

Towards Enforceable Labor Rights in U.S. Free Trade Agreements

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Labor rights provisions in U.S. free trade agreements (FTAs) continue to be an area of enormous controversy and are certain to take center stage as the U.S. moves to re-negotiate several of its most important FTAs in the coming years. In the past, the trend has been for each FTA to include a more elaborate and structured dispute settlement procedure than its predecessor. This Article contends that, amid an emerging academic consensus that FTA labor dispute mechanisms have failed to materially improve workers' rights, a new approach is needed. In particular, this Article uses labor disputes in Peru and Guatemala to diagnose the ailments preventing effective enforcement of FTA labor standards. The Article then examines two more successful approaches—the Generalized System of Preferences and the Cambodian Textiles Agreement—to propose a new, more muscular approach to FTA labor enforcement specifically designed to remedy the institutional failures of existing regimes.

I. INTRODUCTION

During the 2016 Presidential campaign, President Trump promised trade policy more focused on bilateral relationships and 'fair' trade for American workers.¹ Jack Lew, President Obama's Treasury Secretary, sold the Trans-Pacific Partnership using similar economic themes, saying, "high standards that protect workers' rights . . . give U.S. workers and businesses the ability to get a fair share of the global markets."² The policy that Mr. Lew was referring to, and that likely represents one piece of President Trump's agenda, is linking labor standards to market access through free trade agreements ("FTAs").

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1. Al Jazeera News and Agencies, *Donald Trump vows to quit TPP for 'fair trade deals'* (Nov. 22, 2016), <http://www.aljazeera.com/news/2016/11/donald-trump-vows-quit-tpp-fair-trade-deals-161122132615324.html>.

2. All Things Considered, *Treasury Secretary Lew on Global Trade Deals and Corporate Taxation*, NPR (Aug. 31, 2016), <http://www.npr.org/2016/08/31/492125813/treasury-secretary-lew-on-global-trade-deals-and-corporate-taxation>.

However, despite political rhetoric, the mechanisms that currently form the basis of the trade-labor linkage in U.S. FTAs have no discernable impact on the level of workers' rights protection in U.S. trade partner countries. FTAs' labor impotence is concerning not only for those who support protectionist economic agendas but also for those with concerns about basic human rights in global supply chains. The remedy is, theoretically, simple.

To affect labor rights enforcement practices, FTAs must tie trade benefits that matter to trade partners tightly to specific labor-standard enforcement practices. This can be done in a variety of ways. Negotiators could write more specific labor standards, increase the value of trade incentives to those with power, or tighten the causation between violations and sanctions. Unfortunately, in practice, America's suite of ratified FTAs does not effectively remedy violations of workers' basic rights.

This paper explores why U.S. FTAs do not effectively improve on-the-ground labor conditions and proposes some reforms that might make them more effective. Section II begins by examining the basic trade-labor design in the context of two U.S. FTAs, those with Peru and Guatemala. Section III then explores both U.S. and trade-partner motivations underlying the linkage of trade with labor. Section IV examines two alternative models of linking labor with trade, the Generalized System of Preferences and the Cambodian Textile Agreement, to develop a broader perspective on institutional design in American trade policy. Section V combines the analysis into a set of recommendations aimed at improving the efficacy of FTA labor chapters. Section VI concludes.

II. FREE TRADE AGREEMENT LABOR CHAPTERS: PERU AND GUATEMALA

The history of workers' rights provisions in FTAs is marked by a steady ratcheting-up of protections starting in the 1990s and continuing through the present day. However, FTAs only became the linkage method of-choice after attempts at multi-lateral negotiations failed. In the late 1980s and early 1990s, during Uruguay Round negotiations under the auspices of the General Agreement on Tariff and Trade ("GATT"), the international community formed the World Trade Organization ("WTO"). This new organization enjoyed a widely expanded mandate in relation to the GATT, which only covered trade in goods, adding issues like intellectual property and services. However, the new WTO did not include binding agreement on labor rights protections. Although the United States proposed putting labor standards on the Uruguay Round agenda, the proposal was "dropped in the face of near unanimous opposition."³ Thus, workers' rights were left to the International Labor Organization ("ILO"). While the ILO promulgates

3. Ernest H. Preeg, *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System* 4 (1995).

internationally recognized labor standards, it possesses no enforcement mechanism. The ILO's institutional deficit was unfortunate in the eyes of American and European policymakers who thought that, by including labor rights in the trade regime, minimum standards could be enforced via threats to limit valuable market access.

In an effort to overcome the ILO's institutional enforcement deficit, American and European negotiators attempted to include labor rights on the WTO negotiating agenda at both the Singapore conference in 1996 and the Seattle Ministerial in 1999.⁴ However, these efforts were unsuccessful, culminating in a toothless declaration that Members were committed to core labor rights.⁵ Thereafter, both U.S. and European policymakers turned to FTAs as the most promising mechanisms for linking labor with trade to create an enforceable set of international labor standards.⁶ America's first bilateral FTA to include a labor chapter was signed with Jordan in October 2000.

Since then, every U.S. FTA has included a chapter on labor rights in which the parties agree to abide by certain minimum legal standards.⁷ In the Trade Act of 2002,⁸ Congress established labor objectives as part of Bipartisan Trade Promotion Authority.⁹ Its objectives are:

1. To promote respect for workers' rights consistent with the "core labor standards" of the ILO, which are defined in Title 19 U.S. Code, section 3813(6) as:
 - a) The right of association;
 - b) The right to organize and to bargain collectively;
 - c) A prohibition on the use of any form of forced or compulsory labor;
 - d) A minimum age for the employment of children; and
 - e) Acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

4. World Trade Organization, *Labour standards: consensus, coherence, controversy*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (last visited May 13, 2017).

5. See Kevin Kolben, *The New Politics of Linkage: India's Opposition to the Workers' Rights Clause*, 13 *Ind. J. Global Legal Stud.* 225, 242–43 (2006).

6. For a thorough treatment of why preferential trade agreements are the most promising way to link labor with trade, see Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 *Har. Int'l L. J.* 203 (2007).

7. There is a large body of legal and economic literature addressing the benefits and costs of legal harmonization. See, e.g., Katharina Pistor, *The Standardization of Law and its Effect on Developing Economies*, 50 *Am. J. Comp. L.* 97 (2002); Drusilla K. Brown et al., *International Labor Standards and Trade: A Theoretical Analysis*, in Jagdish Bhagwati and Robert Hudec, eds., *Fair Trade and Harmonization: Prerequisites for Free Trade?*, 1 *Econ. Analysis*, 227–80 (1996). Addressing this debate at length is beyond the scope of this paper, which seeks only to explore the most effective legal mechanisms available to advance the stated international labor rights objectives of the United States Congress.

8. Pub. L. 107–210, 116 Stat. 933 (2002) (codified as amended at 19 U.S.C. § 3803).

9. Robert A. Rogowsky and Eric Chyn, *U.S. Trade Law and FTAs: A Survey of Labor Requirements*, U.S. Int'l Trade Commission, *J. Int'l Com. & Econ.* 7 (2007).

2. To seek provisions in FTAs in which parties strive to ensure that they do not weaken or reduce the protections afforded in domestic labor laws as an encouragement for trade.¹⁰
3. To promote universal ratification and full compliance with ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the worst forms of child labor.¹¹

Negotiating in the shadow of the Trade Act's guidance, the United States Trade Representative ("USTR") concluded agreements like the United States-Peru Trade Promotion Agreement ("PTPA"), which entered into force on February 1, 2009.¹² Chapter 17 of the PTPA, touted as the "strongest labor protections ever in an FTA," addresses labor issues by creating a bi-national institutional structure, articulating procedural and substantive commitments, and subjecting the Parties to dispute resolution.¹³

The PTPA establishes a standing Labor Affairs Council ("LAC") and Capacity Building Mechanism ("CBM"). The LAC comprises "cabinet-level or equivalent representatives" who have primary responsibility for overseeing adherence to the Parties' obligations in the Chapter, including coordination and oversight of the CBM.¹⁴ Meanwhile, the CBM formalizes the Parties' commitment to "bilateral or regional cooperation activities on labor issues," including 16 'priorities,'¹⁵ 8 'activities,'¹⁶ and a promise to "consider the views of [the country's] worker and employer representatives."¹⁷

There are three substantive commitments made by the Parties. The first substantive obligation is to "adopt and maintain in [their] statutes and regulations" the ILO's five core labor standards.¹⁸ The second obligation is to neither, "waive or otherwise derogate from . . . [their] statutes or regula-

10. 21 U.S.C. § 2102(a)(7) (2012).

11. 21 U.S.C. § 2102(a)(9) (2012).

12. United States Trade Representative, Peru Trade Promotion Agreement, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa#> (last visited Feb. 19, 2017).

13. United States Trade Representative, *Peru TPA Facts* (2007), https://ustr.gov/archive/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file726_13231.pdf.

14. "1. The Parties hereby establish a Labor Affairs Council (Council) comprising cabinet-level or equivalent representatives of the Parties [. . .] 2. The Council shall: (a) oversee the implementation of and review progress under this Chapter [. . .] (c) prepare reports, as appropriate, on matters related to the implementation of this Chapter and make such reports available to the public [. . .] (e) perform any other function as the Parties may agree." PTPA, *supra* note 12, at Article 17.5.

