

Labor Implications of TPP: A Game Changer?

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May 10, 2016

A. Introduction

The Social Dimension Labor Provision of the Transpacific Partnership (TPP) indeed represents the “Next Generation” in Free Trade Agreements (FTAs) and is possibly a “game changer” in the several Asian countries with TPP-side agreements with the U.S. As one of the few countries in the world that includes labor provisions in FTAs with Asia-Pacific countries, the U.S. in the TPP has built on its past FTA labor provisions and through its side agreements on labor with Vietnam, Malaysia, and Brunei to advance new and higher labor standards.¹ The significance of the Side Agreements cannot be over-emphasized. As always, the proof is in the actual enforcement and, in the author’s opinion, future scrutiny should be on making enforcement meaningful. In the interim and final analysis, it may well be up to the economists to proclaim a conclusion on its economic impact and its success or failure.

This paper places discussion of the TPP in the context of addressing the growth of FTAs and the limited use of social dimension provisions on labor, particularly with many Asia-Pacific countries, thus highlighting the progressive measures on labor protections undertaken by the TPP and how it fits with emerging developments in the region.² This discussion is followed by identifying new research agenda implicated by TPP labor provisions and its side agreements and, providing analyses to the challenges and opportunities they present. Finally, in the conclusion, summaries, suggestions, and challenges to other disciplines will be made.

Based on a paper presented at the NSF Workshop on Mega-Regionalism: New Challenges for Trade and Innovation (MCTI) at the East-West Center, Honolulu, Hawaii, on January 20-21, 2016

¹ The side agreements of the TPP that the U.S. has with Vietnam, Malaysia, and Brunei, by express terms require their labor laws to be changed and improved *prior* to their implementation of the TPP so as to allow independent labor unions, strikes, proper treatment of immigrants, anti-discrimination provisions, labor inspections, and the basic labor standards affecting working conditions. That is, *before* they are allowed to export goods duty-free to the United States and otherwise use the provisions of the TPP the required legislative labor reforms must be concluded. The side agreements are very detailed in their obligations. TPP Full Text, at, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

² Not all agree the TPP is “progressive. The AFL-CIO retains many of its pre-signing reservations. *See*, Celeste Drake, TPP Daily Debunk #1: The ‘Most Progressive Trade Agreement Ever’ (November 11, 2015), *at*, <http://www.aflcio.org/Blog/Political-Action-Legislation/TPP-Daily-Debunk-1-The-Most-Progressive-Trade-Agreement-Ever>. Also, *see*, Report on the Impacts of the Trans-Pacific Partnership by The Labor Advisory Committee on Trade Negotiations and Trade Policy (December 2, 2015), *at*, <https://ustr.gov/sites/default/files/Labor-Advisory-Committee-for-Trade-Negotiations-and-Trade-Policy.pdf>.

B. Emerging Mega-FTAs; Prior U.S. FTA Labor Protections and Shortcomings; and the TPP – a New Generation?

1. Mega-FTAs Currently Emerging³

In the last decade there has been a blossoming of trade liberalization initiatives resulting in free trade agreements.⁴ As of January 2013, the number of ratified FTAs involving at least one country from the Asian region is 109. This is more than triple the number in 2002. There are another 148 FTAs at various stages of development, bringing the total to 257.⁵ Nearly three-quarters of the FTAs, or 189 out of a total of 257, were bilateral (i.e., involving two countries); only 68 were multi-lateral.⁶

³ This material is more fully discussed in Ronald C. Brown, FTAs in Asia-Pacific: “Next Generation” of Social Dimension Provisions on Labor? _ Indiana Int’l & Comp. L. Rev. _ (2016). Leading the way in numbers are the FTAs involving the 10 members of the Association of Southeast Asian Nations (ASEAN) and their six trade partners: Australia, China, India, Japan, South Korea, and New Zealand. FTAs involving these countries have increased from 27 in 2002 to 179 by January 2013, a 600 percent increase. The ADB report states that ASEAN is leading negotiations with its six partners to establish the Regional Comprehensive Economic Partnership (RCEP) by 2015, the deadline ASEAN set to achieve the ASEAN Economic Community. This will have a market size of 3.4 billion people and a combined GDP of \$21.4 trillion or about 30% of world GDP. ³ Currently, the ASEAN+6 countries account for 70% of the total FTAs in Asia. Id. And see, *Regional Cooperation and Integration in a Changing World* 18 (2013), available at <http://www10.iadb.org/intal/intalcdi/PE/2013/11842.pdf> [hereinafter RCICW]. Negotiations on RCEP, an initiative involving the 10 ASEAN members and its partners - Australia, China, India, Japan, New Zealand and South Korea started in 2013 seeks an economic partnership which would form the world’s largest economic bloc, *Asean plus Six likely to form world’s largest economic bloc*, ASEANAFFAIRS.COM (Nov. 17, 2012), http://www.aseanaffairs.com/asean_news/trade/asean_plus_six_likely_to_form_world_s_largest_economic_bloc.

⁴ See discussion in REGIONAL COOPERATION AND INTEGRATION IN A CHANGING WORLD 17-26 (Asian Dev. Bank 2013), available at <http://www10.iadb.org/intal/intalcdi/PE/2013/11842.pdf>. See also, Bilateral FTAs by Geographic Area, WTO Notification and Status 2000 and 2015, ASIA REG’L INTEGRATION CTR., <http://aric.adb.org/fta> (last visited Aug. 16, 2014). The potential for negative effects of FTAs because of the complexity and inconsistency of some regulations, has been described as the “noodle bowl” (or “spaghetti bowl”) effect arising from different rules of origin (ROOs). Yunling Zhang & Minghui Shen, *The Status of East Asian Free Trade Agreements* 3 (Asian Dev. Bank, Working Paper No. 282, 2011), available at <http://www.econstor.eu/handle/10419/53698>. See summary at *Asian Free Trade Agreements: Untangling the Noodle Bowl*, ASIAN DEV. BANK (Aug. 8, 2013), <http://www.adb.org/features/free-trade-untangling-asia-s-noodle-bowl>. Two proposals have been advanced to disentangle the Asian free trade noodle bowl: consolidation - which creates a regional FTA to harmonize bilateral FTAs; and multi-lateralization - which grants non-discriminatory preferences to nonmembers, eliminating preference discrepancies. *Asian Economic Integration Monitor – March 2013*, ASIAN DEV. BANK, <http://www.adb.org/publications/asian-economic-integration-monitor-march-2013> (last visited Aug. 16, 2014).

⁵ *Regional Cooperation and Integration in a Changing World* 17 and 21 (2013), available at <http://www10.iadb.org/intal/intalcdi/PE/2013/11842.pdf>. See also, *Bilateral FTAs by Geographic Area, WTO Notification and Status 2000 and 2015*, ASIA REG’L INTEGRATION CTR., <http://aric.adb.org/fta> (last visited Aug. 16, 2014).

⁶ *Regional Cooperation and Integration in a Changing World* 18 (2013), available at <http://www10.iadb.org/intal/intalcdi/PE/2013/11842.pdf>. “Two leading participants in Asian FTAs—Japan and Singapore—strongly favor a WTO-plus approach to FTAs. All of Japan’s agreements and most of

More recently, *mega-regional* trade deals have come into vogue.⁷ Asia’s own mega-regional trade deal — the Regional Comprehensive Economic Partnership (RCEP) – was launched in 2012. This trade deal could create the world’s largest trading bloc and have significant implications for the world economy.⁸ The objective is to achieve an economic partnership agreement among the ASEAN member states and ASEAN’s FTA Partners,⁹ and envisages a highly competitive single market and production base that is fully integrated into the global economy.¹⁰ At the same time, a “key purpose is to reconcile two long-standing proposals into a large region-wide trade agreement: the East Asian Free Trade Agreement,¹¹ which included ASEAN, China, Japan and South Korea; and the Regional Comprehensive Economic Partnership, which added Australia, India and New Zealand. The RCEP bridges the two proposals by adopting an open accession scheme. The RCEP permits external countries to join later and does not prohibit members from acceding to other free-trade groupings, such as the Trans-Pacific

Singapore’s are WTO-plus. Likewise, Brunei Darussalam, Indonesia, the Republic of Korea, Malaysia, the Philippines, and Viet Nam largely follow a WTO-plus format.” *Id.* at 19. Singapore’s primary issues were found to be newer additions to the scope of a FTA agreement, and included investment, competition, intellectual property, and public procurement (“the four Singapore issues”). *Id.* at 2. These go beyond the scope of the WTO requirements and thus are sometimes incorporated to FTAs and characterized as “WTO-plus”. These newer issues were economically focused, without inclusion of a social dimension. Masahiro Kawai & Ganeshan Wignaraja, *Asian FTAs: Trends, Prospects, and Challenges* 1, 4 (Asian Dev. Bank, Working Paper No. 226, 2010), available at http://www.un.org/esa/ffd/msc/regionalcooperation/ADB_WPs.pdf.

