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## SUSTAINING WORKERS' BARGAINING POWER IN AN AGE OF GLOBALIZATION Institutions for the meaningful enforcement of international labor rights

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### I. Introduction

The current age of globalization has been built on international ground rules that protect rights of property, contract, and investment. The rules are enforceable through hard economic sanctions authorized by the World Trade Organization (WTO) in the case of trade and by international arbitrators in the case of investment and commercial contracts. This is the model of a 19th century, laissez-faire constitution—protecting commercial and corporate interests, but not social and personal rights. If a political opportunity arises to add social rights to the international economic constitution, we should seize it, as progressives did in the domestic construction of social states in the 20th century.

In May 2007 President Bush and congressional leaders announced a tradeoff that many heralded as a breakthrough in trade policy. Congress would support free trade agreements, so long as core labor rights were included in the agreement's main text and were enforceable by the same dispute mechanism covering the agreement's commercial rights. In the 2008 presidential campaign, then-candidate Obama announced his commitment to strengthening the labor rights provisions along the same lines.

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Many commentators maintain that this tradeoff provides the golden resolution of debates over globalization. We will reap the overall benefits of free trade, while ensuring protection of those who might otherwise suffer under the rigors of international competition. To put it differently, the tradeoff ensures that the global economic pie will expand *and* be distributed fairly.

This paper argues that enforcing labor rights through trade legislation and trade agreements is, in principle, the right way to go. Stated in these broad terms, the paper agrees with the policy tradeoff just described. But while it would be comforting to say simply that the devil is in the technical details, in fact more than mere legalistic details are at stake. The mantra of the day—“put core labor rights in trade agreements”—raises as many conceptual and institutional questions as it answers.

In fact, existing U.S. trade legislation already requires U.S. trading partners to comply with internationally recognized labor rights,<sup>1</sup> and already authorizes imposition of sanctions or withdrawal of benefits against countries that fail to comply.<sup>2</sup> A variety of private monitoring organizations and corporate social-responsibility departments also declare that they will impose unilateral “sanctions” (withdrawal of purchase orders by the corporations) against overseas suppliers that fail to comply with labor rights and standards. Several existing bilateral and regional trade agreements already commit the signatory states either to promote or to actually comply with enumerated labor rights, enforceable by specified procedures and sanctions. Additionally, the International Labor Organization (ILO), a specialized agency of the United Nations, promulgates and “supervises” compliance with an international labor code that binds many countries. The ILO created the “core labor rights” to which recent proposals refer.

The American labor movement, together with its peers in other countries, fought for these initiatives. Indeed, without their efforts, global labor rights would not even be on the table. And American unions have collaborated with their overseas counterparts in making practical use of those tools, pushing existing institutions to expand their interpretation and enforcement of labor rights and standards. Labor unions, students, and others have also pushed for new ways to monitor global supply chains,

going beyond corporations’ voluntary codes of conduct and managers’ often supine monitoring of those codes.

Yet, existing statutes, private monitoring systems, trade agreements, and international organizations have proven ineffective in improving conditions for real workers in real workplaces, except in rare, erratic instances. Indeed, the infrequent and sporadic successes reveal the critical defects in the existing model of linking core labor rights with trade laws, management systems, and treaties. That model fails to (1) continuously (rather than sporadically) investigate U.S. trading partners’ and corporations’ compliance with labor standards; (2) focus investigations on well-specified standards (rather than highly abstract “core labor rights,” the specific meaning of which is highly indeterminate); (3) place real constraints on otherwise highly discretionary executive branch and corporate decisions about whether or not to impose sanctions that are powerful enough to change the behavior of U.S. trading partners’ labor-enforcement agencies and their employers, and (4) establish transparent, democratic institutions, in which worker representatives participate, to specify and enforce labor rights and standards.

Is it possible to design institutions that would overcome these defects? Can we design institutions that would rigorously and continuously investigate the labor standards actually enforced in the workplaces of our trading partners? Can we design institutions that will promulgate standards that are specific enough to provide real guidance to investigators, to our trading partners’ enforcement agencies, to corporate managers, to our own executive branch, which must decide whether U.S. trading partners are compliant, and to other domestic bodies (legislative, administrative, and judicial) that can review and constrain such executive branch decisions? Can such institutions be sufficiently nimble and responsive to ensure that the specific standards provide ever-greater worker protection as productivity rises and production systems change? Can the institutions be not technocratic agencies but rather democratic bodies, incorporating worker participation and representation in all key stages of setting and enforcing standards?

From a policy perspective, the fundamental question is: what new institutions should we seek in future political initiatives? That is, what are the specific terms of trade agreements and trade legislation—the protocols

for generating specific criteria of compliance with labor rights, and the specific institutions for ensuring compliance—that would make the agreements and legislation politically acceptable to those of us who are just as concerned about the distributive consequences of trade and capital flows—the social and political consequences of globalization—as about the growth potential of a liberalized global economy?

This paper answers that question in two stages. First, it proposes “ideal” rules and institutions—provisions for enforcing global labor rights that would generate substantial, sustained increases in workers’ bargaining power and actual improvements in working conditions. Second, it proposes “incremental” reforms. The incremental reforms would produce more limited gains for workers, but they point toward, and embody some but not all of the features of, the ideal rules and institutions. Even these incremental proposals go substantially beyond the terms of recent, ostensibly breakthrough trade agreements and the reforms that others have proposed (although the concrete proposals in this field have been surprisingly few and unspecific).<sup>3</sup>

In light of this two-stage analysis, the political question can be reframed as: What set of labor rules and institutions—the ideal, the incremental, or something in between—is a sufficient precondition for supporting trade agreements and legislation predictably stamped with robust protection for investors, corporations, and commercial interests?

If we do not carefully focus on this question, we may mistakenly view small steps as big leaps or settle for incremental steps that do not point toward our ultimate destination.

Section II of this paper makes the normative case for incorporating labor rights and standards in the fundamental ground rules of the global economy. Section III gives an overview and critical analysis of existing institutions.

Section IV and V are the programmatic heart of the paper. Section IV enumerates the key features of new institutions that would remedy the defects of the existing models canvassed in Section III. Section V then applies the key institutional features to the concrete categories of unilateral trade legislation, bilateral and regional trade agreements, and global institutions. That section

offers ideal and incremental policy proposals for each of these categories.

Finally, Section VI provides an illustration of the practical implications of this paper’s reform proposals. A reader who wants a summary of the key features of the proposals and their practical consequences could jump straight to Section VI. That section describes a hypothetical case in which labor and human rights organizations seek to use a bilateral trade agreement to enforce labor rights against a trading partner of the United States. The section compares the way a claim would proceed under the existing template for bilateral trade agreements (the U.S.-Peru Agreement) with the way the same claim would proceed under a bilateral agreement that conformed with this paper’s proposed reforms. In the hypothetical case, labor and human rights organizations file complaints against Peru for gender discrimination, employers’ failure to recognize majority unions, and for prison labor.

## **II. Background: Domestic and international inequality, and decline in workers’ bargaining power**

We live in a new Gilded Age—an age of gross inequalities, declining bargaining power, and increased risk for most of the working population. These are not just domestic trends. They also occur within and across economies overseas, restraining wage growth and limiting the improvements in working conditions across global labor markets. Even when global economic growth increases wages for some workers, their earnings do not rise proportionately with gains in productivity and profits. The world is witnessing a startling decrease in the ratio of returns to labor (wages) relative to returns to managers and investors (profits), and an unusual disconnect between growth in labor productivity and relative stagnation in wages.

Today, the top 1% of Americans, whose average annual income is \$1.27 million, receives 23% of the nation’s income, and the top 10% receives 49%—the largest shares since the roaring ’20s. Meanwhile, in just the last 25 years, the income share of the bottom 80% has decreased by 7%. In the richest country in history, 36.5 million people live in poverty, and another 57 million are “near poor” (with annual incomes of \$27,000 to \$47,000 for families

of four). The bottom half of American households has an average annual income of about \$25,000.

While corporate profits as a percentage of national income have reached a 56-year high, the median hourly wage (adjusted for inflation) rose only from \$13.91 in 1973 to \$15.11 in 2007. Male workers' total annual earnings are actually falling from generation to generation. Today, men in their 30s earn \$35,010 on average. Twenty-five years earlier, their fathers earned \$40,210 in inflation-adjusted dollars. At the same time, swings in household income are increasingly volatile—twice as likely today as 25 years ago to drop by as much as 50% in one year.

Disparities in wealth are even greater than disparities in income. In 1962, the wealth of the wealthiest 1% of the population was 125 times that of the median. The ratio in 2004 was 190. Over the same period, the wealth of the top 20% rose from 15 times the median to 23 times. The share of wealth held by the bottom 80% fell from 19.1% to 15.3%.

In the same period, the percentage of the workforce that enjoys union representation has fallen from 35% to 12%. This accounts in significant part for workers' reduced bargaining power in the workplace. It also accounts for much of the diminution in workers' political power and consequent erosion of social safety nets for ordinary citizens.

Domestic political economy is not the only culprit. The rapid integration and liberalization of global markets in the last quarter century contributed to the shift in relative power and factor shares between capital and labor. Global markets are now more integrated than at any other time in history. Tariffs and non-tariff barriers are lower than ever, and the volume of capital flows is enormous. Even with continuing restrictions on cross-border flows of labor, global labor markets are increasingly integrated. Increased trade and capital mobility place workers of one country in greater competition with those of another, even when workers themselves cannot move across borders. In the last two decades, the integration of global labor markets has proceeded at an accelerating pace. Billions of new workers have, directly or indirectly, entered global labor markets.

As recently as the 1990s, there was much resistance by economists and centrist policy analysts to the idea that

global labor markets exert downward pressure on American and overseas wages. Today, even the cheerleaders of globalization acknowledge that that phenomenon is real. After all, basic economic theory tells us that if there is a radical increase in the relative supply of a resource (in this instance, the supply of workers relative to the supply of capital), the relative price of that resource (wages relative to profits) will fall.

This phenomenon creates a severe problem not just for American workers. In the current period of globalization, inequality has widened sharply in most countries, including major trading partners like Mexico, China, India, and Argentina. The earnings of ordinary workers in these countries have stagnated or have increased much less rapidly than productivity and output, even when international trade and investment have greatly increased incomes for those in the upper economic strata. The top 1% of the world's population holds approximately 40% of the world's wealth. The bottom 50% owns 1.1%.

Inequalities across countries have also increased substantially. Today, incomes in rich countries are 50 times higher than in poor countries. A century ago, the ratio was 10 to 1. As the wages of the poorest countries diminish relative to wages in other countries, greater downward pressure is placed on the latter in an integrated global labor market.

Domestic and international inequality contributed substantially to the current economic crisis. Suppression of wages and purchasing power in fast-growing Asian economies, particularly China's, generated a so-called "savings glut." The resulting capital flow to the United States fed irresponsible lending and packaging of risky assets by financial institutions. It also sustained the excessive indebtedness of U.S. workers as their own earnings stagnated.

Even though economists increasingly acknowledge what their own theories would predict—that the bargaining power of workers relative to investors has weakened globally—they often take those simplified theories as the end of the analysis. Market fundamentalists fail to analyze what social scientists have long documented: namely, that workers' wages and bargaining power are determined by institutional variables as much as by the simple variables of supply and demand.

In all countries, domestic politics has, to varying degrees and over the course of many decades, created complex institutions that empower or disempower workers. Worker-empowering institutions at the domestic level depend, to a large degree, on the protection of workers' basic rights—rights against forced labor, rights against child labor, rights against hazardous work, rights against discrimination, and most fundamental of all, workers' freedom of association. Without protection of workers' most fundamental right to act collectively to defend their own interests at the workplace and in the political arena, there is little possibility that the political economy will sustain institutions that systematically promote economic equality and workers' well-being.

The United States could adopt many domestic policy reforms to increase workers' bargaining power in the labor market and workers' organized power in the political system. These include: affording genuine protection of workers' right to unionize; implementing macro-economic policies that sustain full employment; enacting a minimum wage that supports a non-poverty standard of living and increases automatically with inflation; and providing high levels of unemployment benefits and retraining linked to job-creation policies to all workers displaced by economic misfortune, whether trade-related or not, for the entire duration of their unemployment.

Globalization has not, in fact, entirely disabled governments from regulating their labor markets through domestic policies such as these, as market fundamentalists claim.

Nonetheless, there are at least four strong reasons for reforms that promote effective cross-border enforcement of labor rights at the bilateral, regional, and international levels. First, the impact and sustainability of domestic policy reforms will be fortified by such complementary reforms in international labor markets. While globalization does not block domestic labor-market reforms, it does limit their effectiveness. Second, the liberalization of trade and capital flows is itself a direct, significant source of domestic inequality, in the absence of international institutions that strongly enforce labor rights. Third, enforcing worker rights and thereby increasing workers' earnings and purchasing power will help reverse one of the significant causes of the current economic crisis, as just explained. Finally, the enforcement of global labor

rights is, of course, an important value in its own right, apart from any impact on domestic policy, domestic and global equality, and macro-economic stability. Labor rights are fundamental, universal human rights, codified in the Universal Declaration of Human Rights of 1948 and other basic charters of human rights.

The United States Congress has enacted trade legislation based on each of these four rationales. It is true that, in the last three decades, U.S. foreign economic policy has been guided predominantly by the neoliberal model—the model of a *laissez-faire* constitution, protecting only global rights of property, contract, and investment. However, there is an often neglected counter-current in congressional policy. The labor rights provisions of U.S. trade legislation authorize the president to use economic leverage to secure worker rights overseas. (The strengths and weaknesses of that legislation are discussed in Section III.) When it enacted that legislation, Congress stated explicitly that it aimed to safeguard fundamental human rights:

The United States has embraced labor rights, in principle, as well as political rights for all of the people of the world upon adoption of the Universal Declaration of Human Rights in 1948. The Declaration specifically affirms for each person the right to a job, the right to form and join unions, and the right to an adequate standard of living.<sup>4</sup>

The aim of protecting human rights cannot be dismissed as “protectionist,” as free traders like to say. The goal of labor rights provisions in U.S. trade legislation is not to deny jobs and economic advancement to workers overseas. To the contrary: when U.S. trading partners safeguard basic worker rights, they can enjoy access to the enormous U.S. market and create the kind of jobs that honor human rights and promote equitable economic growth overseas and at home.

In this view, securing worker rights overseas is concordant with, and indeed a precondition to, protecting the rights and bargaining power of U.S. workers. Congress understood that domestic equality and domestic labor market policies are undermined by “the lack of basic rights for workers in many [less developed countries],” which



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is “a powerful inducement for capital flight and overseas production by U.S. industries.”<sup>5</sup>

Congress also recognized—correctly—that a global economic constitution lacking social rights will not produce equitable and sustained economic development, whether for developing or developed countries:

[P]romoting respect for internationally recognized rights of workers is an important means of ensuring that the broadest sectors of the population within [developing countries] benefit from [access to U.S. markets]. The capacity to form unions and to bargain collectively to achieve higher wages and better working conditions is essential for workers in developing countries to attain decent living standards and to overcome hunger and poverty. The denial of internationally recognized worker rights in developing countries tends to perpetuate poverty, to limit the benefits of economic development and growth to narrow privileged elites, and to sow the seeds of social instability and political rebellion.<sup>6</sup>

And when the fundamental right of association is denied, a crucial pillar of democratic governance is lost. The right to form autonomous associations in civil society is a precondition to resisting state tyranny and mobilizing citizens for participation in pluralist political institutions. In recent years, autonomous worker organizations helped democratize such countries as South Africa, Brazil, Poland, and South Korea—a fact that is not lost on leaders of autocratic regimes around the world.

The U.S. commitment to promoting these rights should not be falsely labeled U.S. imperialism. Just as individual consumers can choose not to buy goods made under sweatshop conditions, so U.S. citizens, through their democratic representatives, can decide to direct the country’s purchasing power to countries that safeguard ethical production.<sup>7</sup> After all, in the absence of such a policy, American consumers and investors are actively supporting exploitative production overseas. That is, the United States is already inextricably implicated with working conditions abroad. The question is whether we will complacently profit from exploitation or instead take

moral and political responsibility for our economic relationships with overseas workplaces.

In the development model embodied in the labor rights provisions of U.S. trade legislation, then, the global integration of labor markets, capital markets, and markets in goods and services is not intrinsically a bad thing. If worker rights are vigorously enforced, then the impoverished, underemployed, unskilled, or semi-skilled—whether in China, India, Indonesia, Mexico, or the United States—may improve their standard of living and generate new domestic demand in a virtuous cycle of equitable development, while providing new markets for investors and producers, including those in the United States.

More fundamentally still, coercive labor—not just slavery and indentured servitude, which still scar our world to a surprising degree, but all forms of highly exploitative work—remains the world’s greatest obstacle to free, dignified human development and to creative, innovative economic progress.<sup>8</sup>

It is now vital to bring worker-empowering institutions into the sphere of global labor markets to match the international protections for trade and capital. Yet, as discussed below, putting abstract fundamental rights on paper produces actual gains for workers only when well-designed institutions are capable of generating detailed criteria and performance measures for compliance in the specific context of local production systems and local worker communities, enabling governments and employers to know concretely what it takes to fulfill the rights, and only when those institutions create high-powered incentives to comply with such criteria and measures.

And institutional redesign is sure to fail if it is a purely technocratic exercise. Instead, legitimate worker organizations in all affected countries must have a cardinal place in the design and operation of the institutions. Without comprehensive worker participation, the institutions are bound to wither on the vine. Workers and their organizations are the only powerful stakeholder with a real interest in enforcing worker rights in a sustained and effective way.

These are the central lessons of decades of experience in the enforcement of global labor rights (and are summarized in the following section).

### **III. What is the experience with enforcing international labor rights?** ***Experience with international organizations***

The International Labor Organization (ILO) is the specialized agency of the United Nations vested with authority to promulgate fundamental (and other) worker rights, and it has done so—most recently in the 1998 Declaration of Fundamental Principles and Rights at Work.<sup>9</sup> International financial institutions, such as the World Bank Group, have also promulgated protocols for borrowing entities' compliance with labor rights.

The world has 90 years of experience with the ILO system. The governance of the ILO is tripartite. That is, three groups participate in ILO decision-making—governments, trade unions, and business federations. Each of the 175 member states sends four delegates to the annual meetings of the International Labor Conference, which is the ILO's law-making body. For each member state, there are two governmental delegates, one trade union delegate, and one business delegate.

The ILO has promulgated 188 binding Conventions and 199 non-binding Recommendations. Twenty-nine of the Conventions have been withdrawn or shelved. Nine are deemed “core” Conventions, addressing four fundamental rights: rights of association and collective bargaining, freedom from forced labor, freedom from child labor, and rights against discrimination. Some of the remaining Conventions address important issues to all workers, such as workplace health and safety. Others focus on fairly narrow categories of workers. Indeed, nearly one-third of active Conventions apply only to seaman or fisherman. Other Conventions deal with outdated social concerns such as night-work for women.

Each member state is free to ratify or not ratify each Convention. Some countries, such as the United States, have ratified very few. Member states are required to file periodic reports on their compliance with ratified Conventions and their efforts to ratify the other Conventions. Reports must be filed every two years for core Conventions and every five years for other Conventions. Member states and employer or employee delegates can file complaints against another member state alleging failure to comply with a Convention which the state has ratified. Employer

and worker organizations, even if not ILO delegates, can file “representations” alleging violations of Conventions.

The ILO's “supervisory” bodies (specialized committees) issue various types of findings and recommendations in response to the reports, complaints, and representations. In the so-called “regular” supervisory process, a Committee of Experts reviews the member states' periodic reports and makes “observations,” which note discrepancies between the Conventions and domestic law. Some of the observations are discussed in the annual sessions of the International Labor Conference.

In response to complaints by one member state against another member state, the ILO may create a three-person Commission of Inquiry. Such Commissions are created rarely—only when the member state has repeatedly refused to address its persistent, serious violations of Conventions. The Commission's finding becomes binding if the member state chooses to acquiesce.<sup>10</sup> In response to “representations” filed by workers or worker organizations, the ILO may create a three-member tripartite committee to write a report that responds to the representation and the member state's response. If the member state does not respond adequately to the committee's recommendations, the committee will publish the representation and the response. If a representation raises a question of freedom of association, it will be referred to the Committee on Freedom of Association, comprised of a chairperson and representatives of workers, employers, and governments. If the Committee finds a violation, it recommends steps for compliance. The member state must file reports on its implementation of the recommendations. In some cases, the Committee may propose a “direct contacts” mission to visit the member state to speak with government officials, worker representatives, and employers.

Apart from these supervisory mechanisms, the ILO's secretariat (the International Labor Office) undertakes various kinds of technical assistance—for example, helping governments draft labor laws; doing research on workplace conditions; educating managers, unions, and workers on labor rights; and partnering with local actors in factory improvement programs, initiatives to reduce child labor, and human-resource development projects.

The ILO has done much good, especially through its research and technical assistance programs. But it has fallen short in making ILO Conventions a day-to-day reality in the world's workplaces. The reasons are well-known. First, the ILO does not deploy incentives for compliance, other than the "soft-law" tool of shaming governments by reporting on their violations. The one recent exception is telling: the ILO recommended that member states "review" their relations with and take "appropriate measures" against Myanmar—a small, powerless country that flagrantly repudiated the uncontroversial ILO norm against forced labor.<sup>11</sup> It is unimaginable that the ILO, as currently constituted, would authorize member states to take action against a powerful country for violations of freedom of association, discrimination, or workplace health and safety—for example, against China's repression of independent labor unions, or against the United States' failure to protect workers' right to organize. Indeed, the ILO is very unlikely to recommend action against a powerful country such as China even when it engages in widespread forced labor.

Second, the ILO's supervisory bodies are hesitant to probe actual, systematic implementation and enforcement of labor rights. The reporting mechanisms focus largely on whether the domestic law on the books measures up to ILO Conventions. Many countries simply ignore the reporting requirements. Others fill their reports with boilerplate or the text of statutory provisions that say nothing about actual enforcement. The Committee of Experts, which meets for a short time each year, cannot give close scrutiny to the reports of the 175 member states, let alone to the actual practices in those countries. And only a few substantive matters contained in the reports are actually aired in the International Labor Conference.

