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Strengthening Labor Rights in the Trans-Pacific Partnership Agreement: A Lost Opportunity?

by Desirée LeClercq & Karen Curtis

1. Introduction

This Chapter was initially drafted during the Obama Administration. The Trans-Pacific Partnership Agreement (TPP) had been negotiated and, although it had not yet been ratified in the United States, the Administration and majority of policy makers were in favor of its implementation. Since that time, as previous Chapters have made clear, the United States Administration changed and the United States withdrew from participation in the TPP. While unfortunate, the Administration's political decision to withdraw from the TPP does not come as a surprise; an examination of the negotiating history of those provisions illuminates a stark political divide within the United States, even prior to the change in Administrations. Fortunately, the other eleven parties to the TPP persevered, resulting in the Comprehensive and Progressive TPP.[1]

To this Chapter's authors, this withdrawal represents a partial set-back to the momentum that this agreement would have achieved for the advancement of labor rights in the participating countries, and in particular for those where a labor consistency plan had been agreed. To substantiate this belief, we highlight below the many areas in which the novel labor provisions negotiated and agreed upon in the TPP marked a significant advance in trade agreement labor standards.

Proponents of the TPP acclaimed it to be the " Twenty-First-Century Trade Agreement," noting that its provisions mark the most advanced and modern developments in mega-regional trade. Nevertheless, public discourse did not widely accept this acclaim. As divergent views increasingly infused political debates and platforms, one of hottest topics to emerge concerned the TPP labor provisions, contained in the Chapter 19 Labor Chapter. Those provisions committed the TPP signatories to certain "internationally recognised labor rights" as well as labor cooperation and dialogue mechanisms. It also subjected non-compliance with those provisions to the same dispute settlement as other commercial-related provisions. The TPP was also intrinsically connected to three bilateral side agreements between the United States and Vietnam, Malaysia and Brunei Darussalam, which committed those parties to specific labor law reforms before the TPP could enter into force for those countries.

Despite its ambitious labor rights commitments, acute disagreement arose among trade and labor critics as to whether the agreement was the most progressive or most regressive trade agreement. Both sides of the debate supported their claim by identifying the evolution of labor provisions in various trade agreements and speculating the impact and shortcomings those provisions had had on workers' rights. Sides in favor of the TPP's Labor Chapter cited to that trajectory to argue that the labor provisions

[1] CPTPP, Mar. 8, 2018, entered into force December 30, 2018, https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents.

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corrected previous weaknesses and anticipated that they would strengthen workers' rights in party countries. Those against the Chapter, citing to the same trajectory, argued that the latest provisions did not sufficiently correct those weaknesses, victimizing workers in favor of trade.

The ideological divide in trade and labor is not new, nor is it confined to the trade agreement context. Indeed, the evolution of various labor provisions in trade agreements is the byproduct of this divide; one that famously began within the multilateral walls of the World Trade Organization (WTO) and the International Labor Organization (ILO), both of which could not reach consensus among their Membership to regulate labor provisions in trade agreements.[2] Consequently, trade parties have had full discretion concerning whether to include labor provisions in their negotiations and, assuming labor provisions are included, what specific labor standards to identify. Furthermore, as opposed to commercial dispute settlement procedures, which fall under the WTO dispute settlement procedures, trade parties have discretion concerning the procedures to apply in the event of labor-provision violations. This discretion – and lack of international regulation – has resulted in a fragmented regime of trade and labor.

In the wake of a fragmented regime, the ideological divide continues to take center stage in political debates, even taking precedence over national and local issues during presidential campaigns. There are no international guidelines or requirements concerning labor provisions, so each country may decide whether to include those provisions in its trade agreements and, if it does, what type of provisions, which labor standards to include, and what type of legal commitment those provisions should entail. These decisions have not been easy, and the challenges remain.

Those who oppose including labor provisions in trade agreements argue that domestic labor laws should be safeguarded against international regulations. In particular, developing countries argue that requiring costly labor protections and higher wages has the inevitable consequence of reducing comparative advantages.[3] Other opponents of labor provisions contend that international labor standards are a form of disguised protectionism whereby labor rights are invoked to exclude the competitive threat posed by developing countries.[4] Moreover, even if labor provisions were to be included, other opponents argue that those provisions should not be considered on equal footing with traditional trade issues, because they might create barriers to trade, thereby diminishing a developing country's ability to improve its labor standards.[5]

On the other side of the debate, proponents of labor provisions assert that, to prevent international trade from hurting workers, trade parties must agree upon and regulate through their provisions certain

[2] Failed attempts to integrate labor standards into the multilateral regime, either in the WTO or the ILO, has been the subject of numerous articles and books, and will thus not be taken up in this Chapter. See, e.g., Bob Hepple, LABOR LAWS AND GLOBAL TRADE (Oxford and Portland, Oregon, 2005), at Ch. 6; see also Arturo Bronstein, INTERNATIONAL AND COMPARATIVE LABOR LAW: CURRENT CHALLENGES (ILO, Geneva 2009), at Ch. 4; Wolfgang Plaza, RECONCILING INTERNATIONAL TRADE AND LABOR PROTECTION: WHY WE NEED TO BRIDGE THE GAP BETWEEN ILO STANDARDS AND WTO RULES (Lexington Books, Lanham, 2015), Ch. 1.

[3] See Stephen J. Powell and Paola A. Chavarro, *Toward a Vibrant Peruvian Middle Class: Effects of the Peru-United States Free Trade Agreement on Labor Rights, Biodiversity, and Indigenous Population*, 20 Fl. J. Int'l L., 94, 97 (2008).

[4] See id., see also Hepple, supra (citing K Anderson, *The Intrusion of Environmental and Labor Standards into Trade Policy*, in W Martin and LA Winter (eds), URUGUAY ROUND AND THE DEVELOPING COUNTRIES (Cambridge, CUP,1996)) 435.

[5] See Heather Corbin, *The Proposed United States – Chile Free Trade Agreement: Reconciling Free Trade and Environmental Protection*, 14 Colo. J. Int'l Ent'l L & Pol'y 119, 123 (2003).

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minimum labor standards.[6] In other words, global competition should not entail the lowering of domestic labor conditions, otherwise known as "social dumping"[7] or a "race to the bottom."[8]

Both proponents and opponents of labor provisions in trade agreements seem to acknowledge that globalization and trade have an impact on workers' rights and working and living conditions around the world – whether owing to availability of jobs, shifts in skills, wages, or other labor-market drivers.[9] It has yet to be empirically. determined whether this impact is positive or negative on workers. The proliferation of global supply chains and other cross-border business entities have given rise to new challenges to workers whose labor relationships and, indeed, protections are based on national laws that stop at the border. Trade agreements have transformed the movement of capital, the specializations and competitive advantage of skills, and the character of employment.[10]

Acknowledging the impact – both potential and real -- of trade relationships on workers' rights and conditions, countries have compensated for the lack of multilateral regulation by creating their own labor rights obligations in trade agreements. Indeed, rather than shying away from labor-related commitments, the inclusion of such commitments has been on a steady rise. In 2009, for example, the ILO reported that "labor provisions adopted in trade arrangements have multiplied over the past 25 years."[11]

As the number of trade agreements with labor provisions continues to increase, those agreements have increasingly referred to the ILO's instruments and labor standards. According to the WTO's Regional Trade Agreements Information System, nearly three-quarters of trade agreements with labor provisions referred to the ILO.[12] In this connection, the majority of labor provisions refer to the ILO's 1998

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[6] See John Cavanagh, Lance Compa, Allan Ebert, Bill Goold and Kathy Selvaggio. *Trade's Hidden Costs: Worker Rights in a Changing World Economy*. (Washington, DC: The International Labor Rigths Education and Research Fund, 1988), electronic version available at http://digitalcommons.ilr.cornell.edu/monograph/2/, p. xi.

[7] The term "social dumping" refers to "costs that are for their part depressed below the 'natural' level by means of 'social oppression' facilitating unfair pricing strategies against foreign competitors." H Grossman ad G Koopman, *Social Standards in International Trade*, *in* H Sander and A Inotai (eds), WORLD TRADE AFTER THE URUGUAY ROUND (London, Routledge)), 1996, at 116.