⁷ Ganeshan Wignaraja, *Why the RCEP matters for Asia and the world*, EAST ASIA FORUM (May 15, 2013), <http://www.eastasiaforum.org/2013/05/15/why-the-rcep-matters-for-asia-and-the-world/>. “Mega-regional trade deals” is a term used to describe multi-country trade agreements made between (1) a large amount of countries; (2) a large geographical area; or (3) very large countries.

⁸ASEAN *Regional Comprehensive Economic Partnership*, ASS’N OF SE. ASIAN NATIONS, <http://www.asean.org/news/item/asean-framework-for-regional-comprehensive-economic-partnership> (last visited Aug. 16, 2014). JAMES WALLAR, NAT’L BUREAU OF ASIAN RESEARCH, *ACHIEVING THE PROMISE OF THE ASEAN ECONOMIC COMMUNITY: LESS THAN YOU IMAGINE, MORE THAN YOU KNOW* 20 (2014), available at http://www.nbr.org/downloads/pdfs/ETA/wallar_paper_072814.pdf.

⁹*Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership*, ASEAN.ORG (Aug. 30, 2012), <http://www.asean.org/images/2012/documents/Guiding%20Principles%20and%20Objectives%20for%20Negotiating%20the%20Regional%20Comprehensive%20Economic%20Partnership.pdf>; JAMES WALLAR, NAT’L BUREAU OF ASIAN RESEARCH, *ACHIEVING THE PROMISE OF THE ASEAN ECONOMIC COMMUNITY: LESS THAN YOU IMAGINE, MORE THAN YOU KNOW* 20 n.43 (2014), available at http://www.nbr.org/downloads/pdfs/ETA/wallar_paper_072814.pdf.

¹⁰Asian Dev. Bank, *Asian Development Outlook 2013 Asia’s Energy Challenge* 13 (2013), available at <http://www.adb.org/sites/default/files/pub/2013/aem-201303.pdf> [hereinafter ADO].

¹¹ *East Asia Free Trade Area (ASEAN+3)*, ASIA REG’L INTEGRATION CENTER, <http://aric.adb.org/fta/east-asia-free-trade-area-%28asean3%29> (last visited May 11, 2015).

Partnership (TPP).¹² Negotiations among the 16 parties began in early 2013 and is predicted to conclude in 2016.¹³ It does not include a social dimension provision protecting labor.

In May 2016, President Obama, in promoting the need for the TPP, stated China and 15 other nations recently met in Australia with a goal of getting their deal, the RCEP, done before the end of 2016. He added, “[t]hat trade deal won’t prevent unfair competition among government-subsidized, state-owned enterprises. It won’t protect a free and open Internet. Nor will it respect intellectual property rights in a way that ensures America’s creators, artists, filmmakers and entrepreneurs get their due. And it certainly won’t enforce high standards for our workers and our environment.”¹⁴ In fact, China does not include labor protection provisions in its FTAs.

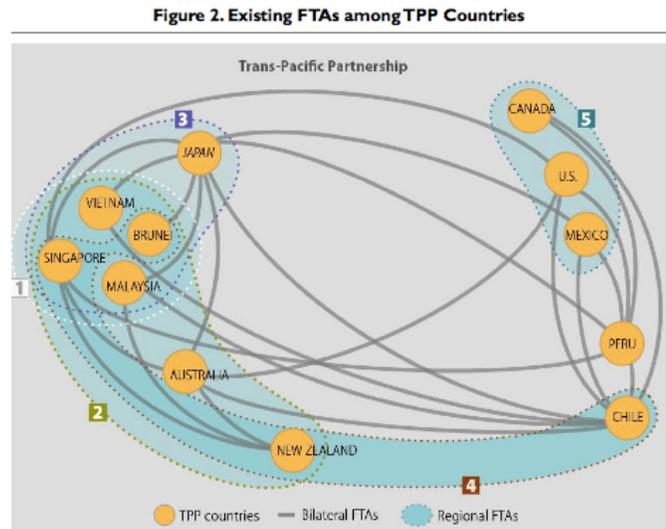
Besides the RCEP, the newest FTA in world trade these days is the Trans-Pacific Partnership (TPP). “Hailed as a state-of-the-art free trade agreement (FTA), it will unite 11 countries—Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam—with a combined GDP

¹² Murray Hiebert & Liam Hanlon, *ASEAN and Partners Launch Regional Comprehensive Economic Partnership*, CTR FOR STRATEGIC AND INT’L STUDIES (Dec. 7, 2012) <http://csis.org/publication/asean-and-partners-launch-regional-comprehensive-economic-partnership>.

¹³ *RCEP set to miss 2015 deadline, talks to spill over to next year* (Oct. 23, 2015), at <http://economictimes.indiatimes.com/news/international/business/rcep-set-to-miss-2015-deadline-talks-to-spill-over-to-next-year/articleshow/49499225.cms>. Ganeshan Wignaraja, *Why the RCEP matters for Asia and the world*, EAST ASIA FORUM (May 15, 2013), <http://www.eastasiaforum.org/2013/05/15/why-the-rcep-matters-for-asia-and-the-world/>. “Because the RCEP will contain three of the largest economies in the world — China, India and Japan — it is globally important. The bloc represents 49 per cent of the world’s population and accounts for 30 per cent of world GDP. It also makes up 29 per cent of world trade and 26 per cent of world FDI inflows. Conservative estimates using various computable general equilibrium models suggest that if the RCEP were implemented it would bring large income gains to the world economy of between US \$260–644 billion in a decade or so.” *Id.* A critique on the trajectory of the RCEP and its relationship with regional FTAs in East Asia is found in a recent ADB report. See generally, Yoshifumi Fukunaga & Ikumo Isono, *Taking ASEAN+1 FTAs towards the RCEP: A Mapping Study* (ERIA Discussion Paper Series, ERIA-DP-2013-02, 2013), available at <http://www.eria.org/ERIA-DP-2013-02.pdf>. Talks appear to be advancing. India, backed by South Korea and China, has made a two-tier proposal at the [Regional Comprehensive Economic Partnership](#) (RCEP), offering wider duty eliminations to the 10 [Asean](#) countries in the trade bloc and a lower market access to the five non-Asean members. The exact categories that will be given duty-free status will be decided in further deliberations in April, with an end 2015 deadline to conclude negotiations. Dilasha Seth, *India offers wider duty cuts at Regional Comprehensive Economic Partnership*, THE ECONOMIC TIMES (Feb 18, 2015, 4:32 AM), http://articles.economictimes.indiatimes.com/2015-02-18/news/59268923_1_regional-comprehensive-economic-partnership-asean-rcep. Other regional developments are also moving forward. In March 2014, China, Japan, and South Korea held their fourth round of negotiations over a trilateral free trade agreement (China-Japan-South Korea FTA). [Shannon Tiezzi](#), *China-Japan-South Korea Hold FTA Talks Despite Political Tension*, THE DIPLOMAT (Mar. 5, 2014), <http://thediplomat.com/2014/03/china-japan-south-korea-hold-fta-talks-despite-political-tension/>.

¹⁴ *President Obama: The TPP would let America, not China, lead the way on global trade*, at https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html

of almost \$21 trillion (about 30 percent of world GDP) and \$4.4 trillion in exports of goods and services, or about a fifth of total world exports. If Japan and South Korea are added (they are actively exploring entry later this year), TPP would cover 40 percent of world GDP and nearly a third of world exports.”¹⁵ The TPP countries already have a number of existing FTAs, as seen in the figure below.¹⁶



Source: WTO FTA database and websites of TPP countries' trade ministries. Trade data from IMF.