Third, the ILO's complaint mechanisms review only a small number of cases relative both to the number of member states and to the enormous range of subject areas covered by the Conventions. In the ILO's first 40 years, only one complaint was filed against a member state under the formal Article 26 complaint process. Six complaints, on average, were filed each subsequent decade.<sup>12</sup> In its entire 90 years, the ILO has established only 11 Commissions of Inquiry to rule on such complaints. After World War II, the ILO created the special

process, mentioned above, to address issues of freedom of association. In the past 55 years, the ILO has processed approximately 2,300 cases on freedom of association filed by labor unions against member states—about 42 cases per year, for all of its 175 member states. This amounts, on average, to *only one case every four years for each member state*. The practical incentive effect of such sparse dispute resolution—backed up only by the weak shaming effect of a notice published in committee reports—can have only minimal effect on a government's actual compliance with the innumerable aspects of workplace practices. This is especially true for authoritarian governments with the worst labor rights records.

Fourth, there is a deep conceptual limitation to the ILO's jurisprudence. Most of the ILO Conventions are written at a high level of generality—much more general than domestic statutes and regulations, let alone the body of actual, finely textured norms and practices in real workplaces. The Conventions (even when supplemented by ILO Recommendations) generally do not provide specific criteria or performance measures by which member states' compliance might be measured.

The ILO's "common law"—the committees' concrete elaboration of the abstractly worded Conventions—does give some specific content to the Conventions; and some of these more specific norms provide vital rebukes to certain of the worst forms of non-compliance by member states. In that respect, ILO Conventions and ILO supervisory mechanisms are indispensable. If ILO norms are incorporated into trade agreements or trade legislation, then those instruments might be deployed, at least on occasion, against some egregious failures in domestic compliance.

But the ILO's common law is still relatively generalized and fragmentary compared either to real workplace practices or to the specific regulations, judicial decisions, and administrative rulings of domestic labor law systems. This relative disengagement from the details of workplace practices and administrative systems means that the ILO cannot act as an engine for continuous, comprehensive improvement in domestic enforcement and in actual workplace conditions.

There are three main reasons for this relative disengagement from workplace reality and domestic enforcement



methods: First, as just noted, the ILO's "judicial" decisions are too few in number to generate a sufficiently detailed common law. Compare the trickle of cases processed by the ILO for 175 countries—as just noted, a single case on freedom of association every four years for each country, on average—with the annual flow of cases in the U.S. labor law system, for example. Although the U.S. system is not highly protective of workers' rights, it still processes *hundreds of thousands of cases each year* on rights of collective bargaining (through courts, the National Labor Relations Board, and arbitrators), on wages and hours (through federal and state courts and labor departments), on employment discrimination (federal and state courts and specialized administrative boards), on occupational safety and health (courts and administrative agencies), on unemployment insurance (courts and agencies), on workers' compensation (courts and agencies), and on other subject matters. A significant percentage of these cases yield elaborate judicial or administrative opinions that flesh out the more general terms of statutes and regulations, providing the specific guidance required by government enforcement attorneys, employer compliance managers, workers, and labor unions. For example, the standard treatise that summarizes these decisions—merely for the U.S. law of private collective bargaining—comprises more than 3,200 pages of fine print, providing very detailed, precise statements of legal criteria applicable to extremely detailed factual situations.<sup>13</sup> The comparable ILO treatise is less than 240 pages in large print, many of them devoted to general platitudes such as "justice delayed is justice denied" or to repeated statements of obvious, uncontroversial general norms such as a ban against violence or unjustified arrests.

Second, and related, the ILO supervisory bodies have insufficient capacity or experience with ground-level, proactive investigations and monitoring of actual practices of domestic agencies and employers. Those bodies instead receive second-hand information that has already passed through several layers of bureaucratic and politically distorting filters. This is a grave weakness. An institutional mechanism cannot promulgate and enforce effective *norms* for practical action if it lacks the capacity to "see" deeply and directly into *actual*, evolving practical action. The mechanism will instead, as does the ILO, announce

general or intermediate-level rules that are disengaged from workplaces, production systems, domestic agencies, and economic-developmental contexts.

Third, the ILO's supervisory bodies too often avoid controversial, substantive decisions about the specific meaning of the broadly worded Conventions. It is true that the ILO from time to time attacks a significant domestic problem, such as China's requirement that all labor unions be affiliated with the ruling party. But many cases are akin to narrow "lawsuits" alleging, for example, that the government failed to provide redress when an employer maliciously fired or assaulted a union supporter. Such suits are of the greatest urgency to the individual complainants in practical terms, but they are often legally "uninteresting" (or what lawyers call "easy cases") in the sense that they do not require the ILO to formulate any new, detailed criteria or performance measures that tell governments or employers how to comply with the abstract Conventions. For example, it is obvious and well-settled that workers' right of association is violated when a government fails to provide a remedy after an employer fires a union leader for anti-union reasons or engages in violence against union supporters. Such cases require only fact-finding, not elaboration of legal criteria.

In contrast, interesting or hard cases are unavoidably controversial, calling for new substantive criteria or performance measures that apply to some detailed factual context. Examples of hard cases, routinely faced by domestic labor law systems, include: whether union organizers must be granted access to company parking lots, driveways, or customer areas; whether a company's provision of union offices on company property is required by the right of association or instead proscribed as unlawful support, or neither; the circumstances in which a company may invest disproportionately in its non-unionized facilities in a manner that reduces long-term employment in its unionized facilities; the permissible rates of workplace exposure to innumerable, particular toxins; or what, if any, degree of under-representation of a racial group in a workforce counts as discrimination when the employer has no invidious intent. Even these questions are framed at a fairly high level of generality; each question calls for more specific criteria or measures if they are to yield answers that address particular problems and that

give guidance to managers and enforcement agencies faced with concrete decisions.

The supervisory mechanisms often strive to avoid the appearance of formulating new substantive legal criteria or performance measures because of a political constraint. ILO bodies are hesitant to broadly challenge the interests of the governments and business federations that constitute a controlling bloc in its governing bodies. To maintain the support or tolerance of government, employer, and worker representatives, the ILO bodies often cast their decisions in the narrowest, most irresolute terms.

In sum, the ILO's protocols for acquiring information, together with the number and type of ILO decisions, are manifestly not sufficient to actually monitor and enforce government compliance with worker rights across the thousands of government agencies and millions of workplaces in member states. Nor are they sufficient to produce a comprehensive common law that can tell governments and employers how to concretely comply with the abstract Conventions in the myriad situations to which they apply.

This is not to say that a large mass of detailed rules, criteria, and performance measures are, themselves, signs of a healthy regulatory system. I do not mean to endorse the kind of regulatory systems, such as the U.S. and other domestic systems of labor law, which rest on bodies of rules that are relatively static, set at a low level of worker protection, unresponsive to changing worker needs, and undemanding of continuous improvements in managerial capacity to satisfy those needs. But the U.S. and other domestic systems do at least demonstrate the capacity of regulatory institutions, if properly designed, to generate highly specific, comprehensive indicators and criteria applicable to highly detailed practices in workplaces. The ILO lacks that elementary capacity.

Some analysts maintain that a global organization need not or cannot focus on the details of actual workplace practices. That is the job of domestic regulatory agencies and managerial systems. The global organization need only ensure that the regulatory agencies and managers act transparently and adopt the best practices in systemic design. This view is mistaken, for reasons given below in Section IV.

International financial institutions have also promulgated labor-rights protocols to which borrowing entities are expected to adhere. Most notably, the International Finance Corporation (IFC) has issued Performance Standards on Social and Environmental Sustainability. The most recent iteration of the standards was promulgated in April 2006. The standards apply to private borrowers in member states, and may be applied by other financial institutions in emerging markets. Financial institutions that have adopted the so-called Equator Principles look to the IFC protocols for realization of the IFC Standards. Some 40 financial institutions responsible for more than 80% of international project finance lending have voluntarily adopted the Standards.

The existing mechanisms for enforcing the IFC standards are even weaker than the ILO's. They require only self-reporting by borrowers on the impact of their projects on worker rights, and creation of remedial action plans by the borrowers themselves. The IFC has highly limited capacity for review of the borrowers' self-designed plans. As a substantive matter, the IFC's goal is merely to encourage compliance with worker rights within the constraints of the borrower's resources and strategies and only when such compliance is deemed "appropriate." Since these mechanisms remain so ramshackle, no further analysis is warranted here. Reform proposals for the ILO's enforcement mechanisms (see Section V) will apply *a fortiori* to the international financial institutions.

### ***Experience with unilateral programs—public and private***

The United States has 25 years of practical experience with unilateral, bilateral, and regional systems for enforcing basic labor rights across borders. These initiatives are the fruit of sustained political efforts by American labor unions and human rights advocates. In domestic trade statutes—Section 301(d) of the Trade Act; the Generalized System of Preferences (GSP); and region-specific legislation including the Andean Trade Promotion and Drug Enforcement Act (ATPDEA), the African Growth and Opportunity Act (AGOA), and the Caribbean Basin Economic Recovery Act (CBERA)—the Congress has authorized the president to impose unilateral sanctions

against trading partners that fail to comply or take steps toward compliance with internationally recognized labor rights.<sup>14</sup> In addition, U.S. states, cities, and private organizations engage in “unilateral” investigation and remediation of conditions in overseas factories. These investigations are backed up by the threat of “sanctions” in the form of reduced purchase orders by U.S. retailers, manufacturers, universities, cities, and states.

**Congressionally enacted unilateral programs.** The labor rights provisions of the Generalized System of Preferences (GSP) were enacted in 1984. The GSP is a program that grants special tariff benefits to developing countries to promote their economic development, by affording them preferred access to the United States market.<sup>15</sup> This “discrimination” between developing and other countries is explicitly authorized by the GATT and therefore does not run afoul of the GATT’s most-favored-nation requirement. The GSP requires that beneficiary countries meet certain policy standards, such as enforcement of arbitral awards, support for U.S. anti-terrorism efforts, or taking steps toward compliance with five internationally recognized worker rights.<sup>16</sup> The five worker rights are: freedom of association; union organizing and collective bargaining rights; rights against forced labor; rights against child labor; and acceptable minimum wages, maximum hours, and health and safety standards.<sup>17</sup> More recently, Congress established region-specific preference programs, including the Andean, African, and Caribbean trade preference programs, which also require the trading partner to take steps toward compliance with these rights.<sup>18</sup> Private parties, including labor unions, can file petitions demanding that the president withdraw benefits from a trading partner that fails to comply or take steps toward compliance.

The labor rights provisions of Section 301(d) of the Trade Act were added in 1988.<sup>19</sup> They include essentially the same rights enumerated in the GSP and the region-specific programs. Unlike the GSP and the regional programs, Section 301 applies to all trading partners of the United States, not just to developing countries or regionally designated countries. Section 301 authorizes the president to impose trade sanctions or take other measures against any trading partner that commits unjustified, unreasonable, or discriminatory trade practices

that burden U.S. businesses or workers. Any interested party can petition the president to take such action. The typical petition under Section 301 is filed by corporations alleging unfair trade practices of a strictly commercial nature—such as a trading partner’s subsidy of exports to the United States or obstruction of imports from the United States. The labor rights provisions are the sole basis under Section 301 for imposing trade sanctions in the service of human rights.

The GSP, the regional preference programs, and Section 301 embody a model of global economic relations strikingly different from the model embodied in current rules of the WTO and in many other aspects of U.S. foreign economic policy. In the model embodied in the trade statutes (sketched above in Section II) Congress recognized that the ground rules of the global economy should enshrine labor rights alongside rights of property, contract, and investment. Indeed, the labor provisions of the trade statutes marked the first time since the 19th-century abolition of slave-trafficking that fundamental labor rights were linked to hard incentive systems with a transnational reach.

When the president has exercised his authority under the trade statutes to use economic leverage on behalf of workers’ human rights, the results have been positive—in Chile, Guatemala, Paraguay, Belarus, and elsewhere. Sanctions or the mere threat of sanctions have worked; compliance with labor rights by U.S. trading partners and the employers within their borders has improved markedly. The use of these unilateral tools has been spearheaded by petitions filed by American labor unions and human rights organizations, working in close concert with the labor movements of U.S. trading partners.

The cases of Chile and Guatemala show the positive potential of unilateral sanctions on behalf of worker rights.<sup>20</sup> Following the Pinochet coup against the democratic government of Chile in 1973, the military government prohibited collective bargaining, repealed the right to strike, dismantled trade union organizations, and killed, kidnapped, and tortured hundreds of union leaders. In 1986, United States unions filed a GSP petition against Chile, with the support of Chilean labor and human rights advocates. In 1988, the U.S. government suspended GSP trade benefits to Chile. The consequent loss of

exports was a shattering event for the Chilean elite, some of whom aligned themselves with the forces opposing the military government in the run-up to the plebiscite that restored civilian government. The GSP process, of course, was not the primary agent of political change and restoration of labor rights in Chile; but it did play a substantial role.

Similarly, after the 1954 coup in Guatemala, the military regime carried out years of killings, kidnappings, beatings, and threats against unionists, suppressed labor organizations, and abjured protections against forced labor, child labor, and unsafe work. The abuses continued under the nominally civilian regimes of the late 1980s and early 1990s. Finally, in 1992, the United States accepted a petition against Guatemala and began serious review of its GSP status. Immediately following the Serrano palace coup of 1993, the United States threatened to implement trade sanctions, petrifying the Guatemalan business elite and contributing to Serrano's capitulation. The Guatemalan legislature chose a long-time human rights advocate as the country's new president; the United States announced that Guatemala would qualify for GSP benefits but would remain under the probation of continuing review; and compliance with labor rights substantially improved.

But the promise of GSP, the regional programs, and Section 301 has not been realized. The president has used his authority rarely, and has not applied leverage evenhandedly against countries with similar labor rights records. In a world in which pervasive non-compliance with basic labor rights is the norm, the president has suspended benefits on only 13 occasions under the GSP.<sup>21</sup> The president declined to take action against countries such as Indonesia, Malaysia, Thailand, and others that persistently and violently repressed worker rights. Only one petition has been filed under Section 301 (against China) and it was rejected by the president. A president's geopolitical purposes and ideological dispositions account for this erratic, sparse record.

The problem is straightforward: The GSP, regional preference programs, and Section 301 grant the president nearly total discretion. Under those statutes, the president need not take action where the trading partner is "taking steps" to come into compliance with worker rights.<sup>22</sup> Under the GSP, APTDEA, and CBERA, even when a

trading partner is failing to take steps toward compliance, the president may decline to take action if he deems it in the "national economic interest."<sup>23</sup> Under Section 301, the president may decline to take action if he thinks it "[in]appropriate,"<sup>24</sup> and is not permitted to take action if he finds that the labor rights violations are consistent with the trading partner's level of economic development.<sup>25</sup>

In practice, these provisions give virtually unlimited discretion to the president. For example, between 1988 and 1991, labor rights groups filed four GSP petitions detailing the Guatemalan government's horrific violations of worker rights summarized above. The president rejected the petitions on the ground, among others, that Guatemala was "taking steps" to comply, since a bill to reform Guatemalan labor law had been introduced, notwithstanding that no legislation had actually been enacted.<sup>26</sup> In the case of the recent petition urging the president to take action against China, President Bush acknowledged the extreme and systematic abuses of labor rights in that country but asserted that trade measures would not be effective.<sup>27</sup> He gave no grounds for that assertion.

Critically, the GSP, regional preference programs, and Section 301 provide no concrete, well-specified measures of compliance with basic worker rights, nor do they require that the president apply such measures in each case. The courts have ruled, on various grounds, that they have no authority to review his exercise of that discretion.<sup>28</sup> As one federal court stated:

GSP contains no specification as to how the President shall make his determination. There is no definition of what constitutes "has not taken . . . steps" or "is not taking steps" to afford internationally recognized rights. Indeed, there is no requirement that the President make findings of fact or any indication that Congress directed or instructed the President as to how he should implement his general withdrawal or suspension authority.

Given this apparent total lack of standards, coupled with the discretion preserved by the terms of the GSP statute itself and implicit in the President's special and separate authority in

the areas of foreign policy there is obviously no statutory direction which provides any basis for the Court to act. The Court cannot interfere with the President's discretionary judgment because there is no law to apply.<sup>29</sup>

**Unilateral initiatives by private organizations and state and city governments.** States, cities, universities, and corporations based in the United States have implemented unilateral leverage of a different kind, yielding different lessons. Several states and cities have enacted “sweat-free” laws and ordinances that bar the state or city from purchasing goods made in workplaces that fail to comply with certain labor rights and standards. Universities have adopted sweat-free codes for the production of collegiate merchandise. Many large corporations have adopted codes of conduct that require their overseas suppliers to adhere to certain labor standards, often including host-country labor laws and other basic worker rights.

The corporate codes are “unilaterally” enforced by the corporations’ in-house labor auditors or by third-party firms or organizations employed by the corporations. Enforcement of the corporate codes is undermined by obvious conflicts of interest. In tough cases—that is, the cases that matter most to workers—the corporations’ profit centers override whatever sincere ambitions the labor auditors might have. Third-party firms that depend on the corporations’ business get the message. Enforcement of the codes is largely an exercise in public relations—in managing the risk to brand reputation from potential media exposés of sweatshop conditions in supplier factories or farms. As a consequence, labor investigations are often cursory. Auditors make brief visits to workplaces. Workers are interviewed for a few minutes on company premises, often in managerial offices. Managers coach workers in advance on what to say, and threaten workers with reprisals if any negative findings are reported by the corporate auditors. Managers keep double books to provide auditors with the documents needed to gain the seal of approval sought by their production and public-relations departments. Corporate auditors are reluctant to probe seriously into questions of free association and unionization, reporting instead on vague indicators such as “good employer-employee communication.” Even when

code violations are found and not remedied by a supplier, corporations waive sanctions against the supplier in order to leave plans for production and sourcing undisturbed.

And, crucially, corporations do not take financial responsibility for the costs that genuine compliance would impose on their supplier factories. That is, corporations abjure any obligation to pay a higher price for goods from suppliers. To the contrary, many corporations, including the behemoth Wal-Mart, demand that suppliers continuously lower their prices from year to year. Factories are unable to raise wages to comply with minimum wage laws, let alone pay a prevailing or living wage.

There is one monitoring organization that is genuinely independent of the industry that it monitors—the Worker Rights Consortium (WRC).<sup>30</sup> The WRC is an organization of 182 universities, students, faculty, and other labor rights experts. It takes no funding from the industry it monitors. The universities require manufacturers of collegiate merchandise (sweatshirts, caps, and the like, bearing university names and logos) to use factories that comply with a code of conduct. The code requires factories to adhere to host-country labor laws, international labor rights and standards, and certain standards exceeding domestic and international law. In practice, the WRC also requires factories to meet best practices in protecting worker rights.

The WRC protocols are the most successful model of transnational labor monitoring by a private organization.<sup>31</sup> In order to be practically effective, the WRC has developed a model of monitoring that differs greatly from the corporate model—and from the investigative models of the ILO and the United States executive branch. The WRC assembles investigative teams comprised of labor rights experts and advocates without industry ties, from the United States and host countries. Before undertaking formal investigations, WRC staff members engage in long periods of trust-building with local stakeholders, including workers, managers, and local authorities. Workers are interviewed at great length in confidential settings. The formal investigations may last several days, followed by close oversight of remediation of violations by local accountability teams and centralized staff, working with legitimate local enforcement authorities.

The WRC has found that sustained oversight of remediation is critical. Factories frequently relapse into



non-compliance if, as with corporate-controlled monitoring, intensive scrutiny lasts only a short period. Ultimate success typically depends on organizing by the workers themselves to enforce their own rights and ensure long-term remediation—a process that itself depends on securing workers’ fundamental right to association. Often, success in remediation also depends on cooperation with factory and village communities. The workforce is often migratory, circulating between the factory in question, other factories, villages, and the informal sector. For example, remediation often requires reinstatement of workers who have been fired and intimidated and who have melted back into local communities or moved to other factories; in these cases it is essential that enforcement institutions engage in aggressive outreach into the broader social network that comprises the relevant labor market.

The WRC has also found that genuine remediation of violations requires that its intensive engagement with stakeholders and local communities be combined with sustained pressure on multinational buyers and their supplier factories. Such pressure includes credible threats of well-targeted economic sanctions, in the form of threatened cutoff of the universities’ contracts with manufacturers in the event of non-remediation. Paradoxically, if these “adversarial” threats are sufficiently powerful, there is no need to actually use them; so the monitoring organization and managers can instead engage in cooperative problem-solving. That is, to avoid economic sanctions, manufacturers and suppliers will cooperate with the WRC (and its affiliated universities or the state and cities whose suppliers are now monitored by the WRC) in finding constructive ways to remedy violations and continue production for the universities and local governments. As a consequence, workers do not lose their jobs, but instead retain jobs with better conditions.

WRC investigative teams have also found that abstractly worded rights (such as the “right to a safe workplace”) provide necessary touchstones, but often are of limited value in determining what criteria and performance measures can and must be met by managers. As a simple matter of practical effectiveness, more detailed measures must be specified, often beginning with domestic labor codes or international best practices, each of which is

typically more detailed than core labor rights. If, for example, a sewing factory fails to use safe cable lifts that are used in similar factories, the WRC demands that the factory comply with such international best practices even if ILO Conventions and domestic labor law say nothing specific about cable lifts.

The success of the WRC model of intensive, team-based monitoring has led to an interesting reversal between private and public enforcement. The WRC was founded to fill a gap between ineffectual corporate monitoring systems, on the one side, and the failure of sovereign, public institutions to develop mechanisms that could reach across borders to enforce worker rights in globalized workplaces, on the other.<sup>32</sup> But many states and cities have recently enacted so-called “sweat-free” laws and ordinances, which prohibit public purchases from suppliers that fail to comply with host-country and international labor laws. Meanwhile, the relative effectiveness of the WRC model of monitoring did indeed confirm the relative ineffectiveness of the corporate compliance systems.

As a result, many states and cities have committed themselves to the WRC model in their enforcement of the new public codes. Some have contracted with the WRC to monitor supplier factories. Several states and cities are now creating a public-sector consortium, modeled on the WRC, to enable them to collectively monitor their suppliers, just as the WRC acts as a collective monitor of the universities’ suppliers. In this way, private experimentation with transnational enforcement is now reintegrating with public institutional innovations. And the public-sector innovations can be stronger than the best private-sector methods: Unlike private monitors, the states and cities have at their disposal criminal and civil sanctions and subpoena power to back up requirements that suppliers fully and accurately disclose workplace conditions, undertake compliance, and verify remediation of violations. They need not engage in catch-as-catch-can efforts by consumers to induce large manufacturers to pressure their supplier factories.

