FIT FOR PURPOSE? THE EXTENT AND ENFORCEMENT OF INTERNATIONAL TRADE AGREEMENT LABOR OBLIGATIONS AFTER THE *GUATEMALA – LABOR OBLIGATIONS* DECISION

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ABSTRACT

This Article considers how far labor obligations in trade agreements extend into state regulation of national economies, and more specifically what it means for state action or inaction to be "in a manner affecting trade" so as to engage those obligations. This question is key to defining what potential issues labor chapters aim to address. It was central to the first trade dispute in the world involving labor obligations to be resolved by a dispute settlement panel, the Guatemala – Labor Obligations *case. The panel's decision was followed by agreement on a definition of this phrase in the revamped labor chapter that was key to reaching the new* United States-Canada-Mexico Agreement. *This definition may in turn have implications for the interpretation of many earlier trade agreements to which the United States is party. The literature to date treats the definition as correcting an interpretation in* Guatemala – Labor Obligations *that critics contend made proof of violation, and thus enforcement, unworkable. This Article maintains that this account is inaccurate, and that the extent of labor obligations in U.S. trade agreements can only be understood by more fully grasping their purposes, something about which the parties and the panel in* Guatemala – Labor Obligations *had relatively little to say, and which remains unsettled in policy debate and the academic literature. The Article develops a theory of labor obligation purposes that accounts well for their wording and structure and explains how the USMCA labor chapter may set normative ground rules for an integrated economic space to address systemic labor rights problems, rather than simply prohibiting and remedying particular*

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failures to uphold labor rights with material effects on trade. With these purposes in mind, it might be arguable that labor chapters in previous agreements have an extent of obligations similar to that of the USMCA.

I. Introduction

The political acceptability of free trade agreements in the United States increasingly depends on the effectiveness of their labor obligations.[1] This in turn depends upon which potential issues or problems those obligations can reach and address, and how well agreement procedures enable the parties to ensure compliance with them. According to the wording of most U.S. trade agreements, how far many labor obligations extend into state regulation of national economies depends on what it means for state action or inaction to be "in a manner affecting trade."[2] This question was central to the first trade dispute in the world involving labor obligations to be resolved by a dispute settlement panel, *Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (*Guatemala – Labor Obligations*).[3] The panel report in that case stands to influence how dispute settlement panels interpret the similarly worded obligations found in many other trade agreements,

1. Kimberly Ann Elliot, Developing a More Inclusive US Trade Policy at Home and Abroad, 18–21 (2019), https://www.cgdev.org/sites/default/files/developing-more-inclusive-us-trade-policy-home-and-abroad.pdf.

2. U.S.-Australia Free Trade Agreement, U.S.-Austl., art.i 18.2, May 18, 2004, T.I.A.S. 6422, https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text; U.S.-Bahrain Free Trade Agreement, U.S.-Bahr., art. 15.2, Sept. 29, 1999, T.I.A.S. 13065, https://ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text; U.S.-Chile Free Trade Agreement, U.S.-Chile, art. 18.2, June 6, 2003, U.S.I.T.C. 3605, https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text; U.S.-Colombia Free Trade Agreement, U.S.-Colom., art. 17.3, Nov. 22, 2006, 125 Stat. 464, https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa/final-text; Agreement Between The United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, art. 6.4, Oct. 24, 2000, I.L.M. 41(1), https://ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/final-text; U.S.-Korea Free Trade Agreement, U.S.-Kor., art. 19.3, June 30, 2007, 125 Stat. 428., https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text; U.S.-Morocco Free Trade Agreement, U.S.-Morocco, art. 16.2, June 15, 2004, 118 Stat. 1103, https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta ; U.S.-Oman Free Trade Agreement, U.S.-Oman, art. 16.2, Jan.19, 2006, 120 Stat. 1192, https://ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text; U.S.-Panama Free Trade Agreement, U.S.-Pan., art. 16.3, June 28,2007, 125 Stat. 497, https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text; U.S.-Peru Free Trade Agreement, U.S.-Peru, art. 17.3, Apr. 12, 2006, 121 Stat. 1455, https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text; U.S.-Singapore Free Trade Agreement, U.S.-Sing., art. 17.2, May 6, 2003, 42 I.L.M. 1026, https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text.

3. *Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (June 14, 2017) (Banks, Posner, Hernandez, arbs.) [hereinafter, *Final Report*]. Dominican Republic-Central American United States Free Trade Agreement (CAFTA DR), Aug. 5, 2004, 43 I.L.M. 514, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

how parties seek to prove violations of such obligations, and how future labor chapters are drafted. Following the release of the report, and quite likely in response to it, the parties to the new United States-Mexico-Canada Agreement (USMCA) agreed to different enforcement procedures and to different language defining the extent of labor obligations than are contained in the CAFTA-DR and other trade agreements to which the United States is party.[4] The procedural changes address difficulties inherent in proving a course of state action or inaction with respect to labor rights, and its relationship to international trade.[5] The new language on the extent of obligations effectively dispenses with any need to address, as the panel did in *Guatemala – Labor Obligations*, whether a course of state action or inaction that otherwise failed to comply with obligations was "in a manner affecting trade" by having any material effect on conditions of competition, or indeed on any other identified aspect of trade. Instead, obligations will apply, in essence, whenever such a course involves (1) goods or services traded between the parties, (2) goods or services competing with goods or services traded between the parties, or (3) a person having an investment in the territory of a party that has failed to comply with such obligations.[6]

This new language on the extent of obligations suggests that the USMCA's labor chapter sets normative ground rules for an integrated economic space, taking a systemic or comprehensive approach to labor rights rather than simply prohibiting and remedying particular failures to uphold labor rights as unfair trading practices when they have material effects on trade. It may thus redefine the ambit of labor chapter obligations in a way that raises fundamental questions about how their purposes may have changed. It may also have important implications for how labor chapters in other agreements are interpreted and

4. The United States-Mexico-Canada Agreement,, art. 23.3 at n.4, Art. 23.5 at n.9; and art. 23.7 at n.12, Oct.1, 2018, 134 Stat. 11, [hereinafter USMCA] https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement, as amended by the USMCA Amendment Protocol, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/protocol-amendments.

5. *See infra*, notes 69, 71, 72 and accompanying text.

6. *See* USMCA, *supra* note 4 art. 23.3 n.4; art. 23.5 n.9; art. 23.7, n.12; each stipulating that: "For greater certainty, a "course of action or inaction" is "in a manner affecting trade or investment between the Parties" if the course involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party."

applied. This is because it was accomplished through a footnote purporting to define, for greater certainty, the phrase "in a manner affecting trade."[7] If this definition is understood as simply clarifying intentions of previous agreements, then it will in turn guide their interpretation. On the other hand, if it is understood to increase the extent of labor chapter obligations beyond that provided in previous ones, its influence on their interpretation will be limited.

