

U.S.-UK FTA NEGOTIATIONS: A PRIMER ON LABOR AGENDA

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ABSTRACT

With Brexit completed and the UK's conditions of separation from the EU pending, there is some anticipation for a U.S.-UK FTA. But then there is the Pandemic and the unpredictable variables of Donald Trump and Boris Johnson, and the influence of the residual binding obligations of the UK-EU separation agreement and possible UK-EU FTA, which may cause some pause. Identifying the negotiating agenda of the labor issues may flow easily from each country's recent FTAs – USMCA and UK's obligations under CETA. With that likely agenda, a comparison can be made between each country's current labor laws on these issues to identify possible emerging areas needing further attention. Linger in the background is the potential U.S.-EU FTA (TTIP) which will set standards and obligations for the UK which can be relevant to the UK FTAs with the U.S. and the EU. This is followed with analysis as to likely outcomes on these labor issues and the U.S.-UK FTA. Although the future cannot be predicted, it can be prepared for.

KEYWORDS

U.S.-UK FTA, U.S.-U.K. FTA Agenda for Labor Provisions, Post-Brexit UK FTA with U.S., UK-U.S. FTA Social Dimension Provisions

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I. INTRODUCTION

Anticipation for a successful negotiation of a post-Brexit U.S.-UK FTA is high. Both President Trump and Prime Minister Johnson are eager to finalize the trade deal. But there are certain realities and obstacles to surmount, some of them political, including a third-party, EU, indirectly influencing the negotiations. While UK has a transitional period until December 31, 2020, absent an extension, to reach an exit deal with EU, including an FTA, both sides have significant unresolved issues.¹ That deal is expected by EU to be balanced on UK agreeing to continue its obligations on labor and other issues, such as that the UK commit in writing to stay in the jurisdiction of the European Court of Human Rights,² which could affect and influence the UK-U.S. FTA negotiations, especially on labor standards.

As those negotiations progress, the US presidential elections approach, and as much as the Trump Administration may want to finalize a U.S.-UK FTA, the U.S. Congress must approve it. Congress may not want to provide President Trump with a pre-election trade victory and Congress could hold up final approval.³ Further slowing the negotiations is the coronavirus Pandemic and the uncertainties in the market.⁴ Still, it is expected the U.S.-UK FTA negotiations will continue.⁵

The UK also is working to replicate existing EU deals with non-EU countries. The EU has more than 40 trade agreements with around 70 countries. During the transition period, EU trade agreements continue to apply to the UK. As of June

¹ As of July 2, 2020, the negotiations were as follows. “Negotiations between the U.K. and European Union over their future relationship broke up a day early on Thursday amid warnings that big differences still exist between the two sides. Barnier highlighted the UK’s “red lines” on the ECJ, fishing and the need to break away from EU law. He said the EU would still insist on a level playing field to ensure fair competition between the two sides, a “sustainable” fishing solution, as well as an effective dispute-resolution mechanism.” Ian Wishart, *Brexit Talks End Early as EU, U.K. Say Major Hurdles Remain*, BLOOMBERG (Jul. 2, 2020), <https://www.bloomberg.com/news/articles/2020-07-02/brexit-talks-end-early-as-eu-u-k-say-big-differences-remain>. See also, Tom Edgington, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (Feb. 17, 2020), <https://www.bbc.com/news/uk-politics-32810887>. See Justin Millar, *Is a Post-Brexit US-UK Free Trade Agreement Realistic?*, CHI. COUNCIL ON GLOBAL AFF., (Nov. 4, 2019), <https://www.thechicagocouncil.org/blog/world-cents/lcc/post-brexit-us-uk-free-trade-agreement-realistic>. See *Brexit and Outlook for U.S.-UK Free Trade Agreement*, CONG. RES. SERV. (Feb. 12, 2020), <https://fas.org/sgp/crs/row/IF11123.pdf>.

² The UK will continue to be committed to the EU Charter until 2021 when it ceases to be binding on the UK. For a general introduction to the Charter, see, *What is the Charter of Fundamental Rights of the European Union?*, EQUALITY & HUM. RIGHTS COMMISSION, <https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union> (last modified Oct. 3, 2016).

³ See Mark Landler & Ana Swanson, *About That Much Vaunted U.S.-U.K. Trade Deal? Maybe Not Now*, N.Y. TIMES (Mar. 2, 2020), <https://www.nytimes.com/2020/03/02/world/europe/uk-us-trade-deal.html>.

⁴ Benjamin Laker, *3 Severe Implications of Coronavirus on Global Trade*, FORBES (Apr. 7, 2020, 3:50PM), <https://www.forbes.com/sites/benjaminlaker/2020/04/07/3-severe-implications-of-coronavirus-on-global-trade/#573bfd803d11>.

⁵ Justin Millar, *Is a Post-Brexit US-UK Free Trade Agreement Realistic?*, CHI. COUNCIL ON GLOBAL AFF. (Nov. 4, 2019), <https://www.thechicagocouncil.org/blog/world-cents/lcc/post-brexit-us-uk-free-trade-agreement-realistic>.

2020, the UK had signed continuity deals covering over 8% of total UK trade with close to 50 countries or territories, including Switzerland, Liechtenstein, Chile, Israel, and South Korea. ... Also, as part of its “Global Britain” strategy, the UK is taking steps to pursue new trade deals. ... Rather than rolling over the EU-Japan FTA, Japan seeks to quickly negotiate new terms with the UK in time for Japan to pass an FTA in autumn. The UK also launched FTA negotiations with Australia and New Zealand and seeks to join the regional Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) U.S. Trade Representative (USTR) Robert Lighthizer has committed to pursuing a comprehensive agreement that would be subject to congressional approval and not a limited, ‘skinny’ deal. He warned, however, that negotiations will take time and likely not be complete in advance of the upcoming presidential election.⁶

The agenda for the labor issues likely will flow from each country’s prior FTA obligations; for the U.S. it will be the USMCA and for the UK, it will be the EU’s CETA. Both FTAs agree to the ILO core labor obligations, *albeit* with added nuances and obligations, but they have also added new provisions which, in the case of the US, may be ahead of its current law, such as protecting the right to strike.⁷ Likewise, the provisions for dispute resolution have differed.⁸

The recent USMCA provides obligations on gender discrimination, including gender identity and LGBTQ+, and pay gap issues; it also deals with migrant workers’ rights, a hot issue in each country, as well as family care and paid medical leave, and it recognizes the right to strike. CETA, which included UK as an EU Member at the time of the signing, also has a list of progressive labor obligations. These include labor standards committing the UK to the ILO Decent Work Agenda and the Declaration on Social Justice for a Fair Globalization that are more progressive than those required by the USMCA.⁹ Leaders of the major unions of both countries have weighed in with their union’s agenda for the new FTA.¹⁰

The article in Part II identifies the labor obligations agreed to by the Parties in their previous FTAs and sets them up as likely agenda items; Part III compares these agenda items with existing labor legislation in each country and identifies potential trouble spots likely to be put on the negotiating agenda; Part IV provides analysis of the challenges of uncertainty and the likely emerging agenda for negotiation of the labor issues in the U.S.-UK FTA; Part V concludes.

⁶ SHAYERAH I. AKHTAR ET AL., CONG. RESEARCH SERV., IF11123, BREXIT AND OUTLOOK FOR A U.S.-UK FREE TRADE AGREEMENT (2020).

⁷ See Agreement between the United States of America, the United Mexican States, and Canada, Art. 23.3, Can.-Mex.-U.S., Nov. 30, 2018 [hereinafter USMCA], <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

⁸ USMCA, Art. 31.1-31.22.

⁹ CETA, Art. 23.3 Multilateral Labour Standards and Agreements, Can.-E.U., Oct. 30, 2016, O.J. (L 11) 23. (a) Health and safety at work, including prevention of occupational injury or illness and compensation in the case of such injury or illness, (b) Establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and, (c) Non-discrimination in respect of working conditions, including for migrant workers.

¹⁰ *US and UK unions call for trade deal that delivers for workers*, TRADES UNIONS CONGRESS (Mar. 13, 2020), <https://www.tuc.org.uk/news/us-and-uk-unions-call-trade-deal-delivers-workers>.

II. NON-LEGAL

A. POST-BREXIT DRAMA: “THREE PARTIES” IN BILATERAL NEGOTIATIONS—U.S., UK, AND EU AND THE “LEAKED DRAFT”

UK’s trade realignment with the EU following Brexit matters significantly on the level of labor and human rights standards in the US-UK negotiations. Is the UK still bound to EU standards and the European Charter and other EU legal institutions?

¹¹ If so, this can provide a higher bar for worker protections than just UK labor laws. Therefore, American negotiators will pay close attention to the ongoing and possibly concurrent UK-EU negotiations on many matters, including labor.

The UK likewise must evaluate the risk of completing a UK-U.S. FTA before reaching agreement with EU on its future arrangement. The U.S.-UK trade (import, export, and services) is reported for UK to be at about 15 percent of its trade versus UK-EU trade is at about 49 percent. U.S. standards are often lower than that of EU, e.g., on food and health service drugs; and loss of EU trade protections could affect the viability of FDI and supply chains using UK as a base.¹² Assuming the UK would need to make concessions to the U.S., one can predict UK’s negotiations and arrangements with EU may certainly be complicated.¹³

The UK’s position on a trade deal with EU was first presented by Prime Minister Boris Johnson.¹⁴ Its negotiation goals, particularly on labor issues, were laid out by the UK Government as follows.

“The UK aims for a relationship based on ‘friendly cooperation between sovereign equals’ with both sides respecting each other’s ‘legal autonomy’. It will not abide by EU rules and states the UK ‘will not negotiate any arrangement in which the UK does not have control of its own laws’, will not accept any ‘obligations’ to be aligned with EU laws, or the ‘EU institutions, including the court of justice’. The UK wants a “comprehensive free trade agreement” but in the same paragraph states it wants a Canada-style agreement ‘supplemented’ by a range of other agreements including ‘fisheries law enforcement ... judicial cooperation in criminal matters, transport and energy’. [Re]Workers’ rights: Here the government is committing to ‘reciprocal commitments not to weaken or reduce the level of protection afforded by labor laws and standards.’ However, it wants to reserve the right to ‘adopt or modify its labor laws.’”¹⁵

¹¹ The UK formally left the EU on 31 January 2020, and there is a transition period which is due to end on 31 December 2020. “During this 11-month period, the UK will continue to follow all of the EU’s rules and its trading relationship will remain the same.” *Brexit: All you need to know about the UK leaving the EU*, BBC News (Feb. 17, 2020), <https://www.bbc.com/news/uk-politics-32810887>.

¹² Luke McGee, *The UK will never get the US trade deal it wants*, CNN Bus. (Nov. 6, 2019 5:55AM), <https://www.cnn.com/2019/11/06/business/brexit-us-uk-trade-donald-trump-boris-johnson-intl-gbr/index.html>.

¹³ *Britain to start trade talks with U.S. next week: The Sun*, REUTERS (May 1, 2020, 10:17AM), <https://www.reuters.com/article/us-britain-usa-trade/britain-to-start-trade-talks-with-us-next-week-the-sun-idUSKBN22D69H>.

¹⁴ Rowena Mason, *UK says it will consider walking away from Brexit talks in June*, GUARDIAN (Feb. 27, 2020, 8:05AM), <https://www.theguardian.com/politics/2020/feb/27/uk-says-it-will-consider-walking-away-from-brexit-talks-in-june>.

¹⁵ Lisa O’Carroll, *Brexit: UK negotiating objectives for trade with EU, in a nutshell*, GUARDIAN (Feb. 27, 2020, 5:35AM), <https://www.theguardian.com/politics/2020/feb/27/brexit-uk-negotiating-objectives-for-trade-with-eu-in-a-nutshell>.