15. "Fundamental rights at work and their effective application, worst forms of child labor, labor administration, labor inspectorates, alternative dispute resolution, labor relations, occupational safety and health, working conditions, migrant workers, social assistance and training, technology and information exchange, labor statistics, employment opportunities, gender, best labor practices, and issues related to small, medium, and micro-enterprises, and artisans." *Id.*

16. "Technical assistance programs, exchange of official delegations, exchange of information, exchange or development of written guidance, joint education, development of joint research, exchanges on technical labor matters, and exchanges on technology issues." *Id.*

17. PTPA, *supra* note 12, at Annex 17.6.

18. *Id.* at Article 17.2.1.

tions implementing [the five core labor standards].¹⁹²⁰ The third obligation is a promise to “effectively enforce” labor laws.²¹ Meanwhile, procedural guarantees support the effective enforcement of labor laws and can be reduced to: promoting awareness of labor law,²² ensuring access to tribunals and appellate review of tribunal decisions,²³ and ensuring judicial transparency.²⁴

The three substantive commitments are written in deference to both countries’ sovereign power. No obligation requires any specific labor legislation or rule to be adopted, only that the countries’ labor law embody the core labor standards and that any existing law be enforced.²⁵ Additionally, all three obligations are shielded from dispute resolution and enforcement by a ‘minimum contacts’ test whereby “a Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation, or practice in a manner affecting trade or investment between the Parties.”²⁶ The recent panel report on alleged Guatemalan CAFTA-DR violations, discussed in more detail below, elucidated the legal test for “affecting trade . . . between the Parties.”²⁷ It is “focused principally on (1) whether the enterprise or enterprises in question export to CAFTA-DR Parties in competitive markets or compete with imports from CAFTA-DR Parties; (2) identifying the effects of a failure to enforce [labor laws]; and (3) whether these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises.”²⁸ Limiting the scope of dispute resolution to PTPA labor violations that affect trade or investment between the Parties prevents dispute procedures from interfering with domestic labor policy.

The dispute resolution mechanism also defers to national sovereignty. Before bringing a dispute under Chapter 21, titled Dispute Settlement, the Parties must adhere to the process laid out in Article 17.7, “Cooperative

19. Listed in the PTPA as they appear in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up* (1998): “(a) freedom of association; (b) the effective recognition of the right to collective bargaining; (c) the elimination of all forms of compulsory or forced labor; (d) the effective abolition of child labor and, for purposes of this Agreement, a prohibition on the worst forms of child labor; and (e) the elimination of discrimination in respect of employment and occupation.”

20. PTPA, at Article 17.2.2.

21. *Id.* at Article 17.3.

22. “Each Party shall promote public awareness of its labor laws.” *Id.* at Article 17.4.7.

23. “Each Party shall ensure [. . .] appropriate access to tribunals,” *id.* at Article 17.4.1, and “shall provide, as appropriate, that parties to such proceedings have the right to seek review.” *Id.* at Article 17.4.4.

24. Judicial decisions shall be “in writing” and “made available without undue delay.” *Id.* at Article 17.4.3.

25. There is also legal leeway for inadequate enforcement, as “distribution of enforcement resources shall not be a reason for not complying with the provisions of this Chapter.” *Id.* at Article 17.3.1(b).

26. *Id.* at Article 17.2, n. 1.

27. *Id.*

28. Arbitral Panel Established Pursuant to Chapter Twenty, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(A) of the CAFTA-DR: Final Report of The Panel*, at 62–3 (June 14, 2017).

Labor Consultations.”²⁹ The Article mandates at least 60 calendar days of consultations by the LAC, with the goal of arriving at a “mutually satisfactory resolution of the matter,” before the complainant may invoke Article 21. Parties may then initiate further consultations or request intervention.³⁰ Countries may want to proceed to Article 21 consultations after Article 17 consultations because Article 21 allows third parties with “a substantial trade interest in the matter” to participate.³¹ If consultations fail, Parties may petition for an intervention of the Free Trade Commission (“Commission”).³² Mandated to convene within ten days of a request, the Commission is empowered to use “good offices, conciliation, or mediation; or make recommendations,” to resolve the dispute within thirty days.³³ After thirty days,³⁴ Parties may request the formation of an arbitral panel to hear the dispute. A panel will be formed within thirty-six days of such request.³⁵ An initial panel report is due “within 120 days after the last panelist is selected” with a final panel report due “within 30 days” of the initial report.³⁶ If the party complained against is found to be in violation of the PTPA and does not eliminate their non-conformity, the Parties “shall enter into negotiations” within 45 days of receipt of the final report.³⁷ Those negotiations must last for at least 30 days before the complainant may give notice that it is suspending trade benefits.³⁸ These procedures ensure that an ongoing dispute will proceed for a minimum of about 175 days, and possibly much longer, before any trade-related benefits may be revoked.

The dispute resolution process is deferential to national sovereignty in a couple of ways. The cooperative labor consultations cover a broader range of issues than an Article 21 dispute. The Parties may engage in labor consultations “regarding any matter arising under” Chapter 17 through the institutional arrangements established in the PTPA.³⁹ On the other hand, for a dispute to proceed under Article 21, the complainant must believe that the alleged non-conformity results in nullification or impairment of trade benefits to such an extent that the cost of dispute resolution will be recouped. So, for many labor violations, the most that a complainant will be willing to do is engage in consultations, insulating national labor law from international sanctions. Moreover, the fact that dispute resolution proceeds

29. PTPA, at Article 17.7.7.

30. *Id.* at Article 17.6.

31. *Id.* at Article 21.4.3.

32. *Id.* at Article 21.5. The Free Trade Commission is established in Article 20.1 of the PTPA to, among other things, “supervise the implementation of [the PTPA].” *Id.* at Article 20.1.

33. *Id.* at Articles 21.5.4, 21.6.1.

34. Other timelines may apply at the consent of the Parties or if the Commission does not convene. *Id.* at Article 21.6.1(d) & (e).

35. *Id.* at Article 21.9.1(b) & (c).

36. *Id.* at Article 21.13-14.

37. *Id.* at Article 21.16.1.

38. *Id.* at Article 21.16.2.

39. *Id.* at Article 17.7.1.

through multiple rounds of consultations, negotiations, and mediation stretching over, at minimum, six months, allows each government a chance to be heard and to ensure conformity without penalty.

Even if a Party is eventually found to be in violation of its labor obligations such that trade benefits were impaired, the imposition of trade-related sanctions is circumscribed. Trade-related benefits may only be suspended “up to the level the [arbitral] panel has determined . . . or, if the panel has not determined the level, the level the complaining Party has proposed to suspend.”⁴⁰ That level of benefits is meant to be calibrated to what the “complaining Party considers will have an effect equivalent to that of the disputed measure.”⁴¹ On its face, this language might mean that a Party could impose trade sanctions that impose the full retroactive cost of the nullification or impairment on the non-conforming Party in a one-year time period, or perhaps even shorter. However, this language is reminiscent of that in the WTO’s Dispute Settlement Understanding (“DSU”), which limits trade retaliation measures to prospective damages for as long as the losing party maintains its nonconforming measure.⁴² While an arbitral panel convened under the PTPA is not bound by WTO law, panelists are generally drawn from a small community of international law specialists.⁴³ Moreover, a non-conforming Party may pre-empt the revocation of trade-related benefits by acquiescing to payment of “an annual monetary assessment.”⁴⁴ Negotiations over the amount of the annual payments may take up to 40 days and, if the Parties cannot agree on an amount, the losing party defaults. It must then pay an amount equal to 50% of the benefits assessed by the panel or proposed by the complaining Party.⁴⁵ In the end,

40. *Id.* at Article 21.16.4.

41. *Id.* at Article 21.16.2, n. 3.

42. “The level of the suspension of concessions or other obligations authorized by the [Dispute Settlement Body] shall be equivalent to the level of the nullification or impairment.” WTO, Dispute Settlement Understanding, Article 22.4.

43. The Parties nominated eight people: three Americans, three Peruvians, and two non-Party citizens, to act as panelists in future disputes. PTPA, *supra* note 12, at Article 21.7. These potential panelists are required to “have expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements.” *Id.* at Article 21.8. While the phrase, “other matters covered by this Agreement,” might allow for a broad range of panelists, the international arbitral community is quite homogenous. A recent review of investment arbitrator characteristics revealed that most are lawyers, 40% are specialists in public international law, 33% are full-time academics, and 90% are male. David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on Int’l Inv. (2012), <http://dx.doi.org/10.1787/5k46b1r85j6f-en>. While international investment law and international trade law are different substantive areas, the community of lawyers and academics who engage with the topics overlap and the characteristics from one group can be expected to reflect the other. Such a homogenous group of people will share common understandings about what certain legal language, such as that found in PTPA Article 21.16, means for the functional operation of trade sanctions. For a panelist to deviate from such an understanding would require either misunderstanding of dominant trade law thought or disagreement with the way international relations are structured, and some level of personal fortitude since deviation for the norm will undoubtedly be criticized.