[8] See Clotilde Granger and Jean-Mare Siroen, *Cases to Include Labor Standards in Trade Agreements*, in John-Ren Chen et al. (eds.) *Contributions to the Study of International Institutions and Global Governance,* , Innsbruck University Press, Austria (2009) 151, at 158-159; see also Hepple, supra, at pp. 13-15; Jordi Agusti-Panareda, Franz Christian Ebert, and Desiree LeClercq, *ILO Labor Standards and Trade Agreements: A Case for* Consistency, 36 (3) COMP. LAB. L & POL'Y J., 349, 347-380 and Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 48-52 (1999).
Notably, concerns of social dumping and the race to the bottom continue, despite empirical studies observing the absence of any evidence that lowering labor standards will impact trade. See, e.g., Organisation for Economic Cooperation and Development, *Trade, Employment and Labor Standards: A Case for Core Workers' Rights and International Trade* (Paris: OECD. 1996), 12-13; see also Robert M. Stern, *Labor Standards and International Trade*, Integration and Trade Journal (1998), p. 20.

[9] See e.g., Bronstein, supra, at p. 97, Cavanagh et al., supra, at pp. xi-xiv ("The increasing ability of large corporations to shift resources around the globe led to rivalries between governments destructive to workers").

[10] See Pablo Lazo Grandi, *Trade Agreements and their Relation to Labor Standards: The Current Situation*, International Centre for Trade and Sustainable Development, Issue Paper No. 3 (2009), p. 1 ("Indeed, economic globalisation and technological revolution are developing at such speed, especially with respect to trade liberalisation and free movement of capital, but also with respect to transport and telecommunications, that they have transformed the economy and with it societies across the world. The process has a continuous and daily impact on the worlds of labor and employment").

[11] World of Work Report 2009: The Global Jobs Crisis and Beyond / International Institute for Labour Studies. – Geneva: ILO, 2009, p. 63.

[12] See the WTO's Regional Trade Agreements Information System, http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx. See also Jordi Agusti-Panareda, Franz Christian Ebert

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Declaration on Fundamental and Principle Rights at Work ("ILO 1998 Declaration").[13] Citing to the ILO Constitution, the ILO 1998 Declaration states that all Members have "an obligation arising from the very fact of membership…to respect, to promote and to realize," regardless of whether they had ratified the relevant ILO conventions, the principles concerning the fundamental rights. [14] The ILO's "fundamental rights" concern:

(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labor;
(c) the effective abolition of child labor; and
(d) the elimination of discrimination in respect of employment and occupation.

The provisions have also sought, to varying extents, to harmonize the labor regulations among trade partners. In so doing, the trade partners hope to ensure that none of the other partners may gain a competitive edge by having less favorable (and hence, less costly) labor legislation.[15]

Despite their common reference to the ILO 1998 Declaration and incorporation of the ILO's fundamental rights, the specific labor provisions and dispute settlement mechanisms have varied among trade partners, including the parties to the TPP.[16] Accordingly, when the TPP's Labor Chapter was first brought to the table, many of the trade parties were already bound to various labor-standards commitments. The negotiators thus faced the challenge of designing a labor chapter that would not only contain acceptable labor standards, but one which might bring these various, pre-existing labor-standards commitments to common ground.

These negotiations concluded in the TPP Labor Chapter (Chapter 19), which contained the labor-standards obligations to which the trade parties were bound. Rather than cede to the arguments raised by opponents (i.e., that the Chapter should refrain from regulating trade), the Chapter presents the next evolution in labor provisions. As discussed below, the Chapter was unprecedented in three ways. First, it harmonized the fragmented labor-standards commitments of its signatories. In so doing, it went beyond the ILO's fundamental labor standards and introduced new standards related to occupational safety and health and labor inspection. Second, it subjected the entirety of its labor provisions to the same dispute settlement and sanctions as the other terms of the agreement. Third, it provided for an enhanced role for the ILO to provide assistance, upon request, to TPP countries concerning labor standards and to facilitate labor dialogue among the parties (including governments and representatives of workers' and employers' organizations). In addition to the Chapter, the three bilateral Labor Consistency Plans created legally-binding commitments to undertake significant labor reforms as a precondition for the TPP trade benefits to enter into force in those countries vis-à-vis the United States.

This chapter seeks to develop a more comprehensive understanding of the TPP's Labor Chapter, and to highlight what could have been (and, the authors argue, what should be replicated or further improved in future agreements). To do so, it identifies ways in which the Labor Chapter harmonized the trade parties' previous labor-standards commitments and the ways – in particular, through the preconditions set out in the Labor Consistency Plans – that it had added new commitments. Section 2 of this Chapter describes the various labor standards that have been included in the trade agreements of the TPP

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and Desirée LeClercq, *Labor Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System* (ILO Background Paper, 2014), at 8.

[13] See Agusti-Panareda et al., supra, at p. 354.

[14] See 1998 ILO Declaration.

[15] See Bronstein, supra, at p. 92.

[16] See Agusti-Panareda et al., supra, at 347-380.

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signatories. Particular emphasis is placed on the United States and Canada, both of which have included labor provisions that have progressively evolved over time and have been a pre-condition for ratifying trade agreements. Section 3 describes the negotiated TPP text and highlights the various political and ideological debates that had to be overcome in order to achieve the objectives of the Chapter. Finally, Section 4 examines the novel provisions in that Chapter, as well as in the three bilateral Labor Consistency Plans between the United States, and Malaysia, Vietnam and Brunei Darussalam.

2. International Trade Agreements and Labor Standards: A Fragmented System

The nexus between labor standards and trade traces its origins to the late eighteenth and nineteenth centuries, when concerns over child labor and prison labor began to manifest in trade requirements.[17] Labor standards, however, were not formally included in trade agreements as separate and distinct provisions until the 1990s, when general trade flow took on unprecedented growth. This increased trade was carried out between – and hence exposed – diverse countries in differing stages of development, with very different labor standards and labor costs.[18]

As noted above, the TPP signatories addressed labor-standards commitments in trade in various ways. These countries had become bound to multiple trade agreements, many of which contained various labor provisions, creating a "spaghetti bowl" of labor-standards obligations.

The following sections briefly describe the various labor-standards obligations that the TPP signatories would have undertaken. Notably, agreements executed by the United States and Canada contain the most pronounced and enforceable labor-standards commitments, because these countries have required labor provisions in all recent trade agreements and have thus driven the inclusion of those provisions. The remaining TPP signatories, in particular Chile, had begun to develop their own labor provisions by the time of the TPP negotiations.

Table 1: A Snapshot of Labor Standards in TPP Parties at the time of TPP negotiations

Country	**Agreement** (if applicable)	**Party to a trade agreement with labor provisions**	**Commitment to fundamental labor rights**	**Commitment to effective enforcement of domestic labor law**	**Normal dispute settlement applies to all labor provisions**	**Normal trade sanctions apply to all labor provisions**
Australia	Australia-US FTA	√	√	√	√	√
Brunei Darussalam	P-4	√	√	x	x	x
Canada	NAFTA 1.0	√	√	√	x	x
	1st Generation	√	√	√	x	x
	2nd Generation	√	√	√	x	x
	3rd Generation	√	√	√	√	x
	4th Generation	√	√	√	x	x
Chile	US-Chile FTA	√	√	√	√	√
Japan	Japan-Philippines FTA	√	x	x	x	x
Malaysia	New Zealand-Malaysia Agreement on Labor Cooperation	√	√	√	x	x

[17] See Kaushik Basu, *Child Labor: Cause, Consequence, and Cure, with Remarks on International Labor Standards, Journal of Economic Literature*, Vol. XXXVII (September 1999) pp. 1083–119; Christopher L. Erickson and Daniel J.B. Mitchell, *Labor Standards and Trade Agreements: U.S. Experience*, 19 Comp. Lab. L. & Pol'y J. 145 (1997-1998).
[18] See Bronstein, supra, p. 89.

