

A NEW MODEL FOR TRADE AND LABOR?
THE TRANS-PACIFIC PARTNERSHIP'S LABOR
CHAPTER AND BEYOND

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I. INTRODUCTION

When President Donald Trump notified the other signatory countries to the Trans-Pacific Partnership (TPP) that the United States did not intend to become party to the agreement—despite the signature of the outgoing Obama administration—among the thirty chapters of text left on the cutting floor was a chapter on labor.¹ That labor chapter was not in itself novel. Indeed, in recent years it has been standard negotiating practice by the United States, the European Union, and Canada to include labor provisions in their trade agreements.²

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1. Press Release, The White House Office of the Press Secretary, Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (Jan. 23, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>.

2. See, e.g., Free Trade Agreement Between the United States of America and the Republic of Korea, S. Kor.-U.S., ch. 19, June 30, 2007, 46 I.L.M. 642 [hereinafter U.S.-Korea FTA]; Free Trade Agreement Between the European Union and its Member States and the Republic of Korea, E.U.-S. Kor.,

Moreover, labor provisions, or at least references to labor issues, have been included in the trade agreements of an increasing number of other countries, such as Chile and New Zealand, as well as parties to South-South agreements.³ According to a recent International Labour Organization (ILO) study of labor provisions in free trade agreements (FTAs), it is more unusual at this point *not* to include labor provisions than to include them. As the ILO reported, “[A]s of December 2015, there were 76 trade agreements in place (covering 135 economies) that include labour provisions, nearly half of which came into existence after 2008. Over 80 per cent of agreements that came into force since 2013 contain such provisions.”⁴

The TPP labor chapter, while unlikely to ever be enacted, provides an interesting case study of the evolution of U.S. labor provisions in trade agreements. It also provides insights into how the U.S. approach to trade and labor chapters might continue to evolve, and how it could take a different direction. This Article uses the stillborn labor chapter as a foundation to examine how labor provisions should be conceptualized and actualized, not only in U.S. trade policy, but more generally. It argues that a trade and labor approach that is grounded in fairness, consumer citizenship, and development can provide a framework for experimental institutions that can improve on the limited “state action-state sanction” model currently utilized.

In Part II, I examine the strongest justifications in favor of the inclusion of labor provisions in FTAs, which in turn inform the institutional and legal frameworks that a labor chapter should adopt. After laying this conceptual foundation, I turn in Part III to the labor chapter of the TPP. This Part uses the TPP as representative of an iteration and evolution of a “state

Oct. 15, 2009, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2011.127.01.0001.01.ENG [hereinafter E.U.-Korea FTA]; Free Trade Agreement Between Canada and the Republic of Korea, Can.-S. Kor., ch. 18, Sep. 22, 2014, <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/korea-coree/fta-ale/index.aspx?lang=eng>.

3. INTERNATIONAL LABOUR ORGANIZATION, SOCIAL DIMENSIONS OF TRADE AGREEMENTS 69 (2013).

4. INTERNATIONAL LABOUR ORGANIZATION [ILO], ASSESSMENT OF LABOUR PROVISIONS IN TRADE AND INVESTMENT ARRANGEMENTS 1 (2016).

action-state sanctions” approach to labor provisions that has been utilized by the United States Trade Representative. Such an approach makes the primary aim of the labor chapter to strengthen domestic labor laws and enforcement of those laws by partner countries. This Article also argues that while evolutionary rather than revolutionary, the TPP labor chapter is a constructive and helpful progression from previous labor chapters because it creates new institutions and processes that open the door to future, more experimental labor chapters that would be better able to effectuate a set of institutions grounded in the fairness, consumer citizenship, and development justifications described in Part II. A better strategy, which I outline in Part IV, is an integrative regime that: (1) uses governance-based tools to catalyze self-regulation by employers and other social actors, and (2) deploys capability-based evaluative tools to inform policymakers and other stakeholders, including consumers, about how workers are faring.

II. JUSTIFICATIONS FOR LABOR PROVISIONS

To construct an ideal trade and labor regime, it is necessary to grasp what the ends of such a regime should be. This requires an examination of the justifications for the link between trade and labor. The first three arguments are internal, or what I call self-regarding. They ask, “What are the justifications for trade and labor provisions from the perspective of the wants, needs, and effects upon citizens of an importing country that is deliberating on its trade policies?” The last argument—development—is more external. That is, it concerns how trade and labor provisions might benefit a trading partner and its worker citizens.

A. *Protectionism*

The first argument in favor of labor provisions in trade agreements, and by far the least persuasive, is protectionism. The basic argument is that labor provisions will or should make it more onerous and costly for employers in a given country to invest and source from trading partners. Underlying this justification is the claim that it is economically advantageous to protect home industries through tariffs and other non-tariff barriers to trade in order to increase employment in the trade-protecting country.

The economic argument for protectionism, while enjoying a popular political resurgence, is largely discredited by economists.⁵ The unanimous support for free trade among economists is rooted in the original theory underlying the international trading regime—specialization and comparative advantage. Adam Smith first made the observation that specialization by a country in the production of goods in which it is most productive will lead to greater welfare.⁶ He argued that a division of labor, not only at the domestic but on an international scale, would enable countries to reap the economic benefits of specializing in the economic activities in which they are most productive by expanding their potential markets around the world.

What Adam Smith was arguing for was a theory of *absolute advantage*. He assumed that if a country had an absolute advantage in a good, then it would be beneficial for that country to specialize in it. But it was David Ricardo's insight that has made the most profound impact on trade theory and policy. Ricardo had the counter-intuitive insight that even if a country had an absolute advantage in producing all goods, then it still might be advantageous for it to specialize in producing those goods in which it had a *comparative advantage*.⁷ That is, it should specialize in those goods in which it derives the most advantage in relation to another country, even if it can produce all goods more efficiently than that other country.⁸ The corollary of this is that it would then have to import those goods in which it had the least comparative advantage.

To illustrate, suppose a business school professor is a superb academic paper writer, and also an amazing office cleaner—so good that he is better than the business school's janitor. It would still make more sense for the professor to write papers because that is what derives the most prestige for the schools, attracts alumni donations, and leads to salary increases. Whereas, the janitor should clean the offices. By doing so, the business school generates more revenue and can hire more janitors, or invest the money in other ways, than it would

5. See DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* 77–113 (4th ed. 2015).

6. See *id.* at 33.

7. See *generally id.* at 34–44.

8. *Id.* at 34.

had the professor produced papers and cleaned his own office.

Ricardo's theory of comparative advantage has been shown by economists to lead to greater economic welfare through higher productivity⁹ and lower prices for consumers—leading to a net economic benefit and higher national income on average.¹⁰ While trade theory has become more nuanced and complex, this basic insight remains. However, there are also real costs associated with free trade. Most importantly, there will be workers who lose their jobs because the industries in which they work are those where it makes economic sense to specialize.¹¹ For example, according to research by Daron Acemoglu and his co-authors, increased trade with China alone has caused an estimated employment reduction of 2.4 million jobs in the United States,¹² taking into account not just direct manufacturing job losses but also other spillover effects such as weaker aggregate demand.¹³ Other recent work has demonstrated that instead of adjusting quickly, the U.S. economy has yet to sufficiently adjust and put those affected back to work.¹⁴

Some opponents of trade-related labor provisions argue that they are merely thinly veiled attempts at protectionism, hurting workers in developing countries who are in most need of free trade without conditions.¹⁵ This fear has fueled opposition by many developing countries to the inclusion of labor standards in the WTO, and has led to trepidation among countries seeking to negotiate FTAs with the European Union and the United States.¹⁶ Despite such skepticism and fear, however, labor provisions are in fact a rather poor and clunky

9. *Id.* at 50-55.

10. *Id.* at 44.

11. *Id.* at 141-42.

12. Daron Acemoglu et al., *Import Competition and the Great US Employment Sag of the 2000s*, 34 J. LAB. ECON. S141, S146-47 (2016).

13. *Id.* at S183.

14. See generally David H. Autor et al., *The China Shock: Learning From Labor-Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205 (2016).

15. Irwin, *supra* note 5, at 229-33.

16. Kevin Kolben, *The New Politics of Linkage: India's Opposition to the Workers' Rights Clause*, 13 IND. J. GLOBAL LEGAL STUD. 225, 244-249 (2006) (discussing India's opposition to a workers' rights clause on protectionist grounds); Virginia A Leary, *The WTO and the Social Clause: Post-Singapore*, 8 EUR. J. INT'L L. 118, 119 (1997) (discussing the opposition of developing

means of engaging in protectionism. Labor provisions, as they are currently constructed, do little to raise labor costs in trading partner countries. This is because they are centered on enforcing the core labor rights as delineated in the ILO Declaration of Fundamental Principles and Rights at Work,¹⁷ which were specifically formulated not to serve protectionist ends, but rather to promote broadly accepted human rights principles.¹⁸ Labor standards that would more directly result in higher production costs—such as specified wage levels, health and safety regulations, or certain benefits—might therefore impact a nation’s comparative advantage, and do not come under the ILO core labor standards rubric.¹⁹ Even in the TPP, where for the first time it is required that “each party shall adopt and maintain statutes and regulation . . . governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health,” it is still up to each country to set those standards.²⁰ Presumably these countries would not do so to their own detriment.

Indeed, case studies of U.S. labor conditionality in trade agreements have found that the intent of its proponents, and the structure of the labor chapters, did not demonstrate that these were protectionist in intent or practice.²¹ Other research, in the Dominican Republic for example, has found

countries to the inclusion of labor issues in the WTO during the 1996 Singapore Ministerial).

17. See INTERNATIONAL LABOR CONFERENCE, ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK AND ITS FOLLOW-UP 7 (1998) (Annex revised June 15, 2010) (recognizing, among others, the right to “(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation”).

18. See Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 J. Int’l Econ. L. 43, 51–52 (2000).

19. See *id.* at 60 (discussing the difference between worker rights and labor standards).

20. Trans-Pacific Partnership, art. 19.3(2) [hereinafter TPP]. The full text of the proposed agreement is available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

21. See Alisa DiCaprio, *Are Labor Provisions Protectionist: Evidence from Nine Labor-Augmented US Trade Arrangements*, 26 COMP. LAB. L. & POL’Y. J. 1, 17-28 (2004) (concluding that an analysis of the implementation and design of U.S. labor provisions failed to demonstrate protectionist intent of its promoters or design features that would block trade).

that trade-related and other efforts to raise labor conditions, rather than having negative economic or social effects, had a positive effect on a country's economy by promoting "high road" employment and human resource practices.²²

B. *Fairness*

On the other hand, a more compelling argument for labor and trade linkage is not economic, but rather political—trade agreements must be seen as fair for them to be politically acceptable. If we expect for there to be political support for trade liberalization and the attendant economic and social dislocation that is associated with it, it seems legitimate that citizens might reasonably demand that, as a condition of this liberalization and social upheaval, trading partners agree to abide by, at a minimum, a set of universally agreed upon labor and human rights standards. Without these guarantees, it becomes harder to justify the diffuse benefits of liberalization in light of its concentrated costs. Thus, fairness is a necessary condition for public support of trade liberalization.