44. PTPA, *supra* note 12, Article 21.16.6.

45. *Id.*

any payments or benefit suspensions “are intended as temporary measures pending the elimination of any non-conformity or nullification or impairment.”⁴⁶ These protections—prospective damages limited to on-going non-conformity and a default annual payment—limit the impact that an adverse panel ruling can have on either Party.

The text and structure of the complaint procedure in the PTPA was largely a copy of an FTA completed only a few years earlier, the Dominican Republic-Central American Free Trade Agreement (“CAFTA-DR”). Therefore, the shortcomings of this dispute resolution design can be seen in the recently concluded dispute between the United States and Guatemala (“Guatemala-Labor”). Guatemala is notoriously dangerous for unionists. Union organizers and members suffer violent oppression,⁴⁷ including torture and murder.⁴⁸ The International Trade Union Confederation has called Guatemala “[t]he most dangerous country to be a trade unionist.”⁴⁹ On April 23, 2008, armed with clear violations of labor rights, the American Federation of Labor-Congress of Industrial Organizations (“AFL-CIO”) and six Guatemalan worker organizations⁵⁰ submitted allegations to the United States Department of Labor (“DoL”).⁵¹ DoL completed its investigation on January 16, 2009. Despite egregious human rights violations, including two specifically alleged murders, DoL did “not recommend requesting” formal dispute resolution procedures, which would have begun with “consultations pursuant to Article 16.6.1 of the CAFTA-DR.”⁵²

However, American agencies did continue to monitor the situation in Guatemala and eventually, in July 2010, requested consultations pursuant to Article 16.6.1.⁵³ American reticence to initiate the formal dispute resolution process might have reflected caution at utilizing an untested mechanism. The establishment of formal consultations under CAFTA-DR was the

46. *Id.* at Article 21.16.9.

47. Lance A. Compa & Jeffrey S. Vogt, *Labor rights in the generalized system of preferences: A 20-year review*, 22 *Comp. Lab. L. & Pol’y J.* 199, 212–15 (2001).

48. International Labor Organization, *Follow-up to the Conclusions of the Committee on the Application of Standards (International Labour Conference, 100th Session, June 2011)* (2012), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2698648,102667,Guatemala,2011.

49. International Trade Union Confederation, *Countries at Risk: Violations of Trade Union Rights* (2013), <http://www.ituc-csi.org/countries-at-risk-2013-report-on>.

50. The six Guatemalan organizations were the: Union of Port Quetzal Company Workers, Union of Izabal Banana Workers, Union of Int’l Forzen Products, Inc. Workers, Coalition of Avandia Workers, Union of Frito Company Workers, and Federation of Food and Similar Industries Workers of Guatemala.

51. AFL-CIO, *Public Submission to the Office of Trade & Labor Affairs (OTLA) Under Chapters 16 (Labor) and 20 (Dispute Settlement) of the Dominican Republic – Central America Free Trade Agreement (DR-CAFTA): Concerning the Failure of the Government of Guatemala to Effectively Enforce its Labor Laws and Comply with its Commitments Under the ILO Declaration on Fundamental Principles and Rights at Work* (2008), p vi; <http://www.dol.gov/ilab/reports/pdf/GuatemalaSub.pdf>

52. U.S. Department of Labor, *Public Report of Review of Office of Trade and Labor Affairs U.S. Submission 2008-01 (Guatemala)* (2009), <https://www.dol.gov/ilab/reports/pdf/20090116Guatemala.pdf>

53. U.S. Department of Labor, *Submissions under the Labor Provisions of Free Trade Agreements: Current Status: Review of Submissions*, <https://www.dol.gov/agencies/ilab/our-work/trade/fta-submissions>

first time that a labor rights case was ever brought under a U.S. FTA.⁵⁴ Consultations advanced to arbitration in August 2011.⁵⁵ Arbitral proceedings were then suspended as the Parties negotiated an Enforcement Plan. The final Enforcement Plan, signed on April 26, 2013 by American Ambassador Miriam E. Sapiro and Guatemalan Minister of Economy Sergio de la Torre Gimeno, included specific and time-limited Guatemalan obligations relating to: Ministry of Labor funding, Ministry of Labor enforcement power, judicial transparency, and police cooperation with labor investigations, as well as a number of other reforms.⁵⁶ Unfortunately, lack of progress prompted U.S. Trade Representative Michael Froman to announce, in September 2014, that the United States was restarting arbitral proceedings: “Our goal in taking action today remains the same as it has always been: to ensure that Guatemala implements the labor protections to which its workers are entitled. Litigation is a means toward that goal, not an end in itself.”⁵⁷ Those arbitral proceedings finally ended, more than two years after they restarted, with a panel report on June 26, 2017 that found no violations of CAFTA-DR’s labor provisions.⁵⁸

The Guatemala-Labor panel report highlights some of the shortcomings in the FTA’s dispute resolution process. In its complaint, the United States alleged (1) that Guatemala failed to protect union members and (2) that Guatemala failed to conduct proper inspections in response to workers’ complaints.⁵⁹ The panel found “that Guatemala has failed to effectively enforce labor laws . . . with respect to 74 workers at eight worksites.”⁶⁰ Yet, the ‘minimum contacts’ test ultimately limited the number of potential CAFTA-DR violations to Guatemala’s failure to enforce labor laws at only one of those eight worksites.⁶¹ Even that potential violation did not meet CAFTA-DR’s legal burden because it did not constitute, in the panel’s view, “a sustained or recurring course of inaction.”⁶² In sum, the United States failed to prove any Guatemalan violations of CAFTA-DR,⁶³ despite a

54. Gerda van Roozendaal, *The Diffusion of Labour Standards: The Case of the US and Guatemala*, 3 *Politics and Governance* 18, 26 (2015).

55. Bureau of International Labor Affairs, *Submissions under the Labor Provisions of Free Trade Agreements: Current Status: Review of Submissions*, <https://www.dol.gov/agencies/ilab/our-work/trade/fta-submissions> (last visited May 13, 2017).

56. U.S. Department of Labor, *Mutually Agreed Enforcement Action Plan between the Government of the United States and the Government of Guatemala* (“Enforcement Plan”) (2013), <https://www.dol.gov/ilab/reports/pdf/0413GuatEnforcementPlan.pdf>

57. United States Trade Representative, *United States Proceeds with Labor Enforcement Case Against Guatemala* (2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/September/United-States-Proceeds-with-Labor-Enforcement-Case-Against-Guatemala>.

58. See generally Arbitral Panel, *supra* note 28.

59. *Id.* at 71.

60. *Id.* at 143.

61. *Id.* at 167.

62. *Id.* at 169.

63. *Id.* at 201.

large body of evidence collected over many years that Guatemalan workers suffer both labor and human rights abuses.⁶⁴

Dispute resolution procedures, potentially lengthy as written, obviously risk significant additional delay when politics drive decision-making. In Guatemala-Labor, the Guatemalan government attempted to resolve some of the alleged labor violations as early as 2008. DoL and USTR were presented with a hard choice. Consultative resolution and capacity-building were undoubtedly the preferable means to improve Guatemalan working conditions, since punitive fines risk harming the very workers that CAFTA-DR's labor chapter purportedly protects.⁶⁵ Decisions about when to transition from trading-partner as collaborator to trading-partner as dispute adversary are not simple and are subject to political influence.⁶⁶ Political considerations probably played a role in the U.S.'s decision to monitor the situation when it seemed like the Guatemalan government was addressing concerns in the initial AFL-CIO complaint, as well as in the course-reversal when USTR suspended arbitral proceedings in favor of the Enforcement Plan.⁶⁷

A complaint filed with DoL under the PTPA is undergoing a similar review process to Guatemala-Labor. The original submission was filed on July 23, 2015 by six labor organizations.⁶⁸ DoL released a public report in response to the submission on March 18, 2016 finding that Peru "has failed to fulfill its commitments under the PTPA Labor Chapter."⁶⁹ The DoL report included six specific recommendations for the Government of Peru to implement, and concluded that the U.S. government "will assess any such progress by the [Government of Peru] within nine months and thereafter, as appropriate."⁷⁰ The assessment was subsequently published on December 16, 2016. In two pages, it noted some progress and committed the relevant U.S. agencies to "monitor and assess progress" over the next six

64. *E.g.*, *supra* notes 47, 48, & 60.

65. Amy Luinstra, *Labor Standard and Trade* 13 (2004) ("Most of the economics literature which discusses linking trade and labor standards argues that trade sanctions do not necessarily advance the cause of improving labor standards, and in many cases, risk hurting the group intended to benefit.").

66. van Roozendaal, *supra* note 54, at 26 (arguing that President Obama asked for the initiation of formal CAFTA-DR labor consultations as a political signal to Congress).

67. Council on Hemispheric Affairs, *Obama's Hard Stance on Guatemalan Labor: A Monumental Step for Labor Rights or Mere Political Maneuvering?* (2010), <http://www.coha.org/obama%E2%80%99s-hard-stance-on-guatemalan-labor-a-monumental-step-for-labor-rights-or-mere-political-maneuvering/>.