How one resolves this question depends in turn on what interpretive problem or problems one considers the *Guatemala – Labor Obligations* decision to have made evident, or perhaps created. Currently, the most common answer to that question is that the panel's interpretation of CAFTA-DR Article 16.2.1(a) made it difficult or unworkable to prove that a "course of action or inaction" through which a party fails to effectively enforce labor laws is "in a manner affecting trade."[8] If this were the case, it would make sense to treat clarifications of the extent of obligations introduced in the USMCA as necessary to avoid problems of enforcement in all similarly worded agreements. In this view, the procedural reforms and extent of obligations clarification in the USMCA are

7. *Id.*

8. Alberto Alvarez-Jimenez, *The International Law Gaze: The Protection of Labour Rights in Free Trade Agreements: Mission Impossible?*, 9 N.Z. L.J. 287, 291 (2018)]. The most frequent criticism of the Panel's report takes the form of arguments that proof that enforcement failures were "in a manner affecting trade" requires obtaining and analyzing detailed and often confidential firm-level financial data, and thus imposes impossible burdens; *see also* Lance Compa, *Trump, Trade and Trabajo: Renegotiating NAFTA's Labor Accord in a Fraught Political Climate*, 26 IND. J. GLOBAL LEGAL STUD. 263, 292–93, 302 (2019) (arguing that Panel interpretation requires proof that "specific companies gained quantifiable cost and price advantages," and "forensic financial analysis," and proof of changed "price structure[s]"); Kathleen Claussen, *Reimagining Trade Plus Compliance: The Labor Story*, 23 J. INT'L ECON. L. 25, 38–39 (2020) (arguing that proof requires "an ability to subpoena data from companies"); JEFFREY VOGT, LANCE COMPA & ERIC GOTTWALD, INT'L LAB. RTS. F., WRONG TURN FOR WORKERS' RIGHTS: THE U.S. - GUATEMALA CAFTA LABOR ARBITRATION RULING - AND WHAT TO DO ABOUT IT, 10–11, 20 (2018) (contending that proof requires "intimate costs/sales/profit information in the hands of the employer"); June Namgoong, *Two Sides of One Coin: The U.S. - Guatemala Arbitration Decision and the Dual Structure of Labour Provisions in the CPTPP*, 35 Int'l J. Comp. Lab. L & Ind. Rel. 483, 502–03 (2019) (maintaining that proof requires evidence of how the employer benefited from "saved costs" (in terms of increased profit, or decreased wages)). Some have described the Panel's approach as creating an "unworkably high barrier" and "enormous practical hurdles," *see* VOGT, COMPA & GOTTWALD, *supra* note 8, at 18–19; or as making proof "practically impossible" and thus as reflecting a "conceptual misstep," *see* Claussen, *supra* note 8, at 39. Some have also have argued that the Panel's interpretation of "sustained or recurring course action or inaction" set the bar for the Complainant party "very high," *see* Alvarez-Jimenez, *supra* note 8, at 289; and in a way that does not bode well for future complainants, *see* VOGT, COMPA & GOTTWALD, *supra* note 8, at 10–11.

of a piece—they are essentially housekeeping aimed at ensuring that proof of labor chapter violations remains workable.[9]

This Article contends that this narrative rests on inaccurate views of the *Guatemala – Labor Obligations* decision, and that the extent of labor chapter obligations in the USMCA is best understood as effecting an expansion of its purposes relative to those of the CAFTA-DR addressed by the parties and the panel in the *Guatemala – Labor Obligations* decision. To understand the implications of the panel's Report in *Guatemala – Labor Obligations* and subsequent changes to the extent of labor obligations in the USMCA, it is necessary to articulate and reflect upon those purposes and what they imply about the extent of obligations. Policy and academic discourse have yet to do so.[10] To close this gap, this Article identifies and discusses alternative potential labor chapter purposes and their implications for the extent of labor obligations. With these considerations in mind, the Article then sheds light on how to analyze the potential implications of *Guatemala – Labor Obligations* and subsequent changes to trade agreement language in the USMCA, both for interpreting the extent of labor chapter obligations and for the drafting of future agreements. This analysis in turn shows how the role of labor chapters in trade agreements may be changing.

The Article proceeds as follows. Part II briefly summarizes key elements of the *Guatemala – Labor Obligations* decision. Part III then shows (1) that the decision's interpretation of Article 16.2.1(a) of the CAFTA-DR workably gives effect to the purpose of ensuring that particular failures to effectively enforce labor laws do not undermine fair conditions of competition in international trade, and (2) that procedural reforms can respond appropriately to problems of proof inherent in proving violations of labor obligations without requiring reinterpretation of those obligations themselves. Part IV then argues that (1) understanding the extent of labor chapter obligations requires understanding their purposes, because the purposes and extent of obligations inform each other; (2) *Guatemala – Labor Obligations* does not foreclose the possibility that labor chapters, including that of the CAFTA-DR, might serve purposes other than ensuring that particular failures to effectively enforce labor laws do not undermine fair conditions of competition; (3) that particular purpose is a relatively narrow one among purposes potentially accounting for trade agreement labor obligations, which include addressing systemic weaknesses in labor rights enforcement and setting normative ground rules as a precondition for closer

9. *See* Claussen, *supra* note 8, at 41–43.

10. Claussen, *supra* note 8 at 36–37.

economic integration; and (4) these other purposes correspond to a wider extent of obligations. Part IV then explains how the extent of obligations language in the USMCA may reflect such broader purposes, and why establishing that labor chapters in previous trade agreements also have similar purposes and extents of obligations would require either novel, purposive legal argument, or new clarifying agreement text. Part V summarizes and concludes.

II. The *Guatemala – Labor Obligations* Decision's Definition of Obligations

The *Guatemala – Labor Obligations* case was about whether Guatemala had failed to meet its obligations under Article 16.2.1(a) of the CAFTA-DR.[11] That Article provides as follows: "A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement."[12] In its written submissions, the United States claimed that Guatemala had failed to effectively enforce its labor laws by: (1) failing to secure compliance with court orders requiring employers to reinstate and compensate workers wrongfully dismissed for union activities and to pay a fine for their retaliatory action; (2) failing to properly conduct investigations under the Guatemalan Labor Code (GLC) or to impose the requisite penalties when Ministry of Labor inspectors identified employer violations; and (3) failing to register unions or institute conciliation processes within the time required by law.[13]

The panel found that Guatemala had repeatedly failed to effectively enforce its labor laws, by failing to enforce in a timely manner court orders for the reinstatement and compensation of workers unlawfully dismissed for union activity.[14] The panel also concluded, however, that the United States had not demonstrated that these failures constituted

11. *Final Report*, *supra* note 3, ¶ 1.

12. Dominican Republic–Central America Free Trade Agreement, *supra* note 3, art. 16.2.1(a), https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

13. *Final Report*, *supra* note 3, ¶ 60.

