

# FTAS IN ASIA-PACIFIC: “NEXT GENERATION” OF SOCIAL DIMENSION PROVISIONS ON LABOR?

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## A. Introduction

Recent years have brought a proliferation of Free Trade Agreements (“FTA”),<sup>1</sup> bilateral and multilateral, often regional, with even larger ones being negotiated, such as the European Union (“EU”) and United States (“U.S.”) Transatlantic Trade and Investment Partnership (TTIP) and the Transpacific Partnership (TPP). The Asia Pacific Economic Cooperation (“APEC”) forum members recently discussed plans to “phase out regional free trade agreements” (or supplement them) in favor of creating a singular Free Trade Agreement Asia Pacific (“FTAAP”), covering much of the Asia Pacific Region.<sup>2</sup>

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<sup>1</sup>*Free Trade Agreements and Labor Rights*, INT’L. LABOUR ORG. (ILO), <http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/lang--en/index.htm> (last visited Aug. 15, 2014) [<http://perma.cc/9PTM-DJZ3>]; Int’l Labour Org (ILO), *Social Dimensions of Free Trade Agreements*, INT’L. INST. FOR LABOUR STUD. (2013), [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms\\_228965.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf) [<http://perma.cc/9MYJ-T7SE>]. (explaining that while only four percent of trade agreements that entered into force between 1995 and 1999 included labor provisions, this rose to eleven percent between 2000 and 2004; whereas, between 2005 and 2013 about one third of all trade agreements that came into force included labor provisions, and by June 2013, of the 248 trade agreements that were in force (WTO), 58 contained labor provisions) (“In 34 out of those 58 existing trade agreements, the provisions are exclusively promotional, taking the form of cooperative activities between partner countries.”) (explaining that these trade agreements come under different names and in different forms; e.g., EU-US Transatlantic Trade and Investment Partnership (TTIP); Trans-Pacific Partnership (TPP); Regional Comprehensive Economic Partnership (RCEP); Trans-Pacific Strategic Economic Partnership (TPSEP or “P-4”); Agreement bilateral investment treaty (BIT); Free Trade Area of the Asia Pacific (FTAAP)).

<sup>2</sup> See He Weiben, *How the FTAAP Incorporates the TPP*, CHINAUSFOCUS (Nov. 18, 2014), <http://www.chinausfocus.com/finance-economy/how-the-ftaap-incorporates-the-tpp/> [<http://perma.cc/A8J7-BSUM>] (explaining that the 2014 APEC Summit in Beijing initiated the process toward a Free Trade Agreement in Asia and Pacific (FTAAP) by having a collective strategic study to be completed by the end of 2016) (“The APEC region currently accounts for roughly 70% of total world RTAs and FTAs. The APEC official website cited 56 RTAs within APEC. According to Professor Dan Steinbock citing the Asia Development Bank, there are 109 bilateral FTAs in force and another 148 FTAs under negotiation. If this trend continues, which is most likely, the world largest trade area will be highly fragmented, with different RTAs and FTAs intertwined, only to result in a much higher trading cost and trade non-facilitation. All the APEC members, including the US, will be in an unfavorable competitive

The International Labour Organization (“ILO”) reports that in the last two decades, there has been an increasing number of FTAs that include labor protections under a social dimension provision, either in the agreement itself or in a parallel agreement.<sup>3</sup> “Of the 185 ILO member countries with trade agreements notified to the World Trade Organization (“WTO”), about 60 percent are covered by at least one trade agreement with labor provisions.”<sup>4</sup> On the other hand, the ILO has also stated its studies do not show these labor provisions have any certainty of improving labor standards within the parties’ home country.<sup>5</sup>

In light of the increasing number of labour provisions in trade agreements and the variety of approaches, the question arises as to the practical implications of these provisions; in particular, whether labour provisions have created more space for improving labour standards and whether the ability to implement existing labour standards has improved.<sup>6</sup>

There are widely divergent views on their effectiveness, however. While some consider them a panacea for improving labor standards and working conditions, others criticize them as mere window dressing or even disguised protectionism. The debate is made even more complex by the variety of labor provisions with different legal and institutional implications. This makes it difficult

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position in the world marketplace . . . . TPP is the most important one among all the APEC RTAs and FTAs. The twelve TPP parties are all APEC members, with the U.S. playing the leading role. Another major RTA is the Regional Comprehensive Economic Partnership, led by ASEAN, which covers all ten ASEAN countries plus China, Japan, South Korea, India, Australia and New Zealand. China is an important partner, but not a leader. In turn, the U.S. is also excluded so far. The FTAAP does not cast aside all of the RTAs and FTAs. Rather, it hopes for an acceleration and smooth conclusion of them all. The FTAAP will not be mapped out from zero, but will be based on those RTAs and FTAs as pathways.”)

<sup>3</sup> Int’l Labour Org (ILO), *Social Dimensions of Free Trade Agreements*, INT’L INST. FOR LABOUR STUD., 20 (2013), [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms\\_228965.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf) [<http://perma.cc/9MYJ-T7SE>] [hereinafter *ILO Report*].

<sup>4</sup> *ILO Report*, *supra* note 3, at 21. (See illustrative treaties collected on various trade agreements). *International Institute for Labour Studies*, INT’L LAB. ORG. (2014), [www.ilo.org/inst/lang--en/index.htm](http://www.ilo.org/inst/lang--en/index.htm) [<http://perma.cc/H7ND-GDQX>] [hereinafter *IILS*]; *ILO Report*, *supra* note 3, at 33.

<sup>5</sup> *ILO Report*, *supra* note 3. See discussion in, Ronald C. Brown, *Asian and US Perspectives on Labor Rights under International Trade Agreements Compared*, in *PROTECTING LABOR RIGHTS IN A GLOBALIZING WORLD* (Marx, A., Wouters, J., Rayp, G. & L. Beke, eds., Cheltenham: Edward Elgar) (forthcoming 2015).

<sup>6</sup> *ILO Report*, *supra* note 3, at 22.

to generalize about their effects.<sup>7</sup> Likewise, the United States finds shortcomings in the effectiveness of FTA labor provisions. A November 2014 report of the U.S. Government Accounting Office (“GAO”), assessing implementation and enforcement of the labor provisions of selected U.S. FTAs found “persistent challenges to labor rights, such as limited enforcement capacity, the use of subcontracting to avoid direct employment, and, in Colombia and Guatemala, violence against union leaders.”<sup>8</sup>

The recent disaster in Bangladesh at Rana Plaza caused by substandard building and working conditions, in which over a thousand workers employed by subcontractors of multinational corporations (“MNC”) in the garment industry were killed, raised the specter of the difficulties of regulating and protecting the labor rights of these workers.<sup>9</sup> There were domestic labor laws in place, ILO core labor standards ratified, MNCs had their codes of conduct and Corporate Social Responsibility (“CSR”) provisions, but still there was little enforced labor protection for these workers.<sup>10</sup>

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<sup>7</sup> *ILO Report*, *supra* note 3, at 6.

<sup>8</sup> U.S. GOV'T ACCOUNTABILITY OFF., *Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed* GAO-15-160, (2014), <https://www.hsdl.org/?view&did=759407> [<http://perma.cc/V3L2-GUEK>] (explaining that more recently, see the political debate in the U.S. on this issue where Senator Elizabeth Warren issued a report chronicling years of “broken promises” to enforce labor protection provisions in the FTAs of the U.S.). *See*, The White House, *See What the Most Progressive Trade Agreement in History Looks Like* (Mar. 4, 2015), <https://www.whitehouse.gov/blog/2015/03/04/see-what-most-progressive-trade-agreement-history-looks> [<http://perma.cc/F283-Y3LS>]. *Broken Promises*, Prepared by the Staff of Sen. Elizabeth Warren, <http://www.warren.senate.gov/files/documents/BrokenPromises.pdf> [<http://perma.cc/5SPM-7Y3B>].

<sup>9</sup> *See discussion in* Ronald C. Brown, *The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, *Int'l Labour Rev. (ILR)* (2015). (explaining that Rana Plaza is where U.S. and other western retailers housed their garment factories and the supply chains are packed with firms and foreign nations competing for the MNC dollar.) (“This competition entails being the cheapest country in which to do business—that is, lowest labor costs or the most lax environmental standards—popularly known as a ‘race to the bottom.’”); Krishna Chaitanya Valdamannati, *Rewards of (Dis)Integration: Economic, Social, and Political Globalization and Freedom of Association and Collective Bargaining Rights of Workers in Developing Countries*, 68 *IND. & LAB. REL. REV.* 3, 4 (2015).

<sup>10</sup> *Rana Plaza: Compensation for Victims of Industrial Homicide Still Short of Target*, INT'L TRADE UNION CONFEDERATION (Apr. 24, 2015), <http://www.ituc-csi.org/rana-plaza-compensation-for> [<http://perma.cc/7TY4-SVSW>] (“Two years after the deaths of more than 1,100 workers in the Rana Plaza factory collapse in Bangladesh, the compensation fund for their families and for the thousands injured is still US \$6 million short of the \$30 million target. The legally binding Bangladesh Accord on Fire and Building Safety, negotiated by IndustriALL, UNI and

While inter-Asian business grows and FTAs flourish in and with Asia, the inclusion of social dimension provisions in FTAs or Bilateral Investment Treaties (“BIT”) is practically non-existent, except where the Western influence appears to dominate and social dimension provisions are included, such as in FTAs with South Korea and with Singapore.<sup>11</sup> For example, though Korea has social dimension provisions with the United States, E.U., Australia, and Canada, it has no such labor provisions in its FTAs with Singapore or India.<sup>12</sup> By contrast, Japan in its Economic Partnership Agreements (“EPA”) with Singapore, Malaysia, Thailand, Indonesia, Brunei, Association of Southeast Asia Nations (“ASEAN”), Philippines, Vietnam, and India,<sup>13</sup> has a modest labor provision entitled ‘Investment and Labour’<sup>14</sup> that generally reiterates the ILO core labor rights and states that investment cannot be encouraged at the expense of weaker labor laws and their enforcement.<sup>15</sup>

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NGO partners with the brands after the disaster now has more than 200 brands signed up and has to date completed nearly 1,500 factory inspections, identifying many thousands of safety issues to be remedied.”).

<sup>11</sup> See Ronald C. Brown, *Asian and US Perspectives on Labor Rights under International Trade Agreements Compared*, in PROTECTING LABOR RIGHTS IN A GLOBALIZING WORLD (Marx, A., Wouters, J., Rayp, G. & L. Beke, eds., Cheltenham: Edward Elgar) (2015)(explaining that “[w]estern” particularly includes the E.U., Canada, and Australia all of which typically include Social Dimension provisions in their FTAs with Asian countries).

<sup>12</sup> *FTA Status of ROK*, MINISTRY OF FOREIGN AFF. REPUBLIC OF KOREA, [http://www.mofa.go.kr/ENG/policy/fta/status/overview/index.jsp?menu=m\\_20\\_80\\_10](http://www.mofa.go.kr/ENG/policy/fta/status/overview/index.jsp?menu=m_20_80_10) (last visited Jan. 31, 2015) [<http://perma.cc/XYA5-5XY4>].

<sup>13</sup> Ministerial Comm. Comprehensive Econ. P’ships., *Basic Policy on Comprehensive Economic Partnerships*, MINISTRY OF FOREIGN AFF. JAPAN (Nov. 6, 2010), <http://www.mofa.go.jp/policy/economy/fta/policy20101106.html> [<http://perma.cc/MPY2-F8HQ>]. (explaining that Japan’s EPAs contain a labor provision entitled “Investment and Labour” that generally reiterates the ILO core labor rights and states that investment cannot be encouraged at the expense of weaker labor laws and their enforcement). *Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPA)*, MINISTRY OF FOREIGN AFF. OF JAPAN (April 2014), <http://www.mofa.go.jp/policy/economy/fta/> [<http://perma.cc/9CJ3-VESM>].

