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Corporate Social Responsibility for Enforcement of Labor Rights: Are There More Effective Alternatives?

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CORPORATE SOCIAL RESPONSIBILITY FOR ENFORCEMENT OF LABOR RIGHTS: ARE THERE MORE EFFECTIVE ALTERNATIVES?

BARBARA J. FICK*

I.	INTRODUCTION	2
II.	CORPORATE CODES OF CONDUCT	2
III.	MONITORING CORPORATE CODES OF CONDUCT	4
IV.	ENFORCEMENT OF CORPORATE CODES OF CONDUCT	7
V.	INTERNATIONAL FRAMEWORK AGREEMENTS	11
VI.	GENERALIZED SYSTEM OF PREFERENCES	14
VII.	FREE TRADE AGREEMENTS	17
VIII.	CONCLUSION	24

“Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state. The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And, as ownership of the shares is becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly concentrated in the hands of a few. The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving ‘corporate system’ with the feudal system; and to lead other men of insight and experience to assert that this ‘master institution of civilized life’ is committing it to the rule of a plutocracy”. Justice Brandeis (dissenting in part) in *Liggett Co. v. Lee*, 288 U.S. 517, 565 (1933) (footnote omitted).

“If Wal-Mart were a country, its revenues would make it on par with the GDP of the 25th largest economy in the world, surpassing 157 smaller countries.” Vincent Trivett, 25 US Mega Corporations: Where They Rank if They Were Countries.¹

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¹ Vincent Trivett, 25 US Mega Corporations: Where They Rank if They Were Countries, BUS. INSIDER (June 27, 2011), available at <http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?op=1>.

I. INTRODUCTION

The activities of multi-national corporations (hereinafter MNCs) impact on the communities in which they operate in many ways. Recent examples include the environmental impact of British Petroleum's operation of the Deepwater Horizon oil rig which spilled millions of barrels of oil into the Gulf of Mexico;² the human rights impact of the alleged use of the military by Royal Dutch Shell to protect its oil facilities in Nigeria resulting in violence against the Ogoni people;³ or the corrupting influence on governmental programs and officials caused by bribery payments allegedly made by Siemens to officials in, inter alia, Bangladesh, Argentina, and China.⁴

Internal corporate codes of conduct have been in existence for quite some time. These codes mainly address internal rules for the company's own employees to follow, such as maintaining confidential information, avoiding conflicts of interest and prohibiting bribery. A second type of corporate code emerged in the 1990s addressing external corporate relationships, such as those with suppliers and the communities affected by corporate conduct. These types of codes are generally concerned with issues of corporate social responsibility. It is these latter types of codes which are the focus of this article.

Specifically, this article addresses the concept of corporate social responsibility (hereinafter CSR) as it relates to labor rights. It considers the following issues: is the CSR model, as evidenced by the adoption of corporate codes of conduct (hereinafter CoC), effective in protecting labor rights; and is this model the best way to protect labor rights? These issues are examined from two perspectives: practical and philosophical. Lastly, some alternative enforcement mechanisms are considered and their respective advantages and disadvantages for purposes of ensuring labor rights are discussed.

II. CORPORATE CODES OF CONDUCT

Activists and NGOs responded to news exposés of sweatshop conditions at overseas factories manufacturing consumer goods for MNCs by demanding accountability for worker rights violations. The public outcry over worker exploitation by Levi Strauss' contractors in Saipan⁵ and in Nike factories in Indonesia⁶ eventually led those corporations to establish supply chain codes of conduct meant to ensure labor rights. Levi Strauss adopted one of the first corporate

² See *BP Oil Spill*, THE GUARDIAN, available at <http://www.theguardian.com/environment/bp-oil-spill> (last visited August 11, 2014).

³ See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

⁴ Siri Schubert & T. Christian Miller, *At Siemens, Bribery was Just a Line Item*, N. Y. TIMES (December 21, 2008), available at http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html?pagewanted=all&_r=1&.

⁵ Frank Swoboda, *Levi Strauss to Drop Suppliers Violating its Worker Rights Rules*, THE WASH. POST, March 13, 1992, at D1.

⁶ Jeff Balinger, *Nike Chronology*, CENTER FOR COMM. AND CIVIC ENGAGEMENT, <http://depts.washington.edu/ccce/polcommcampaigns/NikeChronology.htm> (last visited May 28, 2014).

codes of conduct to address supply-chain/business partner labor issues in 1992,⁷ closely followed by Nike that same year. Ten years later over 1,000 companies had some type of CSR code,⁸ and the numbers continue to rise.

Of course not all of these CoCs address labor rights issues. Those which do generally focus on issues related to compliance with domestic wage and hour laws, and the prohibition on child labor, forced labor and discrimination. What is conspicuously absent in many of these codes is protection for freedom of association (FOA) and the right to collectively bargain (CB). A 1998 International Labor Organization (ILO) study of 215 CoCs found that only 15% referenced to FOA and CB.⁹ A similar study of 246 codes published by the Organization for Economic Cooperation and Development (OECD) in 2001 found that only 148 included any labor standards and of those only 29.7% mentioned FOA.¹⁰ A 2012 study of 600 publicly-traded companies indicated that 43% had supplier CoCs.¹¹ The latter study looked specifically at the footwear/apparel/food and beverage/retail/technology hardware sectors and found only 38% of companies in these sectors had CoCs which referred to the ILO's core labor standards including, inter alia, FOA and CB.¹²

Why is the omission of FOA and CB problematic? One is reminded of the proverb: "Give a man a fish and he eats for a day; teach a man to fish and he eats for a lifetime." CoCs which fail to protect FOA and CB supposedly give the workers certain employment-related benefits without ensuring that workers have the means either to enforce compliance with those benefits or to respond to new employment issues that may arise. As noted by Aurret van Heerden, President and CEO of the Fair Labor Association (a third party CoC monitoring group): "You can never visit facilities often enough to make sure they stay compliant – you'll ever have enough inspectors to do that. What really keeps factories compliant is when workers have a

⁷ Mark Anner, *Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains*, 40 POL. & SOC'Y 609, 613 (2012).

⁸ JAN MARTIN WITTE, REALIZING CORE LABOR STANDARDS: THE POTENTIAL AND LIMITS OF VOLUNTARY CODES AND SOCIAL CLAUSES: A REVIEW OF THE LITERATURE 53 (Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH 2008), available at <http://old.gppi.net/fileadmin/gppi/Studie-CLS-endfassung.pdf>.

⁹ INT'L LABOUR ORG., OVERVIEW OF GLOBAL DEVELOPMENTS AND OFFICE ACTIVITIES CONCERNING CODES OF CONDUCT, SOCIAL LABELING AND OTHER PRIVATE SECTOR INITIATIVES ADDRESSING LABOUR ISSUES ¶47 and ¶56 (1998), <http://www.ilo.org/public/english/standards/reln/gb/docs/gb273/sdl-1.htm>.

¹⁰ Org. for Econ. Co-operation and Dev., *Codes of Corporate Conduct: Expanded Review of their Contents* 8, 10 (Directorate for Fin., Fiscal and Enter. Affairs Working Papers on Int'l Inv. No. 2001/6, 2001), available at http://www.oecd.org/daf/inv/investment-policy/WP-2001_6.pdf.

¹¹ CERES & SUSTAINALYTICS, THE ROAD TO 2020: CORPORATE PROGRESS ON THE CERES ROADMAP FOR SUSTAINABILITY 36 (2012), <http://www.ceres.org/resources/reports/the-road-to-2020-corporate-progress-on-the-ceres-roadmap-for-sustainability/view>.

¹² *Id.* In 1998 the ILO adopted the Declaration of Fundamental Principles and Rights at Work highlighting four core labor rights: freedom of association and collective bargaining, abolition of child labor and forced labor, and the elimination of discrimination in employment and occupation. These four principles are often referred to as "core labor standards."

voice and they can speak out when something isn't right."¹³ Under the CoC regime, workers may be protected from unsafe conditions for a day, but are left vulnerable to workplace injury or death for a lifetime.

Another philosophical problem with MNC CoCs is that a private actor is picking and choosing the standards for which it will be held "accountable." The entity being governed by the standards is deciding what those standards are. Given general corporate dislike of trade union "interference", it should come as no surprise that many corporations would choose not to be held accountable for protecting FOA or CB. Moreover, the private actor who is doing the choosing is the employer; the entity which controls the workers is telling the workers which workplace problems they should be concerned about, thereby reinforcing the inequality present in the workplace hierarchy and undermining the inherent dignity of the individual worker.

III. MONITORING CORPORATE CODES OF CONDUCT

Even assuming these CoCs explicitly require protection for the core labor standards as defined by the ILO, the question arises as to the effectiveness of the mechanism for ensuring the code is followed. First, the sheer number of suppliers within any MNC supply chain makes monitoring problematic. For example, Walmart has over 100,000 suppliers worldwide.¹⁴ In two regions (one in Pakistan and one in India) there are 500 businesses active in the football stitching industry and 3400 subcontractors.¹⁵ In 2012 there were over 5000 garment factories in Bangladesh alone.¹⁶ It would be a gargantuan task for Walmart, football or apparel retailers to attempt to monitor each of their suppliers even once yearly. Even if all suppliers covered by a CoC were monitored, it would result in wasted resources as some suppliers deal with more than one MNC; MNCs may use different organizations, consultants or internal personnel for monitoring resulting in overlapping and redundant monitoring.

There is also an issue with transparency of the auditing process. Many audits provide aggregate data which does not link a specific supplier to a specific violation.¹⁷ Thus information which would allow the state to enforce its own laws is

¹³ Stephanie Clifford & Steven Greenhouse, *Fast and Flawed Inspections of Factories Abroad*, N. Y. TIMES (Sept. 1, 2013), available at http://www.nytimes.com/2013/09/02/business/global/superficial-visits-and-trickery-undermine-foreign-factory-inspections.html?pagewanted=all&module=Search&mabReward=relbias%3A%2C{%221%22%3A%22RI%3A7%22}&_r=0.