A leaked draft of the EU's early proposals for the Brexit agreement affecting trade (UK-EU FTA) shows EU proposals would make some actions of future British governments irreversible, such as "social rights" which include labor rights.¹⁶

The agreement drawn up by the European Commission and seen by The Independent insists that "future levels of protection" brought in by both sides must be maintained as a condition of UK access to European markets. The plan goes further than a simple "non-regression" pledge to maintain existing rules at the point of Brexit, and means any future UK government that brings in new social rights could see its changes become untouchable, as long as they are endorsed and matched by Brussels. The rule is the latest bid by the EU to ensure Britain does not unfairly deregulate itself into "Singapore-on-Thames" after Brexit, to unfairly undercut European businesses with lower standards.¹⁷

The EU also insists on the requirement that the UK commit in writing to remain in the jurisdiction of the European Court of Human Rights. The document says both parties must have a "continued commitment to respect the European Convention on Human Rights."¹⁸ It is expected that EU's proposals will be resisted by UK negotiators, "who have accused Brussels of trying to hold Britain to conditions that it is not holding other countries with free trade agreements."¹⁹ But EU officials are

¹⁶ "The draft document also includes a demand that the UK notify Brussels in advance of any plans for "major" new regulations, before they are proposed to the UK parliament." Jon Stone, *EU trade deal plan would stop UK governments repealing future workers' rights*, INDEP. (Mar. 13, 2020, 4:30PM), <https://www.independent.co.uk/news/uk/politics/eu-trade-deal-boris-johnson-brexit-leak-labour-workers-rights-a9400376.html>.

¹⁷ Article LPFS.2.28 of the draft agreement, headlined "Future levels of protection" states that "where both parties have increased ... the level of labour and social protection above the level referred to in Article LPFS.2.27 [Non-regression of the level of protection], neither party shall weaken or reduce its level of labour or social protection below a level of protection which is at least equivalent to that of the other party's increased level of labour and social protection." It is suggested this means "that if a future UK government brought in new rights and those rights were matched by the EU, they could not be repealed by a later UK government ..." – without further mutual arrangements with EU. Stone, *supra* note 16.

¹⁸ Stone, *supra* note 16.

¹⁹ "The UK plans to publish its own draft for the proposed agreement "shortly", with chief negotiator David Frost having said he will make the text available "before round two next week [in April 2020]," Stone, *supra* note 16. Brexit talks on the future relationship between the UK and the EU "resumed and were expected to provide an urgent 'refocus' before the 30 June deadline for both sides to formally agree to extend the transition period if the UK asks for one. 'A free-trade agreement could still be agreed but it would be hard to implement. Even if we were coming to the end of this pandemic by then, businesses will be not be prepared,' said Lowe, who described himself as optimistic that a free-trade deal could be done by the end of the year, albeit a poor one." Subsequent talks focused on the future relationship with a separate undertaking proceeding on the implementation on the withdrawal agreement. A Joint Committee was formed, and "Michael Gove, the Cabinet Office minister, and Maroš Šefčovič, a European commission vice-president, the committee met for the first time on 30 March and will make decisions on recommendations made by civil servants who will staff six specialized committees. Those committees cover the Northern Ireland protocol; citizens' rights; British sovereign army bases in Cyprus, the divorce bill, Gibraltar and "other separation issues". Who is on the committees, how often they will meet and precisely what they will be exploring has yet to be disclosed?" Lisa O'Carroll, *Brexit talks: who is*

adamant that the UK's proximity to and links with Europe require a strong 'level playing field' of regulations."²⁰

B. AGENDA ITEMS: LOOKING BACK TO THE FUTURE (USMCA AND CETA)?

It is likely the Parties to the U.S.-UK FTA will draw upon recently negotiated FTAs, which for the U.S. would be USMCA and for the UK would be CETA, negotiated by the EU for its members, which at the time included the UK. The UK would also likely look to keep other EU residual obligations remaining after its withdrawal from the EU is final, perhaps including the Charter of Fundamental Rights of the European Union (EU Charter) and labor standards in a UK-EU FTA, if negotiated.²¹

1. USMCA²²

The **labor rights** provisions in the USMCA can be organized as follows.

- a. Each Party agrees to maintain in its statutes and regulations, and practices thereunder, for the following rights, as stated in the basic ILO core labor standards in the ILO Declaration on Rights at Work, including the freedom of association (and now including the *right to strike*) and the right to collectively bargain, the elimination of forced or compulsory labor, the abolition of child labor, and the elimination of discrimination in respect of employment and occupation.²³ The USMCA now also provides for "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."²⁴

involved and what is being covered?, GUARDIAN (Apr. 24, 2020, 1:05AM), <https://www.theguardian.com/politics/2020/apr/24/who-and-what-uk-and-eu-resume-interrupted-brexite-talks-future-relationship>. See also, Daniel Boffey, *Post-Brexit trade talks with EU on course to fail, Johnson warned*, GUARDIAN (Apr. 26, 2020, 12:00PM), https://www.theguardian.com/politics/2020/apr/26/post-brexit-trade-talks-with-eu-on-course-to-fail-johnson-warned?CMP=oth_b-aplnews_d-1.

²⁰ "Nathalie Loiseau MEP, former French minister of European affairs and member of the European Parliament's UK Coordination Group told The Independent: No one can ignore now that the times ahead of us are challenging and that they require more cooperation, not less, more solidarity, not less, more coordination, not less. The way we envisage the future EU-UK relationship is based on our understanding that being independent doesn't prevent us from deciding freely to be stronger together. This is why common high standards are so important, for the safety and security of consumers, in order to preserve jobs, to protect businesses which are about to be severely challenged. My message to the British authorities: ideology doesn't save jobs and it doesn't save lives. The time is right for good old British pragmatism and to join forces." Stone, *supra* note 16..

²¹ Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 2.

²² USMCA, Art.23.1-23.17.

²³ USMCA, Art. 23.3(1) a-d.

²⁴ USMCA, Art. 23.3(2). Wages are further defined to include "acceptable conditions of work with respect to minimum wages" include requirements under that Party's labor laws to provide wage-related benefit payments to, or on behalf of, workers, such as those for profit sharing, bonuses, retirement, and healthcare. USMCA, Art. 23.1(e) note 1.

- b. **Non-Derogation and Enforcement of Labor Laws:** The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labor laws.²⁵ They also agree to fully enforce the labor provisions of the agreement and create processes to mediate and resolve labor conflicts.²⁶
- c. **Violence, threats, or intimidation against workers** for exercising their labor rights under Article 23.3 in a manner affecting trade or investment between is prohibited.²⁷
- d. **Migrant Workers** are recognized as vulnerable and in implementing Article 23.3, each Party shall ensure that migrant workers are protected under its labor laws, whether they are nationals or non-nationals of the Party.²⁸
- e. **Eliminating discrimination in employment and occupation**²⁹ is recognized and the parties support the goal of promoting equality of women in the workplace and agree to implement policies³⁰ that it considers appropriate to protect workers against employment discrimination on the basis of sex, including with regard to sexual harassment, pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.
- f. **Dispute Settlement:**

²⁵ USMCA, Art. 23.4.

²⁶ USMCA, Art. 23.5.

²⁷ Footnotes 13 and 14 further clarify this section: 13: "For greater certainty, a failure is "in a manner affecting trade or investment between the Parties" if it involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party.14: For purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise." USMCA, Art. 23.7.

²⁸ USMCA, Art. 23.8.

²⁹ USMCA, Art. 23.9.

³⁰ While sounding high-minded, the US. added footnote 15 which appears to greatly ameliorate or eliminate its obligations, "The United States' existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article. The Article thus requires no additional action on the part of the United States, including any amendments to Title VII of the Civil Rights Act of 1964, in order for the United States to be in compliance with the obligations set forth in this Article." Article 23.9 footnote 15. For insight into the origins of footnote 15, see, Chantal Da Silva, *These 38 GOP Lawmakers Want LGBT Protections Removed From the New NAFTA Deal*, NEWSWEEK (Nov. 19, 2019 9:54AM), <https://www.newsweek.com/these-38-gop-lawmakers-want-lgbt-protections-removed-new-nafta-deal-1221751>. Shane Croucher, *Trump Uses Footnote to Dodge LGBTQ Rights in New Trade Deal with Mexico and Canada*, NEWSWEEK (Dec. 4, 2018 7:13AM), <https://www.newsweek.com/trump-uses-footnote-dodge-lgbtq-rights-new-trade-deal-mexico-and-canada-1242937>.

Labor consultations and an enforceable panel report are available upon disagreement whether a labor violation has occurred,³¹ procedures are provided, and **a retaliatory remedy** is available under the State-to-State Dispute Settlement mechanism for a breach of the labor provisions.³² Procedures for Individual-Investor (ISDS) (between only the U.S. and Mexico). There also is a new labor-related dispute resolution applicable only to U.S.-Mexico. The rapid response enforcement mechanism is to hear complaints against facilities for violating the right of freedom of association and collective bargaining.³³ State to State dispute mechanism is provided and allow a choice of international forums including UNCITRAL.³⁴ A Party may request consultations regarding any matter arising under this Chapter.³⁵ A third party that considers it has a substantial interest in the matter may participate in the labor consultations,³⁶ and the requesting Party may request the establishment of a panel.³⁷ Procedures of good offices, conciliation, and eventually a fact-finding panel are available to determine if there were activities inconsistent with the agreement, and the panel can issue a final report.³⁸ If no timely resolution is reached over the purported nonconformity pursuant to a panel's final report, the Suspension of Benefits Clause becomes available.³⁹ Under this provision, suspension must first be sought in the same sector affected by the dispute; that is, benefits conferred under the labor provisions must be considered.⁴⁰

³¹ USMCA, Art. 23.17.

³² USMCA, Art. 31, 31.3, 31.16. For a description of the state-to-state dispute settlement system under the USMCA compared with NAFTA, see, J. Anthony VanDuzer, State-to-state Dispute Settlement under the USMCA: Better than NAFTA? (Feb. 27, 2020) (forthcoming) (available at: <https://ssrn.com/abstract=3341662>).

³³ “The North American Free Trade Agreement (NAFTA) put the famous investor–state dispute settlement mechanism (ISDS) on the map. Now its rebirth as the United States–Mexico–Canada Agreement (USMCA) is taking it off again—at least between the United States and Canada.” Nathalie Bernasconi-Osterwalder, *USMCA Curbs How Much Investors Can Sue Countries—Sort of*, INT’L INST. FOR SUSTAINABLE DEV (Oct. 2, 2018), <https://www.iisd.org/library/usmca-investors>. The provisions for ISDS are between the US and Mexico, only. USMCA, Art. 14.1–14.17. The new Facility Specific Rapid Response Labor Mechanism. USMCA, Art. 31 Annex 31-A concerns the United States and Mexico; and USMCA, Art. 31 Annex 31-B concerns Canada; there is no such Rapid Response Labor Mechanism between the United States and Canada.

³⁴ If a dispute regarding a matter arises under this Agreement and under another international trade agreement to which the disputing Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute. USMCA, Art. 31.1. The Investor-State Dispute Settlement (ISDS), Facility Specific Rapid Response Labor Mechanism, both of which are available only in disputes with Mexico; and the State-to-State disputes resolution mechanisms, are available to all parties.

³⁵ USMCA, Art. 31.4.1.

³⁶ USMCA, Art. 31.14.

³⁷ USMCA, Art. 31.6.

³⁸ USMCA, Art. 31.4–17.5.

³⁹ USMCA, Art. 31.19.

⁴⁰ In certain situations, the complaining party may suspend benefits in other sectors, unless negated by the USMCA. USMCA, Art. 31.19.2(a). In the case the Facility Specific Rapid Response Labor Mechanism with Mexico is used, there is a review by a three-person arbitration panel that should be issued within thirty days. The complaining party is empowered to impose remedies if the panel finds that there was a violation of worker's rights or free association. This rapid resolution mechanism allows the arbitrators to

In proving violations, the USMCA has added provisions,⁴¹ such as in Article 31.11(2)(b) that explicitly state that “The Rules of Procedure shall include rules of evidence, which shall ensure that: (b) the disputing Parties have the right to submit anonymous testimony and redacted evidence, in appropriate circumstances.”⁴² Further, Article 23.5 requires the US not to fail to effectively enforce its labor laws through a sustained or recurring course of action *in a manner affecting trade or investment*. The newly revised USMCA provides a rebuttable presumption that a failure to comply *does* affect trade or investment.⁴³ Providing the necessary evidence in contested cases to overcome presumptions may prove challenging, for example in cases such as under U.S. law, legally permitting the permanent replacements of strikers while granting the right to strike; or sex discrimination.