<sup>14</sup> See, e.g., *Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPA)*, MINISTRY OF FOREIGN AFF. JAPAN (April 2014), <http://www.mofa.go.jp/policy/economy/fta/> [<http://perma.cc/9CJ3-VESM>]. (explaining that the Japan-Philippines Economic Partnership Agreements (EPAs) is the exception and has no investment and Labour provision). *Japan-Philippines Economic Partnership Agreement*, Japan-Phil., art. 103, MINISTRY OF FOREIGN AFF. (Sept. 9, 2006), <http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf> [<http://perma.cc/4SSE-LWL8>] [hereinafter JPEPA].

<sup>15</sup> *Japan-Indonesia Free Trade Agreement*, Japan-Indon., ch.7, (Aug. 20, 2007), <http://www.mofa.go.jp/region/asia-paci/indonesia/epa0708/agreement.pdf> [<http://perma.cc/TMT6-LCUF>] (explaining that however, Indonesia has an EPA with Japan that has no labor standards but does have chapter 7 that deals with movement of natural persons pertaining only to visas) [hereinafter JIEPA].

Within the Asian Region, there is the Trans Pacific Strategic Economic Partnership Agreement (Pacific Four or “P-4”) involving a plurilateral agreement among Brunei Darussalam, Chile, New Zealand, and Singapore. There is also a side agreement of the parties referred to as the “Labour Cooperation Memorandum of Understanding” (“MOU”) that provides promises of labor protections by committing to the ILO Declaration, agreeing to improve labor legislation and conditions, and undertaking cooperative activities and institutional contacts to achieve improved labor rights and protections.<sup>16</sup>

There is also the promise of potential inclusion of labor protection provisions in new trade agreements being negotiated inter-Asia, some of which also will include the United States and other western partners. For example, the currently negotiated TPP includes the United States, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. In that negotiation, some of the provisions under discussion are said to include a section on a labor chapter that includes commitments on labor rights protection and mechanisms to ensure cooperation, coordination, and dialogue on labor issues of mutual concern,<sup>17</sup> and likely will build upon and further develop the beginnings of the P-4’s MOU on labor cooperation.<sup>18</sup>

Additionally, the United States has a Trade and Investment Framework Arrangement (“TIFA”) with ASEAN that states in the preamble that the parties recognize the ILO Declaration’s

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<sup>16</sup> See *Memorandum of Understanding on Labour Cooperation Among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement*, BRUNEI-CHILE-N.Z.-SING. (Jun 19, 1998), [http://www.fta.gov.sg/tpfta/p3\\_authentic\\_labour\\_mou\\_text\\_english\\_v1.pdf](http://www.fta.gov.sg/tpfta/p3_authentic_labour_mou_text_english_v1.pdf) [<http://perma.cc/S8GT-TK73>] [hereinafter *MOU*].

<sup>17</sup> See *Labor*, OFFICE U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-4> (last visited Apr. 17, 2015) [<http://perma.cc/2WHJ-JSW3>]. See *discussion in*, Ronald C. Brown, ASEAN: Harmonizing Labor Standards for Global Integration, LRRN Conference paper (June 25, 2015) (on file with author).

<sup>18</sup> *Trans-Pacific Partnership (TPP)*, OFFICE U.S. TRADE REP., <http://www.ustr.gov/tpp> (last visited Jun. 19, 2013) [<http://perma.cc/SE7P-EWPN>].

core labor standards and the importance of adequate and effective protection of workers' rights in accordance with each participant's 'own law'.<sup>19</sup> The United States and ASEAN are also negotiating the Expanded Economic Engagement ("E3") Initiative, which "establishes a framework to expand cooperation to boost trade and investment between the United States and the ASEAN."<sup>20</sup> The U.S.-Cambodia Textile Agreement demonstrates an additional external source of labor regulation, monitored in part by the ILO, which provides a framework to monitor working conditions in garment factories as well as pave the way for new laws to improve these conditions, increase worker awareness of international labor standards and rights under existing Cambodian law, and increase workers' individual capacities to improve their working conditions to comply with national and international law.<sup>21</sup>

The United States reportedly is [also] negotiating a labor action plan ("LAP") with Vietnam. This plan may be similar to the LAP negotiated in conjunction with the U.S. FTA with Colombia. That plan included benchmarks to be undertaken by the Colombian government to address perceived weaknesses in Colombian labor laws and practices within specified deadlines. It includes numerous commitments to protect union members and improve worker rights. On May 29, 2014, 153 House Democrats wrote to [United States Trade Representative ("USTR")] Froman requesting that the United States negotiate

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<sup>19</sup> See *Trade and Investment Framework Arrangement. Between U.S. and ASEAN*, OFFICE U.S. TRADE REP., [https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset\\_upload\\_file932\\_9760.pdf](https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file932_9760.pdf) (last visited May 9, 2015) [<http://perma.cc/5DHV-7DKH>]. Also see, Dean A. DeRosa, *US Free Trade Agreements with ASEAN*, in *FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES* (Jeffrey J. Schott, ed. 2004), [http://www.piie.com/publications/chapters\\_preview/375/06iie3616.pdf](http://www.piie.com/publications/chapters_preview/375/06iie3616.pdf) [<http://perma.cc/A6PC-5BDJ>].

<sup>20</sup> *Association of Southeast Asian Nations (ASEAN)*, OFFICE OF U.S. TRADE REP., <https://ustr.gov/countries-regions/southeast-asia-pacific/association-southeast-asian-nations-asean> (last visited May 9, 2015) [<http://perma.cc/VQS5-JGWH>]; and Murray Hiebert, *The E3 Initiative: The United States and ASEAN Take a Step in the Right Direction*, CENTER STRATEGIC INT'L STUDIES (Dec. 21, 2012), <http://csis.org/publication/e3-initiative-united-states-and-asean-take-step-right-direction> [<http://perma.cc/3PR8-N9LX>] (explaining that the E3 will begin by working on four specific priorities: Its initiatives include obtaining a trade facilitation agreement to simplify customs, develop and improve communications technology, address investment policies, and work to harmonize standards across the region).

<sup>21</sup> Don Wells, "Best Practice" in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement, 27 *COMP. LAB. L. & POL'Y J.* 357-375 (2006). See also Lejo Sibbel & Petra Borrmann, *Linking Trade with Labor Rights: The ILO Better Factories Cambodia Project*, 24 *ARIZ. J. INT'L & COMP. L.* 235 (2007); What can bridge compliance gaps? Evidence from Cambodia, Paper presented at the Regulating for Decent Work: Regulating for a Fair Recovery 6- 8 July 2011, Geneva, ILO; Daniel Adler & Michael Woolcock, *Justice without the rule of law? The challenge of rights-based industrial relations in contemporary Cambodia*, in *HUMAN RIGHTS AT WORK: PERSP. ON L. & REG.* 529-554 (Colin Fenwick & Tonia Novitz, eds., Hart Publishing, 2011).

LAPs with Brunei, Malaysia, and Mexico as well. One issue concerning the LAPs is the stage in which they are implemented: prior to signing the agreement, or before, during, or after any potential congressional consideration of TPP.<sup>22</sup>

Also being negotiated among the ASEAN member states and ASEAN's FTA Partners is the Regional Comprehensive Economic Partnership Agreement ("RCEP"), which begun in 2012 and could create the world's largest trading bloc as well as have significant implications for the world economy<sup>23</sup> as a mutually beneficial economic partnership agreement.<sup>24</sup>

The thesis of this paper is straightforward; there are workers throughout the world, particularly in developing countries, who are subjected to substandard labor standards, and their countries are targeted for investment because of their countries' low wages or lax enforcement of labor laws. The existence of domestic labor laws and ratification of ILO Core Labor Conventions do not necessarily provide labor protection for the workers. Likewise, international treaty obligations under FTAs with social dimension provisions on labor do not necessarily bring labor protections. There are a number of emerging FTAs in the Pacific Region and the several very significant ones on the cusps of conclusion are discussed below so as to evaluate current approaches of labor protections by FTAs. This paper proposes the "new generation" of FTA social dimension provisions should embrace a marriage of international obligations, which incorporate

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<sup>22</sup> IAN F. FERGUSSON, MARK A. MCMINIMY & BROCK R. WILLIAMS, THE TRANS-PACIFIC PARTNERSHIP (TPP) NEGOTIATIONS AND ISSUES FOR CONGRESS, CRS R42694, at 40 (Mar. 20, 2015), <http://fas.org/sgp/crs/row/R42694.pdf> [<http://perma.cc/6MWY-CSW6>] (footnotes omitted).

<sup>23</sup> ASEAN Regional Comprehensive Economic Partnership, ASS'N OF SE. ASIAN NATIONS, <http://www.asean.org/news/item/asean-framework-for-regional-comprehensive-economic-partnership> [<http://perma.cc/S4MM-DNX9>] (last visited Aug. 16, 2014); WALLAR *supra* note 23, at 20.

<sup>24</sup> *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership*, ASEAN.org (Aug. 30, 2012), <http://www.asean.org>. James Wallar, Nat'l Bureau Asian Research, Achieving the Promise of the ASEAN Economic Community: Less Than You Imagine, More Than You Know 20 n.43 (2014), [http://www.nbr.org/downloads/pdfs/ETA/wallar\\_paper\\_072814.pdf](http://www.nbr.org/downloads/pdfs/ETA/wallar_paper_072814.pdf). ASEAN Regional Comprehensive Economic Partnership, Ass'n of Se. Asian Nations, <http://www.asean.org/news/item/asean-framework-for-regional-comprehensive-economic-partnership> (last visited Aug. 16, 2014); Wallar *supra* note 23, at 20. See discussion in Ronald C. Brown, ASEAN: Harmonizing Labor Standards for Global Integration. Pacific Basin L. J. (March 2016).

mandates for private contractual remedies under International Framework agreements (“IFA”), CSRs, and Codes of Conduct, with the private obligations contractually enforceable by private parties.

### **B. FTAs and Asia-Pacific Social Dimension Landscape**

While bilateral free trade agreements exist in many forms with multiple purposes, more recently, regional FTAs have taken the spotlight and with so many configurations and acronyms it begins to look like alphabet soup.

#### **P-4; ASEAN; RCEP; TPP; FTAAP; E.U.-U.S. TTPI**

Few existing or proposed FTAs have comprehensive or complete provisions protecting labor; and while there is much regional growth in FTAs, Asia-Pacific Economic Cooperation (“APEC”) members have signaled they would prefer a multi-regional umbrella FTA, the FTAAP. And so, it is useful to see current and proposed, but pending, social dimension provisions with labor protections to evaluate if they represent the status quo of arguably ineffective provisions or if they propose new initiatives in a step toward more effective protection.

Some trade experts “believe that the Regional Comprehensive Economic Partnership (“RCEP”) and the TPP could be harmonized under the larger umbrella organization of the FTAAP.<sup>25</sup> Toward that end, the Asia-Pacific Economic Cooperation (APEC)<sup>26</sup> has directed a

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<sup>25</sup> Jeffrey Schott, *Asia-Pacific Economic Integration: Projecting the Path Forward*, in *NEW DIRECTIONS IN ASIA-PACIFIC ECONOMIC INTEGRATION* 246–53 (Tang Guoqiang & Peter A. Petri, eds., 2014); *see also*, ELLEN L. FROST, NAT’L BUREAU ASIAN RESEARCH, *RIVAL REGIONALISMS & REGIONAL ORDER* 8 (2014), <http://www.nbr.org/publications/specialreport/pdf/free/021115/SR48.pdf> [<http://perma.cc/KEG9-QA24>].