14. *Id.* ¶ 426. The Panel concluded that Guatemalan labor courts had failed to effectively enforce labor laws, finding that:

> "The evidence shows that authorities were unsuccessful in enforcing court orders or neglected their enforcement. Courts specifically and directly responsible for initiating enforcement of and securing compliance with their orders directed reinstatement of groups of employees dismissed for union activity and employers failed or refused to comply with the terms of those orders. They also failed to pay the fines imposed by those courts. The subsequent failure by courts to take effective enforcement action in

a sustained or recurring course of action or inaction that was "in a manner affecting trade."[15] To reach its decision, the panel was required, among other things, to interpret and apply, as a matter of first impression, the terms "not fail to effectively enforce," "sustained or recurring course of action or inaction," and "in a manner affecting trade." The following sub-sections will briefly summarize the panel's decisions on these points.

A. *"Not Fail to Effectively Enforce"*

The panel determined that the obligation to "not fail to effectively enforce" labor law is

> [A]n obligation to compel compliance with labor laws (or, more precisely, not neglect to compel or be unsuccessful in compelling such compliance) in a manner that is sufficiently certain to achieve compliance that it may reasonably be expected that employers will generally comply with those laws, and employers may reasonably expect that other employers will comply with them as well.[16]

The panel found that this obligation applies regardless of which organs of the State—whether executive or non-executive—are responsible for enforcement,[17] and that it therefore covered enforcement by courts and tribunals as well as labor inspectorates.[18]

B. *"Sustained or Recurring Course of Action or Inaction"*

The panel agreed with the parties that "recurring" means "repeated" and that "sustained" means "prolonged."[19] This seems uncontroversial, perhaps even obvious. But the phrase "sustained or recurring course of action or inaction" has to mean more than sustained or recurring inaction. If not, the word "course" would be redundant and inutile. The panel's principal task in interpreting the phrase was to determine what meaning the word "course" adds to it.

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response signaled to the employers in question that they would not be held accountable for their non-compliance with labor laws."

15. *Id.* ¶ 594.
16. *Id.* ¶ 139.
17. *Id.* ¶ 120.
18. *See id.* ¶¶ 114–120.
19. *Id.* ¶ 145.

The United States argued that the term "course" means "a manner of conducting oneself" or a "way of acting" or "behavior," so as to indicate a degree of relatedness among the actions or inactions that makes up the course.[20] Guatemala, on the other hand, argued that the term "course" means "[h]abitual or regular manner of procedure; custom, practice . . ., [a] line of conduct, [or] a person's method of proceeding" reflective of a deliberate policy of action.[21] The parties thus recognized that a course of action or inaction involves relatedness or similarity of conduct. They differed with respect to whether it necessarily involved deliberateness or an adopted method of proceeding.

The panel articulated a definition incorporating the objective characteristics of a "course" identified by the parties, but not the subjective elements that Guatemala submitted were required.[22] The panel concluded that a sustained or recurring course of action or inaction is a line of connected, repeated, or prolonged behavior by an enforcement institution or institutions. It found that the connection establishing a line of behavior "is manifest in sufficient similarity of behavior over time or place to indicate that the similarity is not random."[23] Put differently, in a line of connected behavior amounting to a failure to effectively enforce labor laws, instances of action or inaction relate to each other in a way that creates a reasonable expectation of increased likelihood of failure above a baseline of isolated events.[24] A sustained or recurring course of action or inaction can be, but need not be, enforcement system wide or pervasive.[25]

C. *"In a Manner Affecting Trade"*

The central interpretive question faced by the panel was what type of consequences of a course of action or inaction could be considered to be "in a manner affecting trade."[26] Both parties relied upon definitions of "affecting" that included notions of influencing or making a material impression upon that which is affected. The panel accepted that

20. *Id.* ¶ 143.

21. *Id.* ¶ 144.

22. *Id.* ¶¶ 149–51. The Panel specifically rejected Guatemala's contention that a course of action or inaction had to be intentional.

23. *Id.* ¶ 152. A sustained course of action or inaction is composed of prolonged behavior in which there is sufficient consistency in sustained acts or omissions as to constitute a line of connected behavior by an enforcement institution. A recurring course of action or inaction is composed of repeated behavior which displays sufficient similarity as to constitute the same. *Id.*

24. *Id.* ¶ 439.

25. *Id.* ¶ 435.

26. *Id.* ¶ 164.

this was the plain meaning of "affecting."[27] The panel did not expressly adopt a comprehensive definition of "trade," but noted that, in its view, action or inaction that is in a manner affecting trade must influence or make a material impression upon "some aspect of trade, that is, upon the cross-border exchange of goods and services."[28] The question thus became what is required to establish an influence or material impression upon trade. On this question, the panel was faced with two very distinct positions. Guatemala argued that to affect trade a course of action or inaction would have to distort trade flows or have similar consequences.[29] The United States took the position that a complaining party need only demonstrate that, based on a failure to effectively enforce labor laws, there had been a modification to conditions of competition in trade between the parties.[30] The panel concluded that it could not agree with Guatemala's argument that to be in a manner affecting trade a failure to enforce labor laws would have to distort trade flows. This was essentially because (1) failing to enforce labor law does not necessarily distort trade flows, even and indeed especially where it creates competition between employers affecting working conditions,[31] and (2) it would be so fraught with difficulties of proof as to make establishing cause and effect often impossible.[32] The panel saw Guatemala's approach as inconsistent with the related objectives of ensuring that internationally recognized labor rights are protected by law (reflected in Article 16.1) and of ensuring fair conditions of competition (an objective of the CAFTA-DR, according to Article 1).[33] The panel accepted the general proposition advanced by the United States that a failure to effectively enforce labor laws affects trade when it affects conditions of competition.[34]

Where the panel differed with the United States was with respect to what it means to affect conditions of competition. The United States equated evading any costs associated with labor law compliance with affecting conditions of competition. It took the position that any effects on the labor costs of an employer engaged in trade would be sufficient to affect conditions of competition, and that by definition lack of

27. *Id.* ¶ 167.
28. *Id.*
29. *See id.* ¶¶ 157–59.
30. *Id.* ¶ 161.
31. *Id.* ¶¶ 177, 179.
32. *Id.* ¶ 178.
33. *Id.* ¶¶ 174, 176.
34. *Id.* ¶ 192, 479.

enforcement reduces the marginal costs of enterprises.[35] This position implies that every failure to effectively enforce labor laws with respect to an employer engaged in trade or competing with imports affects conditions of competition. Conversely, only enforcement failures in relation to workers whose work does not involve the production of goods or the provision of services competing in cross-border commerce would not be in a manner affecting trade.[36] The panel did not agree that every failure to enforce labor laws affected conditions of competition. It recognized that failures to enforce labor laws tend to affect conditions in certain predictable ways but noted that:

> [A] competitive advantage does not necessarily result from every failure to effectively enforce labor laws. While we ordinarily would expect a failure to effectively enforce labor laws to have some effect on employer costs, such effects may in some cases be too brief, too localized or too or small to confer a competitive advantage. A failure to enforce labor laws, even when through a sustained or recurring course of action or inaction, may, for example, affect only a small number of workers for a short period of time and thus may not be sufficient to confer a competitive advantage to an employer or employers engaged in trade.[37]

The panel thus concluded that to affect conditions of competition, a failure to enforce labor law had to confer some competitive advantage on an employer or on some employers.[38] It noted that to hold otherwise would be to treat all failures to enforce labor laws (through a sustained or recurring course of action or inaction) in traded industries as affecting trade, without proof of effect on trade.[39] It also observed that this result could have been achieved much more directly by drafting Article 16.2.1(a) so as to use the phrase "in a manner that is trade-related," a

35. *Id.* ¶ 478.