The Parties also may decide to use alternative methods, such as “arbitration, mediation, online dispute resolution and other procedures for the prevention and resolution of international commercial disputes between private parties in the free trade area.”⁴⁴

Another avenue of resolution, permits referrals to judicial or administrative forums:

If an issue of interpretation or application of this Agreement arises in a domestic judicial or administrative proceeding of a Party that a Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Parties and its Section of the Secretariat. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible. 2. The Party in whose territory the

conduct an on-site investigation to verify whether workers’ rights have been violated, subject to the other party’s consent. Therefore, under the ISDS, dispute resolution can be completed in a few months rather than years. USMCA, Art. 31-A.8.

⁴¹ See generally, Steve Charnovitz, *The Labor Rights Rationale to Approve the USMCA*, INT’L. ECON. L. & POL’Y. BLOG (Dec. 13, 2019), <https://ielp.worldtradelaw.net/2019/12/the-labor-rights-rationale-to-approve-the-usmca.html>.

⁴² USMCA, Art. 31.11.2(b). The applicable arbitration rules, whether they were the ICSID Rules, the ICSID or UNCITRAL Rules, will govern the rule of evidence.

⁴³ USMCA Art. 23.3 footnotes 4 and 5 provide further clarification: “4. A failure to comply with an obligation under paragraphs 1 or 2 must be in a manner affecting trade or investment between the Parties. For greater certainty, a failure is “in a manner affecting trade or investment between the Parties” if it involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party. 5. For purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise.” The USMCA did not include the competitive advantage required in earlier U.S. FTAs to prove the case. These and other USMCA improvements were called for in a comprehensive article by Professor Lance Compa. Eric Gottwald & Jeff Vogt, *Wrong Turn for Workers’ Rights: The U.S.- Guatemala CAFTA Labor Arbitration Ruling – And What To Do About It*, INT’L. LAB. RTS. F., (2018), <https://laborrights.org/sites/default/files/publications/Wrong%20Turn%20for%20Workers%20Rights%20-%20March%202018.pdf>.

⁴⁴ USMCA, Art. 31.22.1.

court or administrative body is located shall submit an agreed interpretation of the Commission to the court or administrative body in accordance with the rules of that forum.⁴⁵

2. CETA⁴⁶

- a. The Parties affirm their commitment to respect, promote and realize the principles and rights in accordance with the **obligations of the ILO** and its core labor standards relating to freedom of association and the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor; and the elimination of discrimination in respect of employment and occupation.⁴⁷
- b. Further, each Party shall ensure that its labor law and practices promote the ILO Decent Work Agenda, and in accordance with the ILO Declaration on Social Justice for a Fair Globalization of 2008,⁴⁸ and other international commitments: “(a) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; (b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and, (c) non-discrimination in respect of working conditions, including for migrant workers.”⁴⁹
- c. The Parties have the **right to regulate and establish levels of protection**⁵⁰ and they **recognize non-derogation**,⁵¹ providing it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labor law and standards.

⁴⁵ USMCA, Art. 31.20.

⁴⁶ Comprehensive Economic and Trade Agreement Between Canada of the One Part, and the European Union and its Member States, of the Other Part, Art. 23.1-23.11, Can.-E.U., Oct. 30, 2016 [hereinafter CETA] http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

⁴⁷ CETA, Art. 23.3.1.

⁴⁸ CETA, Art. 23.3.2.

⁴⁹ “Article 23.3.3. Pursuant to subparagraph 2(a), each Party shall ensure that its labour law and practices embody and provide protection for working conditions that respect the health and safety of workers, including by formulating policies that promote basic principles aimed at preventing accidents and injuries that arise out of or in the course of work, and that are aimed at developing a preventative safety and health culture where the principle of prevention is accorded the highest priority. ...” CETA, Art. 23.3.2. CETA also adopted ILO standards regarding migrants. CETA, Art. 23.3. And see, Ferdi De Ville, Jan Orbie & Lore Van den Putte, *TTIP and Labour Standards*, DIRECTORATE-GEN. FOR INTERNAL POLICIES (2016), [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578992/IPOL_STU\(2016\)578992_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578992/IPOL_STU(2016)578992_EN.pdf).

⁵⁰ CETA, Art. 23.2.

⁵¹ CETA, Art. 23.4.

d. Dispute resolution⁵²

For any labor dispute that arises under this Chapter, the Parties shall only have recourse to the rules and procedures provided in this Chapter on *labor*.⁵³ The Parties shall make every attempt to arrive at a mutually satisfactory resolution of a dispute. At any time, the Parties may have recourse to good offices, conciliation, or mediation, and all consultation procedures provided in Article 23.10 to resolve that dispute.

The Parties understand that the obligations included under this Chapter are binding and enforceable through the procedures for the resolution of disputes provided in Article 23.10. Within this context, the Parties shall discuss, through the meetings of the Committee on Trade and Sustainable Development, the effectiveness of the implementation of the Chapter, policy developments in each Party, developments in international agreements, and views presented by stakeholders, as well as possible reviews of the procedures for the resolution of disputes provided for in Article 23.10.⁵⁴ In the EU, the legality of investor–state dispute settlement (ISDS), including in the form of an Investment Court System (ICS), in EU trade agreements under EU law (e.g., CETA) was a contentious issue, but in 2018 it was confirmed as legal.⁵⁵ Since then, the Parties have renegotiated a clear break from the current ISDS system and are committed to establishing a multilateral investment tribunal for trade issues.⁵⁶

C. INTERNATIONAL PERSPECTIVE

*1. U.S. and UK Unions' Agendas*⁵⁷

U.S. union leader of the AFL-CIO, President Richard Trumka, joined with the British union leader of TUC, General Secretary Frances O'Grady, to announce to the White

⁵² CETA, Art. 23.11.

⁵³ CETA, Art. 23.11.2.

⁵⁴ CETA, Art. 23.11.3. “In the case of disagreement under paragraph 3, a Party may request consultations according to the procedures established in Article 23.9 in order to review the provisions for the resolution of disputes provided for in Article 23.10, with a view to reaching a mutually agreed solution to the matter. Article 23.11.4. Further action may include, “The Committee on Trade and Sustainable Development may recommend to the CETA Joint Committee modifications to relevant provisions of this Chapter, in accordance with the amendment procedures established in Article 30.2 (Amendments). CETA, Art. 23.11.5.

⁵⁵ See discussion in, Anaëlle Idjeri, The ISDS mechanism provided for under the CETA is compatible with EU law, [https://www.soulier-avocats.com/en/the-isds-mechanism-provided-for-under-the-ceta-is-compatible-with-law/#:~:text=In%20this%20context%2C%20there%20was,%2C%20hereinafter%20%E2%80%9C-ISDS%E2%80%9D\).](https://www.soulier-avocats.com/en/the-isds-mechanism-provided-for-under-the-ceta-is-compatible-with-law/#:~:text=In%20this%20context%2C%20there%20was,%2C%20hereinafter%20%E2%80%9C-ISDS%E2%80%9D).)

⁵⁶ CETA: EU and Canada agree on new approach on investment in trade agreement, https://ec.europa.eu/commission/presscorner/detail/lt/IP_16_399.

⁵⁷ This earlier briefing by TUC specifically targets what it identified as deficiencies in the US labor system. *Submission to the Department for International Trade*, TRADES UNION CONGRESS (2018), <https://www.tuc.org.uk/sites/default/files/TUC%20UK-US%20trade%20consultation%20final%20response.pdf>.

House and Downing Street that any UK-U.S. trade deal must put workers' jobs and rights first. U.S. and UK unions demand fair trade and will vigorously oppose any deal that seeks to promote the narrow interests of multinational corporations over those of working people.⁵⁸

The TUC and AFL-CIO – union federations which together represent over 18 million workers – agree that the UK's first priority should be negotiating a good trade deal with the EU. Their statement outlines a series of needed requirements for any UK-U.S. deal, including:

Enforceable commitments to protect workers' rights.

Exclusion of all kinds of special courts which allow foreign investors to sue governments for actions that threaten their profits, such as Investor-State Dispute Settlement (ISDS) or the Investment Court System (ICS).

Contain enforceable commitments to respect International Labor Organization core conventions on labor rights including the right to take industrial action, to join and form a trade union and the right to collective bargaining, with swift and certain enforcement mechanisms applied to business and governments when labor rights are abused;

Include a rapid-response labor enforcement mechanism that would provide for facility specific inspections and appropriate sanctions including denial of entry of goods and access to the government procurement market for businesses that violate the agreement's labor standards commitments.

Before undertaking negotiations on any trade deal involving the UK and US, and throughout any negotiations, our governments must engage with trade unions to ensure the objectives of any deal are to promote good jobs and protect high standards of employment, environment and safety.⁵⁹

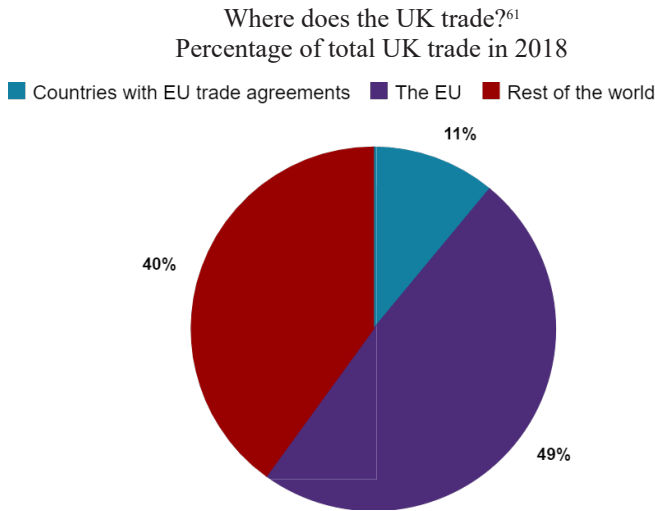
2. Post-Brexit UK Reaches for International Trade Connections

As the UK exits from the EU, it also reaches out to other states to form new trade relations. As EU members cannot enter separate FTAs and must be under the umbrella of the EU, the UK will now be free to move ahead with future individual FTA arrangements with numbers of countries.⁶⁰ A compilation of its recent trade activities is shown below.

⁵⁸ TRADES UNIONS CONGRESS, *supra* note 10.

⁵⁹ *Id.*

⁶⁰ Matthew Ward, *Geographical pattern of UK trade*, HOUSE OF COMMONS LIBR. (Nov. 1, 2019), Briefing Paper Number 7593, <http://researchbriefings.files.parliament.uk/documents/CBP-7593/CBP-7593.pdf>. See generally, Ronald C. Brown, *China-EU BIT and FTA: Building a Bridge on the Silk Road Not Detoured by Labor Standard Provisions*, 29 WASH. L. REV. 61 (2019).



After Brexit and since March 2020, the UK has made 19 trade deals to be effective following its transition from the EU on December 31, 2020. While it was an EU member, the UK was automatically part of around 40 trade deals the EU had struck with more than 70 countries. The UK has been trying to copy these arrangements. So far, 19 such deals, covering 50 countries or territories, have been rolled over. These deals represent just over 8% of total UK trade. [A number of] deals are expected to take effect at the end of the transition period, according to the Department for International Trade.⁶²

The UK will need an agreement with the EU to stop new tariffs and other trade barriers coming into force after the transition period ends on 31 December 2020. If any trade deals are reached, either with the EU or other countries, they will not start until the transition period ends. The UK and the EU currently share the same rules in areas like workers' rights, competition and environmental policy - they're known as level playing field rules.

If negotiators fail to reach a deal, the UK faces the prospect of trading with the EU under the basic rules set by the World Trade Organization (WTO). If the UK had to trade under WTO rules, tariffs would be applied to most goods which UK businesses send to the EU. This would make UK goods more expensive and

⁶¹ Japan and Singapore are included in the "rest of the world" as their EU trade deals had not come into force in 2018. Tom Edgington, *Brexit: What trade deals has the UK done so far?*, BBC News (Mar. 2, 2020), <https://www.bbc.com/news/uk-47213842>.