¹⁴ See *Apply to Be a Supplier*, WALMART, <http://corporate.walmart.com/suppliers/apply-to-be-a-supplier/> (last visited Sept. 8, 2014).

¹⁵ Axel Marx & Jan Wouters, *Redesigning Enforcement in Private Regulation – The Case of International Labor Governance* 7 (Leuven Centre for Global Governance Stud., Working Paper No. 126, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2371212.

¹⁶ *Factory Growth in Bangladesh*, BANGLADESH MERGERS AND EXPORTERS ASS'N, http://www.bgmea.com.bd/chart_test/factory_growth_in_bangladesh (last visited Sept. 9, 2014).

¹⁷ See, e.g., INT'L HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC (STANFORD LAW SCHOOL) & WORKER RIGHTS CONSORTIUM, *MONITORING IN THE DARK*, at vi, 76 (2013), <http://humanrightsclinic.law.stanford.edu/project/monitoring-in-the-dark/>; Scott Nova & Isaac Shapiro, *Apple's Self-Reporting on Suppliers' Labor Practices Shows Violations Remain*

withheld and enforcement falls on private actors. As will be discussed in the next section, even where effective monitoring occurs private enforcement is problematic.

Moreover monitoring provides a snapshot picture. Compliance is measured at one point in time. For example, a fire at a garment factory in Karachi killed almost 300 workers. All but one exit door had been locked and all the windows were barred. Three weeks previously the factory had been certified as meeting worker safety standards under SA8000 as set by Social Accountability International, which is seen by many as the gold standard for workplace certification.¹⁸

Monitoring mechanisms may also be ineffective at identifying problems. For example, an early version of Nike's Code of Conduct included a standard for its contractors to certify that they comply with minimum wage laws and other labor standards.¹⁹ However, it was not until 1998, after being subjected to criticism of its contractors for failing to pay minimum wages, child labor and other labor abuses, that Nike announced its intent to implement a more effective and independent monitoring system.²⁰

Similarly Apple adopted a CoC in 2005 and self-monitored its contractors' compliance. As early as 2006 Boston Common Asset Management had raised concerns with Apple about abusive working conditions at Foxconn, an Apple contractor in China.²¹ In 2009-10 the New York Times published several articles concerning worker suicides at Apple contractor facilities in China that were attributed by some to work pressures including excessive overtime.²² In May 2011

Common: Mixed Results on Labor and Human Rights, No Overall Progress in Health and Safety, ECON. POL'Y INST. (Feb. 12, 2013), <http://www.epi.org/publication/apples-reporting-suppliers-labor-practices/>.

¹⁸ AFL-CIO, RESPONSIBILITY OUTSOURCED: SOCIAL AUDITS, WORKPLACE CERTIFICATION AND TWENTY YEARS OF FAILURE TO PROTECT WORKER RIGHTS 7 (2013), <http://www.aflcio.org/content/download/77061/1902391/CSRReport.pdf>.

¹⁹ Nike Code of Conduct, <http://business.nmsu.edu/~dboje/NIKcodeconduct.html> (last visited Sept. 11, 2014); Richard M. Locke, Fei Qin & Alberto Brause, *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61 INDUS. & LAB. REL. REV. 3, 8-9 (2007).

²⁰ John H. Cushman Jr., *Nike Pledges to End Child Labor and Apply U.S. Rules Abroad*, N.Y. TIMES, May 13, 1998, available at <http://www.nytimes.com/1998/05/13/business/international-business-nike-pledges-to-end-child-labor-and-applyusrulesabroad.html?module=Search&mabReward=relbias%3Ar%2C%22%21%22%3A%22RI%3A7%22}&pagewanted=print>.

²¹ Press Release, Boston Common Asset Management, Boston Common Engages Apple Inc., <http://www.bostoncommonasset.com/news/press/apple-engagement.php> (last visited Sept. 12, 2014). (BCAM is an investment management firm specializing in socially responsible investment strategies).

²² David Barboza, *iPhone Maker in China Is Under Fire After a Suicide*, N.Y. TIMES, July 26, 2009, available at http://www.nytimes.com/2009/07/27/technology/companies/27apple.html?pagewanted=all&_r=0; David Barboza, *Another Death at Electronics Supplier in China*, N.Y. TIMES, May 21, 2010, available at <http://www.nytimes.com/2010/05/22/technology/22suicide.html?module=Search&mabReward=r>; David Barboza, *After Suicides, Scrutiny of China's Grim Factories*, N.Y. TIMES, June 6, 2010, available at

the New York Times printed an article about an explosion at a Foxconn factory caused by combustible dust.²³ Seven months later a similar combustible dust explosion occurred at another Apple contractor plant in China.²⁴ In January 2012 the New York Times published a major piece on worker abuses in Apple contractor plants in China.²⁵ Finally, in February 2012, Apple responded by announcing that it would employ an outside monitoring group to inspect its Chinese factories.²⁶

Monitoring by outside organizations or individuals who are unfamiliar with the day- today operations of a supplier, however, does not necessarily produce better auditing results. A BBC investigative reporter went undercover as a buyer at a garment factory in Dhaka where he asked the owner about work hours. He was shown time sheets indicating that the work day ended at 5:30 p.m. The day before, however, he had sat outside the factory from 7 a.m., when the workers entered, until 2:30 a.m. the next day when he finally saw the workers leave.²⁷ Similarly, a factory which had been certified as compliant with Walmart's CoC merely moved goods made at a noncompliant subcontractor's factory and presented them for approval at its own factory.²⁸ A study of the monitoring practices of PriceWaterhouseCoopers concluded that while the auditors found "minor problems in the factories. . . , they consistently overlooked larger, more important issues. PWC's audit reports glossed over problems with freedom of association and collective bargaining, overlooked serious violations of health and safety standards, and failed to report common problems in wages and hours."²⁹

Even when CoCs include protection of FOA and CB, monitoring does not appear to be effective at determining compliance. In the last 6 years Apple has reported

<http://www.nytimes.com/2010/06/07/business/global/07suicide.html?pagewanted=all&module>

²³ David Barboza, *Explosion at Apple Supplier Caused by Dust, China Says*, N.Y. TIMES, May 24, 2011, available at <http://www.nytimes.com/2010/06/07/business/global/07suicide.html?pagewanted=all&module>.

²⁴ *61 Workers Injured in Explosion at Shanghai Apple Supplier*, CHINA LABOR WATCH, December 19, 2011, <http://www.chinalaborwatch.org/newscast/160>.

²⁵ Charles Duhigg & David Barboza, *In China, the Human Costs that are Built into an iPad*, N.Y. TIMES, January 25, 2012, available at <http://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html?pagewanted=all>.

²⁶ Steven Greenhouse, *Critics Question Record of Monitor Selected by Apple*, N.Y. TIMES, February 13, 2012, available at <http://www.nytimes.com/2012/02/14/technology/critics-question-record-of-fair-labor-association-apples-monitor.html>.

²⁷ Richard Bilton, *Bangladeshi factory workers locked in on 19-hour shifts*, BBC NEWS, September 23, 2013, available at <http://www.bbc.co.uk/news/business-24195441>.

²⁸ Clifford & Greenhouse, *supra* note 13.

²⁹ Dara O'Rourke, *MONITORING THE MONITORS: A CRITIQUE OF PRICEWATERHOUSECOOPERS (PWC) LABOR MONITORING 7* (2000), available at <http://web.mit.edu/dorourke/www/PDF/pwc.pdf>.

over 95% compliance with FOA and CB³⁰ in supplier practices even though 44% of its suppliers are located in China³¹ which does not allow for true freedom of association – by law all trade unions in China must be affiliated with the All-China Federation of Trade Unions.³² The FLA states that it monitors for FOA, yet in 2004 it “did not detect a single violation of the union blacklisting benchmark in all the factories that they audited in the world. In that same year, the U.S. State Department found strong evidence of union blacklisting in apparel export zones in regions such as Central America.”³³

IV. ENFORCEMENT OF CORPORATE CODES OF CONDUCT

An initial problem with enforcing CoCs is the nature of MNC supply chains. A former Apple executive was quoted in the New York Times: “You can set all the rules you want, but they’re meaningless if you don’t give suppliers enough profit to treat workers well. . . . If you squeeze margins you’re forcing them to cut safety.”³⁴ Similarly a report issued by Stanford Law School and the Worker Rights Consortium noted that “buyers must adjust their purchasing practices if significant improvements in factory conditions are to be achieved and sustained.”³⁵ Purchasing models which shift the cost for compliance down the supply chain while demanding short turn-around times, and offering slim profit margins with no long-term commitments provide little incentive for contractors to invest in improvements.³⁶

Moreover, while not unheard of, it is rare for companies to terminate supplier contracts even in the face of non-compliance with their CoCs.³⁷ According to a former Apple executive “We’ve known about labor abuses in some factories for four

³⁰ APPLE, *Supplier Responsibility 2014 Progress Report* 32, https://www.apple.com/supplier-responsibility/pdf/Apple_SR_2014_Progress_Report.pdf; *Supplier Responsibility 2013 Progress Report* 29, https://www.apple.com/supplier-responsibility/pdf/Apple_SR_2013_Progress_Report.pdf; *Supplier Responsibility 2012 Progress Report* 7, https://www.apple.com/supplier-responsibility/pdf/Apple_SR_2012_Progress_Report.pdf; *Supplier Responsibility 2011 Progress Report* 15, https://www.apple.com/supplier-responsibility/pdf/Apple_SR_2011_Progress_Report.pdf.

³¹ See APPLE, Supplier map, <https://www.apple.com/supplier-responsibility/our-suppliers/>.

³² See Ronald C. Brown, *Understanding Labor And Employment Law In China* 44 (2010).