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Mexico	NAFTA 1.0	√	√	√	x	x
New Zealand	P-4	√	√	x	x	x
Peru	US-Peru FTA	√	√	√	√	√
Singapore	P-4	√	√	x	x	x
United States	NAFTA 1.0	√	√	√	x	x
	1st Generation	√	√	√	√	√
	2nd Generation	√	√	√	x	x
	3rd Generation	√	√	√	√	√
	4th Generation	√	√	√	√	√
Vietnam		x	x	x	x	x

2.1. United States Labor Provisions

The United States has linked labor standards and protections to their trade agreements since 1993.[19] Over time, the US model labor provisions have evolved, culminating in the present "May 10" template, described below. Prior to reaching that template, the United States adopted various approaches to labor provisions, beginning with the (NAFTA Supplemental Agreement) North American Agreement on Labor Cooperation (NAALC), then adopting various labor standards, consultative mechanisms and dispute settlement procedures in subsequent agreements. Following the NAALC, the United States continued to progressively strengthen the labor provisions included in its trade agreements. The following sections briefly describe the NAALC as well as subsequent four generations of agreements, in which the United States moved its labor provisions into the core of its trade agreements and has modified the labor standards it includes in trade agreements, the labor cooperation mechanisms, as well as the dispute resolution process for non-compliance with those labor provisions.

2.1.1. The Blueprint (NAALC)

The United States, along with TPP signatories Canada and Mexico, introduced the first separate and distinct labor provisions into a trade agreement in 1993, when the parties annexed the NAALC to the North American Free Trade Agreement (NAFTA 1.0).

Annex 1 of the Agreement enumerates the following eleven labor standards:

(1) freedom of association and the right to organize;
(2) the right to collective bargaining;
(3) the right to strike;
(4) the prohibition of forced labor;
(5) restrictions on child labor;
(6) assurance of minimum standards for working conditions;
(7) elimination of discrimination in employment;
(8) equal remuneration for men and women;
(9) prevention of accidents at work and occupational illnesses;
(10) compensation in the event of accidents at work and occupational illnesses; and

[19] While the labor provisions contained in the NAALC mark the first link between labor standards and protections in trade agreements signed by the United States, the country had begun linking compliance with labor standards to trade preferences in 1984 in the Trade and Tariff Act 1984, which contains language that limits trade preferences under the Generalized System of Preferences (GSP) to countries that respect internationally recognized worker rights. Pursuant to the GSP, the US President began to submit annual reports to Congress on the status of labor rights in the GSP beneficiary countries in 1985. In 1987, the benefits of three countries were revoked on account of their treatment of worker rights. For a discussion of these early initiatives, see Cavanagh et al., supra, at pp. x, 4, 51.

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(11) protection of migrant workers.[20]

However, these standards are preceded by the reservation that "[t]he following are guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law."[21]

The treatment given to compliance with labor-related complaints under the NAALC differ from complaints that can be lodged under NAFTA 1.0 by private entities. For example, under NAFTA 1.0, private investors who lodge complaints have the right to go before an international tribunal that may render binding decisions. Under the NAALC, on the other hand, organizations may initiate complaints ("public communications") before a national administrative office (NAO) concerning labor standards, but only eight of the eleven standards may be subject to higher-level procedures. Those excluded are freedom of association, discrimination and forced labor. In addition, the complaints must be "trade related" and involve "a persistent pattern of practice."[22] Finally, only three of the eleven labor standards that may be subject to complaint may reach the final stage of the dispute resolution process invoking fines or trade sanctions, those involving occupational safety and health, child labor and minimum wage laws.[23]

Complaints referring to the Annex I labor standards are brought before a three-person Evaluation Committee of Experts (ECE), which publishes a report. A two-thirds majority vote by the Labor Ministers Council can transmit the complaint to an arbitration panel, which may impose monetary penalties, initially up to $20 million USD.[24] This money must be used for improving compliance with labor regulations in the relevant country if failure to comply has repercussions on trade. If those penalties are not paid, the panel may order a suspension of tariff benefits.

2.1.2. First Generation (US-Jordan FTA (2000))

Following the ratification of NAFTA 1.0, under the President Clinton Administration, trade agreements stalled owing to the initial failure for the President to secure fast track procedures. In 2000, however, the Administration successfully concluded the US-Jordan Free Trade Area Agreement (US-Jordan FTA), marking the first generation of US trade agreements that contained labor provisions in the text of the agreement.

The US-Jordan FTA arose in the wake of the 1998 ILO Declaration. This Agreement became the first of many to refer to that Declaration in defining the applicable labor standards. With a nod to the emphasis of domestic legislation and enforcement witnessed in the NAALC, the labor chapter commits the Parties to including the protection the fundamental labor standards – as set out in the 1998 ILO Declaration – in domestic labor legislation.

Under Article 6, paragraph 1 of the Agreement, the Parties "strive to ensure that such labor principles and the internationally recognized labor rights set forth in paragraph 6 are recognized and protected by domestic law." The term "internationally-recognized workers' rights" as coined by the US

[20] NAFTA Supplemental Agreement North American Agreement on Labor Cooperation (NAALC) at Annex 1, 32 I.L.M. at 1515-16. The NAFTA Parties negotiated two supplemental agreements, one regulating labor rights and the other regulating environmental standards.
[21] Id. at Art. 49(1), 32 I.L.M. at 1513-14.
[22] Id. at Arts. 23, 27(1), 29(a), 49(1), 32 I.L.M. at 1508-09, 1514.
[23] Id. at Art. 29(1), 32 I.L.M. at 1509.
[24] These penalties are capped at 0.007% of total trade in goods between the NAALC Parties. See North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S.-Mex.-Can, Arts. 1(b), 2, 32 I.L.M. 1499, Annex 39(1).

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Administration, refers to (a) the right of association; (b) the right to organize and collectively bargain; (c) the 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. This term first appeared within the context of US Generalized System of Preferences (GSP) in 1984, but was later incorporated into their labor provisions for trade agreements.

The US-Jordan FTA accordingly establishes provisions for consultations and cooperation, albeit of a general nature. While it refers to a Joint Committee, established under Article 15, that Committee is charged with meeting once a year and reviewing any matter covered under the Agreement, not specifically labor matters. In contrast to the NAALC, which places clear emphasis on cooperation between Parties to enhance understanding of one another's labor laws and practices, the US-Jordan FTA is silent concerning cooperative activities.

During this time, the US also entered into a Textile Agreement with Cambodia. While not a free trade agreement, the Textile Agreement turned at least in part on the effective implementation of labor

Box 1 **US-Cambodia Textile Agreement**

In 2000, the US Administration executed a Textile Agreement with Cambodia. In order to ensure that the Cambodian apparel factories complied with the labor standards required under the Agreement, the ILO was requested to provide monitoring support and assistance. This assistance provided both States with objective and reliable data concerning implementation, and the ILO was able to take steps in line with its mandate to promote the effective realization of international labor standards.

standards. As in Box 1, the parties introduced an unprecedented mechanism of cooperation, whereby a joint request was made for the participation of the ILO in the monitoring and consequential implementation of that Agreement. [25]

In addition to cooperation and consultation, one of the key advancements of the first general of agreements over the NAALC is the parity of treatment of violations and sanctions for labor-related violations as all other trade-related violations. The dispute provisions contained in the first generation go beyond hortatory expressions of objectives and subjected parties to dispute settlement for labor-related matters, at least to a limited extent. Thus, the commitment to enforce domestic laws relating to

[25] For an in-depth account of this case, including commentary on the effectiveness of the ILO's assistance to ensure compliance with the agreement, see Sandra Polaski, *Combining Global and Local Forces: The Case of Labor Rights in Cambodia, World Development* (May 2006), Vol. 34, No. 5. As noted by that author, this case constituted the first instance in which the ILO's assistance was requested to monitor the private sector or otherwise engage in inspection of workplace premises. This request, which cane from both the US and Cambodia, apparently evoked "a cautious response from the Director General of the organization" and "provoked debate within the ILO bureaucracy and governing body." Nevertheless, following deliberations, the ILO ultimately decided to support the project since it would be valuable to the Member states involved and had the backing of employers and labor unions in the target country.