⁶² Kosovo (£8m of trade in 2018); Jordan (£448m in 2018); Morocco (£2.5bn in 2018); Georgia (£123m in 2018); Southern African nations (£10.2bn in 2018); Tunisia (£542m in 2018); Lebanon (£762m in 2018); South Korea (£14.8bn in 2018); Central America (£1.1bn in 2018); Andean countries (£3.4bn in 2018); Caribbean countries (£3.7bn in 2018); Pacific Islands (£163m in 2018); Liechtenstein (£146m in 2018); Israel (£4.2bn in 2018); Palestinian Authority (£41m in 2018); Switzerland (£32.4bn in 2018); The Faroe Islands (£252m in 2018); Eastern and Southern Africa (£2bn in 2018); Chile (£2bn in 2018). The government says it is still in negotiation with a further 16 countries, including Canada and Mexico. Tom Edgington, *Brexit: What trade deals has the UK done so far?*, BBC News (Mar. 2, 2020), <https://www.bbc.com/news/uk-47213842>.

harder to sell in Europe. Having WTO terms would also mean full border checks for goods, which could cause traffic bottlenecks at ports. And the UK service industry would lose its guaranteed access. Qualifications would no longer be recognized, and it would be much harder for workers to travel to the EU.⁶³

III. LEGAL

A. COMPARATIVE AGENDA ISSUES OF U.S. AND UK DOMESTIC LABOR LAWS

Under the USMCA, the labor agenda earlier identified and summarized below, is followed by brief highlights of UK and U.S. relevant labor laws, allowing a comparison to help further identify potential trouble spots in the negotiations.

1. **Labor Rights:** ILO Core Labor Standards and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. The UK has ratified all eight core conventions whereas the U.S. has ratified only two.⁶⁴ The USMCA added the right to strike as part of the freedom of association and “acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.”⁶⁵ Both countries have laws regulating wages, hours, and safety,⁶⁶ as well as the topics of the ILO core labor standards.⁶⁷
 - a. UK’s Trade Union and Labour Relations Act provides for unionization and collective bargaining,⁶⁸ the right to strike,⁶⁹

⁶³ *Id.* Britain also has applied to become a dialogue partner of the Association of Southeast Asian Nations (ASEAN), as it seeks to boost post-Brexit ties in the region. *UK seeks to boost post-Brexit ties with ASEAN partnership*, REUTERS (June 5, 2020 11:36AM), <https://www.reuters.com/article/us-britain-politics-asean-idUSKBN23C32D>.

⁶⁴ The US has ratified two of the ILO’s core labor standards: No. 105 on the Abolition of Forced Labor and No. 182 on the Elimination of the Worst Forms of Child Labor. *Ratifications for United States of America*, INT’L LABOUR ORG., w (last accessed July 1, 2020). The U.S. law prohibiting the Abolition of Forced Labor is 18 U.S.C.A §1589 (Westlaw through Pub. L. No. 116-130). *The US: A Leading role in the ILO*, INT’L LABOUR ORG., <https://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang--en/index.htm#:~:text=The%20US%20has%20ratified%2014,Worst%20Forms%20of%20Child%20Labor> (last accessed July 1, 2020).

⁶⁵ USMCA Art. 23.3.2.

⁶⁶ *E.g.*, in the US: Fair Labor Standards Act of 1938, 29 U.S.C.A §§201-219 (2016).

⁶⁷ National Minimum Wage Act 1998, c. 39 (UK).

⁶⁸ Trade Union and Labour Relations (Consolidation) Act 1992, c. 52 (UK), §§ 62(5), 178(2). If still applicable the Human Rights Act’s Schedule 1, Part 1, Article 11 asserts the United Kingdom’s obligation not to restrict its citizens’ freedom of assembly and association. This freedom of association includes association with other people as well as the formation or membership with a trade union created in order to protect individual rights and interests. Human Rights Act 1998, c. 42, Art. 11(1), (UK).

⁶⁹ Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, § 62, (UK) . However, there are cumbersome procedural requirements before a strike can occur and questions whether a permanently replaced striker has the right to return to the job after

and prohibits terms in a collective agreement that restrict employees' right to engage in a strike or industrial action.⁷⁰ Employees' termination must be for a "fair reason"⁷¹ and the law protects employees whose business is being transferred to another business.⁷² UK laws create a minimum standard of employment rights, located in various Acts, including the National Minimum Wage Act 1998,⁷³ the Working Time Regulations 1998,⁷⁴ the Employment Rights Act 1996,⁷⁵ and the Pensions Act 2008.⁷⁶ The Modern Slavery Act prohibits any form of compulsory or forced labor.⁷⁷

- b. U.S. law provides private and federal government employees the freedom of association and private employees the right

the strike. See Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, §§ 62–70 (UK). Also see Employment Rights Act 1996, c. 18 § 14(UK). If EU obligations continue, there is a clear obligation to permit strikes. Article 28 states workers have the right "to take collective action to defend their interests, including strike action." Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 2. The UK Court of Appeals in the *Metrobus* case in 2009 held delay in informing an employer of the outcome of a ballot for strike action will cause the subsequent strike action to be unlawful, and consequently not protected under the Trade Union and Labor Relations (Consolidation) Act 1992. "For strike action to be lawful and therefore protected, s.231A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C) A) imposes a duty on the union concerned to inform the employer of the outcome of a ballot "as soon as is reasonably practicable" after the holding of the ballot. This requires the identification of the earliest time by which the communication of the information is reasonably achievable. Where the union does not achieve such compliance, the proposed strike action will not be protected, and an employer will be entitled to an injunction restraining the strike action." *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829 CA (Eng.).

⁷⁰ Trade Union and Labour Relations (Consolidation) Act 1992, c.52 §180(1) (UK) .

⁷¹ Employment Rights Act 1996, c. 18 §94 (UK).

⁷² "The Regulations apply: (a) when a business or undertaking, or part of one, is transferred to a new employer; or (b) when a 'service provision change' takes place (for example, where a contractor takes on a contract to provide a service for a client from another contractor).

DEPT. FOR BUS. INNOVATION & SKILLS, EMPLOYMENT RIGHTS ON THE TRANSFER OF AN UNDERTAKING (TUPE), 7 (2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf.

⁷³ National Minimum Wage Act 1998, c. 39 (UK).

⁷⁴ Provides the right to 28 days paid holidays, breaks from work, and attempts to limit excessively long working hours. Working Time Regulations 1998, No. 1833 (UK).

⁷⁵ Provides the right to leave for childcare, and the right to request flexible working patterns. Employment Rights Act 1996, c. 18 (UK).

⁷⁶ Provides the right to be automatically enrolled in a basic occupational pension, whose funds must be protected according to the Pensions Act. Pensions Act 2008, c. 30 (UK).

⁷⁷ Modern Slavery Act 2015, c. 30 (UK). If applicable, the Human Rights Act Article 4 also prohibits "slavery or servitude" and "no one shall be required to perform forced or compulsory labour." Human Rights Act 1998, c. 42 , Art. 4(1)–(2) (UK). The Trade Union and Labour Relations Act authorizes collective bargaining. Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, § 70B(1), (UK).

to collective bargain and strike,⁷⁸ while federal employees can bargain, but not over wages, with strikes prohibited in the public sector.⁷⁹ Employees are employed “at will,” except in certain public sector jobs, unless protected by contract or statute.⁸⁰ Wages, hours and non-discriminatory pay are also regulated, as is occupational health and safety.⁸¹

2. **Non-Derogation and Enforcement of Labor Laws:** The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party’s labor laws. They also agree to fully enforce the labor provisions of the agreement and create processes to mediate and resolve labor conflicts.
 - a. **The UK** has accepted this in EU FTAs, and it is of current concern to the EU in its negotiations with the UK that the UK maintain high labor standards and enforcement after Brexit and not become a competitive cheap labor country.
 - b. U.S. FTAs typically include these provisions and the U.S. has a strong record of law enforcement.
3. **Violence, threats, or intimidation against workers** for exercising their labor rights under Article 23.3 in a manner affecting trade or investment between the Parties is prohibited.
 - a. UK employers are obligated to provide workers a general duty of care to protect them from threats and violence at work.⁸² The

⁷⁸ See 29 U.S.C.A. §157 (Westlaw through Pub. L. No. 116-30); 29 U.S.C.A. §163 (Westlaw through Pub. L. No. 116-30). Section 29 U.S.C.A. 163 of the NLRA provides that nothing in the chapter was intended to, or in practice will, interfere with or otherwise inhibit employees’ right to strike.

⁷⁹ National Labor Relations Act of 1935, 29 U.S.C.A. §§151-69 (Westlaw through Pub. L. No. 116-30). Equal Employment Opportunity Act of 1972, 29 C.F.R. §§ 1600-1899.

⁸⁰ *At-Will Employment – Overview*, NAT’L. CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> (last accessed July 1, 2020).

⁸¹ Fair Labor Standards Act of 1938, 29 U.S.C.A §§ 201-19 (2016); Civil Rights Act of 1964, 42 U.S.C.A § 2000e (Westlaw through Pub. L. No. 116-45); Title VII, Civil Rights Act of 1991, 42 U.S.C.A. § 2000e (Westlaw through Pub. L. No. 102-66); Occupational Health and Safety Act of 1970, 29 U.S.C.A. §§ 651-78 (Westlaw through Pub. L. No. 116-45).

⁸² “There are also five specific health and safety laws that extend to violence at work: laws include the Health and Safety at Work Act 1974 (HASAWA); the Management of Health and Safety at Work Regulations 1999; the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR); the Safety Representatives and Safety Committees Regulations 1977; and the Health and Safety (Consultation with Employees) Regulations 1996. Employers may also owe you duties under the Protection from Harassment Act 1997. The Act protects you against harassment and victimisation on grounds of sex, sexual orientation, trans-sexuality, marriage, civil partnership, pregnancy, maternity, race, nationality, disability, religion and belief, and age. In Northern Ireland, protection extends to harassment and victimisation on grounds of political opinion.” *What laws protect me from threats and violence at work?*, WORKSMART, <https://worksmart.org.uk/health-advice/illnesses-and-injuries/violence-and-bullying/violence/what-laws-protect-me-threats-and> (last accessed July 1, 2020).

Trade Union and Labour Relations Act of 1992 is the primary source of U.K. labor protection relating to unionization, collective bargaining, and the right to strike.⁸³ Under the Equality Act, “victimization (retaliation) is prohibited as it pertains to protected categories of workers.”⁸⁴

- b. U.S. laws, in addition to criminal laws, provide for government statutory and administrative protection for exercise of labor rights and from retaliation for their exercise.⁸⁵
4. **Migrant Workers** are recognized as vulnerable and each Party shall ensure that migrant workers are protected under its labor laws, whether they are nationals or non-nationals.
 - a. UK migrant workers are granted labor rights, and under the law, “are entitled to receive pay equal to British workers doing the same job and must be paid at least the national minimum wage. They are protected by UK employment laws, have the right to be paid annual leave and statutory sick pay, and must pay tax and national insurance.”⁸⁶ However, advocates of migrant domestic workers argue the laws are insufficient, and practices sometimes appear to violate forced labor laws.⁸⁷
 - b. U.S. legal migrant workers have the same legal rights as US citizens, although the remedies for illegal aliens are sometimes lower under particular labor laws.⁸⁸

⁸³ Trade Union and Labour Relations (Consolidation) Act 1992, c. 52 (UK). The right to strike is contained in Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, § 62 (UK).

⁸⁴ Equality Act 2010, c. 15, § 27(1) (UK). Article 14 of the Human Rights Act also protects citizens from all forms of discrimination. Human Rights Act 1998, c. 42, Art. 14 (UK).

⁸⁵ National Labor Relations Act of 1935, 29 U.S.C.A. § 158 (Westlaw through Pub. L. No. 116–45); Fair Labor Standards Act of 1938, 29 U.S.C.A. § 215 (Westlaw through Pub. L. No. 116–45); Title VII, Civil Rights Act of 1991, 42 U.S.C.A. § 2000e (Westlaw through Pub. L. No. 102–66).