<sup>26</sup> *History and Membership of APEC*, INTERNATIONAL.GC.CA, <http://www.international.gc.ca/apec/map-carte.aspx?lang=eng> [<http://perma.cc/MTL7-59KA>] (last visited May 9, 2015) (APEC is a forum for 21 Pacific Rim member economies that seeks to promote free trade and economic cooperation. APEC now comprises 21 member economies: Australia, Brunei Darussalam, Canada, Chile, People's Republic of China, Hong Kong, Indonesia, Japan,



feasibility study due at the end of 2016, with members agreeing that the smaller FTAs would not be in conflict and would remain in place.<sup>27</sup> Even though many of the TPP participants have FTAs with each other, many also have trade agreements with other partners who will not be part of the TPP.<sup>28</sup> The Trans Pacific Strategic Economic Partnership or more commonly referred to as the Pacific Four (P-4) is also in effect. It is a plurilateral agreement among Brunei Darussalam, Chile, New Zealand and Singapore<sup>29</sup> and includes mechanisms for ongoing cooperation and dialogue on labor and environment issues.<sup>30</sup> The P-4 partners are currently negotiating with Australia, Malaysia, Peru, the U.S., and Vietnam to expand the P-4; and upon its conclusion, it will be referred to as the Trans-Pacific Partnership (“TPP”).<sup>31</sup>

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Republic of South Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Republic of the Philippines, Russia, Singapore, Chinese Taipei (Taiwan), Thailand, the United States, and Vietnam.).

<sup>27</sup> He Weiwen, *How the FTAAP Incorporates the TPP*, CHINAUSFOCUS.COM (Nov. 18, 2014), <http://www.chinausfocus.com/finance-economy/how-the-ftaap-incorporates-the-tpp/> [<http://perma.cc/8RXC-UKNV>] (“[T]he core reason for the final unanimity was that, all the current RTAs and FTAs, including the TPP, could and should continue. The FTAAP will be the ultimate umbrella built on the basis of the former as necessary pathways. Hence, the FTAAP does not conflict with the TPP. In pursuing the FTAAP kick-off, the APEC Beijing Summit fully considered all the existing RTAs and FTAs, the different focuses and interests of various members, only to highlight the shared goals while reserving the particular concerns, thus reaching an inclusive solution through joint efforts.”).  
*Id.*

<sup>28</sup> Barbara Kotschwar & Jeffrey J. Schott, *The Next Big Thing? The Trans-Pacific Partnership & Latin America*, LATIN AMERICA GOES GLOBAL 9 (Spring 2013), <http://americasquarterly.org/next-big-thing-trans-pacific-partnership> [<http://perma.cc/NW4P-LSSL>] (Chile and Peru have signed agreements with China and South Korea; Chile and Mexico have negotiated FTAs with Japan; and Colombia recently signed its FTA with South Korea and is in negotiations with Japan.) (Commentators propose if these issues are handled well, “TPP will serve to update and expand existing pacts, as well as reinforce their integration into global supply chains. Equally important, TPP can help set the standard for trade reform not just for the Asia-Pacific region, but for the global trading system. Indeed, precedents developed in the TPP could become a foundation for new initiatives to revive the flagging multilateral trade talks in the World Trade Organization (WTO).”).

<sup>29</sup> *Brunei Darussalam’s FTA Policy*, MINISTRY OF FOREIGN AFF. TRADE BRUNEL, <http://www.mofat.gov.bn/index.php/free-trade-agreements-ftas/brunei-darussalam-s-fta-policy> [n/a] (last visited Aug. 17, 2014)

<sup>30</sup>*Id.*

<sup>31</sup>Jonathan Weisman, *Trade Authority Bill Wins Final Approval in Senate* (June 25, 2015), <http://www.nytimes.com/2015/06/25/business/trade-pact-senate-vote-obama.html> [<http://perma.cc/S4ZX-MM3Z>]; Trans-Pacific Strategic Economic Partnership Agreement, Brunei-Chile-N.Z.-Sing., May 28, 2006, [hereinafter *P4*] <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/0-P4-Text-of-Agreement.php> [<http://perma.cc/9GFV-EEWT>] (The Trans-Pacific Partnership (TPP) is a proposed regional free trade agreement that is currently being negotiated by twelve countries throughout the Asia-Pacific region (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam). The agreement began in 2005 as the Trans-Pacific Strategic Partnership Agreement (TPSEP or P4).); see also Memorandum of Understanding on Labour Cooperation Among the Parties to the Trans-

It is said, the “hottest topic” in world trade these days is the TPP.<sup>32</sup>

Hailed as a state-of-the-art free trade agreement, it will unite 11 countries—Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam—with a combined GDP of almost \$21 trillion (about 30 percent of world GDP) and \$4.4 trillion in exports of goods and services, or about a fifth of total world exports. If Japan and South Korea are added (they are actively exploring entry later this year), TPP would cover 40 percent of world GDP and nearly a third of world exports.<sup>33</sup>

All current TPP participants are members of the Asia Pacific Economic Cooperation (“APEC”) Forum;<sup>34</sup> and many see their prospective agreement as a step toward APEC’s long-standing goal to create a Free Trade Area of the Asia Pacific (“FTAAP”).

At the same time, other trade integration arrangements are in place in the Asia Pacific area.<sup>35</sup> ASEAN,<sup>36</sup> of which four of its ten members are not signatories to APEC; Pacific Alliance;<sup>37</sup> and the Regional Comprehensive Economic Partnership (“RCEP”), in which the ASEAN-10 are

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Pacific Strategic Economic Partnership Agreement, Brunei-Chile-N.Z.-Sing (Jun 19, 1998) [hereinafter *MOU*], [http://www.fta.gov.sg/tpfta/p3\\_authentic\\_labour\\_mou\\_text\\_english\\_v1.pdf](http://www.fta.gov.sg/tpfta/p3_authentic_labour_mou_text_english_v1.pdf) [<http://perma.cc/9FLV-KZKA>] (The Memorandum aims to improve understanding and encourage dialogue on labor matters, as well as promoting sound labor policies and practices. According to the text of the TPP, article 20.4 states that the TPP amongst the original 4 members would come into effect the 1 January 2006, once the signatories have deposited “instruments of ratification”).

<sup>32</sup> Barbara Kotschwar & Jeffrey J. Schott, *The Next Big Thing? The Trans-Pacific Partnership & Latin America*, LATIN AMERICA GOES GLOBAL 8 (Spring 2013), available at <http://americasquarterly.org/next-big-thing-trans-pacific-partnership> [<http://perma.cc/5PFR-3TXG>].

<sup>33</sup> *Id.*

<sup>34</sup> *History and Membership of APEC*, INTERNATIONAL.GC.CA, <http://www.international.gc.ca/apec/map-carte.aspx?lang=eng> (last visited May 9, 2015) [<https://perma.cc/H5BC-LX4X?type=source>] (These countries include Australia, Canada, Chile, China, Indonesia, Japan, Mexico, Peru, and the United States.).

<sup>35</sup> Socorro Ramirez, *Regionalism: The Pacific Alliance*, AMERICAS QUARTERLY (Spring 2013), available at <http://www.americasquarterly.org/content/regionalism-pacific-alliance> [<http://perma.cc/T948-HNVK>] (These include ASEAN, RCEP, and the Latin America trade bloc, the Pacific Alliance including Chile, Columbia, Mexico, and Peru).

<sup>36</sup> ASEAN members are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

<sup>37</sup> The Pacific Alliance VII Summit (May 23, 2013), available at [http://alianzapacifico.net/documents/abc\\_eng.pdf](http://alianzapacifico.net/documents/abc_eng.pdf) [na]; see also *Pacific Alliance*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Pacific\\_Alliance](http://en.wikipedia.org/wiki/Pacific_Alliance) [<http://perma.cc/YNJ6-YB5E>] (last visited March 10, 2016) (“The Pacific Alliance is a Latin American trade bloc, beginning toward integration. It currently has four member states—Chile, Colombia, Mexico, and Peru, which all border the Pacific Ocean. Costa Rica began the process of joining the Alliance in February 2014. . . The four founding nations of the Pacific Alliance represent nearly 36% of Latin American GDP. If counted as a single country this group of nations would be the sixth largest economy in the world with a PPP GDP of more than US\$3 trillion. Pacific Alliance”) (footnotes omitted).

working together to deepen ties with their FTA partners in the region (those six countries are China, India, Japan, South Korea, Australia, and New Zealand). China, thus far, has not agreed to a social dimension provision relating to the protection of labor.<sup>38</sup>

As of 2015, ASEAN has created the ASEAN Economic Community (“AEC”), and with its motto of “ASEAN centrality” it seeks to expand trade and investment regionally and beyond.<sup>39</sup> Currently, the share of inter-ASEAN trade remains at about twenty-five percent while the remaining seventy-five percent is outside the ASEAN region.<sup>40</sup> ASEAN has also reached out to its neighbors in Asia and concluded trade agreements with China, Japan, India, and South Korea.<sup>41</sup> In seeking greater uniformity, ASEAN looks to expand its preferential trading area and in 2012 began engagement for the creation of a sixteen-member Asian FTA called the Regional Comprehensive Economic Partnership (“RCEP”), which includes New Zealand and India (ASEAN+6). All six additions are ASEAN FTA partners, and several are also members of the TPP.<sup>42</sup> The standards of the RCEP, which include poorer Asian nations, will likely be lower than the standards of the TTP, which includes wealthier nations. Therefore, it may be advantageous to join the RCEP, which

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<sup>38</sup> See discussion in Ronald C. Brown, *China: Implementing ILO Standards by BITS and Pieces (within FTAs)*, ILO LABOR RIGHTS IN CHINA: LEGAL IMPLEMENTATION AND CULTURAL LOGIC (eds. Liukkunen, Ulla, Chen, Yifeng (Eds.) (Springer 2016) (On-going negotiations of the U.S.-China BIT, which has U.S.-proposed labor provisions is not concluded at this time and if agreed to would be the first agreement in which China accepts ILO standards in a FTA or BIT.).

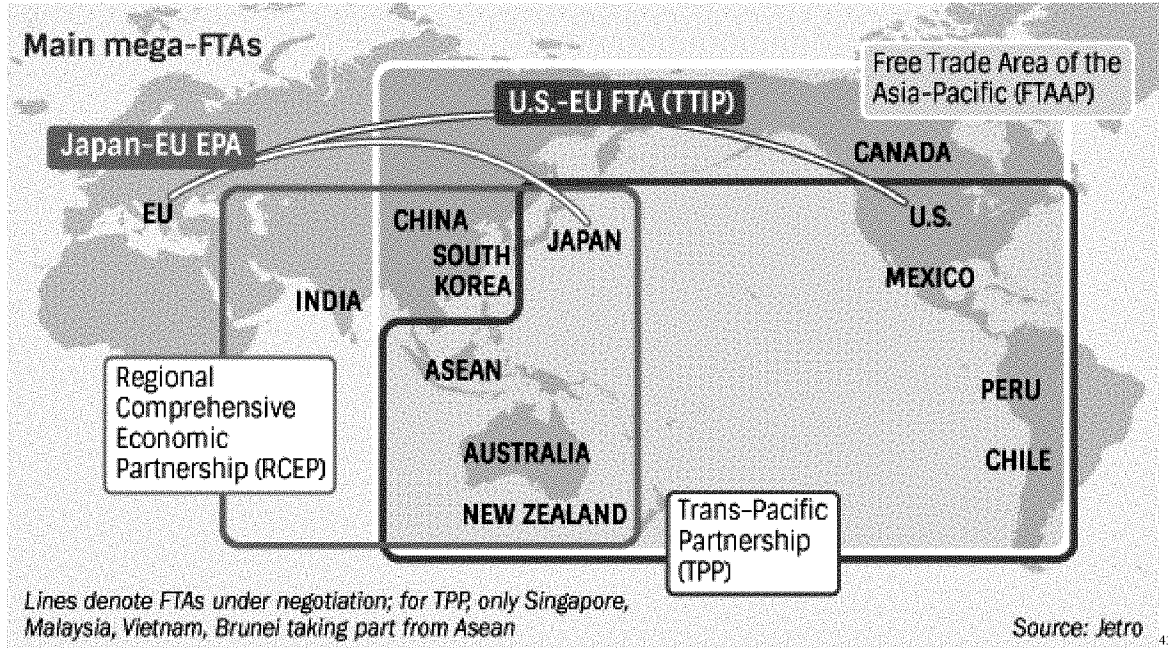
<sup>39</sup> See discussion in Ronald C. Brown, ASEAN: Harmonizing Labor Standards for Global Integration, LRRN Conference paper (March 2016); see also, FROST, *supra* note 25, at 7.

