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Falling Short for Labor: Why the Trans-Pacific Partnership Does Not Do Enough for Workers' Rights, and Evaluating better Options

Judd Cohen

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FALLING SHORT FOR LABOR: WHY THE TRANS-PACIFIC PARTNERSHIP DOES NOT DO ENOUGH FOR WORKER'S RIGHTS, AND EVALUATING BETTER OPTIONS

*Judd Cohen**

Using free trade agreements to increase labor standards in developing countries has not worked. Although most critics focus on lack of enforcement by the U.S., the real problem is the inherent tension between using free trade to make money, and spending money to improve labor standards. If the U.S. were to enforce labor standards, it would destroy the gains from free trade, which is why there is no incentive for developed countries to enforce the agreements. The Trans-Pacific Partnership is the latest example of a U.S. free trade agreement that does not address the tension between trade and labor. This Note proposes that the only way to simultaneously continue free trade and improve labor rights is through a redistribution of wealth. By redistributing the gains of free trade, developing countries will have the means and the incentive to improve their labor standards. Developing countries will be incentivized to improve working conditions and build new manufacturing locations, because as improvements are made more money will flow in to continue the growth. Rich countries will be incentivized to enter into these agreements, because although they will be giving up portions of the gains of free trade at first, the redistribution will create wealth for all countries. Even though the rich countries will have to swallow a smaller percentage of wealth generation, the total amount of monetary

* Judd Cohen is a second-year law student at Case Western Reserve School of Law. He has a B.S. in Business Management from Case Western Reserve University. He is grateful to Peter Gerhart and Ameera Haider for their guidance in writing this Note.

gain will increase when there are more middleclass countries to buy from rich countries. Only through redistribution of wealth can the incentives of free trade be aligned to improve labor standards across the globe.

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“The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.”¹

I. THE TPP DOES NOT SOLVE THE INHERENT TENSION BETWEEN FREE TRADE AND LABOR RIGHTS, AND, THEREFORE, WILL NOT BE SUCCESSFUL IN TRANSFORMING LABOR STANDARDS

The United States of America uses free trade agreements to influence labor standards in developing countries.² A free trade agreement is generally an agreement between at least two countries to reduce tariffs and promote unencumbered trade.³ The goal of free trade agreements is to help open up trade between the countries in an attempt to boost economic growth in each country, creating wealth.⁴ Conditioning free trade on increased rights for labor is flawed because there is an inherent tension between free trade and labor rights.⁵ What the U.S.’s free trade agreements have done in the past, up to and including the Trans-Pacific Partnership (TPP), is to threaten poorer countries with trade sanctions and ending trading agreements if labor standards are not adhered to.⁶ The incentives are aligned against a country enforcing labor rights because prices of trade goods will go up if labor rights are enforced, which decreases the rewards from free trade.⁷ If the U.S. continues the strategy of linking market access to

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1. Franklin D. Roosevelt, President, U.S., Inaugural Address (Jan. 20, 1937), available at <http://historymatters.gmu.edu/d/5105/> [https://perma.cc/WS5L-WR2U].
 2. See Kevin Banks, *Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law*, 32 BERKELEY J. EMP. & LAB. L. 45, 48 (2010); see also EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, *THE ECONOMIC BENEFITS OF U.S. TRADE* (2015).
 3. *TPP: What is it and why does it matter?*, BBC (Mar. 14, 2013), <http://www.bbc.com/news/business-21782080> [https://perma.cc/3RJS-8QER].
 4. *Id.*
 5. Bobbi-Lee Meloro, *Balancing the Goals of Free Trade with Workers’ Rights in a Hemispheric Economy*, 30 U. MIAMI INTER-AM. L. REV. 433, 435 (1999).
 6. Rick Rowden, *9 Ways the TPP Is Bad for Developing Countries*, FOREIGN POLICY, (July 7, 2015, 12:28 PM), <http://foreignpolicy.com/2015/07/07/9-ways-the-tpp-is-bad-for-developing-countries/> [https://perma.cc/8RKU-YZCS].
 7. Daniel Costa, *The True Cost of Low Prices is Exploited Workers*, N.Y. TIMES (Aug. 31, 2015, 4:24 PM), <http://www.nytimes.com/roomfordebate/2015/05/12/should-prices-at-nail->

enforceable labor standards,⁸ it would only hurt U.S. consumers, and would not have a definite impact on labor rights. Sanctioning countries for not adhering to labor standards is not a feasible threat to countries that do not comply with labor standards, because sanctions would kill free trade. Threatening sanctions has not worked in the past.⁹

Past U.S. free trade agreements have only resulted in marginal if any gains in labor conditions.¹⁰ The problem with these agreements is that they were more of a political charade than actual plausible solutions. Past free trade agreements created dueling incentives that labor conditions simply could never win.¹¹ Without a redistribution of wealth, there is no way to solve this problem. Not all labor rights are created equal, and there is a problem fine-tuning the laundry list of rights in trade agreements to reflect each country's circumstances.¹² The current list of rights may only reflect the western system's beliefs, and perhaps it is best to start by addressing safety issues.¹³

This Note proposes that redistribution of the wealth created by trade from rich to poor is the key to solving the tension between free trade and labor standards. Part II will discuss the failings of past free trade agreements in their aim to influence labor rights. Part III will outline the TPP's solution to improve labor rights through free trade. Part IV will then evaluate the TPP's solution to improve labor rights through free trade. Part V takes a survey of the pros and costs of a redistributive solution to the problem of using free trade to influence labor rights; including creating an international agency to monitor labor

salons-and-elsewhere-reflect-their-true-cost/the-true-cost-of-low-prices-is-exploited-workers [https://perma.cc/VAA9-VHGD].

8. MARY JANE BOLLE, CONG. RESEARCH SERV., RS 22823, OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS (2014).
9. *Id.*
10. Joel R. Paul, *The Cost of Free Trade*, XXII BROWN J. OF WORLD AFFAIRS (2015), *available at* http://repository.uchastings.edu/faculty_scholarship/1215; *see also* UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, FOUR FREE TRADE AGREEMENTS GAO REVIEWED HAVE RESULTED IN COMMERCIAL BENEFITS, BUT CHALLENGES ON LABOR AND ENVIRONMENT REMAIN (2009).
11. PUBLIC CITIZEN, NAFTA'S BROKEN PROMISES 1994–2013: OUTCOMES OF THE NORTH AMERICAN FREE TRADE AGREEMENT, *available at* <http://www.citizen.org/documents/NAFTAs-Broken-Promises.pdf> [https://perma.cc/7FU6-GGGC].
12. Josh Bivens, *The Trans-Pacific Partnership Is Unlikely to Be a Good Deal for American Workers*, ECON. POL'Y INST. (Apr. 16, 2015), <http://www.epi.org/publication/tpp-unlikely-to-be-good-deal-for-american-workers/> [https://perma.cc/SRH9-SJNB].
13. FRANCIS MAUPAIN, THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION IN THE GLOBAL ECONOMY 142 (2013).

standards, and an evaluation of who would bear the costs of redistribution.