⁸⁶ *Migrant Workers*, UNISON, <https://www.unison.org.uk/get-help/knowledge/vulnerable-workers/migrant-workers/> (last accessed July 1, 2020). See also, Alan C. Neal, *Migrant Workers and the United Kingdom Labor Market: Some Trends and Implications of Twenty-First Century International Labor Migration Flows*, 31 COMP. LAB. L. & POL’Y J. 91, 116–17 (2009).

⁸⁷ In June 2011, the UK was one of only nine EU states that did not vote in favor of the ILO’s Domestic Workers Convention recognizing domestic workers’ rights to the same labor protections as other workers. For a report by UK’s largest union, UNISON, with 1.3 million members representing staff who provide public services in the public and private sector on the alleged abuses of migrant domestic labor in UK, see, *Hidden Away: Abuses against Migrant Domestic Workers in the UK*, HUM. RTS. WATCH (Mar. 31, 2014), <https://www.hrw.org/report/2014/03/30/hidden-away/abuses-against-migrant-domestic-workers-uk>. See also, “The Coroners and Justice Act of 2009 introduced into the domestic law of the United Kingdom the offense of holding another person in slavery or servitude or requiring them to perform forced or compulsory labor.” Coroners and Justice Act 2009, § 71. Siobhán Mullally & Clíodhna Murphy, *Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights*, 36 HUM. RTS. Q. 397 (2014).

⁸⁸ In the *Sure-Tan, Inc. v. N.L.R.B.*, 476 U.S. 883 (1984), the NLRB held an employee under the law who was an illegal alien, though protected under the law, was not entitled to the usual remedy of reinstatement. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.

Although agricultural migrant workers have a series of labor protection laws, it is often argued to be inadequate.⁸⁹ Agricultural workers, including migrants who often make up a large percentage of that labor force, are excluded from

S. 137, 142-52 (2002) (Federal immigration policy, as expressed by Congress in IRCA, foreclosed the Board from awarding backpay to an undocumented alien who has never been legally authorized to work in the United States for an employer's violation of the worker's rights under the NLRA). *Contra Patel v. Sumani Corp.*, 660 F. Supp. 1528 (N.D. Ala. 1987) (right to remedy under FLSA). "The guidance explains that undocumented workers are entitled to the same remedies as any other workers back pay, reinstatement if the employee was unlawfully terminated, hiring if the employee was denied a job due to discrimination, other appropriate injunctive relief, damages and attorneys' fees except in the very narrow situations where an award would directly conflict with the immigration laws. The guidance also emphasizes that unauthorized workers are fully protected by the retaliation principles of the federal anti-discrimination laws." EEOC Issues Guidance on Remedies for Undocumented Workers Under Laws Prohibiting Employment Discrimination, <https://www.eeoc.gov/newsroom/eeoc-issues-guidance-remedies-undocumented-workers-under-laws-prohibiting-employment> For discussion of remedies under anti-discrimination laws. Also see, Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AMERICAN U. L. REV. 1361, 1381-86 (2009).

⁸⁹ Chandra Bhatnagar, *Human Rights Abuse In Plain Sight: Migrant Workers in the U.S.*, ACLU (Dec. 18, 2009, 11:57AM), <https://www.aclu.org/blog/national-security/human-rights-abuse-plain-sight-migrant-workers-us>. Alternative federal laws seek to protect these workers. The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures, and recordkeeping. *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*, U.S. DEPT. OF LAB., <https://www.dol.gov/agencies/whd/agriculture/mspa> (last accessed July 1, 2020). Migrant workers fall into two broad categories in the U.S.: domestic and foreign. Domestic workers are immigrants who move to the U.S. to work in various vocations who are in the process of obtaining citizenship, or who have citizenship. Foreign migrant workers are non-immigrant workers who are in many cases seasonal workers, especially in the agricultural professions. Non-immigrant foreign workers typically must apply for a visa, and in the case of agricultural labor, an H-2A visa. For a summary, see Claudia G. Catalano, *Construction and Application of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA)—General Provisions Subchapter* (29 U.S.C.A. §§ 1851 to 1872), 65 A.L.R. Fed. 2d 339 (2012). Lance Compa, *Migrant Workers in the United States: Connecting Domestic Law with International Labor Standards*, 92 CHI.-KENT L. REV. 211 (2017). Though a federal domestic workers rights bill was introduced in Congress in 2019, there is no federal law protection. Domestic Workers Bill of Rights Act, S. 2112, 116th Cong. (2019–20). As of 2019, "nine states have passed laws extending labor protections to domestic workers: Oregon, California, Connecticut, Illinois, New York, Massachusetts, Hawaii, and Nevada." Alexia Fernández Campbell, *Kamala Harris just introduced a bill to give housekeepers overtime pay and meal breaks*, Vox (Jul. 15, 2019, 4:20PM), <https://www.vox.com/2019/7/15/20694610/kamala-harris-domestic-workers-bill-of-rights-act>. Likewise, the Occupational Health and Safety Act, which established a worker's right to a safe and healthy work environment, also left out domestic workers and farmworkers. Occupational Health and Safety Act of 1970, 29 U.S.C.A. §§ 651–678 (WestLaw through P.L. 116-145). In the 1970s the FLSA was amended to cover most domestic workers, but not live-in housekeepers and nannies. *Id.* Farmworkers are still excluded from the FLSA. Both domestic workers and farmworkers are also excluded from the National Labor Relations Act, which gave workers the right to form labor unions and organize for better working conditions. 29 U.S.C. 158(3).

federal legislation that provides basic protections like the right to a minimum wage, overtime pay, freedom of association, and health and safety guarantees while at work. Domestic service employees may or may not have the full protections of the labor laws, but are provided some protections, such as minimum wages, depending on a variety of federal and state laws.⁹⁰

5. The USMCA provides for the **elimination of gender-based workplace discrimination** in employment and occupation, promoting equality of women, and implementing policies appropriate to protect workers on the basis of sex, including sexual harassment, pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.
 - a. UK has the Equality Act of 2010 that enumerates characteristics protected from discrimination including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief; sex, and sexual orientation.⁹¹ The non-discrimination prohibition includes wages,⁹² yet the gender pay gap in the UK ranks high compared with EU member states.⁹³ Sexual harassment is also prohibited⁹⁴ as is discrimination based on *LGBTQ+*, including gender reassignment and sexual orientation.⁹⁵ Disputes are typically resolved in the Advisory, Conciliation and Arbitration Service (Acas) which is similar in function to the EEOC in the United States and it provides dispute resolution procedures on employment rights and issues between employers and employees and is the step before the Employment Tribunal.⁹⁶

⁹⁰ See for example, 29 U.S.C. §206(f) (Westlaw through Pub. L. No. 116-130) (minimum wages except when not compliant with §209(a)(6) of the Social Security Act, or when that employee 1) is employed in multiple households during a given week and 2) is employed for more than eight hours total).

⁹¹ Equality Act 2010, c. 15, § 4, (UK).

⁹² Equality Act 2010, c. 15, § 71, (UK).

⁹³ *The Guardian view on gender inequality in the UK: time to change the face*, GUARDIAN (Oct. 28, 2014, 3:25PM), <https://www.theguardian.com/commentisfree/2014/oct/28/guardian-view-gender-inequality-uk>.

⁹⁴ Equality Act 2010, c. 15, § 26, (UK). An additional form of prohibited discrimination is “victimization,” which is similar to “retaliation” under US law. Equality Act 2010, c. 15, § 27, (UK).

⁹⁵ Equality Act 2010, c. 15, § 4, (UK). UK laws have adopted protections provided under the European Human Rights Act against discrimination for *LGBTQ+* status. Human Rights Act 1998, c. 42 (UK). *But see*, Alex Cooper, *Boris Johnson gets mixed review from LGBTQ Community*, NBC NEWS (Jul. 26, 2019, 11:42AM), <https://www.nbcnews.com/feature/nbc-out/boris-johnson-gets-mixed-reviews-u-k-s-lgbtq-community-n1035241>. *See also*, Jamie Wareham, *This is How U.K. LGBTQ Rights Change After Brexit*, FORBES (Jan. 26, 2020, 7:10PM), <https://www.forbes.com/sites/jamiewareham/2020/01/26/this-is-how-uk-lgbtq-rights-will-change-when-we-brexite/#5f0df054756d>.

⁹⁶ *Acas: What we do*, ADVISORY, CONCILIATION & ARB. SERV., <https://www.acas.org.uk/what-we-do> (last visited June 30, 2020).

Family leave policies exist and generally are paid for certain durations with the right to return to work without discrimination.⁹⁷ Maternity protection is provided by the Equality Act of 2010 that also covers the right to equality of pay throughout pregnancy-related maternity leave.⁹⁸ Other areas of family care are also provided for under UK law, such as paternity leave.⁹⁹

- b. U.S. laws include anti-discrimination laws¹⁰⁰ covering gender and wages, though there is a significant wage gap in the U.S.¹⁰¹ Sex harassment¹⁰² and pregnancy discrimination are prohibited, though maternity benefits are not required by law.¹⁰³ Unpaid family leave is provided, though with

⁹⁷ See Employment Rights Act 1996, c. 18, pt. VIII, (UK). See also, *Holidays, time off, sick leave, maternity and paternity leave*, Gov.UK, <https://www.gov.uk/browse/working/time-off> (last accessed July 1, 2020); *Employee rights when on leave*, Gov.UK, <https://www.gov.uk/employee-rights-when-on-leave> (last accessed July 1, 2020).

⁹⁸ The Statutory Mandatory Pay Act makes all working mothers eligible for up to fifty-two weeks of maternity leaves, with thirty-nine paid weeks, the first six of which are at the rate of 90% of the mother's full pay. Equality Act 2010, c. 15, § 74, (UK).

⁹⁹ Statutory Paternity Pay and Leave: employer guide, Gov.UK, <https://www.gov.uk/employers-paternity-pay-leave>.

¹⁰⁰ E.g., 42 U.S.C.A 2000e et seq. (Westlaw through Pub. L. No. 116-30). Equal Pay Act, 29 U.S.C.A §206(d)(1) (Westlaw through Pub. L. No. 116-30)

¹⁰¹ Analyzing the most recent Census Bureau data from 2018, women of all races earned, on average, just 82 cents for every \$1 earned by men of all races. A further breakdown shows the gender wage gap is more significant among women of color: White 79%; Black 62%; Hispanic or Latino 54%; Asian 90%; and American Indian or Alaska Native 57%. Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Mar. 24, 2020, 9:01AM), <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/>. The Equal Pay Act is a federal law prohibiting wage discrimination on the basis of sex. 29 U.S.C. §206(d).

¹⁰² *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). See Natalie Dugan, *#Timesup on Individual Litigation Reform: Combatting Sexual Harassment Through Employee-Driven Action and Private Regulation*, 53 COLUM. J.L. & SOC. PROBS. 247, 265–66 (2020).