All current TPP participants are members of the Asia Pacific Economic Cooperation (APEC) Forum;¹⁷ and, many see their prospective agreement as a step toward APEC's long-standing goal to create a Free Trade Area of the Asia Pacific (FTAAP) among APEC members.

At the same time, other trade integration arrangements are in place in the Asia Pacific area.¹⁸ These are, ASEAN,¹⁹ of which four of its ten members, are not signatories to

¹⁵ Barbara Kotschwar & Jeffrey J. Schott, *The Next Big Thing? The Trans-Pacific Partnership & Latin America*, LATIN AMERICA GOES GLOBAL 8 (Spring 2013), available at <http://americasquarterly.org/next-big-thing-trans-pacific-partnership>

¹⁶ Ian F. Fergusson, Mark A. McMinimy, Brock R. Williams, *The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress* (March 20, 2015), at 9, available at <https://www.fas.org/sgp/crs/row/R42694.pdf>

¹⁷ These countries include Australia, Canada, Chile, China, Indonesia, Japan, Mexico, Peru, and the United States. *History and Membership of APEC*, INTERNATIONAL.GC.CA, <http://www.international.gc.ca/apec/map-carte.aspx?lang=eng> (last visited May 9, 2015).

¹⁸ These include ASEAN, RCEP, and the Latin America trade bloc, the Pacific Alliance (including Chile, Columbia, Mexico, and Peru). Socorro Ramirez, *Regionalism: The Pacific Alliance*, AMERICAS QUARTERLY (Spring 2013), available at <http://www.americasquarterly.org/content/regionalism-pacific-alliance>

APEC; Pacific Alliance;²⁰ and, in current negotiations, is the Regional Comprehensive Economic Partnership (RCEP), in which the ASEAN-10 are working together to deepen ties with their FTA partners in the region (those six countries are China, India, Japan, South Korea, Australia, and New Zealand). *China thus far has not agreed to a social dimension provision in any of its FTAs relating to the protection of labor.*²¹ One could imagine if the TPP were not ratified by the U.S. Congress, the RCEP with China as a leading member, would be poised to be concluded without labor protection provisions.²²

Of the six countries above (China, India, Japan, South Korea, Australia, and New Zealand), all are ASEAN FTA *partners*, and several are also members of the TPP.²³ As the RCEP, with its relatively poorer Asian nations included (contrasted with TPP's, relatively wealthier nations), it may be seen as advantageous for some countries to join the RCEP, which could be a possible pathway to harmonization and an eventual FTAAP.²⁴

In addition to the TPP, other mega-FTAs that may come into being are in the figure below and include the U.S.-E.U. FTA (TTIP), the Free Trade Area of the Asia-Pacific (FTAAP), the RCEP, and the Japan-EU EPA..

¹⁹ ASEAN members are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

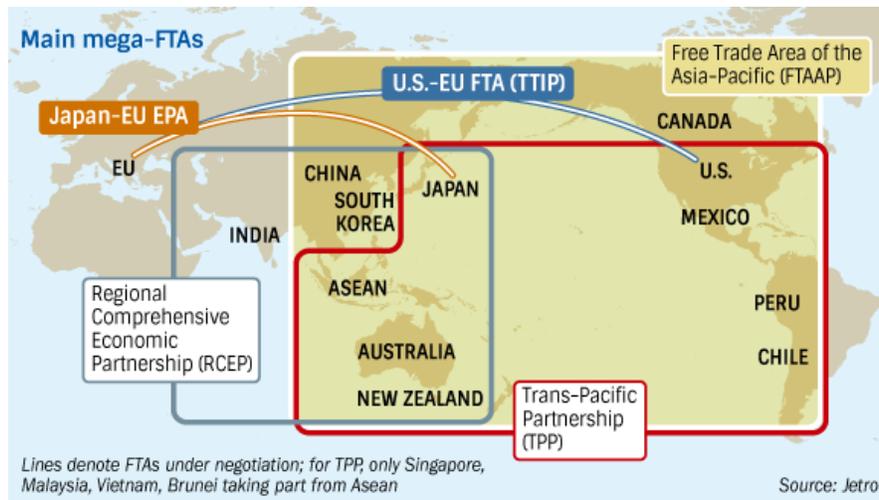
²⁰ The Pacific Alliance is a Latin American trade bloc, beginning toward integration. It currently has four member states—Chile, Colombia, Mexico, and Peru, which all border the Pacific Ocean. Costa Rica began the process of joining the Alliance in February 2014. The four founding nations of the Pacific Alliance represent nearly 36% of Latin American GDP. If counted as a single country this group of nations would be the sixth largest economy in the world with a PPP GDP of more than US\$3 trillion. Pacific Alliance, The Pacific Alliance VII Summit (May 23, 2013), *available at*, http://alianzapacifico.net/documents/abc_eng.pdf; *see also*, *Pacific Alliance*, WIKIPEDIA, http://en.wikipedia.org/wiki/Pacific_Alliance.

²¹ On-going negotiations of the U.S.-China Bilateral Investment Treaty (BIT), which has U.S.-proposed labor provisions, is not concluded at this time and if agreed to would be the first agreement in which China accepts ILO standards in a FTA or BIT. *See discussion in*, Ronald C. Brown, *Fundamental Labour Rights in China - Legal Implementation and Cultural Logic* 169, Ulla Liukkunen, Yifeng Chen, eds, *China – U.S. Implementation of ILO Standards by BITs and Pieces (FTAs)* (Springer 2015).

²² *See, e.g.*, Steven T. Dennis, *Obama Faces a Tough Road with TPP Trade Deal* (November 12, 2015), <http://fortune.com/2015/11/12/barack-obama-tpp-trade-deal/>

²³ *Regional Comprehensive Economic Partnership (RCEP)*, N.Z. MINISTRY FOREIGN AFF. & TRADE, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/RCEP/> (last visited May 10, 2015). The seven countries presently included in both the TPP and RCEP are Malaysia, Singapore, Vietnam, Brunei, Japan, Australia, and New Zealand. South Korea already qualifies for the TPP but has not applied to join the negotiations. Indonesia, Thailand, and China are potential future members. Ellen I. Frost, *Rival Regionalisms And Regional Order A Slow Crisis Of Legitimacy* 8-9, *at*, <http://www.nbr.org/publications/specialreport/pdf/free/021115/SR48.pdf>. (last visit November 27, 2015).

²⁴ Vinod K. Aggarwal, *Mega-FTAs and the Trade-Security Nexus: The Trans-Pacific Partnership (TPP) and Regional Comprehensive Economic Partnership (RCEP)* *at*, http://www.eastwestcenter.org/system/tdf/private/api123_0.pdf?file=1&type=node&id=35584



2. Prior U.S. FTA Labor Protections and Shortcomings

In 2007, the U.S. adopted the so-called “May 10 Standard” or “model” labor protection language in its FTA social dimension provisions to advance international labor standards.²⁵ It seeks to embrace and promote commitments to the four ILO core labor standards as embodied in the 1998 ILO *Declaration on Fundamental Principles and Rights at Work*²⁶ and provide enforcement mechanisms, and with sanctions, for states and investors for alleged trade or labor violations. The US model bilateral trade and investment frameworks are significantly distinguishable from EU FTAs in two important

²⁵ For full discussion, see Ronald C. Brown, FTAs in Asia-Pacific: “Next Generation” of Social Dimension Provisions on Labor? _ *Indiana Int’l & Comp. L. Rev.* _ (2016). Also discussed in Ronald C. Brown, *Asian and US Perspectives on Labor Rights under International Trade Agreements Compared*, in *PROTECTING LABOR RIGHTS IN A GLOBALIZING WORLD* (Marx, A., Wouters, J., Rayp, G. & L. Beke, eds., Cheltenham: Edward Elgar) (2015). As will be seen, these U.S. frameworks are not fully efficacious to do so, and recommendations to bolster them, including comments on incorporation or utilization of Corporate Social Responsibility (CSR) and International Framework Agreements (IFA) provisions are provided in Ronald C. Brown, FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards, in Part II at 109, in *EMPLOYMENT RELATIONS AND TRANSFORMATION OF THE ENTERPRISE IN THE GLOBAL ECONOMY* (eds. Edoardo Ales, Francesco Basenghi, William Bromwich, and Iacopo Senatori), Giappichelli-MBF book series (2016), For additional discussion, see Ronald C. Brown, *The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, _ *INT’L LABOUR REV. (ILR)* _ (2016) at, <http://onlinelibrary.wiley.com/doi/10.1111/j.1564-913X.2015.00038.x/abstract?jsessionId=055D1AC00204698AA550B328B1DC6DB3.f02t01?systemMessage=Wiley+Online+Library+will+be+unavailable+on+Saturday+14th+May+11%3A0014%3A00+BST+%2F+06%3A0009%3A00+EDT+%2F+18%3A0021%3A00+SGT+for+essential+maintenance.Apologies+for+the+inconvenience.&userIsAuthenticated=false&deniedAccessCustomisedMessage=>. See also, Mary Jane Bolle, Overview of Labor Enforcement Issues in Free Trade Agreements 2 (January 29, 2014), at, <https://www.fas.org/sgp/crs/misc/RS22823.pdf>.