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foreign trade and investment is subject to the same dispute settlement as all of the other provisions. Any labor-related complaints beyond that commitment, however, are not subject to dispute settlement.[26]

2.1.3. The Second Generation (2004-2009): The Bush Administration Labor Template[27]

In 2002, the United States approved the Trade Act and, with it, the Trade Promotion Authority (TPA). Stemming from the US-Jordan FTA, the TPA linked trade and labor standards as a condition of limiting legislative procedure in consideration of a trade agreement to an up and down "fast track" vote, without possibility of amendment.[28] Thus, by its terms, the TPA aimed "to promote respect for worker rights...consistent with core labor standards of the ILO"[29] and referred to ILO Worst Forms of Child Labor Convention, 1999 (No. 182) as a main principle of negotiation.[30] Furthermore, it stipulated that the US Administration should engage in consultations with prospective trade Parties concerning their labor laws and, where necessary, should provide technical assistance.[31]

The TPA thus opened the door for the US to enter into successive trade agreements, all with similar labor provisions that furthered the TPA's objectives. The labor criteria for "fast track" under the TPA, which surfaced in subsequent trade agreements, were as follows:

(1) the inclusion of labor rights in the body of the agreement;
(2) the effective enforcement of domestic labor law;
(3) the recognition and protection of "internationally recognized labor rights" through domestic law;
(4) a non-derogation clause;
(5) promoting ratification and implementation of ILO Convention No. 182, and
(6) parity in enforcement procedures and remedies among labor rights and other trade-related rights.[32]

The second-generation agreements permitted the United States to strengthen its link to labor standards, as well as a more direct reference to the ILO's international labor standards. Nevertheless, the provisions maintained the "strive to ensure" standard, and introduced a more limited dispute settlement provision. In this regard, contrary to the first-generation agreements – which subject labor-related disputes to the same trade-related sanctions as the other provisions in the agreement – the second-generation agreements limit labor-related disputes to those concerning the Parties' obligation to "effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties…"[33]

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[26] Notably, for all disputes arising under the Agreement: (i) the dispute concern the interpretation of the Agreement; (ii) a Party must consider that the other Party has failed to carry out its obligations under the Agreement; or (iii) a Party must consider that measures taken by the other Party "severely distort the balance of trade benefits accorded by this Agreement, or substantially undermine fundamental objectives of this Agreement." See US-Jordan FTA, Art. 17(1)(a).

[27] US-Chile (2004); US-Singapore (2004); US-Australia (2005), US-Morocco (2006); US-Bahrain (2006); US-Central America - Dominican Republic (CAFTA-DR) (2006); US-Bahrain (2006); and US-Oman (2009).

[28] See Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§3801-3813 (2002).

[29] See § 3802 of the Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801-13 (2002).

[30] See id., § 2102(b)(17). The United States has ratified two out of the eight fundamental ILO Conventions. It ratified Convention No. 182 in 1999.

[31] See Id., at §2012(c).

[32] See 19 U.S.C. §§ 3802(a)(6), (7), (b)(11), (b)(12)(G), (b)(17) (2001).

[33] See, e.g., US-Chile, sec. 18.6(7) (limiting dispute settlement to those arising under section 18.2(1)(a), quoted above).

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Despite the narrow provision for dispute settlement contained in the second-generation agreements, to date, only one labor-related complaint has arisen under this framework. As highlighted in Box 2, below, the United States had raised a complaint against Guatemala under the US-CAFTA-DR. In accordance with the terms of the agreement, the complaint alleged that "Guatemala had breached its obligation under Article 16.2.1(a) of the CAFTA-DR by failing to effectively enforce its labor laws, through a sustained and recurring course of inaction, in a manner affecting trade between the Parties."[34]

Box 2: Guatemala under CAFTA-DR

The first complaint filed and processed under US trade agreements arose in 2008 against the Government of Guatemala. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and six Guatemalan labor unions filed a complaint with the Office of Trade and Labor Affairs (OTLA), alleging that the Government violated Chapter 16 of the CAFTA-DR for failing to effectively enforce its labor laws, respect its shared commitment to the ILO 1998 Declaration, or provide access to a fair and efficient court system. After several years of procedural obstacles, including the unexpected departure of one of the three arbitral panelists in November 2015, the panel issued its decision in June 2017. While the panel did find that the Guatemalan government had failed to effectively enforce its labor laws with respect to eight worksites by failing to secure compliance with court orders, it was not able to conclude that this course of inaction was in a manner affecting trade[35].

2.1.4. Third Generation and the May 10 Agreement[36]

In 2007, Congress and the Bush administration jointly agreed to the Bipartisan Agreement on Trade Policy, which is commonly known as the "May 10th Agreement." One of the most notable changes – viewed by labor advocates as a significant achievement– was the deletion of the "enforce your own laws" and the "strive to ensue" standards in the Bush Administration template. As noted below, the labor commitments require the Parties to affirmatively "adopt and maintain in its statutes, regulations and practices" concerning the specific labor rights. Furthermore, the new model continued to incorporate the ILO 1998 Declaration and, with it, the ILO's fundamental labor standards.

Before the United States enacted implementing legislation for its trade partners, various labor committees in the United States as well as the ministers responsible for trade and labor in some partner countries examined the labor conditions in the countries. To strengthen those conditions, the Parties engaged in certain cooperative activities at the outset, as well as during implementation.

One well-known example of the preemptive labor plans was carried out in the US-CAFTA-DR, under which the ministers of partner countries developed a "White Paper" to address labor concerns in Central America and the Dominican Republic. The White Paper set out six focus areas[37] and included recommendations to strengthen the region's labor institutions. The US Department of Labor funded an

[34] See 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 (November 3, 2014), available online at https://ustr.gov/sites/default/files/US%20sub1.fin_.pdf.

[35] Final report of the arbitral panel established under Article 16.2.1(a) of the CAFTA-DR to review the complaint against Guatemala, 14 June 2017

[36] US-Peru (2009); US-Colombia (2012); US-Panama (2012); and US-South Korea (2012).

[37] These areas include (1) labor law and implementation; (2) budget and personnel needs of the respective labor ministries; (3) strengthening the judicial system of labor law; (4) protections against discrimination in the workplace; (5) worst forms of child labor; and (6) promoting a culture of compliance.

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ILO project, entitled the ILO Verification Project, which monitored the implementation of the White Paper's commitments and released verification reports every six months between 2007 and 2010.

The third-generation agreements accordingly mark an enhanced role for ILO participation, where the trade parties have requested such participation. As noted previously (see Box 1), trade partners have requested the ILO's participation in earlier agreements, in particular concerning the monitoring of labor standards. The third-generation agreements continued to request this assistance, and broadened requests to include ILO assistance to trade Parties in strengthening labor laws and regulations.[38]

2.2. Canada Labor Provisions

The labor provisions' trajectory in Canada is similar to that described above in the United States. Like the United States, Canada is a party to the NAALC, and its trade agreements have evolved from references to national labor laws and policies to references to the international labor standards contained in the ILO 1998 Declaration. Furthermore, like the United States, its labor-standards commitments are binding, and thus enforceable through dispute settlement procedures in cases of non-compliance.

Although many of the basic labor standards and enforcement mechanisms of the United States and Canadian labor provisions are similar, certain distinctions remain. Whereas the United States has consistently included its labor provisions in the body of its trade agreements, Canada has mainly included labor provisions in a parallel agreement concerning "Labor Cooperation." Furthermore, while Canada refers to the ILO 1998 Declaration, its most recent agreements also refer to labor standards within the framework of the ILO Decent Work Agenda, which include occupational safety and health and non-discrimination specifically concerning the working conditions of migrant workers.

2.2.1. First Generation

Two years after its ratification of the NAALC, Canada entered into the Canada-Chile Agreement on Labour Cooperation (CCALC). The labor-standards commitments contained in the CCALC do not cite to the ILO's instruments or Declaration. Rather, the Agreement "is closely modelled on the North American Agreement on Labor Cooperation (NALC)"[39] and commits the parties to ensure that domestic labor laws are consistent with "high labor standards…."[40]

Under Annex 1, the Agreement enumerates the eleven labor standard "principles" to which the Parties are committed to promote:

1. Freedom of association and protection of the right to organize

[38] The ILO's assistance provided within the framework of the May 10 template has had an additional benefit beyond the agreements. While the ILO has targeted its assistance to strengthen the implementation of labor standards under the terms of the trade agreement, that assistance has also resulted in the strengthened implementation of those labor standards within the ILO. For example, in Colombia, the ILO supervisory bodes have noted the various ILO technical assistance programs and, particularly in the area of labor inspection, have noted progress in the country. See 2014 comment to the Colombian Government under the Labor Inspection Convention, 1947 (No. 81) ("the Committee notes with ***satisfaction*** the issuing of Ministerial Decision No. 1867 of 13 May 2014…"), available online at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3188115.