<sup>40</sup> FROST, *supra* note 25, at 7; see also Mely Caballero-Anthony, *Understanding ASEAN's Centrality: Bases and Prospects in an Evolving Regional Architecture*, 27 PACIFIC R. 505 (2014) for further discussion; see Fukunari Kimura & Ayako Obashi, Working Paper No. 320: *Production Networks in East Asia: What We Know So Far*, ASIAN DEV. BANK INSTITUTE, 10-12 (November 2011), available at <http://www.adbi.org/files/2011.11.11.wp320.production.networks.east.asia.pdf> [<https://perma.cc/585H-BLR5?type=source>] (Four of ASEAN's members have the highest volume of that export and import trade, led by Singapore, the Philippines, Malaysia, and Thailand.).

<sup>41</sup> FROST, *supra* note 25, at 8.

<sup>42</sup> *Regional Comprehensive Economic Partnership (RCEP)*, N.Z. MINISTRY FOREIGN AFF. & TRADE, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/RCEP/> [<http://perma.cc/MRG8-HYJ4>] (last visited May 10, 2015) (The seven countries presently included in both the TPP and RCEP are Malaysia, Singapore, Vietnam, Brunei, Japan, Australia, and New Zealand. South Korea already qualifies for the TPP but has not applied to join the negotiations. Indonesia, Thailand, and China are potential future members); FROST, *supra* note 25, at 8.

could then be a pathway to harmonization, and an eventual FTAAP.



In view of the above development of increasing government-to-government free trade agreements, a reasonable question can be asked: what difference does it make to the everyday labor standards in the workplace? In the Rena Plaza disaster in Bangladesh where the government had labor standard laws in place and had ratified most of the ILO's core labor standard conventions, would the additional layer of an international treaty with labor protections in the social dimension provisions have made a difference? If the answer is – “not much,” then there is a problem that needs to be fixed with a “new generation” of FTAs that includes and protects workers as the driving means of production of that trade perhaps through a marriage of government obligations with private mandates; i.e., using private contractual obligations under mandated IFAs, CSRs, and Codes of Conduct for employers.

<sup>43</sup> Kazuki Kagaya, Trading up, *Nikkei Asian Review* (December 5, 2013), at, [asian.nikkei.com/magazine/20131205-Rebalancing-act/Cover-Story/Trading-up](http://asian.nikkei.com/magazine/20131205-Rebalancing-act/Cover-Story/Trading-up).

Understanding what an FTA's social dimension provision with labor protections currently does and does not do can help planners fashion what may be needed for the next generation of FTAs now being negotiated. Will they be a "step up" to enforceable and decent labor standards or a "step on" down the path of status quo? Do social provisions really add increased protections for workers in terms of rights or enforcement obligations of the parties? Below is a discussion of the specific social provisions currently in place and those likely to emerge from current negotiations.

### **1. Social Dimension Labor Provision "Mandates" Currently in place**

Free Trade Agreements ("FTA") have proved to be one of the best ways to open up foreign markets<sup>44</sup> and scholars note that the "U.S. has led the way in consistently attempting to make bilateral trade liberalization subject to the observance of labor standards."<sup>45</sup> The social dimension provisions of U.S. trade agreements use a conditional approach and usually link commitments on labor standards to a sanction-based enforcement mechanism and provide for cooperative activities. Additionally, there are obligations to effectively enforce national labor laws in specific areas and

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<sup>44</sup> Historically the United States first implemented labor standards in establishing trade agreements in 1890. The United States heightened this standard in 1984 to include penalties for violations of labor standards by withdrawing trade preferences. The idea behind implementing and enforcing a standardization of labor practice and including a Social Dimension to a country's trade agreement was to avoid globalization at the expense of the rights of workers' while aiding in the enforcement of international labor standards. FROST, *supra* note 25, at 17-18; *Free Trade Agreements*, US DEPT. COMMERCE, INT'L TRADE ADMINISTRATION, <http://trade.gov/fta/> [<http://perma.cc/E8D6-JZXA> ] (last visited Aug. 15, 2014).

<sup>45</sup> Ludo Cuyvers & Tim De Meyer, *Chapter 5: Market-driven Promotion of International Labour Standards in Southeast-Asia – the Corporatization of Social Justice*, in PRIVATE STANDARDS & GLOBAL GOVERNANCE, ECONOMIC, LEGAL AND POLITICAL PERSPECTIVES 141, (Alex Marx, Miet Maertens, Johan Swinne & Jan Wouters, eds., 2012). *See also*, *United States Free Trade Agreements (FTAs)*, INT'L LABOUR ORG. (Oct. 19, 2009), [http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS\\_115531/lang--en/index.htm#P0\\_0](http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115531/lang--en/index.htm#P0_0) [<http://perma.cc/2YW2-Q8JA>].

also include standards with which the domestic labor law itself must comply.<sup>46</sup> As of January 1, 2014, the United States had 14 FTAs in force with twenty countries.<sup>47</sup>

In identifying a U.S. perspective on labor rights and trade agreements, one might begin with its Model Free Trade Agreement and Model Bilateral Investment Treaty (“BIT”), with respect to labor provisions and relative enforcement mechanisms used in advancing international labor standards.<sup>48</sup> The U.S. perspective might be said to be one that seeks to embrace and promote commitments to the four ILO core labor standards as embodied in the 1998 ILO Declaration on Fundamental Principles and Rights at Work,<sup>49</sup> not its individual conventions, and provide enforcement mechanisms for states and investors for alleged trade or labor violations and with sanctions.<sup>50</sup> The earlier use of related side agreements and its institutions for settlement of disputes, such as North American Agreement on Labor Cooperation (“NAALC”) under North American Free Trade Agreement (“NAFTA”), to many appear to be ineffectual and are not currently raised

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<sup>46</sup> See, e.g., the US-Peru Trade Agreement; the US-Republic of Korea Trade Agreement; the US-Colom. Trade Agreement; the Can.-Peru Trade Agreement; and the Can.-Colom. Trade Agreement. (Under many earlier United States trade agreements this commitment was not subject to sanctions), (see Table 2.1). *ILO Report, supra* note 3, at 33.

<sup>47</sup> *Trade Agreements*, OFF. U.S. TRADE REP., <https://ustr.gov/trade-agreements> (last visited May 11, 2015). See also *Free Trade Agreements*, U.S. DEPT. OF COMMERCE, INT'L TRADE ADMIN., <http://trade.gov/fta/> (last visited Aug. 15, 2014) [<http://perma.cc/AB65-X7UX>].

<sup>48</sup> See Ronald C. Brown, *Asian and US Perspectives on Labor Rights under International Trade Agreements Compare*, PROTECTING LABOR RIGHTS IN A GLOBALIZING WORLD (Marx, A., Wouters, J., Rayp, G. & L. Beke, eds., Cheltenham: Edward Elgar) (2015). (As will be seen, these U.S. frameworks are not fully efficacious to do so, and recommendations to bolster them, including comments on incorporation or utilization of Corporate Social Responsibility (CSR) and International Framework Agreements (IFA) provisions are provided in Ronald C. Brown, FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards, presented at Marco Biagi Conference, Modena, Italy (March 2015)) (on file with author). See Ronald C. Brown, *The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, *INT'L LABOUR REV.(ILR)* (2015), for further information. DOI: 10.1111/j.1564-913X.2015.00038.x, at, [onlinelibrary.wiley.com/doi/10.1111/j.1564-913X.2015.00038.x](http://onlinelibrary.wiley.com/doi/10.1111/j.1564-913X.2015.00038.x).

<sup>49</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, INT'L LABOUR ORG., <http://www.ilo.org/declaration/lang--en/index.htm> (last visited Dec. 2, 2014) [<http://perma.cc/4AB9-A33A>].

<sup>50</sup> The “EU perspective” may provide insights about the relative strengths and weaknesses of US FTAs. See generally, *Dispute Settlement*, EUROPEAN COMM'N-TRADE, <http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/> (last visited Aug. 15, 2014) [<http://perma.cc/X8PR-G8ZC>].

in negotiations.<sup>51</sup> The United States has adopted only two of the core International Labor Organization Conventions,<sup>52</sup> although it has approved the ILO Constitution vis-à-vis its membership in the ILO.

While the U.S. model bilateral trade and investment frameworks that emerged in recent years are in many ways similar to previous FTA's and BIT's, they are significantly distinguishable from EU FTAs in two important ways. First, alongside trade obligations, the FTA and BIT include labor obligations that incorporate the ILO Declaration, not the *Conventions* as with EU. Second, unlike the EU, the U.S.'s *FTA*, though not the BIT, *weds* bilateral trade with these labor obligations under a new substantive legal procedure and provides an unprecedented unitary enforcement mechanism for both sets of obligations, wherein trade sanctions may be brought for labor violations.<sup>53</sup>

Though the United States is ahead of Asia in implementing labor protections in trade agreements through the social dimension provisions; there are shortcomings of the current U.S. model in furthering ILO Standards. Without question, the U.S. model bilateral trade and investment frameworks are an improvement in that they attempt to wed free trade with

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<sup>51</sup> It is argued that the system in NAALC is flawed due to the fact that it follows an adversarial and litigious approach towards solving labor issues. Isabel Studer, *The NAFTA Side Agreements: Toward a More Cooperative Approach?*, 45 WAKE FOREST L. REV. 469-490 (2010); *see also*, Tamara Kay, Univ. of Cal. Berkeley, Analysis of the Labour Aspects of NAFTA: Preliminary document for commentaries of Work Group I of the Inter-American Conference of Ministers of Labour, INT'L. LABOUR ORG. (Jun. 2003).

<sup>52</sup>*Ratifications for United States, INT'L LABOUR ORG.*, [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102871](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871) (last updated 2012). [<http://perma.cc/JD7D-DFXR>]. (The US has ratified 2 of 8 Fundamental Conventions, including (1) Abolition of Forced Labor Convention, (1957 [No. 105]) (Sept. 25, 1991); (2) Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (1999 [No. 182]) (Dec. 02, 1999)). *ILO Country Profile: United States, INT'L LABOUR ORG.*, [http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110\\_COUNTRY\\_ID:102871](http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102871) (last updated 2012) [<http://perma.cc/G5SG-PVY7>](The US has been an ILO member since 1980 and has ratified the ILO Constitution and Declaration).