Whether trade agreements meet this fairness requirement relates to a broader argument about the nature of trade liberalization. FTAs are not really *free* trade agreements, but rather *regulated* trade agreements. The reason that the TPP spans some thirty chapters and covers such a broad range of topics—from textiles to intellectual property to financial services—is that there are multiple constituencies with economic and non-economic interests in each negotiating country whose concerns and interests need to be addressed.²³ In the United States, one such constituency is labor, whose interests are in part represented by labor groups, such as the AFL-CIO, but that is constituted by a larger group of non-union affiliated citizens and workers who are affected by trade liberalization.²⁴

22. Andrew Schrank, *From Disguised Protectionism to Rewarding Regulation: The Impact of Trade-Related Labor Standards in the Dominican Republic*, 7 *REG. & GOVERNANCE* 299, 300 (2013).

23. See Catherine Ho, *Industry, Labor and Environmental Groups Gear Up to Oppose TPP Trade Deal*, WASH. POST, Oct. 6, 2015, <https://www.washingtonpost.com/news/powerpost/wp/2015/10/06/industry-labor-and-environmental-groups-gear-up-to-oppose-tpa-trade-deal/>.

24. Nationwide private sector union membership stood at 6.4% in 2016. Economic News Release, Bureau of Labor Statistics, Union Members Summary (Jan. 26, 2017), <https://www.bls.gov/news.release/union2.nr0.htm>. In

A major theme of Donald Trump's 2016 presidential campaign was that the TPP would be both economically damaging to American workers and would threaten U.S. sovereignty. As he put it, "Not only will the TPP undermine our economy, but it will undermine our independence."²⁵ A central claim was that, as a result of liberal trade, U.S. workers and citizens have suffered, while foreign countries have been allowed to engage in unfair trade practices and compete unfairly against American workers because of lower labor standards, particularly lower wages. Again, as Trump said of the TPP, "The agreement would . . . force American workers to compete directly against workers from Vietnam, one of the lowest wage countries on Earth."²⁶

Trump's rhetoric places the emphasis on the lower wage levels of competing countries, but he has also referenced other workplace issues. Specifically, Trump's statements hint at a sense of unfairness: Why should those who will suffer from trade liberalization, whether it be the people actually losing jobs or even their friends and family who see them suffer, tolerate this for the greater economic good when we see that labor conditions are so substantially worse in other countries? This intuition arguably becomes more compelling when we focus, not on wages, which tend to be correlated with productivity, but on labor conditions that rise to the level of human rights violations, such as forced and child labor, discrimination, and violations of the right to freedom of association.

Related to this fairness intuition is a political argument. If pro-trade policymakers wish to gain the assent of a sufficient number of citizens to enact pro-trade policies, then it is necessary that citizens actually assent to those policies. Without a sense that trade liberalization is being conducted fairly, that support will not be present. This is what appears to be happening in the United States today. According to a Pew Research Center poll, in April 2016, forty-nine percent of the general

contrast, in 2013, only 10.1% of manufacturing workers belonged to unions. Robert E. Scott, *The Manufacturing Footprint and the Importance of U.S. Manufacturing Jobs*, ECONOMIC POLICY INSTITUTE BRIEFING PAPER #388, at 9 (2015), <http://www.epi.org/files/2015/bp388-manufacturing-footprint.pdf>.

25. Donald J. Trump, Declaring American Economic Independence, Address at Monessen, PA (June 28, 2016) (transcript available at <http://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891>).

26. *Id.*

public considered “U.S. involvement in the global economy” to be a bad thing because it lowered wages and cost jobs in the United States.²⁷ Conversely, only forty-four percent believed U.S. involvement was a good thing.²⁸ Importantly, those without a college degree were significantly less likely to support global economic integration.²⁹ Whether this level of support would change with the inclusion or exclusion of trade and labor provisions is a question that merits future research.

C. *Consumer Citizenship*

A third argument in support of labor provisions in trade agreements is what I term the “consumer citizenship” justification. While this argument is related to the second, it shifts from the perspective of citizens in their role as *voters*, to citizens in their role as *consumers*. Citizen-consumers want to ensure that the goods they consume are made using processes that conform to their ethical and political expectations. That is, as a polity, they have made a decision that trade liberalization must be accompanied by certain guarantees, particularly that, as consumers, they are assured of certain conditions they deem necessary for trade liberalization to be considered legitimate. Labor provisions are thus one means of ensuring that citizen-consumers’ ethical and political expectations are satisfied.

Citizenship is the idea that one has both individual rights in relation to the state as well as duties towards other members of a defined political community. As Michael Walzer has described it, “[a] citizen is, most simply, a member of a political community, entitled to whatever prerogatives and encumbered with whatever responsibilities are attached to membership.”³⁰ Consumer citizenship expands this notion and can be

27. Jacob Poushter, *American Public, Foreign Policy Experts Sharply Disagree over Involvement in Global Economy*, PEW RESEARCH CENTER (Oct. 28, 2016), <http://www.pewresearch.org/fact-tank/2016/10/28/american-public-for-foreign-policy-experts-sharply-disagree-over-involvement-in-global-economy/>.

28. *Id.*

29. *Id.* According to this same poll, the American public and foreign policy experts sharply disagree over the advantages of U.S. involvement in the global economy, as eighty-six percent of international relation scholars describe U.S. involvement as a good thing.

30. Michael Walzer, *Citizenship*, in *POLITICAL INNOVATION AND CONCEPTUAL CHANGE* 211 (Terrence Ball et al. eds., 1989).

defined as the “use of the market as an arena for politics in order to change institutional or market practices found to be ethically, environmentally, or politically objectionable.”³¹ Citizen-consumers see their everyday purchasing decisions and consumption choices as political acts.³² Their purchasing decisions thus cross the realm from being the mere satisfaction of individual hedonistic preferences into the realm of the political.³³

Some have further argued that a traditional notion of citizenship that is limited to the nation state also needs to be rethought. In a global economy—where production is disaggregated, far-flung supply chains are central to the organization of the modern corporation,³⁴ and market transactions can have far reaching effects beyond the boundaries of the nation state—citizenship potentially requires a cosmopolitan conception of political community.³⁵ Cosmopolitanism contains two key ideas: (1) our legal rights are not contingent upon citizenship in a state that happens to extend those rights to us; and (2) our political and moral duties do not extend only to our fellow citizens but to all humans by virtue of their humanity.³⁶ These duties become all the more salient when we take into consideration how we are economically and, in the

31. DIETLIND STOLLE & MICHELE MICHELETTI, *POLITICAL CONSUMERISM: GLOBAL RESPONSIBILITY IN ACTION* 39 (2013).

32. *Id.*

33. By political, I mean to invoke a broader notion of citizenship—that consumer action constitutes a form of the political duties and responsibilities consonant with republican and liberal conceptions of citizenship.

34. Gerald F. Davis, *After the Corporation*, 41 *POL. & SOC'Y* 283, 290 (2013) (“Production has become modular across nearly every industry, allowing both large and small firms to contract out the manufacture and distribution of physical goods.”).

35. DAVID HELD, *COSMOPOLITANISM: IDEALS AND REALITIES* 3 (2010); *but see* Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 *STAN. L. REV.* 1667, 1669 (2003) (critiquing the cosmopolitan duty approach to treaty ratification and humanitarian intervention).

36. Thomas Pogge argues that Cosmopolitan positions share three characteristics: (1) individualism, that individuals are the ultimate unit of concern; (2) universality, that every living human enjoys this status equally; and (3) generality, that persons are the ultimate unit of concern for everyone on a global scale; not just for the fellow countrymen, for example. Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 *ETHICS* 48, 48-49 (1992).

words of Iris Marion Young, structurally interconnected.³⁷ By structurally interconnected, Young means that the acts of consumers “contribute . . . to the structural processes that produce injustice,” and as such, consumers have “responsibilities to work to remedy these injustices.”³⁸ This makes consumers “structurally” responsible for the conditions in which they work. If our lives are in fact so deeply enmeshed in the structural and economic web that requires the labor of supply-chain workers for our lives, then nation-state-based conceptions of citizenship are not sufficient to allocate moral and political responsibility.³⁹

There is also a more pragmatic, regulatory problem that arises in traditional national state-bounded conceptions of citizenship. As a number of scholars have argued, the rights and duties of citizens can no longer be adequately addressed solely within the boundaries of the nation state.⁴⁰ A concrete example is the hypothetical Vietnamese worker who manufactures garments for American consumers, who under the TPP would now have access to cheaper garments because of reduced tariffs. Vietnamese garment workers are not only subject to the power of the Vietnamese state, nor are their work lives solely affected by the economic or legal activity *within* the Vietnamese state. While the state might be the primary source of labor rights and the primary provider of protections, the workers are also significantly impacted by economic, political, and legal institutions outside of the Vietnamese state. For instance, the workers’ immediate employer is a manufacturer and exporter that is economically subject to the power of the lead firm that imports those garments. The lead firm is likely to have power over the supplier in ways that the Vietnamese state might not, or that it might choose not to exercise because of perceived competitive pressures from other countries.

My point in this discussion is not necessarily to argue for the adoption of a cosmopolitan or traditional liberal conception of the boundaries of political duty and responsibility.

37. Iris Marion Young, *Responsibility and Global Justice: A Social Connection*, 23 SOC. PHIL. & POL’Y 102, 102–03 (2006).

38. *Id.*

39. *See id.* at 104–05 (arguing that people “stand in dense relationships with others prior to, apart from, or outside political communities”).

40. HELD, *supra* note 35, at 13–14.

Rather, I accept the notion that, in practice, a strictly state-bounded conception of citizenship, and by extension a state-bounded approach to regulation of global supply chains, is not operable. What is needed is some version of cosmopolitan or transnational citizenship that recognizes that we are, as Young argues, connected to those people that produce the goods we consume along the global supply chain.⁴¹ Accordingly, there is a compelling argument that trade and labor provisions are justified and should be designed in a citizenship framework. They are justified as legitimate because they should not be intended or deployed in such a way that is protectionist. Rather, they ought to be deployed in a way that is oriented toward assuring citizen-consumers that the products they are importing into their home countries are, if not guaranteed to have been produced in a just manner, at least subject to a set of rules and processes provided for in trade agreements.