Critically, just as the private-sector models depend on the universities’ threat of a targeted “sanction” (cutting off supplier contracts), so do the public-sector models. Non-compliance suppliers will be barred from public contracting.

States and cities can, in addition, deploy punitive sanctions in the form of monetary fines against noncompliant vendors.

It is true that transnational monitoring by universities, states, and cities seeks compliance only by *private firms*, unlike recommendations issued by the ILO and unilateral sanctions imposed by the U.S. *government*, which seek primarily to induce compliance by governments. But transnational monitoring shows precisely that improving actual conditions in workplaces requires that sanctions be targeted at employers as well as governments—including sanctions against the large corporations that buy from the supplier factories whose labor rights records are under challenge. And enforcement of compliance by governments, in turn, requires effective monitoring of compliance by employers, for reasons detailed below. The experience of transnational monitors therefore provides relevant lessons for unilateral (and bilateral or regional) leverage against U.S. trading partners.

In sum, the experience of transnational monitors highlights that the hardest part in achieving improved compliance with labor rights—whether by private corporations or by governments—is not the formulation of the list of general rights and standards. The real challenge, rather, is to design an effective mechanism for enforcing and remedying violations of the rights and standards.<sup>34</sup> That experience also shows that the all-important process of enforcement and remediation must have several features: the threat of potent, well-targeted sanctions, even if those sanctions are merely held in reserve; the formulation of specific criteria and performance measures for compliance, giving detailed content to the more general rules of domestic labor law, international labor law, and international best practices, whichever is most worker-protective; investigative teams and staff with detailed knowledge of and very strong commitment to labor rights; thorough interviews, under conditions of high trust, with workers, managers, local authorities, and communities in which workers live; long-term oversight and support for sustained remediation of violations, requiring ongoing participation by workers in monitoring and enforcing their own rights; and verification that compliance and remediation have occurred in real workplaces for real workers, not just that government agencies or managerial systems have adopted promising procedures for compliance.

## **Experience with bilateral and regional mechanisms**

Labor rights provisions are contained in several bilateral and regional free trade agreements to which the United States is signatory. Like the unilateral instruments, the labor rights provisions of the bilateral and regional agreements are the product of vigorous political campaigns by American labor unions.

In debates over the recently negotiated bilateral agreements with Peru, Colombia, and Panama, much has been made of the fact that the labor rights provisions are made subject to the agreements' dispute mechanisms and sanctions. But this amounts to little, in the absence of much deeper reforms. Let's not forget: similar dispute resolution procedures have been in place for 15 years at the North American regional level—in the North American Free Trade Agreement (NAFTA) side agreement, called the North American Agreement on Labor Cooperation (NAALC)—and for a shorter period at the Central American regional level in the Central American Free Trade Agreement (CAFTA). The NAALC and CAFTA provide for binding arbitration of several labor rights, just as the pending bilateral agreements provide.<sup>35</sup> But not a single case has gone to arbitration.

The bilateral and regional agreements suffer from the same fundamental flaws as U.S. unilateral trade legislation: the president has complete discretion in enforcing the labor rights provisions of the agreements. No party, whether a public entity such as a court or a private actor (labor union), has the power to undertake or initiate binding review of the president's decision to not enforce the labor rights provisions of the agreements. Indeed, some defended the U.S.-Peru Agreement with only the modest argument that the agreement puts machinery in place, and that we have no alternative to hoping that a labor-friendly president will exercise his or her discretion to use it.

It is sometimes asserted that this is simply in the nature of trade agreements, which like other treaties are enforceable only "state to state," not by individuals or entities other than the executive branch of each state. This assertion is misleading. It is true that trade agreements are typically enforceable by state-to-state complaints. But there are at least three modifications that could ensure

that treaty enforcement is not left to the fickle discretion of the president.

First, the United States could create domestic institutions that would allow private parties to file petitions or bring lawsuits requiring the president, in turn, to bring claims against our trading partners. Indeed, the United States has such laws on the books. Section 301 of the Trade Act already allows private parties to petition the president to bring sanctions against a trading partner that violates bilateral or regional trade agreements. But as discussed above, Section 301 grants the president nearly total discretion in acting on such petitions.<sup>36</sup> Section 301 thereby reinstates the president's pre-existing discretionary authority to enforce trade agreements. Analogously, protocols established under the NAALC authorize private parties to file petitions alleging that a government has violated the agreement's labor rights provisions. But executive officials of the signatory governments have unconstrained discretion to request binding arbitration in response to a petition, and those officials have sent no case to arbitration in the 15-year life of the NAALC.

United States regulations also allow private actors such as labor unions and human rights organizations to file petitions alleging that trading partners have violated the labor rights provisions of bilateral trade agreements. Unspecified executive branch officials have unconstrained discretion whether, in response to the petition, to investigate the matters raised in the petition. If they do investigate, there are no well-specified investigative protocols for finding the facts, and there are no well-specified legal criteria for executive officials to apply to the facts. The executive branch has full discretion whether to file a complaint against the trading partner to initiate the dispute settlement mechanism of the bilateral agreement.

New legislation could mandate that the president's decision not to file a complaint or seek arbitration under a trade agreement be subject to review by federal courts. This, however, requires that the criteria for violation of labor rights provisions be sufficiently well-specified, at a minimum, to permit courts to find the matter justiciable. That is, the criteria must be specified in sufficient detail to permit a court to play the accustomed judicial role of applying the criteria to the factual record.

Second, the dispute resolution procedures of trade agreements need not be exclusively state-to-state. Many trade agreements now establish investor-state enforcement procedures, authorizing private investors to directly file claims against governments, alleging that the government has violated the investor rights protections of the agreement. Trade agreements should have analogous worker-state enforcement procedures to enforce the worker rights provisions. Investor-state claims are now heard by ad hoc panels of arbitrators. As detailed in Sections IV and V, worker-state claims should instead be decided by an ongoing commission dedicated to labor rights and vested with other powers, including the oversight of investigative teams and the specification of rights and standards just mentioned. Building such a commission is therefore a crucial complement to the first proposal—authorizing federal courts to review presidential action or inaction—since federal courts cannot play these additional roles.

One of the much-touted “breakthroughs” of recent bilateral agreements is that they require governments to adhere to the ILO core labor rights. In fact, it is questionable whether the terms of the agreements actually codify the core rights, rather than the vague, undefined principles that underlie those rights.<sup>37</sup> In any event, we have already seen that the rights themselves are much too abstract to provide detailed criteria and performance measures for real compliance in many contexts, in the absence of a robust mechanism to convert the abstractions into such criteria and measures.

Most of the bilateral agreements do have the virtue of requiring each government to effectively enforce its own, detailed labor laws. This obligation is often derided because it adds no new rights or standards to the laws already applicable to the trading partner. But domestic law at least provides rules and criteria for compliance that are much more concrete than ILO Conventions and Declarations. If the obligation to effectively enforce domestic law were *itself* effectively enforced by bilateral or regional mechanisms, the benefits to workers would be great.

That is, the biggest problem with domestic regulation is typically not that domestic labor laws provide inadequate substantive rights and standards—on paper. (Of course, there are many important exceptions, such as China's ban

on unions that are independent of the one-party state—which is why it is critical to also include the ILO’s fundamental rights in trade agreements. But the broad proposition stands.) The primary problem, rather, is that the labor laws on the books are not rigorously enforced, if enforced at all. This is notoriously true of the United States itself. If the U.S. government effectively enforced the existing ban on employers’ retaliation against pro-union workers, the rate of successful union organizing in the United States would leap significantly. The same is true in Mexico, Indonesia, Thailand, and almost all other countries.

While the general obligation—requiring governments to effectively enforce their own labor laws—is not a bad starting point, the bilateral and regional agreements have enormous exceptions or lacunae that greatly weaken the substantive obligation. First, most of the agreements state that the trading partner’s actions with respect to one labor right cannot be challenged if the actions flow either from discretionary judgments about enforcement or from allocation of budgetary resources to enforcing other labor rights.<sup>38</sup> When a trading partner has not effectively enforced a particular right (say, a ban on child labor), it can easily claim it has not violated the agreement on the ground that it made a discretionary judgment not to enforce or because resources have been allocated to other purposes (say, minimum-wage enforcement).

Second, the agreements state that a trading partner does not violate the agreement if its non-compliance with worker rights does not affect trade or investment with the United States. Under this standard, fundamental labor rights are not universal human rights, but are enjoyed only by workers in international supply chains. This is wrongheaded. U.S. trade agreements should use U.S. economic leverage to enforce human rights and raise labor standards around the world. The purpose is not to enforce those rights and standards *only* if their violation causes a *direct* commercial harm to the United States. We should not abandon the rights of workers simply because they work in sectors that do not feed directly into global supply chains reaching to the United States. In any event, even if labor violations occur solely in the non-exporting sectors of United States’ trading partners, the suppression of wages and benefits in those sectors pulls down wages and benefits in the exporting sectors as well, thereby

*indirectly* causing economic harm to the United States. Consider, for example, the case of China. If the Chinese government suppresses the earnings of rural laborers, urban construction workers, and urban retail workers, this drags down the wages of export workers, whose only alternative employment is in those non-exporting sectors.

Further, this standard makes it extremely difficult to prove a violation. It is not easy to prove empirically that violations of, say, workplace safety and health standards or that firing of pregnant workers cause a decrease in labor costs and final product prices sufficient to have a measurable effect on trade flows with the United States—especially when the trading partner’s economy is small.<sup>39</sup>

Third, while it is true that, on many subject matters, domestic labor law provides more concrete rules than do ILO core labor rights, many domestic rules are still pitched at a more general level than actual workplace practices.

Even more important than these *substantive* weaknesses in the requirement that domestic law be effectively enforced is the weakness in the *institutional* mechanism to ensure that the parties effectively enforce their domestic law. The various organs established by the regional and bilateral agreements have no mandate to formulate specific criteria or performance measures, investigate whether those criteria and measures are satisfied, order remedies for non-compliance, and verify that remedies are implemented. Nor do they have the mandate to ensure that domestic regulatory systems effectively undertake these functions in a way that demands continuous and systemic improvements in employer protection for worker rights and standards. The experience of the WRC, summarized above, shows how intensive, locally focused, and persistent these activities must be, to achieve real remediation of employer abuses and real strengthening of domestic regulatory systems.

The NAALC, CAFTA, and the U.S.-Peru Agreement do create Labor Councils, comprised of cabinet-level representatives of the signatory states. The NAALC also establishes a Secretariat; and the U.S.-Peru Agreement and CAFTA each establish a Labor Cooperation and Capacity-Building Mechanism. As noted, all three agreements authorize arbitration of claims (by signatory governments) of violations of their respective labor rights provisions.

Arbitration rosters and panels are assigned the task of deciding complaints filed under the labor rights provisions. There is little possibility that this process will implement sustained incentives, comprehensive specification of criteria and measures, or continuous investigation and verification of remedial improvements. First, we can expect that governments will, at best, file complaints only on the rarest of occasions—as past experience has shown. Even a labor-friendly government, such as the Obama administration, is unlikely to file a significant number of complaints.

Second, as described in detail in Section VI, even if U.S. executive officials file such a complaint, the officials have discretion to drop the case at any stage of the trade agreements' lengthy, byzantine procedures. The officials need not seek binding arbitration of the complaint and need not impose sanctions against the trading partner even if arbitrators rule in favor of the United States. The labor unions or human rights organizations that filed the initial petition have no right to participate in this process, and no right to challenge officials' decisions to drop the case. Recall that no case has gone to arbitration under the NAFTA labor agreement in the 15 years since its inception.

Third, even if arbitrators have an opportunity to decide cases, they need not give precedential weight to earlier decisions, making it unlikely that they will produce a body of coherent criteria and performance measures.

Fourth, when the members of an arbitral panel are selected to hear a complaint under the U.S.-Peru Agreement, the complained-against government can veto the selection of a majority of the panel. In effect, the “defendant” government chooses its own judge and jury.

Fifth, sanctions under the “breakthrough” template of the U.S.-Peru Agreement are weak. A non-compliant government can opt to pay a fine equal to only half of the benefit it reaps from violating labor rights, creating a perverse incentive to violate the agreement. In any event, even if the offending government pays full *compensation* for the damage done to the complaining government, this may provide insufficient incentive to *deter* the former's violations—as explained in detail in Section VI.

In theory, the Labor Councils and Cooperation Mechanisms could undertake the functions that genuinely ensure that domestic systems enforce their labor laws.

However, the agreements do not mandate that they do so; and in the absence of a mandate, it is highly unlikely they will assume these demanding, continuous functions—as the actual record of the NAFTA and CAFTA bodies has shown. It is true that the Councils have undertaken some important programs to strengthen certain aspects of domestic labor enforcement. They have not, however, implemented a mechanism that specifies the rules and standards for compliance with the trade agreement, nor a mechanism for continuous monitoring of actual compliance with such well-specified indicators.

Even if the Labor Councils and Cooperation Mechanisms had sufficient resources and a mandate to carry out these functions, those institutions would still fall short of an ideal of democratic, responsive governance. They are fundamentally technocratic, not democratic, in design. They do not systematically include workers or worker representatives as decision-makers in all of their core functions.<sup>40</sup> Nor do they provide opportunities for systematic participation by domestic enforcement officials, specialists on relevant production systems, representatives of the informal sector, women's organizations, village associations, and other relevant non-governmental constituents. It is this array of actors—especially workers and their representatives—whose rights and interests are at stake, who have knowledge of local norms and practices, and who have the incentive to ensure that criteria and performance measures are vindicated.

### ***Investigating compliance systems vs. investigating actual compliance***

As mentioned in passing above, some theorists of global governance might argue that the global, regional, bilateral, or unilateral mechanisms need not investigate the details of actual workplace conditions and actual employer compliance with rights and standards. That is the job of domestic regulatory agencies and managerial systems. If the international mechanism ensures that governments and employers adopt best practices in the design of *compliance systems*, we can be confident that labor rights and standards will improve as rapidly and continuously as is feasible. In other words, international institutions should monitor the “second-order” rules and incentives of domestic enforcement institutions, not the “first-order”



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rules of actual workplace conditions, actual criteria and performance measures for employer compliance, and actual measures to remedy violations. If the second-order rules and incentives are sound, then first-order compliance will ensue.

This is a comforting view, since it absolves international mechanisms of any need to directly engage with the innumerable details and complexity of actual workplace practices. It validates the ILO's dominant strategy of supervising only the general contours of domestic systems of labor law. And it justifies those private monitoring organizations that do not investigate and remedy workplace violations but evaluate only the systems put in place by managers to ensure compliance.

As appealing as this argument may sound, it is grossly mistaken. Institutions for the transnational enforcement of labor rights cannot hope to be effective if they avoid close scrutiny of actual workplace practices and of the substantive remedial steps necessary for employers to cure actual workplace violations. That is, the institutions must not avoid close engagement with first-order rules and practices.<sup>41</sup>

Practical experience shows that governmental and managerial systems, no matter how well-designed on paper, do not root out entrenched abuses in actual workplaces, in the absence of genuinely independent monitoring, remediation, and sustained external pressure that reaches directly into those workplaces. Thus, the WRC's independent monitoring of garment factories shows that tenacious and sustained efforts are necessary to uncover and remedy violations even in supply chains managed by those "progressive" manufacturers with "best practice" corporate codes and internal monitoring systems.<sup>42</sup>

Analogously, the failure of the ILO supervisory mechanisms shows that an international mechanism is inadequate if it evaluates only the administrative procedures installed by the very governments that are failing to ensure actual compliance by employers. Like their corporate counterparts, governmental administrative systems may look state-of-the-art on paper. But there is no way to know if the administrative procedures are succeeding or failing, without deep investigation of actual workplace conditions, employers' actual compliance or non-compliance with well-specified criteria and performance measures, actual

remedial steps necessary for employers to cure those violations, and whether administrative procedures are actually able to identify those violations and ensure those remedial steps are taken by employers.

It is true, as already mentioned, that the primary responsibility for ensuring remediation of *employer* violations rests with our *trading partners*, acting under the incentives of actual or threatened sanctions by the United States. Hence, one fundamental mandate of a regional or bilateral enforcement mechanism is to ensure that the signatory governments meet *their* obligations to *enforce* labor rights. But to carry out that mandate, the mechanism must monitor and *verify* the government's compliance with its obligations to enforce labor rights—otherwise, there is no way of knowing whether sanctions must be imposed and when they should be lifted. And the mechanism cannot verify each government's compliance without verifying that the government's enforcement efforts are in fact protecting workers against *employer* violations of workers' rights. This requires verification of rigorous remediation of employers' violations, which in turn requires a mechanism that can specify either the substantive criteria of compliance and substantive remedial steps that employers must take or performance measures for evaluating the outcome of employer compliance and remediation.<sup>43</sup>

In this respect, labor rights and standards are different from most other human rights. Most human rights protect people against government depredations. While governments can also directly deny worker rights (for example, when riot police attack striking workers), most labor rights and standards protect workers against *employer* commissions or omissions (for example, when an employer fires a union activist or fails to pay minimum wages). The government's responsibility is to protect workers against employers. In light of this triangular relationship, it is not enough for an international mechanism to monitor the government's enforcement mechanism, without also monitoring actual compliance by employers.

Not only is it insufficient for the international mechanism to evaluate only the administrative or managerial *procedures* used to ensure compliance, but is also insufficient for the international mechanism to enter workplaces solely to engage in intensive *observation* of how ground-level administrators and managers actually engage

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in the main compliance activities. That is, when the international mechanism investigates actual workplaces, it is critical that the mechanism's personnel *themselves* engage in those frontline compliance activities (including: specification of criteria and performance measures, investigation of whether those criteria and measures are violated, and use of sanctions and benefits to ensure that specified remedial steps are taken).

Why is it not enough for the mechanism to intensively observe workplace-level compliance activities by administrators and managers? Why must the mechanism itself undertake compliance activities? The WRC experience shows that the best way, perhaps the only way, to evaluate compliance efforts by other organizations (whether governmental or managerial) is by actually undertaking parallel compliance activities. Without doing so, it is difficult to know whether violations are going unnoticed, whether existing remedies are sufficiently strong, whether remedies are comprehensive and implemented fully, and whether remediation is fully verified. Equally important, without testing alternative compliance strategies, it is impossible to know whether there are feasible protocols that improve upon existing governmental or managerial systems.

To take one of myriad examples: In 2002, the WRC investigated a garment and toy factory in Indonesia, which supplied progressive brands that used best practices in corporate monitoring. The WRC found, among other abuses, that the factory required workers to take work home at night without additional pay, and that factory managers held workers in solitary confinement for several days at a time. These findings emerged after lengthy, probing interviews with large complements of workers in confidential locations—interviews that followed upon a substantial period of trust-building communications between WRC staff and workers in their own communities. The “best practice” corporate monitors—which had continuously audited the factory but had not engaged in such high-trust, intensive interviews—had failed to find these gross managerial abuses. Even when the WRC brought the abuses to light, the corporate monitors lacked the incentive to tenaciously remedy managerial practices. Only under the threat of unilateral sanctions (i.e., cancellation of contracts by the universities) did managers and local enforcement officials finally come into compliance.

Enforcement activities by international mechanisms not only play the critical role of revealing and demonstrating the weaknesses in domestic enforcement procedures. They may also directly strengthen the authority of those local agencies that are genuinely committed to enforcement of worker rights. In the same WRC investigation in Indonesia, for example, the WRC's persistent efforts to ensure *employer* compliance necessarily encouraged and enabled the provincial *ministry of labor* to carry out mediation and enforcement functions that were authorized by law but that local, anti-democratic elites allied with local employers had never before permitted the ministry to carry out. The WRC's exposure of the local non-enforcement of Indonesian law, combined with the pressure of the WRC's threatened sanctions, tipped the balance of local political power in favor of the officials genuinely devoted to enforcement of the rule of law. International mechanisms, if properly designed, are well-suited to act as levers that strengthen the authority of legitimate democratic local agencies and weaken the relative power of officials who obstruct or oppose labor law enforcement.

In sum, there is simply no substitute for global, regional, bilateral, or unilateral institutions capable of investigating actual workplaces, specifying the criteria or performance measures necessary for employers to comply, identifying remedial action that must be taken in response to a finding of noncompliance, and verifying that those remedial steps are taken.

For these reasons, a bilateral or regional enforcement mechanism has *two* big tasks that require resources, staff, and well-designed procedures. One is to assess and enforce employers' compliance on the ground, in real workplaces, as just discussed. Another is to assess and strengthen domestic governmental systems of enforcement, including administrative and judicial resources and procedures for ensuring compliance by employers. The existing global organizations and regional agreements and the pending bilateral agreements fail to establish high-capacity international institutions that can carry out these twin functions.

Now, it is true that the international mechanism need not and should not act as a super-Ministry of Labor or a super-National Labor Relations Board, supplanting domestic enforcement bodies, whether governmental or

non-governmental. In fact, when assessing compliance and remediation in workplaces, the international mechanisms should themselves draw on the best practices of governmental and non-governmental enforcement bodies. This will provide a means to simultaneously (a) investigate and verify real working conditions in real workplaces, (b) test the effectiveness of the protocols used by the best domestic enforcement agencies, and (c) strengthen the capacity of weak enforcement agencies or restructure those that obstruct worker rights.

However, the international mechanism should not simply mimic even the best domestic enforcement agencies, since this would likely disable the mechanism's effectiveness in providing an independent, aggressive check on the domestic bodies. That is, the international mechanism should not allow existing domestic protocols, no matter how good some may be, to become a stationary ceiling rather than an ever-elevating floor. First, the international mechanism should require each of its own investigative teams to meet the best practices of its *other* investigative teams, as well as the best practices of domestic enforcement agencies and managerial systems. Second, the international mechanism must itself be an innovator in enforcement methods, seeking to set the pace for domestic agencies that, at their best, are also continuously striving to strengthen their protocols and, at their worst, are laggards or obstructionists or out-and-out corrupt.