¹⁰³ The U.S. is the only OECD country without a national statutory paid maternity, paternity or parental leave. The Family and Medical Leave Act (FMLA) enables some employees to take up to 12 weeks unpaid maternity leave but only 60% of workers are eligible. Miranda Bryant, *Maternity leave: US policy is worst on list of the world's richest countries*, GUARDIAN (Jan. 27, 2020, 3:00AM), <https://www.theguardian.com/us-news/2020/jan/27/maternity-leave-us-policy-worst-worlds-richest-countries>. It is also worst on granting paid paternity leave. Miranda Bryant, *Paternity leave: US is least generous of world's richest countries*, GUARDIAN (Jan. 29, 2020, 2:00AM), <https://www.theguardian.com/us-news/2020/jan/29/paternity-leave-us-policy>. The Federal Employee Paid Leave Act (FEPLA) provides benefits for some federal employees. The new law grants most federal employees up to 12 weeks of paid parental leave for the birth, adoption or foster of a new child. Family and Medical Leave Act of 1993 (29 U.S.C. 2601 et seq.). Nicole Ogrysko, *New federal paid parental leave benefits will be ready without delay*, OPM says, FED. NEWS NETWORK (Mar. 10, 2020, 9:00AM), <https://federalnewsnetwork.com/workforce/2020/03/new-federal-paid-parental-leave-benefits-will-be-ready-without-delay-opm-says/#:~:text=The%20new%20law%20grants%20most,1>.

qualifying time eligibility requirements, that allows for time off from work for family health and care needs.¹⁰⁴ The question of whether federal anti-discrimination law includes prohibitions against sexual orientation and gender identity was decided on Monday, June 15, 2020, when the United States Supreme Court ruled that the prohibition against sex-based discrimination in employment set forth in Title VII of the Civil Rights Act of 1964 includes claims of sexual orientation and gender identity-based discrimination.¹⁰⁵

1. *Dispute Settlement:*

- a. UK 's labor dispute resolution takes place first in the Advisory, Conciliation and Arbitration Service (Acas).¹⁰⁶ It emphasizes the importance of attempting to resolve disputes informally before going to the Employment Tribunal¹⁰⁷ and issues guidelines for labor dispute resolution which, though not legally binding, are nevertheless referred to by UK courts.¹⁰⁸
- b. U.S. law provides the parties may resolve most individual or collective contract or statutory labor disputes through voluntary non-governmental arbitration whose decisions are deferred to by the courts, assuming certain standards are met.¹⁰⁹ In the U.S., each labor law has an administrative agency to enforce the statutory labor rights under the law; these agencies typically investigate and render a decision, deferred to by the courts if there is substantial evidence supporting it.¹¹⁰ Where there is no deferral or if the statute permits it, the courts decide the issues.¹¹¹

¹⁰⁴ *FMLA: Applicable Laws and Regulations*, U.S. DEPT. OF LAB., <https://www.dol.gov/agencies/whd/fmla/laws-and-regulations> (last accessed July 1, 2020).

¹⁰⁵ *Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020). Nina Totenberg, *Supreme Court Delivers Major Victory to LGBTQ Employees*, NAT'L. PUB. RADIO (June 15, 2020, 10:19AM), <https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees>.

¹⁰⁶ *Acas: About Us*, ADVISORY, CONCILIATION & ARB. SERV., <https://www.acas.org.uk/about-us> (last visited June 30, 2020).

¹⁰⁷ *Id. Making a claim to an employment tribunal*, ADVISORY, CONCILIATION & ARB. SERV., <https://www.acas.org.uk/making-a-claim-to-an-employment-tribunal> (last accessed June 30, 2020).

¹⁰⁸ *Acas: About Us*, ADVISORY, CONCILIATION & ARB. SERV., <https://www.acas.org.uk/about-us> (last accessed June 30, 2020).

¹⁰⁹ *See e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

¹¹⁰ *See e.g., Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951), where the United States Supreme Court held that a court will defer to a federal agency's findings of fact if supported by "substantial evidence on the record considered as a whole."

¹¹¹ By statute, the EEOC does not have enforcement powers and therefore does not receive the same judicial deference. "Under Title VII of the Civil Rights Act, EEOC's authority

B. EMERGING AGENDA: TROUBLE SPOTS

Violations “in a Manner Affecting Trade or Investment?”

The most contentious labor issues or the ones with political risks of domestic law not meeting the obligations of the negotiated FTA are emerging as follows. Keep in mind also that to claim violations of obligations under the language of the USMCA, the violation must be shown to be “in a manner affecting trade or investment.” So, one can ask: “what evidence demonstrates a claim and what evidence overcomes the presumption under the FTA that it did not affect trade or investment?”

1. *Right to Strike*

The ILO does not expressly mention the right to strike but the Freedom of Association Committee through ongoing rulings established principles on the right to strike as an essential element of the freedom of association protected by Convention No. 87.¹¹² Only the International Covenant on Economic, Social and Cultural Rights contains a clause protecting the right to strike; however, like the Social Charter of 1961, the Covenant permits each signatory country to abridge the right to strike. The ILO has also concluded striker replacement, while not in contravention of ILO agreements, carries with it significant risks for abuse and places trade union freedoms in “risk of derogation from the right to strike.”¹¹³

to issue legislative regulations is limited to procedural, record keeping, and reporting matters. Regulations issued by EEOC without explicit authority from Congress, called “interpretive regulations,” do not create any new legal rights or obligations, and are followed by courts only to the extent they find EEOC’s positions to be persuasive.” *What You Should Know: EEOC Regulations, Subregulatory Guidance and other Resource Documents*, U.S. EQUAL EMP. COMMISSION, <https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource> (last accessed June 30, 2020). Also, see discussion in, Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second-Class Agency?*, 60 Ohio St. L. J.1533 (1999).

¹¹² For full discussion, see, Jeffrey Vogt, Janice Bellace, Lance Compa, K. D. Ewing, John Hendy QC, Klaus Lörcher, Tonia Novitz, *The Right to Strike in International Law*, <https://www.bloomsburyprofessional.com/uk/the-right-to-strike-in-international-law-9781509933556/>. The ILO Committee on Freedom of Association and other ILO bodies have interpreted the core ILO conventions as protecting the right to strike as an essential element of the freedom of association. For example, the ILO has ruled that “the right to strike is an intrinsic corollary of the right of association protected by Convention No. 87.” *Compilation of decisions of the Committee on Freedom of Association*, INT’L. LABOUR ORG., at 754, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945366,1 (last accessed July 2, 2020). The European Social Charter of 1961 was the first international agreement to expressly protect the right to strike. However, the European Union’s Community Charter of the Fundamental Social Rights of Workers permits EU member states to regulate the right to strike. *Strikebreaker*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Strikebreaker> (last accessed July 2, 2020).

¹¹³ The ILO has concluded striker replacement, while not in contravention of ILO agreements, carries with it significant risks for abuse and places trade union freedoms

The EU Charter of Fundamental Rights establishes a right to strike, and the right to associate, in the European Convention on Human Rights, but leaves it to national legislation how it will be administered; therefore, UK law and an applicable FTA are determinative.¹¹⁴

United Kingdom

In the UK, workers and employers, or their respective organizations, have, in accordance with the Trade Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. However, this right is limited.¹¹⁵

There is no explicit legal right to strike in the UK, but there is limited protection for individuals from unfair dismissal.¹¹⁶ The so-called ‘right to strike’ only exists provided that certain procedures and conditions are met.¹¹⁷ “Strikes and other forms of industrial action invariably involve a breach of contract. Therefore, it may be lawful for an employer to dismiss employees for it and to refuse pay for a service not provided.”¹¹⁸

“entails a risk of derogation from the right to strike.” *Compilation of decisions of the Committee on Freedom of Association*, INT’L. LABOUR ORG., at 919, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945366,1 (last accessed July 2, 2020).

¹¹⁴ Workers and employers, or their respective organizations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. “The textual note points out “[T]his Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). The right of collective action was recognized by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR. ... The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.” [emphasis added] Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 2.

¹¹⁵ See Marie Brunot et al., *The legality of employee strike action*, EMP. L. WATCH (July 21, 2015) <https://www.employmentlawwatch.com/2015/07/articles/employment-us/the-legality-of-employee-strike-action/>.

¹¹⁶ Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, § 238A (UK).

¹¹⁷ The UK Court of Appeals in the Metrobus case in 2009 held delay in informing an employer of the outcome of a ballot for strike action will cause the subsequent strike action to be unlawful, and consequently not protected under the Trade Union and Labor Relations (Consolidation) Act 1992. *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829 CA (UK). See, Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, § 62 (UK). “In order to proceed with a strike lawfully, a union must first give a notification of ballot and provide a copy of the voting papers to the employer no later than a week and three days before the ballot takes place. Every member of the union is entitled to vote and has the right to do so secretly where the conditions are met. Employees have some protection against disciplinary action by their employer as a result of both deciding to vote for a strike and participating in a strike or other industrial action.” Brunot, *supra* note 115.

¹¹⁸ It is an unfair dismissal to terminate an employee who has taken part in any lawful industrial action within 12 weeks of the action. “The right of an employer to dismiss

UK's Trade Union Act¹¹⁹ places tight limits on what constitutes legitimate industrial action; and, in the words of TUC General Secretary Frances O'Grady, "attacks the right to strike – a fundamental British liberty. Workers will still technically have a right to strike, but the Act makes the right much harder to access."¹²⁰

There is protection to strike when: "the dismissal is within 12 weeks of the action starting; it is after 12 weeks but the employee ceased the action within the 12-week period; the employer failed to take reasonable procedural steps to resolve the dispute. It is important to note that an employer can legally dismiss all those who take part in unlawful action."¹²¹ As to strike replacements, it appears after 12 weeks striking employees can be dismissed, so presumably that includes being permanently replaced at that time. The issue of strike replacements during the strike is addressed by the following Regulation.

Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319) precludes the provision of temporary workers to perform the duties normally performed by a worker who is taking part in a strike or other industrial action.¹²²

those taking part in lawful action is restricted. In the case of unofficial action, the employer can dismiss and later pick and choose who it re-employs – with no protection from victimization for those it chooses not to reemploy." *Unison Industrial Action Handbook*, UNISON (June 2019), at 9, 14, <https://www.unison.org.uk/content/uploads/2019/06/25528.pdf>.

¹¹⁹ Trade Union Act 2016, c. 15, §§ 5–9, (UK).

¹²⁰ *What is happening to the right to strike?*, WORKSMART, <https://worksmart.org.uk/news/what-happening-right-strike> (last accessed July 2, 2020). There are cumbersome procedural requirements before a strike can occur and questions whether a permanently replaced striker has the right to return to the job after the strike. See Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, §§ 62–70 (UK). Also see, Employment Rights Act 1996, c. 18, § 14, (UK). UK's Trade Union and Labour Relations Act provides for unionization and collective bargaining, the right to strike, and prohibits terms in a collective agreement that restrict employees' right to engage in a strike or industrial action. Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, §§ 62(5), 178(2) (UK). . If it remains applicable after Brexit is complete, the Human Rights Act's Schedule 1, Part 1, Article 11 asserts the United Kingdom's obligation not to restrict its citizens' freedom of assembly and association. This freedom of association includes association with other people as well as the formation or membership with a trade union created in order to protect individual rights and interests. Human Rights Act 1998, c. 42, Art. 11(1) (UK).

¹²¹ *Unison Industrial Action Handbook*, UNISON (2019), at 9, 14, <https://www.unison.org.uk/content/uploads/2019/06/25528.pdf>.

¹²² The Regulation reads: Restriction on providing work-seekers in industrial disputes 7.— (1) Subject to paragraph (2) an employment business shall not introduce or supply a work-seeker to a hirer to perform—(a) the duties normally performed by a worker who is taking part in a strike or other industrial action ("the first worker"), or (b) the duties normally performed by any other worker employed by the hirer and who is assigned by the hirer to perform the duties normally performed by the first worker, unless in either case the employment business does not know, and has no reasonable grounds for knowing, that the first worker is taking part in a strike or other industrial action.

United States

The U.S. grants the right to strike and at the same time allows the employer to hire striker replacements; and, for economic strikers, but not unfair labor practice strikers,¹²³ the replacements can be permanent.¹²⁴ Advocates argue this basically negates the right to strike in the U.S., removing a union's greatest economic weapon.¹²⁵

The permanent-replacement doctrine is not used only against workers' exercise of the right to strike. Employers aggressively use the threat of permanent replacement in campaigns against workers' efforts to form and join a union and to bargain collectively. In every organizing drive examined by Human Rights Watch for this report, management raised the prospect of permanent replacement in written materials, in captive-audience meetings, and in one-on-one meetings where supervisors spoke with workers under their authority.

(2) Paragraph (1) shall not apply if, in relation to the first worker, the strike or other industrial action in question is an unofficial strike or other unofficial industrial action for the purposes of section 237 of the Trade Union and Labour Relations (Consolidation) Act 1992(1). The Conduct of Employment Agencies and Employment Businesses Regulations 2003, No. 3319 (UK), Reg. 7; also, *employees take strike action, can their employer hire temporary staff to cover their work?*, XPERTHR, <https://www.xperthr.co.uk/faq/where-employees-take-strike-action-can-their-employer-hire-temporary-staff-to-cover-their-work/99324/> (last accessed July 2, 2020).