A second and related point is that the regulatory institutions of the state are not necessarily sufficient in the modern global economy to regulate highly complex supply chains that span jurisdictions and involve factories domiciled in countries with sub-optimal regulatory enforcement. As a number of scholars have noted, in many countries, particularly developing ones, labor law and labor law enforcement are often weak.⁴² This is not to say that labor law or other state institutions are non-existent or useless. In fact, the state, even when it is weak, still plays important functions.⁴³ Rather, labor governance deficits at the local and international levels mean that

41. Young, *supra* note 37, at 119 (discussing a “social connection model of responsibility”). For an elaborated theory on how responsibility ought to be allocated in a global justice framework, see Yossi Dahan et al., *Global Justice, Labor Standards and Responsibility*, 12 THEORETICAL INQUIRIES L. 117, 119–120 (2011).

42. See Richard M. Locke & Ben A. Rissing, *Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains*, 51 BRITISH J. INDUS. REL. 519, 520 (2013).

43. For discussion of this point see Tim Bartley, *Transnational Governance and the Re-centered State: Sustainability or Legality?* 8 REG. & GOVERNANCE 93, 95–6 (2014) (arguing against treating developing countries as “areas of limited statehood”); Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 THEORETICAL INQUIRIES L. 517, 521–22 (2011) (arguing state regulatory institutions and “law on the books” are still important in adjudicating disputes even in weak regulatory regimes).

policymakers must take into account and potentially make use of non-state and private forms of supply-chain labor regulation. These forms have developed rapidly in the last few decades to the point that now supply-chain governance, or what would be more commonly referred to as compliance by businesses, is a core function of a great many, if not most, transnational corporations. Typically, although with a great deal of variation, corporations will develop or sign on to a code of conduct that requires their suppliers to adhere to a given set of labor standards or else be subject to potential contractual remedies, generally limited to rescission of the contract.⁴⁴

These non-state systems of supply-chain governance are predicated on a base of consumer and civil society action. Specifically, consumers' expectation that goods and services are produced in a certain manner spurs efforts by corporations to ensure that their supplier and supply chains are in compliance with these expectations. Consumers are often said to have two main tools at their disposal. They can *buycott*, which is to say that they will choose to purchase products and choose suppliers of those products based on a set of social criteria, such as labor and human rights standards.⁴⁵ Alternatively, they can *boycott*, in which they actively avoid buying products from a particular company or provider, or a product altogether if it is more generally problematic.⁴⁶ Companies are aware of this and rationally would seek to avoid the latter, and, in some circumstances, benefit from the former by attracting the business of ethically minded consumers.⁴⁷

D. *Development*

The last justificatory category grounds the ends of trade in a development framework. One of the limitations of the previous arguments is that they are all mostly self-regarding. The protectionist, fairness, and consumer-citizenship justifications

44. Richard M. Locke et al., *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61 *INDUS. & LAB. REL. REV.* 3, 4 (2007).

45. DIETLIND STOLLE & MICHELE MICHELETTI, *POLITICAL CONSUMERISM: GLOBAL RESPONSIBILITY IN ACTION* 40 (2013).

46. *Id.* at 39.

47. For a discussion of benefit corporations, which seek to attract the business of ethical consumers, see Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 *WAKE FOREST L. REV.* 591 (2011).

are all grounded in the perspective of citizens seeking labor provisions for their own political, economic, or psychic benefit. In contrast, a development perspective recognizes that a core objective of liberalizing trade is not simply to promote economic growth but to promote general human welfare and capabilities. Or, in the terminology of Amartya Sen, a development perspective seeks to develop the “‘capabilities’ of persons to lead the kind of lives they value—and have reason to value.”⁴⁸

A capabilities approach argues that the key indicators of development are not traditional measures such as gross domestic product (GDP) growth, personal income growth, industrialization, technological advance, or social modernization.⁴⁹ Higher incomes and industrialization are not necessarily ends in themselves, as more traditional conceptions of development would have it but are rather instruments to achieve a set of individual functionings. In Sen’s conception, functionings are the “beings and doings” that make a life valuable to an individual. The capabilities, or the opportunities, to achieve those functionings are the ends, or the goal, of development.⁵⁰ To illustrate this different perspective, Sen examines poverty according to his theory. Poverty, for Sen, should be understood primarily as a capability deprivation. In this view, poverty is not intrinsically bad, but rather is *instrumentally* bad because it deprives people of the freedom to achieve various functionings that they have reason to value.⁵¹ Low income is seen as an important instrumental deprivation because money enables us to purchase things we have reason to value. Income, however, is not what Sen would consider to be a “substantive freedom,” in that it is not intrinsically important, but rather instrumentally

48. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 37 (1999); see also MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011).

49. *Id.* at 4–5. For a fuller account of the conceptualization of the development approach and its application to trade and labor, see Kevin Kolben, *A Development Approach to Trade and Labor Regimes*, 45 WAKE FOREST L. REV. 355 (2010); see also Kevin Kolben, *Labour Regulation, Capabilities, and Democracy*, in *LABOUR REGULATION AND DEVELOPMENT SOCIO-LEGAL PERSPECTIVES* (Shelley Marshall & Colin Fenwick eds., 2016) [hereinafter *Labour Regulation*].

50. Ingrid Robeyns, *The Capability Approach: A Theoretical Survey*, 6 J. HUM. DEV. 93, 95 (2005).

51. SEN, *supra* note 48, at 87.

so.⁵² Rather than enumerating a set of universally generalizable capabilities, Sen prefers that individuals identify these on their own.⁵³ Accordingly, Sen enumerates several *instrumental* types of freedom that aid individuals in identifying and developing these capabilities. These include “(1) political freedoms, (2) economic facilities, (3) social opportunities, (4) transparency guarantees, and (5) protective security.”⁵⁴ Yet, Sen’s decision not to propose a set of concrete capabilities that can be generalized across contexts makes his approach difficult to operationalize.

Martha Nussbaum takes a somewhat different view of the capabilities approach. She defines capabilities, similarly to Sen, to be “what people are actually able to do and to be—in a way informed by an intuitive idea of a life that is worthy of the dignity of the human being.”⁵⁵ Nussbaum, however, emphasizes the central role of the state, and of institutional and political arrangements in ensuring that people achieve a certain threshold level of capabilities; or, as she puts it, the objective is that a “structure of social and political institutions should be chosen . . . with a view to promoting at least a threshold level of these human capabilities.”⁵⁶ To help realize these goals she identifies a number of threshold capabilities. These are: (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination, and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) other species; (9) play; and (10) political and material control over one’s environment.⁵⁷ A number of these, I would claim, are directly relevant to labor and the workplace, including the capabilities of life and bodily health (workplace health and safety); bodily integrity (workplace sexual harassment); affiliation (freedom of association and collective bargaining, and freedom from discrimination); play (adequate rest and leisure time); and material control over one’s environment (the right to seek employment on an equal basis with others and having some degree of autonomy and control over one’s work).

52. *Id.*

53. See NUSSBAUM, *supra* note 48, at 19 (discussing Sen’s approach).

54. SEN, *supra* note 48, at 38.

55. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 5 (2000).

56. *Id.* at 75.

57. *Id.* at 78–80.

How does this discussion of development relate to trade and labor provisions? A central justification for free trade from the perspective of development economics is that it is beneficial for developing countries and middle-income countries to integrate into the global economy to raise GDP. If we adopt a more current approach to economic development, such as the one argued for by Sen and Nussbaum, then trade should be grounded in a different, or perhaps additional, set of development goals—namely, achieving human development. The workplace is one of the central and key arenas of human functioning, and one in which a person’s capabilities can be developed and even legally or constitutionally guaranteed.⁵⁸ There are several reasons for this. First, humans spend a very large percentage of their living time at work and, if one works in the formal sector, at traditionally organized work places.⁵⁹ Second, work is a central source of freedoms and “unfreedoms,” both instrumental and substantive.⁶⁰ It is at work that we earn money, which enables us to achieve certain capabilities; and it is at work that many, particularly low-skill workers, experience various forms of “unfreedom” through discrimination, repression of union organizing, forced overtime, and other forms of oppression that fundamentally restrict the freedom of workers to be and do the things that they have reason to value. The removal of these various “unfreedoms” ought to be the aim of development because they are highly correlated to the development of one’s capabilities.

A final aspect of the development approach advocated for here, is that it recognizes democracy in the workplace to be an important means of achieving political democracy.⁶¹ This is because (1) the workplace is an important locus where workers build capacity for democratic functioning in the political

58. Nussbaum’s objective in her work on capabilities is to constitutionalize a set of threshold capabilities so that the state is obligated to ensure their attainment. See NUSSBAUM, *supra* note 48, at 166-67.

59. The formal sector is meant to describe traditional workplaces that are subject to traditional regulation by the state. This is in contrast to the informal sector, which can generally be defined as work activities that are not “regulated, monitored, or controlled directly or indirectly by the state.” SUPRIYA ROUTH, *ENHANCING CAPABILITIES THROUGH LABOUR LAW: INFORMAL WORKERS IN INDIA* 21 (2014).

60. For a discussion of the difference between instrumental and substantive freedoms see Sen, *supra* note 48, at 35–53.

61. See Kolben, *Labour Regulation*, *supra* note 49, at 60, 71–78.

sphere,⁶² and (2) voice and workplace democracy are understood as intrinsically important to workers, who desire to exert some control over their lives, including in the workplace itself. Accordingly, trade and labor provisions should broadly aim to increase workplace democracy.⁶³

III. THE TPP

As discussed above, labor chapters in trade agreements are not justifiable by protectionism, but by (1) fairness, which is key for political support of free trade, (2) consumer citizenship, and (3) development. These justifications also provide a guide for how labor chapters ought to be designed. Before doing so, however, it is useful to address the specifics of the ill-fated TPP's labor chapter. U.S. labor chapters evolved largely as a response to pressure from various constituencies that have been skeptical of free trade. These constituencies, particularly the AFL-CIO, often argue that free trade should only be pursued if it is done in what they consider to be a fair and equitable manner. The AFL-CIO "oppose[s] a set of rules made largely by and for global corporations,"⁶⁴ and claims that "working- and middle-class families have paid the price in terms of increasing inequality, depressed wages, reduced job opportunities, a substantial trade deficit and a weaker democracy."⁶⁵

The approach of the TPP labor chapter is an extension of prior U.S. labor chapters and somewhat different from the design proposed in Part IV. The U.S. approach is substantially grounded in "fairness as a condition for political support." The approach that was adopted by the U.S. government was intended to ensure and demonstrably show that trading partners were held to account for adherence to core labor rights. Accordingly, the United States has embraced a labor chapter structure that is primarily aimed at ensuring that states enact

62. See ROBERT ALAN DAHL, A PREFACE TO ECONOMIC DEMOCRACY 95 (1986).

63. I intentionally leave the definition of workplace democracy somewhat open for discussion in order to embrace various forms, union and otherwise.