³³ Anner, *supra* note 7, at 620.

³⁴ Duhigg & Barboza, *supra* note 25. See also AFL-CIO, *supra* note 18, at 9.

³⁵ INT’L HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC (STANFORD LAW SCHOOL) & WORKER RIGHTS CONSORTIUM, *supra* note 17, at v.

³⁶ Witte, *supra* note 8 at 67; See also Jeff Vogt, *Bangladesh and the Labour Law* (May 22, 2013), <http://www.ituc-csi.org/Bangladesh-and-the-labour-law>.

³⁷ See, Margeret Levi et al., *Aligning Rights and Interests: Why, When and How to Uphold Labor Standards* 23 (2013), http://siteresources.worldbank.org/EXTNWDR2013/Resources/8258024-1320950747192/8260293-1320956712276/8261091-1348683883703/WDR2013_bp_Aligning_Rights_and_Incentives.pdf.

years, and they're still going on. Why? Because the system works for us. Suppliers would change tomorrow if Apple told them they didn't have another choice."³⁸

This reluctance by some MNCs to enforce labor standards was evidenced in the aftermath of the Rana Plaza factory collapse.³⁹ Many European MNCs agreed to an Accord on Fire and Building Safety which had been negotiated with input from Global Union Federations.⁴⁰ Most American MNCs refused to sign this Accord, instead drawing up their own "commitment" to ensure worker safety.⁴¹ One of the differences between the two documents is enforceability: the Accord is enforceable through binding arbitration; the American agreement provides for no enforcement mechanism.⁴²

Recent protests involving garment workers in Cambodia also illustrates this corporate reluctance to enforce their stated commitment to worker rights. From late 2013 to early 2014 there were ongoing protests by apparel workers in Cambodia fighting for an increase in the minimum wage. These protests were met with police violence resulting in the shooting deaths of several workers.⁴³ In response, several

³⁸ Duhigg & Barboza, *supra* note 25; *But see*, David Barboza, *Samsung Contractor Suspended Over Child Labor Allegations*, N. Y. TIMES, July 15, 2014, at B7. It should be noted, however, that the news story indicates the supplier was only temporarily suspended and that if the investigation discloses under-age workers were hired illegally the contractor "could be permanently barred from working with Samsung." *Supra*.

³⁹ Julfikar Ali Manik & Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, N.Y. TIMES, April 24, 2013, at A1 available at <http://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html?pagewanted=>; *See also*, Associated Press, *Death Toll in Bangladesh Passes 1,100*, N.Y. TIMES, May 11, 2013, at A14, available at <http://www.nytimes.com/2013/05/12/world/asia/death-toll-in-bangladesh-collapse.html>.

⁴⁰ *See* Steven Greenhouse, *Major Retailers Join Bangladesh Safety Plan*, N. Y. TIMES, May 14, 2013, at A1, available at <http://www.nytimes.com/2013/05/14/business/global/hm-agrees-to-bangladesh-safety-plan.html?>. Global Union Federations are international trade union organizations which bring together national unions from various countries which represent workers in a specific economic sector.

⁴¹ *See* Steven Greenhouse, *U.S. Retailers See Big Risk in Safety Plan for Factories in Bangladesh*, N. Y. TIMES, May 23, 2013, at B1, available at <http://www.nytimes.com/2013/05/23/business/legal-experts-debate-us-retailers-risks-of-signing-bangladesh-accord.html?pagewanted=all>; *See also*, Steven Greenhouse & Stephanie Clifford, *U.S. Retailers Offer Plan for Safety at Factories*, N.Y. TIMES, July 11, 2013, at B1, available at <http://www.nytimes.com/2013/07/11/business/global/us-retailers-offer-safety-plan-for-bangladeshi-factories.html?pagewanted=all>.

⁴² *Two Plans for Safety at Bangladesh Factories*, N.Y. TIMES, September 1, 2013, available at [http://www.nytimes.com/interactive/2013/09/01/business/global/inspections-comparison.html?module=Search&mabReward=relbias%3Ar%2C{%22%22%3A%22RI%3A7%22}](http://www.nytimes.com/interactive/2013/09/01/business/global/inspections-comparison.html?module=Search&mabReward=relbias%3Ar%2C{%22%22%3A%22RI%3A7%22); *See also*, *Comparison: The Accord on Fire and Building Safety in Bangladesh and the Gap/Walmart Scheme*, available at <http://www.cleanclothes.org/resources/background/comparison-safety-accord-and-the-gap-walmart-scheme>.

⁴³ *Cambodia police clash with protesters at Nike contractor*, BBC NEWS ASIA, June 3, 2013, <http://www.bbc.com/news/world-asia-22757730>; *See also*, *One killed in Cambodia garments worker protest violence*, BBC NEWS ASIA, November 12, 2013, <http://www.bbc.com/news/world-asia-24910835>; *See also*, *Cambodia garment workers killed*

MNC clothing retailers addressed a letter to the Cambodian government protesting the violence and urging the government to negotiate a raise for the workers. However, when a Voice of America reporter contacted the companies they indicated that “they did not plan to stop buying goods from Cambodia if the minimum wage is not raised or violence against workers continues.”⁴⁴

In the face of MNC hesitancy to impose significant costs on noncompliant contractors, third parties have attempted to enforce the terms of CoCs. The results present a mixed bag. In *Doe v. Wal-Mart Stores, Inc.*,⁴⁵ the plaintiffs, employees of foreign contractors of Wal-Mart whose contracts included a CoC, brought, inter alia, a breach of contract claim against Wal-Mart for failing to enforce the terms of the CoC. The contract claim was based on a third-party beneficiary theory. Specifically the alleged breach was Wal-Mart’s failure to conduct adequate on-site inspections and the contractors’ failure to ensure that working conditions complied with the CoC. First, the Court held that the language in the CoC – “Wal-Mart will undertake affirmative measures, such as on-site inspection. . .to monitor said standards” – did not create a promise to monitor. Thus no promise was breached. Secondly, the Court found that Wal-Mart was the promisee with respect to the contractors’ promise to comply with labor standards and thus the plaintiffs could not claim beneficiary status vis-a-vis Wal-Mart since beneficiaries can make the claim only as against the promisor.⁴⁶

A slightly different claim was raised by the University of Wisconsin in a motion for a declaratory judgment filed against Adidas alleging breach of a product licensing agreement.⁴⁷ The University alleged that its contract with Adidas incorporated a labor code of conduct which required, inter alia, that Adidas “shall provide legally mandated benefits” to workers where their apparel is produced and that, while Adidas may subcontract work, it still remained responsible for ensuring that goods are manufactured per the license agreement. One of Adidas’ subcontractors closed its Indonesian factory yet failed to pay the workers severance pay required by domestic law. The University asked the court to interpret the contract as requiring Adidas to ensure the severance payments are made.⁴⁸ Adidas’ position was that its obligation under the contract only required it to cease doing business with any contractor which failed to abide by the labor code of conduct.⁴⁹ Adidas received its last shipment from the contractor before the latter failed to make

in clashes with police, BBC NEWS ASIA, January 3, 2014, <http://www.bbc.com/news/world-asia-25585054>.

⁴⁴ Kimseng Men, *World Retailers Want Negotiations in Cambodia Labor Dispute*, VOICE OF AMERICA (Jan. 10, 2014), <http://www.voanews.com/articleprintview/1827740.html>.

⁴⁵ *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 679-681 (9th Cir. 2009).

⁴⁶ *Id.* at 681-682.

⁴⁷ *Summons, Board of Regents of the University of Wisconsin System v. Adidas America, Inc.*, No. 12CV2775 (Dane Cty. Cir. Ct. 2012).

⁴⁸ *Id.*

⁴⁹ Letter with attachment from Paul E. Loving, Special Counsel, Adidas, to Brian D. Vaughan, Senior University Legal Counsel, University of Wisconsin-Madison (February 2, 2012) (on file with author).

required payments to its employees. Since Adidas had ceased doing business with the contractor it fully complied with its obligations under its contract with the University.⁵⁰ A court judgment on the issue was avoided when the University and Adidas reached a settlement where the latter agreed to make a financial contribution toward payment of severance owed.⁵¹

Aside from the practical problems with enforcement, there are philosophical objections. As noted, both monitoring and enforcement are to a large extent reactions to public pressure, not proactive. Thus, situations that do not make “front page headlines” but still impact the lives of workers may often not be addressed. For example, it was not until over 1100 workers died in the Rana Plaza collapse in April 2013 that MNCs reached an enforceable agreement on fire and safety standards in the Bangladeshi garment industry. In the three years prior to Rana Plaza, however, at least 235 workers died in Bangladeshi garment factory fires or building collapses.⁵² Had those earlier incidents incited the kind of public outcry produced by the Rana Plaza tragedy, 1100 workers might still be alive.

A corollary problem with public outrage as the impetus for enforcement concerns the types of issues most likely to engage public sympathy. Worker deaths and child labor can easily strike a public nerve; such fervor is rarely seen when the issue involves the workers’ right to form a trade union. Yet, as noted previously, the empowerment of workers within the workplace to speak up and hold the employer accountable for workplace conditions may be the best way to ensure on a continuous basis that health and safety issues are addressed and domestic laws relating to child labor and working hours are complied with.⁵³

Finally, to the extent that CoCs address the core ILO labor standards and are actually enforced, their effectiveness is limited to the specific company or factory subject to the terms of the CoC. Similarly any protection from CoCs are also generally limited to workers in the sector of the economy which does business with MNCs. So while garment workers in Bangladesh may enjoy the benefits of health and safety protections due to the recently agreed-to Accord on Fire and Building Safety, these protections will not necessarily be extended to workers in, for example, the Bangladesh shrimp industry.⁵⁴ A similar case in point is the Rugmark campaign, a product labeling program which certifies that rugs made in Southeast Asia have not

⁵⁰ *Id.*

⁵¹ See, Karen Herzog *UW-Madison drops suit against Adidas over treatment of workers*, JOURNAL SENTINEL, June 3, 2013, available at <http://www.jsonline.com/blogs/news/209952971.html>.; Cf. James J. Brudney, *Envisioning Enforcement of Freedom of Association Standards in Corporate Codes of Conduct: A Journey for Sinbad or Sisyphus?*, 33 COMP. LAB. L. & POL’Y J. 555, 576 et seq. (2011-2012)(discussion of other possible judicial enforcement options).