¹²³ It is argued that in practice, the distinction between an unfair labor practice strike and an economic strike fails to protect workers' right to strike. As the ILO Committee on Freedom of Association noted, "that distinction obfuscates the real issue because workers and employers only find out years after the strike took place, and by then, even with a decision in favor of the workers, the strike is often long broken, and workers scattered to other jobs." *VI. Legal Obstacles to U.S. Workers' Exercise of Freedom of Association*, HUM. RTS. WATCH, <https://www.hrw.org/reports/2000/uslabor/USLBR008-08.htm> (last accessed July 2, 2020).

¹²⁴ *N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938), The US Supreme Court held workers who strike remain employees for the purposes of the National Labor Relations. The Court granted the relief sought by the Board, to reinstate the workers. However, the decision in dictum said an employer may hire strikebreakers and is not bound to discharge any of them if or when the strike ends. This applies to economic but not unfair labor practice strikes where workers have the right to immediate reinstatement. "An employer can replace employees who engage in economic strikes and are not required to reinstate strikers after they apply unconditionally to go back to work. If, however, the strikers do not obtain regular and substantially equivalent employment after the strike, they are entitled to be recalled to their jobs when openings occur. Employees who strike in order to protest an unlawful practice of the employer, such as disciplining employees for engaging in union activity, have greater rights to reinstatement. They are entitled to immediate reinstatement even if replacement employees have to be discharged." *VI. Legal Obstacles to U.S. Workers' Exercise of Freedom of Association*, HUM. RTS. WATCH, <https://www.hrw.org/reports/2000/uslabor/USLBR008-08.htm> (last accessed July 2, 2020).

¹²⁵ *VI. Legal Obstacles to U.S. Workers' Exercise of Freedom of Association*, *supra* note 123.

The United States is almost alone in the world in allowing permanent replacement of workers who exercise the right to strike. Some of the United States' key trading partners take a polar opposite approach. In Mexico, for example, federal law requires companies to cease operations during a legal strike.¹²⁶ Permanent replacements are also prohibited throughout Canada. In Quebec, even temporary striker replacements are banned, and a company may only maintain operations using management and supervisory personnel. In most European countries the law is silent on the subject because permanent replacements are never used and the very idea of permanent replacement of strikers is considered outlandish.¹²⁷

2. Discrimination in the Workplace

The USMCA prohibits employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.¹²⁸

Could violations of these provisions provide an advantage to the employers and the country that utilizes this work, made cheaper by discriminating and avoiding having to pay higher wages and benefits costs?¹²⁹ Could it be demonstrated that violations of these obligations are in a manner affecting trade or investment? So, again, one can ask: "what evidence demonstrates a claim and what evidence overcomes the presumption under the Treaty that it did not affect trade or investment?"

¹²⁶ Lance A. Compa, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards*, HUM. RTS. WATCH, at 196 <https://www.hrw.org/sites/default/files/reports/uslbr008.pdf> (last accessed July 2, 2020). [This was before Mexico was a signatory to the USMCA].

¹²⁷ *Supra* note 125.

¹²⁸ USMCA, Art. 23.9.

¹²⁹ Analyzing the most recent Census Bureau data from 2018, women of all races earned, on average, just 82 cents for every \$1 earned by men of all races.³ This calculation is the ratio of median annual earnings for women working full time, year round to those of their male counterparts, and it translates to a gender wage gap of 18 cents. When talking about the wage gap for women, it is important to highlight that there are significant differences by race and ethnicity. The wage gap is larger for most women of color. Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Mar. 24, 2020, 9:01AM) <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/>. However, some labor cost items of sex discrimination, such as discrimination for sexual identity, may not have the necessary impact on trade or investment and arguably could be rebutted.

United Kingdom

Laws on gender rights and benefits in the UK are comprehensive and of a higher standard than the U.S., bolstered in part by EU standards and the government enforcement mechanisms are regularly used;¹³⁰ however, as in many countries, in practice there is a wide wage gap between male and female labor.¹³¹ There has been concern that without continuing legal ties with EU and its standards, the UK could become a “cheap labor” country with a competitive advantage over EU countries and perhaps the U.S.?

Therefore, from the U.S. perspective an argument could be made that if the UK’s post-Brexit arrangement with EU does not maintain the EU standards, the UK could allow its gender laws to weaken, providing a less expensive market for U.S. investors. Whether that could manifest itself into violations of an FTA “in a manner affecting trade or investment” is certainly speculative at this point as arguably the US already provides fewer gender-based benefits than the UK.

United States

The answer for the U.S. was provided by footnote 15 of Article 23.9 of the USMC.

The United States’ existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article. The Article thus requires no additional action on the part of the United States, including any amendments to Title VII of the Civil Rights Act of 1964, in order for the United States to be in compliance with the obligations set forth in this Article.¹³²

¹³⁰ The gender pay gap among full-time employees stands at 8.9%, little changed from 2018, and a decline of only 0.6 percentage points since 2012. Many settlements happen long before cases reach court. Bloomberg has analyzed the court database’s sex discrimination cases. There are 3,585 judicial cases, of which 2,195 were apparently settled or withdrawn. *Search the Data Behind Britain’s Sex Discrimination Cases*, BLOOMBERG (Sept. 5, 2019), <https://www.bloomberg.com/graphics/2019-uk-sexual-discrimination-settlements/tribunals.html>.

¹³¹ The gender pay gap among all employees fell from 17.8% in 2018 to 17.3% in 2019 and continues to decline. For age groups under 40 years, the gender pay gap for full-time employees is now close to zero. Among 40- to 49-year-olds the gap (currently 11.4%) has decreased substantially over time. Among 50- to 59- year-olds and those over 60 years, the gender pay gap is over 15% and is not declining strongly over time. One of the reasons for differences in the gender pay gap between age groups is that women over 40 years are more likely to work in lower-paid occupations and, compared with younger women, are less likely to work as managers, directors or senior officials. *Gender pay gap in the UK: 2019*, OFF. FOR NAT’L. STAT., <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2019#:~:text=The%20gender%20pay%20gap%20among,2019%2C%20and%20continues%20to%20decline> (last accessed July 2, 2020).

¹³² USMCA, Art. 23.9 at note 5.

So, it would seem if the U.S. were able to use this approach of a footnote agreement to there being no violations, it would not be a trouble spot for the U.S.

3. *Migrants*

In Article 23.8 of the USMCA, migrant workers are recognized as vulnerable and each Party shall ensure that migrant workers are protected under its labor laws, whether they are nationals or non-nationals.

United Kingdom

The UK policies on migrant labor is now in a bit of a flux, and it has recently proposed policies that would limit foreign workers who often are the ones doing the dirty, dangerous jobs that British citizens do not want to do. In February 2020, Britain announced it is considering a policy to close its borders to unskilled workers and those who can't speak English as part of a fundamental overhaul of immigration laws that will end the era of cheap EU labor in factories, warehouses, hotels and restaurants.¹³³ Employers from coffee shops to agriculture to factories have raised a huge outcry as to the likely lack of workers for their businesses.¹³⁴ The below chart shows the allocation of foreign migrant labor coming into the UK from EU countries.

Low-skilled factory and construction 21%; Factory and machine operators 17%; Food preparation and other skilled trades 13%; Low-skilled administration and service 12%; Drivers and mobile machine operators 11%; Skilled construction and building trades 9%; STEM professionals 9%; Leisure, travel and related personal service 8%; STEM associate professionals 7%; Culture, media and sports 7%.¹³⁵

While UK laws may provide basic rights and benefits for these workers, the absence of these workers certainly would be a factor affecting labor costs and possibly impact trade and investment. It appears this policy, if implemented, it would not drive UK toward cheap labor, but just the opposite, making the migrant issue a possible plus for US traders who can supply the more UK products which have become more expensive. Thus, if the UK policy stays after it is finally separated from EU, the migrant issue likely would not be a trouble spot in the negotiations.

United States

Generally, in the U.S., migrant workers fall into two main categories: domestic and foreign. Domestic workers are legal immigrants who have moved to the U.S.

¹³³ See, Guardian graphic | Source: The Migration Observatory. Lisa O'Carroll, Peter Walker & Libby Brooks, UK to close door to non-English speakers and unskilled workers, GUARDIAN (Feb 18, 2020, 5:30PM), <https://www.theguardian.com/uk-news/2020/feb/18/uk-to-close-door-to-non-english-speakers-and-unskilled-workers>.

¹³⁴ *Id.*

¹³⁵ *Id.*

to work and who either are in the process of obtaining citizenship, or who have citizenship.¹³⁶ Foreign migrant workers are non-immigrant workers who are in many cases seasonal workers, especially in the agricultural professions, as well as in the difficult jobs of meat plant production and construction. Non-immigrant foreign workers typically must apply for a visa, and in the case of agricultural labor, an H-2A visa.¹³⁷ It is estimated that about 11.3 million people are currently living in the U.S. without authorization, with many of their job categories listed below.¹³⁸

What unauthorized workers do

Undocumented immigrants make up more more than half of the hired labor on farms, according to the USDA, while Pew data show their share in construction is about 15 percent. Overall, they make up 5 percent of the U.S. workforce.



The Conversation, CC-BY-ND Source: USDA, Pew Research Center

Advocates of migrant workers' rights point out they can be easily exploited and provide the country with a cheap labor supply, especially for the dirty, dangerous jobs that American citizens do not want, that can greatly reduce the cost of labor for employers.¹³⁹

Our current immigration system isn't working for workers. Instead, it benefits low-road employers who exploit the immigration status of unauthorized immigrants and authorized guest workers through a legal framework that puts downward pressure on wages and leaves migrant workers powerless to enforce their labor rights and hold employers accountable. This hurts both migrants and the U.S. workers—citizens and lawful permanent residents—who work alongside them.¹⁴⁰

¹³⁶ See, Claudia G. Catalano, *Construction and Application of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA)—General Provisions Subchapter (29 U.S.C.A. §§ 1851 to 1872)*, 65 A.L.R. Fed. 2d 339 (2012).

¹³⁷ *H-2A: Temporary Agricultural Employment of Foreign Workers*, U.S. DEP. LABOR, <https://www.dol.gov/agencies/whd/agriculture/h2a>.

¹³⁸ Mary Jo Dudley, *These U.S. industries can't work without illegal immigrants*, CBS NEWS (Jan. 10, 2019, 3:55PM), <https://www.cbsnews.com/news/illegal-immigrants-us-jobs-economy-farm-workers-taxes/>.

¹³⁹ Daniel Costa, *Employers increase their profits and put downward pressure on wages and labor standards by exploiting migrant workers*, ECON. POL'Y. INST. (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-immigration-policy/>.

¹⁴⁰ *Id.*

Could it be demonstrated that violations of USMCA-style labor obligations relating to migrant labor are occurring and are in a manner affecting trade or investment?

U.S. total exports of agricultural products to the United Kingdom totaled \$2.0 billion in 2018. Leading domestic export categories include wine & beer (\$261 million), tree nuts (\$197 million), prepared food (\$168 million), soybeans (\$109 million), and live animals (\$90 million).¹⁴¹

So, again, one can ask: “what evidence demonstrates a claim and what evidence overcomes the presumption under the Treaty that it did not affect trade or investment?”¹⁴²

4. Related Issues

a. Dispute Resolution Mechanisms: Process and Remedies

United Kingdom

The EU approach to dispute resolution mechanisms in FTAs, to which the UK has been a party, is to provide an exclusive section for trade and a different one for labor. The labor settlement process is a series of consultations and negotiations, but no penalties or real remedies at the end of the process. This contrasts with the U.S. approach of a unified dispute resolution process including both labor and trade issues with a possible penalty in the end versus the EU approach of having a separate path for each with labor issues not having an enforceable remedy for a violation.¹⁴³ CETA is going through modifications of its ISDS provisions and breaking from the ISDS system and is establishing a multilateral investment tribunal for trade.¹⁴⁴

United States

The USMCA presumes that labor violations affect trade and investment, shifting the burden of proof to the party alleged to have violated USMCA labor provisions to prove otherwise. The State to State dispute settlement provisions of Chapter 31 of the USMCA apply “when a Party considers that an actual or proposed measure of another Party is or would be inconsistent with an obligation of this Agreement or that another Party has otherwise failed to carry out an obligation of this Agreement;”¹⁴⁵ Following a possible choice of forum and consultations, mediation and an arbitration panel may be formed and its final report may include

¹⁴¹ *United Kingdom: Exports*, OFF. U.S. TRADE REPRESENTATIVE, [\(https://ustr.gov/countries-regions/europe-middle-east/europe/united-kingdom#:~:text=U.S.%20total%20exports%20of%20agricultural,live%20animals%20\(%2490%20million\)\)](https://ustr.gov/countries-regions/europe-middle-east/europe/united-kingdom#:~:text=U.S.%20total%20exports%20of%20agricultural,live%20animals%20(%2490%20million)) (last accessed July 1, 2020).