²⁶ *ILO Declaration on Fundamental Principles and Rights at Work*, INT’L LABOUR ORG., <http://www.ilo.org/declaration/lang-en/index.htm> (last visited Dec. 2, 2014).

ways.²⁷ First, alongside trade obligations, the FTAs and Bilateral Investment Treaties (BIT) include labor obligations that incorporate the ILO *Declaration*, not the *Conventions* as does the EU. Second, unlike the EU, the US's *FTA*, though not the BIT, *weds* bilateral trade with these labor obligations under a new substantive legal procedure and provides an unprecedented unitary enforcement mechanism for both sets of obligations, wherein trade sanctions may also be brought for labor violations.²⁸

Though the U.S. is ahead of Asia in implementing labor protections in trade agreements through its social dimension provisions; still there are shortcomings in its furthering ILO Standards. Without question, the US model bilateral trade and investment frameworks are an improvement in that they attempt to wed free trade with international labor norms in an effort to halt the race to the bottom, but, it can be argued, its efforts to advance international labor standards are inadequate for several reasons.²⁹ First, while the US model frameworks integrate international labor norms, it is clear that the ILO commitments are to the ILO Declaration and not the ILO Conventions and likely are not sufficiently substantive to be enforceable.³⁰ Second, the dispute settlement mechanisms for enforcing the labor obligations are somewhat vague on what constitutes a violation and how violations would likely be remedied. Third, while the FTA's dispute settlement

²⁷ The “*EU perspective*” may provide insights about the relative strengths and weaknesses of US FTAs. *See generally, Dispute Settlement*, EUROPEAN COMM’N – TRADE, <http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/> (last visited Aug. 15, 2014). The U.S. has adopted only two of the core International Labor Organization Conventions, although it has approved the ILO Constitution and Declaration *vis-à-vis* its membership in the ILO.

²⁸ For further discussion *see* Ronald C. Brown, China – U.S. Implementation of ILO Standards by BITs and Pieces (FTAs), ch.6, *Fundamental Labour Rights in China - Legal Implementation and Cultural Logic*, (eds. Liukkunen, Ulla, Chen, Yifeng (Eds.)) (Springer 2016).

²⁹ See discussion in Ronald C. Brown, FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards, at *supra* n. 25. *See also*, Ronald C. Brown, *Fostering Labor Rights in a Global Economy: The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, *supra* n. 25. Though the US model has agreement on the “conventions,” by a footnote in the treaty it explicitly limits its definition to the Declaration. *Id.*

³⁰ “Where labour provisions refer to ILO conventions the parties can rely on the reports of the ILO supervisory bodies, which provide guidance on the interpretation of labour standards. By contrast, the 1998 Declaration is, as such, not subject to the supervision of the ILO’s supervisory bodies although some guidance on the 1998 Declaration may be drawn from the comments of the ILO supervisory bodies on the respective fundamental conventions.” *Social Dimensions of Free Trade Agreements*, INT’L. INST. FOR LABOUR STUD. 107 (2013), at, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf. The EU, on the other hand, commits to the Conventions, but its enforcement mechanism is not as strong as that of the U.S. See discussion on the draft EU-Columbia FTA at *Text of Draft EU-Colombia trade deal offers nothing for threatened workers*, TUC.ORG.UK (May 2010), available at <http://www.tuc.org.uk/international-issues/countries/colombia/human-rights/text-draft-eu-colombia-trade-deal-offers>. For the U.S. standard language in its FTA’s Social Dimension provisions, see, KORUS FTA, U.S. OFFICE OF TRADE REP. 19.2.1, n.1, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (last visited Jan. 31, 2015).

mechanisms allow for wedded enforcement of trade and labor obligations,³¹ only states and individual investors may directly bring claims that can lead to sanctions;³² third parties such as non-governmental organizations, unions and labor groups, and/or workers cannot directly bring similar challenges, except in some FTAs through cumbersome administrative requests to the state's discretion, thus inhibiting enforcement. And, fourth, while the frameworks place an onus on the states to enforce labor standards, they do not *require companies* to adhere to basic corporate social responsibility norms (CSR) in their operations; and, MNCs can easily evade compliance, through such activities as subcontracting.³³

3. TPP – A New Generation?³⁴

Highlights of the TPP labor provision found in Chapter 19, with its U.S. model language promoting ILO core labor standards, includes emphasis on not using labor standards for protectionist purposes (19.2:2) or derogating from its labor standards (19.4:b). The TPP also calls for “impartial and independent tribunals that are fair and transparent” (19.8:2-3). A new provision is to “encourage” enterprises to “voluntarily” adopt corporate social

³¹ However, the European Union (EU) in its FTAs does not wed the labor and trade enforcement mechanisms, each having their own mechanism, with the former, not having trade sanctions available. For more detailed discussion, see Ronald C. Brown, *T Fostering Labor Rights in a Global Economy: the Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, at, *supra* n. 25.

³² Some FTAs permit third parties to present allegations to institutionalized contact points. *Free Trade Agreements and Labor Rights*, INT'L. LABOUR ORG. (ILO), <http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/lang--en/index.htm> (last visited Aug. 15, 2014); Int'l Labour Org (ILO), Int'l. Inst. for Labour Stud. *Social Dimensions of Free Trade Agreements*, (2013), available at, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf, at 32. In a few cases, the only sanction available is the modification of development cooperation. This is the case of the Canada-Costa Rica Trade Agreement and, to some extent, of the EU-Cariforum Economic Partnership Agreement. *Id.*, at 32 n. 30. Also, see the side agreement of NAFTA, The North American Agreement on Labor Cooperation (NAALC) that authorizes third party complaints on labor disputes, but which is reported ineffective and not used. Frank H. Bieszcak, *Labor Provisions in Trade Agreements: From to Now*, 83 CHI.-KENT L. REV. 1387, 1388 (2008), available at <http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3695&context=cklawreview>. It is argued that the system is flawed due to the fact that it follows an adversarial and litigious approach towards solving labor issues. Isabel Studer, *The NAFTA Side Agreements: Toward a More Cooperative Approach?*, 45 WAKE FOREST L. REV. 469-490 (2010); see also Tamara Kay, Univ. of Cal. Berkeley, *Analysis of the Labour Aspects of NAFTA: Preliminary document for commentaries of Work Group I of the Inter-American Conference of Ministers of Labour*, INT'L. LABOUR ORG. (Jun. 2003), at, white.oit.org/pe/cimt/DocumentosWord/ingles/EDITADO%20NAFTA.doc

³³ For further discussion, see Ronald C. Brown, *FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards*. at *supra* n. 25.

³⁴ TPP Full Text, at, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>. [hereinafter TPP].

responsibility (CSR) initiatives (19.7). Provisions for cooperative activities, including technical assistance, are very wide in scope and encompass 21 very specific categories of improving labor standards and conditions in a list from a-u (19.10:6). These activities can be accomplished through a variety of modes from workshops to exchange of technical expertise and assistance (19.10:7). Cooperative dialogue is authorized through contact points under the labor ministries (19.11) and a Labour Council is established to oversee all processes (19.12) and through labor consultations, use of experts and panels and other means, resolve labor issues that are raised (19.15). If there is no resolution by consultation within 60 days, the establishment of a panel can be requested and pursuant to the Dispute Resolution (Chapter 28) the case may proceed. Under the Dispute Resolution provisions labor violations affecting trade can proceed through the mechanism ultimately resulting in trade sanctions.