68. The International Labor Rights Forum, Peru Equidad, General Trade Union Coordinating Body of Peru, National Federation of Textile Workers of Peru, Federation of Workers in the Textile Industry in Peru, and National Federation of Agricultural Workers. *Public Submission to the Office of Trade and Labor Affairs Under Chapters 17 (Labor) and 21 (Dispute Settlement) of the Trade Promotion Agreement Between the United States and Peru Regarding the Failure of the Peruvian Government to Comply with the Labor Standards Included in the United States-Peru Trade Promotion Agreement* (2015), https://www.dol.gov/ilab/media/pdf/PTPA%20submission_July%2023%202015_English%20translation.pdf.

69. U.S. Department of Labor, *Public Report of Review of U.S. Submission 2015-01 (Peru)*, at 16 (2016), https://www.dol.gov/ilab/reports/pdf/Public_Report_of_Review_of_US_Submission_2015-01.pdf.

70. *Id.* at 19.

months.⁷¹ It remains to be seen whether the Government of Peru will make meaningful progress, there has been no follow-up report for the DoL and, meanwhile, workers in Peru continue to suffer labor rights abuses.⁷²

Procedural delays and political headwinds are not the only shortcomings with contemporary FTA labor linkages. The preceding analysis assumes that the initial complaint is accepted for review and that recommendations are made. This is not always the case. For example, as of April 2003 there had been sixteen submissions to the U.S. government alleging North-American Free Trade Agreement (“NAFTA”) labor violations.⁷³ Four were denied review, only nine resulted in public reports, and seven advanced to consultations.⁷⁴ As of 2009, none of the thirty-two NAFTA labor cases had ever reached arbitration or resulted in trade sanctions.⁷⁵ Ten were declined for review, nine resulted in no further action, and the others ended with some level of bilateral or unilateral remedial action, prompting some to call NAFTA’s labor protections “toothless.”⁷⁶ Meanwhile, American trading partners’ enforcement of labor rights, especially in Latin America, remains mixed.⁷⁷

Moreover, the level of sanctions available in FTAs may be insufficient to induce improvements in labor conditions, even after sanctions are imposed. For example, CAFTA-DR Chapter 20, Dispute Resolution, limits trade retaliation to US\$15 million annually.⁷⁸ US\$15 million was less than one-half the dollar value of one percent of Guatemalan exports to the United States in 2014.⁷⁹ In the PTPA, no such penalty limit exists. As discussed, PTPA sanctions may match but not exceed trade-related harm. Unfortunately, the trade-related harm of a particular labor-related abuse may still be insufficient to overcome the labor law-and-enforcement preferences of a country like Peru.

71. U.S. Department of Labor, *First Periodic Review of Progress to Address Issues Identified in the U.S. Department of Labor’s Public Report of Review of Submission 2015-01 (Peru)* (2016), <https://www.dol.gov/sites/default/files/documents/ilab/Peru%20Review%20Statement.pdf>.

72. See, e.g., International Labor Organization, *Magnitud y Características del Trabajo Infantil en Perú: Informe 2015* (2016), http://www.ilo.org/lima/publicaciones/WCMS_534921/lang—es/index.htm.

73. Robert M. Stern, *Labor Standards and Trade Agreements*, Research Seminar in Int’l Economics, Discussion Paper No. 496, at 15 (2003).

74. *Id.*

75. Kimberly A. Nolan Garcia, *The Evolution of United States-Mexico Labor Cooperation (1994-2009): Achievements and Challenges*, 39 *Pol. & Pol’y* 91, 99 (2011).

76. *Id.* at 98–9.

77. Moonhawk Kim, *Ex Ante Due Diligence: Formation of PTAs and Protection of Labor Rights*, *Int’l Studies Quarterly* 704, 713–14 (2012).

78. van Roozendaal, *supra* note 54, at 21.

79. Guatemalan exports to the United States were US\$4.32 billion in 2014, consisting primarily of bananas, gold, precious metals, coffee, and knit sweaters. Observatory of Economic Complexity, MIT Media, *What Does Guatemala Export to the United States?* (2014), <http://atlas.media.mit.edu/en/>.

These examples demonstrate why labor provisions in U.S. FTAs are not driving *ex post* improvements in labor practices of signatory countries.⁸⁰ They are indicative of the broader failure of the dominant system of FTA trade-and-labor linkages to effectively enforce a labor rights baseline. Evidence suggests that labor standards as they are currently incorporated into U.S. trade agreements do not result in material improvements for workers in U.S. trading-partner countries.⁸¹

Globally, FTAs have not produced an inspiring track record of worker protection success, especially in comparison with other approaches. Advocates for coercive trade-and-labor linkages, such as Hafner-Burton, give examples of developed country trade-linkages driving improvements in workers' rights protections.⁸² However, none of these examples include the use of FTA dispute resolution mechanisms.⁸³ There are some instances in which European FTAs have been invoked to cajole improvements by their trade partners through consultations.⁸⁴ This evidence leads some to conclude that the remedy to U.S. impotence is more active engagement with the mechanisms built into its own FTAs. As the thinking goes, U.S. FTA design is good enough to coerce trading partners when it is in U.S. interests to enforce the labor chapter, and any failure to change behavior before that time is not a reflection on the design of the agreements so much as the political choice of successive administrations.⁸⁵ However, "when influence does occur, it is modest."⁸⁶ FTAs, at best, "provide incentives for small, incremental changes in some policies and practices."⁸⁷ Some might think that these incentives are sufficient, especially since FTAs are simply one tool in the international relations kit. But in the face of labor rights abuses like unpunished murder for union activities, it seems appropriate to re-examine this tool in particular, because it is a major foreign policy mechanism developed specifically to repair failing labor structures.

80. *Ex post* labor practice improvements are those made after signing an FTA. This is distinguished from *ex ante* improvements, where a country improves their labor conditions prior to signing an FTA. For information about *ex ante* improvements by U.S. trading partners, see Kim, *supra* note 77, at 716.

81. Jean-Marc Siroën & David Andrade, *Regional Trade Agreements and Diffusion of International Labour Standards*, Asian Law & Economics Association 12th Annual Conference (2016), http://aslea.org/program2016/2B_Siroen.pdf; Angel Torres, *A Wishful Thought: Enforceability and Avoidance of Labor Provisions in Foreign Trade Agreements*, 20 *Law & Bus. Rev. Am.* 617, 645 (2014); Isao Kamata, *Labor Clauses in Regional Trade Agreements and Effects on Labor Conditions: An Empirical Analysis*, Discussion Paper No. E-14-019 (2015), <http://www.ide.go.jp/English/Publish/Download/Dp/pdf/609.pdf>; Isao Kamata, *Regional Trade Agreements with Labor Clauses: Effects on Labor Standards and Trade*, La Follette School Working Paper No. 2014-002 (2014), http://www.lafollette.wisc.edu/images/publications/workingpapers/kamata2014-002_A4.pdf.

82. Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, *Int'l Org.* 593, 609 (2005).

83. *Id.*

84. Emilie M. Hafner-Burton, *Forced to be Good: Why Trade Agreements Boost Human Rights* 154–60 (2009).

85. Torres, *supra* note 81, at 632–35.

86. Hafner-Burton, *supra* note 84, at 160.

87. *Id.*

Unfortunately, the failure of FTAs to drive *ex post* improvements is not unexpected from the perspective of human rights scholars.⁸⁸ States that do not enforce basic human rights, construed in the U.S. FTA case as fundamental worker rights, prefer the status quo.⁸⁹ Reforming human rights practices and ending repressive behavior usually requires “hard” laws that create binding obligations through precise rules and enforceable obligations.⁹⁰ This is in contrast to the “soft” law of norms, joint declarations, and diplomatic exhortation. The challenge, then, is to design FTA labor chapters that include sufficient incentives to raise the cost of committing labor abuses, such that actors in trade partner countries find it in their best interest to comply.

Given the apparent failure of current FTA labor chapter design, U.S. negotiators should design different incentives and institutions in future FTA labor chapters to make the commitments therein more effective. There are some examples of U.S. trade-and-labor links that have been more successful at driving *ex post* improvements in labor practices, such as the Generalized System of Preferences (“GSP”) and the US-Cambodia Bilateral Textile Agreement (“Textile Agreement”), which can provide useful insights for FTA design. But first, to figure out how best to design FTA labor provisions, we must examine the motivations behind U.S. FTA negotiations.

III. MOTIVATIONS FOR LABOR STANDARDS AND REFORM

The literature identifies two reasons the United States advocates and purports to enforce international labor standards: economic self-interest and satisfying normative concerns for human wellbeing.⁹¹

Arguments advanced in favor of including labor rights provisions to protect domestic economic interests, commonly heard in political rhetoric,⁹² are grounded in the concern that developing countries gain a comparative advantage by violating international labor rights. In doing so, those countries erode not only labor rights but also labor’s bargaining power vis-à-vis global business.⁹³ The downward pressure on wages affects workers in advanced economies, who then view liberalized trade as more of a threat than

88. Hafner-Burton, *supra* note 82, at 594.

89. “Prefer” in this context refers to individual actors’ incentives, institutional design, and circumstances that drive policymaking decisions.

90. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *Int’l Org.* 421–56 (2000); Hafner-Burton, *supra* note 82, at 594–95.