Continuous dialogue among the investigative teams, and disciplined comparison of their enforcement methods, will encourage such innovation. For these purposes, the international mechanism must regularly convene fora or conferences at which its decentralized investigative teams will be required to engage in these disciplined comparisons with one another and with the most successful government agencies. Each team must disclose its methods and its record of successes and failures in achieving compliance by governments and employers. Each team must explain, and attempt to justify, why its record is not as good as the record of other teams or government agencies. If it cannot justify its failures, it must adopt the methods of better-performing teams and government agencies. In the process of comparing methods and performance, the teams are likely to generate new strategies for enforcement which can be tested on the ground and subsequently

evaluated in later rounds of deliberations among the teams. Government agencies must then be held to the most successful enforcement practices that the teams either reveal or create.

### ***Sanctions against governments vs. sanctions against employers***

The previous subsection argued that labor rights machinery must continuously investigate *employers'* actual compliance, in order to demonstrate whether *governments* are effectively enforcing labor rights.

But the investigation of employers' actual compliance is important in its own right. That is, the labor rights provisions of trade legislation and agreements should impose sanctions directly against specific employers or specific sectors of employers who fail to comply with labor rights. It is true that existing law and agreements provide for punitive tariffs or quotas against goods made in violation of labor rights, imposing *de facto* penalties against employers in non-compliant sectors. But the sanctions are conceived as a remedy against a non-compliant government, not as a remedy against the non-compliant employers themselves. This weakens the potential effectiveness of sanctions.

If sanctions are instead conceived as a remedy against employers (as well as governments), then sanctions and benchmarks of compliance will better match the underlying problem. First, in appropriate circumstances, sanctions can be targeted more precisely at workplaces where labor rights are violated, rather than being targeted bluntly at entire sectors that may include violators and non-violators. Second, because sanctions can be targeted more precisely, the *level* of sanctions can be increased and have greater incentive effect. That is, an arbitrator or commission is likelier to impose a lower, inadequate level of punitive tariffs when the sanction will punish non-violators as well as violators. Third, the system of monitoring and benchmarking—which will determine whether sanctions should be incrementally lifted in response to increasing compliance—can be geared to the particular problems and performance observed in the offending workplaces.

Fourth—and critically—sanctions can be targeted not only at the immediate employer that stands in violation,

but at global manufacturers and retailers who buy from that employer. The experience of the WRC and of public procurement programs, recounted above, shows that the economic power of global corporations can be used as a powerful lever to improve conditions in supplier factories—if the global corporation is faced with strong sanctions and tenacious monitoring. If, for example, Wal-Mart faces sanctions for the non-compliance of its thousands of supplier factories in China, it may be enlisted as an agent for improvement of working conditions in those factories.

### ***The United States-Cambodia Textiles Agreement***

The United States has engaged in one successful experiment in which economic leverage was tied to systematic verification of a trading partner's compliance with labor rights. In the U.S.-Cambodia bilateral textiles agreement of 1999, the United States agreed to give Cambodia a significant increase in its annual quota of exports to the United States if Cambodia adhered to enumerated measures of compliance with labor rights. (The agreement ended when the global quota system expired in 2005.)

The U.S. garment workers union, UNITE, was largely responsible for the political initiative for the Cambodia program, and for its innovative design. The AFL-CIO also strongly supported the program. While free-traders sometimes denounce global labor rights as disguised protectionism by U.S. labor unions, the Cambodia program shows the opposite: bilateral trade would increase, Cambodia would have more jobs, and the jobs would be better.

Cambodia's compliance was monitored continuously by inspection teams supervised by an ILO official, who formulated hundreds of specific criteria for measuring compliance with domestic and international law. The ILO inspectors generated the information used by the United States to decide whether Cambodia had actually complied with labor rights and thereby earned the annual bonus in export quota. The ILO was uncharacteristically willing to undertake this in-depth investigation into actual practices—this intrusion on sovereignty—since the U.S.-

Cambodia agreement signified Cambodia's "consent" to ILO intervention.

The Cambodia program has been extolled as a model for international enforcement of labor rights. And indeed, it did lead to significant improvements in enforcement of worker rights and in actual working conditions on the ground. Nonetheless, the weaknesses in the program are revealing.

First, the economic leverage was not as well-targeted as it might have been. While Cambodia's garment industry as a whole would forego additional exports if labor rights compliance was inadequate, the individual offending employers might still maintain their export volumes if they were politically well-connected. That is, sanctions were not well-targeted to create high-powered incentives directed at the actors responsible for violations. Second, the inspectors lacked sufficient resources to maintain the kind of intensive monitoring and remediation carried out by the WRC investigative teams described above.

Third, excessive discretionary authority was placed in the hands of the ILO official who served as the program's chief technical adviser. The Cambodian and U.S. governments had rejected proposals by UNITE to use a less technocratic and more democratic model, in which labor organizations and other civil society groups would play a significant role in setting indicators, undertaking investigations, and verifying remediation. The indicators and investigations lost some legitimacy and effectiveness, since they did not always reflect the priorities, knowledge, and resolve of the workers.

Fourth, the willingness of the USTR to rigorously enforce compliance and credibly threaten to use the leverage authorized by the agreement was compromised by the geopolitical conciliation of the U.S. State Department toward the autocratic government of Cambodia. Fifth, the ILO's monitoring functions were not well-integrated into a program to strengthen the Cambodian government's own capacity to ensure employer compliance (although the ILO can hardly be faulted on this score, in light of the corrupt nature of the Cambodian regime and the unwillingness of the U.S. State Department to challenge the regime more aggressively).

## IV. What are the essential features of well-designed institutions to enforce global labor rights

This section sets out 13 features of well-designed institutions to enforce labor rights across borders, based on the experience summarized in the preceding section. Section V then adapts these features to unilateral, bilateral, regional, and global institutions, to generate concrete proposals for policy reform, and Section VI shows the practical implications of the concrete proposals.

How can we sum up the lessons from the experience canvassed above? It is not enough to put a statement of highly abstract “core labor rights” in trade agreements and to leave their enforcement to the discretion of the executive branch and to panels of international arbitrators, as stipulated in recent bilateral trade agreements. To make a difference in the lives of real workers, international institutions must be well-designed to engage closely, at the local level, with the finely textured practices, norms, and knowledge of workers and worker organizations, and with employers’ actual compliance practices. Well-specified compliance criteria and performance measures must be backed up with the credible threat of immediate potent sanctions for non-compliance or the credible promise of immediate potent benefits for compliance.

More specifically, the experience shows that international institutions must:

1. (Deploy incentives that are sufficiently *high-powered* to change the behavior of governmental and managerial actors.
2. Apply the incentives *systematically and continuously*, not infrequently and unreliably, through *mandatory application* of well-specified criteria or measures.
3. Apply the criteria or measures *fairly and uniformly* across countries and workplaces that are similarly situated in relevant respects.
4. *Target* the incentives at the specific actors who can actually achieve compliance with workers rights, including specific government agencies, specific employers, and specific global corporations that buy from non-compliant employers.
5. Withdraw the incentives only when there is *actual, full compliance with well-specified criteria and performance measures* of worker rights on the ground.
6. Require governments and employers to *adopt the most worker-protective criteria and performance measures based on international law, domestic law, and the best practices* that have been adopted by other, similarly situated corporations and governments.
7. Establish *commissions* that formulate and continuously strengthen the well-specified criteria and performance measures, impose and withdraw sanctions, enforce comprehensive disclosure and transparency by domestic agencies and employers, and carry out other compliance functions.
8. Ensure that the commissions are *democratic* in the sense that (a) the bodies that formulate the criteria and performance measures and that oversee the investigative staff are comprised of worker representatives and jurists, and (b) prior to worker representatives’ and jurists’ promulgation of the criteria and measures, other interested and knowledgeable actors—such as domestic enforcement officials, specialists in production systems, specialists in occupational health, managerial representatives, representatives of the informal sector, women’s organizations, and village associations—participate in the bodies’ deliberations.
9. Ensure that *investigations are participatory* in the sense that they are conducted by teams comprised of commission staff, worker representatives, and other interested and knowledgeable actors.
10. Enforce systematic requirements for *transparent disclosure and verification* of actual conditions in workplaces and of domestic enforcement bodies’ activities.
11. Ensure that the commissions have *sufficient resources* and highly motivated staff and investigators.
12. Combine these transnational enforcement functions with *intensive promotion of (a) domestic administrative capacities* to enforce labor rights, (b) *managerial capacities* to comply with labor rights as an integral part of production, and (c) *capacities of worker*



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*organizations* to provide continuous monitoring and verification of managerial compliance. The international mechanism must be authorized not only to provide resources and technical support to domestic enforcement authorities, but also to mandate their restructuring where warranted.

13. *Regularly convene fora* at which investigative teams must disclose and compare their records of enforcement, and develop new strategies for enforcement. The mechanism must require teams to adopt the methods of better-performing teams and governmental enforcement agencies, create new strategies, and *evaluate the effectiveness of the innovative enforcement strategies* at subsequent rounds of deliberation among the teams.

Why are these 13 features so critical? The experience canvassed in Section III shows why.

The experience of the ILO demonstrates the obvious point that promulgating rights does not achieve enforcement of rights. The ILO's "soft law" mechanism of reporting on countries' performance is not enough to move recalcitrant governments and employers. Unlike the WTO, international commercial arbitrators, IMF, World Bank, the GSP, and the WRC, the ILO has not implemented a regime of "hard law"—that is, rules and standards backed up by high-powered economic incentives. The WTO authorizes countries to use trade sanctions to enforce the ground rules of free trade in goods and services. Commercial arbitrators order monetary awards enforceable through the coercive sanctions of domestic courts. The IMF and World Bank withhold capital from countries that fail to enforce the ground rules of financial markets.

When the United States has used high-powered incentives to enforce labor rights (in the GSP and the U.S.-Cambodia agreement), the positive results have been striking. The same is true of the WRC's economic pressure targeted at manufacturers in global supply chains. The ILO has held out no comparable incentives, whether carrots or sticks, to enforce basic worker rights (except for the single aberrant case of forced labor in Myanmar). On paper, the NAALC, CAFTA, and pending bilateral agreements provide for binding arbitration and sanctions. But sanctions

have never been ordered under the NAALC, and the NAALC institutions have yielded minimal real gains for worker rights. There is little promise of better performance under CAFTA and the recent bilateral agreements.

Targeted incentives—whether trade sanctions, financial sanctions, monetary fines, or other penalties and rewards, and whether targeted at designated corporations, sectors, countries, or governmental bodies—must be sufficiently powerful to induce actual behavioral change. Again, the Cambodia program shows that large economic penalties or benefits are necessary. In CAFTA and the pending bilateral agreements, the monetary fine is set at only 50% of the benefit to the offending party, creating a perverse cost-benefit incentive to violate the agreement.

The second feature—effective targeting—means that incentives must be directed at the specific actors who can achieve actual remediation of noncompliant behavior. Carrots and sticks must be targeted at those corporate and government actors with authority and capacity to remedy violations of worker rights in systematic ways.

The Cambodia program shows the limitations of sanctions that are not well-focused on both employers and government officials responsible for labor-rights enforcement. Non-compliant but politically well-connected factories were able to keep their export licenses; while the garment sector could win the bonus in export quota so long as non-compliance by particular factories did not, in aggregate, constitute a lack of "substantial compliance" by the sector as a whole. Somewhat analogously, the incentive systems of CAFTA and the pending bilateral agreements, which permit the complained-against government to choose to pay a monetary fine in lieu of sectoral trade sanctions, may not be well-targeted. If the export sector is politically powerful, it might violate labor rights but pass much of the cost of noncompliance onto others by pressuring the government to foot the bill.

The experience of the WRC also shows the potential effectiveness of targeting sanctions against global corporations that buy from non-compliant factories. Global manufacturers have the economic clout and the administrative capacity to change workplace conditions in their supplier factories. However, global corporations will use their clout and capacity only if faced with tough sanctions and sustained investigation.

Yet, if promulgation of a list of rights is not the same as creating incentives, neither is the threat or imposition of sanctions the same as real compliance by corporations and governments. That is, high-powered incentives are necessary but not sufficient to achieve real fulfillment of worker rights on the ground. Benefits or sanctions must not be deployed in scattered fashion, blown by geopolitical winds. The third and fourth features—mandatory, fair enforcement—mean that economic incentives for worker rights must not be dependent on the political whims of the executive branch of powerful governments, including the United States. As we have seen, current U.S. trade legislation authorizes the president to order trade sanctions against trading partners that fail to enforce internationally recognized labor rights—but he has exercised that power in limited and geopolitically biased ways. Under existing trade agreements, the president has never exercised his discretion to pursue sanctions against a trading partner for violating any terms of the agreement. The multilateral ILO has ventured to authorize sanctions only in a single, geopolitically easy case.

The lesson is clear: If they are to be meaningful, benefits and sanctions must not be a matter of discretion exercised by politically driven actors. Rather, incentives must be based on the continuous application of clear, mandatory criteria.

Reducing discretion in enforcement may actually lessen the opposition by some governments to the inclusion of labor rights in the ground rules of global trade. To be sure, many governments implacably oppose labor rights because economic and political elites fear the redistributive consequences of increasing workers' economic and political power. But some opposition to labor rights rests on legitimate fears that powerful countries will enforce the rights in politically distorted ways. A low-wage country might genuinely prefer to protect the rights and standards of its workers, but may nonetheless oppose international (and domestic) standards out of fear that it will be unfairly singled out for enforcement and will thereby lose competitive advantage with other low-wage countries. This is a familiar collective-action problem. The more the international mechanism promises to enforce labor rights uniformly and concurrently against trading partners, the less opposition it may meet, at least on this ground.

The fifth feature requires actual, full compliance, rather than allowing governments and employers to avoid sanctions or receive full benefits if they meet fuzzy goals like “taking steps toward” compliance. Absolving governments and employers of further compliance responsibilities when they meet these kinds of fuzzy goals has undermined the GSP, Section 301, and other initiatives. This does not mean that the incentive system cannot or should not reduce sanctions or increase benefits incrementally as governments and employers meet benchmarks of increasing compliance. But the benchmarks must measure actual increases in compliance, demonstrated by improvements in actual workplace conditions, not mere efforts at (“taking steps toward”) compliance. And, while partial actual compliance can trigger incremental increases or decreases in incentives, it cannot justify removing a country or its employers altogether from the incentive system.

Critically, compliance must be “well-specified,” in the sense that governments and corporations must be held to specific criteria and performance measures. Rights that are stated in highly abstract terms—like the ILO core labor rights—provide essential touchstones, but they are much too general to define actual compliance by governmental and corporate actors. The indispensable virtue of the ILO core rights is simply that they state the broad rubrics of freedom of association and collective bargaining rights. In the absence of such international endorsement, the United States might well leave these entire categories out of trade agreements. But the key point here is that the enumeration of such abstract rights is insufficient in the absence of detailed rules, criteria, and performance measures that serve as indicators of compliance by governments and employers. How to design a mechanism to generate detailed compliance criteria and measures that are fair and effective—and are continuously strengthened in light of changing worker needs and continuously improved capacities of production systems—is perhaps the most difficult problem in designing institutions to enforce global labor rights. (Analogous problems arise in designing institutions to enforce any other category of legal rights.)

Well-specified criteria and performance measures can take at least two forms. They can be bright-line, specific rules or criteria, such as: “Employers must permit union

organizers to meet with workers on company property during workers' lunch break, in areas not dedicated to current production or to service of customers." This type of rule tells employers the precise action they must take, and tells governments the precise rules they must enforce. (Note that telling a government or an employer it must comply with a highly abstract right like "freedom of association" or "the right to organize" does not in itself tell them to comply with a specific rule like the one just stated.)

Alternatively, they can be performance measures that mandate specific outcomes. This type of standard tells the employer or government the result that must be achieved, but does not dictate the action the employer or government must take to achieve the specific outcome. The employer or government can use whatever means it chooses to arrive at the specific outcome. For example: "The employer shall ensure that workers' exposure to cotton dust does not exceed a maximum time-weighted average exposure limit of 200 micrograms per cubic meter of air for an eight-hour workday." The employer can choose among the different technologies that will satisfy this standard. (Again, an abstract statement of a core labor right—such as the "right to a safe workplace"—would not itself tell the government or employer to achieve a specific outcome such as the one just stated.<sup>45</sup>)

Since abstractly phrased "core labor rights" do not themselves provide such well-specified criteria or performance measures, how is the enforcement mechanism—whether a domestic court or administrative agency, or a bilateral or regional commission—to identify and apply the latter?

An enforcement mechanism should start by ensuring that governments and corporations comply fully with host-country labor laws. That is, domestic legal codes typically provide a set of rules and outcome requirements that exceeds in detail the generalities of "core labor rights." For this reason, in *actual practice* international investigators such as WRC investigative teams typically look *in the first instance* to domestic labor rules as the most specific, detailed set of available benchmarks for determining whether factories are in compliance with labor rights and standards. As discussed above, this approach is already embodied in U.S. bilateral and regional trade agreements. Those agreements require governments to "effectively en-

force" the labor laws on the books. Again, the problem with this rule is not so much its substantive content but the fact that our trade agreements do not meaningfully enforce it. If the international enforcement mechanism could actually induce governments—including the United States—to effectively enforce their labor laws, we would see a radical improvement in working conditions and workers' bargaining power around the world.

The experience canvassed above shows that domestic labor legislation and regulations can play this role *only* if there are institutional mechanisms to (1) give detailed content to the domestic legislation and regulations, where those domestic rules are not yet sufficiently precise, and (2) rigorously test the domestic legislation and regulations against international rights and standards.

The first of these two conditions reflects the point that domestic rules, even if less abstract than international core labor rights, are frequently still too general to directly serve as specific compliance criteria and performance measures, engaging comprehensively with the innumerable practices of actual workplaces. The second condition means that the requirement that governments "effectively enforce" their domestic laws must be combined with the requirement that domestic law complies with international labor standards. For example, domestic labor laws that specifically prohibit the organization of unions that are independent of the government cannot serve as a compliance standard, however well-specified the law may be. This, of course, raises a dilemma: If international "core rights" are too abstract to generate detailed guidance, how can we test specific domestic rules in light of the abstract international standards?<sup>46</sup>

The problem can be mitigated, though not altogether avoided, in at least four ways. First, the ILO core labor rights have not, in fact, remained pure abstractions in all cases. ILO supervisory bodies have developed a common law that turns the abstractions into more specific rules—even if, as explained above, the ILO's common law is developing much too slowly, is not nearly as elaborate or specific as most domestic bodies of labor law, and leaves many gaps (i.e., areas where specific rules have not yet been announced by the ILO supervisory bodies). For example, ILO decisions make clear that "freedom of association" prohibits governments from requiring that all

unions become affiliated with a government-controlled federation. So, even though the core rights are framed in the most abstract terms, there will still be at least some “easy” cases such as this.

Second, the international setting may provide an advantage in developing detailed criteria and performance measures: The enforcement mechanism can hold each country or corporation, at a *minimum*, up to the best rules, measures, and practices for protecting workers’ core rights that have already been adopted by comparable countries and corporations. For example, if one government has implemented successful programs to eliminate child labor, then all other countries in the same region (or at comparable levels of economic development) must implement programs that are no less effective. Or, if one corporation in the automobile assembly industry in one developing country meets high standards of protection against ergonomic injuries, then that country must ensure that all auto companies meet the same standards, and other trading partners must ensure that all auto companies within their jurisdictions do the same. One big advantage of the “best practices” standard is this: By definition, existing best practices will be comprehensive and detailed, since there *are* existing, specific practices as to any particular workplace issue.<sup>47</sup> However, it must be absolutely clear that international best practices set a floor, not a ceiling. Otherwise, industry-wide abuses may become entrenched as global standards.

Third, and perhaps most important, the international or domestic commission should take on the rule-making functions of an administrative agency. That is, the commission can promulgate detailed criteria or performance measures through proactive rule-making rather than solely through case-by-case adjudication in response to particular disputes. Such rule-making will be greatly facilitated by the 10th feature—the requirement of comprehensive, verifiable disclosure of workplace standards by governments and corporations. The commission can use that information to, among other things, compare and benchmark the performance of different countries, sectors, and corporations.

*If there are differences among the three sources of well-specified rules—domestic law, ILO rights and standards, international best practices—then governments and*

*corporations must be held to the specific criteria and measures that are most protective of workers’ basic rights.*

Moreover, these detailed criteria and measures must not be static. Interpretation of the specific requirements of international and domestic rights and international best practices will themselves evolve. That is, *over time, the specific measures must be revised to provide increasing protection*, as the seventh feature requires. We can expect that, over time, high-powered incentives and high-powered information disclosure will reveal that stronger specific measures are *feasible*, especially in light of the more or less continuous increases in productivity that accompany economic development and organizational innovation. We can also expect that workers’ claims before the commission and their demands in collective bargaining will reveal that stronger specific measures are *necessary* to achieve sustained fulfillment of workers’ basic rights through actual compliance and remediation on the ground.

The latter point will be familiar to practitioners of labor rights enforcement, whether in domestic or cross-border settings. A public agency or private consortium may order compliance with labor rights—such as workers’ right to engage in union activity, free of coercion—but much more specific rules are subsequently found to be *necessary* to achieve *actual compliance* with that order and *actual remediation* of violations of the right. For example, an employer may engage in such a variety of subtle forms of coercion against union supporters that it becomes necessary (and feasible) to place a neutral observer or “snap” arbitrator in the workplace to deter coercion before it happens and to observe violations “in real time” rather than try to reconstruct subtle events from conflicting testimony long afterwards, when it is too late to repair the damage to the right. The right of association may be fulfilled only by such detailed, specified measures; and it may only be during the remediation process that they are shown to be necessary and feasible.

If enforcement commissions should act as administrative agencies that proactively promulgate specific criteria and measures telling governments and employers how to comply with otherwise abstract rights, then what *kind* of administrative agency should they be? The commissions should not be purely technocratic organizations that remain



distant from local production systems and from workers' local efforts to ensure real fulfillment of their rights on the ground. More specifically, the commissions should not be composed only of jurists specializing in labor rights. Rather, the commissions should be democratized, in the sense that worker organizations should be constitutive participants in decision-making alongside expert jurists, as the eighth feature requires. Worker representatives should participate in the commission's ongoing deliberations over formulation of well-specified measures of compliance—that is, over the detailed definition of worker rights in specific contexts. As just explained, workers are particularly well-situated to help formulate the necessary and feasible measures that governments and corporations must take to achieve compliance. Worker representatives should also sit on the commission's arbitral panels for resolving particular disputes in response to complaints. They should participate in the evaluation of actual enforcement systems from government to government. And they should serve on the commission's decentralized investigative teams that carry out ground-level monitoring and enforcement.