36. *Id.*

37. *Id.* ¶ 193.

38. Specifically, the Panel concluded that "a failure to effectively enforce labor laws through a sustained or recurring course of action or inaction is in a manner affecting trade between the Parties if it confers some competitive advantage on an employer or employers engaged in trade between the Parties." *Id.* ¶ 190. It went on the note that "whether any given failure to effectively enforce labor laws affects conditions of competition by creating a competitive advantage is a question of fact." *Id.* ¶ 192.

39. *Id.* ¶ 168.

phrase used in a previous trade-related labor agreement to which the United States is party.[40]

III. The Workability of Proof of Violation

If labor obligations were interpreted so that proving their violation required an amount or type of evidence that made doing so effectively impossible for workers, advocacy groups, or foreign governments involved in bringing complaints, they would essentially become unenforceable. Interpretations of labor obligations producing such outcomes would be inconsistent with the apparent intent of the parties in creating binding obligations in the first place. The main thrust of commentary on the *Guatemala – Labor Obligations* decision has been that it renders proof of violation unworkable, by setting a high bar for proof of a "sustained or recurring course of action or inaction," and by requiring the complaining party to obtain and analyze detailed and often confidential firm-level financial data in order to quantify changes to costs, wages, prices, or profits to establish that such a course was "in a manner affecting trade."[41] This Part explains why, in this Article's view, the panel's decision does not do these things, why procedural reforms are a more appropriate means of addressing difficulties of proof of labor chapter violations, and why workability of enforcement cannot account for the new language on the extent of obligations found in the USMCA.

A. *Sustained or Recurring Course of Action or Inaction*

The *Guatemala – Labor Obligations* Panel Report makes a number of observations with respect to what is required to demonstrate a course of action or inaction. These observations indicate that a course of action or inaction can be proven by evidence that is likely to be available to workers, unions, and foreign governments. This evidence includes statements of workers or union representatives seeking to enforce labor laws in particular cases, or research reports on the functioning of enforcement institutions.

First, as noted above, the *Guatemala – Labor Obligations* panel stated that a course of action or inaction need not be representative of the overall conduct of an enforcement institution, be system-wide, or be pervasive.[42] Indeed, the panel's treatment of the proven failure to

40. *Id.*

41. *See* USMCA, *supra* note 4, art. 23.

42. *Final Report*, *supra* note 3 ¶ 435.

effectively enforce labor laws against an employer named Avandia suggests that a sustained course of action or inaction could arise at a single employer, if there was evidence that enforcement authorities had been made aware of, or had a duty to make themselves aware of that employer's continuing non-compliance.[43]

Second, the connection between acts or omissions constituting a course of action or inaction need not be explained by evidence, and can be inferred from circumstances.[44] The panel specifically stated that

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43. The Panel found that a labor court had remained unsuccessful in securing the reinstatement of nine illegally dismissed workers for eight months, and the reinstatement of two of those workers for nine months. *Id.* ¶ 404. The evidence of the court's behavior before the Panel was that the court issued an order on November 22, 2006 directing Avandia to reinstate 9 workers; the court directed the reinstatement of the same nine individuals on July 3, 2007; on August 7, 2007 the court received a complaint claiming that two of the workers had not been reinstated to their original positions and had not received monies owed to them; on August 9, 2007 the court issued an order doubling the fine imposed on Avandia and warning that payment to those two workers had to be made within three days, failing which the case would be certified for criminal prosecution for disobedience. The Panel concluded that in the Avandia case the court had failed to effectively enforce labor laws. But the Panel found that it had insufficient evidence with respect to interactions between the court and complainants or other behavior by the court to determine whether the failure constituted a sustained course of action or inaction. *Id.* ¶ 504. The Guatemalan Labor Code requires courts to respond to disobedience by an employer by increasing fines, and to persistent disobedience by referring a matter to prosecution. The court took such steps in August of 2007. The key question, left unanswered by the evidence, was what the court knew about the employer's non-compliance and how it responded to any such knowledge prior to July of 2007. There was no evidence whatsoever in the record on this subject. The evidence did not disclose whether the employer's disobedience had been brought to the court's attention before its July 3, 2007 order, by the complainants or by anyone else. Nor did the evidence speak to whether the court was responsible to monitor compliance with its orders. This made it impossible to conclude that the prolonged period during which the court order was not enforced was due to a course of action or inaction. Some evidence regarding the court's behavior would be necessary to make this determination. A sustained course of action or inaction requires consistency over time in sustained acts or omissions, so as to constitute a line of connected behavior. (Otherwise, there would be no difference between a sustained course of inaction and sustained inaction, or indeed any sustained failure to enforce.) Without any evidence of acts or omissions during the relevant time, the Panel was required to conclude that the United States had not met its burden to show that Guatemala's failure to enforce its labor laws in the case of Avandia had formed part of a sustained course of action or inaction.

44. The Panel made no finding with respect to whether the multiple failures to effectively enforce labor law by Guatemalan labor courts constituted a course of action or inaction. It nonetheless observed that the pattern of significant shortfall between the courts' mandate and performance suggested that the failures were not random, but rather more than isolated behaviors. *Id.* ¶ 442. The Panel also noted that statistical evidence indicating that during a two-year period beginning not long after the events in question defendants had failed in large numbers and at a high rate to comply with courts' orders in response to certain enforcement proceedings reinforced this suggestion. *Id.* The Report also observed however that the number of

it is not necessary to prove why a line of acts or omissions is connected.[45] It observed that while the connection could be established through evidence of custom or practice that routinely produces failures, bias, or lack of institutional capacity or political will, none of this is required in proof.[46] This is consistent with recognizing that evidence of the causes that connect failures to enforce may not be available to complainant parties or to workers and their organizations.