II. PAST LABOR AGREEMENTS ARE INADEQUATE BECAUSE THE REQUIREMENTS IN THE AGREEMENTS ARE NOT ENFORCED, AND BECAUSE ENFORCEMENT MAKES IT HARDER TO CREATE WEALTH

While the common perception is that the U.S. does not enforce the labor sections of free trade agreements,¹⁴ the real problem is not in enforcement. The U.S. does not have any incentive to enforce labor standards, because it will destroy its access to the cheap goods the trade agreements were intended to create. The U.S. uses free trade agreements to impact labor standards.¹⁵ Historically, the labor sections of these agreements have lacked enforcement.¹⁶ While theoretically important, free trade agreements have not done as much as promised for workers.¹⁷ Free trade agreements have failed, because of the tension between creating wealth through trade and making it costly to create wealth through spending on labor improvements.¹⁸ This tension also explains why the U.S.s' interests are not strongly for enforcing labor sections of trade agreements.

This point can be appreciated by examining the way in which trade agreements have been used to improve labor standards. In 1993, the U.S. entered into the North American Free Trade Agreement (NAFTA), which was the first trade agreement that included a labor cooperation component, albeit in a side agreement.¹⁹ NAFTA has very

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14. See STAFF OF SEN. ELIZABETH WARREN, *BROKEN PROMISES: DECADES OF FAILURE TO ENFORCE LABOR STANDARDS IN FREE TRADE AGREEMENTS 2* (2015) (noting the historical examples where the United States has not acted to enforce pertinent labor standards).
 15. See Samira Salem & Faina Rozental, *Labor Standards and Trade: A Review of Recent Empirical Evidence*, U.S. INT'L TRADE COMM. J. OF INT'L COMMERCE AND ECON. 4 (2012), available at https://www.usitc.gov/journals/LaborStandardsandTrade_final%209_12.pdf [<https://perma.cc/Q7D7-2MPD>] (“Since 1993, the United States has negotiated thirteen FTAs that include varying levels of labor commitments and enforceability.”).
 16. U.S. Gov't Accountability Office, *GAO-15-160, FREE TRADE AGREEMENTS, U.S. PARTNERS ARE ADDRESSING LABOR COMMITMENTS, BUT MORE MONITORING AND ENFORCEMENT ARE NEEDED 46* (2014).
 17. Salem & Razental, *supra* note 15, at 10 (“[A]vailable evidence indicates that the ratification of labor clauses does not influence labor conditions.”).
 18. See Salem & Razental, *supra* note 15, at 2-3 (noting that critics argue whether linking labor standards and trade agreements harms developing countries' economic advantages, hurting overall trade as a result).
 19. M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RESEARCH SERV., R42965, *THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)*,

weak enforcement mechanisms that were never used to enforce the agreed upon labor standards.²⁰ There has only been one submission of a labor violation in the more than 20 years since the ratifying of NAFTA: the violation was against Mexico and the Department of Labor (DOL) accepted it in 2011, but it has yet to be resolved.²¹ Political considerations were not strong enough to lead the U.S. to bring a claim against Mexico for its non-compliance with the agreed upon labor standards.²²

On May 10, 2007, the U.S. Congress passed a Bipartisan trade deal with the Bush Administration, which incorporated the International Labor Organization (ILO) standards,²³ and made a plan to include these in all future trade agreements.²⁴ Since the May 10th Bipartisan deal, the U.S. has used these standards in unilateral trade agreements with Peru, Colombia, and South Korea before entering into the TPP.²⁵ There are still problems with labor standards in these countries even with the new standards as part of the agreement.²⁶ In the last eight years, the

available at <https://www.fas.org/sgp/crs/row/R42965.pdf>
[<https://perma.cc/9D6R-D75K>].

20. BOLLE, *supra* note 8, at 5–6.
21. *United States Department of Labor, Submissions under the North American Agreement on Labor Cooperation (NAALC)*, DEPT. OF LABOR, <http://www.dol.gov/ilab/trade/agreements/naalc.htm#>.
<http://www.gao.gov/assets/670/666787.pdf> [<https://perma.cc/9GZQ-PY4W>].
22. AFL-CIO, THE TRANS-PACIFIC PARTNERSHIP: FOUR COUNTRIES THAT DON'T COMPLY WITH U.S. TRADE LAW 2.
23. Salem & Razental, *supra* note 15, at 6 (noting that the standards are: (1) freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of forced or compulsory labor; (3) the abolition of child labor; and (4) the elimination of discrimination in respect of employment and occupation).
24. VILLARREAL & FERGUSON, *supra* note 19.
25. Ian F. Fergusson, CONG. RESEARCH SERV., RL33743, TRADE PROMOTION AUTHORITY AND THE ROLE OF CONGRESS IN TRADE POLICY 17 (2015).
26. Joan Claybrook, *Analysis of the Trade "Deal" Announced May 10, 2007*, PUBLIC CITIZEN (May 11, 2007) available at <http://www.citizen.org/documents/analysis-of-may-10-deal-on-fta-terms.pdf> [<https://perma.cc/5XG6-CGD9>]; see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-160, FREE TRADE AGREEMENTS: U.S. PARTNERS ARE ADDRESSING LABOR COMMITMENTS, BUT MORE MONITORING AND ENFORCEMENT ARE NEEDED 1–2 (2014) (noting significant challenges connected with the enforcement of labor provisions in multiple FTAs); see also, Kimberly Ann Elliott, *The ILO and Enforcement of Core Labor Standards*, INT'L ECON. POL'Y BRIEFS (INST. FOR INT'L ECON., WASHINGTON D.C.), Jul. 2000, available at <https://pie.com/publications/pb/pb00-6.pdf> [<https://perma.cc/S3GU-JWX3>] (noting that there has been a lack of enforcement of the ILO standards worldwide and in countries with which the U.S. has free-trade agreements).

DOL has taken up²⁷ five claims against countries for possibly violating labor commitments in trade agreements.²⁸ In 2008, the DOL accepted a claim against Guatemala alleging a violation of the right to freedom of association, violation of rights to organize and bargain collectively, and unacceptable work conditions.²⁹ It took five years for the U.S. to sign an Enforcement Plan with Guatemala's government.³⁰ After multiple extensions, Guatemala still did not meet the Enforcement Plan's terms.³¹ In September 2014, the U.S. government finally resigned to using the dispute settlement process in the free trade agreement.³² This case, which is still ongoing,³³ exemplifies the excruciatingly long process that goes into correcting a labor violation.

The perceived problem with the U.S.'s approach to labor components of trade agreements is the lack of enforcement of labor rights that developing countries are supposed to adhere to.³⁴ There were many more claims that should have or could have been taken up.³⁵ Government Accountability Office interviews with non-governmental stakeholders in enforcing labor violations, revealed that there was little understanding of how to submit a claim to the DOL, and that the DOL did not make an effort to explain how to make a claim or how it