⁵² *Timeline: Deadly factory accidents in Bangladesh*, CBC NEWS, Oct 9, 2013, <http://www.cbc.ca/news2/interactives/timeline-bangladesh>.

⁵³ See David Weill, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. REL. 20 (1991). A study of OSHA health and safety inspection and enforcement data with respect to U.S. manufacturing facilities revealed that the probability of an inspection, the intensity of the inspection and the gravity of the penalty all increased in unionized workplaces.

⁵⁴ *Our Mission is to Protect People and Planet*, ENVTL. JUST. FOUND. (2014), http://ejfoundation.org/sites/default/files/public/Impossibly_Cheap_Web.pdf, detailing the health and safety issues confronting workers in that industry.

used child labor.⁵⁵ While this campaign has had some success in reducing child labor in the carpet industry, as of 2009-10 there were still 4.98 million child workers in India⁵⁶ – they may not be weaving rugs, but they are making bricks, working in agriculture or employed as street vendors.

Given these problems with the CoC system, are there other options? And if so, are they more effective? While there are many possible mechanisms, this article will focus on three options: International Framework Agreements (IFAs), the Generalized System of Preferences (GSP) and Free Trade Agreements (FTAs).

V. INTERNATIONAL FRAMEWORK AGREEMENTS

IFAs are a response to globalization and the rise of MNCs.⁵⁷ “An international (or global) framework agreement (IFA) 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.”⁵⁸ All IFAs include a commitment by the signatory MNC to respect the ILO core labor standards which include FOA and CB. Additionally most contain provisions concerning working conditions (health and safety) and wages and hours.⁵⁹

In terms of coverage, there are currently more than 100 IFAs which cover about 9 million workers.⁶⁰ With few exceptions, IFAs cover the entire operations of an MNC (including subsidiaries). 69% of IFAs apply in some manner to the suppliers and contractors of the MNC – 9% directly apply to the entire supply chain; 14% require the MNC to take measures to ensure supplier/contractor compliance; and 46% require the MNC to encourage suppliers/contractors to comply. 31% of IFAs apply solely to the MNC’s own operations and do not include suppliers or

⁵⁵ See *Welcome to Rugmark India*, RUGMARK FOUND. INDIA (2012), <http://www.rugmarkindia.org/Rugmark/index.htm>.

⁵⁶ *NSSO Data on Child Labour*, MINISTRY OF LAB. & EMP. (Feb. 3, 2015), <http://labour.gov.in/content/division/nso-data-on-child-labour.php>.

⁵⁷ For a history of the evolution of IFAs see Dan Gallin, *International Framework Agreements: A reassessment*, in *CROSS-BORDER SOCIAL DIALOGUE AND AGREEMENTS: AN EMERGING GLOBAL INDUSTRIAL RELATIONS FRAMEWORK?* (Konstantinos Papadakis ed., 2008), available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_093423.pdf.

⁵⁸ *International Framework Agreements: A Global Tool for Supporting Rights at Work*, INT’L LAB. ORG. (Jan. 31, 2007), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_080723/lang--en/index.htm.

⁵⁹ Renée-Claude Drouin, *Promoting Fundamental Labor Rights Through International Framework Agreements: Practical Outcomes and Present Challenges*, 31 *COMP. LAB. L. & POL’Y J.* 591, 594-95 (2010).

⁶⁰ *Framework Agreements*, GLOBAL UNIONS, <http://www.global-unions.org/+framework-agreements-+.html> (last visited Aug. 20, 2014); César F. Rosado Marzán, *Labor’s Soft Means and Hard Challenges: Fundamental Discrepancies and the Promise of Non-Binding Arbitration for International Framework Agreements*, 98 *MINN. L. REV.* 1749, 1753 (2014).

contractors.⁶¹ Finally, the majority of IFAs are concluded with European-based MNCs, although there are a few non-European signatories.⁶²

Unlike CoCs, IFAs are the result of bilateral negotiations between MNCs and worker representatives allowing for workers themselves to identify the important workplace issues. The process also strengthens and legitimizes the union as an institution which can play a positive role in insuring adherence to the terms of the agreement. Like CoCs, however, the impact of IFAs is limited to particular companies and sectors of the economy.

The first IFA was negotiated in 1998 between the International Union of Food and Allied Workers' Association and BSN (Danone).⁶³ The growth in the use of IFAs has lagged behind the adoption of CoCs. In 2002 there were 27 IFAs⁶⁴ whereas at that point over 1,000 MNCs had CoCs.⁶⁵ Even today there are only a few more than 100 MNCs which are signatories to IFAs.⁶⁶ Thus, the impact from enforcement of IFAs is likely more limited vis-a-vis CoCs given the lower participation rate.

With regard to enforcement, there are no reported cases of court litigation related to IFAs. Indeed, several commentators have expressed the view that judicial enforcement of IFAs is problematic.⁶⁷ While legal enforceability is unclear at this point, the fact is that one of the parties to the process, the union, has a self-interest in effectively enforcing the IFA; in the case of CoCs it is not readily apparent that either party to the agreement – the MNC or the supplier -- has such an interest.

The wording of IFAs themselves indicates methods of implementation short of judicial enforcement. Some agreements rely on the good faith between the parties. For example, the 2004 IFA between H&M and Union Network International provides that the parties “will bear joint responsibility for the full implementation in good faith of this agreement. . .”⁶⁸ Other IFAs provide for discussions between union and company representatives regarding compliance; the 2012 Ford-International Metalworkers Federation IFA provides that “compliance. . . can be raised and discussed between the Company and the Union in the Regions or at the Ford Global Information Sharing Forum. When issues are identified, the parties will

⁶¹ Volker Telljohann Et Al., EUROPEAN AND INTERNATIONAL FRAMEWORK AGREEMENTS: PRACTICAL EXPERIENCES AND STRATEGIC APPROACHES 32 (2009). See also, Drouin, *supra* note 59 at 621 et seq.

⁶² See *Framework Agreements*, *supra* note 60 for list of IFA signatories.

⁶³ Gallin, *supra* note 57 at 26.

⁶⁴ Telljohann, *supra* note 61 at 21 Figure 1.

⁶⁵ Witte, *supra* note 8 at 53.

⁶⁶ *Framework Agreements*, *supra* note 60.

⁶⁷ See e.g., Brian Burkett, *International Framework Agreements: An Emerging International Regulatory Approach or a Passing European Phenomenon?*, 16 CAN. LAB. & EMP. L.J. 81, 92 et seq (2011); but see, Alvin L. Goldman, *Enforcement of International Framework Agreements Under U.S. Law*, 33 COMP. LAB. L. & POL'Y J. 605 (2011-2012).

⁶⁸ *Agreement Between H&M Hennes & Mauritz AB (H&M) and Union Network International (UNI)*, HM (Jan. 14, 2004), about.hm.com/content/dam/hm/about/documents/masterlanguage/CSR/Policies/RM_UNI_AN_D_HM_LINK_1178884959035.pdf.

work together to find mutual solutions.”⁶⁹ Some IFAs create committees to oversee compliance; the International Union of Foodworkers-Chiquita agreement requires the parties to “appoint up to four members to a Review Committee that will meet periodically to oversee the application of this agreement...”⁷⁰ More recently, a few IFAs have included arbitration clauses. The 2008 IFA between ISS and UNI Global Union creates a multi-step dispute process which culminates in binding arbitration.⁷¹

Given the private nature of implementation mechanisms, information regarding the effectiveness of IFAs in protecting working rights is largely anecdotal. What this episodic evidence indicates is that IFAs have been mainly successful in creating transnational union cooperation which can be used to address local problems, in particular employer resistance to trade union organizing campaigns. For example, in 2010 workers at an Illinois plant which had been recently purchased by Rhodia, a French chemicals company, sought representation by the United Steelworkers union (USW). The US plant managers engaged in an anti-union campaign. USW officials contacted the International Federation of Chemical, Energy and Mine Workers’ Union (ICEM) which had an IFA with Rhodia. The agreement provided that Rhodia would respect the right of employees to unionize and would remain neutral. ICEM informed Rhodia of the problems at the US plant and Rhodia’s CEO instructed the US managers to cease anti-union activity. USW won the subsequent representation election.⁷²

A similar anti-union campaign against the Machinists Union (IAM) was waged by local management at a plant in Virginia which was an IKEA subsidiary. IKEA was a party to an IFA with the Building and Woodworkers’ International (BWI) which provided that IKEA would allow its workers to join a union. Communication between the IAM, BWI and IKEA led the latter, after some initial delay, to rein in its U.S. managers and the IAM eventually won a representation election in 2011.⁷³

While IFAs appear to be more effective at protecting FOA rights than CoCs, there is no evidence that these agreements are better at protecting other labor standards.⁷⁴ As mentioned previously, however, protection of FOA empowers

⁶⁹ *International Framework Agreement Ford Motor Company and Global IMF/Ford Global Information Sharing Network*, GLOBAL UNIONS (Apr. 25, 2012), http://www.global-unions.org/IMG/pdf/ifa_ford.pdf.

⁷⁰ *IUF/Colsiba and Chiquita Agreement on Freedom of Association, Minimum Labour Standards and Employment in Latin American Banana Operations*, IUF (May 11, 2001), <http://www.iufdocuments.org/www/documents/Chiquita-e.pdf>.