<sup>53</sup> *See* Ronald C. Brown, *China: Implementing ILO Standards by BITS and Pieces (within FTAs), in ILO LABOR RIGHTS IN CHINA: LEGAL IMPLEMENTATION & CULTURAL LOGIC* (Wolters Kluwer 2015), for further discussion [emphasis added].

international labor norms in an effort to halt the race to the bottom. But, the efficacy of the U.S. model frameworks to advance international labor standards is inadequate for several reasons.<sup>54</sup> First, while the U.S. model frameworks integrate international labor norms, it is clear that the ILO commitments are to the ILO Declaration, not the ILO Conventions, and are, therefore, not likely to be sufficiently substantive for enforcement.<sup>55</sup> Second, the dispute settlement mechanisms for enforcing the labor obligations are somewhat vague on what constitutes a violation and how violations would likely be remedied. Third, while the FTA's dispute settlement mechanisms allow for wedded enforcement of trade and labor obligations,<sup>56</sup> only states and individual investors may directly bring claims that can lead to sanctions;<sup>57</sup> third parties such as non-governmental

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<sup>54</sup> See Ronald C. Brown, FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards, presented at Marco Biagi Conference, Modena, Italy (March 2015) (on file with author). See also, Ronald C. Brown, *The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, \_\_INT'L LABOUR REV. (ILR)\_\_ (2015) (Though the US model has agreement on the "conventions," by a footnote in the treaty it explicitly limits its definition to the Declaration).

<sup>55</sup> "Where labour provisions refer to ILO conventions the parties can rely on the reports of the ILO supervisory bodies, which provide guidance on the interpretation of labour standards. By contrast, the 1998 Declaration is, as such, not subject to the supervision of the ILO's supervisory bodies although some guidance on the 1998 Declaration may be drawn from the comments of the ILO supervisory bodies on the respective fundamental conventions." *ILO Report, supra* note 1, at 107. The EU, on the other hand, commits to the Conventions, but its enforcement mechanism is not as strong as that of the U.S. See discussion on the draft EU-Columbia FTA at *Text of Draft EU-Columbia trade deal offers nothing for threatened workers*, TUC.ORG.UK (May 2010), available at <http://www.tuc.org.uk/international-issues/countries/colombia/human-rights/text-draft-eu-colombia-trade-deal-offers> [<http://perma.cc/ZNA3-9E9E>]. For the U.S. standard language in its FTA's Social Dimension provisions, see, KORUS FTA, U.S. OFF. OF TRADE REP. 19.2.1, n.1, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (last visited Jan. 31, 2015) [<http://perma.cc/3YCU-XZ4C>].

<sup>56</sup> However, the European Union (EU) in its FTAs does not wed the labor and trade enforcement mechanisms, each having their own mechanism, with the former, not having trade sanctions available. For more detailed discussion, see Ronald C. Brown, *The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, \_\_INT'L LABOUR REV. (ILR)\_\_ (2015).

<sup>57</sup> Some FTAs permit third parties to present allegations to institutionalized contact points. *ILO Report, supra* note 3, at 32. In a few cases, the only sanction available is the modification of development cooperation. This is the case of the Canada-Costa Rica Trade Agreement and, to some extent, of the EU-Cariforum Economic Partnership Agreement. *Id.*, at 34 n. 30. See also, the side agreement of NAFTA, The North American Agreement on Labor Cooperation (NAALC) that authorizes third party complaints on labor disputes, but which is reported ineffective and not used. Frank H. Bieszcak, *Labor Provisions in Trade Agreements: From to Now*, 83 CHL-KENT L. REV. 1387, 1388 (2008), available at <http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3695&context=cklawreview> [<http://perma.cc/3WPG-A6TF>]. It is argued that the system is flawed due to the fact that it follows an adversarial and litigious approach towards solving labor issues. Isabel Studer, *The NAFTA Side Agreements: Toward a More Cooperative Approach?* 45 WAKE FOREST L. REV. 469-490 (2010); see also Tamara Kay, Univ. of Cal. Berkeley,



organizations, unions and labor groups, and/or workers cannot bring similar challenges, except in some FTAs through cumbersome administrative requests to the state's discretion, thus inhibiting enforcement. And fourth, while the frameworks place an onus on the states to enforce labor standards, they do not *require companies* to adhere to basic corporate social responsibility ("CSR") norms in their operations; and, MNCs can easily evade compliance, through such activities as subcontracting.<sup>58</sup>

Recommendations have been made to improve the U.S. model frameworks that currently place the onus squarely on the parties to advance international labor norms within their domestic laws. That, however, limits effectiveness, given that entities actually transacting across borders are the companies, like U.S. retailers and local employers, who are not obliged to ensure similar standards are adopted in practice, given the frequent local custom of lax enforcement.<sup>59</sup> Under the current U.S. model frameworks, U.S. companies would be able to continue to flaunt international standards by subcontracting with companies in the country to run factories, without meaningful legal responsibility to avoid substandard practices.<sup>60</sup>

While inter-Asian business grows and FTAs flourish in and with Asia, the inclusion of social dimension provisions in FTAs or BITs is practically non-existent except where the Western

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*Analysis of the Labour Aspects of NAFTA: Preliminary document for commentaries of Work Group I of the Inter-American Conference of Ministers of Labour*, INT'L. LABOUR ORG. (Jun. 2003).

<sup>58</sup> See, Ronald C. Brown, FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards 7-8, presented at Marco Biagi Conference, Modena, Italy (Mar. 2015) (on file with author), for further discussion [emphasis added].

<sup>59</sup> *Id.*

<sup>60</sup> *Corporate Social Responsibility: Disaster at Rana Plaza*, ECONOMIST, May 4, 2013, available at <http://www.economist.com/news/leaders/21577067-gruesome-accident-should-make-all-bosses-think-harder-about-what-behaving-responsibly> [<http://perma.cc/2VSS-V5S6>].

influence appears to dominate and social dimension provisions are included, such as in FTAs with South Korea and with Singapore.<sup>61</sup>

Within the Asian Region, the only plurilateral agreement with labor protections is the Trans Pacific Strategic Economic Partnership Agreement (Pacific Four or P-4), which includes Brunei Darussalam, Chile, New Zealand and Singapore. It is contained in a side agreement of the parties, referred to as the ‘Labour Cooperation Memorandum of Understanding’ (“MOU”) that provides promises of labor protections by committing to the ILO Declaration, agreeing to improve labor legislation and conditions, and undertaking cooperative activities and institutional contacts to achieve improved labor rights and protections.<sup>62</sup> This MOU has the promise of improved labor provisions, placing some obligations on the parties, as described in the labor section below.<sup>63</sup>

*Memorandum of Understanding on Labour Cooperation among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement*

Article 2: Key Elements/Commitments

1. Parties that are members of the ILO reaffirm their obligations as such.
2. The Parties affirm their commitment to the principles of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998).

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<sup>61</sup> Ronald C. Brown, *Asian and US Perspectives on Labor Rights under International Trade Agreements Compared*, in *PROTECTING LABOR RIGHTS IN A GLOBALIZING WORLD* (Marx, A., Wouters, J., Rayp, G. & L. Beke, eds., Cheltenham: Edward Elgar) (2015). (“Western” particularly includes the EU, Canada, and Australia all of which typically include Social Dimension provisions in their FTAs with Asian countries).

<sup>62</sup>*Memorandum of Understanding on Labour Cooperation Among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement*, ORG. AM. STATE FOREIGN TRADE INFO. SYS. (SICE), available at [http://www.sice.oas.org/Trade/CHL\\_Asia\\_e/Side\\_Agreements/Labor\\_e.pdf](http://www.sice.oas.org/Trade/CHL_Asia_e/Side_Agreements/Labor_e.pdf) [http://perma.cc/M35C-CBN7] [hereinafter P-4 MOU].

<sup>63</sup> P-4 MOU, *Id.*, arts. 2-3.

3. Each Party shall work to ensure that its labor laws, regulations, policies and practices are in harmony with their international labor commitments.
4. The Parties respect their sovereign rights to set their own policies and national priorities and to set, administer and enforce their own labor laws and regulations.
5. The Parties recognize that it is inappropriate to set or use their labor laws, regulations, policies and practices for trade protectionist purposes.
6. The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws.
7. Each Party shall promote public awareness of its labor laws and regulations domestically.<sup>64</sup>

There is also the potential inclusion of *proposed* labor protection provisions in new trade agreements being negotiated inter-Asia, some of which also will include the U.S. and other Western partners, for example in the currently negotiated TPP, discussed below.<sup>65</sup>

Finally, in Asia there are Economic Partnership Agreements (“EPA”) which include FTAs. While these do not normally include social dimension provisions, they do often include general goals to protect labor standards and a provision dealing with the movement of natural persons. This is needed to facilitate the trade aspects of the EPA. Though perhaps it is better related to immigration issues than to labor protections, it may be a small step toward recognizing the significance of labor rights in trade agreements.<sup>66</sup>

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<sup>64</sup> P-4 MOU, *Id.*, art. 2.

<sup>65</sup> In that negotiation, some of the provisions under discussion are said to include a section on a labor chapter that includes commitments on labor rights protection and mechanisms to ensure cooperation, coordination, and dialogue on labor issues of mutual concern. This likely will build upon and further develop the beginnings of the P-4’s MOU on labor cooperation. *Outlines of TPP*, OFFICE U.S. TRADE REP., <http://www.ustr.gov/tpp/outlines-of-TPP> (last visited Jun. 19, 2013) [<http://perma.cc/523V-YBMN>].

<sup>66</sup> Japan’s EPAs contain a labor provision entitled “Investment and Labour” that generally reiterates the ILO core labor rights and states that investment cannot be encouraged at the expense of weaker labor laws and their enforcement. *Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPA)*, MINISTRY FOREIGN AFF. JAPAN (April 2014), <http://www.mofa.go.jp/policy/economy/fta/> [<http://perma.cc/J5RS-7VMS>].

## 2. Proposed Social Dimension Labor Provision “Mandates”

In an age of integrated supply chains and fluid movement of capital, business people and digital trade, the TPP has been called the “next generation” of free trade agreements.<sup>67</sup> This, of course, holds no promise that the social dimension provision on labor will be the “next generation.”<sup>68</sup> It also has been the target of much criticism by U.S. and international unions. The Labor Advisory Committee (“LAC”), comprised of 19 American labor union leaders, strongly opposes the TPP<sup>69</sup> as does the International Trade Union Confederation (“ITUC”).<sup>70</sup> The American Federation of Labor and Congress of Industrial Organizations (“AFL –CIO”) shares the reluctance of the ITUC to rely on the agreements’ promises, based on the US- Columbia LAP experience.<sup>71</sup>

Highlights of the TPP labor provision found in Chapter 19<sup>72</sup>, with its U.S. model language promoting ILO core labor standards, includes emphasis on not using labor standards for protectionist purposes<sup>73</sup> or derogating from its labor standards.<sup>74</sup> The TPP also calls for “impartial

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<sup>67</sup> Ronald C. Brown, *Mega-Regionalism: TPP Labor Provisions: A Game Changer?* (Proceedings, at, <http://www.eastwestcenter.org/sites/default/files/filemanager/pubs/pdfs/7-5Brown.pdf> (2016) 6-7. Presented at the NSF Workshop on Mega-Regionalism: New Challenges for Trade and Innovation (MCTI) at the East-West Center, Honolulu, Hawaii, on January 20-21, 2016. TPP Full Text, at, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>. [hereinafter TPP].