[39] See *Labor Program*, Government of Canada, Canada-Chile Agreement on Labor Cooperation, available online at http://www.labor.gc.ca/eng/relations/international/agreements/lca_chile.shtml.

[40] See CCALC, Preamble and Article 2. For an examination of the history of the negotiations and language, see Melissa Ann Miller, *Will the Circle be Unbroken? Chile's Accession to the NAFTA and the Fast-Track Debate*, 31(1) *Valpraiso L. Rev*., 153-190 (1996).

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2. The right to bargain collectively
3. The right to strike
4. Prohibition of forced labor
5. Labor protections for children and young persons
6. Minimum employment standards
7. Elimination of employment discrimination
8. Equal pay for women and men
9. Prevention of occupational injuries and illnesses
10. Compensation in cases of occupational injuries or illnesses
11. Protection of migrant workers

The CCALC is comprised of a labor Ministerial Council. It may periodically engage independent experts of recognized experience to prepare background reports setting out publicly available information supplied by each Party on labor matters.[41]

When a matter is not resolved after ministerial consultations, either Party may request in writing the establishment of an Evaluation Committee of Experts (ECE). To identify the chair of the ECE, the Agreements establish that the Parties will "seek to establish cooperative arrangements with the ILO to enable the Council and Parties to draw on the expertise and experience of the ILO."[42] The selection of ECE participants – and resulting ECE findings – are critical to the implementation of the agreement. Where the dispute involves occupational safety and health, child labor or minimum wage technical labor standards, and consultations fail, an arbitral panel may impose monetary sanctions.[43]

2.2.2. Second Generation

Following the CCALC, Canada implemented its second Labor Cooperation Agreement with Costa Rica in 2001 along with its bilateral free trade agreement. At the same time as the United States was preparing to enter into its second generation of labor clauses (with the signing of the TPA in 2002), Canada adopted a new approach to its labor provisions. In so doing, it inserted a reference to the ILO 1998 Declaration in defining the applicable labor standards while, simultaneously, softening its dispute settlement procedures by eliminating the recourse to monetary sanctions.

As with its first-generation agreement, the Agreement with Costa Rica stipulates to the labor standards under the Annexes of the Agreement. Deviating from both its first generation, as well as the United States model, the Canada-Costa Rica Agreement incorporates the ILO's fundamental labor rights recognized in the ILO 1998 Declaration, as well as additional labor rights that include (1) minimum employment standards; (2) prevention of occupational injuries and illnesses; and (3) compensation in cases of occupational injuries or illnesses.[44]

The second generation also parallels the first generation in that the Parties' obligation under the (albeit additional) labor standards in Annex 2 is "to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law." In contrast to the first generation, however, under Annex 1, the Parties "are committed to respecting and promoting the principles and rights" and shall reflect these in their laws, regulations, procedures and practices."

[41] See CCALC Art. 11(2).
[42] See id., Arts. 22(1)(b) and 42.
[43] See id., Art. 35.
[44] See Canada-Costa Rica Agreement on Labour Cooperation, Annexes 1 and 2.

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2.2.3. Third Generation[45]

Canada's third-generation agreements more closely resemble the United States model. Substantively, the labor provisions refer to the fundamental labor rights set out in the ILO 1998 Declaration, introduce a non-derogation clause that prohibits lowering domestic laws to encourage trade or investment, and stipulates that the dispute settlement procedure includes the possibility of monetary sanctions. Aesthetically, the labor standards remain in the side agreement, but were moved out of the Annexes and into the body of that agreement. Nevertheless, the Canadian agreements continue to differ from US agreements insofar as the labor standards extend beyond the ILO 1998 Declaration and incorporate other ILO instruments.

Despite the addition of new labor standards, the third-generation agreements limit the review and penalties for a Parties' failure to comply with those new standards. In this connection, the Review Panel may only "examine, in light of the relevant provisions of this Agreement, whether the Party that was the object of the request has engaged, in a trade-related matter, in a persistent pattern of failure to effectively enforce its labor law or has failed to comply with its obligations under Articles 1 and 2 *to the extent that they refer to the ILO Declaration*...."[46]

Notably, while the various generations of US labor agreements follow a template, the third-generation Canadian agreements demonstrate variations. For example, some agreements: (i) refer to ILO instruments in addition to the traditional ILO 1998 Declaration (such as the 2008 Declaration on Social Justice[47]); (ii) expressly provide for cooperation with the ILO;[48] or (iii) include a $15 million cap on penalties for non-compliance.[49]

2.2.4. Fourth Generation: A New Labor Chapter

The Canada-Korea FTA marks the first Canadian trade agreement to contain labor provisions in a Chapter within the core agreement, rather than a labor cooperation side agreement. Aside from the shift in placement, the labor standards continue to call for "acceptable minimum employment standards, such as minimum wages an overtime pay, for wage earners, including those not covered by collective agreements."[50] The agreement continues to refer to labor cooperation activities, albeit in an annex rather than the core.[51] Nevertheless, the agreement expressly envisions the participation of international organizations within the framework of cooperation, noting that "Parties may, as appropriate and by agreement, seek the assistance of the International Labor Office or any other competent international and regional organisation that has the necessary expertise and resources to enhance cooperation under this Chapter."[52]

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[45] The third generation includes Labor Cooperation Agreements between Canada and Peru (2009), Colombia (2011), Jordan (2012), Panama (2013), and Honduras (2014).
[46] See, e.g., Canada-Peru Agreement, Annex 3, para. 4 (emphasis added).
[47] See Agreement on Labor Cooperation between Canada and the Republic of Honduras, Preamble.
[48] See the Labor Cooperation Agreement between Canada and Peru, Art. 25.
[49] All of the third-generation agreements contain this cap except for the Canada-Honduras Labor Cooperation Agreement.
[50] See the Canada-Korea FTA, Chapter 18, section 18.2.
[51] See Annex 18-A.
[52] See the Canada-Korea FTA, Chapter 18, section 18.23.

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2.3. Evolution of Labor Provisions in Other Signatories

The United States and Canada have included labor provisions in their trade agreements for four generations, thus leading efforts among TPP Parties in this respect. Nevertheless, efforts by the other TPP Parties bare mentioning, particularly as those provisions have taken on different commitments, thus creating a fragmented regime of various agreements with differing labor standards commitments.

2.3.1. Chile[53]

As discussed above, Chile entered into Canada's first generation of trade agreements with labor provisions under the Canada-Chile Labor Cooperation Agreement in 1997. In 2003, it entered into the US-Chile FTA under the second generation of US labor models, thus committing to "strive to ensure" the ILO's fundamental labor standards.

Between these agreements, Chile entered into the Chile-European Association Agreement (2002), which focuses mainly on cooperation mechanisms and, commits the Parties to "promote social development" and states that "the Parties will give special priority to respect for fundamental social rights."[54] Concerning the labor standards, the Agreement commits the Parties to give priority to job creation and respect for fundamental social rights, promoting ILO conventions relating to freedom of association and the right to collective bargaining and nondiscrimination, abolition of forced labor and child labor, and equal treatment between men and women, amongst others.[55] While the Agreement contains ambitious standards and cooperation mechanisms, the provisions are not subject to dispute settlement or to sanctions.

As of 2016, Chile had entered into 12 trade agreements with labor provisions.[56] The specific nature of those provisions varies by trade partner country, based on the negotiations and country-specific issues arising within the framework of each agreement. Throughout its agreements, Chilean labor provisions place emphasis on cooperative measures, including the participation of the ILO and its technical assistance on labor standards.[57] Only four of these agreements foresee a dispute resolution mechanism to consult on labor matters, and one[58] triggers the general dispute settlement mechanism of the Agreement, albeit without monetary or trade sanctions.

2.3.2. Australia

As late as 2003, the Australian Federal Coalition Government declined to include labor provisions in trade agreements, citing to the lack of evidence that trade liberalization lowered standards of labor protection.[59] In March 2003, however, the country entered into trade negotiations over the US-Australia

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[53] Regrettably, this Chapter does not permit the space to give full appreciation of the many areas in which Chile engaged in developments of labor provisions in trade agreements. For a rich examination of this topic, see Pablo Lazo Grandi, supra.

[54] See the Chile-EU Association Agreement, at Part III, Article 16 point 1, b).

[55] See id at Art. 44.