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27. The DOL receives all claims of labor violations against U.S. trading partners from interested parties, and notifies any country that is the subject of a claim. After an interested party makes a submission, the DOL has sixty days to determine whether it will accept the submission for review. If the DOL reviews the submission and finds a violation, it has 180 days to give a public report with any findings or recommendations for how to resolve the dispute. U.S. Gov't Accountability Off., *supra* note 16, at 24.
 28. These claims were against Bahrain, Dominican Republic, Guatemala, Honduras, and Peru. U.S. Gov't Accountability Off., *supra* note 16, at 25; *see also* Cole Stangler, *Will The Trans-Pacific Partnership Improve Labor Standards?*, INT'L BUS. TIMES (Oct. 5, 2015 4:19 PM), <http://www.ibtimes.com/will-trans-pacific-partnership-improve-labor-standards-2127388> [<https://perma.cc/8MQG-X8A4>] (referencing the five claims).
 29. U.S. Gov't Accountability Off., *supra* note 16, at 25–26.
 30. U.S. Gov't Accountability Off., *supra* note 16, at 12.
 31. U.S. Gov't Accountability Off., *supra* note 16, at 68.
 32. U.S. Gov't Accountability Off., *supra* note 16, at 68.
 33. *Submissions Under the Labor Provisions of Free Trade Agreements*, U.S. DEP'T OF LABOR BUREAU OF INT'L LABOR AFF., <https://www.dol.gov/agencies/ilab/our-work/trade/fta-submissions#Guatemala> [<https://perma.cc/FM42-LRH8>] (last visited Feb. 12, 2017).
 34. U.S. Gov't Accountability Off., *supra* note 16, at 33.
 35. U.S. Gov't Accountability Off., *supra* note 16, at 34.

evaluates claims.³⁶ Even most government officials that the U.S. is in free trade agreements with, while they understood how to make a claim,³⁷ had no understanding of how the DOL evaluates claims.³⁸ Only a single claim against Peru has moved through the system set up by the trade agreements six years after it was initially filed,³⁹ even though there have been many possible claims.⁴⁰ The barriers to the claims are that governments must bring them,⁴¹ and there is a lot of political pressure against bringing such a claim.⁴² Although there has been a lack of formal claims brought,⁴³ there is evidence that changes have been made as a result of public pressure.⁴⁴

After the bilateral trade agreement in Colombia, despite incorporating the ILO standards and a “Labor Action Plan,”⁴⁵ 105 union activists have been murdered⁴⁶ and 1,337 death threats have been issued.⁴⁷ In addition, Colombia has had issues with the enforcement of child labor laws: “prohibitions against children working in mining and construction were reportedly largely ignored.”⁴⁸ By not enforcing the trade agreement’s language,⁴⁹ the U.S. is not doing its part to improve labor conditions in Colombia. Enforcement is the public face of the problem, but the real obstacle lies in the tension between trade and labor standards. The U.S. will never enforce labor standards until the incentives make enforcement the financially responsible solution.

36. U.S. Gov’t Accountability Off., *supra* note 16, at 29–30.

37. U.S. Gov’t Accountability Off., *supra* note 16, at 29.

38. U.S. Gov’t Accountability Off., *supra* note 16, at 29.

39. Stangler, *supra* note 28.

40. U.S. Gov’t Accountability Off., *supra* note 16, at 25.

41. Frank H. Bieszczyk, Note, *Labor Provisions in Trade Agreements: From the NAALC to Now*, CHI.-KENT L. REV. 1387, 1394 (2008).

42. *Id.* at 1395.

43. *Id.* at 1395.

44. *Id.* at 1395.

45. STAFF OF SEN. ELIZABETH WARREN, *supra* note 14.

46. STAFF OF SEN. ELIZABETH WARREN, *supra* note 14.

47. STAFF OF SEN. ELIZABETH WARREN, *supra* note 14.

48. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Country Reports for Human Rights Practices for 2013: Colombia (Dec. 2014), <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dclid=253001#wrapper>.

49. Brian Finnegan, *Five Reasons Colombia Is Violating Its Trade Agreement with the U.S.* AFL-CIO (Jul. 18, 2016), <http://www.aflcio.org/Blog/Global-Action/Five-Reasons-Colombia-Is-Violating-Its-Trade-Agreement-with-the-U.S> [<https://perma.cc/T6LU-E8ML>].

Redistribution of wealth reforms the incentives to promote positive change.

III. THE TPP SOLUTION TO LABOR AGREEMENTS IS AN IMPROVEMENT, BUT IS STILL LACKING TEETH

The TPP is an improvement for labor rights.⁵⁰ The TPP forces countries to change their labor laws to ensure the protection of ILO labor standards before they can enter into the agreement and reap the rewards of free trade.⁵¹ The TPP requires all member countries to institute a minimum wage, set a standard working time, and implement safety regulations.⁵² The TPP will create faster dispute resolution mechanisms as well as making it easier for labor activists to induce the DOL to investigate a claim of a labor violation.⁵³

Although the TPP is an improvement, it still does not do enough. Even with the improvements it offers, the TPP is still deficient because none of the solutions are redistributive. The improvements in the TPP do not overcome the basic problem that arises when trade is linked to labor rights, which is the inherent tension between using free trade to make money, and spending money to improve labor standards. If the U.S. were to enforce labor standards, it would eliminate the gains from free trade, which is why there is no incentive for developed countries to enforce the agreements.

The TPP leaves too much in the hands of the U.S. to police and incorporates similar changes in laws that failed to make a difference in previous free trade agreements. Without a redistributive solution to properly align the incentives to improve labor standards, third world countries will not enforce their newly created labor laws and regulations, nor will the U.S. have the incentive to enforce what it has required the TPP member countries to agree to.

The TPP incorporates the ILO declaration establishing minimum labor standards into its labor section as the main feature of the agreement.⁵⁴

Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO

50. The Editorial Board, *Pacific Trade and Worker Rights*, N.Y. TIMES (Nov. 21, 2015), http://www.nytimes.com/2015/11/22/opinion/sunday/pacific-trade-and-worker-rights.html?_r=1 [<https://perma.cc/JH85-JMWM>].

51. *Id.*

52. *Id.*

53. *Id.*

54. International Labor Organization, *Labour and social policy components in current trade agreements in Asia and the Pacific*, ILO (2015), http://www.ilo.org/public/english/dialogue/actemp/downloads/publication/s/research_note_2015march.pdf [<https://perma.cc/7N3L-NW7R>].

Declaration[3][4]: a) freedom of association and the effective recognition of the right to collective bargaining; b) the elimination of all forms of forced or compulsory labour; c) the effective abolition of child labour and, for the purposes of this Agreement, a prohibition on the worst forms of child labour; and d) the elimination of discrimination in respect of employment and occupation.⁵⁵

The TPP has side agreements with the three most troubled countries in terms of labor standards in the partnership – Vietnam, Brunei, and Malaysia.⁵⁶ The problem is that the deficiencies are in looking for a non-distributive solution that breaks through the inherent tension. The TPP is yet another illustration of how the current paradigm cannot be improved.