But by far, the most dramatic break-through on labor protections is found in the side agreements of the TPP that the U.S. has with Vietnam, Malaysia, and Brunei, i.e., those countries with the poorest record of ratification of ILO labor standard conventions. By express terms their labor laws must be newly established, changed and improved to allow independent labor unions, strikes, proper treatment of immigrants, anti-discrimination provisions, labor inspections, and the basic labor standards affecting working conditions, *before* they are allowed to export goods duty-free to the United States and otherwise use the provisions of the TPP. The side agreements are very detailed in their obligations.³⁵

In the Side Agreement with Vietnam (Plan for the Enhancement of Trade and Labour Relations), Vietnam agrees to eight categories of detailed legislative labor reforms, including the rights of union organization and collective bargaining, strikes, prohibitions on forced labor, discrimination, and the creation of administrative institutions to effectively enforce these obligations.³⁶ Oversight, review, cooperation, and technical assistance are also provided. The Agreement states these obligations to be enacted “prior to the entry into force of the TTP Agreement between the United States and Vietnam.”³⁷

The Side Agreement (Labor Consistency Plan) with Malaysia creates certain targeted legislative labor reforms to protect labor unions, union membership, collective bargaining and strikes, as well as access to remedies.³⁸ Specific provisions on prohibiting forced labor, child labor, and discrimination are included, as well as the creation of administrative institutions to effectively enforce these obligations. Oversight, review, cooperation, and technical assistance are also provided. The Agreement states these obligations to be enacted “prior to the entry into force of the TTP Agreement between the United States and Malaysia.”³⁹

³⁵ TPP, *id.*

³⁶ United States-Vietnam Plan for the Enhancement of Trade and Labour Relations, *at*, TPP, *id.*, *at n.* 34..

³⁷ *Id.*, *at* Art. VII 1.

³⁸ Malaysia-United States Labour Consistency Plan, TPP, *supra*, *note* 34.

³⁹ *Id.*, *at* VII 1.

The Side Agreement with Brunei (Labor Consistency Plan) obligates Brunei to legislative labor reforms addressing specific rights and obligations under the rights of labor unions to organize, collectively bargain, strike and to provide meaningful tribunals to resolve labor disputes.⁴⁰ It also targets forced labour, child labor, employment discrimination, and acceptable conditions of work. It obligates Brunei to have in place meaningful institutions to implement the legal reforms, including a labour inspectorate. Oversight, review, cooperation, and technical assistance are also provided. The Agreement states these obligations to be enacted “prior to the entry into force of the TTP Agreement between the United States and Brunei.”⁴¹

The Labor Advisory Committee (LAC), comprised of 19 American labor union leaders, strongly opposes the TPP.⁴² Its conclusion is that the TPP does not meet labor objectives and lists 14 deficiencies,⁴³ fails to advance the economic interests of the U.S., and does not fulfill all of the negotiating objectives identified by Congress in the Trade Priorities and Accountability Act of 2015.

It continues, that while the TPP's Labor Chapter broadly meets the standards of the “May 10” Agreement, “it fails to include the vast majority of the improvements that the LAC recommended to build upon “May 10” to better ensure that member nations actually protect worker rights. The TPP also clearly falls short of “May 10” for a major reason--a critical component of “May 10” was that member nations needed to bring their laws into compliance with “May 10” standards before a congressional vote on implementing legislation for the agreement. It appears that some TPP member nations’ laws will not be in compliance with the Labor Chapter’s mandates before the agreement takes effect. For example, under the side understanding with Vietnam, Vietnam will have five years after the TPP enters into force to allow independent unions to form *beyond the enterprise level* [emphasis added].”⁴⁴ While the TPP also includes side letters/consistency plans to improve labor rights laws in three partner countries (Brunei, Malaysia, and Vietnam), by focusing on legal changes to the exclusion of

⁴⁰ Brunei-United States Labour Consistency Plan, TPP, *supra*, note 34.

⁴¹ *Id.*, Art. VII 1.

⁴² Report on the Impacts of the Trans-Pacific Partnership by The Labor Advisory Committee on Trade Negotiations and Trade Policy (December 2, 2015), *at*, <https://ustr.gov/sites/default/files/Labor-Advisory-Committee-for-Trade-Negotiations-and-Trade-Policy.pdf>. [hereinafter, LAC Report].

⁴³ *Id.*, *at* 15-17. See also, Senator Elizabeth Warren, Broken Promises, *at*, <http://big.assets.huffingtonpost.com/WarrenReport.pdf>

⁴⁴ LAC Report *supra* n. 42, *at* 50.

implementation and enforcement benchmarks, the plans adopt the same failed approach as the Colombia Labor Action Plan.⁴⁵

The International Trade Union Confederation (ITUC) released its list of labor issues it advocates are unaddressed or are under-addressed by the labor provisions in the TPP.⁴⁶ The critique does not address the three TPP-side agreements with Vietnam., Malaysia, and Brunei, but only the TPP. More specifically, it raises issues about continued ambiguities in the TPP provisions. For example, the vagueness of obligations, such as referencing the Declaration, rather than Conventions, “acceptable conditions of work,” and non-derogation, where minimum standards of the laws are met though conditions that are still not acceptable, the uncertain location of when a labor violation “affects trade” so as to trigger remedial action, and continued inaccessibility of non-state parties to trigger the ISDS. Some progress was noted regarding treatment of migrants and of forced labor.

The Office of the U.S. Trade Representative provided the following summary of the concluded, relevant provisions of the TPP.⁴⁷

On October 4, 2015, Ministers of the 12 Trans-Pacific Partnership (TPP) countries – Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam – announced conclusion of their negotiations. The result is a high-standard, ambitious, comprehensive, and balanced agreement that will promote economic growth; support the creation and retention of jobs; enhance innovation, productivity and competitiveness; raise living standards; reduce poverty in our countries; and promote transparency, good governance, and enhanced labor and environmental protections. We envision conclusion of this agreement, with its new and high standards for trade and investment in the Asia Pacific, as an important step toward our ultimate goal of open trade and regional integration across the region.

⁴⁵ *Id.*, at 52. The LAC Report also evaluates the three side agreements. *Id.*, at 71-72 (Brunei); 76-79 (Malaysia); 87 (Singapore); and 87-90 (Vietnam).

⁴⁶ TRANS PACIFIC PARTNERSHIP LABOUR CHAPTER SCORECARD FUNDAMENTAL ISSUES REMAIN UNADDRESSED, at, http://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf. The AFL-CIO shares the reluctance of the ITUC to rely on the agreements’ promises, based on the US- Colombia LAP experience. Making the Columbia Action Plan Work, at, http://www.aflcio.org/content/download/123141/3414471/April2014_ColombiaReport.pdf. Also see, <http://www.aflcio.org/content/download/38251/594971/report+version+2+no+bug.pdf>

⁴⁷ The Office of the U.S. Trade Representative <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>. It specifies that the TPP is open to accession by members of the Asia-Pacific Economic Cooperation Forum and other States or separate customs territories as agreed by the Parties, again after completing applicable legal procedures in each Party. *Id.*

19. Labour⁴⁸

All TPP Parties are International Labour Organization (ILO) members and recognize the importance of promoting internationally recognized labour rights. TPP Parties agree to adopt and maintain in their laws and practices the fundamental labour rights as recognized in the ILO 1998 Declaration, namely freedom of association and the right to collective bargaining; elimination of forced labour; abolition of child labour and a prohibition on the worst forms of child labour; and elimination of discrimination in employment. They also agree to have laws governing minimum wages, hours of work, and occupational safety and health. These commitments also apply to export processing zones. The 12 Parties agree not to waive or derogate from laws implementing fundamental labour rights in order to attract trade or investment, and not to fail to effectively enforce their labour laws in a sustained or recurring pattern that would affect trade or investment between the TPP Parties. In addition to commitments by Parties to eliminate forced labour in their own countries, the Labour chapter includes commitments to discourage importation of goods that are produced by forced labour or child labour, or that contain inputs produced by forced labour, regardless of whether the source country is a TPP Party. Each of the 12 TPP Parties commits to ensure access to fair, equitable and transparent administrative and judicial proceedings and to provide effective remedies for violations of its labour laws. They also agree to public participation in implementation of the Labour chapter, including establishing mechanisms to obtain public input.