It is difficult to see how, in itself, this approach to defining and inferring the existence of a course of action or inaction creates barriers to enforcement of labor obligations. A course can be proven on the basis of observations of the behavior of enforcement institutions in response to complaints of or information about employer non-compliance in particular cases. Particular failures to effectively enforce labor laws can be proven on the basis of similar evidence. The panel noted that "[e]ffective enforcement generally will be evident in results—in particular, compliance by employers";[47] that "[e]ffective enforcement generally will require that when enforcement authorities find an employer to be out of compliance they will take appropriate action to bring it into compliance";[48] and will also require that "[e]nforcement authorities will both detect and remedy non-compliance with the law sufficiently that employers will reasonably expect that other employers will comply with the law."[49] A failure to effectively enforce labor laws can thus be demonstrated with evidence of employer non-compliance and the absence of appropriate state action to bring employers into compliance, or to detect and remedy non-compliance sufficiently that it may reasonably be expected that employers will generally comply with the law.[50]

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failures proven, involving 74 workers at eight worksites over a five-year period, was small enough to make it difficult for members of the Panel to discern a line of connected behavior. *Id.* ¶ 443.

45. *Id.* ¶ 438.

46. *Id.*

47. *Id.* ¶ 134.

48. *Id.* ¶ 135.

49. *Id.* ¶ 136.

50. The Panel also noted that in interpreting and applying Article 16.2.1(a) it should take into account that international obligations assumed by both parties by virtue of their membership in the International Labour Organization committed them to realize principles requiring prompt and effective redress of anti-union dismissals of workers. *Id.* ¶ 427. A failure to effectively enforce labor laws can thus be demonstrated with evidence that authorities did not take prompt action to determine whether an employer alleged not to be in compliance is not compliant; did not take prompt action to bring a non-compliant employer or employers into compliance or remedy that non-compliance; or failed to deter non-compliance. Evidence of such matters was provided in *Guatemala – Labor Obligations,* through first-hand accounts of workers, and published rulings and other records of courts, inspectors and tribunals. *See id.* ¶¶ 285–428. The Panel also indicated that

B. *In a Manner Affecting Trade*

The panel made a number of observations with respect to what must be proven, on the basis of types of evidence and inference, to establish that a course of action or inaction is in a manner affecting trade. With regard to what must be demonstrated to prove an effect on conditions of competition, the panel observed that cost or other effects need not be proven with any particular degree of precision.[51] In fact, it concluded that a particular failure to enforce labor laws against a particular employer was in a manner affecting trade despite the absence of any precision with respect to the competitive advantage conferred by the failure in question.[52] Conversely, the panel noted that a competitive advantage can be proven on the basis of systemic effects on employers, without proving specific effects on any particular employer, and that a group of failures to effectively enforce labor laws might be shown to collectively affect trade even where no evidence established that any individual failure to enforce had such effect.[53]

With regard to sources of evidence, the panel indicated that proof of competitive advantage did not require data drawn from employer records.[54] It noted that competitive advantage can be proven on the basis of first-hand evidence from workers.[55] The panel specifically

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reports of international organizations and government agencies are admissible and can be probative as well. *See id.* ¶¶ 269–70.

51. *See id.* ¶ 195.

52. *See id.* ¶ 487 (where the Panel draws a conclusion on that basis).

53. The Panel provides the following example:

> . . . if the failures making up a course of action or inaction occurred with sufficient frequency and notoriety among employers, they might incentivize employers to violate the law with an expectation of impunity, and the cumulative impact of such violations might be to reduce employers' costs so as to gain a competitive advantage and affect trade. This might be so even if each individual failure on its own had no discernible impact on trade. *Id.* ¶ 502.

It is therefore incorrect to assert the Panel implicitly interpreted "recurring or sustained action or inaction" to be measured in a single work context, with the result that the provisions of the FTA allow for blatant and systemic violations of the freedom of association to be tolerated. *See* Philip Paiement, *Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute*, 49 GEO. J. INT'L L. 675, 690 (2017).

54. *See Final Report*, *supra* note 3, ¶¶ 194, 487 (where the panel draws such a conclusion without regard to evidence drawn from employer records). The Panel did consider whether stevedoring companies passed cost savings resulting from failures to enforce labor laws on to Guatemalan exporters. *See id.* ¶¶ 462–64. This was because the stevedoring companies were not providing a traded service. It was therefore necessary to consider whether failures to enforce labor laws against them indirectly affected employers engaged in trade.

55. The Panel noted that effects on the right to organize can be proven with "first-hand evidence from those involved in seeking to organize the union or to bargain collectively" *Id.*

mentioned that a statement from a union organizer or worker describing the effects of the dismissals on the efforts of the union to represent workers would have been probative with respect to the central question facing the panel in determining whether the failures to enforce conferred a competitive advantage[56]: whether they substantially impaired the capacity of workers to organize a union or bargain collectively.[57] For example, a statement describing how, following a failure or failures to effectively enforce labor laws, a union organizing campaign that had been succeeding had then foundered would tend to show that the failure to effectively enforce had impaired the capacity of workers to organize, conferring a competitive advantage on the employer. Similarly, a statement describing how, following a failure to effectively enforce labor laws, a union had been unable to press for key demands for fear of further employer retaliation or interference would tend to establish that the failure to enforce had impaired the capacity of workers to bargain collectively, and had thus conferred a competitive advantage on the employer. It is difficult to see how obtaining such statements would pose an impossibly high barrier to proof. The United States, in fact, obtained statements from many workers and union organizers and submitted them to the panel. The panel admitted those statements into evidence. It did so even though they were redacted to protect the anonymity of the workers who, the panel was told, feared reprisals for giving evidence. The panel went on to find many such statements to be credible and made numerous findings of fact on the basis of them.[58]

¶ 485. The Panel indicated that this could be a statement "by a union organizer or worker describing the effects of the dismissals on the efforts of the union to represent workers." *Id.* ¶ 476.

56. *See id.* ¶¶ 476, 481.

57. *See id.* ¶¶ 476, 481.

58. The Panel also found that several statements were of little probative value. This was not because they were disbelieved, but rather because they lacked particulars of alleged conduct and specificity regarding dates or even time of year, and these problems were not remedied by any corroboration. Many were simply conclusory statements characterizing conduct of officials as dismissive of worker concerns without describing that conduct in any detail so as to provide a basis for such characterizations. *See, e.g.*, *id.* ¶¶ 535, 552, 563. The Panel could not provide examples in its Report of such statements to demonstrate the basis for its conclusions that they had little probative value. This was because the statements themselves were treated as confidential under the Rules of Procedure governing the Panel's proceedings. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE DOMINICAN REPUBLIC - CENTRAL AMERICA - UNITED STATES FREE TRADE AGREEMENT: DECISION OF THE FREE TRADE COMMISSION ESTABLISHING MODEL RULES OF PROCEDURE, app. 2, ¶ 6 (2011), https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/cafta/Decision%20Establishing%20Model%20Rules%20of%20Procedure.pdf [hereinafter CAFTA-DR RULES OF PROCEDURE]. All that was made public of most statements were very general summaries.