The TPP establishes an objective review mechanism to monitor the three problem countries' implementation of the new labor standards.⁵⁷ Failure to adhere to these standards can lead to sanctions from the U.S., such as withholding or suspending tariff reductions.⁵⁸ A problem with this approach is that a non-biased party does not monitor adherence to these new labor standards; instead the government of each problem country and the U.S. government are the only overseers.⁵⁹

A. Vietnam Labor History and Side Agreement

The inadequacy of the system is demonstrated by Vietnam, which has labor laws that are never enforced.⁶⁰ Vietnam's Constitution gives

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55. Trans Pacific Partnership, Chapter 19, Feb. 4, 2016, *available at* <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour.pdf> [<https://perma.cc/PL4H-TAYZ>].
 56. Dwyer Gunn, *Will the Trans-Pacific Partnership Make Workers' Lives Better?*, PACIFIC STANDARD (Nov. 12, 2015), <http://www.psmag.com/business-economics/can-the-trans-pacific-partnership-make-workers-lives-better> [<https://perma.cc/FJN2-3F9P>].
 57. Press Release, Office of the United States Trade Representative, Summary of the Trans-Pacific Partnership Agreement (Oct. 2015), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> [<https://perma.cc/2F87-KZPR>].
 58. Office of the United States Trade Representative, *Summary of Chapter 19 of the Trans-Pacific Partnership Agreement*, USTR <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Labour-1.pdf> [<https://perma.cc/8NCY-CLN2>].
 59. Alana Semuels, *The TPP's Uneven Attempt at Labor Protection*, ATLANTIC (Jan 22, 2016), <http://www.theatlantic.com/business/archive/2016/01/tpp-mexico-labor-rights/426501/> [<https://perma.cc/NLW2-9XB2>].
 60. Keith Bradsher, *Labor Reform in Vietnam, Tied to Pacific Trade Deal, Depends on Hanoi's Follow-up*, N.Y. TIMES (Nov. 5, 2015), http://www.nytimes.com/2015/11/06/business/international/vietnam-tpp-trade-agreement-labor-reaction.html?_r=0 [<https://perma.cc/RAL6-2C29>].

workers the right to strike and engage in organized protests.⁶¹ Although these rights are part of the Constitution, they receive little support and protection from other laws passed by the Vietnamese government.⁶² The side agreement with Vietnam requires it to create new laws or to amend its current laws to meet the ILO labor standards.⁶³ The agreement seeks to ensure that Vietnam allows all workers to join a grassroots union, although the government must pre-approve these unions.⁶⁴ Most of the side agreement centers on the rights of workers to unionize, and the enforcement of the ILO labor standards against Vietnamese employers.⁶⁵

The U.S. and Vietnam agree to create a government-to-government mechanism called the Senior Officials Committee (SOC) to oversee Vietnam's compliance with all of the elements included in the side agreement.⁶⁶ The SOC will be made up of members from the Office of the United States Trade Representative (USTR) and the U.S. DOL.⁶⁷ The SOC will meet annually for the first ten years of the agreement.⁶⁸ If there is a complaint filed against Vietnam, the SOC will meet within thirty days to determine what action it must take to address the concerns of the complaining party.⁶⁹ Although the agreement looks good in theory, these new policies will be ineffective in practice, because the U.S. will likely dominate the SOC, and the U.S. has not changed its incentives to enforce labor rights at the expense of cheap goods.⁷⁰

B. Brunei Labor History and Side Agreement

A significant problem with the Brunei side agreement is that it fails to provide independent labor courts and organizations that are free from the influence of the Sultan.⁷¹ The Sultan of Brunei rules Brunei

61. *Id.*

62. *Id.*

63. Office of the United States Trade Representative, United States-Viet Nam Plan for the Enhancement of Trade and Labour Relations, <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Labour-1.pdf> [<https://perma.cc/ZB98-JG5J>].

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. MICHAEL F. MARTIN, CONG. RESEARCH SERV., R41550, U.S.-VIETNAM ECONOMIC AND TRADE RELATIONS: ISSUES FOR THE 114TH CONGRESS (2016).

71. Semuels, *supra* note 59.

and bases its penal code on Sharia law.⁷² Brunei uses Islamic criminal law, which includes archaic punishments.⁷³ Workers in Brunei face issues in the labor market relating to wage theft, passport confiscation, abuse, and confinement.⁷⁴ In addition, there is a prohibition against strikes, and there is no guarantee of collective bargaining.⁷⁵

In light of these issues facing workers, the side agreement with Brunei contains many stipulations aimed at ensuring workers are not taken advantage of by employers.⁷⁶ The agreement makes Brunei ensure that unions have protection from disruptive actions by employers; that workers are compensated for anti-union discrimination that impacts their employment; and that workers have the right to elect union leaders, to collective bargaining, and to strike.⁷⁷

Among other concessions by Brunei, it must list all dangerous jobs prohibited to children under eighteen,⁷⁸ set a minimum wage for private sector workers,⁷⁹ and stop employers from holding employee passports.⁸⁰ Brunei must take efforts to make its labor laws more transparent, including making laws publicly available;⁸¹ collaborating with the U.S. on developing and implementing the changes to its laws;⁸² and creating outreach programs to inform workers and other stakeholders of their rights.⁸³ Finally, Brunei agreed that the U.S. to review its progress.⁸⁴

Brunei has agreed that it will implement these changes prior to entering into the TPP.⁸⁵ Although this agreement represents steps

72. AFL-CIO, *supra* note 22.

73. AFL-CIO, *supra* note 22.

74. AFL-CIO, *supra* note 22.

75. AFL-CIO, *supra* note 22.

76. Trans Pacific Partnership, *Brunei – United States Labour Consistency Plan*, USTR (2015), <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-BN-Labor-Consistency-Plan.pdf> [<https://perma.cc/P4C9-W7SA>].

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* (Additionally, the side agreement requires Brunei to make institutional reforms and develop its capacity-building by taking measures to make institutional changes within the government that will allow it to implement the new laws; revise inspection policies to ensure that laws will be enforced by the government; and ensure that effective mechanisms for workers' complaints are in place).

85. *Id.*

towards ensuring workers' rights and improving labor standards, Brunei has signed up for a huge commitment that may be too burdensome to uphold all at once. This is another example of the failings of the U.S. policy to institute changes in other countries' laws without incentivizing them to enforce those laws.

C. Malaysia Labor History and Side Agreement

Malaysia has problems with forced labor in many of its manufacturing sectors.⁸⁶ As of 2014, Malaysia had the lowest possible ranking on the U.S. Department of State annual Trafficking in Persons report,⁸⁷ meaning that "Malaysia does not fully comply with the minimum standards to prevent trafficking and is not making significant efforts to do so."⁸⁸ Forty percent of workers in Malaysia are migrant workers,⁸⁹ who Malaysia prohibits from organizing and collective bargaining.⁹⁰ There are also limits to the right of freedom of association for all workers.⁹¹

The side agreement with Malaysia seeks to remedy conditions for Malaysian workers in a number of areas.⁹² The agreement seeks to ensure that trade unions have the right to review government decisions about union registration, and that unions can seek judicial review of government decisions regarding union registration.⁹³ The agreement also seeks to amend numerous laws that grant the Director of General Trade Unions permission to restrict the formation and registration of unions, as well as laws that restrict the types of employees eligible to join unions and hold leadership positions within unions.⁹⁴ The agreement also seeks to amend the law to remove restrictions on the scope of collective bargaining.⁹⁵ Additionally, Malaysia must agree to amend laws that limit and punish strikes, as well as laws that restrict employers and trade unionists to select their own representation in

86. AFL-CIO, *supra* note 22.

87. AFL-CIO, *supra* note 22.

88. AFL-CIO, *supra* note 22.

89. AFL-CIO, *supra* note 22.

90. AFL-CIO, *supra* note 22.

91. AFL-CIO, *supra* note 22.

92. Trans Pacific Partnership, Malaysia – United States Labour Consistency Plan (Nov. 2015), <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-MY-Labor-Consistency-Plan.pdf> [<https://perma.cc/C3W6-8V8X>].