The commitments in the chapter are subject to the dispute settlement procedures laid out in the Dispute Settlement chapter. To promote the rapid resolution of labour issues between TPP Parties, the Labour chapter also establishes a labour dialogue that Parties may choose to use to try to resolve any labour issue between them that arises under the chapter. This dialogue allows for expeditious consideration of matters and for Parties to mutually agree to a course of action to address issues. The Labour chapter establishes a mechanism for cooperation on labour issues, including opportunities for stakeholder input in identifying areas of cooperation and participation, as appropriate and jointly agreed, in cooperative activities.

In March 2016, the Peterson Institute for International Economics, in its assessment of the TPP, concluded that the TPP is the “most ambitious of US FTAs”⁴⁹ and while it does not

⁴⁸ *Id.* Also see, Cathleen Cimino-Isaacs, Chapter 4 Labor Standards In The TPP 41-65, at, <https://piie.com/system/files/documents/piieb16-4.pdf>

⁴⁹ Cathleen Cimino-Isaacs, Labor Standards in the TPP, at, <https://piie.com/system/files/documents/cimino-isaacs20160328ppt.pdf>, at 2. Peterson Institute for International Economics (March 28, 2016). See full text in, volume 2 of the PIIE Briefing, *Assessing the Trans-Pacific Partnership*, on March 28, 2016; and see, Cathleen Cimino-Isaacs, Chapter 4 Labor Standards In The TPP 41-65, at, <https://piie.com/system/files/documents/piieb16-4.pdf>

address “all the concerns of labor rights advocates, it does move the labor agenda along.”⁵⁰

28. Dispute Settlement⁵¹

The Dispute Settlement chapter is intended to allow Parties to expeditiously address disputes between them over implementation of the TPP. TPP Parties will make every attempt to resolve disputes through cooperation and consultation and encourage the use of alternative dispute resolution mechanisms when appropriate. When this is not possible, TPP Parties aim to have these disputes resolved through impartial, unbiased panels. The dispute settlement mechanism created in this chapter applies across the TPP, with few specific exceptions. The public in each TPP Party will be able to follow proceedings, since submissions made in disputes will be made available to the public, hearings will be open to the public unless the disputing Parties otherwise agree, and the final report presented by panels will also be made available to the public. Panels will consider requests from non-governmental entities located in the territory of any disputing Party to provide written views regarding the dispute to panels during dispute settlement proceedings.

Should consultations fail to resolve an issue, Parties may request establishment of a panel, which would be established within 60 days after the date of receipt of a request for consultations or 30 days after the date of receipt of a request related to perishable goods. Panels will be composed of three international trade and subject matter experts independent of the disputing Parties, with procedures available to ensure that a panel can be composed even if a Party fails to appoint a panelist within a set period of time. These panelists will be subject to a code of conduct to ensure the integrity of the dispute settlement mechanism. They will present an initial report to the disputing Parties within 150 days after the last panelist is appointed or 120 days in cases of urgency, such as cases related to perishable goods. The initial report will be confidential, to enable Parties to offer comments. The final report must be presented no later than 30 days after the presentation of the initial report and must be made public within 15 days, subject to the protection of any confidential information in the report.

To maximize compliance, the Dispute Settlement chapter allows for the use of trade retaliation (*e.g.*, suspension of benefits), if a Party found not to have complied with its obligations fails to bring itself into compliance with its obligations. Before use of trade retaliation, a Party found in

⁵⁰ Cathleen Cimino-Isaacs, *Labor Standards in the TPP*, *id.*

⁵¹ Volume 2 of the PIIE Briefing, *Assessing the Trans-Pacific Partnership*, March 28, 2016, *id.*

violation can negotiate or arbitrate a reasonable period of time in which to remedy the breach.

In March 2016, the Peterson Institute for International Economics, in its assessment of the TPP, concluded that the “the text of Chapter 28 [disputes between governments] reflects real learning from past mistakes in setting up FTA dispute settlement systems and offers genuine hope for a strong, efficient, and effective system for resolving TPP disputes.”⁵² It “is designed to be a faster, more transparent and more comprehensive hybrid of the WTO’s Dispute Settlement Understanding and the dispute settlement provisions in a number of US bilateral and regional trade agreements.”⁵³

The TPP has two separate dispute settlement chapters; Chapter 2, above, applies to disputes between governments and Chapter 9, below, covers disputes between private parties. The assessment of the Peterson Institute for International Economics on the latter is that it “is designed to be broader, deeper, faster, and more transparent than either the WTO’s Dispute Settlement Understanding or any prior bilateral or regional free trade agreement. It covers more chapters and issues than prior dispute settlement systems (including systems on labor, the environment, cross-border data flows, and state-owned enterprises).”⁵⁴

“[T]he ISDS provisions in the TPP are a significant improvement over those in previous agreements; ... it ensures the transparency of dispute proceedings ... [and] echoing recent EU agreements, the TPP more narrowly defines “fair and equitable treatment” than the definition in previous such accords. It also eliminates forum shopping—i.e., the attempt by companies to litigate in the most sympathetic places—and enables the assessment of costs against a losing party (a provision that discourages frivolous cases).”⁵⁵

⁵² Assessing the Trans-Pacific Partnership, vol. 1: Market Access and Sectoral Issues, Jennifer Hillman, ch. 9, Investor-State Dispute Settlement 101 (2016), at, <https://piie.com/system/files/documents/piieb16-4.pdf>.

⁵³ *Id.*, at 109.

⁵⁴ However, the Peterson Institute Report points out that “it leaves out some key issues, including the side agreement on currency manipulation, trade remedies, and many of the new issues included in the TPP itself, such as capacity building, competitiveness and business facilitation, and regulatory coherence.” Assessing the Trans-Pacific Partnership, vol. 2: Market Access and Sectoral Issues, Gary Clyde Hufbauer, ch. 10 Investor-State Dispute Settlement 109 (2016), at, <https://piie.com/publications/briefings/piieb16-1.pdf>. TPP Chapter 9 also clarifies that the investor bringing the case against the government bears the burden to prove all elements of its claims. It makes proceedings fully open and transparent and allows civil society organizations and others not party to the dispute to participate. In addition, Chapter 9 will for the first time clarify important concepts in the nondiscrimination and minimum standard of treatment obligations. For example, it clarifies the definition of legitimate public welfare objectives as a ground for defending a country’s regulations and makes clear that frustrated investor expectations are not in and of themselves sufficient to overturn such regulations. TPP countries will also establish a code of conduct for ISDS arbitrators to guide arbitrator independence and impartiality. *Id.*, at 110.

⁵⁵ *Id.*

C. Implications For New Research Agenda

The overall economic impact of the potential TPP agreement depends on a number of factors, including the extent of the trade liberalization achieved in the agreement, as well as the current level and potential growth of trade and investment among TPP members.⁵⁶ On both measures, the TPP appears significant given that the TPP would be the largest U.S.FTA by trade flows (\$727 billion in U.S. goods exports and \$882 billion in imports in 2014).⁵⁷

The potential and actual economic impacts of the TPP on the living standards, institutional structures, employment, job creation, etc. in all countries, including the U.S., would seem to present a worthwhile challenge and endeavor for future research and analysis. For example, the LAC expects the TPP to drive down wages, cost jobs, and have a negative impact on the U.S. economy as a whole.⁵⁸ Economists might also solve the perennial riddle of how to measure the impacts of “*labor violations affecting trade*,” which can trigger the Dispute Settlement mechanism.

*Labor Market Implications of Trade and Trade Agreements*⁵⁹

Trade also has notable impacts on labor markets, many of them a direct result of the classic gains from trade in terms of increased productivity and innovation. U.S. businesses that expand in response to the increased foreign market access due to U.S. trade agreements support additional jobs. The importance of such export-led job growth for the Nation’s income is reinforced by the fact that wages in export-intensive

⁵⁶ Ian F. Fergusson, Mark A. McMinimy Brock R. Williams The Trans-Pacific Partnership (TPP), Negotiations and Issues for Congress Analyst in International Trade and Finance 10 (March 20, 2015), *at*, <https://www.fas.org/sgp/crs/row/R42694.pdf>

⁵⁷ *Id.*

⁵⁸ The position of the Labor Advisory Committee on Trade Negotiations and Trade Policy (LAC) is as follows. “The primary measure of the success of our trade policies should be increasing jobs, rising wages, and broadly shared prosperity, not higher corporate profits and increased offshoring of America’s jobs and productive capacity. Trade rules that enhance the already formidable economic and political power of global corporations—including ISDS, excessive monopoly rights for pharmaceutical products, and deregulatory financial services and SPS rules—will continue to undermine worker bargaining power, here and abroad, as well as weaken democratic processes and regulatory capacity across all 12 TPP countries.” Report on the Impacts of the Trans-Pacific Partnership 38-42 (December 2, 2015), *at*, <https://ustr.gov/sites/default/files/Labor-Advisory-Committee-for-Trade-Negotiations-and-Trade-Policy.pdf>.