91. Kevin Banks, *Trade, Labor and International Governance: An Inquiry Into The Potential Effectiveness Of The New International Labor Law*, 32 *Berkeley J. Emp. & Lab. L.* 45, 62–72 (2011); United States. Cong. Senate. Finance Committee. Hearing on US Trade Policy: The China Question Mar. 27, 2007. 110th Cong. 1st sess. Washington: GPO, 2007 (statement of Jagdish Bhagwati).

92. See All Things Considered, *supra* note 2.

93. See Anita Chan & Robert J. Ross, *Racing to the bottom: international trade without a social clause*, 24 *Third World Q.* 1011 (2003).

an opportunity.⁹⁴ Labor rights standards in trade agreements thus level the playing field between advanced-economy workers who enjoy high workplace standards and developing-country workers who do not, or cannot, demand such standards.

Empirical evidence supporting this proposition is mixed. Countries may gain comparative advantages by shirking some labor rights,⁹⁵ but the net effect might still harm national welfare.⁹⁶ Additionally, exporting industries often foster better working conditions than domestic industries in the same country, and many exporters only invest in a country once working conditions meet a suitable minimum standard.⁹⁷ Regardless of the empirical uncertainty, protectionism plays an important role in political rhetoric and policy discussion.⁹⁸

Normative concerns for human wellbeing are still valid and play an important role in policy-making. These arguments for trade-labor links generally focus on the ILO's core labor standards. The fundamental claim is that "some set of labor rights are human rights that exist independently of national boundaries."⁹⁹ If one accepts this claim, it suggests that, since abuses continue to be perpetuated in maquiladora plants in Mexico,¹⁰⁰ mines in Peru,¹⁰¹ and ports in Guatemala,¹⁰² the United States should have a functional mechanism in place that it can use to coerce compliance.

FTA labor enforcement does not further the normative goal of improved workers' rights because there is little-to-no evidence of successful enforcement. In light of these findings we ask: what mechanisms should the

94. Jeffrey M. Jones, *Americans Shift to More Positive View of Foreign Trade*, Gallup (2013), <http://www.gallup.com/poll/160748/americans-shift-positive-view-foreign-trade.aspx>.

95. Matthias Busse, *Do Labor Standards Affect Comparative Advantage in Developing Countries?*, 30 *World Dev.* 1921 (2002).

96. Kamata, *Regional Trade Agreements*, *supra* note 81, at 7.

97. Drusilla K. Brown, et al., *Labor Standards and Human Rights: Implications for International Trade and Investment*, IPC Working Paper Series No. 119 at 35–6 (2011), <http://ipc.umich.edu/working-papers/pdfs/ipc-119-brown-deardorff-stern-labor-standards-human-rights-international-trade-investment.pdf>; *see also* David Kucera, *International Labour Standards and Foreign Direct Investment*, 141 *Int'l Lab. Rev.* 31–69 (2002).

98. *See* David Lawder et al., *Trump adviser: TPP 'dead,' will move quickly on bilateral trade deals*, Reuters (Jan. 13, 2017), http://www.reuters.com/article/us-usa-trump-trade-adviser-idUSKBN14X1X8?FeedType=RSS&feedName=businessNews&utm_source=Feedburner&utm_medium=feed&utm_campaign=feed%3A+reuters%2FbusinessNews+%28Business+News%29&utm_content=google+Feed+fetcher.

99. Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 *Cal. L. Rev.* 885, 892 (2003).

100. Kimberly A. Nolan Garcia, *Transnational Advocacy and Labor Rights Conditionality in the International Trading Order*, Dissertation, Univ. N.M. (2009) (describing positive local-level effects of NAALC dispute procedures, such as securing severance pay, while noting that many workers were blacklisted from ever working again).

101. Barbara Fraser, *Tarnished Gold: why Peru's forced labor mining matters to the US*, *The Guardian* (Oct. 16, 2013), <https://www.theguardian.com/sustainable-business/peru-gold-mining-forced-labor>.

102. United States Trade Representative, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, Initial Written Submission of the United States 11–12 (Nov. 3, 2014), https://ustr.gov/sites/default/files/US%20sub1.fin_.pdf.

United States employ in FTA design to strengthen the impact of labor commitments?

The United States is in a strong position to change the incentive structure for governments and businesses that currently do not enforce internationally recognized labor standards. With the world's largest consumer market¹⁰³ and economy,¹⁰⁴ the U.S. is a coveted market for foreign producers. The importance of access to American markets means that even repressive governments will sign trade agreements with enforceable labor standards.¹⁰⁵ Such power means that U.S. trade negotiators have the luxury of designing trade agreements that are favorable to the U.S. interests, including its interest in enforceable labor standards.

IV. ALTERNATIVE MODELS: GSP AND TEXTILES

Any reforms to the United States' links between trade and labor must strike a fine balance: proposals must support America's twin goals of economic growth and normative leadership while also meeting trading partners' economic and normative concerns. At the same time, reforms must also be sufficiently deferential to national sovereignty to be palatable to those who are worried about unelected international lawyers, foreign companies, or foreign governments controlling national policy.¹⁰⁶ These goals are often in tension. For example, trade negotiators might advance national sovereignty by limiting the enforceability of dispute resolution outcomes, but doing so might jeopardize the ability of an agreement to strengthen the protection of workers' rights. Other trade-related programs that have a track record of systematically improving labor conditions sometimes struggle to balance all of these goals successfully. Nevertheless, a few existing regimes do show promise.

One widely discussed program is the GSP. The GSP is an exception, articulated in the WTO's "Enabling Clause," to the WTO's most favored nation ("MFN") principle. The Enabling Clause allows a country to implement "generalized, non-reciprocal and non-discriminatory preferences" for developing countries that are "differential and more favorable" than the granting country's standard MFN commitments.¹⁰⁷ Not only are Enabling

103. The World Bank, *Household final consumption expenditure (current US\$)*, http://data.worldbank.org/indicator/NE.CON.PRVT.CD?year_high_desc=true.

104. World Development Indicators database, World Bank, 1 February 2017. <http://databank.worldbank.org/data/download/GDP.pdf>.

105. Hafner-Burton, *supra* note 82, at 608–09 (presenting evidence against the concern that states with repressive governments will not join enforceable labor rights regimes in FTAs).

106. See, e.g., Jonathan Weisman, *Trans-Pacific Partnership Seen as Door for Foreign Suits Against U.S.*, *New York Times* (Mar. 25, 2015), https://www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html?_r=0.

107. General Agreement on Tariffs and Trade, *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*; Decision 28 Nov. 1979, L/4903 (Dec. 3, 1979), http://www.wto.org/gatt_docs/English/SULPDF/90970166.pdf.

Clause programs unidirectional, but the implementing country also gets to set the terms. In the case of the United States, the GSP implementing legislation provides that countries that have not taken or are “not taking steps to afford internationally recognized worker rights”,¹⁰⁸ or “has not implemented its commitments to eliminate the worst forms of child labor”,¹⁰⁹ shall not be eligible beneficiaries.¹¹⁰ USTR enforces these requirements through country reviews that are initiated either by private petitioners or *ex officio*. Private petitions are common and sometimes lead to the revocation of benefits. For example, Bangladesh had its GSP benefits suspended in September 2013 based on a review instigated by an AFL-CIO petition alleging worker rights violations.¹¹¹ USTR exercises its *ex officio* powers less frequently, but still may review conditions applicable to the current beneficiary nations and potential beneficiaries. In April 2013 USTR requested public comments and announced a public hearing to review whether Myanmar and Laos should be granted GSP preferences.¹¹² Although the GSP had expired before USTR made a final determination, industry groups and activists lined up to discuss the topic.¹¹³

The linkage between trade preferences and worker rights in the GSP is very different from the linkage implemented in contemporary FTAs. GSP preferences are directly linked to tariff preferences without any *de jure* intermediate consultations: countries either do or do not qualify for preferential treatment. By contrast, FTAs interpose multiple rounds of consultations and dispute resolution before there is any effect on tariffs. Therefore, the GSP’s revocation of trade preferences is less attenuated from the fact-finding process than the FTA enforcement process. Attenuation reduces trading partner incentives to reform labor law enforcement quickly, if at all.

Additionally, penalties for non-compliance with American norms or demands are much higher in the GSP. When trading partners fail to meet the

108. Internationally recognized worker rights is defined for the GSP purposes to include: “(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children, and a prohibition on the worst forms of child labor.” 19 U.S.C. § 2467(4).

109. Worst forms of child labor is defined for the GSP purposes as: “(A) all forms of slavery or practices similar to slavery, such as the sale or trafficking of children, debt bondage and serfdom, or forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict; (B) the use, procuring, or offering of a child for prostitution, for the production of pornography or for pornographic purposes; (C) the use, procuring or offering of a child for illicit activities in particular for the production and trafficking of drugs; and (D) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, or morals of children.” 19 U.S.C. § 2467(6).

110. 19 U.S.C. § 2462(g)-(h).

111. United States Trade Representative, Results of the 2015/2016 Generalized System of Preferences (GSP) Annual Review, <https://ustr.gov/sites/default/files/Outcomes-2015-2016-GSP-Annual-Review.pdf>.

112. Vivian C. Jones, *Generalized System of Preferences: Background and Renewal Debate*, Congressional Research Service 12 (2015), <http://fas.org/sgp/crs/misc/RL33663.pdf>.