93. *Id.*

94. *Id.*

95. *Id.*

administrative hearings.⁹⁶ The agreement also includes stipulations aimed at reducing human trafficking.⁹⁷

Malaysia must also issue a list of hazardous jobs prohibited for workers under the age of eighteen; establish a minimum age of thirteen for light work; and amend the law to further prohibit discrimination based on occupation.⁹⁸ Malaysia agrees to make institutional reforms to ensure the effective enforcement of labor laws.⁹⁹ Finally, Malaysia agrees to enhance transparency and the sharing of information by collaborating with the U.S. on reforms and development of labor instruments, creating an outreach program about changes to ensure that workers and employers are knowledgeable about the system, and establish a SOC to oversee implementation of labor regulations.¹⁰⁰

The side agreement with Malaysia suffers from the same issues as the side agreements with Vietnam and Brunei. While the changes look good on paper, the incentives to make and enforce these changes are not present. Without a redistributive solution, developing countries will never meet the goal of improving labor standards.

IV. EVALUATION OF TPP SOLUTION: IMPROVEMENTS BUT NOT ENOUGH

A. An Overview of the Shortcomings

As Part II of this Note has shown, free trade agreements that include labor standards for developing countries look good on paper but lack enforcement, because enforcement of labor rights would kill free trade.¹⁰¹ The TPP is part of the same political charade as past agreements that have claimed to transform working conditions for

96. *Id.*

97. *Id.* (Malaysia must reinforce that retaining a worker's passport is illegal; ensure that workers who are entitled to housing by employers receive it and that workers have a secure place to keep their belongings; amend the law to enforce that repeated violations of labor law are punishable by rejecting future quotas or revoking licenses of the offending companies; amend the law to provide additional supportive services to victims of trafficking; and amend laws that require employers to communicate with foreign workers in languages they understand.).

98. *Id.*

99. *Id.* (Malaysia will make institutional reforms by appointing new labor officers and inspectors; revising inspection policies to ensure that labor regulations are enforced; developing training with the ILO for labor inspectors; and performing biannual data analysis on complaints received about companies and investigations conducted.).

100. *Id.* (The SOC will be comprised of senior officials selected by the U.S. and Malaysia that will meet annually for seven years after the changes are adopted.).

101. U.S. Gov't Accountability Off., *supra* note 16.

workers in third world countries.¹⁰² While the TPP places more restrictions on countries, these new strategies will fall to the same lack of enforcement that past trade agreements have, because the TPP does not address the inherent tension between labor rights and free trade.¹⁰³ Cathy Feingold, director of the International Department at the AFL-CIO, says that “Consistency plans are an attempt to make the labor and human rights committee feel good that we talked about this, that we’re engaged in it, but a lot of it is unenforceable.”¹⁰⁴ The solution should not focus on enforcement, but on reducing the tension between labor rights and free trade through redistributive means.

The best example of this charade is the minimum wage component of the labor section of the TPP.¹⁰⁵ The TPP requires all twelve member countries to adopt minimum wage regulations.¹⁰⁶ As a recent New York Times article assessing the TPP summarized, “[the adoption of minimum wage regulations] could turn out to be mostly symbolic because the agreement does not specify how countries should set minimum wages.”¹⁰⁷ Without specifications to how minimum wages should be set, countries could set minimum wages “at a penny an hour—which wouldn’t do much to help workers.”¹⁰⁸ The same problem of lack of specifications in the TPP arises with safety and health standards.¹⁰⁹ Without a specific threshold of minimum standards to meet, meeting undefined standards could be mostly irrelevant.¹¹⁰

As discussed in Part III of this Note, the TPP puts too high of a burden on the three problem countries, without properly aligning the incentives for these countries to adhere to the ILO standards.¹¹¹ The monitoring of these countries’ labor practices is not enough of a

102. Semuels, *supra* note 59 (“Labor advocates have many complaints about. . . [NAFTA]. . . one being that many of the provisions meant to improve life for workers were unenforceable. . . [there were] complaints about the lack of labor rights in NAFTA and other trade agreements. . .”).

103. Semuels, *supra* note 59.

104. Semuels, *supra* note 59.

105. Editorial Board, *supra* note 50.

106. Editorial Board, *supra* note 50.

107. Editorial Board, *supra* note 50.

108. Semuels, *supra* note 59.

109. Semuels, *supra* note 59.

110. Semuels, *supra* note 59 (arguing, in part, that if there are no specific minimum standards, there would be potentially little benefit to workers.)

111. *Q&A: The Trans-Pacific Partnership*, HUMAN RIGHTS WATCH (Jan. 12, 2016) <https://www.hrw.org/news/2016/01/12/qa-trans-pacific-partnership#4> [<https://perma.cc/66YC-Z4KE>].

mechanism to fix the problems in each country's labor market.¹¹² Moral suasion is not enough.¹¹³

Only a government can invoke dispute settlement against the other government for a labor violation under a trade agreement.¹¹⁴ The problem with this is that there are great political pressures on governments, so enforcing labor standards of other countries may not be the most important objective for sitting governments.¹¹⁵ The people most affected by the poor labor standards have no ability to challenge their own country's poor labor standards.¹¹⁶ U.S. and international labor unions cannot bring claims against problematic countries, even though they have the most motivation to be watchdogs for labor violations.¹¹⁷ Leaving the enforcement to the U.S. government places a great deal of responsibility on the whims of politics, because a more conservative president may choose not to enforce the TPP labor section.¹¹⁸

B. The Current ILO Standards May Not Be Focusing on the Right Standards

All of this analysis rests on the same assumption that the ILO labor standards are the correct and only minimum standards that are acceptable to the international community. But, are the ILO's

112. See, Press Release, *Udall Joins Senate Coalition Calling for Strong Labor Standards in Trans-Pacific Partnership and Implementation of Standards in TPP Countries* (May 11, 2015), available at http://www.tomudall.senate.gov/?p=press_release&id=1965 [<https://perma.cc/26B3-MR52>] (stating “[T]hese standards must be implemented on the ground in TPP countries prior to TPP taking effect”).

113. *Id.*

114. Bipartisan Trade Deal, Office of the United States Trade Representative, *Bipartisan Agreement on Trade Policy* (May 2007), https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf [<https://perma.cc/Q9V2-EXWU>].

115. Kimberly Ann Elliott & Richard B. Freeman, *The Role Global Labor Standards Could Play in Addressing Basic Needs*, in GLOBAL INEQUALITIES AT WORK: WORK'S IMPACT ON THE HEALTH OF INDIVIDUALS, FAMILIES, AND SOCIETIES 299, 302 (Jody Heymann ed., 2003).

116. See Department for International Development, *Labour Standards and Poverty Reduction* (May 2004), <https://www.tuc.org.uk/sites/default/files/labourstandardsJune04.pdf> [<https://perma.cc/83RF-T754>] (“Development co-operation can support both the capacity of marginalised workers to organise to make claims, and the capacity of the justice and regulatory systems to respond to abuses of workers’ rights.”).

117. Daniel Viederman, *Overseas Sweatshops Are a U.S. Responsibility*, BUSINESS WEEK (Jun. 2007).

118. Editorial Board, *supra* note 50 (“By far the biggest concern, aside from the particulars of the side deals, is whether President Obama’s successor will actively enforce the T.P.P.’s provisions.”).

standards actually the correct standards? To understand this, TPP member countries need to determine the best course of action for countries as individual entities to make substantial changes to their labor conditions.