⁷¹ *ISS-UNI Global Agreement*, UNI GLOBAL UNION (2008), http://place.uniglobalunion.org/LotusQuickr/pub/PageLibraryC1257824003A7C09.nsf/h_C584938BF113738FC12578AA004FD1D8/3E1939837F766C41C12578AA0050B203/?OpenDocument; For a general discussion of IFA enforcement mechanisms see Drouin, *supra* note 59 at 618-21; and Telljohann et al, *supra* note 61 at 33-6.

⁷² Dick Blin, *Global Framework Agreements: Compliance*, 18 INT’L UNION RTS. 3, 4 (2011).

⁷³ Dimitris Stevis & Michael Fichter, *International Framework Agreements in the United States: Escaping, Projecting, or Globalizing Social Dialogues?* 33 COMP. LAB. L. & POL’Y J. 667, 686 (2012).

⁷⁴ Drouin, *supra* note 59, at 610.

workers to seek and enforce the protections of other labor rights. But given the limited number of IFAs as well as the episodic evidence of their effectiveness, it would be hard to argue that IFAs are a better mechanism for ensuring protection of worker rights than CoCs.

VI. GENERALIZED SYSTEM OF PREFERENCES

The U.S. GSP program was established in 1974 and authorized the President to grant duty-free treatment to imports from developing countries which are designated as beneficiaries.⁷⁵ This allows the designated countries to export their goods into the U.S. market at a competitive advantage vis-a-vis both developed countries and non-designated developing countries (which latter groups are required to pay prevailing tariffs whenever exporting their goods to the U.S.). In 1984 new language was added to the GSP program, requiring that beneficiaries must respect enumerated worker rights in order to maintain their duty-free status: "...the President shall not designate any country as a beneficiary developing country...if such country has not taken, or is not taking, steps to afford internationally recognized worker rights to workers in the country...." These internationally recognized worker rights include FOA and CB as well as standards relating to forced labor, child labor and acceptable working conditions with respect to minimum wages, hours of work and occupational safety and health.⁷⁶

As indicated, the standard for determining whether to designate a developing country as a GSP beneficiary is whether the country has taken, or is taking, steps to comply with the labor standards. Therefore, even if a country is not in full compliance with the enumerated labor standards, it may still be eligible for GSP if it demonstrates that it is taking steps to comply.

An annual review process determines if a country is in compliance with GSP conditions. Petitions to review the worker rights practices of a particular beneficiary are submitted to the U.S. Trade Representative. Petitions may be filed by any interested party, but the most active organizations involved in submitting petitions have been the AFL-CIO, the International Labor Research and Education Fund, the Lawyers Committee on Human Rights and Human Rights Watch. The petitions are reviewed by the GSP Subcommittee which decides whether to accept or reject the petition. Over a ten year period (1985 - 1996) 82 petitions were filed alleging worker rights violations, 47 of which were accepted for review.⁷⁷

If a petition is accepted, a one-year review is conducted based on an analysis of data received from a variety of sources. After reviewing the information, the Subcommittee determines if a country is taking steps to afford worker rights. It can

⁷⁵ Vivian C. Jones, Cong. Res. Serv., *Generalized System of Preferences: Background and Renewal Debate*, 1 (2014) available at <https://www.fas.org/sgp/crs/misc/RL33663.pdf>. Authorization for the GSP program expired on July 31, 2013 and has not yet been renewed. *Id.*

⁷⁶ Bama Athreya, U.S. Dept. of Lab., Bureau of Int'l Lab. Aff., *Comparative Case Analysis of the Impacts of Trade-Related Labor Provisions on Select US Trade Preference Recipient Countries*, 1-3 (2011) available at <http://www.dol.gov/ilab/reports/pdf/2010ILRF.pdf>.

⁷⁷ Kimberly Ann Elliott, Peterson Inst. for Int'l Econ., *Preferences for Workers? Worker Rights and the US Generalized System of Preference*, tbl.4 (May 8, 2000), (transcript available at <http://www.iie.com/publications/papers/paper.cfm?ResearchID=313>).

recommend to the President that s/he: 1) extend the review process so that the Subcommittee may continue its investigation; 2) terminate the review because the country has “taken steps” to comply or 3) suspend or revoke the country’s eligibility for benefits. The President makes the ultimate decision about whether to suspend a country’s eligibility.⁷⁸ During the life of this program, approximately fourteen countries have had their eligibility suspended due to failure to comply with labor standards.⁷⁹ Since 1987, 23 countries have been under continuing review for various periods of time.⁸⁰

Within the US GSP regime, a study of 40 cases which were reviewed for labor rights violations between 1985-1996 found that in 15 cases respect for worker rights improved due to the GSP review process, and in 17 cases there was no change in worker rights.⁸¹ Of the latter 17 cases, “12 resulted in suspension or termination of GSP eligibility.”⁸²

Some commentators have suggested that even when petitions are ultimately rejected or review is continued for years until the case is closed, the pressure of the petition itself and US government review often brings about improvements, even if not at the hoped-for level.⁸³ Some examples of the impact of GSP include a petition filed in 1993 by the AFL-CIO alleging that Costa Rica permitted the use of management-supported trade unions; the government enacted legislation banning such organizations (called “solidarista”) from engaging in collective bargaining and the AFL-CIO withdrew its petition.⁸⁴ In 1996 Cambodia applied for GSP status and the AFL-CIO protested that its labor code did not protect worker rights. Cambodia enacted a new labor code and was granted GSP beneficiary status.⁸⁵ In 2008 the

⁷⁸ Athreya, *supra* note 76.

⁷⁹ Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL’Y J. 199, 209 n.39 (2001). Subsequently, Bangladesh was suspended in 2013. *Id.*; See Rosella Brevetti, *Obama Orders Suspension of Bangladesh from GSP Because of Worker Rights Issues*, 124 Daily Lab. Rep. (BNA) A-17 (June 27, 2013).

⁸⁰ Compa & Vogt, *supra* note 79 at 209 n.38; Office of the U.S. Trade Representative, *Results of the 2012 GSP Annual Review*, 16 (2013) available at http://www.ustr.gov/sites/default/files/2012%20AR%20Results%20List_0.pdf.

⁸¹ Elliott, *supra* note 77, tbl.7. In the remaining 8 cases reviewed, improvements occurred after domestic political change and thus the improvement could not be attributed to the GSP process. *Id.* at 6.

⁸² *Id.* at 6.

⁸³ See generally, *id.*; Compa & Vogt, *supra* note 79; Athreya, *supra* note 76; Witte, *supra* note 8, at 44-46; OECD, *Trade, Employment and Labour Standards: A Study of Core Workers’ Rights and International Trade*, 186 (1996), available at http://www.keepeek.com/Digital-Asset-Management/oecd/trade/trade-employment-and-labour-standards_9789264104884-en#page1.

⁸⁴ U.S. Dept. of State, *Country Commercial Guides FY 1999: Costa Rica*, http://www.state.gov/1997-2001/NOPDFS/about_state/business/com_guides/1999/wha/costar99_03.html.

⁸⁵ *Asian AFL-CIO Affiliate May Recommend Opposition To GSP Benefits For Cambodia*, 313 Daily Lab. Rep. (BNA) A-6 (Nov. 4, 1996); Daniel Pruzin, *Cambodia Adopts*

AFL-CIO filed a petition to withdraw GSP status from Sri Lanka for failure to protect worker rights. After a 4 year review period, the case was closed based on the government's efforts to address the issues contained in the petition, including investigating and resolving unfair labor practice cases and enacting legislation to increase fines for violations.⁸⁶

The European Union GSP includes both sanctions for worker rights offenses and incentives for compliance. The law provides that the European Union will suspend benefits if a beneficiary country engages in any form of forced labor, the export of goods made by prison labor, or if a country engages in systematic and serious violations of core ILO labor standards. On the other hand, additional incentives (GSP+) are offered to countries which comply with the principles enshrined in the core ILO Conventions. The incentives consist in an additional tariff reduction of 20%.⁸⁷ The European Commission has suspended two countries for violations of worker rights – Myanmar (for forced labor) and Belarus (for repression of trade unions).⁸⁸

From a coverage perspective, the GSP enforcement mechanism has the potential to improve worker rights throughout the beneficiary country, not just in one company or one sector of the economy. Country coverage is relatively extensive as well. Under the US program, 180 countries are eligible to apply for GSP beneficiary status;⁸⁹ under the EU's newly revised program, 90 countries qualify.⁹⁰

In terms of enforcement, parties with a self-interest in ensuring compliance with labor standards (i.e. trade unions and human rights NGOs) have access to the petition process to initiate review. Moreover, both the US and EU have shown a willingness to activate the enforcement mechanism and cut off GSP trade benefits for non-complying countries, thus creating a credible incentive for countries to comply. As has been mentioned by several commentators, however, suspension of GSP is often

New Labor Law On Eve Of Visit By U.S. Delegation, 10 Daily Lab. Rep. (BNA) A-2 (Jan. 15, 1997).

⁸⁶ Press Release, Office of the U.S. Trade Representative, USTR Closes GSP Worker Rights Review of Sri Lanka: Preference Program Helps Promote Progress on Labor Issues, (June 29, 2012), (available at <http://www.ustr.gov/about-us/press-office/press-releases/2012/july/ustr-closes-gsp-worker-rights-review-sri-lanka>).

⁸⁷ See European Commission, *The European Union's Generalised System of Preferences* (2004), http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc_116448.pdf.

⁸⁸ Press Release, European Commission, European Commission proposes to reinstate trade preferences to Myanmar/Burma (Sept. 27, 2012) (available at http://europa.eu/rapid/press-release_IP-12-971_en.htm) (http://europa.eu/rapid/press-release_IP-12-971_en.htm) (Myanmar was subsequently reinstated); see ITUC, *Suspension of EU trade preference to Belarus, ITUC General Council urges the government to implement international labour standards*, (June 2, 2007), <http://www.ituc-csi.org/suspension-of-eu-trade-preferences>.