113. *Id.*

GSP standards they lose, or fail to gain, all of their trade benefits.¹¹⁴ By contrast, U.S. FTAs impose formidable caps on damages. In the context of CAFTA-DR, the strict damages limitation imposed on labor violation disputes means that incentives for the Guatemalan government to improve enforcement are even lower when compared to the GSP than they are relative to the PTPA. Even in the PTPA, where full trade impairment may be recouped, incentives for government reform are circumscribed by the scope of cognizable violations and their causal impact on trade.

The GSP also gets better results than FTAs. According to Compa and Vogt in their 20-year review of the GSP, “13 countries have been suspended from GSP beneficiary status,” and “[s]everal of the suspended countries undertook labor reform measures to meet GSP requirements and thus regained GSP benefits.”¹¹⁵ Their review does not include Bangladesh, which had its beneficiary status revoked 12 years after their paper was published. The examples they cite include Chile, which lost its GSP beneficiary status in February 1988 after years of marginalization and outright destruction of workers’ rights under General Pinochet’s regime.¹¹⁶ Revocation of GSP benefits undermined support among Chile’s economic elites for General Pinochet’s authoritarian yet free market government, contributing to a return to democracy and reform of the labor code.¹¹⁷ As they acknowledge, Chile’s transition from authoritarian to democratic rule was a complicated process in which the revocation of GSP benefits played a minor role.¹¹⁸ The argument and evidence that the GSP played any perceivable role in Chile’s transition highlights the necessity for mechanisms tying labor rights to trade preferences that invoke major benefits and therefore provide large incentives to powerful actors.

Importantly, from the perspective of American policymakers, it is critical to develop institutional mechanisms through FTAs that essentially impose unidirectional requirements on trading partners in exchange for increased market access. The GSP is a paradigmatic program in this regard. It is “a limited program affecting a small portion of total U.S. trade,”¹¹⁹ that proved coercive on trading partners under certain circumstances.¹²⁰

A separate, yet credible critique of the Chilean GSP example is that the revocation of benefits still took quite some time in the face of flagrant labor

114. A common criticism of American revocation of Bangladeshi GSP preferences after the Rana Plaza disaster was that textiles were not included in the GSP, and therefore the wrong industries were targeted with trade sanctions. Although complete GSP revocation may be a blunt policy tool, its use does create internal advocacy groups (i.e., those who are ‘unfairly’ punished) who will push for better enforcement in the offending industry.

115. Compa & Vogt, *supra* note 47, at 209.

116. Carol Pier, *Labor Rights in Chile and NAFTA Labor Standards: Questions of Compatibility on the Eve of Free Trade*, 19 Comp. Lab. L. & Pol’y J. 185, 192 (1998).

117. Compa & Vogt, *supra* note 47, at 212.

118. *Id.* at 211-12.

119. *Id.* at 204.

120. *Id.* at 204-06.

and human rights violations. The AFL-CIO and United Electrical, Radio, and Machine Workers of America filed their first Chile-related petitions with the USTR in 1986.¹²¹ The USTR then monitored the situation in Chile for over a year before revoking GSP benefits in 1988.¹²² Meanwhile, labor rights in Chile had been systematically undermined since General Pinochet's rise to power in 1973; they were formally put on notice for elimination in the 1979 Labor Plan; and they were finally eliminated in the 1987 Labor Code.¹²³ The delay between the filing of complaints and trade-related repercussions is the function of an institutional-design aspect of the GSP system that also exists in contemporary FTAs. The U.S. government outsourced initial monitoring to third-parties, and then retained control over the final determination of the existence of violations. This system relied on unions and human rights groups to monitor the situation in Chile and compile a case, which was then submitted to USTR for review and further monitoring before anything could be done. As Compa and Vogt note, the 3-year lag between the initial petition and suspension of trade benefits in the Chilean case is quite short relative to other preference reviews.¹²⁴ The potential for delay is even worse in modern FTAs because in the GSP framework USTR could act immediately to revoke benefits after it completed its own review of the facts. Under modern FTAs, USTR may only enter into consultations and initiate dispute resolution after an internal assessment is complete.

As a general proposition, any U.S. labor enforcement mechanism that requires a federal agency to make explicit findings will involve political considerations. Agencies will necessarily include, and sometimes make decisions based primarily upon, the domestic and international political concerns of the administration, rather than objective facts. Trade partners often recognize this reality. Pinochet's government tried to assure the USTR that "killing, jailing, and harassment of union leaders would be halted,"¹²⁵ making it more difficult for USTR to revoke trade benefits from a country that had, at minimum, nominal support among American economic constituencies because of its free market orientation. Similarly, in a modern context, one reason that the Guatemalan dispute dragged on for so many years is that the government continuously presented evidence to USTR and DoL that it was trying to improve labor rights enforcement. Compa and Vogt forward this same political-economy theory for why USTR suspended GSP benefits for Belarus, a relatively tiny trade partner, in 2000, and yet consistently refused to even consider petitions about Thailand's labor and human rights abuses, which might have resulted in the suspension of trade

121. *Id.* at 211.

122. *Id.*

123. See Pier, *supra* note 116, at 192.

124. Compa & Vogt, *supra* note 47, at 233.

125. *Id.* at 211.

benefits to a partner who exported 100 times more goods than Belarus to the United States.¹²⁶

Another successful program is the Textile Agreement. The trade deal was signed between Cambodia and the United States in 1999 to address a range of worker and human rights abuses in Cambodia's textile industry.¹²⁷ These abuses were the function of a Cambodian government unable to enforce laws that were facially in conformance with international norms.¹²⁸ The basic structure of the original agreement provided that the American government would "make a determination . . . whether working conditions in the Cambodia textile and apparel sector substantially comply with" internationally recognized core labor standards, "through the application of Cambodian labor law."¹²⁹ If such a determination was made, then the quota for Cambodian exports to the United States could be increased by up to fourteen percent, providing a positive incentive for Cambodian factory owners to comply.¹³⁰ Conditions were monitored by the ILO, an external and independent body.¹³¹ Additionally, the ILO provided technical assistance to Cambodian labor officials.¹³² Based on ILO reports and American determinations of Cambodian progress the United States increased Cambodian textile quotas by five percent in 2000 and twelve percent in 2003.¹³³

The linkage between trade preferences and workers' rights in the Textile Agreement provides several lessons to incorporate into America's FTA playbook. First, outsourcing monitoring to the ILO resulted in both positive results and generated criticism.

On the plus side, information collection by the ILO was institutionalized through dedicated teams of ILO inspectors. Those inspectors, who were trained professionals, were members of an organization whose *raison d'être* is monitoring labor conditions around the world.¹³⁴ This is different from the standard FTA model where primary monitoring is outsourced to unions, such as the AFL-CIO, or non-governmental organizations ("NGO") that have other core missions, such as representing their own membership, and therefore limited time and resources to devote to monitoring. Another positive aspect of ILO monitoring is that the institutionalized reporting re-

126. *Id.* at 209–12.

127. See generally John Hall, Note, *Human Rights and the Garment Industry in Contemporary Cambodia*, 36 *Stan. J. Int'l L.* 119 (2000).

128. Kevin Kolben, *Trade, Monitoring, and the ILO: Working To Improve Conditions in Cambodia's Garment Factories*, 7 *Yale Hum. Rts. & Dev. L.J.* 79, 85 (2004).

129. Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products Between the Government of the United States of American and the Royal Government of Cambodia, Art. 10, <http://www.tcc.mac.doc.gov/cgi-bin/doi.cgi?204:64:189233445:25>.

130. *Id.*

131. Kolben, *supra* note 128, at 100.

132. *Id.* at 101.

133. See Regina Abrami, *Workers Rights and Global Trade: The U.S.-Cambodia Bilateral Textile Trade Agreement*, Harvard Business School Case Study, No. 9-703-034, at 10, 15 (2003).

134. See Kolben, *supra* note 128, at 101.

quirements imposed on Cambodian manufacturers were made readily available to American apparel buyers. Both Gap and Nike requested copies of factories' ILO monitoring reports, and more companies probably requested them as well.¹³⁵ Again, this is in contrast to union monitoring efforts that are not as concretely institutionalized and therefore do not provide as much transparency to importing buyers.

On the negative side, monitoring was outsourced to the ILO alone. This marginalized Cambodian textile workers. ILO inspectors were more removed from workers' on-the-ground concerns than the workers' union representatives. The arrangement might not have been problematic if there was trust between local unions and the parties setting up the treaty arrangement, namely the Cambodian and American governments and the ILO, but institutional trust was not high. ILO monitoring reports were not initially shared with unions for fear of fomenting strikes and other unrest,¹³⁶ and some unions did not report abuses to the ILO.¹³⁷ The situation might have progressed more smoothly if international workers' rights organizations and unions were formally included in the process, since those organizations generally have more trustful relationships with local and national unions in trading partner countries.