With regard to inferences based on such evidence, the panel explained that failures to enforce labor laws often have predictable effects on costs, risks, and liabilities,[59] and that the existence of a competitive advantage may be inferred on the basis of the likely consequences of a failure or failures to enforce labor laws or other aspects of the totality of the circumstances.[60] Thus, for example, proof of a failure or failures to enforce that effectively allowed an employer not to pay the minimum wage to a number of its employees, or to require them to work unpaid overtime over a sustained period of time, could support an inference that the employer had obtained a competitive advantage in the form of reduced labor costs and/or reduced risk of liability for unpaid wages. Similar inferences could be drawn with respect to failures to enforce many other labor laws, such as occupational health and safety standards.

Thus, a finding that a failure to effectively enforce labor laws was "in a manner affecting trade" can be made on the basis of credible, but approximate, information regarding how many workers were affected by that failure, in what way, for how long, and on the basis of reasonable inferences regarding effects on employers, in the light of the ordinary operation of labor law and/or the ordinarily expected consequences of unremedied labor law violations. The information upon which such inferences could be based includes first-hand observations by workers of things like the effects of employer violations of the law on union organizing campaigns, their wages, or their working conditions. Alternatively, it could be based on observations of how enforcement institutions have failed to enforce labor laws in relation to a set of employers, and reasonable inferences about whether the frequency of

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59. *See* Final Report, supra note 3, ¶¶ 172, 193, 482–83. For example, the Panel made a number of observations on likely relationships between failure to enforce laws protecting employee rights to organize and bargain collectively:

> As a general matter, we note that employer dismissals in reprisal for union activity pose a serious threat to the ability of employees to exercise their legal rights to organize and bargain collectively. Employees represented by a union cannot help but take note of the absence of those who sought to represent them or who expressed support for the union following retaliatory dismissals. Retaliatory dismissal of union organizers and supporters tends to send a clear message to employees that they risk serious economic consequences for trying to organize or participate in a union." *Id.* ¶ 482.
>
> "If an employer enjoys impunity for retaliatory dismissals it will face significantly lower risk on an ongoing basis that its employees will organize a union or bargain collectively in an effective manner. This in turn will provide such an employer with a competitive advantage by substantially lowering the risk of unionization within its facilities on an ongoing basis. The practically automatic effects of depriving employees of effective access to the right to bargain collectively are to reduce the risk that they will do so, and thus to reduce their bargaining power in relation to the employer." *Id.* ¶ 483.

60. *See id.* ¶¶ 194, 487.

such failures would give them sufficient notoriety to indicate to employers that they are likely to have impunity for labor rights violations. All that is required is proof, directly or by inference, of some cost reduction, reduced risk, or reduced liability[61] not too brief, too localized, or too small to confer some competitive advantage on an employer or employers.[62] Proof of this threshold requirement thus does not require quantification. It can be established through qualitative reasoning based on a set of hypotheses that are supported by sufficient evidence.

C. *Addressing Difficulties of Proof Through Procedural Reform*

The definition of obligations provided in the *Guatemala – Labor Obligations* decision does not render proof of violation unworkable. The unworkability thesis therefore cannot account for the changes to labor obligations found in the USMCA. This is not to say however that proving a violation of an obligation such as that contained in Article 16.2.1(a) of the CAFTA-DR is a straightforward matter. It poses two types of challenges that often do not arise in trade law proceedings with respect to traditional matters, for example, those addressing alleged violations of national treatment obligations. First, proving a labor chapter violation will often require proof of sustained or recurring failures of the state to act effectively. This may require, as it did in *Guatemala – Labor Obligations*, evidence gathered over a relatively lengthy period of time. By contrast, a national treatment claim can often be based upon the fact that a government has implemented, at a particular point in time, a measure that does not treat imported products as favorably as like domestic ones.[63] Second, the sources of evidence in support of a labor chapter claim may be more difficult to access. A national treatment claim may be based on official records proving the existence of a measure such as a law, regulation, or policy, and inferences about the effects of such measures on conditions of competition.[64] By contrast, a

61. *See id.* ¶ 172.

62. *See id.* ¶¶ 193, 196.

63. *See, e.g.*, Panel Report, *India – Measures Affecting the Automotive Sector*, ¶ 7.307, WTO Doc. WT/DS146/R, WT/DS175/R (adopted Dec. 21, 2001); Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" Recourse to Article 21.5 of the DSU by the European Communities*, ¶¶ 211–13, WTO Doc. WT/DS108/AB/RW (adopted Jan. 14, 2002); Panel Report, *Canada – Measures Affecting the Automotive Industry*, ¶ ¶ 10.81–10.82, WTO Doc. WT/DS139/R, WT/DS142/R (adopted Feb. 11, 2000); Panel Report, *China – Publications and Audiovisual Products*, ¶¶ *4.79-4.85*, WTO Doc. WT/DS363/R (adopted Aug. 12, 2009); Panel Report, *China – Measures Affecting Imports of Automobile Parts*, ¶¶ 7.256–7.257, WTO Doc. WT/DS339/R, WT/DS340/R, WT/DS342/R (adopted July 18, 2008).

64. *See* sources cited *supra* note 58.

labor chapter claim is likely to be based on one of two potential sources that may be more difficult to access, and that may have incomplete records.

The first potential source is workers and their representatives willing to provide accounts of their experiences seeking to enforce labor laws. Gathering statements from multiple individuals recounting events occurring over a long period of time is clearly laborious. It is also quite likely to face difficulties with recollection. Relatively few workers will keep detailed contemporaneous notes of their encounters with labor officials, particularly in areas with high rates of illiteracy. In addition, in some places workers are likely to fear reprisals at work, or worse, against their safety or that of their families.[65] In response to such stated concerns, the panel admitted anonymous, redacted evidence, subject to evaluation of its probative value.[66] But, as the panel noted, anonymity and redactions limit the ability of panels to assess the reliability of evidence.[67]

The second potential source of evidence is the records of labor law enforcement institutions. Unlike a national treatment case based on published laws or regulations, the records in a labor chapter case would be those documenting the handling of particular cases over relatively long periods of time. There are potential difficulties of access to such materials. For example, access to labor law case files may be restricted to parties, and workers may be reluctant to get involved if they fear retaliation. Just as problematic, enforcement agencies may simply avoid keeping records and statistics in a way that would allow researchers (or any other member of the public) to determine whether enforcement efforts are effective at a system or subsystem-wide level.

These challenges in compiling evidence in support of a claim are compounded by what may be described as the burden of anticipation placed on a party complaining under Rules of Procedure such as those found under the CAFTA-DR. Under the rules, the factual record is provided with written submissions.[68] It is compiled prior to any hearing.[69] Timelines for written submissions are tight.[70] The Rules of Procedure contemplate no examination of witnesses at the hearing.[71] The rules

65. *See, e.g.*, Int'l Labour Office, *391st Report of the Committee on Freedom of Association*, GB.337/INS/10, 153 (Oct. 31, 2019).