¹⁴² And in this case, one could ask who will lodge the complaint?

¹⁴³ See, Ronald C. Brown, *China-EU BIT and FTA; Building a Bridge on the Silk Road Not Detoured by Labor Standard Provisions*, 29 WAS. INT’L L. J. 61, 112 n.227 (2019).

¹⁴⁴ CETA, *supra* note 56.

¹⁴⁵ USMCA, Art. 31.2(b).

enforceable, economic remedies.¹⁴⁶ Therefore, it is unknown whether the UK will negotiate a unified or a dual dispute resolution system, but for labor, it is most likely to seek to negotiate the dual path without penalties and the issue will be whether the US will prevail with no ISDS and have a unified system of dispute settlement with penalties?

b. Proof of Violation: Alleging and Disproving “in a Manner Affecting Trade or Investment Between the Parties”

The USMCA is instructive in its “determinative footnotes” that lay out the path for finding violations of the Labor Article. The summary conclusion from the multiple explanatory footnotes in Article 23 is that a violation occurs if it is “in a manner affecting trade or investment between the Parties” and “a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise.”

More specifically, the footnotes of the Labor Article provides the “obligations set out in this Article: i. as they relate to the ILO, refer only to the ILO Declaration on Rights at Work;¹⁴⁷ ii. the definition of trade and investment;¹⁴⁸ iii. the “sustained or recurring course of action or inaction” regarding enforcement of labor laws;¹⁴⁹ and iv. “presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise.”¹⁵⁰

One can predict these footnotes will be used in a future US-UK FTA.

¹⁴⁶ USMCA, Art. 31.6, 31.18.2, 31.19.1. The U.S. approach of combining labor and trade issues for dispute settlement paths contrasts with the EU approach of having a separate path for each.

¹⁴⁷ USMCA, Art. 23.3 at note 3. And therefore, not to the more specifically worded obligations of the Conventions.

¹⁴⁸ It reads: “A failure to comply with an obligation under paragraphs 1 or 2 must be in a manner affecting trade or investment between the Parties. For greater certainty, a failure is “in a manner affecting trade or investment between the Parties” if it involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party.” USMCA, Art. 23.3 at note 4, 23.4 at note 8, 23.5 at note 11, 23.7 at note 13.

¹⁴⁹ It reads: “For greater certainty, a “sustained or recurring course of action or inaction” is “sustained” if the course of action or inaction is consistent or ongoing, and is “recurring” if the course of action or inaction occurs periodically or repeatedly and when the occurrences are related or the same in nature. A course of action or inaction does not include an isolated instance or case.” USMCA, Art. 23.5 at note 10.

¹⁵⁰ It reads: For purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise. USMCA, Art. 23.3 at note 5, 23.4 at note 9, 23.5 at note 12, 23.7 at note 14.

IV. ANALYSIS

A. CURRENT STATUS: UNCERTAINTY

1. Pandemic

The impact of the Pandemic on the global economy and the ability of governments and businesses to trade and invest is still unknown as of this date. How this may affect US-UK negotiations for a FTA is uncertain.¹⁵¹ Even if negotiated, will the Parties and businesses be ready to implement it? On the other hand, might it not be better to have the rules of investment and trade in place when and as the threats of the Pandemic recede and global commerce increases? On May 4, 2020, it was reported the “United States and Britain launched formal negotiations on a free trade agreement ..., vowing to work quickly to seal a deal that could counter the massive drag of the coronavirus pandemic on trade flows and the two allies’ economies.”¹⁵² A recent report from Harvard suggested a “full FTA with the US before the summer of 2020 is impossible given the impacts of Covid-19 and roadblocks and risks involved. A ‘mini-deal’, however, is a possibility.”¹⁵³

2. Role of EU: Residual EU Obligations?

Following Brexit, the European Parliamentary Briefing in 2020, summarized the future EU-UK trade relationship as follows.

The withdrawal of the United Kingdom (UK) from the European Union (EU) came into effect on 1 February 2020, [and the] transition period began on the same day and is due to run until the end of 2020. During this period, although no longer part of the EU institutions, the UK remains in the customs union and single market, and within the jurisdiction of the Court of Justice of the EU (with some exceptions). Negotiations during the transition period are aimed at reaching agreements that will shape the future EU-UK relationship in a range of domains, and especially that of trade.

In the Political Declaration accompanying the Withdrawal Agreement, the EU and the UK ‘agree to develop an ambitious,

¹⁵¹ “A free-trade agreement could still be agreed but it would be hard to implement. Even if we were coming to the end of this pandemic by then, businesses will not be prepared.” Lisa O’Carroll, *Brexit talks: who is involved and what is being covered?*, GUARDIAN (Apr. 24, 2020, 1:05AM), <https://www.theguardian.com/politics/2020/apr/24/who-and-what-uk-and-eu-resume-interrupted-brexit-talks-future-relationaship>.

¹⁵² David Lawder & Andrea Shala, *U.S., UK launch trade talks, pledge quick deal as virus ravages global economy*, REUTERS (May 4, 2020, 7:16PM), <https://www.reuters.com/article/us-usa-trade-britain/u-s-uk-launch-trade-talks-pledge-quick-deal-as-virus-ravages-global-economy-idUSKBN22H0E0>.

¹⁵³ Ed Balls, Nyasha Weinberg, Jessica Redmond & Simon Borumand, *Will Prioritizing A UK-US Free Trade Agreement Make or Break Global Britain? Transatlantic Trade and Economic Cooperation through the Pandemic*, HARVARD KENNEDY SCH. M-RCBG ASSOCIATE WORKING PAPER SERIES, No. 136 [May 12, 2020], https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/136_Final_AWP.pdf (last accessed July 1, 2020).

wide-ranging and balanced economic partnership'. However, some major obstacles have surfaced. The UK insists that it is unwilling to submit to EU Court of Justice jurisdiction, and demands autonomy in its regulatory and trade policies. The UK indicates that it seeks a free trade agreement similar to that agreed between the EU and Canada: comprehensive, but very different to the previous relationship. The EU has taken note of the UK objectives, but emphasizes that the deeper the trade agreement, the more UK regulations and standards must align with those of the EU. To the EU, alignment is essential to preserve a level playing field, on the grounds that the EU and UK are close neighboring economies and strongly interconnected. The European Commission's 3 February 2020 recommendation for a Council decision authorizing the opening of negotiations on the future relationship confirms this approach.

In this context, time is critical. The Withdrawal Agreement allows for an extension to the transition period, but the UK Withdrawal Act explicitly prohibits extension. In addition, to allow for ratification, the trade agreement should be ready well ahead of the end of the transition period.... Time constrained negotiation may give rise to a limited economic and trade agreement that covers only priority areas, rather than the ambitious single comprehensive agreement sought under the Political Declaration and Commission recommendation.¹⁵⁴

The important question for the U.S.-UK negotiations will be how much, if any, will the UK still be bound by any residual obligations from laws and institutions of EU, especially regarding EU labor standards which are higher than that of UK and U.S. laws. Again, the answer is uncertain at this time.

3. U.S. Politics on Congressional Approval

The reality of U.S. politics is that a Democratically controlled House of Representatives, in its involvement with the text of the FTA, would be very reluctant to give Republican President Trump a 'win' of a new FTA with the UK. It therefore would be reluctant to finalize the text in the treaty before the issue of Senate consent arose, and before the November Presidential election.¹⁵⁵ Additionally, labor advocates will be pushing hard for even better labor standards more like those in the EU than those in the USMCA, which may slow down and politicize the process of passage.¹⁵⁶

¹⁵⁴ Issam Hallak, *Future EU-UK trade relationship*, European Parliament Think Tank (Feb. 20, 2020), [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2020\)646185](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)646185).

¹⁵⁵ See Mark Landler & Ana Swanson, *About That Much Vaunted U.S.-U.K. Trade Deal? Maybe Not Now*, N.Y. TIMES, (Mar. 2, 2020), <https://www.nytimes.com/2020/03/02/world/europe/uk-us-trade-deal.html>.

¹⁵⁶ See, *US and UK unions call for trade deal that delivers for workers*, TRADES UNIONS CONGRESS (Mar. 13, 2020), <https://www.tuc.org.uk/news/us-and-uk-unions-call-trade-deal-delivers-workers>.

Further, some trade experts hypothesize that while both Johnson and Trump had advertised the trade deal as a top priority, the Johnson administration will likely focus on the domestic economy for the foreseeable future. This and the U.S. politics may force President Trump to focus more on the domestic economy and getting past the economic impacts of the Pandemic.¹⁵⁷

B. GOING FORWARD

In the ongoing negotiations ahead, with all the attendant uncertainties, many think it prudent to wait for the UK-EU separation and possible UK-EU FTA to be completed. In December, 2019, it was reported that the “U.S. and UK have announced a desire to pursue a free trade agreement as soon as the U.K. completes its exit from the EU.”¹⁵⁸ In May 2020, it was announced that the UK and U.S. were to begin negotiations on their FTA.¹⁵⁹ In July 2020, the U.S. stated it would not likely be completed before the November 2020 U.S. presidential elections.¹⁶⁰

The issue to consider is to whose advantage, if anyone’s, is it to complete the U.S.-UK FTA first before knowing the extent of any residual obligations of EU laws and institutions that the UK may retain in its UK-EU trade relationship? This definitely is a debatable point.

V. CONCLUSION

The background in this paper provides a primer for understanding and identifying the variables of some of the more pressing points on labor and employment issues facing the negotiators in the future U.S.-UK FTA. It also can provide for some reflection on the future contents of labor and dispute settlement provisions in a future U.S.-EU FTA (TTIP). As stated earlier, although the future cannot be predicted, it can be prepared for.¹⁶¹

¹⁵⁷ Josh Zumbrun, *New North American Trade Deal Seen as Template for Deals to Come*, WALL STREET J. (Dec. 14, 2019, 5:30AM), <https://www.wsj.com/articles/new-north-america-trade-deal-seen-as-template-for-deals-to-come-11576319401>.

¹⁵⁸ *Id.*

¹⁵⁹ *Britain to Start Trade Talks with U.S. Next Week: The Sun*, REUTERS (May 1, 2020, 10:17AM),

<https://www.reuters.com/article/us-britain-usa-trade/britain-to-start-trade-talks-with-us-next-week-the-sun-idUSKBN22D69H>. At the same time, adding to the uncertainties of the US-UK negotiations, the U.K. is planning a “shock and awe” information campaign to prepare companies for Brexit, bidding to reduce economic disruption when Britain completes its split from the European Union at year-end. Joe Mayes, *U.K. Plans ‘Shock and Awe’ Campaign to Prepare Firms for Brexit*, BLOOMBERG (June 17, 2020 11:26PM) <https://www.bloomberg.com/news/articles/2020-06-17/u-k-plans-shock-and-awe-campaign-to-prepare-firms-for-brexit>.

¹⁶⁰ Shayerah Ilias Akhtar and Rachel F. Fefer, *Brexit and Outlook for a U.S.-UK Free Trade Agreement* (July 8, 2020), <https://fas.org/spp/crs/row/IF11123.pdf>.

¹⁶¹ Nancy Pelosi, the speaker of the House, said that if the UK violates its international agreements [re Northern Ireland], “there will be absolutely no chance of a U.S.-UK trade agreement passing the Congress.” UK’s post-Brexit plan puts trade deal with the EU — and the U.S. — at risk (Sept. 10, 2020), Sylvia Amaro, <https://www.cnbc.com/2020/09/10/brexit-uk-puts-trade-deal-with-the-eu-and-the-us-at-risk.html>.