Another important aspect of the Textile Agreement's institutional design, necessitated by the recognition that the Cambodian government could not enforce its labor laws, was that the Agreement's quota incentives were designed to primarily influence private actors as opposed to public actors. One critique of the Textile Agreement was that, although it focused on the Cambodian textile industry, it did not include mechanisms specific enough to enforce compliance on individual factories.¹³⁸ However, when compared to remedies under an FTA, which might be levied against an entirely different industry than the one violating basic labor protections, the Textile Agreement looks extraordinarily specific. This contrast between the Textile Agreement and modern FTA provisions arises because FTAs are generally focused on encouraging sovereigns to exert control over private domestic actors. Therefore, the thinking goes, trade remedies should be flexible enough to be levied against those products that are most important to the sovereign, as opposed to the offending industry, in an effort to coerce enforcement action.

Yet the Textile Agreement, despite its general focus on industry, provides a compelling example of why targeting trade sanctions against specific private actors should be part of the modern FTA toolkit. The Textile Agreement created in-group pressure for factory owners to ensure that their sites were complying with Cambodian law so that the industry could bene-

135. *See id.* at 105.

136. *Id.* at 104.

137. *Id.*

138. *Id.* at 103.

fit from increased exports. The Textile Agreement also exerted pressure on individual factories when buyers asked for their ILO monitoring reports. The pressures felt by individual factory owners also help to solve one of the major concerns of human rights advocates addressing negative incentive trade-linkages: that the imposition of trade sanctions against a nation that cannot or does not enforce basic labor protections only exacerbates the dire situation of workers by weakening the target country's economy. Individualized sanctions can be smaller-scale, leaving a country's macro-economy, export-economy, and industry unscathed, while still imposing an enormous amount of financial pressure on violators.

Another important institutional component, present in both the GSP and Textile Agreement, is the maintenance of positive incentives for de facto labor rights improvements. As discussed, the Textile Agreement provided increased market access to textile manufacturers through an increased quota. In the GSP, USTR ex officio review of trade partners also provided positive incentives for those partners to achieve and maintain workers' rights protections in compliance with international standards. The value of these positive incentives are highlighted in work looking at ex ante incentives of trading partners to improve labor rights enforcement.¹³⁹ Ex ante incentives are almost exclusively positive incentives because the trading partner, who hopes to sign a trade deal improving market access, foresees economic benefits from any compliance measures that it undertakes before negotiating and signing the agreement. For example, Kim found marked improvements in labor protections prior to signing FTAs because of the incentives to gain market access, whereas there were almost no improvements in labor protection post-signing.¹⁴⁰ The significance of the magnitude of market access incentives is also reflected in Kim's finding that "[s]tates with larger economies are less likely . . . to improve labor protections" prior to signing an FTA with the United States.¹⁴¹ That is, the larger a country's own internal market and exports, the less that country feels pressure to reform its labor rights practices in order to gain market access.

Meanwhile, modern U.S. FTAs do not include positive incentives for trade partners to improve labor rights enforcement. Part of the problem is the structure of international trade governance. FTA partners must liberalize 'substantially all' trade relative to their baseline WTO commitments, leading most tariffs to zero and eliminating many non-tariff barriers.¹⁴²

139. See generally Kim, *supra* note 77.

140. *Id.* at 714.

141. *Id.* at 710.

142. General Agreement on Tariffs and Trade, Article XXIV:8(b) ("A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV, and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."). The purpose of a 'substantially all' requirement is to strike the proper balance between the WTO's two core goals, as stated in the preamble to the GATT, of trade liberalization and nondiscrimination. The preamble reads: "by entering into reciprocal and mutually

This means that it is difficult for FTAs to simply import a GSP ex officio review or the Textile Agreement's quota expansion,¹⁴³ since both systems were designed to unilaterally reduce trade barriers. Despite the challenge, there is still room for flexibility and creativity in FTA design to incorporate prospective positive incentives, partially because there is no generally accepted definition of 'substantially all' trade. Some creative possibilities are explored in the next section.

V. WHERE DO WE GO FROM HERE?

The foregoing examples provide substantial guidance about how American policymakers and negotiators should try to design modern FTAs if they are to be effective tools to ensure basic labor rights, especially in the areas of monitoring and enforcement. A third broad topic of interest, the standards themselves, was generally ignored throughout Sections II and III because the model of incorporating basic labor standards is the same in FTAs, the GSP, and the Textile Agreement. They all list the basic ILO labor rights, demand that those rights be incorporated into domestic law, and link incentives to the (non)enforcement of such law. However, standards should not be stricken from the policy reform agenda just because there are no readily available examples of alternative success stories.

Standards should be written as specifically as possible, without getting lost in details, so as to retain the flexibility attached to domestic legislation that implements basic ILO standards. Using ILO standards alone is often insufficient because a standard like freedom of association is ill-defined and subject to debate. At the same time, too much detail can doom monitoring efforts to a mire of specific box-checking that loses the forest for the trees. A common complaint levied against the ILO's monitoring under the Textile Agreement was that the 156 checklist items missed the bigger picture goal of improving workers' association rights.¹⁴⁴ Yet, the Textile Agreement was a relatively successful example of trade-labor linkage. Therefore, despite the valid criticism that a 156 item checklist is too long, the lesson that tying concrete incentives to specific goals actually works should not be lost, because the program did drive better factory conditions.

advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce," the signatories agree "as follows." Thus, negotiators limited the ability of nations to use the free-trade area exception from the nondiscrimination principle only when those nations liberalized substantially all trade among themselves. However, as mentioned, there is no generally accepted definition of what constitutes 'substantially all' trade.

143. The modern-day version of which, since quotas are generally banned under the WTO, is tariff reduction.

144. Kolben, *supra* note 128, at 102 (noting that the checklist gave "far more attention to standards than to rights").

Meanwhile, monitoring still needs to be outsourced to third-parties because trade offices are too small to undertake the task. However, there is no clear reason why monitoring should be routed through multinational unions and NGOs as opposed to empowering workers, and their unions, to defend themselves. Multinational unions and NGOs have their own missions and constituencies that are not directly related to monitoring conditions in trading partner countries. Also, their interests will not always align with those of workers and unions in trading partner countries, leading to another level of agency slack that removes the enforcement process from facts on-the-ground.

An alternative way to design modern FTA dispute settlement that will empower workers more directly is to provide a private right of action to workers before an international arbitral panel for violations of the labor chapter of their FTA. While it may still be necessary for unions or NGOs to help partner country unions mount a complaint, with a private right of action unions and workers who are most affected by rights violations will finally have a system that is directly responsive to their concerns, as opposed to one that intermediates their problems through a foreign union, foreign (U.S.) government, and bilateral government consultations. Private rights of action are widely recognized in domestic law around the world, yet are much less common in international law, mainly appearing in bilateral investment treaties (“BITs”).

A common complaint with private rights of action in BITs, also known as investor-state arbitration, is that multinational companies can co-opt national sovereignty by subjecting national policy to scrutiny by unelected and unaccountable international lawyers.¹⁴⁵ The same critique also applies, to an extent, to a private right of action for workers. This design provides workers an extra-national avenue to exert their interests on the nation, outside of domestic political processes. At the same time, there are major differences between investor-state arbitration and a private right of action for workers. Often, investors bring international arbitration for property confiscation or other monetary harm.¹⁴⁶ Thus, the complaint about their suit is that nations should be able to set national policy however they choose, and companies can adjust their return-on-investment criteria *ex ante*, given the possibility that their financial interests will be harmed in the future. Moreover, international companies’ financial ties are diversified

145. Elizabeth Warren, *The Trans-Pacific Partnership clause everyone should oppose*, Washington Post (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.7b8392e4dbca.

146. See Scott Miller & Gregory N. Hicks, *Investor-State Dispute Settlement: A Reality Check*, Center for Strategic & International Studies, at 10-11 (2015), https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150116_Miller_InvestorStateDispute_Web.pdf; Ankita Ritwik, *Tobacco Packaging Arbitration and the State's Ability to Legislate*, 54 *Harvard Int'l L. J.* 523 (2013); William S. Dodge, *International Decisions: Metalclad Corp. v. Mexico and Mexico v. Metalclad Corp.*, 95 *Am. J. Int'l L.* 910 (2001).

across countries, minimizing single-nation risk, and companies have relative freedom to enter and exit any given market. On the other hand, workers in states that do not enforce basic worker rights have almost no choice of entry or exit and, by definition, domestic national politics are systematically ignoring their interests to an extent that offends notions of basic human rights, such as the alleged murders in Guatemala.

For those who are concerned about domestic actors co-opting national policy through an international legal mechanism and undermining national sovereignty, the private right of action and jurisdiction of international arbitral panel can be narrowed to exert financial pressure directly on employers. This reform borrows from the industry-pressure model adopted in the Textile Agreement and narrows the focus even further, onto specific employers. The incorporation of specific sanctions against private actors has precedent in WTO law too, from the Agreement on Subsidies and Countervailing Measures, which allows Members to place countervailing duties on products imported by subsidized companies.¹⁴⁷ In such a system, workers would be able to bring their employer before an arbitral panel to account for rights abuses and non-compliance with domestic law. This type of reform, that is, bypassing national courts and petitioning an international panel, makes sense in the context of two typical claims that workers might bring: (1) that the laws on the books are not being enforced or (2) that the law does not meet basic worker rights standards. In the first case, part of the claim is that national courts suffer from institutional weakness that leads to non-enforcement. In the second case, part of the claim is that national courts are limited in their ability to fashion new law that would produce compliance with international requirements.