66. *See Final Report*, *supra* note 3, ¶¶ 237–46.

67. *Id.*

68. CAFTA-DR RULES OF PROCEDURE, *supra* note 58 ¶ 6.

69. *Id.*

70. *Id.* ¶ 7.

71. *Id.* ¶ 44.

impose no duty upon the parties to produce information at the request of the panel. The panel may seek information or technical advice from a person or body that it deems appropriate, but only with the consent of the disputing parties.[72] The procedures thus place a heavy burden of investigation and anticipatory analysis on the complainant party.

It is beyond the scope of this paper to fully canvass and evaluate potential responses to these difficulties. The main points that this Article will make, briefly, is that in principle such responses can and should be procedural, that experience with labor law enforcement around the world can provide some guidance, and that parties to the USMCA have already developed procedural responses to them. Difficulties of proof are nothing new in labor law, where the employer often possesses most of the information needed to determine the validity of an employee claim. Labor law systems commonly make presumptions and shift burdens of proof once an employee has presented a prima facie case.[73] Under the terms of the new USMCA, a breach of several obligations is presumed to be in a manner affecting trade unless the defendant party can establish that it was not.[74] This relieves the complainant of, among other things, the burden of demonstrating that a person or industry produces goods or supplies services for export or that compete with imports, apparently in response to the relative difficulty faced by a complainant in obtaining such information. Another potential procedural change could be the use of investigative verification procedures in appropriate cases. The International Labour Organization has responded for many years to the factual complexity of determining whether alleged labor obligations violations have taken place by conducting on-site verification procedures.[75] The new USMCA provides for verification procedures through its Rapid Response Labor Mechanism.[76] For regular arbitration proceedings, parties might adopt

72. *Id.* ¶ 71.

73. *See, e.g.*, KEVIN BANKS, LANCE A. COMPA, LEONCIO LARA, & SANDRA POLASKI, LABOR RELATIONS LAW IN NORTH AMERICA 88, 141, 151, 220 (2000), https://digitalcommons.ilr.cornell.edu/reports/27/.

74. *See* USMCA, *supra* note 4, art. 23.3 at n.4, art. 23.5 at n.9; and art 23.7 at n.12, as amended by the *USMCA* Amendment Protocol, *supra* note 4.

75. International Labour Organization [ILO], *Special Procedures for the Examination in the International Labour Organization of complaints Alleging Violations of Freedom of Association - Annex 1*, ¶ 67, http://ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:4046805:NO (last visited Feb. 24, 2021).

76. *See* USMCA Amendment Protocol, *supra* note 4, ¶ 7(F) (adding Annexes 31-A, 31-B, 31-A.7, and 31-B.7). Under the Rapid Response Mechanism, an independent, three-person panel of experts can be mandated to conduct a verification of whether there was a denial of freedom of association rights at a particular production facility. The panel can request the opportunity to

duties to cooperate with a dispute settlement panel's requests for information such as those found in the WTO's Dispute Settlement Understanding, or give panels the power to request that parties make available documents or other information and to take any failure to comply with such a request into account in their determination, as the parties have done under the USMCA.[77] It may also be appropriate, in certain circumstances, to enable dispute settlement bodies to hear from witnesses in person and in confidence, with appropriate due process safeguards, in order to address the potentially recurring problem of assessing the probative value of statements from witnesses who fear retaliation.

D. *Conclusions*

To sum up, the interpretation of CAFTA-DR obligations by the panel in *Guatemala – Labor Obligations* allows a complaining party to prove its case on the basis of information from workers and their representatives or obtained from labor law enforcement agencies. Proof of violations drawing upon these sources is workable. Concerns about difficulties in obtaining proof would be most directly addressed through procedural reform, rather than by modifying obligations or the extent of their reach into traded sectors of agreement parties' economies. To account for the reach of new labor chapter obligations such as those in the USMCA, we need to consider their potential purposes.

IV. Towards a Clearer Articulation of Purposes and Extent of Obligations

The extent of labor chapter obligations both reflects and constructs their purposes. One can only understand choices to apply labor obligations to some economic relationships but not to others, or to hold states to account for certain failures to regulate but not others, by asking why those obligations exist. Conversely, where a clear statement of purpose is lacking, one's interpretation of the extent of obligations

obtain information at the production facility in question, and may take into account any interference with its verification in making its determination.

77. Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes art. 13(1), April 15, 1994, 1869 U.N.T.S. 401, 33 I.L.M. 1226 [hereinafter DSU]; USMCA Amendment Protocol, *supra* note 4, ¶ 7(E)(ii) (adding Article 31.11.2 (c)). Similarly, under that Agreement where a Party refuses to allow a Rapid Response Labor Mechanism Panel to conduct a verification of a claim of denial of rights, the Panel may take that refusal into account in making its determinations. *See* USCA Amendment Protocol, *supra* note 4, ¶ 7(F), Annex 31-A, art. 31-A.8.3, Annex 31-B, art. 31-B.8.3.

supports inferences about why those obligations exist. In this sense, the extent and purposes of obligations are mutually constitutive. It follows that a convincing account of extent of obligations will often rest on a convincing account of purposes, that changes to or clarifications of extent of obligations imply changes to or clarifications of purposes, and that a construction of extent of obligations that does not correspond to stated purposes, or vice versa, should be resisted unless agreement text makes it clear that none other is possible.

Some responses to the panel report maintain that its focus on discerning effects on conditions of competition in interpreting the phrase "in a manner affecting trade" reflects a misapprehension, or at least an unduly limited view, of the purposes of labor chapters in trade agreements. The International Labor Rights Forum, for example, contends that it reflects an "economistic approach that ignores labor laws' higher importance in protecting workers' exercise of fundamental rights."[78] June Namgoong, Associate Research Fellow at the Korea Labor Institute, argues similarly that the primary wrong in a failure to abide by labor chapter obligations is a breach of human rights because the purpose of such provisions is to implant a social pillar firmly in the soil of international trade on par with other economic pillars in the foundations of trade agreements.[79] Under such an approach, the fact that a course of failure to enforce labor rights took place in relation to an employer or employers engaged in international trade should be sufficient to establish a violation of labor obligations, independently of any effects on competitive advantages.

These arguments suggest that a well thought out interpretive or policy response to the Panel's Final Report demands reflection on and further definition of the purposes of labor chapters in free trade agreements. But any understanding of the purpose of labor chapters in trade agreements has to account for restrictions on the content and extent of their obligations. Trade agreements incorporate a limited set of human rights (labor rights), and they generally only apply them within traded sectors, often subject to further restrictions on their application. An account of the purposes of labor chapters thus requires an account of the particular policy significance of failures to respect labor rights occurring within trade. It is not enough to simply assert that labor rights are fundamental or human rights and therefore deserve a place within the foundations of trade agreements.