[56] See ILO: Handbook on Assessment of Labor Provisions in Trade and Investment Agreements (Geneva, ILO Research Department) 2017, p. 13.

[57] See Pablo Lazo Grandi, *Implementacion de la clausulas sociales en los tratados de libre comercio. La experiencia de Chile*, background paper (Geneva, ILO Research Department), 2017.

[58] See Chile-Turkey Free Trade Agreement (2011), Arts. 37 and 38. Notably, Art. 37 is entitled Cooperation and addresses the implementation of labor standards through cooperation. Arguably, those promotional provisions would not be subject to dispute. Nevertheless, Art. 37.7 sets out a commitment to "not fail to effectively enforce its labor laws, in a manner affecting trade between the Parties."

[59] See Department of Foreign Affairs and Trade, *Advancing the National Interest: Australia's Foreign and Trade Policy White Paper,* Commonwealth of Australia (2003), p. 33.

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FTA. In accordance with the United States May 10 template, discussed above, the agreement marked the first Australian FTA that included a labor chapter. In 2009, Australia entered into an agreement with Chile. While the agreement does not contain labor commitments, its cooperation chapter expressly refers to the ILO 1998 Declaration and envisages cooperation on "labour and employment matters of mutual interest and benefit" that will be "based on the concept of decent work."[60]

2.3.3. New Zealand

The Arrangement on Labor between New Zealand and the Kingdom of Thailand (2005) commits the parties to "ensure that its labor laws, regulations, policies and practices are not used for trade protectionist purposes."[61] Nevertheless, the provision also states that it "will not legally bind the Participants."[62] The ASEAN – Australia – New Zealand Agreement (2010) eventually superseded this agreement. This agreement refers to the need "to protect the domestic labor force and permanent employment in the territories of the Parties."[63] Aside from this reference to the movement of natural persons, the Agreement contains no commitments to labor standards.

In a side agreement to the ASEAN – Australia – New Zealand Agreement, concluded between the Philippines and New Zealand, the parties have committed not to undercut social protection. With respect to labor cooperation, the parties have further committed to "improve working conditions and living standards" and to uphold high-level standards of labor laws, policies and practices "in the context of economic development and trade liberalization." The agreement establishes a list of cooperative activities and establishes a Labor Committee and a labor consultation mechanism.

Similarly, the Trans-Pacific Strategic Economic Partnership between **Brunei Darussalam**, **Chile**, **New Zealand** and **Singapore** (2006) (P4) contains a Memorandum of Understanding on Labor Cooperation (P4 MoU).[64] The P4 marks the first free trade agreement linking Asia, the Pacific and the Americas.

The P4 MoU refers to the ILO labor standards in the Preamble, stating the following:

> Sharing the common aspiration that free trade and investments should lead to job creation, decent work and meaningful jobs for workers, with terms and conditions of employment which adhere to the core International Labor Organisation (ILO) labor principles.

The terms of the P4 MoU are, in large part, constructed to ensure cooperation between the labor parties on labor-related matters.[65] This cooperation includes to "provide a forum to discuss and exchange views on labor issues of interest or concern with a view to reaching consensus on those issues amongst the involved Parties" as well as to "promote better understanding and observance of the principles embodied in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)."

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[60] See Australia-Chile Free Trade Agreement, Art. 18.2.4.
[61] Art. 1.3 of the New Zealand- Thailand Closer Economic Partnership Agreement.
[62] Id. at section 4.1.
[63] See ASEAN – Australian – New Zealand Agreement (2010), Chapter 9, Art. 1(d).
[64] See http://www.sice.oas.org/Trade/CHL_Asia_e/Side_Agreements/Labor_e.pdf.
[65] Interestingly, under sub-paragraph 2, the Parties "may, as appropriate, invite the participation of its unions and employers and/or other persons and organisations of their countries in identifying potential areas for cooperation and in undertaking cooperative activities." Attention is drawn to this language, making clear that the participation of the social partners – despite the strong emphasis in the ILO of social dialogue – is left to the discretion of the Parties.

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Should any issue arise over the interpretation or application of the P4 MOU, Article 5.3 states that "a Party may request consultation with the other Party(ies), through the national contact point. The Parties will make every effort to reach a consensus on the matter through co-operation, consultation and dialogue."

3. TPP Negotiating History

The TPP set out to be, and for all intents and purposes was considered by many to be, the Rolls Royce of trade agreements from a labor standards perspective. To translate the labor-standards objectives to paper, however, required the negotiators to overcome a number of hurdles. First, as demonstrated above, the labor-standards commitments to which the Parties were bound at the time of negotiations varied significantly. Issues such as the standards to include, the legal enforceability and even whether to permit labor standards, at all created significant points of departure among the countries. Some countries, such as Vietnam, had never committed to labor provisions in a trade agreement. Other countries, such as Brunei Darussalam, Chile, New Zealand and Singapore, were already trade partners in agreements that contained labor commitments, the P4 MoU, but that agreement was separate to the trade agreement, merely required the Parties to "work to ensure" harmonious labor laws and contained no dispute settlement provision.

Even aside from the nature and form of the labor commitments, the negotiators faced an incredibly politically charged atmosphere. To achieve consensus even during the early negotiations, significant expectations required a meaningful demonstration that the TPP labor provisions would mark a progression from the previous trade agreements discussed above. In this respect, those provisions needed to do more than merely commit Parties to effectively enforcing their national labor laws. Rather, labor and workers' rights activists called for a strict requirement to adopt and maintain – at least -- the four categories of fundamental rights stated in the ILO 1998 Declaration, if not to refer directly to the ILO's Conventions. Additionally, early demands by some for linking such commitments to regular dispute settlement procedures accompanied by possible trade sanctions (the same as traditionally used with commercial disputes) created another important challenge.

In the early phases of negotiations, negotiators considered alternative cooperation mechanisms, including building on ILO potential support or the mechanisms already in place under the Asia-Pacific Economic Cooperation forum. It was, however, readily clear that labor groups, traditionally reluctant to support trade agreements for fear of the negative impact on jobs at home, would find such proposals insufficient. These groups raised particular concerns with respect to negotiating partners whose current national frameworks were markedly inconsistent with fundamental labor rights and would likely result in a race to the bottom with consequent job losses.

In response to these and other concerns, negotiations focused on country-specific gaps with respect to fundamental labor rights and the manner in which they could be addressed, as well as the manner in which labor rights violation complaints could be handled. While all negotiating countries are members of the ILO and have thus committed to respect, promote and realize the fundamental labor rights enunciated in the ILO 1998 Declaration, such in-depth gap identification touched upon highly sensitive political issues. For example, in Vietnam, discussed in detail below, issues concerning the fundamental right to freedom of association were raised in this labor context, while outstanding human rights issues concerning freedom of assembly and speech continue to garner international attention.

Moreover, traditional trading partners, such as Canada, raised concerns about imposing trade sanctions, rather than simple monetary penalties, for labor rights violations, out of concern that such sanctions

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would ultimately only further harm the already exploited workers. Monetary penalties, it was argued, can more directly address the problem by funding relevant initiatives aimed at addressing the shortcomings. Canada thus proposed an enforcement mechanism similar to that included in its labor cooperation agreement with Panama, whereby a violation found by a panel would give rise to the development of an "action plan" to implement the panel's recommendations. Failure to agree or non-implementation would enable the determination of a monetary assessment not to exceed 15 million Canadian dollars annually. Other partners raised concerns that enforceable labor provisions could ultimately threaten the intention to expand coverage to the new Southeast Asian partners and rather supported the approach of a "memorandum of understanding on labor cooperation" as had been set out in the P4 Agreement and which creates no binding, enforceable labor rights obligations.

Trade unionists, workers' rights activists and other groups considered however, that the possibility of imposing trade sanctions served as important leverage to bring pressure not only on governments but also on businesses that might try to garner advantage from a lesser regulated environment. Labor groups in particular urged that the TPP key provisions should provide adequate response to workers' needs and ensure labor rights for all concerned. Utmost among their concerns was the absence of full freedom of association and collective bargaining in some of the negotiating countries. In their eyes, this undemocratic backdrop, coupled with a settlement mechanism that could be invoked only in investor-State disputes, would clearly signify that the agreement was catering to corporate rather than workers' interests –from whichever side of the border.

