA have similar records.<sup>190</sup>

#### CONCLUSION

While FTAs have the potential to benefit the parties to the agreement, this generally occurs when the parties are similarly situated. That is, developed countries entering into agreements with one another begin from

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184. *Id.* See also Hendriks, *supra* note 11, at 440 (describing the Haitians trafficked to the Dominican Republic).

The “sugar slaves” are persons of Haitian descent who are forcibly rounded up during sugar-harvest time or lured across borders, typically to the Dominican Republic, with the promise of good jobs. However, they are then sold into slavery to cut sugar cane . . . for six or seven months on sugar fields for subsistence wages . . . . While some of the cane-cutters voluntarily agree to work, many are captured at gunpoint.

*Id.* See also COUNTRY REPORTS: DOMINICAN REPUBLIC, *supra* note 85 (“In various sugarcane industry shantytowns, field guards reportedly kept workers’ clothes and documents to prevent them from leaving until the end of the harvest.”).

185. *Id.*

186. *Id.* (“In June, a raid in Boca Chica resulted in the rescue of 24 children, 1 of them only 7 years old, who were being sexually exploited.”).

187. *Id.* (“Trafficking organizations reportedly received \$5,000 to \$8,000 . . . for trafficking a woman or a child for purposes of prostitution.”).

188. TRAFFICKING IN PERSONS, *supra* note 24, at 233.

[O]fficials made two new arrests in the reporting period: one alleged child trafficker (Aracelis Sanchez Mora) and one trafficker arrested in October 2003. So far, neither case has gone to trial . . . . The Foreign Ministry recalled or fired several ranking Dominican diplomats for suspected complicity in smuggling and trafficking activities. None has been charged.

*Id.*

189. *Id.* at 233–34.

190. *Id.* at 233–36. In 2000, UNICEF reported that between ten and twenty-five percent of visible prostitutes and an estimated forty percent of hidden prostitutes who cater to the upper class in El Salvador were minors. *Id.* In Costa Rica, an estimated 3,000 children, especially street children of the larger cities, suffer from commercial sexual exploitation. *Id.* *Caza Alianza*, an NGO, estimates that there are approximately 8,335 child victims of sexual exploitation in Honduras. *Id.*

generally the same social, economic, political, and legal framework. This is not the case with FTAs between developed and developing countries. As this Note discusses, citizens of developing countries that enter into such agreements are subject to exploitation.

The great majority of people within Central America live in abject poverty. While FTA proponents claim that opening the markets will help to raise the standards of living, it is more likely that the economic distribution between the wealthy and the poor will only further diverge. Yet, without access to world markets, transitional economies are not likely to develop. Therefore, this Note recommends that, prior to entering into FTAs with developed countries, developing countries should work domestically to strengthen the protection for those people most likely to be adversely affected. Alternatively, the FTAs should include labor provisions requiring respect for workers' rights; provisions requiring law enforcement mechanisms upholding human rights in general, including protections for such adversely affected populations as rural farmers; and an effective enforcement mechanism to ensure that these rights are upheld.

Without such protections, FTAs will pressure citizens of developing countries to migrate in search of better opportunities. Regular channels of migration should be recognized by governments that continue to impose restrictive border controls. The combination of improving conditions in the country of origin and amending immigration policies would drastically reduce the instances of alien smuggling and trafficking. In sum, when negotiating trade agreements or border control policies, the needs of those people most likely to be affected must be taken into consideration. In the case of CAFTA, this comprises the vast indigent populations of each Central American country.

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