Both in centralized decision-making and in decentralized investigations, workers and jurists should *deliberate alongside* specialists in production systems, local enforcement officials (to the extent they are democratically legitimate and committed to the rule of law), representatives of the informal sector, small producers, women's organizations, village associations, and other actors with relevant knowledge and interest—even though workers and jurists (who are the formal members of the commission) should retain *final decision-making authority*.

For these reasons, the commission will not be a top-heavy bureaucracy that issues centralized edicts, detached from the realities of workplace organization and production systems. In formulating detailed criteria and performance measures, the commission will rely on decentralized information and prioritization provided by workers, their organizations, and other interested and knowledgeable actors, and will systematically learn from the experience of remediation by employers and government agencies in the context of real production systems.

Comprehensive disclosure by employers and governments—and verification by workers—is just as essential as the raw power to impose sanctions or confer benefits.

Sanctions and benefits cannot be reliably applied on a continuing basis without equally reliable information about employers' and governments' actual compliance or non-compliance with worker rights—that is, information about the actual wages and working conditions from workplace to workplace, the actual managerial systems for ensuring compliance, and the actual enforcement systems from government to government. Such transparency is also vital for uncovering the precise, feasible remedial measures for achieving immediate compliance with any right or standard, whether domestic or international. And, as already mentioned, transparency is vital for determining international best practices, ensuring that workplaces and governments are, at a minimum, held to the most worker-protective standards met by other workplaces in the same industry or by other governments in each region or at similar levels of development. Such disclosure systems will only succeed if the information is immediately made public and subject to verification by the parties with the greatest incentive and capacity to do so—namely, the workers themselves, and their organizations.

The 12th feature is also critical. In the long term, transnational enforcement systems cannot substitute for domestic administrative systems, managerial systems, and worker organizations that will ensure sustained compliance. To the contrary, as just explained, transnational enforcement systems will be most effective when they rely on local actors to provide and verify information about workplace conditions, to propose detailed specifications and measures of abstract rights, to report on the effectiveness of remediation efforts on the ground, and to document the feasibility of alternative remediation strategies. In the very process of carrying out its core enforcement functions, then, the transnational commission will necessarily devote substantial resources to building the capacity of domestic agencies, managerial systems, and worker organizations.

The 13th feature requires that the international mechanism ensure that its *own* investigative and compliance teams meet the highest standards of past performance by other teams, continuously deliberate over new enforcement strategies, and test and evaluate those innovative strategies, in the manner described at some length above in Section III.



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## V. What would ideal institutions for enforcing international labor rights look like, and what steps point toward them?

This section first gives a brief overview of the central and local institutions of a well-designed international mechanism to enforce labor rights. It then offers more detailed proposals for reform of each of the following categories: unilateral, bilateral, regional, and global institutions.

### A. General institutional architecture—the functions of central and local institutions

An international or domestic enforcement mechanism that has the 13 features listed in the previous section will combine centralized commissions and decentralized investigative teams, along with their respective administrative and technical secretariats. The commissions and investigative teams would have the following general structure and functions:

#### 1. Centralized commissions

In the case of unilateral *trade legislation*, the central institution would be a domestic commission devoted to international labor rights. The members of the commission would be worker representatives and jurists who specialize in international and comparative labor law.

In the case of bilateral and regional *trade agreements*, the central institutions would be twofold: (1) the domestic commission just described, and (2) a bilateral or regional commission established by the terms of the agreement. The members of the bilateral or regional commission would be worker representatives from all signatory countries and jurists who specialize in international and comparative labor law. Existing agreements already establish bilateral or regional labor commissions, although their structure and function do not embody the 13 key features enumerated above in the previous section.

In the case of *global institutions*, the centralized agency would be the ILO itself or, if ILO reform is occluded, a new global commission for enforcement of labor rights. The new or reformed global commission would, so far as reasonably possible, be politically insulated against pressure by the

governments and corporations whose abuses must be corrected. Like the domestic and regional commissions, then, the global commission would be comprised of worker representatives and independent jurists.

#### 2. Decentralized investigative teams

In all three cases—unilateral trade legislation, bilateral or regional trade agreements, and global organizations—the *decentralized institutions* would be investigative teams and their administrative offices. Members of the investigative teams would include commission staff; representatives of local worker organizations; specialists in production systems; specialists in occupational safety and health; officials of domestic enforcement agencies with demonstrable legitimacy (by virtue of their proven commitment to the rule of law and their independence from non-compliant managers or repressive state organs); and non-governmental organizations devoted to labor rights in the formal and informal sectors.

#### 3. Functions of the central commissions and decentralized investigative teams

The investigative teams would monitor the performance of both domestic enforcement agencies and managerial compliance systems. Although the central commissions would supervise their work, the investigative teams would have authority to make findings of violations of criteria and performance measures set by the central commission. They would also have authority to order domestic enforcement agencies and employers to take remedial steps necessary to achieve compliance, and to verify that remedial steps are taken. Both the findings and remedial orders would be subject to review by the central commission.

Concurrent with carrying out these investigative functions, the teams would support the capacity-building and in some cases the restructuring of domestic enforcement agencies and managerial compliance systems. In making any of these determinations, if commission staff serving on the investigative team disagree with other members of the team, then the former's decision shall prevail. That is, ultimate decision-making authority on the investigative team rests with the commission staff serving on the team,

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not with local worker representatives, specialists in production systems, local enforcement officials, *et alia*.

If investigative teams determine that enforcement agencies and employers have not achieved compliance, the teams would file a complaint with the commission demanding the imposition of sanctions or withdrawal of benefits. The central commission would have authority to impose sanctions or withdraw benefits, set benchmarks of increasing compliance, and incrementally lift sanctions or restore benefits as those benchmarks are met. Compliance would be measured by actual improvements in workplace rights and standards—hence, the need for investigation not only of domestic enforcement agencies but of employer compliance as well.

The commission would formulate specific criteria and performance measures for each trading partner's compliance with international labor standards, the trading partner's domestic laws, and international best practices. While the worker representatives and jurists comprising the commission would promulgate the criteria and performance measures, they would do so only after deliberations with members of the investigative teams. In those deliberations, the investigative teams would report on successes and failures in compliance across countries, economic sectors, and specific employers. In this way, the central commission would learn from the experience of local worker representatives, local enforcement officials, specialists in production systems, representatives of the informal sector, and other members of the investigative teams.

The commission and investigative teams would repeat this process at regular intervals, continuously strengthening the criteria and performance measures in light of workers' articulated priorities, improvements in production systems, and the best enforcement practices of governments, managers, and worker organizations. The commission would also require investigative teams themselves to adopt the most robust investigation procedures developed by other investigative teams and domestic enforcement agencies, as well as innovative investigative procedures that surpass the current practice of even the best investigation teams and domestic agencies. That is, the commission and investigative teams would together act as an engine of continual improvement in compliance methods for themselves, domestic enforcement agencies, and managers. Therefore,

both the substantive workplace standards and the existing enforcement methods would always be an ever-elevating floor, not a static ceiling.

Complaints could be filed with the commission not only by the commission's investigative teams, but also by governments and by workers, labor organizations, or human rights organizations. At the hearing, all of those actors would be entitled to submit oral and written evidence and arguments. The commission would hold the hearing and issue a final, binding decision within strict deadlines.

In the case of unilateral trade legislation, a U.S. domestic commission would play the role of the central commission just summarized. The commission would formulate criteria and performance measures, decide whether to impose sanctions or withdraw benefits, set benchmarks for incrementally lifting sanctions or restoring benefits, and so on. Workers, worker representatives, and human rights organizations could file petitions demanding that the commission impose sanctions or withdraw benefits against a particular trading partner. If the commission denied the petition, the petitioners could seek review of the decision in federal court.

As explained above, in the case of bilateral and regional agreements, there would be two commissions—(1) the bilateral or regional commission, and (2) the U.S. domestic commission. The U.S. domestic commission would determine whether the United States should file complaints against trading partners under the bilateral or regional agreements, alleging that the criteria and performance measures have been violated. Workers and worker representatives could file petitions demanding that the commission file a complaint against a trading partner. If the domestic commission denied the petition, the petitioners could seek review of the decision in federal court. Alternatively, workers, worker representatives, and human rights organizations could file complaints directly with bilateral and regional commissions.

## **B. Specific institutional proposals**

Finally, the policy payoff: What are the concrete proposals for policy reform that would embody the 13 institutional features outlined above in Section IV and the general division of functions between centralized and decentralized bodies outlined above in Section V-A?

My answer proceeds in two stages: First, I ask: what would be the ideal, comprehensive institutions for enforcing international labor rights? The institutions I propose are “ideal” and “comprehensive” in the sense that they would actually achieve substantial increases in workers’ bargaining power relative to capital, and would achieve actual improvements in wages and working conditions around the world.

The ideal institutions are ambitious. While it is easy enough to outline such ideal institutions, it is harder to imagine a global or domestic political environment that would permit their creation. But the exercise is worthwhile, even vital. We need to be hard-headed about the reforms that are necessary to meet the scale of the problem—reforms that could achieve real, measurable increases in workers’ bargaining power in the face of increasingly mobile capital and increasing global supplies of labor relative to capital. Without such analysis, we might accept trade agreements or trade legislation that purport to protect workers’ interests in the international economy—initiatives that some may trumpet as the grand answer to the problems of globalization—but that in fact provide only a palliative, serving the interests of investors and corporations but doing little if nothing for workers.

And, if political constraints limit us to small gains on behalf of workers, whatever incremental steps we take must have a larger destination. For these reasons, the second stage of my analysis sets out incremental reforms which, in themselves, may not achieve *substantial* gains in workers’ bargaining power or working conditions, but which at least move us in the right direction and produce *some* real gains. That is, they are incremental steps that point in the direction of the deeper reforms that could ultimately yield a global system that gives as much weight to social rights as to commercial and property rights. The partial reforms will be more robust, of course, to the extent that they combine the incremental reforms enumerated below with *some* elements of the ideal reforms.

I will offer reform proposals starting at the unilateral level, then work my way up, through bilateral, regional, and global institutions. The political plausibility of achieving these proposals goes in the same order. That is, as a political matter, achieving unilateral reforms is more feasible than

achieving bilateral reforms, which is more feasible than achieving regional reforms, and so on.

## 1. Reform of unilateral instruments

*Ideal, comprehensive reforms to unilateral instruments.* To achieve ideal, comprehensive reforms of the GSP, regional preference programs, and Section 301, Congress should enact the following amendments:

- Establish a domestic Commission on International Labor Rights.
- Members of the Commission shall include representatives of worker organizations and jurists specialized in international and comparative labor law.
- The Commission shall formulate detailed criteria and performance measures for each trading partner’s compliance with international labor law, the trading partner’s domestic labor law, and international best practices (as defined above in Section IV),<sup>48</sup> whichever is most worker-protective.
- The Commission’s criteria and performance measures shall be applicable to all sectors of the trading partner’s economy. In order to establish a violation, a complaining party need not show that violations of worker rights have an effect on trade or investment.
- The Commission shall supervise an inspectorate that engages in ongoing monitoring of compliance—by each trading partner and representative samples of employers—with the criteria and performance measures applicable to that country.
- The inspectorate’s monitoring activities shall be conducted through investigative teams comprised of inspectorate staff; the trading partner’s worker organizations; officials of the trading partner’s enforcement agencies that are demonstrably committed to the rule of law; specialists in production systems; and representatives of the informal economy, small producers, women’s organizations, village associations, and other non-governmental organizations with relevant knowledge and interests.

- While the Commission shall promulgate the criteria and performance measures for compliance, it shall do so only after deliberations with members of the investigative teams. In those deliberations, the investigative teams shall report on successes and failures in compliance across countries, economic sectors, and specific employers.
- The Commission and investigative teams shall repeat this process at regular intervals, continuously strengthening the criteria and performance measures in light of: workers' articulated needs; improvements in productivity and other innovations in production systems; innovation in compliance systems; and improvements in best practices in compliance by countries in particular regions, by countries at particular levels of economic development, by countries with differing labor relations systems, by employers in particular sectors, and other relevant variables.
- The Commission shall regularly convene fora at which investigative teams must disclose and compare their records of enforcement. The Commission shall require teams to adopt the methods of best-performing teams and of best-performing government enforcement agencies and to create new strategies, the effectiveness of which shall be evaluated at subsequent rounds of deliberation among the teams.
- When investigative teams find that a trading partner or employer has violated the criteria and performance measures, the investigative team shall order remedial steps to achieve compliance, subject to review by the Commission. In the event that compliance is not expeditiously achieved, the investigative teams shall file a complaint with the Commission, demanding sanctions against the trading partner or employer.
- In making any of these determinations, if the inspectorate staff serving on the investigative team disagrees with other members of the team, then the former's decision shall prevail. That is, ultimate decision-making authority on the investigative team rests with the inspectorate staff, not with local worker representatives, specialists in production systems, local enforcement officials, et alia.
- Workers, labor organizations, and human rights organizations shall also have the right to file complaints with the Commission, demanding the imposition of sanctions against a trading partner or employers.
- The Commission shall schedule an arbitral hearing no later than 60 days after a complaint is filed, and shall issue a final decision no later than 90 days after a complaint is filed.
- Workers, labor organizations, and human rights organizations shall have the right to present oral and written evidence and arguments at the Commission hearing, as well as written arguments following the hearing.
- The Commission shall—as a mandatory, not discretionary, matter—order sanctions or withdraw benefits if it finds that the criteria and performance measures are not met.
- Workers and worker organizations shall have a right to appeal to federal district court on claims that the Commission has failed to accurately formulate or apply criteria and performance measures, or has failed to order sanctions or withdraw benefits when the criteria or performance measures are violated.
- Incentives shall include country-wide, sectoral, or firm-targeted tariffs, quotas, monetary penalties, or benefits, and shall be sufficiently potent to achieve full remediation of non-compliance. When necessary to achieve compliance, sanctions will be imposed on global corporations that are supplied by non-compliant workplaces (i.e., contractors and affiliates of the global corporation).
- The Commission shall incrementally lift sanctions or increase benefits as the trading partner or employer achieves well-specified benchmarks of increasing actual compliance with criteria and performance measures, and shall fully lift sanctions or provide full benefits when (and only when) full compliance is achieved. The investigative teams shall verify the trading partner's satisfaction of these benchmarks.
- Before lifting sanctions or restoring benefits, incrementally or fully, the Commission shall give public notice,

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and shall hold a public hearing, at which workers, labor organizations, and human rights organizations shall have the right to present oral and written evidence and argument.

- Only the actual achievement of compliance shall be grounds for declining to impose or for lifting sanctions. The Commission shall not decline to impose sanctions or to withdraw benefits on the ground that the trading partner or employer has agreed merely to take steps or is merely taking steps toward compliance.
- Failure to achieve actual compliance shall not be excused by claims that the trading partner's budgetary or other resources are allocated to governmental purposes other than enforcement of the particular labor right in question.
- Concurrently with carrying out its monitoring and investigative functions, the Commission and inspectorate shall conduct aggressive programs to build our trading partners' capacity to comply with criteria and performance measures. That is, the Commission's compliance function and its technical assistance function shall be tightly integrated; indeed, they must be carried out simultaneously and by the same personnel. The programs shall be generously funded and, if necessary, shall require structural changes in our trading partners' enforcement agencies. Successful implementation of capacity-building measures shall be an element of the remedial orders and benchmarks that justify removal of sanctions or restoration of benefits.
- The USTR shall negotiate agreements with trading partners requiring them to ensure that the Commission's investigative teams have full access to enforcement agencies, enforcement officials, workplaces, workers, managers, and relevant documents, for the purpose of monitoring, investigating, and verifying compliance with criteria and performance measures.
- Enforcement agencies and officials of each trading partner must disclose comprehensive information about budgets, staff, enforcement procedures, enforce-

ment actions, and other data necessary for the Commission to determine whether compliance with criteria and performance measures is achieved.

- When demanded by the Commission (in its investigation of a representative sample of employers or its targeted investigation of complaints against specific employers), employers must disclose comprehensive information about wages, working conditions, managerial compliance systems, and substantive compliance with host-country labor laws, international labor law, international best practices, and the Commission's criteria and performance measures. U.S. corporations must disclose such information pertaining to the corporation's affiliates and suppliers located in each trading partner's territory.<sup>49</sup> Timely and accurate disclosure shall be enforced by the Commission, and by civil and criminal penalties.
- The president may petition Congress for waiver (by vote of both houses and signature by the president) of sanctions against a particular trading partner on grounds of serious impairment of national security interests.

*Incremental reforms of unilateral programs.* Incremental reforms of unilateral programs include the following Congressional amendments to the GSP, regional preference programs, and Section 301:

- The Department of Labor shall promulgate well-specified criteria and performance measures for compliance with international labor law, domestic labor law of U.S. trading partners, and international best practices (as defined above).
- In formulating and continuously strengthening the criteria and performance measures, the Department of Labor shall convene a forum of U.S. labor organizations, human rights organizations, and local actors—the trading partners' worker organizations, enforcement officials, specialists on production systems, representatives of the informal economy, small producers, women's organizations, village associations, and other non-governmental organizations with relevant knowledge and interests—to present



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and compare information about government enforcement systems, working conditions, production systems, and the norms and priorities of local worker communities.

- Workers, labor organizations, and human rights organizations shall have the right to file complaints with the Department of Labor, demanding the imposition of sanctions against a trading partner or employers.
- The Department of Labor shall schedule a hearing no later than 60 days after a complaint is filed, and shall issue a final decision no later than 90 days after a complaint is filed.
- Workers, labor organizations, and human rights organizations shall have the right to present oral and written evidence and arguments at the Department of Labor hearing, as well as written arguments following the hearing.
- If the Department of Labor finds that the criteria and performance measures are not met, the USTR shall—as a mandatory, not discretionary, matter—order sanctions or withdraw benefits.
- The level and type of sanctions shall be sufficient to induce full compliance with the criteria and performance measures.
- The Department of Labor’s criteria and performance measures shall be applicable to all sectors of the trading partner’s economy. In order to establish a violation, the Department of Labor need not find that violations of worker rights have an effect on trade or investment.
- The Department of Labor shall—when denying or granting a petition to investigate a trading partner or when determining that sanctions must be imposed or benefits withdrawn—issue a written, reasoned opinion explaining how the trading partner’s labor rights record does or does not comply with the well-specified criteria and measures promulgated by the Department of Labor. Likewise, the USTR shall issue a reasoned opinion explaining how the level and type of sanctions are adequate to induce immediate compliance.

- Complaining parties (i.e., workers, labor organizations, or human rights organizations) shall have the right to appeal a decision by the Department of Labor or USTR to federal district court, which shall have authority to review whether the Department of Labor and USTR have correctly applied the well-specified criteria and measures of compliance or have correctly imposed adequate mandatory sanctions or correctly withdrawn benefits.
- The USTR, on recommendation by the Department of Labor, shall incrementally lift sanctions or increase benefits as the trading partner achieves well-specified benchmarks of increasing actual compliance with criteria and performance measures, and shall fully lift sanctions or provide full benefits when (and only when) full compliance is achieved.
- Before the USTR lifts sanctions or restores benefits, incrementally or fully, the Department of Labor shall give public notice of the question, and shall hold a public hearing, at which workers, labor organizations, and human rights organizations shall have the right to present oral and written evidence and argument.
- The Department of Labor and USTR shall not decline to impose sanctions or to withdraw benefits on the ground that the trading partner has agreed to take steps or is taking steps toward compliance. Only the actual achievement of compliance shall be grounds for declining to impose sanctions, lifting sanctions, granting benefits, or restoring benefits.
- Failure to achieve actual compliance shall not be excused by claims that the trading partner’s budgetary or other resources are allocated to governmental purposes other than enforcement of the particular labor right in question.

## **2. Reform of bilateral and regional trade agreements**

*Ideal, comprehensive reforms of bilateral and regional trade agreements.* All bilateral and regional trade agreements entered into by the United States shall conform to the following:

- The agreement shall establish a Bilateral or Regional Commission for Labor Rights.
- Members of the Bilateral or Regional Commission shall include representatives of worker organizations of each trading partner and jurists who specialize in international and comparative labor law and who are independent of governments and corporations.
- The Bilateral or Regional Commission shall formulate detailed criteria and performance measures for each trading partner's compliance with international labor law, the trading partner's domestic labor law, and international best practices (as defined above), whichever is most worker-protective.
- The Bilateral or Regional Commission's criteria and performance measures shall be applicable to all sectors of the trading partner's economy. In order to establish a violation, a complaining party need not show that violations of worker rights have an effect on trade or investment.
- The Bilateral or Regional Commission shall supervise an inspectorate that engages in ongoing monitoring of each trading partner's compliance with the criteria and performance measures applicable to that trading partner. The inspectorate shall monitor compliance by government enforcement agencies and by representative samples of employers.
- The inspectorate's monitoring activities shall be conducted through investigative teams comprised of inspectorate staff; the trading partner's worker organizations; officials of the trading partner's enforcement agencies who are demonstrably committed to the rule of law; specialists in production systems; and representatives of the informal economy, small producers, women's organizations, village associations and other non-governmental organizations with relevant knowledge and interests.
- While the Bilateral or Regional Commission shall promulgate the criteria and performance measures for compliance, it shall do so only after deliberations with members of the investigative teams. In those deliberations, the investigative teams shall report on successes and failures in compliance across countries, economic sectors, and specific employers.
- The Bilateral or Regional Commission and investigative teams shall repeat this process at regular intervals, continuously strengthening the criteria and performance measures in light of: workers' articulated needs; improvements in productivity and other innovations in production systems; innovation in compliance systems; and best practices in compliance by countries in particular regions, by countries at particular levels of economic development, by countries with differing labor relations systems, by employers in particular sectors, and other relevant variables.
- The Bilateral or Regional Commission shall regularly convene fora at which investigative teams must disclose and compare their records of enforcement, and develop new strategies for enforcement. The Commission shall require teams to adopt the methods of best-performing teams and best-performing government enforcement agencies and to create new strategies, the effectiveness of which shall be evaluated at subsequent rounds of deliberation among the teams.
- When investigative teams find that a trading partner or employer has violated the criteria and performance measures, the investigative team shall order remedial steps to achieve compliance. In the event that compliance is not expeditiously achieved, the investigative teams shall file a complaint with the Commission, demanding that sanctions be imposed on the trading partner or employer.
- In making any of these determinations, if the inspectorate staff serving on the investigative team disagrees with other members of the team, then the former's decision shall prevail. That is, ultimate decision-making authority on the investigative team rests with the inspectorate staff, not with local worker representatives, specialists in production systems, local enforcement officials, *et alia*.
- Workers, labor organizations, and human rights organizations shall also have the right to file complaints with the Commission, demanding the imposition of sanctions against a trading partner or employers.