64. AFL-CIO, MAKING NAFTA WORK FOR WORKING PEOPLE 1 (2017), https://aflcio.org/sites/default/files/2017-06/NAFTA%20Negotiating%20Recommendations%20from%20AFL-CIO%20%28Witness%3DTLee%29%20Jun2017%20%28PDF%29_0.pdf.

65. *Id.*

and enforce those core rights and threatens sanctions if they are found to violate those commitments. The TPP labor chapter was an iterative improvement to previous labor chapters, although it is still grounded in the same general framework. However, it also incorporated elements of alternative approaches to labor chapters, such as utilizing dialogue, broadening stakeholder involvement, providing for expert oversight, and foregrounding corporate social responsibility, as discussed below. Accordingly, the TPP labor chapter is significant for its embrace of private governance.

A. *New Provisions*

The TPP's model labor chapter, albeit ill-fated, provides a conception of what an iterative improvement in a labor chapter might look like, as well as hints at new tools that can be used to promote and ensure that supply chains conform to consumer expectations and international labor standards. The chapter is a modest, but not insignificant, advance on the labor chapters that have preceded it, and it could have been a useful tool in ratcheting up the quality of labor law, and possibly enforcement, in at least a few partner countries. Its effectiveness, of course, will never be gauged; but examining its structure provides insight into how, as a model, such an approach might be adopted, altered, or rejected in future labor chapters.

In previous work, I have argued that trade and labor provisions would be better suited not to large multilateral contexts like the World Trade Organization (WTO), but to smaller bilateral and regional agreements that could be better tailored to the regulatory environments and labor contexts of the parties to the agreement.⁶⁶ I have also argued that U.S. labor chapters have adopted a state action-state sanctions model.⁶⁷ Viewed through this model, the crux of these chapters has been to compel states to amend their labor laws and enforce

66. See Kevin Kolben, *The WTO Distraction*, 21 STAN. L. & POL'Y REV. 461, 489 (2010).

67. See generally Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L. J. 203 (2007).

them in a prescribed manner, or else suffer potential economic consequences by means of fines or trade remedies.⁶⁸

A central problem with the state action-state sanctions model, however, is that labor chapters adopting such an approach are inherently limited in their ability to affect labor conditions on the ground. This is due to the complex ways in which labor regulation is weak in developing countries—countries with whom the trade and labor chapters are most pertinent. It is not simply due to a plain lack of incentives or willful refusal to enact or enforce laws. Rather, many countries lack financial or other knowledge-based resources, suffer from deeply entrenched rule of law problems, or require more complex solutions to labor governance deficits than labor chapters have traditionally been able to provide. Significantly, many non-state regimes of labor governance have developed in response to the limited tools that international law, treaties, and state-based approaches to supply-chain labor justice have at their disposal.⁶⁹

The TPP labor chapter did not break from this approach. Indeed, the TPP labor chapter was clearly modeled on the general labor chapter template used by the United States since 1994, when it entered into the North American Free Trade Agreement (NAFTA). NAFTA included a side chapter on labor that followed a different model than what evolved in future FTAs.⁷⁰ In NAFTA, the requirement is that the signatories must enforce their own labor laws, but only a few areas of la-

68. *Id.* at 204.

69. See, e.g., RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY* (2013) (arguing that compliance-based private supply-chain governance is limited in its ability to improve working conditions); Jette Steen Knudsen, *The Growth of Private Regulation of Labor Standards in Global Supply Chains: Mission Impossible for Western Small- and Medium-Sized Firms?*, 117 J. BUS. ETHICS 387 (2012) (describing the strains of private governance requirements on small- and medium-size firms); Frederick Mayer & Gary Gereffi, *Regulation and Economic Globalization: Prospects and Limits of Private Governance*, 12 BUS. & POL. 1, 3-5 (describing private governance initiatives as a response to the public governance deficit) (2010).

70. North American Agreement on Labor Cooperation, Sept. 9-14, 1993, 32 I.L.M. 1499.

bor law are potentially subject to sanctions.⁷¹ When the United States entered into its next FTA, a bilateral agreement with Jordan in 2000, it made a significant break from the NAFTA approach. Notably, it (1) incorporated labor provisions into the body of the agreement, (2) referenced the ILO Declaration on Fundamental Principles and Rights at Work, and (3) made those labor provisions subject to dispute settlement.⁷² The approach was then modified slightly in the seven FTAs following the Jordan-United States agreement, largely by excepting the labor chapters from the dispute settlement procedures, creating a special set of procedures for labor violations, and providing for a fine of up to fifteen million dollars if a violation was found to have occurred.⁷³ Following an agreement between Congress and the executive on May 10, 2007 (“May 10 Agreement”) allowing for FTAs to be “fast tracked” in return for strengthening labor protections, the labor chapters in the subsequent four FTAs underwent another significant revision.⁷⁴ Most notably, parties were now obliged to implement ILO core labor rights in their labor laws, and the labor chapter was subject to the same dispute settlement procedures and remedies as other chapters in the FTA.

The TPP labor chapter represents an iterative advance. The main legal requirement of the TPP labor chapter is a provision that has been included since the May 10 Agreement and has become a standard element of US labor chapters. Article 19.3(1) requires that each party:

adopt and maintain in its statutes and regulations,
and practices thereunder, the following rights, as

71. MARY JANE BOLLE, CONG. RESEARCH SERV., 97-861 E, NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATE 5-6 (2001).

72. *See* Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Jordan-U.S., art. 6, Oct. 24, 2000, 41 I.L.M. 63 (2002).

73. *See, e.g.*, The Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004, 43 I.L.M. 514 (2004), <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter CAFTA].

74. For a description of these steps and more details see MARY JANE BOLLE, CONG. RESEARCH SERV., RS22823, OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS (2016).

stated in the ILO Declaration:⁷⁵ (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour and, for the purposes of this Agreement, a prohibition on the worst forms of child labour; and (d) the elimination of discrimination in respect of employment and occupation.⁷⁶

In addition to this core provision, Article 19.3(2) provides that “[e]ach Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.”⁷⁷ This is the first time an agreement has directly called on parties to establish rules and regulations regarding labor standards that fall outside of the ILO core labor rights specified in Article 19.3(1). Another notable addition, or augmentation, is that the TPP non-derogation clause provides that the parties shall not derogate from the ILO declaration,⁷⁸ or from a party’s own statutes in special trade or economic processing zones.⁷⁹ The updated non-derogation clause recognizes the growing use of such zones as export centers and the frequent limitations on the application of domestic labor law to those zones.⁸⁰ Among the TPP signatories, Malaysia had a history of derogating in its large electron-

75. Like in previous agreements, these rights are explicitly limited to those stated in the declaration, which is noted by a number of scholars as an effort to avoid specifically linking them to a requirement to adopt the correlated eight ILO conventions, of which the United States has only ratified two. See Ronald C. Brown, *Promoting Labour Rights in the Global Economy: Could the United States’ New Model Trade and Investment Frameworks Advance International Labour Standards in Bangladesh?*, 155 INT’L LAB. REV. 383, 387–88 (2015).

76. TPP, *supra* note 20, at art. 19.3.1 (footnotes omitted).

77. *Id.* at art 19.3.2.

78. *Id.* at art. 19.4(a).

79. *Id.* at art. 19.4(b).

80. In Bangladesh, for example, which would not have been a party to the TPP, workers are not allowed to form unions in the Export Processing Zones, which is a deviation from labor law applicable to the rest of Bangladesh. See USAID, BANGLADESH LABOR ASSESSMENT 16 (2014).

ics sector but has since reformed its labor laws to extend freedom of association rights to EPZs.⁸¹

Article 19.5 contains the second leg of the U.S. labor chapter model. It provides that “[n]o party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement.”⁸² As is consistent with the state action-state sanctions approach, it requires—in somewhat passive and tortured language—that states not refrain from enforcing labor laws in order to increase trade flows.

While these provisions follow the traditional U.S. model, there are other clauses that suggest a small extension beyond the state action-state sanctions model. For example, one new element is an Article providing that each party “shall . . . discourage . . . the importation of goods from other sources produced in whole or in part by forced or compulsory labor.”⁸³ This is the first time forced and compulsory labor has been highlighted in a separate article and is likely due to the special issues that arise in the context of some TPP trading partners. Also novel is the effort to impact not just domestic labor practices, but the international supply chains of trading partners as well. “Discourage,” however, is a relatively weak standard. Discouragement could be achieved through a straight ban or by encouraging companies located in those jurisdictions to govern their supply chains. The question of how that will be accomplished is left open in the text.

The openness to other regulatory methods, particularly non-state mechanisms and forms of dialogue and public engagement with stakeholders, also suggests new approaches to governance that are not solely wedded to a state-centric model. One such provision, Article 19.7, calls for each party to “encourage enterprises to voluntarily adopt corporate social responsibility initiatives on labour issues that have been endorsed or are supported by that Party.”⁸⁴ This is a “soft” article

81. Cathleen Cimino-Isaacs, *Labor Standards in the TPP*, in *TRANS-PACIFIC PARTNERSHIP: AN ASSESSMENT* 261, 270 (Cathleen Cimino-Isaacs & Jeffrey J. Schott eds., 2016).

82. TPP, *supra* note 20, at art. 19.5.

83. *Id.* at art. 19.6.

84. *Id.* at art. 19.7.

that creates no obligations. Rather, it establishes a promotional framework for companies within each party's jurisdiction, whether lead firms or suppliers, to take action above and beyond what they might be legally obligated to do. Thus, the pressure to act and, in this case, self-regulate would emanate from consumers and other stakeholders instead of from state parties directly.

Of course, there is nothing preventing states from passing laws that set in motion various kinds of self-regulating processes. Transparency laws, for example, could be considered to fall within this category because they compel companies to engage in various kinds of due diligence and public reporting.⁸⁵ The logic is that by requiring companies to engage in these processes, consumers and other stakeholders will potentially obtain more information that they can use as leverage against those companies, and companies in turn will work harder to clean up certain practices in their supply chains knowing that stakeholders will obtain this information. There is no reason why future labor chapters could not make the implementation of various kinds of transparency laws a requirement as a condition for entering into agreements.