Rather than forcing countries to make the large jump to meet all of the ILO labor standards, it might be better to focus on more essential rights for workers initially, and then move on to the other ILO standards. If third world countries can solve the problem of worker safety and child labor first, it might then be easier to move forward to collective bargaining rights. Also, if there is not enough money involved, there is no point to having unions involved. Companies would just go bankrupt if they were to give wage increases, which is why the redistribution solution is key. Without money, it will be extremely difficult to make substantial changes.

TPP member countries have to understand that developing countries might not have the same values when it comes to labor unions that the U.S. and the western powers do. As discussed above, Vietnam, for example, has the right to organize included in its constitution,¹¹⁹ but that right has only been paid lip service to since there are no laws to help protect workers' utilization of their right.¹²⁰

Another issue to consider is what the potential negative implications are when countries try to meet the ILO standards. It is a wonderful thing to get rid of child labor, but what is the alternative to children working? Just saying get rid of children working is great in theory, but if the rich countries are not there to follow through with the implications of that change in culture, then the system will just fall back into the same cycle it is stuck in now.

In some countries, there is a lack of school systems, and therefore children get jobs because they cannot go to school.¹²¹ If third world countries eliminate child labor, children would need to be provided a place to go during the day. There would need to be a massive investment in education. There could be a similar pot to give countries funds for education to the one that is used in the governmental solution to fighting labor violations discussed below.

V. REDISTRIBUTIVE SOLUTIONS THAT CAN FIX THE BROKEN INCENTIVES BETWEEN FREE TRADE AND LABOR STANDARDS

The current approach to improving labor standards in third world countries through the use of free trade agreements is flawed. The tension between free trade and labor rights is what prevents labor

119. Bradsher, *supra* note 60.

120. Bradsher, *supra* note 60.

121. Faraaz Siddiqi and Harry Anthony Patrinos, *CHILD LABOR: ISSUES, CAUSES AND INTERVENTIONS*, HUMAN CAPITAL DEV. AND OPERATIONS POL'Y WORKING PAPERS, HCOWP 56, 6.

standards from being enforced. As long as this tension remains, the incentives to improve labor will never be strong enough to overcome the monetary incentive to trade freely. The solution to fix this broken system is to change the incentives to make it financially prudent for countries to improve labor rights. The only way to accomplish that is through redistribution from rich to poor of the wealth created by free trade. If third world countries have a monetary incentive to improve labor standards, they will not need the U.S. to enforce those standards because they will want to improve labor standards in order to make money. If rich countries are giving poor countries money to improve their labor conditions, then the rich countries will want to make sure that poor countries are spending the money they receive to improve labor conditions. Additionally, rich countries will want to reap the rewards of sharing with poorer countries. This will lead rich countries to make sure that workers in poor countries have money to grow the global economy, which will increase the size of the pot of wealth for all countries. Only after the redistribution of wealth shifts the incentives to improve labor standards will real change be realized.

The only way to make progress and enhance labor rights in developing countries is to find a mechanism that redistributes wealth and allows developing countries to grow economically and protect labor rights at the same time. My approach to this problem is to find a way to diffuse the tension between free trade and increasing labor standards. In this paper I evaluate various ways to create growth and redistribution.

Central to many of these approaches is an independent international agency to determine labor standards on a country-by-country basis and to manage compliance with those labor standards. The reason this agency is vital is that there needs to be a central agency that takes input from all countries around the world to decide what the proper labor standards are, and then to make sure that countries comply with those standards. Only an international agency can be neutral when evaluating different countries, otherwise there would be too much room for deceit between countries.

This section discusses ways to solve the problem of the conflict between free trade and labor rights by creating an international agency to evaluate labor conditions of manufacturers, government level solutions, company-level solutions, consumer level solutions, and the costs and benefits of revenue sharing.

A. Create an Inspection Agency to Determine if Manufacturing Facilities Meet Labor Standards

Before enforcement of these standards is possible, an inspection agency must be created to determine if manufacturing facilities meet labor standards. The inspection agency must be international. If it were only a country-run agency the incentives would be awry. Countries would have an incentive to say that more of their facilities meet labor

standards so that their country gets more money. This would lead to dishonesty and disputes between countries.

A centralized agency run by the United Nations or a similar international agency would allow all countries to have a say in the process, but still create a more neutral agency to make these decisions on whether labor standards are met. Because so much money will be at risk, a neutral agency must make the decision.

The agency would be similar to the U.S. Occupational Safety and Health Administration. The agency would do inspections randomly, as well as if someone alerted it to a violation. The agency would create a standard that each manufacturing facility would need to meet to be eligible for any of the solutions proposed below. A concern for this agency is that the U.S. or other Western forces might try to dominate it and take a disproportionate share of the influence. The ILO has faced criticism for giving too much influence to the U.S. because it gives a considerable amount of funding to the agency.¹²²

All of the member countries would fund the agency. Possible ways to determine funding are: (1) an even amount paid by each country annually; (2) a percentage of each country's annual Gross Domestic Product; or (3) a voluntary amount with a minimum level a country could not go below, but leaving room to go above if it wanted to make a statement that it takes cleaning up labor violations seriously.

*B. Redistributive Solutions can be Made on Three Different Levels –
Governmental, Company, or Consumer*

Solutions for redistributing wealth can be made on three different levels – governmental, company, and consumer. All three of these levels come down to consumers. Taxes will drive governmental costs onto consumers, and companies will pass on costs to consumers via higher prices. Although consumers will be footing the bill in the end, the solutions each start at one of the three levels. Countries can choose which solutions work best for them individually, and can use all solutions that are viable. All of the levels work together or independently. Parts C, D, and E of this Note outline the different redistributive solutions, and the cost and benefit of each solution.

C. Governmental Level Redistributive Solution

To make a substantial change from a government level, there needs to be money put into the pot by the richer countries. The TPP should create an account that all rich countries that are part of the TPP put money into. This money would be sent to countries that are not meeting labor standards to help build new manufacturing plants that meet modern safety standards, or to help renovate current facilities to create safe working conditions.

122. Guy Standing, *The ILO: An Agency for Globalization?*, 39 DEV. & CHANGE 355, 376 (2008).

The money should come from what the rich countries are saving by being a part of the free trade agreement. For example, if Canada were to save \$100,000 as a result of entering the TPP, it would have to set aside \$10,000 to put into the pot for upgrades to the infrastructure in countries struggling to meet labor standards. A certain percentage of savings will go into this account for countries to use to improve building conditions.

Countries will receive funding as a result of their current non-compliance with the ILO labor standards. Those countries will all get the same amount to start with, and only get more money if they can prove they are using the money to foster compliance with the ILO labor standards. The countries who receive these funds must prove that they are using them to conform to labor safety standards to avoid corruption problems. To do this, the countries must show the international reviewing body financial statements of how the money they receive is spent, and allow them to visit the facilities to make sure that there are actual results and not just a paper trail. This will be an ongoing source of funds as long as the TPP is in effect. Countries will only qualify for funding if they are proving that they are using them for improving labor safety conditions. The problem with this method is that it might incentivize countries to fail to maintain their labor standards, in order to become a money receiver instead of a payer as part of this scheme. Over time, it may lead to more and more countries failing to meet labor standards, instead of having the problem countries meet the standards this may end up creating more problem countries. The inspection agency will need to be mindful of these possible problems to help prevent or deter them.