In the absence of a private right of action for workers, USTR should be able to bring private actors before an international tribunal for claims of international worker rights violations. An international dispute system that only provides recourse against a national government but may not sanction a factory is aimed at a peripheral actor. An international dispute system that provides direct recourse against private employers might efficiently curb worker rights abuses by encouraging law enforcement to adequately investigate violations. The important point is that recourse should be had against a diverse array of actors because each one has unique capacity to control abuse. Limiting FTA dispute resolution *ex ante* to government limits its effectiveness.

FTAs should explicitly incorporate the legal tool of joint-and-several liability amongst supply chain participants. Joint-and-several liability can be written into a trade agreement irrespective of whether claims are brought by workers or a government agency, and is necessary in a regime where

147. Countervailing duties shall be imposed "on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury." Agreement on Subsidies and Countervailing Measures, Article 19.3.

private defendants are responsible only for trade-related harm. In our world of disaggregated supply chains, the final exporter might purchase its domestic inputs from suppliers who do not respect international standards. For example, a textile exporting factory that is nominally in compliance with national law may buy raw cotton from a domestic farm that uses child labor. Without a legal mechanism prepared to recognize the upstream harm in export products, companies are easily able to externalize labor abuse savings to non-exporting partners. The imposition of a legal regime that (a) makes private commercial actors liable for trade-related harm but (b) fails to recognize upstream abuses will simply encourage the exporting company to shift employment to another corporation, which acts domestically to employ and contract out workers. Joint-and-several liability is a tool ready-made to ensure that exporters internalize the human costs of an exploitative supply chain.

Most important of all, the dispute resolution process, including consultations, should be substantially shortened. This is especially true if workers are granted a private right of action. Even though the systemic design in that case would be more responsive to their concerns, workers will still be in danger, perhaps even more so than in the current system, because their grievances will be more visible to domestic actors. This dynamic makes it imperative that the timeline for dispute resolution be made shorter. The process can be shortened by limiting the time for U.S. agencies to review and monitor country conditions before making a binding decision about whether to move forward with dispute resolution or drop the matter. More importantly, the parties should stick to the consultation and dispute resolution timelines laid out in their FTA. The U.S.-Guatemala case is a tragic example of procedural manipulation that extends a *de jure* timeline of less than two years into a much longer ordeal.

One particular idea for increasing the probability that trade sanctions will be imposed in a timely manner is to require an arbitral panel to promulgate initial findings within a short time period, and to tie those findings to preliminary sanctions. For example, an arbitral panel might be empowered to make initial findings on a particular evidentiary standard within the first three months after dispute initiation, as opposed to the current six month process. Subsequently, trade sanctions could kick-in while the full panel review proceeds. The full panel review might then apply a more rigorous evidentiary standard with a higher level of threatened trade sanctions attached to an adverse decision. Although it is nearly impossible to imagine a situation in which FTA signatories would deny themselves the flexibility to exit a dispute resolution process, the window for doing so should be shortened. Any proposal that shortens the window of costless exit must accommodate political and economic pressures to exit by lowering the cost of the imposition of sanctions. Quick preliminary findings with provisional damages strikes this balance fairly well.

Thus far, the recommendations have all focused on the ‘sticks’ dynamic of consultation and dispute resolution. One clear lesson from the GSP, Textile Agreement, and academic research is that ‘carrots’ may be even more powerful at generating results. The difficulty of building positive incentives into contemporary FTAs is that such agreements must liberalize ‘substantially all’ trade between the signatories, limiting the amount of trade benefits left to liberalize. Luckily, there is significant flexibility built into the ‘substantially all’ requirement because there is no WTO case law or binding treaty explicating specific requirements. Liberalization of substantially all trade might require tariff reductions for more than 50% of the products that the signatories trade, or for more than 90%. Or liberalization of substantially all trade might mean that more than 50% of trade volume between the two countries benefit from tariff reductions, which could theoretically be one product. If liberalization in an FTA is so limited, must liberalization adapt to changing flows? Moreover, must liberalization take place immediately upon ratification or can the signatories’ commitments extend over a decade or longer?

U.S. negotiators can exploit the flexibility in the ‘substantially all’ standard to develop robust positive incentives for change. Like market access in the Textile Agreement, tariffs can be phased out over time, with the option for speedier concessions if certain benchmarks are achieved. Market access concessions can also be tailored to target the actors most capable of changing their behavior. If the government is best positioned to support the right to organize, then tariff optionality can be built into the largest volume-weighted categories, or to those industries most closely tied with government officials. On the other hand, if a particular industry historically intimidates union members, then tariff optionality can be applied to their specific product-lines. Often, tariffs are already near or at zero. In these cases, trade negotiators can invoke other market access tools, such as the harmonization or reduction of paperwork, to build positive incentives.

Another option, especially if market access cannot be effectively deployed because tariffs are already at zero, is to develop positive incentives by linking the FTA labor chapter to other issue-areas. Issue-area linkage, as a broad concept, is the basis for tying trade with labor in the first instance, and has drawn intellectual property and investment, among other things, into the trade framework. The concept has proven itself an effective method of developing common international standards across a broad range of topics because it leverages nations’ desire for access to major markets to concessions, such as minimum patent protections. America’s trade partner governments may place a high value on specific types of American foreign aid or other development support. Those benefits, historically not directly tied to trade agreements, can be linked to labor protection levels built into FTAs. The potential for issue-linkage is vast and context specific, and is possibly the single-most potent tool to develop positive incentives for trade partners.

Institutionally, the LAC should be empowered to oversee progress on labor rights enforcement. As a body formally constituted to oversee FTA-related collaboration between the countries, it is best placed to monitor and assess progress. Members of the LAC from the trading partner country will be incentivized to present evidence showing progress in labor rights enforcement. This might skew American-member perceptions of actual progress, but reports can be solicited from multiple sources and officials who are on an LAC are best placed to have a realistic perception of actual conditions in the country. Decisions about whether to grant or withhold the positive incentives built into an FTA should ultimately rest with the U.S. delegates to an LAC. As the U.S. trade officials most closely situated to the reality of our trading partners, they are best positioned to make the final decision about granting or withholding trade benefits.

LACs can even be built into more robust bilateral or multilateral consultative bodies. Their initial mandates might shift explicitly from monitoring and granting preliminary progress and market access to negotiating future labor-linked liberalization. As can be seen clearly in the prolonged processes with Guatemala and Peru, and the limited marginal incentives imposed by current FTA design, driving institutional change around entrenched labor practices in foreign countries is a slow and dynamic endeavor. These agreements stay in place for decades, spanning the reign of multiple governments and changed economies. The only way for the FTA framework to stay relevant is if LAC officials are able to identify and invoke those as-yet unattained benefits most desirable to successive governments or new economic actors. Therefore, to be most effective, LACs should enjoy a flexible mandate to develop desirable market access incentives tied to specific progress in trade partner countries. Deployed concurrently with the threat of revocation of trade benefits, dynamic market access ‘carrots’ are America’s best hope for coercing tangible labor rights improvements in trading partners who do not meet the lowest-common denominator of international standards.

VI. CONCLUSION

The forgoing proposals for reform are admittedly varied and ambitious. Our intention is not to suggest that all of them can be adopted simultaneously in a single FTA, but that they should be considered as options to improve the effectiveness of current FTA labor chapter design. A significant political obstacle to the adoption of many of these proposals in an FTA is that FTAs impose reciprocal obligations and risks. Politicians, officials, and negotiators are not only concerned with economic growth and norm promulgation, but also with retaining sovereign latitude. For that reason, although we hope that many of these recommendations can be successfully incorporated into even the most economically important FTAs, the most

radical FTAs, those that incorporate a suite of the foregoing reforms all at once, are likely to be those that involve less economically significant trade partners.¹⁴⁸ Under those conditions, de jure reciprocal obligations transform into de facto unidirectional incentives that pressure the smaller economic signatory to undertake reforms. Therefore, those who are concerned about labor rights enforcement should look, perhaps paradoxically, to FTAs with smaller trading partners with substantial compliance problems to signal how committed USTR and the executive branch are to experimenting with stronger FTA labor chapters.

The fact that modern U.S. FTAs, which are touted as a model, do not measurably help workers should be a major source of concern for those worried about workers' rights abroad, whether for normative or protectionist reasons. This paper looked critically at the design of modern U.S. FTAs, and some comparison programs that have had measurable impacts on workers' rights, to identify design shortfalls that contribute to FTA impotence as well as reforms that can reinvigorate FTAs as America's labor standard enforcement tool-of-choice. The essential task is stated simply: tie trade benefits that matter to FTA partners tightly to specific labor-standard enforcement practices. The effectiveness of FTA labor chapters can be improved by enhancing standard specificity, increasing the value of trade incentives to those with power, and tightening the causation between violations and sanctions, or improvements with benefits. While there are numerous specific options for reform, there is a single impetus to change: the current design of FTA labor chapters does not help protect the most vulnerable workers in global supply chains.

148. United States. Cong. Senate. Finance Committee. Hearing on US Trade Policy: The China Question, *supra* note 81, at 7 (commenting that FTA labor standards "will not succeed with the larger and economically more important developing countries such as India and Brazil").