Elements of the agreement which draw on governance-based regulatory processes are also novel, but they are not particularly well developed. For example, the TPP explicitly promotes processes of state dialogue with various stakeholders. The chapter provides that the Labour Council, an official institution composed of senior ministerial representatives from the various parties,⁸⁶ shall "provide a means for receiving and considering the views of interested persons on matters related to this Chapter."⁸⁷ It then goes even further and provides that each Party "shall establish or maintain, and consult, a national labour consultative or advisor or similar mechanism, for members of its public, including representatives of its labour and business organisations, to provide views on matters regarding

85. The California Transparency in Supply Chains Act is one such example that has received increasing scholarly attention. See, e.g., Adam S. Chilton & Galit Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 *STAN. J. INT'L L.* 1 (forthcoming 2017) (critiquing elements of the Act for not providing usable information for consumers to take effective action).

86. TPP, *supra* note 20, at art. 19.12.

87. *Id.* at art. 19.14(1).

this Chapter.”⁸⁸ What is new in this provision is the mandate that there be an institution in each country explicitly and uniquely tasked with engaging civil society and other stakeholders on issues related to the labor chapter. In previous U.S. FTA labor chapters, institutions of public engagement were somewhat more limited. For example, in the U.S.-Korea FTA, the joint Labour Affairs Council was to include a public session in its yearly meeting,⁸⁹ the parties were required to create a contact point in each labor ministry for submissions from the public,⁹⁰ and each party had the *option* to create a national labor advisory committee comprising members of the public, labor, and business sectors.⁹¹ This kind of mandated institutional dialogue between stakeholders adopted by the TPP exists in some E.U. FTAs, which are far more grounded in dialogue than in sanctions and remedies. For example, the E.U.-Korea FTA provides for a Domestic Advisory Group (DAG) formed by each party that includes civil society representatives of labor, business, and the environment.⁹² This DAG is then required to engage in a yearly Civil Society Forum between the parties to discuss ongoing issues.⁹³

The last dialogue-grounded institution in the Chapter promotes a type of pre-dispute settlement dialogue that is similar to the European Union approach, which excludes sanctions altogether. Article 19.11, entitled “Cooperative Labour Dialogue,” provides that a “Party may request dialogue with another Party on any matter arising under this Chapter,”⁹⁴ that the parties “shall engage in dialogue in good faith,”⁹⁵ and that the “dialoguing Parties shall provide a means for receiving and considering the views of interested persons on the matter.”⁹⁶ This provision takes the place of an annex that the United States has included in previous FTAs called Labor Co-

88. *Id.* at art. 19.14(2).

89. U.S.-Korea FTA, *supra* note 2, at art. 19.5(2).

90. *Id.* at art. 19.5(3).

91. *Id.* at art. 19.5(4) (“Each Party may convene a national labor advisory committee comprising members of its public, including representatives of its labor and business organizations and other persons, to advise it on the implementation of this Chapter.”).

92. E.U.-Korea FTA, *supra* note 2, at art. 13.12(4)-(5).

93. *Id.* at art. 13.13(1).

94. TPP, *supra* note 20, at art. 19.11(1).

95. *Id.* at art. 19.11(3).

96. *Id.*

operation Mechanisms (LCMs).⁹⁷ These LCMs have been primarily oriented towards creating a framework for establishing various U.S.-funded programs, usually administered by the Department of Labor, that address particular labor problems in partner countries.⁹⁸ In the TPP, the emphasis is on the dialogue itself, prioritizing mechanisms, albeit unspecified, for bringing in voices from the public and civil society.

These new provisions are explicitly attempting to create what I term “dialogic mechanisms and institutions.”⁹⁹ Specifically, I refer to mechanisms, processes, and institutions that facilitate engagement between various stakeholders, particularly between non-state actors and governments. Such dialogic processes are important for several reasons. First, they engage the public and affected third parties to share their views and potentially spark democratic responses to their opinions. Second, they unleash democratic processes in countries that are often lacking in democratic institutions, thus achieving one of the goals of development—the formation and improvement of democratic institutions. Third, these institutions may create bridges between civil society, the private sector, and government, which can lead to better regulatory outcomes.¹⁰⁰ As Part IV will show, dialogic institutions can play an important role in governance-based approaches to trade and labor.

B. *Labor Consistency Plans*

The second major development in the TPP that distinguishes it from both prior U.S. FTA labor chapters and from the labor chapters found in agreements with the European

97. See, e.g., U.S.-Korea FTA, *supra* note 2, at Annex 19-A; CAFTA, *supra* note 73, at Annex 16.5; BUREAU OF INT’L LABOR AFF., U.S. DEP’T OF LABOR, PROGRESS IN IMPLEMENTING CAPACITY-BUILDING PROVISIONS UNDER THE LABOR CHAPTER OF THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES-FREE TRADE AGREEMENT (2009).

98. For example, one such program is a \$7 million project to reduce child labor in Honduras and to bolster the Honduran labor ministry’s capacity to address freedom of association and collective bargaining violations in the Maquiladora sector. See U.S. DEPARTMENT OF LABOR, TECHNICAL COOPERATION PROJECT SUMMARY, FUTUROS BRILLANTES: PROJECT TO REDUCE CHILD LABOR AND IMPROVE LABOR RIGHTS AND WORKING CONDITIONS IN HONDURAS (2014).

99. See generally Kevin Kolben, *Dialogic Labor Regulation in the Global Supply Chain*, 36 MICH. J. INT’L L. 425 (2015).

100. *Id.*

Union, Canada, or other nations is the inclusion of individualized Labor Consistency Plans (LCPs). These LCPs were designed for Vietnam,¹⁰¹ Malaysia,¹⁰² and Brunei.¹⁰³ In previous work I have argued that, for FTA labor chapters to be effective, they must be context specific.¹⁰⁴ That is, they need to be crafted not as one-size-fits-all boilerplate provisions, but rather they should address particular institutional and regulatory gaps specific to partner countries.¹⁰⁵ While some have argued that the WTO should include labor provisions in its framework,¹⁰⁶ the flexibility and ability to contour agreements to the particular labor regulatory environments of partner countries make regional and bilateral agreements potentially more effective and more fruitful arenas for experimentation than the WTO.¹⁰⁷

The implementation of the LCPs were pre-conditions for the agreement to be enacted¹⁰⁸—with some leniency made in the case of Vietnam for implementation of the legalization of grassroots unions¹⁰⁹—and are powerful and precedent setting actions that open the door for other kinds of context-specific pre-conditioning in future agreements. Delving into the specifics of the plans reveals concrete requirements for changes in the labor laws that could have a significant impact on democratic functioning and, as discussed in Part II, would create a labor regulatory environment that could help workers en-

101. United States-Viet Nam Plan for the Enhancement of Trade and Labour Relations, U.S.-Viet., Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labour-Relations.pdf> [hereinafter Vietnam LCP].

102. Malaysia-United States Labour Consistency Plan, Malay.-U.S., Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-MY-Labour-Consistency-Plan.pdf> [hereinafter Malaysia LCP].

103. Brunei Darussalam-United States Labour Consistency Plan, Brunei-U.S., Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-BN-Labour-Consistency-Plan.pdf> [hereinafter Brunei LCP].

104. Kolben, *WTO Distraction*, *supra* note 66, at 489.

105. *See id.*

106. *See* Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885, 888–89 (2003); CHRISTIAN BARRY & SANJAY G. REDDY, *International Trade and Labor Standards: A Proposal for Linkage*, 39 Cornell Int'l L. J. 545, 623–627 (2006).

107. *See* Kolben, *WTO Distraction*, *supra* note 66, at 462.

108. *See* Vietnam LCP, *supra* note 101, at VII; Malaysia LCP, *supra* note 102, at VII; Brunei LCP, *supra* note 103, at VII.

109. *See* Vietnam LCP, *supra* note 101, at VII(2).

hance their capability sets. The plans are thematically similar and organized by sections entitled Legal Reforms,¹¹⁰ Institutional Reforms and Capacity Building,¹¹¹ and Transparency and Sharing of Information.¹¹²

In the Vietnam plan, the LCP specifically targets the fundamental problem in Vietnam of restrictions placed on the freedom of association and collective bargaining. Similar to China, Vietnam requires unions to be affiliated with the ruling Communist Party's union.¹¹³ Under the TPP, however, independent, or so-called "grassroots," labor unions must now be permitted to form and their administrative autonomy must be guaranteed—both of which constitute significant advances.¹¹⁴ In the section on institutional reforms and capacity building, the LCP provides for improved capacity for Vietnam's labor inspectorate, including a specified increase in the number of labor inspectors.¹¹⁵ In the section on transparency and information sharing, the LCP calls for the government to release data on the status and final outcomes of applications for union registration.¹¹⁶ It also creates a Technical Assistance Program by the ILO to support the labor inspectorate and issue reports on its progress.¹¹⁷ Finally, the LCP calls for the creation of a labor expert committee to issue independent reports on Vietnam's application and implementation of the legal and institutional reforms provided for in the plan.¹¹⁸

In Malaysia, where forced labor and migrant rights violations are particularly serious, the plan contains concrete requirements reducing government discretion in registering trade unions and cancelling union registration, as well as a number of other provisions that aim to bring Malaysian law

110. *Id.* at II; Malaysia LCP, *supra* note 102, at II; Brunei LCP, *supra* note 103, at II.

111. Vietnam LCP, *supra* note 101, at III; Malaysia LCP, *supra* note 102, at III; Brunei LCP, *supra* note 103, at III.

112. Vietnam LCP, *supra* note 101, at IV; Malaysia LCP, *supra* note 102, at IV; Brunei LCP, *supra* note 103, at IV.

113. U.S. DEPARTMENT OF STATE, VIETNAM 2015 HUMAN RIGHTS REPORT 48–49 (2015).

114. Vietnam LCP, *supra* note 101, at II(A)-(B).

115. *Id.* at III(C)(3).

116. *Id.* at IV(B)(3).

117. *Id.* at V(A)(1).

118. *Id.* at IV(B)(3).

into compliance with ILO standards.¹¹⁹ It also calls, albeit weakly, for the Malaysian government to “ensure that the use of subcontracting or outsourcing is not used to circumvent the rights of association or collective bargaining.”¹²⁰ Its section on forced labor contains significant commitments to ban the withholding of passports from workers¹²¹ and to provide other rights and protections for migrant workers,¹²² such as banning the payment of recruitment fees by workers.¹²³ Another notable provision is the removal of the ban on women working in certain industries.¹²⁴

The Brunei LCP is far less detailed, reflecting the fact, perhaps, that its virtually sole export industry is gas and petroleum and that its primary export partner is Japan.¹²⁵ Nevertheless, the LCP contains some notable requirements, such as the implementation of non-discrimination laws,¹²⁶ enactment of a minimum wage,¹²⁷ elimination of the prohibition on international affiliation by unions,¹²⁸ and enforcement of the law banning the withholding of passports from migrant workers.¹²⁹

The LCPs are an important new development in explicitly requiring specific aspects of the law be changed and in requiring mechanisms, including transparency, reporting, specific goals for the hiring of inspectors, and third-party review of progress be implemented. These developments are notable, but just like the general approach of U.S. labor chapters and the TPP by extension, they are consistent primarily with a unique focus on public law and its enforcement by the state, in addition to a reliance on dispute settlement and remedies if those provisions are violated. It therefore represents a continuation of the state action-state sanctions approach that I have critiqued earlier. At the same time, however, some LCPs in-

119. See Malaysia LCP, *supra* note 102, at II(A).

120. *Id.* at II(A)(20)(a).