⁸⁹ Office of the U.S. Trade Representative, *U.S. Generalized System of Preferences Guidebook*, 18 (2013), http://www.ustr.gov/sites/default/files/GSP%20Guidebook_Final_06262013.pdf.

⁹⁰ Memorandum from European Comm'n, Revised EU trade scheme to help developing countries applies on 1 January 2014 (Dec. 19, 2013), http://europa.eu/rapid/press-release_MEMO-13-1187_en.htm).

influenced not only by compliance with labor standards but also by foreign policy objectives.⁹¹

An additional positive effect of GSP programs vis-a-vis CoCs is that elected governments, rather than private actors, are determining the appropriate rights on which to focus, with a reliance on core ILO standards, including in particular FOA and CB.

VII. FREE TRADE AGREEMENTS

Free trade agreements (FTAs) are bilateral or multilateral agreements between nation- state trading partners to eliminate some or all tariffs in order to encourage economic activity. While FTAs have been around for some time, only recently have such agreements included labor standards. As early as 1973 the EU entered into FTAs with Iceland, Norway and Switzerland;⁹² the first US FTA was signed with Israel in 1985.⁹³ The 1993 North American Agreement on Labor Cooperation (NAALC) negotiated as a side agreement to the North American Free Trade Agreement (NAFTA) was the first FTA with a labor provision.⁹⁴ By June, 2013, 58 FTAs included labor provisions covering 120 countries.⁹⁵

Throughout the years, there has been an evolution in the content of the labor provisions in US FTAs.⁹⁶ In NAALC, for example, the parties agreed to enforce their domestic labor legislation and to promote specified labor standards which included the ILO core standards as well as safety and health in the workplace and protection for migrant workers.⁹⁷ The next group of FTAs contained a commitment to strive to ensure ILO core labor standards are recognized and protected by domestic law and that each party will effectively enforce its labor laws.⁹⁸ The third

⁹¹ Witte, *supra* note 8, at 44; Compa & Vogt, *supra* note 79, at 237.

⁹² See WORLD TRADE ORG., *List of Regional Trade Agreements Notified to the World Trade Organization*, <http://rtais.wto.org/UI/PublicAllIRTAList.aspx> (last visited Aug. 22, 2014).

⁹³ OFFICE OF THE U.S. TRADE REPRESENTATIVE, *Israel Free Trade Agreement*, <http://www.ustr.gov/trade-agreements/free-trade-agreements/israel-fta> (last visited Aug. 22, 2014).

⁹⁴ Int'l Labour Org., *Social Dimensions of Free Trade Agreements* (2013), available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf.

⁹⁵ *Id.* at 5.

⁹⁶ See Robert A. Rogowsky & Eric Chyn, *U.S. Trade Law and FTAs: A Survey of Labor Requirements*, J. OF INT'L COMM. & ECON., Jul. 2007, available at http://www.cpdngo.org/cpdc/attachments/article/96/trade_law_ftas_8_.pdf.

⁹⁷ North American Agreement on Labor Cooperation (NAALC), U.S.-Can.-Mex., arts. 1-3 & Annex, Sept. 14, 1993, 32 I.L.M. 1499 (1993).

⁹⁸ See, Free Trade Agreement, U.S.-Jordan, art. 6 ¶¶ 1 & 3, Oct. 24, 2000, 41 I.L.M. 63; Free Trade Agreement, US-Morocco, arts. 16.1(2) & 16.2(a), June 15, 2004, <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text>; Free Trade Agreement, U.S.-Australia, arts. 18.1(2) & 18.2(1)(a), May 18, 2004, http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_51_68.pdf; Free Trade Agreement, U.S.- Bahrain, arts. 15.1(2) & 15.2(1)(a), Jan 11, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text>; Central

group require the parties to adopt laws which protect the core ILO labor rights and to effectively enforce domestic labor laws.⁹⁹

Within the EU, early FTAs mention some specific social issues such as social welfare, migrant worker rights or non-discrimination in employment.¹⁰⁰ More recent EU FTAs make specific reference to ILO core labor standards.¹⁰¹

A major difference between the US and EU approach to labor conditions in FTAs is implementation methods. While the EU relies heavily on a promotional approach stressing consultation and technical assistance,¹⁰² US FTAs are more sanction-oriented with enforcement mechanisms culminating in fines or suspension of trade benefits.¹⁰³ Within US FTAs, moreover, there has been an evolution in the enforcement mechanisms.

American Free Trade Agreement (CAFTA) arts. 16.1(2) & 16.2(1)(a), Aug. 5, 2004, <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>; Free Trade Agreement, US-Chile, arts. 18.1(2) & 18.2(1)(a), June 6, 2003, <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>; Free Trade Agreement, US-Oman, arts. 16.1(2) & 16.2(1)(a), Jan. 19, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>; Free Trade Agreement, US-Singapore, arts. 17.1(2) & 17.2(1)(a), May 6, 2003, http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4_036.pdf.

⁹⁹ Free Trade Agreement, US-Colombia, arts. 17.2 & 17.3, Nov. 22, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>; Free Trade Agreement, US-Korea, arts. 19.2 & 19.3, June 30, 2007, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>; Trade Promotion Agreement, US-Panama, arts. 16.2 & 16.3, June 28, 2007, <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>; Trade Partnership Agreement, US-Peru, arts. 17.2 & 17.3, Apr. 12, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

¹⁰⁰ See e.g., Euro-Mediterranean Agreement, EU-Algeria, arts. 67 & 68, Apr. 22, 2002, 2005 O.J. (L 265) 2, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22005A1010%2801%29&fro m=EN>; Euro-Mediterranean Agreement, EU-Morocco, arts. 69 & 71, Feb. 26, 1996, 2000 O.J. (L70) 2, available at http://eur-lex.europa.eu/resource.html?uri=cellar:c9d6b9bf-4365-49d7-afdb-4ce7d15eab40.0006.02/DOC_1&format=PDF; See WORLD TRADE ORG., *supra* note 92.

¹⁰¹ See, e.g., Economic Partnership Agreement, EU-CARIFORUM States, arts. 191 & 192, Oct. 15, 2008, 2008 O.J. (L289) I3, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22008A1030%2801%29&fro m=EN>; Free Trade Agreement, EU-Korea, art. 134(3), Oct. 6, 2010, 2011 O.J. (L 127) 6, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514%2801%29&fro m=EN>; Trade Agreement, EU-Colombia-Peru, art. 269(3), June 26, 2012, 2012 O.J. 3, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22012A1221%2801%29&fro m=EN>; see WORLD TRADE ORG., *supra* note 92.

¹⁰² See e.g., Int'l Labour Org., *supra* note 94, at 69; Evgeny Postnikov & Ida Bastiaens, *Does dialogue work? The effectiveness of labor standards in EU Preferential Trade Agreements*, 21 J. OF EUR. PUB. POL'Y 923, 925 (2014).

¹⁰³ See Mary Jane Bolle, Cong. Research Serv., RS 22823, OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS (2013).

Under NAALC, enforcement, which can be initiated by private parties for failure to enforce domestic labor laws, is limited to investigation and consultation.¹⁰⁴ With regard to failure to enforce domestic safety and health law, child labor laws or minimum wage laws, an arbitration panel can eventually be convened which would issue a report and recommendations. The governments concerned may then agree on a plan to address the problems found by the panel. If no plan can be agreed upon, or if a government fails to comply with the plan, the arbitration panel can be reconvened and may impose a monetary penalty on the non-complying government. If the penalty is not paid, trade benefits can be suspended.¹⁰⁵ From 1994-2008, 25 labor communications were accepted for review and fifteen ministerial consultations were held.¹⁰⁶ There has never been a submission for arbitration.

The next FTA with labor provisions was the US-Jordan FTA. It requires that the parties enforce their labor laws and ensure that their laws provide for internationally recognized labor rights related to FOA, CB, child labor, forced labor and acceptable working conditions.¹⁰⁷ Disputes over compliance are initially addressed through bilateral consultations. Absent settlement, the dispute can eventually be submitted to a dispute settlement panel which issues a non-binding report. If the dispute remains unresolved, the aggrieved party may resort to sanctions.¹⁰⁸ Under this agreement, unlike NAALC, only the governments may initiate the compliance process. Moreover, at the time this agreement was signed, the representatives of the respective governments exchanged letters indicating that they did not intend to invoke the dispute settlement provisions should a disagreement arise nor would they seek recourse to trade sanctions.¹⁰⁹

The next seven FTAs shared the same labor and enforcement provisions. The parties agree to strive to establish domestic labor laws consistent with the ILO core labor standards and to effectively enforce such laws.¹¹⁰ Enforcement for non-compliance culminates with a decision by an arbitral panel which can impose an annual monetary assessment not to exceed \$15 million. This assessment is paid into

¹⁰⁴ See COMM'N FOR LAB. COOPERATION, *Section III: Submission of Public Communications*, (last visited Sept. 12, 2014) (describing the enforcement process).

¹⁰⁵ See NAALC, *supra* note 97, at Part Five: Resolution of Disputes.

¹⁰⁶ See NAALC Public Communications and Results, 1994-2008, <http://new.naalc.org/userfiles/file/NAALC-Public-Communications-and-Results-1994-2008.pdf>.

¹⁰⁷ Free Trade Agreement, US-Jordan, *supra* note 98, at Art. 6.

¹⁰⁸ *Id.* at Art. 17.

¹⁰⁹ Exchange of letters between Robert B Zoellick, U.S. Trade Representative and Marwan Muahser Ambassador of the Hashemite Kingdom of Jordan to the U.S. (July 23, 2001), http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005665.asp and http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005664.asp.