⁵⁹ THE ECONOMIC BENEFITS OF U.S. TRADE, Office of the President 10 (May 2015), *at*, https://www.whitehouse.gov/sites/default/files/docs/cea_trade_report_final_nonembargod_v2.pdf

manufacturing industries tend to be higher than wages in non-export-intensive manufacturing industries.

Of course, while the aggregate benefits of trade may be large, they may also be unevenly distributed. Trade, therefore, can also have adverse effects for some workers. Domestic policies the Administration supports, such as investment in infrastructure, worker training, and education, can help our labor force take advantage of the considerable opportunities that trade opens up. For displaced workers and their families, effective policies can help smooth the adjustment into new, potentially higher-paying jobs. The changes will need to be addressed by data collection and research analysis.

*Increased Economic Growth*⁶⁰

When countries specialize in the goods and services they can produce relatively efficiently and trade for the rest, world production and consumption increase as existing global resources are more effectively utilized. Simple international trade theory, therefore, suggests that increased international trade can boost incomes. However straightforward this may seem, it is actually quite difficult to discern empirically a causal relationship between trade and income. For instance, countries may trade more because they are richer. Richer countries have better trading infrastructure, such as good ports, and better access to information about opportunities abroad. The fundamental challenge for statistical inference, then, is that while trade may affect income, income also affects trade.⁶¹

An extensive body of work examines the empirical association between trade openness and per capita income growth. Frankel and Romer (1999) were among the first to attempt to establish a causal picture of the impact of trade on income, arguing that the geographic placement of countries provides a way to isolate a component of trade that is unrelated to income except through its effect on trade. The authors use the distance between countries to predict the amount of their bilateral trade, relying on the well-established relationship that proximity is a strong predictor of trade flows (the so-called “gravity model”). Because a component of trade flows isolated in this manner is highly correlated with income, the authors conclude that trade has a positive causal effect on income.⁶²

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

The OECD and World Bank Group, in an October 6, 2015 Report, urged consideration of expanding inclusiveness of Lesser Developing Countries (LICDs) into Global Value Chains through arrangements lowering the trade barriers.

“In November 2014, the Group of Twenty (G-20) Leaders concluded that trade and competition are powerful drivers of growth, increased living standards and job creation. They also acknowledged that one important way for countries to connect to the global economy and develop is through global value chains (GVCs); a recognition that GVCs provide opportunities to empower the local economy with sophisticated imported technology, know how, and a richer skill-set. G20 leaders at the Brisbane Summit stated that ‘we need policies that take full advantage of global value chains and encourage greater participation and value addition by developing countries.’”⁶³

“G20 countries are the key trading partners for LIDCs, with around 70% of imports of LIDCs originating from G20 countries and close to 80% of LIDCs exports directed to the G20. Thus, policy reforms that would lower trade costs in G20 economies and LIDCs can have important implications for GVC participation. GVC trade is particularly affected by trade barriers: when goods and services cross borders multiple times, as both imports and exports, trade costs are compounded. This is especially problematic for firms in LICDs and for SMEs, which are less able to absorb these costs. Moreover, foreign direct investment (FDI) is the most common vehicle for countries to participate in global value chains. The US government, for example, estimates that intra-firm transactions constitute close to 50% of US imports and around 30% of US exports. According to UNCTAD, an estimated 80% of global trade now occurs within international production networks of multinational companies. And it is these companies that are responsible for more than 1 trillion dollars of global FDI flows annually. FDI are vital for SMEs, as their natural predisposition is to join GVCs indirectly as upstream supplier to exporters.”⁶⁴

Further, the Report indicates that “[O]ne of the most important issues is about assessing the costs of complying with international standards as compared with the opportunity cost of serving regional markets. This is the case because adopting higher standards involves greater difficulties and challenges for SMEs and LIDCs than for larger firms and rich countries. Increases in production and trade costs can originate from the

⁶³ Inclusive Global Value Chains Policy options in trade and complementary areas for GVC Integration by small and medium enterprises and low-income developing countries 7 (October 6, 2015), *at*, <http://www.oecd.org/trade/OECD-WBG-g20-gvc-report-2015.pdf>

⁶⁴ *Id.*, at 8.

required compliance with a multitude of standards and technical regulations. For this reason ... sequencing may be important. ... LIDCs and SMEs may first need to expand into the regional market to gain scale and learning economies and then adopt stringent international standards.⁶⁵

*The Potential Impact of the TPP on U.S. Trade Policy*⁶⁶

The U.S. pursuit of the TPP and the possible non-approval by the U.S. Congress raise other questions regarding its possible impact on the status and shape of current and future U.S. trade policy. For example, how will the TPP agreement relate to the recently launched U.S.-EU FTA negotiations (Trans-Atlantic Trade and Investment Partnership or T- TIP) or RCEP or the FTAAP? If all negotiations conclude successfully could they eventually be merged?

Similarly, the TPP raises the issue of the United States and the future of the WTO as a major force for trade liberalization. Some may argue, for example, that the United States has signaled the death knell of future rounds of multilateral agreements in favor of regional pacts. Others might assert that the TPP could serve as a building block for a more viable multilateral trade system that responds to trade challenges of the 21st century. Some may even say that the TPP may become the predominant force for trade liberalization going forward, that is, if it can be agreed to by the current parties.

Another issue for possible consideration is: What would be the impact on U.S. trade policy if the TPP negotiations are not completed successfully or are delayed indefinitely? Some could argue that such an outcome would indicate that it is not feasible to negotiate a comprehensive set of rules with a diverse group of countries and that the United States would have to tailor its ambitions. In addition, some might assert that such an outcome would signify a temporary, if not permanent setback to the notion of a Free Trade Area of the Asia Pacific (FTAAP). Still others may conclude that such result could force the United States to retreat from negotiating trade agreements altogether.

D. Conclusion and Recommendation

The observation of this paper is that the TPP represents a “new generation” of social dimension labor provisions of FTAs that can actually protect more workers than are currently being protected by in-place domestic labor laws. In the author’s opinion, it is a “game changer” and the labor provisions of the TPP, and especially its three side agreements, should be embraced. It’s not perfect;⁶⁷ clarity of language could be improved

⁶⁵ *Id.*, at 77.

⁶⁶ Ian F. Fergusson, Mark A. McMinimy Brock R. Williams The Trans-Pacific Partnership (TPP), Negotiations and Issues for Congress Analyst in International Trade and Finance (March 20, 2015), at, <https://www.fas.org/sgp/crs/row/R42694.pdf>

⁶⁷ See ITUC’s more negative appraisal, in TRANS PACIFIC PARTNERSHIP LABOUR CHAPTER SCORECARD FUNDAMENTAL ISSUES REMAIN UNADDRESSED, at, http://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf.

and as well as access to the dispute resolution process, but the TPP is progressive and moving toward securing greater labor protections for workers.⁶⁸ It should also be noted that American workers can also benefit from this FTA, as the protections for labor unions, strikes, and working conditions can also be raised regarding U.S. workers.

Of course, the articles of the TPP require close monitoring, cooperation, consultation and enforcement that are all part of the recipe for it to work. And the continuing research and findings of economists and other specialists are needed to actually measure the economic implications of the TPP's labor provisions.