121. *Id.* at II(B)(1).

122. *Id.* at II(B)(2).

123. *Id.* at II(B)(2)(b).

124. *Id.* at II(D).

125. See CIA, THE WORLD FACTBOOK, BRUNEI, ECONOMY, <https://www.cia.gov/library/publications/the-world-factbook/geos/bx.html>.

126. Brunei LCP, *supra* note 103, at II(D).

127. *Id.* at II(E).

128. *Id.* at II(A)(2).

129. *Id.* at II(B).

clude the seeds of a new approach that relies on dialogue, stakeholder involvement, expert oversight, and public reporting.

C. *Critiques of the Labor Chapter*

The leading critic of the TPP labor chapter is the AFL-CIO, which has long supported strong labor chapters while also being highly critical of U.S. trade policy more generally.¹³⁰ In fact, the Labor Advisory Committee (LAC), a group of union leaders charged with advising the United States on trade policy, wrote that the TPP “could amount to little more than a public relations gambit designed to secure passage of the TPP”¹³¹ It is worth at least briefly addressing some of the AFL-CIO’s critique because it illustrates a focus on exactly that model of labor chapter that I believe is flawed. At the core of its critique, the AFL-CIO is not asking for a wholly different approach to trade and labor provisions than what previously existed. Rather, it is advocating for a stronger set of provisions in keeping with the general approach of labor chapters that preceded it—labor provisions which it claims have “largely failed to improve working conditions and labor rights on the ground in our trading partner countries.”¹³²

The AFL-CIO argues, for example, that the TPP labor chapter provides insufficient tools to force the parties to advance labor-related dispute processes.¹³³ It critiques the inclu-

130. See AFL-CIO, *NAFTA AT 20*, at 3 (2014), available at https://aflcio.org/sites/default/files/2017-03/March2014_NAFTA20_nb.pdf.

131. THE LABOR ADVISORY COMM. ON NEGOTIATIONS AND TRADE POLICY, OFFICE OF THE U.S. TRADE REPRESENTATIVE, *REPORT ON THE IMPACTS OF THE TRANS-PACIFIC PARTNERSHIP* 65 (2015), <https://ustr.gov/sites/default/files/Labor-Advisory-Committee-for-Trade-Negotiations-and-Trade-Policy.pdf>.

132. *Id.* at 64. In his remarks to the Committee on Ways and Means on the labor chapter of the TPP, Professor Steven Charnovitz also highlighted the AFL-CIO’s critique of the labor chapter as “the most detailed examination of the TPP Labour Chapter to come to my attention.” However, in the end, he found many of the critiques to be “unjustified by the facts.” See Steve Charnovitz, *Remarks Submitted to the Committee on Ways and Means Democrats: An Appraisal of the Labor Chapter of the Trans-Pacific Partnership* (Jan. 2016), <https://democrats-waysandmeans.house.gov/sites/democrats-waysandmeans.house.gov/files/documents/Labor%20Forum%20Remarks%20-%20Steve%20Charnovitz.pdf>.

133. See AFL-CIO, *A GOLD STANDARD FOR WORKERS? THE STATE OF LABOR RIGHTS IN TRANS-PACIFIC PARTNERSHIP COUNTRIES* 4 (2016), <https://aflcio.org>.

sion of provisions requiring that countries implement health and safety and minimum wage laws because there are no specific minimum standards or wage levels provided for in the agreement.¹³⁴ Likewise, it objects to the requirement that countries discourage the importation of goods produced with forced labor because it does not require specific actions or rules that countries must undertake.¹³⁵ The AFL-CIO further contends that the anti-discrimination provisions in Vietnam's LCP are inadequate because they do not explicitly include sexual orientation, religion, political opinion, or immigration status.¹³⁶ Finally, the AFL-CIO notes that there is a discrepancy between the investor-state dispute settlement provisions and the labor chapter in that foreign investors have the right to bring cases directly against the state, while workers do not have that right. It argues that workers ought to have this right as well.¹³⁷

These are only a few of the AFL-CIO's critiques. While these assessments certainly have some merit, I would like to focus here not on the micro-analysis, but rather on the AFL's macro-level prescriptions—namely strengthening the dispute settlement procedures and detailing the substantive standards. This approach is consistent with a state action-state sanctions framework which, I have suggested, is limited in its potential. A central reason why it is limited is that it overly relies on the effectiveness of traditional regulatory tools, identifies the fundamental problem with enforcement as recalcitrant anti-labor states, and then over-relies on traditional regulatory tools to solve the problems with extant regulation. Despite the AFL-CIO's critique of the TPP and of prior labor chapters, its solution is to apply the same model, but to do so in a more legally stringent and enforceable manner. If in fact previous labor

org/sites/default/files/2017-03/1628_TPPLaborRightsReport.pdf. For a detailed proposal from a coalition of labor unions from TPP countries on how the TPP labor chapter should have been designed, see AFL-CIO ET AL., THE TRANS-PACIFIC PARTNERSHIP AGREEMENT MODEL LABOUR & DISPUTE RESOLUTION CHAPTER (2012), <https://www.ituc-csi.org/the-union-proposal-for-the-labour?lang=en>.

134. A GOLD STANDARD FOR WORKERS, *supra* note 133, at 5.

135. *Id.* at 5-6.

136. *Id.* at 6.

137. *See id.* at 4 (critiquing the fact that, in the TPP, workers do not have rights to bring complaints directly against a signatory country, unlike investors in the investor-state dispute-settlement process).

chapters have failed to improve working conditions in partner countries, as the AFL-CIO claims, then why argue for a slightly beefed-up state action-state sanctions model?¹³⁸ Instead, I turn in the next Part to a proposal for an alternative approach to thinking about labor chapters.

IV. NEW WAYS FORWARD

The TPP has made some notable advances within the frame that it operates. As discussed in Part II, this frame is primarily a state action-state sanctions approach that seeks to improve labor law in trading partners and require that those laws be adequately enforced through the threat of potential dispute settlement and sanctions. It is a framework that is strongly associated with fairness as a political condition for support justification, only loosely associated with the protectionism justification, and very weakly associated with consumer citizenship and development. The problems with this approach are that it (1) focuses on the reform and utilization of just one regulatory type of regime —public law and the state; (2) misdiagnoses the fundamental problems; and (3) does not utilize some promising cures to those problems. This Part proposes that future labor chapters should pivot away from the state action-state sanctions model and towards one that opera-

138. Part of the AFL-CIO's skepticism of the TPP and other FTAs surely follows from its general skepticism of trade liberalization, as well as its critique of how trade policy is made to serve business interests and not worker interests, which it sees as often incompatible. A central argument of the AFL-CIO has been that trade agreements and trade rules have (1) been designed primarily with the needs of corporations in mind, (2) have resulted in significant manufacturing job losses for American workers, and (3) that trading partners such as China have been flagrant violators of trade rules, which has been a primary cause of those job losses. Another structural source of the AFL-CIO's general skepticism of trade and its almost unfettered opposition to every trade agreement that the United States has entered into is that the AFL-CIO's main mission is to serve the economic interests of American workers as workers—not consumers. Thus, in that role, the AFL-CIO's duty is to resist efforts to liberalize trade if it believes that it will hurt labor's membership and constituency, even if there are overall benefits for the American economy as a whole, or for foreign workers. Its institutional orientation thus arguably hews more closely to the protectionism justification, although it is careful to avoid making raw protectionist arguments, and to the fairness justification. For an example of these arguments, see *The Crisis of U.S. Manufacturing in the Age of a Global Race to the Bottom*, AFL-CIO (Feb. 24, 2016), <https://aflcio.org/resolution/crisis-us-manufacturing-age-global-race-bottom>.

tionalizes the justifications, goals, and methodologies that I have argued ought to undergird trade and labor provisions. Future labor chapters should (1) address the legitimate concerns of affected citizens, whose economic and personal lives are impacted by trade liberalization, by ensuring there are steps being taken towards achieving fair rules of the game; (2) achieve a policy goal of enabling citizen-consumers that are increasingly concerned about the processes used to create the goods and services they consume, and (3) aim to realize development objectives. To meet these goals, labor chapters should first adopt an integrative approach, drawing on the insights of governance and experimental theories of regulation, and deploy private modes of governance that interact with the state. Second, policymakers should utilize evaluative criteria drawn from capabilities theory to evaluate the effectiveness of labor chapters as they are implemented.

A. *Integrative Linkage*

One reason that the state action-state sanctions model is limited in its potential is that trade agreements, and labor chapters in particular, have had a mixed record of significantly changing the conduct of states.¹³⁹ This is particularly so given the limited use of dispute settlement mechanisms by the United States for labor issues in its trade relations with partner states and the slow pace of resolution.¹⁴⁰ As the ILO has noted in a major report on labor and trade provisions, “In practice . . . dispute resolution mechanisms have only rarely been triggered, and in the cases where there was a possibility of economic sanctions, only one actually went to arbitration. Instead,

139. In a 2014 report, for example, the United States Government Accountability Office (GAO) reported that while there have been improvements in particular areas, such as labor law and standards, enforcement and capacity remain weak in many of the trading partners surveyed. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-160, FREE TRADE AGREEMENTS, U.S. PARTNERS ARE ADDRESSING LABOR COMMITMENTS, BUT MORE MONITORING AND ENFORCEMENT ARE NEEDED 10-22 (2014), <http://www.gao.gov/assets/670/666787.pdf> [hereinafter GAO Report]; see also Jeffrey S. Vogt, *The Evolution of Labor Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership*, 18 J. INT'L ECON L. 827, 828 (2015) (arguing that U.S. trade agreements have been somewhat effective in changing the laws of partner states before ratification but relatively poor in obtaining results ex post).