¹¹⁰ Free Trade Agreement, US-Chile FTA, *supra* n. 98 at art. 18; Free Trade Agreement, US-Australia, *supra* n. 98 at art. 18; Free Trade Agreement, US-Bahrain, *supra* n. 98 at art. 15; Free Trade Agreement, US-Oman, *supra* n. 98 at art. 16; Free Trade Agreement, US-Singapore, *supra* n. 98 at art. 17; Free Trade Agreement, US-Morocco, *supra* n. 98 at art. 16; CAFTA, *supra* n. 98 at art. 16.

a fund to improve labor rights. Failure to pay the assessment can result in the suspension of benefits.¹¹¹

The most recent FTAs require that the parties adopt and maintain domestic labor law consistent with ILO core labor standards.¹¹² In the event of non-compliance, the dispute may eventually be referred to arbitration and failure by the parties to agree on implementation of the arbitrators' report may result in suspension of benefits.¹¹³

Thus, the content of the labor obligation, as well as the sanctions associated with non-compliance, have been progressively improved. Moreover, with the exception of the US-Jordan FTA, all other FTAs have a compliance mechanism which can be initiated by a third party submission.¹¹⁴ What has been the track record of compliance?

A recent study determined that much of the improvement in labor standards can be attributed to ex ante compliance actions by nations hoping to become trade partners.¹¹⁵ Prospective trade partners improve domestic labor standards "on their belief that, holding other factors constant, having stronger labor protection than other states increases the likelihood of entering into a [FTA] negotiation with a fair trade state and the likelihood of having a negotiated [FTA] ratified."¹¹⁶ For example, Morocco enacted comprehensive labor law reform in 2004 before entering into its FTA in 2006.¹¹⁷ Similarly, in January 2005 the U. S. trade representative indicated that the US would not conclude an FTA with Oman until it had addressed worker rights issues.¹¹⁸ In July 2006 the Omani government "issued a royal decree on workers' rights aimed in part at winning congressional support for" the FTA.¹¹⁹ Panama is another example of a country which responded to US trade representative

¹¹¹ Free Trade Agreement, US-Chile FTA, *supra* n. 98 at art. 22; Free Trade Agreement, US-Australia, *supra* n. 98 at art. 21; Free Trade Agreement, US-Bahrain, *supra* n. 98 at art. 19; Free Trade Agreement, US-Oman, *supra* n. 98 at art. 20; Free Trade Agreement, US-Singapore, *supra* n. 98 at art. 20; Free Trade Agreement, US-Morocco, *supra* n. 98 at art. 20; CAFTA, *supra* n. 98 at art. 20.

¹¹² Trade Promotion Agreement, US-Peru, *supra* n. 99 at art. 17; Trade Promotion Agreement, US-Panama, *supra* n. 99 at art. 16; Free Trade Agreement, US-Korea, *supra* n. 99 at art. 19; Free Trade Agreement, US-Colombia, *supra* n. 99 at art. 17.

¹¹³ Trade Promotion Agreement, US-Peru, *supra* n. 99 at art. 21; Trade Promotion Agreement, US-Panama, *supra* n. 99 at art. 20; Free Trade Agreement, US-Korea, *supra* n. 99 at art. 22; Free Trade Agreement, US-Colombia, *supra* n. 99 at art. 21.

¹¹⁴ ILO, *supra* n. 9 at 32-33 Table 2.1.

¹¹⁵ Moonhawk Kim, *Ex Ante Due Diligence: Formation of PTAs and Protection of Labor Rights*, 56 INT'L STUD. Q. 704 (2012).

¹¹⁶ *Id.* at 717.

¹¹⁷ *Id.* at 714; *see also* Rogowsky & Chyn, *supra* note 96 at 17.

¹¹⁸ Gary Yerkey, *United States to Shelve Trade Accords With Oman, UAE Absent Worker Protections*, 8 Daily Lab. Rep. (Bloomberg BNA) A-9 (Jan. 12, 2005).

¹¹⁹ Gary Yerkey, *Oman Issues Decree on Workers' Rights In Bid to Win Congressional Support for FTA*, 133 Daily Lab. Rep. (Bloomberg BNA) A-8 (July 12, 2006); *see also* Rogowsky and Chyn, *supra* n. 96 at 21-22.

concerns over labor rights issues by enacting a series of reforms prior to US ratification of their FTA.¹²⁰

Colombia presents a case of both pre-ratification and post-ratification improvements. The US and Colombia negotiated a Labor Action Plan (LAP) prior to the ratification of the FTA to address deficiencies in Colombian protection for worker rights. The Colombian Government created a new Labor Ministry and approved a budget to fund the hiring of the first 100 inspectors. It also established an educational out-reach program to promote awareness of a new system for citizen labor complaints.¹²¹ The government issued a decree to grant collective bargaining rights to public sector workers and enacted legislation to prohibit discrimination based on race, ethnic origin, religion, nationality, political ideology, gender and sexual orientation.¹²² The government also enacted criminal penalties, including fines and imprisonment, for employers which interfere with worker freedom to form trade unions.¹²³

After the FTA was ratified in October, 2011, representatives of the US and Colombia have held meetings at both the technical and senior levels to monitor continued compliance with the LAP and Colombia has been working with the ILO to develop its capacity for enforcing labor law.¹²⁴ Colombia continued to hire additional labor inspectors, trained police to investigate violence against trade union members and leaders and enacted new legislation dealing with unlawful subcontracting of work.¹²⁵ Given the long history of internal armed conflict within Colombia including violence against trade unionists, challenges remain in addressing effective protection for worker rights. The trade union movement in both the US and Colombia continue to highlight deficiencies and pressure the governments to take appropriate corrective action.¹²⁶

¹²⁰ ILO, *supra* note 94 at 39; WHITE HOUSE, Labor protections and the U.S.-Panama Trade Promotion Agreement, http://www.whitehouse.gov/sites/default/files/panama_trade_agreement_labor.pdf.

¹²¹ OFFICE OF THE U.S. TRADE REPRESENTATIVE, Colombian Action Plan Related to Labor Rights (2011), http://www.ustr.gov/webfm_send/2787.

¹²² OFFICE OF THE U.S. TRADE REPRESENTATIVE, Recent Labor Rights Advances in Colombia (2011), <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/october/recent-labor-rights-advances-colombia>.

¹²³ U.S. DEPT. OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, REPUBLIC OF COLOMBIA, LABOR RIGHTS REPORT 16 (2011), http://www.dol.gov/ilab/reports/pdf/colombia_LRR.pdf.

¹²⁴ OFFICE OF THE U.S. TRADE REPRESENTATIVE, Update: The Colombian Labor Action Plan: Three Years Later (2014), <http://www.ustr.gov/sites/default/files/Colombia%20Labor%20Action%20Plan%20update%20final-April2014.pdf>.

¹²⁵
Id.

¹²⁶ AFL-CIO, THE COLOMBIAN ACTION PLAN RELATED TO LABOR RIGHTS (July 2012), <http://www.aflcio.org/content/download/38251/594971/report+version+2+no+bug.pdf>; AFL-CIO, MAKING THE COLOMBIA LABOR ACTION PLAN WORK FOR WORKERS (April 2014), http://www.aflcio.org/content/download/123141/3414471/April2014_ColombiaReport.pdf.

In terms of other post-ratification initiatives, a Peruvian trade union filed a submission under the US-Peru FTA with the US national contact point alleging the failure by a public sector agency to comply with domestic collective bargaining laws. After a review of the situation and discussions between the parties, the Peruvian government took steps to clarify the law regarding collective bargaining and an arbitration panel issued an award. The Peruvian trade union credited the review by the US as encouraging Peru to take adopt positive steps to address the problem.¹²⁷

In 2011 the AFL-CIO filed a submission under the US-Bahrain FTA alleging violations of freedom of association as well as anti-union, religious and political discrimination.¹²⁸ After a review, the US Secretary of Labor issued a report concluding that Bahrain did not comply with its commitments under the FTA and recommended consultations with the government pursuant to the compliance mechanisms in the FTA. The report did note, however, that the Bahraini government had taken steps to insure the rehiring of illegally fired workers.¹²⁹

A joint submission filed by the AFL-CIO and several Guatemalan trade unions alleged failure by Guatemala to enforce their domestic labor laws, specifically with regard to anti-union discrimination and violence as well as violations of the right to engage in collective bargaining.¹³⁰ After a review, the U.S. Secretary of Labor requested consultations with Guatemala regarding its apparent failure to effectively enforce its laws.¹³¹ Consultations were held with a view to reaching agreement on an enforcement plan. When agreement could not be reached, the U.S. Government requested the convening of an arbitral panel pursuant to the dispute mechanisms in CAFTA.¹³² The panel was established, but its work suspended as Guatemala and the US reopened negotiations for an enforcement plan which was subsequently agreed

¹²⁷ OFFICE OF TRADE AND LABOR AFFAIRS, U.S. DEPT. OF LABOR, PUBLIC REPORT OF REVIEW OF OFFICE OF TRADE AND LABOR AFFAIRS U.S. SUBMISSION 2010-13 (Peru) (2012), *available at* <http://www.dol.gov/ilab/reports/pdf/PeruSubmission2012.pdf>; ILO, *supra* note 94 at 51-52.

¹²⁸ AFL-CIO Submission, Concerning the Failure of the Government of Bahrain to Comply with its Commitments under Article 15.1 of the US-Bahrain Free Trade Agreement (2011) *available at* <http://www.dol.gov/ilab/reports/pdf/BahrainSubmission2011.pdf>.

¹²⁹ OFFICE OF TRADE AND LABOR AFFAIRS, U.S. DEPT. OF LABOR, PUBLIC REPORT OF REVIEW OF U.S. SUBMISSION 2011-01 (Bahrain)(2012), *available at* <http://www.dol.gov/ilab/reports/pdf/20121220Bahrain.pdf>.