*It is significant to note that the alternative Mega-FTAs in this region, whether it be the RCEP or the FTAAP do not have, nor is there any certainty they will have provisions for labor protection given the nations involved and their track record of not having such labor protection.*⁶⁹

An alternative approach, perhaps for future FTAs, could be to require state party agreement to enforce *binding* CSRs, rather than *voluntary* as in Article 19.7 in the TPP, with worker rights, grievance procedures, and remedies within the governance document; and, in certain industries be part of an International Framework Agreement (IFA)⁷⁰ This "privatization" addresses the labor issues by enforceable contractual obligations between the non- "Parties." The dispute resolution procedures could include private agreement on

⁶⁸ This view is supported in the Peterson Institute's Report cited earlier, where its conclusion regarding the labor provisions was that they "can play a constructive role through added pressure to upgrade standards and to enforce binding TPP commitments." Cathleen Cimino-Isaacs, Labor Standards in the TPP, at, <https://piie.com/system/files/documents/cimino-isaacs20160328ppt.pdf>, at 9. Peterson Institute for International Economics (March 28, 2016). See full text in, volume 2 of the PIIE Briefing, *Assessing the Trans-Pacific Partnership*, (March 28, 2016), and, Chapter 4 Cathleen Cimino-Isaacs, Labor Standards In The TPP 41-65, at, <https://piie.com/system/files/documents/piieb16-4.pdf>

⁶⁹ President Obama's position on this is, "[T]he United States, not countries like China, should write them. Let's seize this opportunity, pass the Trans-Pacific Partnership and make sure America isn't holding the bag, but holding the pen." *President Obama: The TPP would let America, not China, lead the way on global trade*, at, https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html

⁷⁰ A global framework agreement, also referred to as an international framework agreement, is "an instrument negotiated between a multinational enterprise and a Global Union Federation (GUF) in order to establish an ongoing relationship between the parties and ensure that the company respects the same standards in all the countries where it operates". The framework agreements cover the same ILO conventions on which the labor principles are based. *Global Framework Agreements*, UNITED NATIONS GLOBAL IMPACT, https://www.unglobalcompact.org/Issues/Labour/Global_Framework_Agreements.html (last visited Jan. 31, 2015).

mediation and arbitration,⁷¹ with the scope of arbitrable items including alleged violations of contract or domestic or ILO labor law obligations, with venue to be determined.⁷²

The “new” approach of the TPP’s side agreements conditioning use of the TPP on prior compliance with “on-the-books” legislative reforms is in the author’s opinion a big step forward in gaining closer compliance with meeting the obligations of the ILO labor standards. But observers note they look similar to the U.S.-Columbia Agreement where the glittery promises did not come into actuality.

The practical difficulties of affording workers enforceable labor rights and achieving these improved labor protections under international trade agreements, besides the issue of government *will*, is finding the right balance with the MNCs who benefit from locating in areas with low labor standards. Currently, where there is lax law enforcement of labor standards, even if employers and MNCs have and adhere to codes of conduct, OECD guidelines, and CSRs, they are mostly non-binding and do not restrict the use of contractors and subcontractors who fall outside these “obligations.”⁷³

In addition to the above approaches, at a future appropriate time, adding or amplifying third-party access to the enforcement mechanisms through more direct and expeditious means would address some of the national and international labor unions’ concerns and

⁷¹ Though litigation could be considered, issues for exhaustion of domestic remedies and deference to sovereignty would first need to be resolved.

⁷² These remedies and others are discussed in Ronald C. Brown, FTAs in Asia-Pacific: “Next Generation” of Social Dimension Provisions on Labor? _ Indiana Int’l & Comp. L. Rev. _ (2016). *Also see*, Ronald C. Brown, *Asian and US Perspectives on Labor Rights under International Trade Agreements Compared*, in PROTECTING LABOR RIGHTS IN A GLOBALIZING WORLD 83 (Marx, A., Wouters, J., Rayp, G. & L. Beke, eds., Cheltenham: Edward Elgar) (2015).

⁷³ For an excellent discussion regarding privatizing the obligations of MNCs, see discussion in PAUL VAN DER HEIJDEN & RUBEN ZANDVLIET, ENFORCEMENT OF FUNDAMENTAL LABOR RIGHTS, THE NETWORK APPROACH: CLOSING THE GOVERNANCE GAPS IN LOW-WAGE MANUFACTURING INDUSTRIES¹² (policy brief, September 2014), *available at* http://thehagueinstituteforglobaljustice.org/cp/uploads/publications/policypaper_12-enforcement-of-fundamental-labor-rights_1409068554.pdf, or RUBEN ZANDVLIET & PAUL VAN DER HEIJDEN, THE RAPPROCHEMENT OF ILO STANDARDS AND CSR MECHANISMS: TOWARDS A POSITIVE UNDERSTANDING OF ‘PRIVATIZATION’ (February 5, 2014), *available at* <http://dx.doi.org/10.2139/ssrn.2391295>. The same authors argue the post- Rana Plaza disaster and its resulting remedial accords made Bangladesh a “policy laboratory for new ways to enforce fundamental labor rights. These responses, which can be characterized as a network approach, involve many stakeholders cooperating in different coalitions to pursue a variety of goals. The network approach aligns with the idea that improving labor rights in global supply chains is not the sole responsibility of the state in which production takes place. A collaborative effort is required. ... [The Authors] argue that businesses with transnational supply chains should cast their labor commitments in a contractual form, following the successful example of the Bangladesh Accord for Fire and Building Safety. Institutionally, the ILO should engage more directly with businesses and use its authoritative role to strengthen supply-chain bargaining.” PAUL VAN DER HEIJDEN & RUBEN ZANDVLIET, ENFORCEMENT OF FUNDAMENTAL LABOR RIGHTS, THE NETWORK APPROACH: CLOSING THE GOVERNANCE GAPS IN LOW-WAGE MANUFACTURING INDUSTRIES 12, *id.*.

reservations.⁷⁴ Perhaps also clarifying the specific facts necessary to prove a violation of applicable labor standards and more specifically defining how and when “the labor violation affects trade” so as to trigger the Dispute Settlement machinery. And, perhaps thereafter expediting and mandating advancement of the complaint, and granting arbitration panels increased authority to implement remedies, including suspending benefits or some FTA mechanisms, such as the dispute resolution mechanism, that could facilitate the effectiveness of the dispute resolution mechanisms, and in the judgment of some, to actually make them work. A new proposal keyed into the Investor-State Dispute Settlement (ISDS) mechanism and more “worker-friendly,” has been issued by the AFL-CIO, its Australian and New Zealand counterparts, and other unions, and “is based, in part, on the labour and dispute resolution chapters of the U.S.-Peru Free Trade Agreement (FTA), two of the Parties to the current [TPP] negotiations.”⁷⁵

Of course it is easier for an academic to state the above, than for a union, who over the years sees and lives with broken promises and the frustrations of lack of enforcement in FTAs. There certainly are valid worries about the enforcement provisions regarding labor; however, the author supports the optimistic view, that chipping away is better than doing nothing or being rendered irrelevant on the labor issues by the RCEP or the FTAAP. And, just maybe it is the best deal in town; and there are avenues other than FTAs to fight the unions’ fight. As to the over-all value of the non-labor provisions of the TPP, I leave that to the trade experts.

In sum, in the author’s view, the implications of the TPP labor provisions, and particularly on the basis of its three TPP-side agreements, are generally positive, encouraging, and progressive, building on past U.S. approaches. It brings the promise of improved and enforceable labor standards among the TPP parties and the certainty of needed additional research on its legal, economic, political, and social consequences.

⁷⁴ Third-parties could include unions, NGOs, or even the ILO. See, Ronald C. Brown, *The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, at, *supra* n. 25. The ability of stakeholders’ access to enforcement machinery could be better clarified. By merely allowing investor or state complaints, third-parties are left to petition their state through administrative apparatus, such as NAOs or departments of labor, that may leave too much discretion in the state’s decision whether to proceed. U.S. – Peru Trade Promotion Agreement, U.S.-Peru, art. 21, Apr. 12, 2006, available at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>. See also, Canada-European Union: Comprehensive Economic and Trade Agreement (CETA), Canada-E.U., arts. 24 and 33, Sep. 26, 2014, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/33.aspx?lang=eng>, or http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf. This point is reiterated in, “II. Dispute Settlement” in, TRANS PACIFIC PARTNERSHIP LABOUR CHAPTER SCORECARD FUNDAMENTAL ISSUES REMAIN UNADDRESSED, at, http://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf.

⁷⁵ *The Trans-Pacific Partnership Agreement, A New Model Labour & Dispute Resolution Chapter For The Asia-Pacific Region*, <http://www.trungtamwto.vn/sites/default/files/tpp/attachments/Final%20Official%20ITUC%20TransPacificPartnership%20Labor%20Chapter%20b29%20%20TPP%20labor%20rights.pdf> (last visited May 11, 2015).