These groups were not alone. Three-quarters of the House Democratic caucus on 29 May 2014 urged the Obama Administration to negotiate labor action plans for Vietnam, Malaysia, Brunei and Mexico in the context of the TPP and to ensure withholding of the benefits of the trade deal absent improvements in those nations' labor and human rights practices.[66] Critical among their demands was the setting of enforceable milestones to ensure action rather than lip service and to evolve the trade agreement framework beyond the previous generation's non-enforceable provisions.

In the end, negotiators overcame significant hurdles to buttress the TPP significantly, not only with country-specific labor action plans, but also with references to binding dispute settlement procedures. Such procedures would first seek out a mutually agreed "compensation" (which can be used to remedy the violation) but if not possible or recommended measures not implemented, the complaining party could then move for suspension of trade concessions[67].

4. Chapter 19 (Labor)

The TPP Labor Chapter achieved significant breakthroughs to combat social dumping but, in so doing, had to carefully strike a balance between various political and economic sensitivities that arose during the negotiations. Despite the sensitivities – or perhaps because of them -- the Labor Chapter contained many important novel labor provisions that are worthy of mention. Those provisions concerned (i) new labor-standards commitments, beyond the fundamental rights contained in the ILO 1998 Declaration; (ii) enhanced measures to prevent forced or child labor; (iii) non derogation; (iv) enhanced capacity building, including through ILO assistance; and (v) labor cooperation dialogue.

[66] Inside US Trade (world trade online) – 6 June 2014
[67] See Article 28.20

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4.1. Novel Labor Provisions

The TPP Labor Chapter was negotiated by countries that were bound by various labor-standards commitments through their preexisting trade agreements, as well as through their ILO membership by the commitment to respect, promote and realize the fundamental rights that are contained in the 1998 ILO Declaration. Nevertheless, as described previously, various interest groups fought hard to ensure that the TPP marked a significant progression from the current state of play in the nexus of trade and labor. As a result, to combat social dumping and support improved labor rights, the Labor Chapter first deviated from the traditional labor provisions – even those in the United States – to include new labor standards that labor advocates had been urging for years: acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health. The TPP, therefore, would have marked the first agreement ratified by many of the countries that contained labor-standards commitments (see Table 1). It would also have been the first US agreement to extend beyond the 1998 ILO Declaration.

Second, the Labor Chapter provided for enhanced protections for forced and child labor – two standards that are contained in the 1998 ILO Declaration. More concretely, Article 19.6 of the Chapter enhanced protection of these rights and included the commitment to take active steps to discourage the importation of goods produced in whole or in part by forced or compulsory labor or child labor. Similarly, the parties committed to encourage enterprises to voluntarily adopt corporate social responsibility initiatives on certain labor issues.

Third, the Labor Chapter, following the traditional labor provisions discussed above, expressly recognized that labor standards should not be used for protectionist trade purposes. However, it additionally stated, under Article 19.4 (non-derogation), that it was inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labor laws. This article clarified that Parties must ensure strong protections for labor rights throughout the territory, including in special trade or customs areas, such as export processing zones or foreign trade zones. The non-derogation clause thus highlighted the importance of a level playing field regardless of the relegation of production to designated zones. Furthermore, it echoed international concerns that protectionist fears must be balanced with the admonition that the violation of fundamental principles and rights at work could not be invoked or otherwise used as a legitimate comparative advantage.[68]

[68] ILO Social Justice Declaration, 2008, I. A. (iv)

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Box 3. Criticism of Chapter 19

Representatives of workers and trade unions, such as the AFL-CIO in the United States, have consistently spoken out against the labor provisions contained in Chapter 19 of the TPP. In 2011, when the labor provisions were in the early stages of negotiation, the AFL-CIO and labor federations from the other TPP countries drafted their own labor Chapter. These federations hoped that the Agreement would mark a shift away from the US-led labor provision template (the May 10 template, discussed above) and more concretely refer to labor standards such as the ILO Conventions. This proposal was not accepted. Since the finalization of Chapter 19, the AFL-CIO has raised the following criticisms:

- The labor provisions may be "enforceable" but are not realistic. Given the historical difficulties in filing grievances or imposing trade sanctions under labor provisions, it is not likely that these provisions will be enforceable in practice.

- The TPP contains different dispute settlement mechanisms for foreign investors and working people through investor state dispute solution (ISDS).

- A number of important labor recommendations have been ignored.

These critics have recently referred to the final report of the Arbitral Panel established to review the complaint against Guatemala brought under the CAFTA-DR as only bolstering the concerns raised above.

Fourth, the Labor Chapter, under Article 19.10 (Labor Cooperation) showed the common commitment to improving labor standards and advancing the principles and rights set out in the ILO Declaration. It highlighted the importance of providing relevant capacity-building activities and innovative workplace practices, bearing in mind the country's priorities and level of development. The article further placed the relevant stakeholders, including worker and employer representatives, in the driving seat for the identification of those priorities.

Against this background, it is therefore not surprising that the Agreement identified the ILO as a relevant international organization, which may be involved in appropriate activities. Listed areas of potential cooperation go beyond a rights focus also to include the development of institutions and mechanisms to improve social dialogue and tripartite consultation and partnership – a pillar of the ILO agenda - including through the promotion of best practices in alternative dispute resolution.

Fifth, to promote collaboration with the aims of the Labor Chapter, Article 19.11 provided the framework for a cooperative labor dialogue among the parties on any issues of relevance. This dialogue could have, in turn, led to the development and implementation of an action plan with specific and verifiable steps. The dialoguing Parties could have, for example, requested the ILO to carry out independent verification of compliance (19.11.6 (b)) and appropriate incentives could have been provided, including cooperative programs and capacity building. Other mechanisms to discuss and consider matters related to the Labor Chapter were also established, such as the Labor Council (Article 19.12), contact points to facilitate communication between the Parties and with the public and assist the Labor Council (Article 19.13) and labor consultations (Article 19.15). Should those attempts by the parties to resolve a matter arising under the chapter have failed, a request could have been made to set up a dispute settlement panel under Chapter 28 of the TPP.

4.2. Labor Consistency Plans

In addition to the new labor standards and commitments set out in Chapter 19, discussed above, the TPP negotiations enabled the United States to enter into three bilateral, legally enforceable labor side agreements: the Labor Consistency Plans between the United States and

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Vietnam, Malaysia and Brunei Darussalam. Under these Plans, the partner countries conceded the need to make changes in their labor legislation and practices, prior to the TPP entering into force, in order to demonstrate compliance with the labor standards under the TPP. More concretely, the Parties were to achieve those commitments before those countries could export goods duty-free into the United States. Unfortunately, these three labor consistency plans disappeared from the TPP when the United States withdrew in January 2017 and were for obvious reasons not included in the CPTPP package.[69] For historical purposes, and in the event that the United States decides to rejoin the TPP/CPTPP in the future, the labor consistency plans are well worth discussing.

The terms and objectives of the three Plans differed, which may reflect both the priorities identified by the United States, generally, and the concessions that the US trade negotiators needed to obtain to secure political support for the trade negotiations, specifically. Thus, the bilateral "United States-Vietnam Plan for the Enhancement of Labor Relations" (hereafter, the US-VN Labor Consistency Plan) required a holistic reform to Vietnam freedom of association and collective bargaining in order to ensure that workers are autonomous to form and operate unions of their choosing. The Labor Consistency Plan between the United States and Malaysia, on the other hand, focused on forced labor, anti-trafficking legislation and workers' passport protections, while the Labor Consistency Plan between the United States and Brunei aimed to eliminate governmental discretion on trade union registration and operations.

4.2.1. Viet Nam

The political debate in the United States surrounding the TPP negotiations – and all TPP ratification prospects since then – focused largely on Vietnam, which remains a Communist State. From a labor vista, it maintains only one national trade union, the Vietnam General Confederation of Labour (VGCL), and has not historically permitted competitor unions or grassroots labor movements. American Senators and unionists have highlighted the weak protection of labor rights in that country, and have argued that any country that does not afford such fundamental rights as free elections and freedom of assembly cannot be seen as providing for fundamental labor provisions such as the right of association.

Within the framework of the US-VN Labor Consistency Plan, bilateral discussions identified concrete gaps in the protection of fundamental labor rights and the reforms needed to address them. Through several rounds of bilateral negotiations, the parties agreed to specific reforms, and the Government of Viet Nam agreed to massively reform its labor regime.