In addition, it would be hard to convince the rich countries to agree to this solution, because they would be footing the bill for labor improvements in foreign lands. This is not a fatal objection, however. Rich countries would have to understand that because they are benefiting from free trade then they are not losing money. Rich countries would be shooting themselves in the foot by keeping the poor countries poor, because if there were more middle class countries, there would be more money to buy products from rich countries.

D. Company Level Redistributive Solutions

Redistributive solutions can also be invoked at the company level. Public relations campaigns have been used to induce companies to use suppliers with adequate labor standards.¹²³ Nike has been the biggest

123. Max Nisen, *How Nike Solved Its Sweatshop Problem*, BUSINESS INSIDER (May 9, 2013 10:00 PM), <http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5> [<https://perma.cc/9ZNP-ATS2>] (Analyzing how Nike was publicly shamed for its labor practices and has since brought “factories into line . . . [and] executed one of the greatest image turnarounds in recent decades”).

example of this.¹²⁴ In the mid-1990s Nike was accused of using sweatshops and child labor to manufacture its products in Asia.¹²⁵ In June of 1996, Bob Herbert wrote three pieces in the New York Times calling out Nike for exploiting cheap labor in Asia by moving around looking for the lowest wages, giving workers no rights, and working them in terrible conditions.¹²⁶ Nike had to answer consumer concerns about the use of sweatshops after a global boycott campaign took place in 1997.¹²⁷

This boycott left an impact on Nike, reducing sales to the point where Nike had to commit to make changes to working conditions in Asia.¹²⁸ While Nike has increased transparency by publishing a list of factories it contracts with and conditions in its factories,¹²⁹ the problem is that the effect these campaigns have had on labor rights is not clear.¹³⁰ Nike has been dealing with this issue for the last 25 years and has not solved its problems, so it seems that the effect of this public relation campaign is minimal.¹³¹ At a certain point, however, no matter

124. *Id.*

125. Burhan Wazir, *Nike Accused of Tolerating Sweatshops*, GUARDIAN (May 19, 2001 7:29 PM), <http://www.theguardian.com/world/2001/may/20/burhanwazir.theobserver> [<https://perma.cc/J9HB-YZJG>].

126. Bob Herbert, *In America; Nike's Pyramid Scheme*, N.Y. TIMES (Jun. 10, 1996), <http://www.nytimes.com/1996/06/10/opinion/in-america-nike-s-pyramid-scheme.html> [<https://perma.cc/SCF6-6VAL>]; Bob Herbert, *In America; Nike's Bad Neighborhood*, N.Y. TIMES (Jun. 14, 1996), <http://www.nytimes.com/1996/06/14/opinion/in-america-nike-s-bad-neighborhood.html> [<https://perma.cc/7F59-ULZB>]; Bob Herbert, *In America; From Sweatshops To Aerobics*, N.Y. TIMES (Jun. 24, 1996), <http://www.nytimes.com/1996/06/24/opinion/in-america-from-sweatshops-to-aerobics.html> [<https://perma.cc/3SMH-SQ7U>].

127. See Simon Birch, *How activism forced Nike to change its ethical game*, GUARDIAN (Jul. 6, 2012), <http://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike> [<https://perma.cc/3N5Z-9WTT>] (stating that Nike was the target of this boycott because it was a well-known brand and had initially denied responsibility for abusing workers).

128. John H. Cushman Jr., *Nike Pledges to End Child Labor And Apply U.S. Rules Abroad*, N.Y. TIMES (May 13, 1998), <http://www.nytimes.com/1998/05/13/business/international-business-nike-pledges-to-end-child-labor-and-apply-us-rules-abroad.html> [<https://perma.cc/ZRX4-SB26>].

129. Nisen, *supra* note 123.

130. See Nisen, *supra* note 123 (“Transparency doesn’t change ongoing reports of abuses, still-low wages, or tragedies like the one in Bangladesh.”).

131. Shelly Banjo, *Inside Nike's Struggle to Balance Cost and Worker Safety in Bangladesh*, WALL ST. J. (Apr. 21, 2014, 10:38 PM), available at <http://www.wsj.com/articles/SB10001424052702303873604579493502231397942> [<https://perma.cc/SG3Z-YUK7>].

what the public relations are, Nike will reach a breaking point in its profit margins in which it cannot make any more sacrifices.¹³²

Four possible solutions that will incentivize companies to buy from suppliers that meet ILO standards are: (1) requiring companies to only buy from suppliers that meet ILO standards; (2) all suppliers that meet ILO standards are guaranteed a level of production from companies; (3) companies provide a list of all of their suppliers, and are rated based on how many of their suppliers meet ILO standards; and (4) tax breaks for companies that buy only from suppliers that meet ILO standards.

1. Solution #1: all companies based in TPP countries can only buy from suppliers that meet ILO standards

One solution is to use the framework of the TPP to make sure companies only use suppliers that meet current labor standards. The TPP can have a provision that forces all companies based in any of the twelve member countries to only buy from manufacturers that the independent inspection agency approves. The costs of this approach will mean that these companies will only be able to buy from higher priced manufacturers, leading to either higher prices for their goods for consumers or relocating their suppliers outside of the twelve member countries. If companies leave the member countries to search for cheaper suppliers, the incentive to conform to the labor standards goes away, because there will be no buyers. In addition, it will defeat the purpose of the free trade agreement if countries are not producing trade goods.

The benefit of this approach hangs on the assumption that companies will continue to buy from manufacturers in the twelve member countries, and by doing so will incentivize all manufacturers to meet the labor standards or risk losing all of their business to their compliant competitors. In this approach, eventually all of the non-compliant manufacturers will die out and only ones that have advanced to meet ILO labor standards will remain. The problem, even if this does succeed, will be that companies will pass along to consumers the increase in the cost of companies buying from these improved manufacturers. An evaluation of the full ramifications of this potential consequence would take place after this solution comes into effect.

2. Solution #2: all suppliers meeting ILO standards receive a guaranteed level of production from companies

Another company level solution is to have companies grant all manufacturing facilities that meet labor standards a guaranteed production level from different businesses, from the twelve member countries, for a certain period of time. The problems with this approach are getting the companies to agree to a certain level of production, figuring out which facilities get what amount of production, and the

132. *Id.*

dispute resolution procedure if there is a problem. Guaranteed production levels could create in-fighting between manufacturers and could lead to bribery towards whoever is determining the level of production guaranteed to each factory. It also takes some flexibility out of the hands of companies, which could lead them to fight back against this arrangement.

The benefit to guaranteeing production levels is that if a company guarantees a manufacturer a certain level of production, it can do a better evaluation of the costs and benefits of meeting the ILO labor standards. The benefit to the companies is that it wipes their hands of having to search out for suppliers that meet labor standards, and they do not have to take the blame in the event that they use a manufacturer that the international inspection agency approves as an ILO labor standard complier if something does go wrong.

3. Solution #3: companies must provide a list of their suppliers and receive a rating based on how many meet ILO standards

Another solution is to make companies provide an up-to-date list of all of their suppliers and use the labor standards of the suppliers as a reflection on the companies. Nike already does this in response to the public relation campaign against it.¹³³ Then the inspection agency will provide a list of all suppliers who meet the labor standards so that interested parties can know which companies are using suppliers that meet labor standards and what percentage of those suppliers meet the standards.

Companies could get a labor rating based on this analysis. The same international agency that evaluates the manufacturers can give each company a labor rating on either a pass/fail basis or a one through ten scale.