- The Commission shall schedule an arbitral hearing no later than 60 days after a complaint is filed, and shall issue a final decision no later than 90 days after a complaint is filed.
- Workers, labor organizations, and human rights organizations shall have the right to present oral and written evidence and arguments at the Commission hearing, as well as written arguments following the hearing.
- The Bilateral or Regional Commission shall—as a mandatory, not discretionary, matter—order that sanctions be imposed or benefits withdrawn when the criteria and performance measures are not met.
- Incentives shall include country-wide, sectoral, or firm-targeted tariffs or quotas or benefits, and shall be sufficiently potent to achieve full remediation of non-compliance. When necessary to achieve compliance, sanctions will be imposed on global corporations that are supplied by non-compliant workplaces (i.e., contractors and affiliates of the global corporation).
- The Bilateral or Regional Commission shall incrementally lift sanctions or increase benefits as the trading partner or employer achieves well-specified benchmarks of increasing actual compliance with criteria and performance measures, and shall fully lift sanctions or provide full benefits when (and only when) full compliance is achieved.
- Before lifting sanctions or restoring benefits, incrementally or fully, the Commission shall give public notice of the question, and shall hold a public hearing, at which workers, labor organizations, and human rights organizations shall have the right to present oral and written evidence and argument.
- Only the actual achievement of compliance shall be grounds for declining to impose sanctions, lifting sanctions, granting benefits, or restoring benefits. The Bilateral or Regional Commission shall not decline to impose sanctions or withdraw benefits on the ground that the trading partner or employer has agreed merely to take steps or is merely taking steps toward compliance.
- Concurrently with carrying out its monitoring and investigative functions, the Bilateral or Regional Commission and inspectorate shall conduct aggressive programs to build each trading partner's capacity to comply with compliance criteria and performance measures. That is, the Bilateral or Regional Commission's compliance function and its technical assistance function shall be tightly integrated; indeed, they must be carried out simultaneously and by the same personnel. The programs shall be generously funded and, if necessary, shall require structural changes in the trading partner's enforcement agencies. Successful implementation of capacity-building measures shall be an element of the remedial orders and benchmarks that justify reduction or removal of sanctions.
- Trading partners shall ensure full access by the Bilateral or Regional Commission's investigative teams to enforcement agencies, enforcement officials, workplaces, workers, managers, and relevant documents, for the purpose of monitoring, investigating, and verifying compliance with criteria and performance measures.
- Each trading partner shall maintain sufficient administrative and judicial capacity to ensure full compliance. Failure to comply shall not be excused by claims that budgetary or other resources are allocated to governmental purposes other than enforcement of the particular worker right or standard in question.
- When demanded by the Bilateral or Regional Commission (in its investigation of a representative sample of employers or its targeted investigation of complaints against specific employers), each trading partner's firms must disclose comprehensive information about wages, working conditions, managerial compliance systems, and substantive compliance with the trading partner's labor laws, international labor law, international best practices, and the criteria and performance measures promulgated by the Bilateral or Regional Commission. Timely and accurate disclosure shall be enforced by the Bilateral or Regional Commission and by civil and criminal penalties imposed by each trading partner's domestic legal system.

- When demanded by the Bilateral or Regional Commission, United States corporations must also disclose comprehensive information about wages, working conditions, managerial compliance systems, and substantive compliance with host-country labor laws, international labor law, international best practices, and the criteria and performance measures promulgated by the Bilateral or Regional Commission, in the corporation's affiliates and suppliers located in each trading partner's territory. Timely and accurate disclosure by U.S. corporations shall be enforced by the U.S. Commission on International Labor Rights (see below), and by civil and criminal penalties.
- Enforcement agencies and officials of each trading partner must disclose comprehensive information about budgets, staff, enforcement procedures, enforcement actions, and other data necessary for the Bilateral or Regional Commission to determine whether compliance with criteria and performance measures is achieved.
- The United States shall, as a matter of domestic legislation, create a domestic Commission on International Labor Rights, with the features specified in the previous subsection (on reforms of unilateral instruments). That is, there will be both (1) a "Bilateral or Regional Commission" associated with each agreement, and (2) a "United States Commission on International Labor Rights."
- The U.S. Commission shall take petitions from workers, labor organizations, or human rights organizations alleging violations by trading partners or by employers of their labor rights obligations under bilateral or regional trade agreements. The U.S. Commission shall also undertake proactive investigations of compliance with the labor rights obligations under bilateral and regional agreements.
- The U.S. Commission shall schedule an arbitral hearing no later than 60 days after a petition is filed, and shall issue a final decision no later than 90 days after a petition is filed.
- Workers, labor organizations, and human rights organizations shall have the right to present oral and written evidence and arguments at the U.S. Commission hearing, as well as written arguments following the hearing.
- The U.S. Commission shall—as a mandatory, not discretionary, matter—apply the Commission's well-specified criteria and performance measures of compliance. If it finds non-compliance, the United States shall file a complaint against the trading partner or employer in question, and the claim shall be heard by the Bilateral or Regional Commission established pursuant to the trade agreement.
- Workers, labor organizations, and human rights organizations shall have the right to appeal to federal district court on claims that the United States Commission has failed to accurately formulate or apply the Commission's criteria and performance measures or failed to file a complaint against the trading partner or employer in question when those criteria and performance measures are violated.
- Alternatively, as already noted, workers, labor organizations, and human rights organizations shall have the right to file complaints directly with the Bilateral or Regional Commission, alleging that a trading partner or employer has violated the Bilateral or Regional Commission's criteria and performance measures.
- After the Bilateral or Regional Commission imposes sanctions or reduces benefits, the United States Commission shall engage in ongoing monitoring of the trading partner's or employer's achievement or non-achievement of benchmarks of increasing compliance.
- The president may petition Congress for waiver (by vote of both houses and signature by the president) of sanctions or benefit-reductions against a particular non-compliant trading partner on grounds of serious impairment of national security interests.

*Incremental reforms to bilateral and regional trade agreements.* Incremental reforms could require that all bilateral and regional trade agreements conform to the following:

- Each trading partner shall fully enforce domestic labor law, core ILO conventions, and international best practices (as defined above).
- Obligations to comply with labor rights shall be applicable to all sectors of the U.S. and trading partner's economies. In order to establish a violation, a complaining party need not show that violations of worker rights have an effect on trade or investment.
- Failure to comply shall not be excused by claims that budgetary or other resources are allocated to governmental purposes other than enforcement of the particular labor right in question.
- The agreement shall establish a Bilateral or Regional Commission, comprising the labor ministers of the signatory governments.
- The Commission shall maintain a roster of arbitrators who are respected jurists in the field of labor rights and who are independent of governments and corporations. The body of arbitrators shall have a well-resourced inspectorate and staff.
- The body of arbitrators, meeting as a whole, shall formulate well-specified criteria and performance measures of compliance with the labor rights obligations of the agreement. (For this purpose, the arbitrators may draw on the measures defined by the U.S. Commission on International Labor Rights, if one is created, or by the Department of Labor, as described above.)
- In formulating and continuously strengthening the criteria and performance measures, the body of arbitrators shall convene a forum of local actors—the trading partners' worker organizations, enforcement officials, specialists on production systems, representatives of the informal economy, small producers, women's organizations, village associations and other non-governmental organizations with relevant knowledge and interests—to present and compare information about government enforcement systems, working conditions, production systems, and the norms and priorities of local worker communities; however, only the body of arbitrators, meeting as a whole, shall have final authority to formally adopt and revise the criteria and performance measures.
- No later than 60 days after a complaint is filed by one trading partner alleging that another trading partner or employers have violated any of the labor rights provisions of the agreement, an arbitral panel chosen by the body of arbitrators shall hold a hearing, no later than 90 days after the complaint is filed, the body of arbitrators, meeting as a whole, shall issue a final, binding order upon recommendation by the arbitral panel.
- Workers, labor organizations, and human rights organizations shall have the right to present oral and written evidence and arguments at the arbitral hearing, as well as written arguments following the hearing.
- If the body of arbitrators find a failure to comply with the criteria or performance measures of compliance, the arbitrators shall order sanctions or benefit-reductions against the offending government or employers. These shall include country-wide, sectoral, or firm-targeted tariffs, quotas, monetary penalties, or benefits, and shall be sufficiently potent to achieve full remediation of noncompliance.
- Sanctions shall be incrementally lifted or benefits incrementally increased as the trading partner or employer achieves well-specified benchmarks of increasing actual compliance with criteria and performance measures; and sanctions shall be fully lifted or benefits fully restored when (and only when) full compliance is achieved. These determinations shall be made by the body of arbitrators, not by the trading partners' governments.
- Before lifting sanctions or restoring benefits, incrementally or fully, the body of arbitrators shall give public notice of the question, and a panel of arbitrators shall hold a public hearing, at which workers, labor organizations, and human rights organizations shall have the right to present oral and written evidence and argument.
- Workers, labor organizations, and human rights organizations may petition the USTR to file a complaint against a trading partner or employers.



- The USTR shall—when denying or granting a petition to bring a claim against a trading partner—issue a written, reasoned opinion explaining how the trading partner’s or employers’ labor rights record does or does not comply with the criteria and performance measures announced by the body of arbitrators and by the U.S. Commission or Department of Labor.
- Petitioners (i.e., workers, labor organizations, and human rights organizations) shall have the right to appeal a decision by the USTR to federal district court, which shall have authority to review whether the U.S. Commission or Department of Labor has correctly formulated and the USTR correctly applied the criteria and performance measures.
- The president may petition Congress for waiver (by vote of both houses and signature by the president) of sanctions or benefit-reductions against a particular non-compliant trading partner on grounds of serious impairment of national security interests.

### 3. Reform of global labor institutions

The ILO is the obvious candidate for the task of deepened labor rights enforcement at the global level. However, in recent years, owing to its internal political gridlock, the ILO has shown itself unable to assume this role. That might begin to change, if the United States were to give full-throttled support to such an initiative. Proponents of labor rights should strongly advocate such support. Even if the United States were fully committed, however, the likelihood of comprehensive reform of the ILO is not great, without concurrent commitment by other major blocs in the global community. Nonetheless, it is worth considering the reforms that could enable ILO bodies to effectively realize ILO rights and standards.

*Ideal, comprehensive reforms of global labor institutions.* The agenda for comprehensive reforms of the ILO includes, among other things:

- The creation of an ILO Compliance Commission independent of political pressure exerted by blocs of member states and business federations (which currently resist strong enforcement of ILO Conven-

tions). Such insulation would be achieved if independent jurists and worker representatives comprised a majority of Commission members.

- The ILO Compliance Commission shall formulate detailed criteria and performance measures for each member state’s and employers’ compliance with ILO Conventions, the member state’s domestic labor law, and international best practices (as defined above in Section IV), whichever is most worker-protective. The Commission must be empowered to promulgate such criteria and measures up front, rather than through the slow, haphazard process of common-law decision-making (i.e., decisions by ILO supervisory bodies in response to complaints).
- The ILO Compliance Commission shall supervise an inspectorate that engages in ongoing monitoring of each member state’s and its employers’ compliance with the criteria and performance measures applicable to that member state. The inspectorate shall investigate representative samples of employers and shall investigate targeted complaints against particular employers.
- The inspectorate’s monitoring activities shall be conducted through investigative teams comprised of inspectorate staff; the host-country’s worker organizations; officials of the host country’s enforcement agencies who are demonstrably committed to the rule of law; specialists in production systems; and representatives of the informal economy, small producers, women’s organizations, village associations and other non-governmental organizations with relevant knowledge and interests.
- The ILO Compliance Commission shall at regular intervals convene a forum of local investigative teams. At these regular conferences, the investigative teams shall present and compare information about government enforcement systems, working conditions, production systems, and the norms and priorities of local worker communities.
- In light of these deliberations, the ILO Compliance Commission shall continuously strengthening the

criteria and performance measures, based on: workers' articulated needs; improvements in productivity and other innovations in production systems; innovation in compliance systems; and best practices in enforcement by countries in particular regions, by countries at particular levels of economic development, by employers in particular sectors, and other relevant variables.

- At these periodic conferences,, investigative teams must disclose and compare their own records of enforcement, and propose new strategies for enforcement. The Commission shall require teams to adopt the methods of best-performing teams and best-performing government agencies and to test the new proposed strategies, the effectiveness of which shall be evaluated at subsequent rounds of deliberation among the teams.
- The ILO Compliance Commission shall adjudicate complaints filed by the Commission's inspectorate and by workers and labor organizations.
- The ILO Compliance Commission shall—as a mandatory, not discretionary, matter—order the imposition of sanctions or withdrawal of benefits when the criteria and performance measures are not met.
- Sanctions or benefits shall include country-wide, sectoral, or firm-targeted tariffs, quotas, monetary penalties, or benefits, and shall be sufficiently potent to achieve full remediation of noncompliance. When necessary to achieve compliance, sanctions will be imposed on global corporations that are supplied by non-compliant workplaces (i.e., contractors and affiliates of the global corporation).
- The ILO Compliance Commission shall incrementally lift. sanctions or increase benefits as the member state or employer achieves well-specified benchmarks of increasing actual compliance with criteria and performance measures, and shall fully lift sanctions or provide full benefits when (and only when) full compliance is achieved.
- Only the actual achievement of compliance shall be grounds for declining to impose sanctions, lifting

sanctions, granting benefits, or restoring benefits. The ILO Compliance Commission shall not decline to impose sanctions or to withdraw benefits on the ground that the member state has agreed merely to take steps or is merely taking steps toward compliance.

- Concurrently with carrying out its monitoring and investigative functions, the ILO Compliance Commission and inspectorate shall conduct aggressive programs to build a member state's capacity to comply with compliance criteria and performance measures. That is, the ILO's compliance function and its technical assistance function shall be tightly integrated; indeed, they must be carried out simultaneously and by the same personnel. The programs shall be generously funded and, if necessary, shall require structural changes in the member state's enforcement agencies. Successful implementation of capacity-building measures shall be an element of the remedial orders and benchmarks that justify lifting of sanctions or restoration of benefits.
- Member states shall ensure full access by the ILO Compliance Commission's investigative teams to enforcement agencies, enforcement officials, workplaces, workers, managers, and relevant documents, for the purpose of monitoring, investigating, and verifying compliance with criteria and performance measures.
- Each member state shall maintain sufficient administrative and judicial capacity to ensure full compliance. Failure to comply shall not be excused by claims that budgetary or other resources are allocated to governmental purposes other than enforcement of the particular worker right in question.
- Upon demand by the ILO Compliance Commission (in conducting investigations of representative samples of employers or investigations of targeted complaints against particular employers), firms in each member state must disclose comprehensive information about wages, working conditions, managerial compliance systems, and substantive compliance with the criteria and performance measures promulgated by the ILO Compliance Commission. Timely and accurate disclosure shall be enforced by the Commission and by

civil and criminal penalties imposed by each member state's domestic legal system.

- Enforcement agencies and officials in each member state must disclose comprehensive information about budgets, staff, enforcement procedures, enforcement actions, and other data necessary for the ILO Compliance Commission to determine whether compliance with criteria and performance measures is achieved

If the ILO is unable to reform itself in this way, however, the United States should throw its weight behind the creation of a new, independent international commission with the features set out above. A new independent commission would have the virtue of being free of the ILO's current political paralysis—although, of course, the new mechanism would need to be carefully designed to minimize similar pressures by governments and corporate lobbies resistant to labor rights enforcement.

It is not hard to imagine the general contours of a new Commission on International Labor Rights at the global level, however unlikely, as a political matter, that such a commission could be established and insulated from government and corporate control. There are at least two kinds of mechanisms that could play this role. First, a technocratic model would vest decision-making power in a body of labor-rights jurists, with a well-resourced inspectorate, who have no links with governments or corporations. Second, a more appealing, worker-centered model would vest decision-making power in a body that includes such jurists together with representatives of worker organizations around the globe. Under either model, representatives of governments and corporations might be given minority representation, not as a matter of principle but rather to ensure that the creation of the new mechanism is politically feasible. (Not as a matter of principle, because it is a conflict of interest for governments and corporations to participate in determining whether they themselves are in compliance with their labor rights obligations.)

A new commission of this kind would displace much of the ILO's current, inadequate supervisory machinery. It need not, however, entirely displace the ILO's function of promulgating the international labor code. While the

ILO would continue to enact Conventions drafted in general terms, the new commission would convert such Conventions into well-specified criteria and measures and would ensure that governments comply with those criteria and measures.

*Incremental reforms of global labor institutions.* Incremental reforms that point in the right direction include the following initiatives by the ILO:

- The ILO supervisory bodies shall issue rulings that authorize WTO member states to impose sanctions, under Article XX of the GATT,<sup>50</sup> against member states that persistently fail to comply with ILO Conventions.
- The International Labor Office (the ILO's secretariat) shall formulate detailed criteria and performance measures for each member state's compliance with ILO Conventions, the member state's domestic labor law, and international best practices (as defined above), whichever is most worker-protective.
- The ILO supervisory bodies shall undertake systematic investigations of the budgets, staff, enforcement procedures, and enforcement actions of actual domestic enforcement systems.
- The ILO supervisory bodies shall undertake systematic investigations of managerial compliance systems, actual workplace conditions, and employer compliance with substantive criteria and performance measures applicable to each member state.
- The ILO supervisory bodies' investigations shall routinely include on-site inspections, interviews, surveys, and document-gathering.
- The ILO supervisory bodies' systematic investigations of enforcement agencies and workplaces shall be proactive. That is, complaints need not be filed to trigger the investigations.
- Panels of respected labor-rights jurists, who are independent of governments and employers, shall issue the final findings of such systematic investigations, without review or approval by governments or business federations.

- Member states shall ensure that ILO investigators have full access to enforcement agencies, enforcement officials, workplaces, workers, managers, and relevant documents, for the purpose of monitoring, investigating, and verifying compliance with criteria and performance measures. Member states shall grant blanket permission for ILO investigators to enter countries and workplaces for unannounced, proactive investigations.
- Member states shall submit detailed, routine reports on actual enforcement systems, actual enforcement actions, and actual workplace conditions pertaining to the criteria and performance measures promulgated by the International Labor Office—not just reports of laws-on-the-books and formal enforcement procedures.

In light of the fact that significant reform of the ILO or creation of a new international commission could not be carried out by the United States alone even if the United States had the political will to vigorously pursue the project, it is more sensible as a political matter to focus on the unilateral, bilateral, and regional instruments over which the United States has full or substantial control.

#### **4. Reform of legislation granting trade promotion authority to the president**

In legislation delegating trade promotion authority to the president, Congress should mandate that future trade agreements include the concrete requirements set out above in subsection V-B-2 (on bilateral and regional agreements)—not as a negotiating “objective” but as an absolute precondition to congressional ratification of the agreement. Ideal legislation granting trade promotion authority would require that agreements include the specific ideal elements for all bilateral and regional agreements, enumerated above. Incremental legislation would require that agreements include the enumerated incremental steps.

## **VI. Practical implications: a hypothetical claim against Peru, under the existing trade agreement and under the proposed reforms**

Suppose a particular Peruvian company fired all women workers when they became pregnant, refused to recognize a majority union, or used prison labor. Or suppose that these practices were widespread in some sector of the Peruvian economy and that the Peruvian government failed to deter the practices. What could labor organizations or human rights organizations do under the existing U.S.-Peru Agreement, which is the existing template for bilateral agreements? In contrast, what could those organizations do under a bilateral agreement that conformed with this paper’s proposals? How would the case proceed under the existing and proposed agreements?

### **A. How would the case proceed under the existing U.S.-Peru Agreement?**

#### **1. Procedural steps**

Under the existing U.S.-Peru Trade Agreement, private parties such as unions or human rights organizations have no access to the agreement’s dispute settlement mechanism. Complaints against Peru, triggering inter-governmental consultation and arbitration, can be filed only by U.S. executive branch officials.

The only avenue for a union or human rights organization is to file a petition to the Office of Trade and Labor Affairs (OTLA) in the U.S. Department of Labor.<sup>51</sup> The Peru agreement does not require OTLA to provide any particular procedure nor even to respond to the petition. Under U.S. regulations, OTLA has unrestrained discretion to conduct or not conduct an investigation of the matters raised in the petition. If OTLA chooses to conduct an investigation, it has discretion to use any methodology it chooses. It need not address all the issues raised in the petition. It has discretion whether or not to issue a report covering any aspects of the petition it chooses to address.



If OTLA issues a report, it may recommend that the Secretary of Labor engage in “cooperative consultations” with the Peruvian government. The OTLA may also recommend whether the U.S. government should subsequently file a complaint under the agreement’s formal dispute procedure. But the OTLA recommendations have no binding effect.

The executive branch has complete discretion whether to file a complaint against Peru under the agreement. (I use the broad term “executive branch” advisedly—because U.S. regulations do not specify which executive officers make the discretionary decisions, after any OTLA recommendation.) The executive branch’s decision is not constrained by any specific criteria or performance measures of labor rights compliance by the Peruvian government or Peruvian employers. As a result, the executive branch need not issue a reasoned opinion that applies specific criteria or measures.

To date, the U.S. government has not, in fact, filed a single complaint against a trading partner under the labor provisions of any trade agreement. If the executive branch refuses to file a complaint against Peru, the union or human rights organization that submitted the petition to the OTLA has no remedy. That is, the petitioner cannot obtain review of the executive branch decision by any court or agency. One reason for the lack of binding review is precisely the fact that there are no specific criteria or performance measures that the executive branch must apply. A court or other reviewing body cannot hold the executive branch to any binding criteria, since the latter do not exist. In legal jargon, the executive branch’s decision is “non-justiciable.”