140. GAO Report, *supra* note 139, at 25-28.

the signing parties generally prefer to engage in dialogue and cooperative activities to prevent and resolve labour disputes.”¹⁴¹

If a goal of trade and labor chapters is to compel states to improve and enforce their labor laws in order to achieve the legitimate goals identified in Part II, then the most effective means of achieving that goal is not to impose such change externally, but to mobilize social processes in society that can pressure states from within. In addition, policymakers need to examine what kind of regulatory interventions are most effective in achieving regulatory goals. One advocated approach is to draw on and develop experimental institutions and legal interventions that can spur regulated actors in society to change their behavior.¹⁴² For example, one market-based process is the increasing demand by consumer-citizens for human rights compliant supply chains that have then led to private forms of transnational supply chain governance.¹⁴³

Labor provisions should thus be oriented towards creating institutions that help trigger these processes. Accordingly, labor chapters ought to take an integrative approach.¹⁴⁴ An integrative approach at its broadest level centers the importance of the state in labor regulation and bolsters state capacity where it is weak, drawing on the potential of private modes

141. INTERNATIONAL LABOUR ORGANIZATION, ASSESSMENT OF LABOUR PROVISION IN TRADE AND INVESTMENT AGREEMENTS 2-3 (2016).

142. My intention here is to emphasize the limited capacity for law to impose or compel obedience or compliance to the law. A more effective means for law as it is expressed through trade agreements or domestic labor law, I would suggest, is to think more creatively about how it can achieve legitimacy among the regulated, and trigger self-regulating processes. For a discussion of the ways in which law can be a reflexive means of triggering self-regulating processes in society, see Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239 (1983). For a discussion of the importance of how law and legal norms can become internalized through deliberative processes, see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS, CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 28–41 (William Rehg trans., MIT Press 1996) (1992). See also Kevin Kolben, *Transnational Labor Regulation and the Limits of Governance*, 12 THEORETICAL INQUIRIES L. 403 (2011) (discussing and critiquing governance approaches to transnational labor regulation).

143. Mark Anner, *Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains*, 40 POL. & SOC'Y 609, 610 (2012).

144. See Kolben, *Integrative Linkage*, *supra* note 67, at 205.

of governance to (1) improve working conditions in global supply chains, and (2) create dynamic systems of governance that can help catalyze improvements in public governance. Public governance is particularly important in the legal domains in which the state has a comparative advantage, such as in enforcement of freedom of association and human rights,¹⁴⁵ or where it should—from the perspective of political theory—take a central regulatory role, such as in domains that touch on democratic functioning.¹⁴⁶ An integrative approach draws on tools of democratic experimentalism and other governance theories in its implementation, including monitoring, benchmarking, transparency, and competition.¹⁴⁷ It also prioritizes dialogic modes of interaction between private and public actors with the goal of mutual learning and improving the capacity of public regulatory institutions.¹⁴⁸ While the ideal is that private and public regimes be consciously designed and directed to be in communication with each other with a goal of developing state capacity,¹⁴⁹ as Lillian Miles has argued in an examination of a case study of Indonesia, private institutions such as Unions, NGOs, and businesses require a great deal of support and reorientation to take up this task.¹⁵⁰

145. See Matthew Amengual, *Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic*, 38 *WORLD DEV.* 405, 412 (2010) (arguing the state has a comparative advantage in pursuing freedom of association violations); Stephanie Barrientos & Sally Smith, *Do Workers Benefit from Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems*, 28 *THIRD WORLD Q.* 713, 717 (2007) (arguing that corporate codes of conduct are weak at enforcing process rights, such as freedom of association).

146. Kolben, *Dialogic Labor Regulation*, *supra* note 99, at 439–40.

147. See Kolben, *Integrative Linkage*, *supra* note 67, at 242–55.

148. See *id.* at 250; Kolben, *Dialogic Labor Regulation*, *supra* note 99, at 440–41.

149. Kolben, *Dialogic Labor Regulation*, *supra* note 99, at 445–46.

150. Lillian Miles, *The 'Integrative Approach' and Labour Regulation and Indonesia: Prospects and Challenges*, 36 *ECON. & INDUS. DEMOCRACY* 5, 10–16 (2015). Other scholars have used Indonesia as a case study to identify what conditions are necessary for the transnational initiatives and private regulation to reinforce the state. See generally Mathew Amengual & Laura Chirot, *Reinforcing the State: Transnational and State Labor Regulation in Indonesia*, 69 *INDUS. LAB. REV.* 1056, 1057 (2016) (identifying worker mobilization and stakeholder support for authoritative rule interpretation by the state as key conditions for state reinforcement in transnational labor initiatives).

How such a system might be deployed is variable and context specific.¹⁵¹ One arrangement would deploy mechanisms of information gathering on factory labor conditions that would be directed by a master governance council at the top and multiple councils at local levels, composed of multiple stakeholders, that would make both procedural and substantive decisions so long as they were in compliance with the overall directives.¹⁵² Such a system would be designed to complement and bolster public systems of governance. In the context of a trade agreement, the agreement might specify a panel of experts or delegate this task to the ILO. Information would be collected and shared by competing private and public actors, who might use varying methodologies to collect information and address problems.¹⁵³ The quality of those methodologies, as well as the performance of subsidiary councils, would in turn be evaluated by the master council or another supervisory body.¹⁵⁴

There are implicit ways that regulatory competition might spur improved public regulatory functioning,¹⁵⁵ but it is also important to establish explicit systems of communication between private and public actors to help both—particularly the state—improve its performance.¹⁵⁶ The U.S.-Cambodia FTA, which created an ILO-run program called Better Factories, provides some precedent for this approach. Better Factories collected public information about conditions in Cambodian

151. This approach is built upon some of the foundational concepts proposed by Charles Sabel, Dara O'Rourke & Archon Fung in ARCHON FUNG ET AL., CAN WE PUT AN END TO SWEATSHOPS? 19 (2001) (proposing a ratcheting labor standards approach relying on transparency, competitive comparison, continuous improvement, and sanctions as key tools).

152. Kolben, *Integrative Linkage*, *supra* note 67, at 248.

153. Alternatively, there could be one “super monitor” whose track record is well proven, such as the ILO. Although this has its own limitations. *Id.* at 249.

154. *Id.* at 250.

155. See generally Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic*, 8 CHI. J. INT'L L. 513 (2007).

156. Gay Seidman has argued that a deficiency of many private governance regimes is that there is no engagement with the state. One exception has been COVERCO in Guatemala, which made one of its priorities conducting trainings for state inspectors. GAY W. SEIDMAN, BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM 103-04 (2007) (describing the work of Guatemala's Commission for the Verification of Codes of Conduct (COVERCO)).

factories and made that information publicly available, initially both to lead firms as well as consumers and other stakeholders.¹⁵⁷ This transparency created an incentive for factories to improve regardless of state enforcement. A number of scholars have indicated noted improvements as a result of this trade-agreement-mandated program.¹⁵⁸ However, it is less clear how well Better Factories was able to engage with the Cambodian state and improve its regulatory capacity. In contrast, a case study of Better Work Jordan—a successor of Better Factories—found a number of ways in which the Jordan program engages dialogically with the state. This engagement potentially allows for more opportunities for the integrative dynamics argued for here.¹⁵⁹ Other scholars have found evidence of similar dialogic dynamics at work in Indonesia.¹⁶⁰

Tariff reductions can also be made contingent on the implementation of similar programs that draw on experimentalist approaches to governance. Such programs can be modeled on elements of the Better Work program. While these models are varied in different countries, they all share certain characteristics. First, they harness the power of lead firms to influence the conduct of suppliers. They do this by having lead firms join the program and pay a fee, which entitles them to labor-monitoring data gathered by Better Work auditors, or

157. See Sandra Polaski, *Combining Global and Local Forces: The Case of Labor Rights in Cambodia*, 34 *WORLD DEV.* 919, 923 (2006).

158. See APICHOKE KOTIKULA, MILAD POURNIK & RAYMOND ROBERTSON, *WORLD BANK, INTERWOVEN: HOW THE BETTER WORK PROGRAM IMPROVES JOB AND LIFE QUALITY IN THE APPAREL SECTOR* 38-45 (2015) (describing labor standard improvements in various areas); SANDRA POLASKI, *INT'L INSTITUTE FOR LABOUR STUDIES, HARNESSING GLOBAL FORCES TO CREATE DECENT WORK IN CAMBODIA* 11-14 (2009) (emphasizing the value of the quota bonus and monitoring in Cambodia); Chikako Oka, *Accounting for the Gaps in Labour Standard Compliance: The Role of Reputation-Conscious Buyers in the Cambodian Garment Industry*, 22 *EUR. J. DEV. RES.* 59, 60-61 (2009) (discussing the important role of reputation-sensitive buyers in driving supply chain regulation); Chikako Oka, *Channels of Buyer Influence and Labor Standard Compliance: The Case of Cambodia's Garment Sector*, 17 *ADVANCES INDUS. & LAB. REL.* 153, 176 (2010) (arguing that unmediated buyer-supplier relationships produce better compliance when the buyer is reputation conscious).

159. See Kolben, *Dialogic Labor Regulation*, *supra* note 99, at 451-64.

160. Ockert Dupper, Colin Fenwick & Tess Hardy, *The Interaction of Labour Inspection and Private Compliance Initiatives: A Case Study of Better Work Indonesia* (Better Work Discussion Paper Ser. No. 21, 2016), <http://betterwork.org/global/wp-content/uploads/2016/07/Discussion-paper-21.pdf>.

what Better Work calls “enterprise advisors.”¹⁶¹ The suppliers know this information will be made available to the lead firms, which theoretically creates an incentive to improve. In periodic and publicly available “synthesis reports,” the country-level Better Work programs reveal overall compliance levels of participating factories and how they have improved or regressed.¹⁶² There have been efforts to replicate the original Cambodian program’s method of revealing data on particular factories, and Better Work has stated that it aims to replicate this model in all of its programs.¹⁶³

Currently, there are Better Work programs in two countries with which the United States has concluded bilateral free trade agreements containing labor provisions: Jordan¹⁶⁴ and Nicaragua.¹⁶⁵ There are also other countries with Better Work programs that currently benefit, or have benefited, from the U.S. program on Generalized System of Preferences. These include Bangladesh, whose preferences were suspended in 2013 after the Rana Plaza factory collapse, and Indonesia.¹⁶⁶ Better Work also operates in Haiti,¹⁶⁷ which is a beneficiary of a different preference program.¹⁶⁸ Perhaps not surprisingly, the

161. BETTER WORK, THE BETTER WORK SERVICE MODEL 4 (2015), <http://betterwork.org/blog/portfolio/the-better-work-service-model/>.

162. To find a list of compliance synthesis reports see *Our Impact, Publications*, BETTER WORK, <http://betterwork.org/our-impact/publications/>.

163. BETTER WORK, *supra* note 161, at 11.

164. *Better Work Jordan: Home*, BETTER WORK, <http://betterwork.org/where-we-work/jordan/>; See also Kevin Kolben, *Trade, Development, and Migrant Garment Workers in Jordan*, 5 *Middle East L. & Governance* 195 (2013) (describing the context that gave rise to the Better Work Jordan program and how it operates).