<sup>68</sup> Hugh Stephens, *TPP or FTAAP: What It Means for US and the Asia-Pacific Region*, CHINAUSFOCUS.COM (Nov. 25, 2014), <http://www.chinausfocus.com/finance-economy/tpp-or-ftaap-what-it-means-for-us-and-the-asia-pacific-region/> [<http://perma.cc/S8HJ-EXF2>]; See also Barbara Kotschwar & Jeffrey J. Schott, *The Next Big Thing? The Trans-Pacific Partnership & Latin America*, LATIN AMERICA GOES GLOBAL 9 (Spring 2013), <http://americasquarterly.org/next-big-thing-trans-pacific-partnership> [<http://perma.cc/D54S-BBKG>]; Janice Bellace, *How Labor Issues Are Complicating the Latest Wave of Free Trade Pacts*, WHARTON UNIV. PENN. (Jun. 27, 2014), <http://knowledge.wharton.upenn.edu/article/labor-issues-complicating-latest-wave-free-trade-pacts/> [<http://perma.cc/N32Q-9HFT>].

<sup>69</sup> Report on the Impacts of the Trans-Pacific Partnership by The Labor Advisory Committee on Trade Negotiations and Trade Policy (December 2, 2015), at, <https://ustr.gov/sites/default/files/Labor-Advisory-Committee-for-Trade-Negotiations-and-Trade-Policy.pdf>.

<sup>70</sup> TRANS PACIFIC PARTNERSHIP LABOUR CHAPTER SCORECARD FUNDAMENTAL ISSUES REMAIN UNADDRESSED, at, [http://www.ituc-csi.org/IMG/pdf/trans\\_pacific.pdf](http://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf).

<sup>71</sup> Making the Columbia Action Plan Work, at, [http://www.aflcio.org/content/download/123141/3414471/April2014\\_ColumbiaReport.pdf](http://www.aflcio.org/content/download/123141/3414471/April2014_ColumbiaReport.pdf). See also, <http://www.aflcio.org/content/download/38251/594971/report+version+2+no+bug.pdf>.

<sup>72</sup> TPP *supra* note 18, ch. 19.

<sup>73</sup> *Id.* at ch. 19.2:2.

<sup>74</sup> *Id.* at ch.19.4:b.

and independent tribunals that are fair and transparent.”<sup>75</sup> A new provision is to “encourage” enterprises to “voluntarily” adopt corporate social responsibility (“CSR”) initiatives.<sup>76</sup> Provisions for cooperative activities, including technical assistance, are very wide in scope and encompass 21 very specific categories of improving labor standards and conditions in a list from a-u.<sup>77</sup> These activities can be accomplished through a variety of modes from workshops to exchange of technical expertise and assistance.<sup>78</sup> Cooperative dialogue is authorized through contact points under the labor ministries<sup>79</sup> and a Labour Council is established to oversee all processes<sup>80</sup> and through labor consultations, use of experts and panels and other means, resolve labor issues that are raised.<sup>81</sup> If there is no resolution by consultation within 60 days, the establishment of a panel can be requested and pursuant to the Dispute Resolution<sup>82</sup> the case may proceed. Under the Dispute Resolution provisions labor violations affecting trade can proceed through the mechanism ultimately resulting in trade sanctions.

*But by far, the most dramatic break-through on labor protections* is found in the side agreements of the TPP that the U.S. has with Vietnam, Malaysia, and Brunei. By express terms their labor laws must be newly established, changed and improved to allow independent labor unions, strikes, proper treatment of immigrants, anti-discrimination provisions, labor inspections, and the basic labor standards affecting working conditions, *before* they are allowed to export goods duty-free to the United

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<sup>75</sup> *Id.* at ch. 19.8:2-3.

<sup>76</sup> *Id.* at ch. 19.7.

<sup>77</sup> *Id.* at ch. 19.10:6.

<sup>78</sup> *Id.* at ch. 19.10:7.

<sup>79</sup> *Id.* at ch. 19.11.

<sup>80</sup> *Id.* at ch. 19.12.

<sup>81</sup> *Id.* at ch. 19.15.

<sup>82</sup> *Id.* at ch. 28.

States and otherwise use the provisions of the TPP. The side agreements are very detailed in their obligations.<sup>83</sup>

If the TPP falters in Congress, the RCEP is prepared to go forward with China in its membership and without any social dimension provisions on labor.<sup>84</sup>

In 2014, the APEC members issued the Beijing APEC Declaration calling for yet another new regional trade agreement, the Free Trade Area of Asia Pacific (“FTAAP”), which would be a multi-regional, mega-FTA.<sup>85</sup> It was reported that one study concluded the income gains from the FTAAP “would be some eight times that of the 12 nation TPP—close to \$2 trillion by 2025—and three times that of another trade agreement that is being negotiated among the Southeast Asian (“ASEAN”) nations, that also includes China, India, Japan, Korea and Australia/New Zealand (known as the Regional Comprehensive Economic Partnership or RCEP).”<sup>86</sup> There is of yet no negotiation begun on the proposed FTAAP.

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<sup>83</sup> Ronald C. Brown, *Mega-Regionalism: TPP Labor Provisions: A Game Changer?* (Proceedings, at, <http://www.eastwestcenter.org/sites/default/files/filemanager/pubs/pdfs/7-5Brown.pdf> (2016) 6-7. Presented at the NSF Workshop on Mega-Regionalism: New Challenges for Trade and Innovation (MCTI) at the East-West Center, Honolulu, Hawaii, on January 20-21, 2016. TPP Full Text, at, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>. [hereinafter TPP].

<sup>84</sup> Gordon G. Chang, *TPP vs. RCEP: America and China Battle for Control of Pacific Trade* (October 6, 2015), at, <http://nationalinterest.org/feature/tpp-vs-rcep-america-china-battle-control-pacific-trade-14021> Also, see Kit Tang, *RCEP: The next trade deal you need to know about*, at, <http://www.cnn.com/2015/10/14/tpp-deal-pressures-rcep-trade-talks-in-busan-china-keen-for-progress.html>

<sup>85</sup> “In this regard, we decide to kick off and advance the process in a comprehensive and systematic manner towards the eventual realization of the FTAAP, and endorse *the Beijing Roadmap for APEC’s Contribution to the Realization of the FTAAP (Annex A)*. Through the implementation of this Roadmap, we decide to accelerate our efforts on realizing the FTAAP on the basis of the conclusion of the ongoing pathways, and affirm our commitment to the eventual realization of the FTAAP as early as possible by building on ongoing regional undertakings, which will contribute significantly to regional economic integration, sustained growth and common prosperity in the Asia-Pacific region. We instruct Ministers and officials to undertake the specific actions and report the outcomes to track the achievements.” *2014 Leaders’ Declaration, ASIA-PACIFIC ECON. COOP.* (Nov. 11, 2014), [http://www.apec.org/Meeting-Papers/Leaders-Declarations/2014/2014\\_aelm.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/2014/2014_aelm.aspx) [<http://perma.cc/92ZJ-CPN4>].

<sup>86</sup> These gains are said to be predicated on an FTAAP model that bridges the TPP and RCEP templates. Stephens, *supra* note 64.

As to other proposed or pending FTAs in the Asia-Pacific area with labor provisions, it is unlikely that ASEAN will soon provide labor protections in its FTA;<sup>87</sup> and so optimists might only hope the FTAAP would bring the “new generation of FTAs” needed relief to the workers who support and make possible the trade regulated by the FTAs. But, of course the APEC members in that future negotiation include Asian nations that have yet to include a single social dimension provision on labor in any of their FTAs.

And so, it appears the “next generation” of labor protections in social dimension provisions will look just like they do now, at best, unless new initiatives are considered and adopted.

Not to be overlooked or underestimated is the EU-US Transatlantic Trade and Investment Partnership (“EU-USTTIP”) currently being negotiated, which also could provide the “next generation” of FTA’s social dimension provisions on labor.<sup>88</sup> It is estimated that these two economies represent about half of the global Gross Domestic Product (“GDP”) and nearly a third of the world trade flows.<sup>89</sup> While there are similarities in the labor provisions included in their respective past FTAs, the United States typically obligates itself only to the labor standards of the ILO Declaration<sup>90</sup> while the EU obligates itself to the ILO’s Conventions and Decent Work Agenda.

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<sup>87</sup> See Ronald C. Brown, ASEAN: Harmonizing Labor Standards for Global Integration. \_ Pacific Basin L. J. \_\_\_ (forthcoming 2016). As discussed earlier, under TIFA, ASEAN has agreed to goals for some general labor protections.

<sup>88</sup> Though, if so, it is not readily apparent. For a European viewpoint, see Susanne Kraatz, *Briefing, The Transatlantic Trade and Investment Partnership (TTIP) and Labour*, PARL. EUR. DOC. (PE 536.315) (2014), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_BRI%282014%29536315](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI%282014%29536315) [<http://perma.cc/924W-KHGP>].

<sup>89</sup> *Id.*; see also *Trade*, EUROPEAN COMM’N, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/> [<http://perma.cc/KFX7-UTX4>] (last visited May 10, 2015).

<sup>90</sup> It is predicted by E.U. sources that “it is not probable that all fundamental conventions will be ratified [by the U.S.] in the near future. This may result in aspirational language in TTIP labour provisions (e.g. to strive for ratification of the Fundamental Conventions) in combination with good monitoring and policy dialogue.” Kraatz, *supra* note 76, at 6.

Another difference in approach is their dispute resolution mechanisms, with the United States using economic sanctions and the EU relying on reporting and political dialogue.<sup>91</sup> While the EU makes commitments to ILO Conventions in its FTAs, its enforcement machinery, while easier to access, nonetheless does not typically merge trade and labor violations under a single dispute mechanism and provide sanctions for labor violations as the United States does. It is reported that to meet the United States' lack of ratifications, the EU has proposed a provision different from its recent provisions in Comprehensive Economic and Trade Agreement ("CETA") and earlier agreements, namely, proposing thematic core labor standards articles for each of the four areas of fundamental rights and principles as defined in the ILO declaration 1998. These would "describe in more detail the commitments by each partner; including concrete actions planned for implementation."<sup>92</sup> The "labor provisions of this agreement may become a model, given the shared commitment by both partners who already maintain high levels of protection for their workers."<sup>93</sup>

This "thematic" standard could provide a "next generation" step forward on ensuring labor rights, but possibly mainly for the United States since the EU and others already agree to abide by the conventions themselves.

### C. "Next Generation" in Asia-Pacific?

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<sup>91</sup> Kraatz, *supra* note 76.

<sup>92</sup> *Id.* at 7. For a summary of the CETA labor provisions, see *id.* at 8.

<sup>93</sup> Kraatz, *supra* note 76, at 8-9 (citing *Trans-Pacific Partnership: Summary of U.S. Objectives*, *supra* note 72).



Proposed new initiatives, which could make a difference in improving workers' labor protections may include some of the below proposals.<sup>94</sup> Some of the proposals are aimed at the MNCs whose cross-border investments and transactions have a big impact on a receiving country's workforce and economic development; this is particularly so in use of their supply chains, subcontractors, and their millions of workers, especially in the Foreign Direct Investment ("FDI") welcoming, developing countries.<sup>95</sup> Upholding standards and remedies for this large bloc of workers should positively affect the labor standards for other workers in the country. It is reported that there are over "63,000 MNCs with over 800,000 subsidiaries multiplied by millions of suppliers and distributors."<sup>96</sup> The number of workers involved is phenomenal; taking just one industrial sector, out of many, "[a]n estimated 40 million workers, most of them women, are employed in the global garment industry. The industry is worth at least \$350 billion (£190 billion) and is expanding year by year."<sup>97</sup> Clothing production is a major source of employment in many poor countries and could play an important role in social and economic development on a very large scale. For it to do so, however, there need to be fewer obstacles and more enforceable rights for workers to organize and/or to improve their working conditions. In addition, one could add the

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<sup>94</sup> These proposed initiatives were recently presented at the Marco Biagi Conference on March 20, 2015 and are discussed in more depth in that paper. Ronald C. Brown, FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards, presented at Marco Biagi Conference, Modena, Italy (March 2015) (on file with author).