If the U.S. government decides to initiate proceedings under the agreement, the United States will first request “cooperative labor consultations” with the Peruvian government. If the two governments fail to resolve the matter, the United States may decide to drop the matter, or may request the formal convening of the “Labor Affairs Council,” which is composed of cabinet-level representatives of the United States and Peru or any other officials designated by each government. If the Council does not resolve the matter within 60 days, then the U.S. government may request further consultations or a meeting of the “Commission” under the Dispute Settlement provisions of the agreement

(Article 21).<sup>52</sup> The Commission is comprised of the USTR and Peru’s Minister of Foreign Commerce.

Before convening the Commission, the United States and Peru may engage in consultations for 60 days or any “other period as they may agree.”<sup>53</sup> If and when the Commission is convened, the Commission may reach a decision within 30 days or, again, any “other period as [the United States and Peru] may agree.”<sup>54</sup> Hence, if the two governments want to brush a dispute under the carpet, the case could be postponed indefinitely. This has in fact happened under the NAFTA side agreement, to the great frustration of the labor and human rights organizations that have filed NAFTA petitions. Cases have been postponed for years, without explanation by the U.S. government, and without any avenue for petitioners to extract an explanation.

If, after consultations of indefinite duration, the U.S. executive branch decides to push the dispute to arbitration, it may request the establishment of an arbitral panel. The United States, however, may specify the issues to be decided by the arbitrators and need not include all the issues raised in the original petition by labor or human rights groups.

The arbitral panel will have three members—one chosen by the United States, one chosen by Peru, and one chosen jointly by the two governments. Therefore, the government which is the target of a complaint—in our hypothetical, Peru—has veto power over the selection of a majority of the arbitral panel (two out of three).<sup>55</sup> The agreement does require that the governments choose arbitrators with “relevant” expertise or experience. But it is up to the two governments to decide who meets this mushy test, and the petitioners have no means to challenge the governments’ choice of arbitrators.

The hearing before the arbitral panel will be open to the public. But the organizations that filed the petition have no right to participate in the hearing. The United States and Peru are obligated only to “consider” the petitioners’ request to provide written submissions.

The arbitrators will issue an initial report within four months or any other period of time to which the governments agree, followed by a final report. (Again, there is the potential for indefinite delay.) The reports must contain findings of fact, a determination whether Peru has violated the labor rights provisions of the agreement, and



a recommendation for resolution of the dispute. After receiving the final report, the United States and Peru will attempt to reach agreement on a resolution, which should “normally” conform to the arbitrators’ findings and recommendations. If the two sides fail to reach agreement, then they will attempt to negotiate a mutually acceptable level of monetary compensation by Peru.

If the two sides cannot agree on compensation, then the United States may suspend trade benefits equivalent to the benefits impaired by Peru’s labor violations. The sanctions must apply to the sector in which the violations occurred, unless it is impractical or ineffective to impose sanctions only on that sector. However, if Peru chooses, it can avoid sanctions by paying a monetary fine to the United States equal to 50% of the benefits the United States proposed to suspend. In other words, the agreement permits Peru to violate labor rights and bear a cost equal to only half of the benefits that the country gains from non-compliance.<sup>56</sup> The agreement, therefore, creates a perverse incentive for Peru to violate the labor rights provisions of the agreement.<sup>57</sup>

At each of these many steps, the U.S. executive branch has complete discretion whether to move the case forward, and at what speed. The petitioning labor or human rights organization has no say in the matter and has no avenue for gaining binding review of the executive branch’s decision not to take the case to the next step, to drop some of the issues raised in the petition, to not impose sanctions, to impose inadequate sanctions, or to lift sanctions before Peru has come into full compliance. The experience under the NAFTA side agreement shows the danger in giving the U.S. executive branch such comprehensive discretion over processing disputes. Like the Peru agreement, the NAFTA side agreement gives the United States the right to press a case to arbitration; yet the United States has never done so.

## 2. Substantive hurdles

Even if the executive branch chose to push a case through each stage of the dispute procedures and seek an arbitral ruling, the substantive rights that are enforceable under the agreement are quite limited. The issue of prison labor (raised in the hypothetical petition against Peru) is not

covered by the “core labor rights” included in the agreement. And while freedom from employment discrimination and the right to union recognition are “core labor rights,” it is questionable whether the agreement mandates that Peru comply with *actual rights* contained in ILO Conventions, as opposed to the vague “principles” that underlie those “rights.” Those “principles” are not defined in international labor law and have no binding content.

Even if the agreement’s “core labor rights” contained not just vague principles but the actual rights contained in ILO Conventions, the ILO’s definitions of those rights are not always sufficiently detailed and comprehensive to constrain the discretion of the executive branch or an arbitral panel. For example, the ILO states that governments “should take appropriate conciliatory measures to obtain the employer’s recognition” of a majority union.<sup>58</sup> The phrase “appropriate conciliatory measures” leaves much to the Peruvian government’s discretion. However, it is doubtful that an arbitral panel—a majority of whose members are chosen by the Peruvian government—would find that the sovereign legal and administrative “measures” undertaken by Peru are not “appropriate.”

It is true that the U.S. government could file a complaint under the agreement alleging that Peru is not complying with its own domestic law on the issues of gender discrimination and union recognition—though not on the issue of prison labor.<sup>59</sup> But even as to claims under Peru’s domestic law, the Peruvian government may well have leeway to interpret its own labor code in a way that serves its interest in avoiding trade sanctions. In Peru’s legal system, like the legal systems of many trading partners of the United States, courts rarely issue reasoned opinions and therefore court opinions do not provide a body of precedent for interpreting labor codes. When challenged for not effectively enforcing their labor codes, the Peruvian government may therefore have significant wiggle room to say whether its conduct conforms to the abstract language of the code. Again, a cautionary example comes from the NAFTA labor side agreement. Labor and human rights organizations filed a petition alleging that the Mexican government was failing to effectively enforce its employment discrimination law because employers widely refused to hire pregnant workers and fired workers who became pregnant. The Mexican government responded by

authoritatively announcing that, under Mexican law, discrimination based on pregnancy was not a form of gender discrimination. (If this proposition sounds preposterous on its face, bear in mind that the United States Supreme Court had previously ruled that, under U.S. domestic law, discrimination against pregnant workers was not a form of gender discrimination.)

Moreover, whether the United States complains about violations of non-binding “principles,” about the actual rights contained in ILO Conventions, or about domestic Peruvian law, the fact that there are widespread violations by Peruvian *employers* is not sufficient to establish that the Peruvian *government* has violated the agreement. The agreement applies only to failures of the *Peruvian government to comply* with core labor rights and to *effectively enforce* its labor code. That is, the United States would have to show that the widespread employer violations stem from a failure of enforcement by the government. Proof of the former does not necessarily prove the latter. Arbitrators could rule that the Peruvian government is making sufficient efforts to enforce the law, but that intractable behavior by private employers still leads to widespread private violations.<sup>60</sup>

Arbitrators must therefore decide whether Peru’s level of enforcement resources, personnel, legal remedies, and case processing are good enough to constitute “compliance” or “effective enforcement.” And here is the crucial point: The Peru agreement contains no criteria for deciding this question. Nor does international law. Domestic jurisprudence as well provides little guidance to arbitrators—since this kind of systemic failure (i.e. the failure of a legal system to enforce an entire area of law, in this case labor law) is generally not subject to legal challenge in domestic systems.

The legal question of what degree of effort by a domestic government constitutes “effective enforcement” is therefore completely novel, requiring arbitrators to make up the rules as they go. We cannot predict how they will exercise *their* discretion in fashioning a definition for such a novel legal question. The Peru agreement does not constrain that discretion.

Even if arbitrators decided that the Peruvian government had failed to effectively enforce Peruvian law on employment discrimination and union recognition, such

failure would not count against Peru unless the United States could also convince the arbitrators that the failure resulted from “a *sustained or recurring* course of action or inaction” by the government.<sup>61</sup> Arbitrators must therefore forgive even an egregious violation by employers that goes unremedied by the Peruvian government—such as the failure to prosecute perpetrators of a massacre of trade unionists—if the government’s inaction was a one-time occurrence.

Further, to obtain sanctions against Peru, the U.S. government must prove to the satisfaction of arbitrators that Peruvian employers’ gender discrimination and failure to recognize majority unions affected trade or investment with the United States. If the United States is only able to prove that a small number of Peruvian employers are guilty of these offenses, then it will be extremely hard to show that there is a measurable impact on trade or investment.

Even if the United States proves that the violations are widespread, the empirical proof of a non-trivial impact is a very difficult exercise. The United States must show that Peru’s violations of labor rights cause a decrease in Peruvian wages, which then causes a decrease in production costs, which then causes a decrease in the retail price of Peruvian goods sold in the United States, which then causes an increase in Peruvian exports to the United States, which then causes a measurable loss of jobs or drop in wages in the United States.

It is hard enough to show that a labor rights violation such as gender discrimination or unsafe working conditions causes a drop in labor costs. (Firing pregnant workers, or substituting one gender for another, does not necessarily reduce labor costs. Likewise, many advocates of workplace safety argue that safe workplaces are more efficient and less costly than unsafe workplaces.) And, since labor costs are a fraction of production costs, and production costs are a fraction of retail costs, the ultimate impact is further attenuated. Moreover, whatever competitive edge is gained by Peru’s failure to enforce labor rights might, as a statistical matter, mean merely that U.S. imports of cheap Peruvian goods substitute for U.S. imports of cheap goods from other low-wage countries, without measurably affecting wages and jobs in the United States.

## **B. How would the case proceed if the proposed reforms are adopted?**

If this paper's proposals were adopted, labor unions and human rights organizations would have two alternative ways to trigger binding resolution of complaints against both the Peruvian government and Peruvian employers.

First, the labor and human rights organizations could file a complaint directly against the Peruvian government and Peruvian employers, alleging violations of the rights of pregnant workers, the right to union recognition, and rights against prison labor. The complaint would automatically start arbitration proceedings before the new Bilateral Commission (BC) created by the reformed agreement. The complainants would not have to rely on intermediary actors, such as U.S. executive branch officials, to initiate the agreement's binding arbitration mechanism.

Second, and alternatively, the labor and human rights organizations could file a petition with the U.S. government, demanding that the United States itself file a complaint against Peru under the terms of the revised U.S.-Peru Agreement. (Petitioners might choose this route, rather than filing a complaint themselves, in order to elicit the resources, prestige, and influence of the U.S. government when the complaint is heard by the Agreement's Commission.)

***Comparison:** Under the existing U.S.-Peru Agreement, labor and human rights organizations have no access to the Agreement's dispute settlement mechanism.*

If labor and human rights groups pursue this second avenue, their petition would be filed with the proposed U.S. Commission on International Labor Rights (CILR), a domestic U.S. agency that would be created by reformed U.S. trade legislation. The new legislation would charge the CILR with monitoring and enforcing the labor rights provisions of all U.S. trade agreements and trade legislation. Among other tasks, the CILR would promulgate highly specific criteria and performance measures for measuring Peru's (and other trading partners') compliance with (a) all rights and standards contained in international

labor law, (b) all of Peru's (or other trading partner's) domestic labor law, and (c) international best practices in labor rights compliance. (The Peruvian government and Peruvian employers would have to comply with the most worker-protective criteria contained in these three bodies of workplace rules.)

***Comparison:** Under the existing U.S.-Peru Agreement, Peru is obligated to comply only with a limited set of vague, non-binding international "principles" and with domestic labor laws related to only six subject matters. The proposed agreement would cover all areas of labor and employment rights, including (in our hypothetical case) prison labor, the rights of pregnant workers, and employer obligations to recognize majority unions.*

Both the Peruvian government and Peruvian employers would be bound by the labor rights and standards contained in the revised agreement.

***Comparison:** Under the existing U.S.-Peru Agreement, obligations are imposed only on the Peruvian government, not on Peruvian employers.*

In order to establish a violation of the agreement, the complaining party need not show that Peru's violations (of the rights of pregnant workers, rights to union recognition, or rights against prison labor) affect trade or investment with the United States. As explained above, the purpose of sanctions under a U.S. trade agreement with Peru or any other partner is to use U.S. economic leverage to enforce human rights and raise labor standards in Peru (and around the world). The purpose is not to enforce those rights and standards *only* if their violation causes a *direct* commercial harm to the United States. In any event, even if labor violations occur solely in non-exporting sectors in Peru and other trading partners, the suppression of wages and benefits in those sectors pulls down wages and benefits in the exporting sectors as well, thereby indirectly causing economic harm to the United States.

**Comparison:** *Under the existing U.S.-Peru Agreement, the complaining party must show that Peru's violation of the rights of pregnant workers, rights to union recognition, and rights against prison labor affect trade or investment with the United States.*

If labor or human rights organizations file a petition with the CILR—pursuing the second avenue mentioned above—the CILR will hold a hearing within 60 days in order to decide whether the U.S. government will file a complaint against Peru under the terms of the reformed U.S.-Peru Agreement. The CILR must apply its specific criteria and performance measures to the facts presented at the hearings, together with the facts previously gathered by the CILR's investigative teams in the CILR's process of continuous monitoring of Peruvian workplaces and Peruvian enforcement agencies. If necessary, the CILR's investigative teams will expeditiously conduct additional investigations of Peruvian workplaces and government enforcement agencies.

**Comparison:** *Under the existing U.S.-Peru Agreement, when labor or human rights organizations file a petition with the Department of Labor, U.S. executive officials are not bound to follow any particular procedure and are not bound to apply any specific criteria or performance measures.*

If the CILR finds that Peruvian employers or government agencies have violated the criteria and performance measures for compliance with the rights of pregnant workers, rights of union recognition, and rights against prison labor, then the CILR must (within 90 days of the filing of the petition) file a complaint under the terms of the reformed U.S.-Peru Agreement, triggering binding arbitration by the Bilateral Commission created by the agreement.

**Comparison:** *Under the existing U.S.-Peru Agreement, the executive branch has complete discretion to file or not file a complaint against Peru.*

If the CILR decides against the petition (i.e., if the CILR declines to file a complaint under the agreement's dispute settlement mechanism), then the CILR must issue a reasoned opinion, presenting its factual findings in detail and explaining why those findings do not constitute violations of the specific criteria and performance measures previously promulgated by the CILR pertaining to the rights of pregnant workers, rights of union recognition, and rights against prison labor.

**Comparison:** *Under the existing U.S.-Peru Agreement, the executive branch has no obligation to make factual findings and to issue a reasoned opinion applying specific criteria defining Peru's obligations to comply with the labor rights in question.*

The petitioners may then file an action in federal district court, alleging that (1) the evidentiary record fails to support the CILR's factual findings, (2) the CILR did not correctly apply its specific criteria and performance measures to the factual findings, or (3) the CILR's specific criteria and performance measures do not provide the most worker-protective and accurate benchmarks for measuring Peru's compliance with international labor law, domestic labor law, and international best practices. If the federal court rules in the petitioners' favor, the court will order the CILR to file a complaint under the Peru agreement.<sup>62</sup>

**Comparison:** *Under the existing U.S.-Peru Agreement, labor and human rights groups have no avenue for binding review of an executive branch decision not to file a complaint against Peru.*

Even before the petition reaches the CILR and the complaint reaches the Bilateral Commission (BC), labor organizations will have participated in the process of specifying the criteria and performance for Peru's compliance with labor rights—including, in our hypothetical case, the criteria for compliance with the rights of pregnant workers, the employer's obligation to recognize



majority unions, and prohibitions against forced prison labor. Indeed, representatives of labor organizations serve as members of the CILR and BC, alongside jurists with demonstrable expertise and commitment to enforcement of labor rights.

**Comparison:** *Under the existing U.S.-Peru Agreement, labor organizations play no role in defining the criteria for compliance with labor rights.*

As mentioned above, the CILR and BC are charged with continuous monitoring (i.e., investigating) of Peruvian employers' and enforcement agencies' compliance with the specific criteria and performance measures, including those pertaining to the rights of pregnant workers, rights to union recognition, and rights against prison labor. The CILR and BC will monitor government agencies and representative samples of employers. This continuous monitoring will enable the CILR to proactively file complaints under the agreement and to respond effectively to petitions filed by labor and human rights organizations. Continuous monitoring by the BC will similarly enable it to respond effectively to complaints filed either by the labor and human rights organizations or by the U.S. government.

**Comparison:** *Under the existing U.S.-Peru Agreement, neither the U.S. executive branch nor the agreement's Labor Council and Commission are charged with continuous investigation of Peru's and employers' compliance with the agreement.*

In conducting continuous monitoring, the CILR and the BC will deploy investigative teams that include representatives of labor and human rights organizations as well as CILR and BC staff.

**Comparison:** *Under the existing U.S.-Peru Agreement, any investigations by the U.S. executive branch or the agreement's Labor Council are purely discretionary and ad hoc, and would require Peru's consent—since the agreement does not mandate or even mention such investigations. Labor and*

*human rights organizations have no right to participate in any ad hoc investigations to which Peru might consent.*

Investigative teams will have access to all Peruvian workplaces and Peruvian government agencies for all relevant fact-gathering. Investigative teams will have access to managers, workers, government officials, and any other relevant parties for interviews, and will have authority to obtain all relevant documents, by subpoena if necessary. Worker interviews must be conducted in confidential locations off company property.

**Comparison:** *Under the existing U.S.-Peru Agreement, the Labor Council and Commission have no right of access to Peruvian workplaces, government agencies, managers, workers, officials, and other relevant parties, and no right of obtain relevant documents.*

Both the CILR and the BC will, at regular intervals, convene all investigative teams, as well as representatives of other relevant civil-society organizations, government agencies, and experts in production systems from Peru and the United States. Participants in these conferences— together with the worker representatives and jurists who are formal members of the CILR and BC—shall systematically discuss the effectiveness of investigative teams' protocols, managerial systems for compliance, and government agencies' enforcement methods. In light of these deliberations, the CILR and BC shall (1) revise their (respective) criteria and performance measures for compliance in order to provide greater worker protection, but shall not derogate from pre-existing criteria and measures, and (2) revise the protocols of their respective investigative teams to conform with the best practices that are revealed at the conference, and to develop and test innovative strategies for enforcement.

**Comparison:** *Under the existing U.S.-Peru Agreement, there is no mechanism for periodic review of the effectiveness of compliance systems used by*



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*employers and government agencies, nor for periodic review of the effectiveness of the agreement's Labor Council and Commission. Nor is there a mechanism for specifying and periodically strengthening the labor standards covered by the Agreement.*

The Bilateral Commission will convene an arbitral panel no later than 60 days after the complaint is filed against Peru. The United States and Peru will hold consultations during those 60 days. If the United States is satisfied that Peru has come into compliance, the United States will so inform the arbitral panel. Even so, the arbitral panel will convene, to rule on whether Peru has in fact achieved compliance.

**Comparison:** *Under the existing U.S. Peru Agreement, the United States and Peru have discretion to postpone consultations and arbitration indefinitely. If, at some time, the United States decides to drop the case, it may do so, without explanation, with no public participation, and with no review by arbitrators to determine whether Peru has in fact achieved compliance.*

The complaint against Peru, whether filed by a labor or human rights organization or by the U.S. government, will be heard by a panel drawn from the proposed agreement's Bilateral Commission. The panel shall include labor rights jurists and worker representatives from Peru and the United States. The Commission shall select the panel members.

**Comparison:** *Under the existing U.S.-Peru Agreement, arbitral panels do not include worker representatives and jurists, but are instead comprised solely of "experts" designated by the United States and Peruvian governments. And the complained-against party (Peru, in our hypothetical case) has veto power over the selection of two-thirds of the members of the arbitral panel.*

The arbitral panel will conduct an open hearing. Labor and human rights organizations shall have a right to

participate, alongside the U.S. government, in presenting evidence and arguments in support of the complaint. If necessary, investigative teams established by the agreement's Bilateral Commission may conduct expeditious fact-gathering before ruling on the complaint.

**Comparison:** *Under the existing U.S.-Peru Agreement, labor and other human rights organizations do not participate in arbitrations. The arbitral panels have no staff or investigative authority for fact-gathering on the ground in Peru.*

The arbitral panel must issue a final decision no later than 90 days after the complaint is filed. The decision, including any penalties or sanctions against the Peruvian government, Peruvian employers, or global corporations will take effect immediately.

**Comparison:** *Under the existing U.S.-Peru Agreement, the arbitral panel issues its final report within 150 days of the selection of arbitrators, unless both governments agree otherwise. However, even if the panel rules that Peru is not complying with the agreement, the recommendations of the final report do not take effect immediately. Instead, the two governments have 45 days (or any longer period to which they agree) to reach agreement on compensation by Peru. If they fail to reach agreement, the United States can impose sanctions against Peru, equal to the benefits impaired by Peru's non-compliance. However, if Peru believes the sanctions are excessive, it may request that the arbitral panel reconvene to decide the matter. But there is no time limit for the panel to issue a decision. And, after the arbitral panel reaches its decision on the appropriate level of sanctions, Peru may declare that it will instead pay a monetary assessment equal to 50% of the benefit impaired.*

The arbitral panel shall order trade sanctions and monetary penalties that are sufficient to induce compliance by the Peruvian government and Peruvian employers. That is, the

purpose of sanctions and penalties is deterrence of ongoing violations—not merely compensation for lost benefits to the United States. Sanctions and penalties may be targeted at specific sectors or specific corporations, or may be assessed against the Peruvian government (including specific government entities, such as the prison system, in the case of prison labor violations). If the panel finds that a Peruvian government agency has failed to enforce labor rights, then the panel could order a monetary penalty payable by the Peruvian government. If the panel finds that one or more Peruvian employers are violating labor rights, then the panel could impose trade sanctions or other penalties against the relevant employers or sectors or against the global corporations supplied by those employers. In either event, the panel’s mandate is to impose sanctions or penalties that will change the behavior of the offending actor, not just compensate U.S. actors.