165. *Better Work Nicaragua: Home*, BETTER WORK, <http://betterwork.org/where-we-work/nicaragua/>.

166. For a list of GSP beneficiaries, see OFF. OF THE U.S. TRADE REPRESENTATIVE, U.S. GENERALIZED SYSTEM OF PREFERENCES GUIDEBOOK 16 (2016), available at <https://ustr.gov/sites/default/files/GSP-Guidebook-September-16-2016.pdf>.

167. *Better Work Haiti: Home*, BETTER WORK, <http://betterwork.org/where-we-work/haiti/>.

168. Haitian Hemispheric Opportunity through Partnership Encouragement Act, Hope II, 19 U.S.C. § 2703a(e) (2008).

United States government is a major donor to these programs.

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The texts of future agreements could provide for such integrative-type programs. The Haiti Better Work program, for example, was effectively written into the so-called HOPE II legislation.¹⁷⁰ This law extended special tariff preferences to Haiti provided certain conditions were met. One such condition was that the President of the United States certify that Haiti “has established or is making continual progress towards establishing . . . protection of internationally recognized worker rights.”¹⁷¹ Additionally, Haiti is required to mandate that producers of goods eligible for tariff preferences participate in a technical assistance program,¹⁷² or what is referred to in the legislation as a “[t]echnical assistance improvement and compliance needs assessment and remediation program.”¹⁷³ The program is implemented by the ILO;¹⁷⁴ includes representatives of government, unions, and employers;¹⁷⁵ and engages in various kinds of monitoring and compliance assessment,¹⁷⁶ sharing that information with relevant stakeholders¹⁷⁷ and helping to remediate deficiencies.¹⁷⁸

Better Work in Haiti has been operating since 2008, receiving \$7.6 million in funding from the U.S. government to cover activities through 2016.¹⁷⁹ Trade agreements could

169. See *Better Work, Countries*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/agencies/ilab/our-work/projects/better-work> (last visited May 20, 2017).

170. BETTER WORK, BETTER WORK HAITI: 13TH BIENNIAL SYNTHESIS REPORT 10-11 (2016), <http://betterwork.org/blog/portfolio/better-work-haiti-13th-biennial-synthesis-report/>.

171. 19 U.S.C. § 2703a(d)(1)(A)(vi).

172. *Id.* § (e)(1)(A)(ii).

173. *Id.* § (e)(3).

174. *Id.* § (e)(3)(C)(i).

175. *Id.* § (e)(3)(C)(ii).

176. *Id.* § (e)(3)(C)(iii).

177. *Id.* § (e)(3)(C)(iii)(III).

178. *Id.* § (e)(3)(C)(iv).

179. U.S. TRADE REPRESENTATIVE, HAITIAN HEMISPHERIC OPPORTUNITY THROUGH PARTNERSHIP ENCOURAGEMENT ACT OF 2008, 2014 USTR ANNUAL REPORT ON THE IMPLEMENTATION OF THE TECHNICAL ASSISTANCE IMPROVEMENT AND COMPLIANCE NEEDS ASSESSMENT AND REMEDIATION (TAICNAR) PROGRAM AND ASSESSMENT OF PRODUCER ELIGIBILITY 2 (2016), <https://ustr.gov/sites/default/files/06182014%20USTR%20Report%20Haiti%20HOPE%20II%202014.pdf>.

surely include similar programs, such as those like Better Work, that are administered by the ILO and the International Finance Corporation. Alternatively, trade negotiators could develop experimental institutions of hybrid public and private governance that could strategically deploy non-state supply chain governance programs that are accountable to public actors. The focus on dispute settlement would then shift from whether or not a given country has failed to enforce or implement a given set of core labor rights to what processes and institutions—private, and hybrid—it is implementing as a means of remedying the underlying problems.

B. *Development Criteria*

Another way to ground labor chapters in a development approach is to refocus the evaluative criteria used to judge their effectiveness. One of the most compelling justifications for labor rights provisions is that they can be effective mechanisms to promote development in partner countries. Labor and workplaces are particularly fruitful locations to focus on development because of the great deal of time humans spend working, and because workplaces are central loci of freedoms and “unfreedoms.”¹⁸⁰

In a development oriented labor chapter, the goal should be explicitly to promote workers’ capabilities in trading partner countries. One element of such an approach would be to identify and measure benchmarks that directly relate to the achievement of workers’ capabilities. In the TPP, when benchmarking does take place, the LCPs primarily focus on measuring benchmarks achieved by partner states in their labor ministries.¹⁸¹ A development approach would not focus only on measures of regulatory effectiveness, but also look beyond state regulatory institutions and take a more holistic perspective. Specifically, it would examine how a labor chapter and its related institutions have affected workers’ capabilities. Such a strategy would provide different benchmarks for success in addition to the current focus on, for example, indepen-

180. *See supra*, at Part II.

181. *See, e.g.*, Vietnam LCP, *supra* note 101, at Part III(c)(3) (specifying the number of labor inspectors to be hired); *see also id.* at Part V(B)(3) (establishing a Labour Expert Committee to evaluate Vietnam’s application of the requirements of the Vietnam LCP).

dent unions registered or the numbers of new inspectors appointed in the labor ministries.¹⁸²

To understand how a labor chapter could help facilitate development, it is helpful to look at how some scholars have applied a development approach to labor law.¹⁸³ Supriya Routh, in his fieldwork in Kolkata, has identified through interviews a number of capabilities that are relevant to informal workers, many of which fall outside of the traditional core labor rights indicators. In the case of waste pickers, for example, these capabilities include access to worksites and “recognition” of their work.¹⁸⁴ The first step in evaluating the capabilities of workers that come under the purview of trade agreements is identifying what their desired capabilities are. One of the key processes of a capabilities approach is to develop and facilitate deliberative processes that enable people to determine for themselves what capabilities are important for them to achieve and to provide individuals with the ability to achieve them.¹⁸⁵

Some scholars have argued that one capability can be conceptualized as a “capability for voice,” which is “the ability to express one’s opinions and thoughts and to make them count in the course of public discussion.”¹⁸⁶ As applied to work and labor law, the capability for voice should lead to the capability to have managers respond to the needs and demands of workers.¹⁸⁷ This idea of capability for voice is tightly linked to freedom of association, collective bargaining, and what the ILO

182. *Id.* at Part II(A).

183. For a review of some of the literature see Lilian Miles, *The Capabilities Approach and Worker Wellbeing*, 50 J. DEV. STUD. 1043, 1044–1046 (2014).

184. SUPRIYA ROUTH, ENHANCING CAPABILITIES THROUGH LABOUR LAW: INFORMAL WORKERS IN INDIA 201–03 (2014).

185. This requires a democratic framework that enables what Sen has called the instrumental role of political freedom. Political freedom is instrumentally important because it enables a response to people’s demands on governments, and it is constructively important because it helps facilitate people working out what economic and other goals are important for them to achieve. SEN, *supra* note 48, at 152–53.

186. Aristeia Koukiadaki, *The Establishment and Operation of Information and Consultation of Employees’ Arrangements in a Capability-Based Framework*, 31 ECON. & INDUS. DEMOCRACY 365, 367 (2010).

187. *Id.* Koukiadaki describes these legal interventions as a kind of “social conversion factor,” where legal intervention regarding information and consultation can help develop norms of deliberation in the workplace which then lead employees to “convert their assets . . . into positive outcomes.” *Id.* at 367.

refers to as social dialogue.¹⁸⁸ A development approach to labor chapters would go deeper than the limited institutions for public participation that currently exist. It would implement processes that enable, and even mandate, that workers engage in deliberation not only with employers and governments, but also among themselves. The aim of this deliberation would be to articulate the work-related capabilities that they wish to develop, and to discuss concrete legal reform and corporate practices that could help bring those capabilities into being.

The institutions of such a regime would need to engage in measuring and evaluation. An evaluative tool in this context would gauge the degree to which workers are in fact able to convert their bargaining demands or their individual needs into actual public policy and corporate practice. Other evaluative tools might be drawn more explicitly from Nussbaum's list of threshold capabilities. Nussbaum's list has the advantage of providing a clear-cut set of universal capabilities that are grounded in broadly accepted norms and principles. This permits a focus on central capabilities, the achievement of which is likely important for workers everywhere, as well as for citizen-consumers, drawing on a second justification for trade and labor provisions.

Three examples from Nussbaum's list illustrate what evaluative criteria might look like. The capability of bodily health would demand an evaluation of the degree to which workers are capable of having healthy bodies at work, not subject to workplace injury and toxins. Such an evaluative criterion would, of course, take into account factory safety, but also look at the actual health improvements of workers over time, eventually making such findings public. Likewise, a focus on the capability of play would evaluate the degree to which factory workers, engaged in exports to partner countries, are able to have leisure and rest, measuring how much time they in fact spend with family and others outside of work. Finally, a capability-of-voice measure might evaluate the degree to which workers are able to have their concerns responded to in the workplace. This is related to, but not completely the same as, a measure that looks at the number of independent unions in a workplace.

188. *Id.* at 384–85.

An integrative approach would draw on this evaluative information to induce a race to the top through transparent systems of benchmarking and sharing of best practices of capability development. A system of experimentalist monitoring, information sharing, and benchmarking was proposed earlier in which labor conditions would be evaluated on the ground and made public, and competing organizations would use different methodologies of measuring and remedying factory-level problems, ideally leading to improved working conditions. In a development approach, the evaluative measurements would not focus necessarily on working and factory conditions, but rather on the more expansive notion of workers' capabilities, and on developing benchmarks to evaluate the progress workers have made in developing those capabilities. In other words, a development-based system of integrative linkage aims to increase the ability of workers affected by trade agreements to be and do the things that they have reason to value, as those capabilities are related to the workplace.

V. CONCLUSION

We are, of course, a long way from realizing the proposals that I have elementally sketched out here, but perhaps not as far as may appear at first glance. The TPP, albeit a dead letter for now, represented the next step in a process of incrementally strengthening U.S. labor chapters on its own terms, which I have described as a "state action-state sanctions" model. However, it also opened the door to utilizing processes outside of the state action-state sanctions model by looking to enhance systems of dialogue, increase stakeholder engagement, and encourage corporate social responsibility. This article has focused primarily on the U.S. model, from which the TPP primarily derives, but a similar analysis would apply to other countries and regions that are increasingly incorporating labor conditions and concerns into their trade policies. In future iterations of labor chapters, not only in the United States but elsewhere, policymakers should look beyond the traditional boundaries and frameworks that define state-to-state relations. Experimental approaches grounded in principles of fairness, consumer citizenship, and development that mobilize forces within society hold far more promise than the approaches that have been currently adopted.