In this respect, under the US-VN Labor Consistency Plan, the Government committed to creating a new labor infrastructure through specific amendments to its trade union and labor laws, which would have permitted the establishment of independent and grassroots unions. It accordingly tackled the question of freedom of association and directly preconditioned the trade benefit of reduced US tariffs on the granting of full freedom of association to independent unions at the workplace level. This included the rights of workplace unions not to affiliate to the VGCL that, with State party control, maintained a monopolistic representation of workers. Critically, the Plan recognized that any of those legislative

[69] See note 3, above.

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reforms would only be meaningful through the development of robust institutions to support them, including mediation and conciliation services and effective enforcement mechanisms.[70]

Observing the significant change to be brought about to the labor relations system, the Plan also provided for the possibility of workers to seek technical assistance from international workers' organizations "to understand Vietnamese labor law, meet the requirements and procedures for establishing a labor union, organize a labor union and undertake labor union activities once organized, including to bargain collectively, strike, and conduct labor-related collective activities under the ILO Declaration." The Plan referred to specific articles that would need to be amended, perhaps through that ILO assistance. Finally, acknowledging the critical need for transparency in the implementation of these measures, the Plan required reporting every six months for ten years on the unions registered or denied registration, and information on collective bargaining agreements and on strikes.

Under the US-VN Labor Consistency Plan, the US had agreed to support a technical assistance program for Viet Nam to facilitate the above process. Viet Nam for its part agreed to request the cooperation, advice and technical assistance of the ILO to help in its implementation. A three-member labor expert committee, chaired by an unbiased, objective and independent party, possibly the ILO, would have reported on progress made, while reviews of the plan's implementation would have taken place in the third, fifth and tenth years from entry into force.

4.2.2. Malaysia

For several years, the United States Trafficking in Persons Report has categorized Malaysia as a source and transit country for men, women and children subject to forced labor and trafficking, and has called for institutional and legislative reforms to strengthen protection and prevention.[71] Negotiations for the Malaysia-United States Labor Consistency Plan largely centered on this issue, and resulted in a commitment under the Plan to implement significant legal and institutional reforms to fully implement a new Anti-Trafficking law and to increase protections related to the withholding of workers' passports. New regulations would also have to be enacted to allow victims of trafficking to move freely and have access to legal counsel of their choice.

In addition to forced labor, Malaysia had also garnered criticism for its overly restrictive laws and practices on trade union formation and strikes. To address these issues, Malaysia and the United States agreed to focus on the need to ensure effective judicial review of any suspension or cancellation of trade union registration or determinations of strike illegality. The stated purpose was to avoid excessive discretionary authority by Ministry officials and limit the broad and vague legal power granted to them. The Plan also called for the removal of excessive restrictions on trade union membership and the holding of trade union office, the scope of collective bargaining and the prerequisites for strike action. Limitations in the case of essential services would have required amendments to be "consistent with the rights as stated in the ILO Declaration."

Once again, the preamble recognized the technical resources of the ILO that could have been of assistance to the Government in fulfilling its commitments under the Plan. It also called on the Government to develop, in coordination with the ILO, a training program for labor inspectors and plan

[70] To support the carrot part of the deal recognizing the need to support incremental steps through targeted assistance, several US agencies, including the US Agency for International Development (USAID), had requested millions of dollars in the 2017 Congressional Budget Justification to help Viet Nam implement these reforms, especially the priority areas including labor rights and the rule of law.

[71] See, e.g., the 2015 report, available online at http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243485.htm.

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for increased labor inspections targeted at addressing forced labor and practices that increased workers' vulnerability to forced labor. Transparency requirements included biannual statistics on the number of complaints received, investigations conducted and any remediation.

4.2.3. Brunei Darussalam

Brunei Darussalam, a monarchy that has been under the same family rule for more than 600 years, was a late entrant into global labor governance. It did not become a member of the ILO until 2007, and has since then ratified only two ILO fundamental conventions, both of which concern the elimination of child labor. Two of the main issues that arose during negotiations were trade union rights and the lack of any form of minimum-wage machinery. With respect to the former, US labor groups had long criticized the Brunei Government for heavily interfering with trade union autonomy.

During the TPP negotiations, Brunei passed legislation that amended its labor laws to remove some of the Government's broad discretion to register and cancel trade union registration and removed restrictions on trade union practices and operations. The Brunei-United States Labor Consistency Plan committed Brunei to additional legislation reforms in line with those amendments, to ensure that its trade union act and employment order continued to limit the Government's discretion in those areas. Concerning minimum wages, both the TPPP Chapter 19, and the Brunei-United States Labor Consistency Plan, emphasized the need for all TPP countries to have in place a minimum-wage-fixing machinery in the country. As with the other elements of the Plan, the Brunei Government would have needed to implement this requirement prior to receiving trade benefits with the US.

Institutional reforms, capacity building and the appropriate technical assistance were also called for to support the plan. Contrary to the cases of Viet Nam and Malaysia, there was no specific reference to the ILO and its eventual assistance, perhaps owing to the greater national resources in the country. Nevertheless, in technical areas such as minimum wages, the government could have called on ILO expertise to ensure conformity with international standards.

CONCLUSION

The Labor Chapter of the TPP did not come easily. Political groups within the United States disagreed sharply with the principle of entering into trade agreements with certain countries that traditionally violated international labor rights. They also disagreed on the manner in which the TPP's negotiated labor text set out the labor provisions. The fate of those provisions will most likely never be known, as President Trump decided by Executive Order to withdraw the United States from the agreement.

While the United States' exit from the TPP did not as noted earlier seal its fate the bilateral agreements between the U.S. and Viet Nam, Malaysia and Brunei Darussalam are left without any legal force. Accordingly, whether those countries will continue to reform their labor laws and practices as they had previously committed to doing under their respective bilateral agreements remains to be seen.

Four years after the Trump withdrawal, and with a new U.S. President having been installed, the question is posed as to whether the United States will continue with the momentum it garnered in the TPP to enhance its labor provisions beyond the May 10 template. The United States-Mexico Canada Agreement (USMCA), which entered into force July 1, 2020, suggests that the answer is positive. USMCA contains labor protections applicable to Mexico that clarify, advance, and add onto the

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commitments stipulated in the TPP.[72] The USMCA establishes, inter alia,[73] requirements that Mexico amend its constitutional and labor laws to permit independent unions and effective collective bargaining for the first time, and a "rapid response" mechanism so interested parties in the United States (and Canada) such as labor unions may challenge alleged violations of the USMCA provisions by individual enterprises.[74] These changes were insisted on by the Democratic Congress in December 2019 as a condition for congressional approval. Given her role in the congressional consideration of the USMCA, we are optimistic that the U.S. Trade Representative under the Biden Administration, Katherine Tai, will continue to negotiate strong labor provisions in future U.S agreements.[75]

For the remaining TPP signatories, it is notable that the labor concessions hard-won in chapter 23 of the original TPP text were not changed when the CPTPP amendments were adopted[76]. The authors hope that the significant attention given to this matter over years of negotiation, with strong labor provisions negotiated in the TPP that remain in the CPTPP, will assist the eleven CPTPP parties in further progress toward a fair and level playing field for labor rights.

[72] USMCA, Nov ember 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.
[73] The new labor provisions contained in the USMCA – including new protections for migrant workers, strengthening forced labor prohibitions, and broadening the scope of provisions to prohibit discrimination on the basis of sexual orientation and gender identity (SOGI) – are beyond the scope of this Chapter. They nevertheless suggest that the United States will continue to advance labor provisions in U.S. trade agreements to include broader categories of workers.
[74] See USMCA, ch. 23, ch. 31, annexes 31-A and 31-B.
[75] See e.g., "Senate Unanimously Confirms Katherine Tai as U.S. Trade Representative, March 17, 2021," available online at https://www.cbsnews.com/news/katherine-tai-confirmed-us-trade-representative/ (noting that "She handled negotiations with the Trump administration over a revamped North American trade deal. Under pressure from congressional Democrats, Mr. Trump's trade team agreed to strengthen the pact to make it easier for Mexican workers to form independent unions and demand better pay and benefits — decreasing the incentives for U.S. firms to move south of the border to take advantage of cheap labor.").
[76] CPTPP, note 3, above.

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