<sup>95</sup> ANGELA HALE, RESEARCHING INTERNATIONAL SUBCONTRACTING CHAINS, <http://www.cleanclothes.org/resources/national-cccs/garment-report-www.pdf> [<http://perma.cc/4U7G-CLCX>]. The supply chains are packed with firms and foreign nations competing for the MNC dollar. "This competition entails being the cheapest country in which to do business-that is, lowest labor costs or the most lax environmental standards-popularly known as a 'race to the bottom.'" Krishna Chaitanya Valdamannati, *Rewards of (Dis)Integration: Economic, Social, and Political Globalization and Freedom of Association and Collective Bargaining Rights of Workers in Developing Countries*, 68 ILR Rev. 3, 4 (Jan. 2015).

<sup>96</sup> PROMOTING LINKAGES, WORLD INVESTMENT REPORT (U.N. New York and Geneva, 2001), [http://unctad.org/en/docs/wir01ove\\_a4.en.pdf](http://unctad.org/en/docs/wir01ove_a4.en.pdf) [<http://perma.cc/2988-LVKD>].

<sup>97</sup> See JANE WILLSWITH ANGELA HALE, THREADS OF LABOUR: GARMENT INDUSTRY SUPPLY CHAINS FROM THE WORKERS' PERSPECTIVE 1 (Angela Hale & Jane Wills, eds., Wiley-Blackwell 2005), available at [http://media.johnwiley.com.au/product\\_data/excerpt/7X/14051263/140512637X-1.pdf](http://media.johnwiley.com.au/product_data/excerpt/7X/14051263/140512637X-1.pdf) [[perma.cc/2P97-FMYU](http://perma.cc/2P97-FMYU)].

flow of millions of migrant workers, many undocumented, going back and forth across borders in the Asia-Pacific region that often fall victim to low labor standards. They too are in a poor position to demand decent labor standards and protections without meaningful enabling legislation.

“In evaluating the new landscape of labor enforcement initiatives after Rana Plaza, The Hague Institute for Global Justice (“The Hague Institute”) in 2014 convened a roundtable with a select group of academics, policymakers and practitioners in The Hague”<sup>98</sup> which noted,

There is a mismatch between the organization of global supply chains and the governance structures for the enforcement of fundamental labor rights. ILO Conventions are addressed to governments while global supply chains require a transnational approach. In the past there have been various innovative ideas to change the normative framework of the ILO, such as a global social label, a global labor inspectorate . . . and broad framework conventions. It is imperative that also the ILO continues to rethink its approach toward the realization of fundamental labor rights, according to the experts.<sup>99</sup>

After reviewing the Post-Rana Plaza Initiatives,<sup>100</sup> recommendations were put forth by authors van der Heijden and Zandvliet which included: (1) CSR commitments regarding labor

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<sup>98</sup> The roundtable also served as the inaugural event of the Social Justice Expertise Center, a collaborative project with Leiden University to conduct policy-relevant research in the field of fundamental labor rights, facilitate dialogue among stakeholders, and develop capacity-building initiatives to promote social justice. PAUL VAN DER HEIJDEN & RUBEN ZANDVLIET, ENFORCEMENT OF FUNDAMENTAL LABOR RIGHTS, THE NETWORK APPROACH: CLOSING THE GOVERNANCE GAPS IN LOW-WAGE MANUFACTURING INDUSTRIES 12 (Policy Brief 12, September 2014), *available at* [http://thehagueinstituteforglobaljustice.org/cp/uploads/publications/Policypaper\\_12-Enforcement-of-Fundamental-Labor-Rights\\_1409068554.pdf](http://thehagueinstituteforglobaljustice.org/cp/uploads/publications/Policypaper_12-Enforcement-of-Fundamental-Labor-Rights_1409068554.pdf) [perma.cc/8B4L-WX5A].

<sup>99</sup> Manuella Appiah & Ruben Zandvliet, *Advancing Fundamental Labor Rights Using The Newly Re-Discovered Multi-Stakeholder Model*, HAGUE INSTITUTE FOR GLOBAL JUSTICE (May 20, 2014), [http://thehagueinstituteforglobaljustice.org/index.php?page=Recent\\_Commentary&pid=176&id=237&zwoeword=la](http://thehagueinstituteforglobaljustice.org/index.php?page=Recent_Commentary&pid=176&id=237&zwoeword=la) bor [perma.cc/5AZ5-ESFG].

<sup>100</sup> These included: the ILO/UN human rights system ILO Conventions, the ICCP, ICESCR, and Rights of the Child; National Tripartite Plan of Action on Fire Safety; The Rana Plaza arrangement; The Bangladesh Sustainability Compact; Better Work Bangladesh; The Bangladesh Accord on Fire and Building Safety; The Alliance for Bangladesh Worker Safety. PAUL VAN DER HEIJDEN & RUBEN ZANDVLIET, ENFORCEMENT OF FUNDAMENTAL LABOR RIGHTS, THE NETWORK APPROACH: CLOSING THE GOVERNANCE GAPS IN LOW-WAGE MANUFACTURING INDUSTRIES 5-7 (Policy Brief 12, September 2014), *available at* [http://thehagueinstituteforglobaljustice.org/cp/uploads/publications/Policypaper\\_12-Enforcement-of-Fundamental-Labor-Rights\\_1409068554.pdf](http://thehagueinstituteforglobaljustice.org/cp/uploads/publications/Policypaper_12-Enforcement-of-Fundamental-Labor-Rights_1409068554.pdf). [perma.cc/8B4L-WX5A]. Details of two of the resulting remedies, the Accord and the Alliance, are outlined in, SARAH LABOWITZ & DORTHEE BAUMANN-PAULY, BUSINESS AS USUAL IS NOT AN OPTION, SUPPLY CHAINS AND OUTSOURCING AFTER RANA PLAZA (2014), *available at*

should be in a contractual form, including referral to binding arbitration processes; (2) An international factory inspectorate should be considered; and (3) The value of trade union representation for garment workers should be highlighted and included in policies.<sup>101</sup>

The present difficulties of affording workers enforceable labor rights and achieving these improved labor protections under international trade agreements, besides the issue of government will, is finding the right balance with the MNCs who benefit from locating in areas with low labor standards. Currently, where there is lax law enforcement of labor standards, even if employers and MNCs have and adhere to codes of conduct, Organization for Economic Co-operation and Development (“OECD”) guidelines, and CSRs, they are mostly non-binding and do not restrict the use of contractors and subcontractors who fall outside these “obligations.”<sup>102</sup>

In addition to the above approaches, there is the availability of adding legally enforceable international treaties such as FTAs with their social dimension obligations for labor protections and adding or amplifying third-party access to the enforcement mechanisms through more direct

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<http://www.stern.nyu.edu/experience-stern/about/departments-centers-initiatives/centers-of-research/business-human-rights/activities/supply-chains-sourcing-after-rana-plaza> [perma.cc/Z7PF-83PH].

<sup>101</sup> PAUL VAN DER HEIJDEN & RUBEN ZANDVLIET, ENFORCEMENT OF FUNDAMENTAL LABOR RIGHTS, THE NETWORK APPROACH: CLOSING THE GOVERNANCE GAPS IN LOW-WAGE MANUFACTURING INDUSTRIES 12 (Policy Brief 12, September 2014), *available at* [http://thehagueinstituteforglobaljustice.org/cp/uploads/publications/Policypaper\\_12-Enforcement-of-Fundamental-Labor-Rights\\_1409068554.pdf](http://thehagueinstituteforglobaljustice.org/cp/uploads/publications/Policypaper_12-Enforcement-of-Fundamental-Labor-Rights_1409068554.pdf) [perma.cc/8B4L-WX5A].

<sup>102</sup> For an excellent discussion regarding privatizing the obligations of MNCs, see discussion in Zandvliet & Van der Heijden, *supra* note 89, or RUBEN ZANDVLIET & PAUL VAN DER HEIJDEN, THE RAPPROCHEMENT OF ILO STANDARDS AND CSR MECHANISMS: TOWARDS A POSITIVE UNDERSTANDING OF ‘PRIVATIZATION’ (February 5, 2014), *available at* <http://dx.doi.org/10.2139/ssrn.2391295> [perma.cc/J2Z3-GTPQ]. The same authors argue the post-Rana Plaza disaster and its resulting remedial accords made Bangladesh a “policy laboratory for new ways to enforce fundamental labor rights. These responses, which can be characterized as a network approach, involve many stakeholders cooperating in different coalitions to pursue a variety of goals. The network approach aligns with the idea that improving labor rights in global supply chains is not the sole responsibility of the state in which production takes place. A collaborative effort is required. . . . [The Authors argue] that businesses with transnational supply chains should cast their labor commitments in a contractual form, following the successful example of the Bangladesh Accord for Fire and Building Safety . . . . Institutionally, the ILO should engage more directly with businesses and use its authoritative role to strengthen supply-chain bargaining.” VAN DER HEIJDEN & ZANDVLIET, *supra* note 89, at 3.

and expeditious means.<sup>103</sup> Additionally, further proposals to improve the Social Dimension provisions on labor include clarifying the specific facts necessary to prove a violation of applicable labor standards; and thereby expediting and mandating advancement of the complaint; granting arbitration panels increased authority to implement remedies, including suspending benefits or some FTA mechanisms, such as the dispute resolution mechanism. These proposals, it is submitted, facilitate effectiveness of dispute resolution mechanisms, and in the judgment of some, to actually make them work. A new proposal keyed into the Investor-State Dispute Settlement (“ISDS”) mechanism and more worker-friendly, has been issued by the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”), its Australian and New Zealand counterparts, and other unions. This “is based, in part, on the labour and dispute resolution chapters of the U.S.-Peru Free Trade Agreement (FTA), two of the Parties to the current [TPP] negotiations.”<sup>104</sup>

The suggestion of this paper is to have a “new generation” of social dimension labor provisions of FTAs that actually protect the workers. An alternative approach could be to require

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<sup>103</sup> Third-parties could include unions, NGOs, or even the ILO. See, Ronald C. Brown, *The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, INT'L LABOUR REV. (ILR) (2015) (on file with author). DOI: 10.1111/j.1564-913X.2015.00038.x, at, [onlinelibrary.wiley.com/doi/10.1111/j](http://onlinelibrary.wiley.com/doi/10.1111/j). The ability of *stakeholders'* access to enforcement machinery could be better clarified. By merely allowing investor or state complaints, third-parties are left to petition their state through administrative apparatus, such as NAOs or departments of labor, that may leave too much discretion in the state's decision whether to proceed. U.S. – Peru Trade Promotion Agreement, U.S.-Peru, art. 21, Apr. 12, 2006, available at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> [perma.cc/HC47-ZG2S]. See also, Canada-European Union: Comprehensive Economic and Trade Agreement (CETA), Canada-E.U., arts. 24 and 33, Sep. 26, 2014, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/33.aspx?lang=eng>, or [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) [perma.cc/R4SF-PG3T].