4. Solution #4: companies receive tax breaks for buying exclusively from suppliers that meet ILO standards

Another company level solution is to give tax breaks to companies that only buy from manufacturers that the international inspection agency approves. A problem with this approach is that it does not give money directly to the countries that need the money to improve their working conditions. The potential benefit is that this has a two-pronged incentive that will help increase labor standards. First, it will incentivize companies to buy only from suppliers that meet labor standards. If this outcome occurs, then it will incentivize manufacturers to improve the labor conditions to get on the list of approved suppliers in order to get business from these companies. This condition needs to be met before the ultimate goal can be realized.

133. *From Monitoring Factories to Engaging Workers*, NIKE, <http://news.nike.com/pages/manufacturing> [<https://perma.cc/AGD8-57FD>] (last visited Apr. 20, 2016).

While this solution might take the longest to take effect, it is the best company level solution, because it allows companies to have autonomy over their decisions of how much to produce and which manufacturers to use, while at the same time clearly incentivizing them to use manufacturers that meet the labor standards of the international inspection agency. By giving a business incentive to companies, this solution incentivizes companies to support manufacturers that meet labor standards, while also receiving a monetary incentive to go this route.

E. Consumer Level Redistributive Solutions

Most of the solutions discussed above will end up passing the increased costs of better labor conditions onto the consumers. The main concern with this method is that the goal of free trade agreements is to lower costs of goods for consumers. Decreased expense to the consumer would lead to happier voters who will re-elect the politicians who created the agreements. If the cost of goods does not go down as the result of a free trade agreement, then there is really no point to the agreement.

Two possible solutions that will incentivize consumers to buy from suppliers that meet ILO standards are: (1) creating a tax on goods made under inadequate labor standards; and (2) creating labels for products to show the labor conditions where a product was manufactured.

1. Solution #1: tax on goods made under inadequate labor standards

Governments can create a tax on goods made under inadequate labor standards. The goal of this tax would be to make the products just as expensive as or more expensive than similar products made in conditions that meet the ILO labor standards. Calculation of the tax will have to be based on current market prices to make sure the incentives to deter the purchase of goods produced under inadequate labor standards are still in place. The tax will need to be adjustable as market prices change beyond a pre-agreed upon variation. The international inspection agency will be responsible for deciding tax rates.

2. Solution #2: labeling products to show labor conditions where a product was manufactured

Companies can create labels to place on all goods to show whether they make the goods in a factory that meets labor standards or not. This will allow socially conscious consumers to easily buy from manufacturers that use suppliers that meet labor standards. This will

also be a public relations campaign that might shame companies into only using suppliers with good labor standards.¹³⁴

This approach could cause anger within companies over the cost to produce these labels. As of now, it is unclear what effect, if any this will actually have on labor standards in foreign countries. These labels may not have any effect on consumer purchasing practices and therefore, would not lead to any change in labor practices. If consumers do not care what kind of working conditions under which their products are manufactured, then consumers will not change their purchasing habits to influence labor conditions.

An example of this strategy can be found in the food industry. A Vermont law is the first to mandate labels that tell consumers they are buying food with genetically modified organisms (GMOs). This solution is meeting a lot of pushback to keep labeling voluntary.¹³⁵ Critics say that the labels could mislead consumers or cause the costs of products to increase based on the printing costs of these labels. If labeling food with GMOs eventually becomes mandatory in the U.S., it would not be difficult to use the same model to label labor conditions on products. The same arguments against labeling will exist, but the benefit of knowledge gives consumers the ability to choose what matters to them.

F. Other Considerations: Revenue Sharing Example

The biggest criticism of these proposed solutions is getting the rich to agree to help the poor financially. Redistribution is great in theory,

134. There are a number of Environmental Product Declarations, such as Energy Star and FairTrade labels, being used on products, which promote an easy comparison between goods. See *What is an EPD?*, INTERNATIONAL EPD SYSTEM, [http://www.environdec.com/en/What-is-an-EPD/\[https://perma.cc/3Q84-ET2C\]](http://www.environdec.com/en/What-is-an-EPD/[https://perma.cc/3Q84-ET2C]) (last visited Mar. 13, 2016) (“An EPD is an independently verified and registered document that communicates transparent and comparable information about the life-cycle environmental impacts of products.”); *Introduction to Ecolabels and Environmental Product Declarations*, ECO SPECIFIER GLOBAL, <http://www.ecospecifier.com.au/knowledge-green/technical-guides/technical-guide-9-introduction-to-ecolabels-and-environmental-product-declarations/#internationalagencies> [https://perma.cc/YRA8-BX88] (last visited Mar. 13, 2016) (Ecolabels inform consumers about the environmental impacts from producing or using a product by setting minimum environmental and health standards for specific product categories.).

135. See, e.g., Greg Trotter, *GMO labeling debate puts food industry on defensive*, CHICAGO TRIBUNE (Mar. 12, 2016), <http://www.chicagotribune.com/business/ct-gmo-food-labeling-0313-biz-20160311-story.htm>. (“Large food manufacturers based in the Chicago area . . . support voluntary labeling [for genetically modified foods], saying mandatory labels would mislead consumers and that the extra labeling and production costs could be passed on to consumers.”).

but there must be a way to entice the rich to give up some of their wealth to help the poor make improvements to labor conditions. The easy case for redistribution of wealth is on moral grounds. There is a moral obligation to help others gain fair and safe treatment in the workplace. As the ones with the means to make this happen, the rich must fulfill their moral obligation by sending funds to the poor. This argument, while being easy to make, might not hold the most weight. The solution is to redistribute wealth in a way that not only helps working conditions in poor countries but makes the entire pie bigger so that the rich have a monetary incentive to agree to redistribution.

An example of redistribution that makes the pie bigger is revenue sharing in the NFL, NBA and MLB.¹³⁶ In each of these three leagues, there is some form of revenue sharing. Usually, these arrangements have to do with national television agreements where smaller market teams make more money from the deal than they should, as a proportion of how many viewers they bring in.¹³⁷ Owners from large markets agree to this because even though they are giving up what is their fair share of revenue from the television deal, the redistribution helps the league do better financially overall. This is because it makes all teams more competitive and therefore, creates a better product. A better product brings more fans to the seats and more money for the next television deal, and as a result, creates a much larger pie.

The goal of the redistribution is to create a bigger pie. The U.S. economy should benefit from redistribution because if the poorer countries that the U.S. trades with become middle class countries, they will have more money to buy U.S. products.

VI. CONCLUSION

The TPP fails to address the inherent tension between free trade and labor rights. The TPP only addresses the process of improving labor standards on the surface, but does not address the real problem – that enforcing labor rights will kill free trade.

The solutions proposed in this Note work to shift the focus from enforcement to a redistributive solution. These solutions give governments, companies and consumers different ways to actually address the problem of poor labor conditions and make a meaningful determination of what each group is willing to do to effect change. Only once there are concrete incentives for the enforcement of labor rights will labor conditions improve across the globe.

136. Howard Bloom, *NFL revenue-sharing model good for business*, SPORTING NEWS (Sept. 5, 2014), <http://www.sportingnews.com/nfl-news/4607230-nfl-revenue-sharing-television-contracts-2014-season-business-model-nba-nhl-mlb-comparison-salary-cap> [https://perma.cc/E4P7-M2VU].

137. *Id.*