¹³⁰ AFL-CIO et al. Submission, Concerning the Failure of the Government of Guatemala to Effectively Enforce its Labor Laws (2008), *available at* <http://www.dol.gov/ilab/reports/pdf/GuatemalaSub.pdf>.

¹³¹ Letter from Ron Kirk, U.S. Trade Representative and Hilda Solis, U.S. Secretary of Labor, to Erick Echeverria, Minister of Economy, Guatemala, and Edgar Rodriguez, Minister of Labor and Social Protection, Guatemala (July 30, 2010), *available at* <http://www.dol.gov/ilab/reports/pdf/20100730-Letter.pdf>.

¹³² Press Release, Office of the U.S. Trade Representative, U.S. Trade Representative Ron Kirk Announces Next Step in Labor Rights Enforcement Case Against Guatemala (August, 2011), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2011/august/us-trade-representative-ron-kirk-announces-next-ste>.

to.¹³³ While the enforcement plan was being negotiated, Guatemala hired 100 additional labor inspectors and five additional attorneys in the labor inspection office.¹³⁴ The enforcement plan was to be implemented over a period of six months, with the possibility for an additional six month extension.¹³⁵ Upon expiration of that extension period, the AFL-CIO sent a letter to the U.S. Trade Representative requesting that arbitration be reinstated, asserting that Guatemala was still failing to effectively enforce its laws.¹³⁶ While noting that Guatemala had made some improvements, the Trade Representative indicated that it has not fully implemented the terms of the enforcement plan, but gave Guatemala an additional four months extension while visiting the country for talks regarding implementation.¹³⁷

Even in the case of the Jordan-US FTA where the governments had pledged not to use the enforcement mechanisms available under the agreement to settle disputes, improvements were made regarding worker rights protections in response to a complaint filed by the AFL-CIO and the National Textile Association.¹³⁸ Jordan increased inspections in the garment sector, closed a factory where labor violations were occurring, increased its minimum wage and drafted a new labor law. Additionally, USAID funded an effort to reform and improve the operations of the Jordanian Ministry of Labor.¹³⁹

As mentioned earlier, the EU approach to labor standards in FTAs is mainly promotional. Their agreements emphasize technical assistance and consultation.¹⁴⁰ A recent study of the effectiveness of EU promotional compliance efforts found that,

¹³³ News Release, U.S. Dept. Of Labor, Acting US Trade Representative Marantis and Acting Labor Secretary Harris Announce Groundbreaking Labor Rights Enforcement Agreement with Guatemala (April 11, 2013), *available at* <http://www.dol.gov/opa/media/press/ilab/ILAB20130691.htm>.

¹³⁴ Mutually Agreed Enforcement Action Plan between the Government of the United States and the Government of Guatemala ¶ 3, *available at* <http://www.dol.gov/ilab/reports/pdf/0413GuatEnforcementPlan.pdf>.

¹³⁵ *Id.* at 13 ¶18.

¹³⁶ Brian Flood, *Labor Groups Say Guatemala Labor Practices Violate Trade Agreement, Call for Arbitration*, 78 Daily Lab. Rep. (Bloomberg-BNA) A-4 (April 23, 2014).

¹³⁷ Rossella Brevetti, *U.S. Trade Representative Pushes Guatemala to Abide by International Labor Commitments*, 28 Lab. Rel. Wkly (Bloomberg BNA) 1694 (Aug. 6, 2014).

¹³⁸ Request by the AFL-CIO and the National Textile Association to the United States to Invoke Consultations under the United States-Jordan Free Trade Agreement to Address Jordan's Violations of the Agreement's Labor Rights Provisions (Sept. 21, 2006)(on file with the author, available through 184 Daily Lab. Rep. A-112, Sept. 22, 2006).

¹³⁹ INSTITUTE FOR GLOBAL LABOUR AND HUMAN RIGHTS, *USAID To Oversee Jordan Labor Reforms, Talks Under FTA Unlikely* (Apr. 20, 2007)(reprinted from Inside U.S. Trade), <http://www.globallabourrights.org/press/usaaid-to-oversee-jordan-labor-reforms-talks-under-fta-unlikely>; See David A. Gantz, *Labor Rights and Environmental Protections Under NAFTA and Other U.S. Free Trade Agreements*, 42 U. MIAMI INTER-AM. L. REV. 297, 326-7 (2011).

¹⁴⁰ See generally, ILO *supra* note 95 at 69-71 and Table 3.2.

while there is initial improvement during the negotiation stage of FTAs, the “greatest advancement in labor rights is exhibited ex post, after the [FTA] is in force.”¹⁴¹

Similar to the GSP mechanism, FTAs have the advantage over CoCs in terms of country coverage, enforcement and labor standards coverage. When labor standards are improved and enforced pursuant to FTAs, the benefits are realized throughout the labor market. As with GSP, almost all US FTAs have a mechanism to allow third parties to initiate a review process for compliance. Thus, those parties with an interest in ensuring the effectiveness of labor rights (i.e. trade unions and human rights NGOs) have a role in implementation. The submission mechanism has also created opportunities for cross-border trade union cooperation as evidenced by joint submissions under the NAALC and CAFTA.¹⁴² Both pre- and post-negotiation improvements to labor conditions indicate the relative effectiveness of FTAs as instruments for ensuring compliance with labor standards, although there is clearly still room for more robust compliance mechanisms. Finally, most of the FTAs use the ILO core labor standards as the metric for guaranteeing labor rights.

VIII. CONCLUSION

On both a practical and philosophical level, the GSP/FTA mechanisms are superior to CoCs for ensuring protection of worker rights. While political considerations often influence the ultimate imposition of penalties under GSP/FTAs, the evidence indicates that the review process itself influences governments to positively improve labor standards. Trade sanctions have been imposed under the GSP system; thus the threat of the review system (with the implied possibility of sanctions) is itself relatively credible. There is little evidence, however, to support the proposition that CoC monitoring systems have appreciably improved working standards or that the enforcement mechanisms have been invoked often enough to constitute a credible deterrent to suppliers. There is also greater transparency and accountability to governmental monitoring systems which is missing from most corporate CoC monitoring. Moreover the GSP/FTA enforcement process strengthens trade unions allowing them to play a role in initiating the process, as compared to the top down approach of CoCs which envisions no role for third party enforcement measures. The content of the labor conditionality provisions in governmental programs almost always include the ILO core labour standards (including FOA and CB) while CoCs are much less likely to focus on FOA and CB. Lastly, the effect of any improvements in labor standards is widely distributed throughout the economy under the GSP/FTA whereas any improvements under CoCs proceed company by company.

¹⁴¹ Postnikov & Bastiaens, *supra* note 102 at 935.

¹⁴² Joint Submission under NAALC Filed by U.S. Communications Workers Union and the Union of Telephone Workers of Mexico in U.S. NAO Submission 9602 (1996), *available at* http://www.dol.gov/ilab/submissions/pdf/US_9602_Maxi-Switch_submission.pdf; Joint Submission Filed under NAALC by, *inter alia*, the Canadian Auto Workers and the International Brotherhood of Teamster (U.S.) in U.S. NAO Submission 9703 (1997), *available at* http://www.dol.gov/ilab/submissions/pdf/US_97-03_ITAPSA_submission.pdf; Joint Submission Filed under NAALC by, *inter alia*, the Mexican Union of Electric Workers, the AFL-CIO and the Canadian Autoworkers in U.S. NAO Submission 2011-02 (2011), *available at* <http://www.dol.gov/ilab/submissions/pdf/MexicoSubmission2011.pdf>; Joint Submission of the AFL-CIO and Six Guatemalan Unions under CAFTA (2008), *available at* <http://www.dol.gov/ilab/reports/pdf/GuatemalaSub.pdf>.

IFAs, like CoCs, are also limited to a company-by-company impact; and indeed that impact may be even more limited given that the number of MNCs with IFAs is fewer than MNCs with CoCs. However, IFAs are the product of joint decision-making and agreement between management and representatives of the workers, unlike CoCs which are unilaterally imposed by management. Like the GSP/FTA systems, IFAs encourage cross-border trade union cooperation which helps to empower the workers and their representatives. Enforcement does not rely solely on corporate willingness, but involves direct action by trade unions. Similar to the GSP/FTA, all IFAs reference the obligation by the corporation to respect FOA and CB.

This is not to say that CoCs should be abolished. The public advocacy which led to their creation has succeeded in raising awareness of labor conditions in the MNC supply chain as well as labor conditions throughout the world generally. While certainly not the best method for ensuring protection for worker rights, their continued existence does not necessarily impede the ability to pursue more powerful and effective strategies, unless, of course, corporations and recalcitrant governments use CoCs as a shield to prevent the use of better mechanisms by arguing that CoCs are sufficient to the task.

The bottom line for ensuring protection for worker rights is the empowerment of workers to voice their concerns and to act to safeguard those concerns on a daily basis without fear of reprisal. This requires protection for workers to act together (whether through a trade union or other associational body) to determine their interests, voice those interests to the employer and participate in concerted action to make their voices heard. Which of these mechanisms is most likely to achieve that aim? CoCs are top-down, paternalistic systems responding to public outcry. IFAs strengthen and support worker voice but are limited by their coverage – both in terms of numbers of MNCs which are signatories and the limited breadth of their impact. GSPs and FTAs, while political tools aimed at improving trade relations, have as a major corollary benefit the enhancement of worker rights, including FOA and CB, along with an ability for trade unions and worker rights groups to actively monitor their implementation whether through initiation of complaints (in the U.S. system) or through social dialogue and technical assistance (in the EU system).

None of the discussed mechanisms are perfect, but one should not let the perfect be the enemy of the good. All can be useful – some more than others – in educating the public to the importance of worker rights, holding MNCs' feet to the fire in ensuring worker rights, and creating incentives for national governments to enact legislation for protecting worker rights and ensuring effective enforcement.