<sup>104</sup> *The Trans-Pacific Partnership Agreement, A New Model Labour & Dispute Resolution Chapter For The Asia-Pacific Region*, <http://www.trungtamwto.vn/sites/default/files/tpp/attachments/Final%20Official%20ITUC%20TransPacificPartnership%20Labor%20Chapter%20b29%20%20TPP%20labor%20rights.pdf> [perma.cc/7TMM-CB5F]. (last visited May 11, 2015). Various modifications and approaches have been proposed over the years by the ICFTU and the AFL-CIO and numerous other unions. (Proposals are on file with author).

state party agreement to enforce the above-described deficiencies by mandating that an in-country MNC have binding CSRs with worker rights, grievance procedures, and remedies within the governance document; and, in certain industries be part of an International Framework Agreement (“IFA”)<sup>105</sup> that addresses these issues by enforceable contractual obligations. The dispute resolution procedures could include private agreement on mediation and arbitration,<sup>106</sup> with the scope of arbitrable items including alleged violations of contract or domestic or ILO labor law obligations, with venue to be determined. There are new FTAs under negotiation and the opportunity to insert international labor protections is within their reach, if not practicality.<sup>107</sup>

A newly developing innovation might come from a comprehensive United Nations (“U.N.”) initiative to regulate corporate responsibilities on human rights if it were to be expanded to include certain fundamental labor rights.<sup>108</sup>

Another proposal is to have a group or network of public interest or labor lawyer advocates to act as “*mobile global lawyers*” to be activated to negotiate or litigate workers’ labor violations

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<sup>105</sup> A global framework agreement, also referred to as an international framework agreement, is “an instrument negotiated between a multinational enterprise and a Global Union Federation (GUF) in order to establish an ongoing relationship between the parties and ensure that the company respects the same standards in all the countries where it operates”. The framework agreements cover the same ILO conventions on which the labor principles are based. *Global Framework Agreements*, UNITED NATIONS GLOBAL IMPACT, [https://www.unglobalcompact.org/Issues/Labour/Global\\_Framework\\_Agreements.html](https://www.unglobalcompact.org/Issues/Labour/Global_Framework_Agreements.html) [perma.cc/JH6H-G7S8]. (last visited Jan. 31, 2015).

<sup>106</sup> Though litigation could be considered, issues for exhaustion of domestic remedies and deference to sovereignty would first need to be resolved.

<sup>107</sup> For example the TPP and the EU-US TTIP are currently in negotiations. See, Ronald C. Brown, *Asian and US Perspectives on Labor Rights under International Trade Agreements Compared*, in PROTECTING LABOR RIGHTS IN A GLOBALIZING WORLD (Marx, A., Wouters, J., Rayp, G. & L. Beke, eds., Cheltenham: Edward Elgar) (2015).

<sup>108</sup> It is reported that “a fierce debate is under way within the UN Human Rights Council on whether a treaty should address binding human rights norms to companies. On June 30, 2014, the Council adopted a resolution that, *inter alia*, established an intergovernmental working group to draft “a legally binding instrument to regulate, in international human rights law, the activities of Transnational Corporations and Other Business Enterprises.” The vote was “twenty in favor, fourteen against, and thirteen abstentions.” The authors argue “a binding treaty, with possibly a new supervisory or enforcement institution, would further add to the range of stakeholders in the Asian RMG industry.” VAN DER HEIJDEN & RUBEN ZANDVLIET, *supra* note 86, at 12. See also, JOHN RUGGIE, REPORT OF THE SPECIAL REP. OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNAT’L CORP. AND OTHER BUS. ENTER. 21 (HUMAN RIGHTS COUNCIL A/HRC/17/31, March 2011), available at [http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf) [perma.cc/TZ2U-9642].

under FTAs, contractually-enforceable IFAs, codes of conduct or related obligations, wherever they may occur. Perhaps International Trade Union Confederation (“ITUC”) or various Global Union Federations (“GUF”) could supply the advocate network to police the obligations; or perhaps other organizations, such as the International Rights Advocate (“IRA”) could take on special related projects.<sup>109</sup>

To the extent that the above proposals are not practical or likely, given the power and mobility of MNCs, and the predictable resistance of certain states on the basis it harms their competitiveness, perhaps within an IFA a start could be mandatory transparency and reporting of the subcontractors’ compliance with standards, analogous to a California law mandating transparency in supply chains to combat human trafficking and slavery.<sup>110</sup> This approach could be made applicable to decent work standards and be used to raise labor standards and dampen the use of a common techniques resulting in avoidance of labor standards.

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<sup>109</sup> Terry Collingsworth, *IRAdvocates Team*, INT’L RIGHTS ADVOCATES, <http://iradvocates.org/iradvocates-team> [perma.cc/D8P5-C5ZR] (last visited May 11, 2015); and see *About ILRF*, LABORRIGHTS.ORG, <http://www.laborrights.org/about> [perma.cc/AH9L-J7KW] (last visited May 11, 2015). An analogous organization, the Public International Law & Policy Group (PIPLG), now exists as a “global *pro bono* law firm that provides legal assistance to states and governments with the negotiation and implementation of peace agreements, the drafting of post-conflict constitutions, and the creation and operation of war crimes tribunals.” PUBLIC INT’L LAW & POLICY GROUP, <http://publicinternationallawandpolicygroup.org/> [perma.cc/9LWT-X2WJ] (last visited May 11, 2015). In conversations the author had with officials at ITUC, this concept is reportedly under discussion by international unions.

<sup>110</sup> The California law provides that employers using supply chains must make available information indicating the extent to which a company: “*Verifies* supply chains to evaluate and address risks of human trafficking and slavery, including if the verification was conducted by a third party; *Conducts* unannounced and verified audits of suppliers for trafficking and slavery in supply chains to evaluate compliance with company standards; *Maintains internal accountability standards* and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking; *Trains employees and management* with direct responsibility for supply chain management to mitigate risks within the supply chains of products; and *Certifies that materials incorporated into the product* comply with the laws regarding human trafficking of the country or countries in which they are doing business.” (emphasis added) EFFECTIVE SUPPLY CHAIN ACCOUNTABILITY: INVESTOR GUIDANCE ON IMPLEMENTATION OF THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT AND BEYOND 3 (November 2011), *available at* <http://www.calvert.com/NRC/literature/documents/WP10009.pdf> [perma.cc/QF36-Z6T9]. *See also, California Transparency in Supply Chains Act*, STUART WEITZMAN, [http://www.stuartweitzman.com/service/california\\_transparency/](http://www.stuartweitzman.com/service/california_transparency/) [perma.cc/9TRM-DWVX] (last visited Jan. 31, 2015).

Additionally, lessons from Bangladesh could be used in remedies specifically for MNCs using supply chain workers; wherein obligations from either an international or domestic source, obligates employers as a condition of doing business to provide the following security to the supply chain workers:<sup>111</sup> (1) Peremptorily create a fund to be kept and used for victims in their supply chain for proven labor violations;<sup>112</sup> (2) Require MNCs' contractors and subcontractors down the supply chain to post performance bonds on the extent of compliance of legally enforceable obligations existing in their contractual relations relating to labor protections;<sup>113</sup> (3) Allow supply chain workers a lien on the products they worked on, an approach analogous to an artisan's lien;<sup>114</sup> (4) Create joint employer liability, of the MNC and/or the primary contractor and perhaps with contractors down the supply chain. This is a common law legal doctrine in the U.S. and a statutory rule in South Korea to find enforceable liability between employers working strategically together.<sup>115</sup>

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<sup>111</sup> Ronald C. Brown, FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards; Part II at 169, in *Proceedings Employment Relations and Transformation of the Enterprise in the Global Economy* (eds. Edoardo Ales, Francesco Basenghi, William Bromwich, and Iacopo Senatori), Giappichelli-MBF book series (2016).

<sup>112</sup> The Accord and the Alliance are outlined in SARAH LABOWITZ & DORTHEE BAUMANN-PAULY, BUSINESS AS USUAL IS NOT AN OPTION, SUPPLY CHAINS AND OUTSOURCING AFTER RANA PLAZA 53-57 (Center for Bus. Human Rights, April 2014), available at <http://www.stern.nyu.edu/experience-stern/about/departments-centers-initiatives/centers-of-research/business-human-rights/activities/supply-chains-sourcing-after-rana-plaza> [perma.cc/9YDW-ZDVZ].

<sup>113</sup> A performance bond, also known as a contract bond, is a surety bond issued by an insurance company or a bank to guarantee satisfactory completion of a project by a contractor. A job requiring a payment and performance bond will usually require a bid bond, to bid the job. See *Performance bond*, WIKIPEDIA, en.wikipedia.org/wiki/Performance\_bond [perma.cc/K8LG-DL8N] (last visited Jan. 31, 2015).

<sup>114</sup> It is defined as a "type of lien that gives workers a security interest in personal property until they have been paid for their work on that property. Essentially, a mechanic's lien by another name," see LEGAL INFORMATION INSTITUTE, [http://www.law.cornell.edu/wex/artisans\\_lien](http://www.law.cornell.edu/wex/artisans_lien) [perma.cc/48KQ-963T] (last visited Jan. 31, 2015).

<sup>115</sup> See *cf.*, *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2003) (Fair Labor Standards case). In South Korea, "under article 44-2 of the revised Labour Standards Act of 2007, the direct upper-tier contractor is jointly liable with the subcontractor to pay wages to a worker of a subcontractor when the subcontractor fails to pay wages to the worker. Article 93 regards a primary contractor as an employer in relation to accident compensation. A subcontractor is regarded as an employer if they are supposed to pay compensation under a written agreement with a primary contractor under article 90(2). Article 90(3) allows a primary contractor to ask the worker to demand compensation first from the subcontractor who has agreed to responsibility for compensation." *Precarious Work in the Asia Pacific Region*, ITUC, [perma.cc/9ZV4-934W] (last visited Jan. 31, 2015).

In sum, to innovate obligations and remedies against domestic or foreign employers, so as to effectively establish meaningful labor standards and protection of workers, it is proposed to marry state obligations under FTA social dimension provisions with private contractual obligations, such as FTA-mandated IFAs, CSRs, and codes of conduct. It would be the obligation of the state, under the FTA, to ensure compliance by employers. Additionally, a dispute settlement forum would be established with direct access by workers and their representatives. This could be the “next generation” of FTA and it would be a “step up,” and not a step for status quo.

#### **D. Conclusion**

While the proposals in this paper for the “next generation” of FTAs and social dimension provisions may be only a conceptual piece in this era of “race to the bottom,” easy mobility of MNCs, and the abundance of willing countries with lax labor standards looking for FDI, nevertheless, protecting workers through minimum labor standards is what most CEOs of MNCs today publicly espouse, and to which most states would agree is a worthy goal. It is also a priority in the ILO’s agenda. Tools are available to improve labor conditions of workers by either voluntary undertakings or legal compulsion. By privatizing the obligations, while at the same time maintaining state obligations, there is increased likelihood of enforcement and thereby some advancement of the workers’ labor rights. This likelihood is enhanced when combined with local and international enforcement machinery to compel compliance and providing remedies for violations. Finally, domestic limitations may be overcome if there is further added an available and ready team of mobile global advocates. While the ultimate solution to raising labor standards is that each country has and enforces its own domestic labor laws, still more is needed, as was seen



in Bangladesh in the Rana Plaza disaster, where the country had ratified most of the core labor standards and labor laws existed. In the final analysis, it is submitted that an internationally enforced trade agreement with a meaningful social dimension provision on labor, including mandated CSRs and encouraged, if not mandated, utilization of IFAs, may provide the necessary extra-impetus to the beneficiaries of low labor standards – the domestic employers and the foreign MNC employers. For the good corporate citizens, those who not only say it, but just do it, these additional innovative self-help approaches are available, as is the ILO to assist. It would seem this area is not infused with lack of alternative solutions, but rather a lack of will by employers, states, and international negotiators.

Current negotiation of the TPP, the TTIP, the RCEP, and the coming FTAAP present an opportunity for a new beginning in the efforts to protect working people who provide the fuel for international trade. However, the current trajectory of the emerging FTAs discussed appears good for trade, but not for protection of labor rights; and, it looks like the coming scenario is the status quo, at best. Thus, new innovations are required, including consideration of the mandated marriage of public and private rights under FTAs, creating private rights, redressable, possibly with the assistance of mobile global lawyers. If not now, when? The means are available, with only the will in question.