**Comparison:** *Under the existing U.S.-Peru Agreement, Peru can choose to pay a monetary assessment equal to 50% of the value of trade benefits that are lost to the United States as a result of Peru’s noncompliance. For obvious reasons, this may give Peru an incentive to violate the agreement. Even if Peru does not opt for this half-price bargain, the United States may only impose sanctions on sectors of the Peruvian economy in an amount that compensates the United States for loss of benefits under the agreement. This will bring Peruvian employers or the Peruvian government into compliance only if the loss to the United States caused by Peru’s noncompliance is greater than the benefit gained by Peru. That is, compensation of the United States’ loss is not necessarily sufficient to deter ongoing violations by Peru—for at least two reasons. First, sanctions impose a cost on **private** exporters. This may not induce the Peruvian **government** to meet its obligations under the agreement. Second, the benefit to the United States from specific rights under the agreement may be less than the cost imposed on Peru by meeting its obligations under the agreement. For example, it may be costly for Peru to put in place expensive systems for protecting work-*

*place safety, but doing so may cause an economic benefit to the United States that is less than the cost to Peru. (Expensive safety measures may price Peruvian goods out of the U.S. market, but the United States may gain little if cheap goods from other countries take the place of Peruvian imports.) Hence, it may be rational for Peru to violate its obligation and suffer trade sanctions equal to the United States’ lost benefits.*

If the arbitral panel orders the imposition of sanctions or penalties, it will concurrently set forth compliance benchmarks for the Peruvian government, Peruvian employers, and global corporations. Relying on the continuous monitoring conducted by the Bilateral Commission’s investigative teams, the panel will determine whether the Peruvian government and employers are meeting those benchmarks, and will order incremental decreases in sanctions and penalties consistent with those determinations. (The United States’ CIRL will independently investigate, acting as a watchdog over the BC’s determinations.) The panel will order such decreases only if the Peruvian government and employers are *actually* improving compliance for workers, not if they are merely “taking steps” to improve compliance or merely putting into place government programs or managerial systems that have no measurable effect on actual fulfillment of criteria and performance measures in workplaces. Incremental decreases in sanctions and penalties will be calibrated to ensure that remaining sanctions and penalties are sufficient to deter future violations and achieve full compliance. Sanctions and penalties will be fully lifted only when the arbitral panel determines that the Peruvian government and employers have achieved full compliance. Before the arbitral panel makes each of its periodic determinations of whether benchmarks are achieved, it will hold public hearings in which labor and human rights organizations are full participants.

**Comparison:** *Under the existing U.S.-Peru Agreement, there is no procedure for rigorous determination whether sanctions or penalties should be lifted, nor any mandate that labor or human rights organizations play any role in such determinations.*

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If, for reasons of national security, the president wishes to waive sanctions or penalties against Peru, he must seek a majority vote of both houses of Congress.

***Comparison:** Under the existing U.S.-Peru Agreement, the executive branch has absolute discretion to drop the case against Peru at any time, including at the stage of imposing sanctions. The president need not seek a congressional vote to obtain a waiver of sanctions. Nor need he issue a reasoned opinion that justifies his decision. Nor is his decision reviewable by any other official or body. If a labor organization filed a petition under U.S. trade legislation demanding sanctions against Peru, then the president need only publish in the Federal Register his decision not to investigate and not to impose sanctions.*

## VII. Conclusion

Some may see these proposals—even the incremental ones—as excessively ambitious. But we should be clear-sighted about the reforms that are necessary to meet the scale of the problem—reforms that might actually achieve substantial increases in workers’ bargaining power and substantial improvements in working conditions around the world, in the face of increasingly mobile capital and increasing supplies of labor relative to capital. In the meantime, whatever incremental steps we take must have a larger destination. Otherwise, we may lose our way or, perhaps worse, convince ourselves that tiny steps are great strides. We should not accept a trade agreement or trade legislation that tangibly advances the interests of investors and corporations but puts core labor rights only on paper, failing to bring about real gains for real workers.

*—I extend my thanks to participants in an EPI workshop on an earlier draft of this paper. Special thanks to Mark Levinson, with whom I’ve collaborated over the years on a variety of projects to promote global labor rights. Many of the ideas in this paper emerged from practical experience in those projects. —Mark Barenberg*

## Endnotes

1. It is true that, unlike existing trade legislation, the ILO's list of "core labor rights" includes rights against discrimination. However, core labor rights do not include occupational safety and health standards, minimum wages, and maximum hours, which are included in the legislation. Moreover, the ILO Declaration that enumerates the core labor rights does not require ILO member states to comply with worker *rights* at all but instead requires them only to comply with vague *principles* that remain undefined in international law. To the extent that bilateral or regional agreements incorporate that Declaration by reference, the agreements' substantive obligations are much weaker than existing trade legislation.
2. Indeed, existing legislation authorizes unlimited sanctions or positive trade benefits to ensure compliance, while recent bilateral agreements provide for limited sanctions and benefits.
3. In a notable recent book making a powerful case for international labor rights, Reddy and Barry propose institutions for monitoring and enforcement that, while in some respects laudable, would maintain many of the fatal defects of current institutions criticized in this paper. See S. Reddy and C. Barry, *International Trade and Labor Standards: A Proposal for Linkage* (Columbia 2008).
4. H. Rep. No. 98-1090 (1984) (Ways and Means Committee) at p.12, reprinted in 1984 U.S.C.C.A.N. 5101, 5112.
5. H. Rep. No. 98-1090 (1984) at pp.11-12, reprinted in 1984 U.S.C.C.A.N. 5101, 5111-12.
6. H. Rep. No. 98-1090 (1984) at p. 11, reprinted in 1984 U.S.C.C.A.N. 5101, 5111. Again in 1985, Congress recognized that "[d]enial of worker rights in developing countries tends to...limit the benefits of economic growth to a narrow segment of the population, thereby retarding economic development..." H.Conf.Rep. No. 99-428 (1985) at p. 12 (conference report accompanying Overseas Private Investment Corporation Amendment Act of 1985, requiring foreign countries to enforce basic labor rights as a precondition to providing U.S. governmental insurance to investors), reprinted in 1985 U.S.C.C.A.N. 2583, 2584
7. In surveys, a vast majority of American consumers say they would prefer to buy goods made under decent working conditions and would be willing to pay higher prices for such goods. Yet it is rational for consumers to continue to buy cheaper goods made under poor conditions, since no individual consumer can expect her purchasing decisions to have any actual effect on workplace conditions in the absence of assurances that other consumers will also make ethical purchasing decisions. This is a classic collective-action problem: Each consumer fails to make optimal purchasing decisions because she cannot trust others to bear the costs of paying higher prices and acquiring information about workplace conditions. Its solution requires a collective actor that can coordinate purchasing decisions and reliably investigate working conditions. In other words, it requires democratic governmental action.
8. See Roberto Mangabeira Unger, *Free Trade Reimagined: The World Division of Labor and the Method of Economics* (Princeton 2007).
9. The Declaration confirms the core international labor rights of freedom of association, freedom from child labor and forced labor, and freedom from discrimination. (Other, non-core ILO Conventions codify rights to workplace safety, minimum wages, and other workplace rights and standards.) However, the Declaration itself obligates member states only to respect the amorphous "principles" underlying the core Conventions, not the rights stated in the Conventions. Those rights bind only the member states that have chosen to ratify them.
10. The member state can, rather than acquiesce, refer the matter to the International Court of Justice. This has never happened in the 11 cases in which a Commission of Inquiry has been appointed.
11. Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar, ILC, Provisional Record, 88th Session, Geneva, 2000.
12. Member states desist from filing complaints out of fear of triggering counter-complaints.
13. And even that treatise cannot capture the full specificity of legal rules and criteria, which can be found only by careful research of the much more extensive, detailed case law.
14. In the case of the GSP, ATPDEA, AGOA, and CBERA, the "sanctions" take the form of withdrawing or denying special trade benefits otherwise granted to developing countries.
15. 19 U.S.C. §§ 2461-2467.
16. 19 U.S.C. § 2462(b)(2).
17. 19 U.S.C. § 2467(4).
18. 19 U.S.C. § 3202(c)(7) (APTDEA); 19 U.S.C. § 3703(a)(1)(F) (AGOA); 19 U.S.C. § 2702(b)(7) (CBERA).
19. 19 U.S.C. § 2411(d)(3)(B)(iii).
20. The following summary of these two cases is based largely on Lance Compa and Jeffrey Vogt, "Labor Rights in the Generalized System of Preferences: A 20-Year Review," 22 *Comparative Labor Law & Policy Journal*, 199 (2005).
21. In addition, the president has given temporary extensions of benefits to 17 countries placed under continuing review.



22. 19 U.S.C. § 2462(b)(2)(G) (GSP) (“taking steps to afford”); 19 U.S.C. § 2411(d)(3)(C)(i)(I) (Section 301) (“taking actions that demonstrate...overall advancement”); 19 U.S.C. § 3202(c)(7) (ATDPEA) (“taking steps to afford”), 19 U.S.C. § 3703(a)(1)(F) (Africa) (“is making continual progress toward establishing”); 19 U.S.C. § 2702(b)(7) (Caribbean) (“taking steps to afford”).
23. 19 USC § 2462(b)(2) (GSP); 19 USC § 3202(c) (ATDPEA); 19 U.S.C. § 2702(b) (CBERA).
24. 19 U.S.C. § 2411(b)(2).
25. 19 U.S.C. § 2411(d)(3)(C)(i)(II).
26. USTR, Trade Policy Staff Committee, GSP Subcommittee, Workers Rights Review Summary: Petitions Not Accepted for Review (Guatemala 1988-1991).
27. 69 Fed. Reg 26205 (May 11, 2004).
28. Labor Rights Ed. & Research Fund v. Bush, 954 F.2d 745 (D.C. Cir. 1992), aff’g 752 F.Supp. 495 (D.D.C. 1990).
29. Labor Rights Ed. & Research Fund v. Bush, 752 F.Supp. 495, 497 (D.D.C. 1990), aff’d on other grounds, 954 F.2d 745 (D.C. Cir. 1992).
30. Another organization, the Workforce Investment Network (WIN), is also independent of the industry it monitors—the building services sector, including cleaning, security guard, catering, and landscaping firms in the domestic U.S market. WIN has just begun to function and no lessons can yet be drawn from its experience, but it is likely to follow the WRC model in some substantial respects.
31. Disclosure: I have served on the WRC Board since its founding and participated in the drafting of its protocols and its initial investigations.
32. Further, the WRC constituents were committed to ensuring that private monitors, whether corporate or worker-centered, did not simply supplant but rather worked in tandem with and strengthened the capacity of legitimate, democratic enforcement agencies. This point is discussed below.
33. And, completing the circle, robust monitoring of private employers’ compliance almost inevitably pulls monitors into scrutinizing local agencies that sometimes reinforce managerial abuses and sometimes counter them. By insisting on remediation of those abuses, monitors may open space, if not provide direct support, for those local agencies genuinely committed to enforcement of the rule of law. This point is discussed below.
34. In this respect, the lessons from private monitoring of cross-border labor rights merely confirm the long experience of public domestic agencies’ enforcement of domestic labor rights.
35. While much has been made of the fact that the pending bilateral agreements obligate the parties to comply with the abstract core labor rights (in addition to domestic labor law), the earlier regional agreements do require the parties to comply with the much more numerous and detailed requirements of domestic labor law.
36. Section 301 states that it is “mandatory” for the executive branch to take action against a trading partner that violates a trade agreement with the United States. However, the statute further states that it is up to the executive branch to decide whether the trading partner is taking “satisfactory measures” to come into compliance, whether the trading partner has “agreed” to comply, whether the costs of sanctions would outweigh the benefits to the United States, or whether there is a national security reason for not imposing sanctions. 19 U.S.C § 2411(a)(2)(b). In practice, these “exceptions” give nearly complete discretion to the executive branch, especially in light of the fact that there is no judicial review or other mechanism for review of the executive branch decision.
37. Article 17.2 of the U.S.-Peru Agreement states that the parties must comply with fundamental labor rights, but a footnote qualifies that obligation, limiting it to the obligations contained in the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work. *See* Article 17.2, footnote 2. That Declaration does not obligate Member States to comply with core labor rights, but only with the principles underlying those rights. The Declaration states that Member States “have an obligation...to respect, to promote and to realize, in good faith...the principles concerning the fundamental rights which are the subject of those [core] Conventions...” *See* Declaration, Paragraph 2. The principles are even more vague than the abstract rights. Indeed, since the principles are undefined in international law, they have no real binding effect. (It is noteworthy that the NAFTA labor side agreement “committed” the parties to “promote” the principles, but asserted that such principles set no minimum standards for the parties’ domestic law. *See* NAALC Annex 1.) CAFTA requires the parties to “aspire to ensure” both the labor principles and the internationally recognized rights enumerated in U.S. trade legislation. The ostensible “breakthrough” of the recent bilateral agreements may thus amount to no more than this: instead of requiring that the parties “promote” (NAFTA) or “aspire to ensure” (CAFTA) the vague labor principles, they are now required to “respect, promote, and realize” the vague labor principles. While a duty to actually “respect, promote, and realize” the principles is a stricter legal standard than a duty to “aspire to ensure,” the difference in wording is likely to have minimal effect for real workers, in the absence of robust, continuous, mandatory enforcement mechanisms. In any event, the same conclusion is warranted even if the recent bilateral agreements require the parties to comply with the abstract core labor rights and not just the even more abstract principles.
38. The U.S.-Peru Agreement seems to have eliminated this exception, although the relevant text still leaves some ambiguity on this point.



39. It was partly for this reason that the first and only petition under the labor-rights provision of Section 301 was filed against China—not only because China’s failure to enforce labor rights is so comprehensive, but also because the size of China’s economy makes it possible to demonstrate the impact on bilateral trade with the United States. See Section 301 Petition of AFL-CIO, Rep. Cardin, and Rep. Smith, before the U.S. Trade Representative (June 8, 2006) (China labor rights) (follow-up to initial petition filed in 2004).
40. Annex 17.6 of the U.S.-Peru Agreement provides only that the Labor Cooperation and Capacity Building Mechanism shall consider the views of employers, the public, and worker representatives when the Mechanism undertakes cooperative activities. Article 17.6(6) provides that each Party “may consult” an advisory council that includes employer, public, and worker representatives on matters related to the Chapter. These *ad hoc* consultations do not constitute the kind of ongoing participation, referred to in the text, in formulating criteria and performance measures for compliance with labor principles and domestic labor law, and in ensuring compliance with those criteria and measures. Indeed, as discussed above, the agreement creates no process for carrying out these functions, let alone ensuring worker participation in the functions.
41. This does not mean that institutions like the ILO should act like old-fashioned bureaucratic agencies that seek hopelessly to create and enforce centrally created edicts—hopelessly, because any centralized agency is inevitably distanced from the detailed practices of real workplaces. Rather, the central institution should draw systematically on the local knowledge and norms generated by decentralized investigative teams, worker organizations, and production systems. This combination of centralized and decentralized structures is elaborated below in Sections IV and V.
42. In this context, monitoring is not genuinely independent if monitors are hired by manufacturers or retailers. An auditing firm hired and paid by the manufacturer is not independent, although manufacturers like to apply that label to their auditors.
43. As discussed below, the process of specification need not take the form of centralized edicts or static criteria and measures. Centralized commissions may instead review and validate the most worker-protective criteria or performance measures formulated by worker organizations, governments, and managers. And central commissions, or the agreements themselves, may mandate that governments and managers meet to continuously strengthen criteria and measures.
44. Fair and uniform application of incentives does not mean one-size-fits-all. Labor relations systems, domestic legal traditions, and modes of production vary along many dimensions. The problem of turning an abstract right into specific rules for compliance is discussed below.
45. Note that the ILO does not deem the right to a safe workplace to be a core labor right, but United States trade legislation does.
46. This is a common problem in jurisprudence. Indeed, applying abstract rights to detailed factual settings is perhaps *the* most central problem of jurisprudence.
47. For this reason, some theorists maintain (mistakenly) that best practices are the only standards necessary; domestic and international labor laws are too distant from actual practices to make any difference at all. Their analysis begins with the (obvious) pragmatist assumption that real workplaces start with some comprehensive set of existing, fine-grained practices. The key, then, is to induce each workplace, starting from the baseline of its existing practices, to continuously and rapidly improve its practices, improvements being measured by the best practices of other, similarly situated workplaces.
- This theory has two defects: First, without some criteria or measures other than best practices, all workplaces may simply improve until they reach existing best practices. Best practices then become a ceiling rather than an ever-elevating floor. In principle, this defect could be overcome by providing rewards to those workplaces that are able to set new standards for best practices. But in practice, it is infeasible to create sufficiently finely calibrated metrics that could identify and reward governments or corporations based on fine gradations of actual practice—especially when each government or corporation can claim that its seemingly lower standard is in fact the higher standard because the government or corporation is not “similarly situated” to other governments or corporations that claim to set the higher standard. One can expect governments to argue, for example, that their labor compliance is in fact the best practice for a country at such a low level of economic development, so they should not be held to an ostensibly higher “best practice” implemented by a government with a higher GDP. Or, another example: one can expect a country to argue that its labor relations system is qualitatively different from another country, justifying the former’s non-compliance with the more worker-protective standards met by the latter. In fact, countries have made just these arguments in such fora as the governing bodies of the ILO.
- Second, and closely related, there is no magic yardstick for identifying what constitutes an “improvement” in labor practices. Labor rights and standards are complex and multidimensional. Hence the need for innumerable specific criteria and performance measures. Any metric for measuring such rights and standards will be intrinsically controversial. There is no *a priori*, uncontroversial meaning or measure of “improvement.” To put it another

way: Not all movements away from existing practices are improvements; and there is no uncontroversial standard for determining when a new workplace practice is better than, rather than equally good as or worse than the baseline practice. For example, if one employer in a non-union industry installs a collaborative labor-management council, is that an improvement over a non-union workplace (“at least there’s now some form of worker representation”) or a deterioration (“the collaborative union is a sham that impedes full unionization”)? The answer is intrinsically controversial. To determine whether the collaborative union is now the “best practice,” we need some external criterion or performance measure that is not based solely on actual practices. Domestic and international labor law provide a yardstick or destination that can tell us whether a change in practice is headed in the right direction and therefore an improvement.

Now, proponents of “continuous improvement” and “best practice” as the sole measures of success might respond: There is only one good way to resolve the controversial question of what constitutes an “improvement,” of what practices are “better,” and which practice is “best.” Stakeholders must convene and reach consensus on criteria and performance measures, based on deliberations about actual practices. That is, stakeholders must deliberate not only about best substantive *practices*, but also about which *metrics* are themselves “best” for evaluating which *practices* are best. In such deliberations, stakeholders will have an opportunity to argue that their peculiar circumstances justify seemingly worse performance or, put conversely, that their performance is in fact the best that can be done in light of the uniquely adverse circumstances they face. Stakeholders can then collectively (democratically) decide which unique circumstances should count—that is, which variables should go into the metric for determining how well a country or employer is complying with labor rights and standards. For example, all workers, managers, and labor administrators might agree that a works council is better than nothing, in a non-unionized industry.

But once we make this move—allowing democratic debate by all stakeholders to determine the metrics—we are simply back in the rough and tumble of democratic political determination of what the rights and standards, the criteria and performance measures, should be. Ostensible “best practices” then become just one more datum in democratic debate over what is good and what is not good, what is feasible and what is not feasible. The discourse of “best practices” may have its greatest value in flushing out (i.e., revealing) the feasible, practical alternatives among which democratic debate may then choose, not in determining which of those alternatives is the best fulfillment of worker rights. But even this chastened endorsement of best practices must be qualified: Current “best practices” will reveal only what employers or governments have put

into practice to date, not what may be feasible if there is greater political will to provide more protection to worker interests and if there are greater efforts to develop innovative workplace practices that push the envelope of feasibility.

48. That is, best practices would be defined as follows: Governments would be required to adopt the most worker-protective standards and achieve the highest performance measures met by other governments at similar levels of development, in the same regions, or with qualitatively similar labor relations systems. Corporations would be required to adopt worker-protective measures met by other corporations in the same industry. If criteria and performance measures by domestic law or international law exceed these best practices, then the most worker-protective norm shall apply.
49. A bill to amend the Fair Labor Standards Act contains the most rigorous set of requirements of this sort. H.R. 4613 (Amendments to FLSA) (sponsored by Rep. Velazquez).
50. The WTO, which has already recognized the ILO’s authority to supervise the enforcement of labor rights, should defer to the ILO’s determination of whether trade sanctions are necessary to enforce labor rights in *particular* cases. WTO rules do not block the ILO (or other international tribunal) from playing this role. Article XX of the GATT allows countries to impose trade sanctions against trading partners if necessary for public morals and for human life and health. The WTO dispute mechanism has not ruled on the question of whether the enforcement of labor rights is necessary for public morals and human life and health, but distinguished commentators have answered in the affirmative. If in the future the WTO dispute mechanism faces the question and rules in the negative, then the United States should seek a revision of Article XX reversing that decision.
51. Article 17.5(5)(c) of the Agreement provides that each party shall receive communications from “persons” of the party on matters related to the Chapter. However, Article 17.5(6) says that each party shall review the communications “in accordance with domestic procedures.” The Agreement sets out no requirements for those domestic procedures, nor any requirement that the party respond to the communications.
52. U.S.-Peru Agreement Article 17.7 (6); Article 21.4; Article 21.5.
53. U.S.-Peru Agreement Article 21.5 (1)(c).
54. U.S.-Peru Agreement Article 21.6 (1)(e).
55. If the United States and Peru cannot agree on the third arbitrator, that arbitrator will be chosen by lot. If that occurred, then Peru would have consented to only one, not two, of the three-member panel. But it is reasonable to expect that the two governments would rarely fail to agree on the third arbitrator.

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56. This assumes that the cost to the United States of Peru's non-compliance equals the benefit to Peru from Peru's non-compliance—a reasonable assumption in many circumstances.
  57. If Peru believes it has ceased its violations, it can request that the arbitral panel issue an order terminating the U.S. sanctions.
  58. ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth (revised) Edition (2006), Paragraph 959.
  59. The Peru agreement requires Peru to effectively enforce only those domestic laws that directly relate to: freedom of association, collective bargaining, forced labor, child labor, employment discrimination, minimum wages, hours of work, and occupational safety and health.
  60. Think of the analogy to criminal law enforcement. Even when a government makes best efforts to deter and punish crime, there still may be widespread criminal violations. According to some estimates, for example, half the murder cases in the United States go unsolved; yet it might be hard to convince an international arbitrator that the U.S. government is devoting insufficient resources to criminal law enforcement.
  61. U.S.-Peru Agreement Article 17.3(1)(a).
  62. Of course, if the court rules in petitioner's favor on claim number three, then the court would order the CILR to file a complaint under the Peru agreement only if the court also found that the factual findings constituted violations of the criteria and performance measures as revised by the court.