78. VOGT, COMPA & GOTTWALD, *supra* note 8 at 12.

79. Namgoong, *supra* note 8 at 497–98, 506.

This Part will first outline what the panel in *Guatemala – Labor Obligations* decided (and did not decide) with respect to the purposes of the Labor Chapter of the CAFTA-DR. It then considers alternative ideas about the purposes and functions of labor chapters, their implications for the extent of labor chapter obligations, and how they might be reflected in trade agreement language.

A. *What the* Guatemala – Labor Obligations *Report Said (and Did Not Say) About the Purposes of the CAFTA-DR Labor Chapter*

In *Guatemala – Labor Obligations*, the parties called upon the panel to decide whether the phrase "in a manner affecting trade" could refer to action or inaction affecting conditions of competition, or only to action or inaction affecting trade flows. Neither party made submissions about the relationship between Agreement or labor chapter purposes and the extent or construction of obligations. The panel took what was a correspondingly restrained approach to articulating what purposes the labor obligations of the CAFTA-DR may serve.[80]

In deciding the question before it, the panel said that the phrase "in a manner affecting trade" must be understood in light of the context and purposes of the Article 16.2.1(a) obligation within the CAFTA-DR, and the purposes of the Agreement itself.[81] It noted that Article 16.2.1 (a) gives effect to a shared commitment in Article 16.1 to strive to ensure that the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by law.[82] It observed that the objectives of the Agreement include, in Article 1.2.1(c), promoting "conditions of fair competition in the free trade area," and that this objective was consistent with the limitation of Article 16.2.1(a)'s obligations to matters that are "in a manner affecting trade."[83] It found that, without limiting the meaning of the term "fair," in light of Article 16.1 and the resolution recorded in the Preamble to the Agreement to "protect, enhance and enforce basic worker rights," it understood "fair"

80. The mandate of Panels is closely regulated by the terms of the CAFTA-DR and the Rules of Procedure. Article 20.13 of the Agreement requires Panels to base their report on the submissions and arguments of the disputing parties. Dominican Republic-Central America Free Trade Agreement, *supra* note 3 art. 20.13. Rule 35 reinforces this requirement, and Article 20.10.2 requires the Panel to follow the Rules. Rules 54(b), 59 and 62 limit the extent to which the Panel can consider issues raised by Non-Governmental Entities to legal and factual issues raised in the submissions and arguments of the disputing parties. *Id.* art. 20.10.2; CAFTA-DR RULES OF PROCEDURE, *supra* note 57, ¶¶ 35, 54(b), 58, 62.

81. *Final Report*, *supra* note 3, ¶ 169.

82. *Id.* ¶ 170.

83. *Id.* ¶ 171.

conditions of competition as being affected when international competition operated to transmit incentives that tend to undermine efforts to recognize and protect labor rights through domestic law.[84] It observed that treating a failure to enforce labor laws that conferred some competitive advantage in trade as "affecting trade" was consistent with a coherent account of how Article 16.2.1(a) serves the objectives of the agreement, and with the focus of the Agreement's objectives on trade.[85]

But the panel did not exhaustively canvass the purposes of Chapter 16. It made no claims that fair conditions of competition are the sole purpose of Chapter 16 obligations. It simply found that the approach advocated by the United States—that failures to enforce labor laws that influenced or made a material impression upon conditions of competition were "in a manner affecting trade"—was coherent with stated purposes of Chapter 16 and of the Agreement. This finding did not preclude the possibility that other types of effects could be "in a manner affecting trade," in light of other potential Agreement or labor chapter purposes.

B. *Relating Purpose and Extent of Obligations: Accounting for the Moral and Policy Significance of Labor Rights in Trade Relationships and Agreements*

In principle, there are two possible ways to account for the presence and purposes of labor obligations in trade agreements. In the first account, labor obligations in trade agreements could serve primarily to advance goals external to or larger than the relationship between labor rights and economic activity. In particular, they might advance human rights, sustainable development, or a generalized approach to an international economic level playing field. Some have argued that they might simply be a vehicle for disguised protectionism.[86] In the second account, labor obligations would serve, first and foremost, purposes internal to the relationship between labor laws and international trade as a form of economic activity, though they might incidentally serve external purposes as well. This Article takes the position that the internal perspective is the only one that coherently accounts for both the foundational purposes of labor obligations and their form and place within trade agreements negotiated by the United States.

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84. *Id.* ¶ 174.

85. *Id.* ¶ 175.

86. *See* Kevin Kolben, *The New Politics of Linkage: India's Opposition to the Workers' Rights Clause*, 13 IND. J. GLOB. LEGAL STUD. 225, 244–49 (2004).

First, the notion of a generalized international level playing field is incoherent without an account of the specific moral and policy significance of each of its constituent pieces. Arguments for a generalized level playing field appeal to the idea of a normal or undistorted market free of unfair competitive advantages.[87] Within such a market, exported products that owe their competitiveness to low labor standards might be considered as a form of "social dumping," in that their price is below what would normally prevail within a fair market system.[88] The problem with such arguments is not so much with the idea that low labor standards may produce an unfair competitive advantage as with the appeal to the normative baseline of a normal or undistorted market. This baseline cannot be coherently specified, because it starts from a set of assumptions that import but fail to justify a raft of value judgments about the distribution of entitlements and the normative worth of laws and state programs that influence market competitiveness.[89] In addition, such a baseline is not workable. It cannot be rendered concretely given the international diversity of economic and legal systems, and the complexity of interactions between markets, legal rules, the operation of systems for their enforcement, and other government measures.[90] Adopting trade rules broad enough to address all potential economic advantages resulting from international regulatory differences would sweep much of the universe of government activity into the category of unfair trade practices. Anti-dumping laws, while tolerated within the international trade law system, remain the subject of debate as to their very intellectual foundations, and are themselves governed by international norms for the purpose of reducing their potential to disguise protectionism.[91] The notion of social dumping therefore has no firm

87. *See* Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546 (1987).

88. *See, e.g.*, JIM STANFORD, CHRISTINE ELWELL & SCOTT SINCLAIR, SOCIAL DUMPING UNDER NORTH AMERICAN FREE TRADE (1993). For a discussion of such arguments, see Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459 (1994).

89. *See* Tarullo, *supra* note 87.

90. Kenneth W. Abbott, *Defensive Unfairness: The Normative Structure of Section 301*, *in* FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FAIR TRADE? LEGAL ANALYSIS 415 (Jagdish Bhagwati & Robert Hudec eds., vol. 2, 1996); Robert Howse & Michael Trebilcock, *The Free Trade and Fair Trade Debate: Trade, Labor and the Environment*, *in* ECONOMIC DIMENSIONS IN INTERNATIONAL LAW (J. Bhandari & Alan Sykes eds., 1996); John H. Jackson, The World Trading System: Law and Policy of International Economic Relations 293 (2d ed. 1997).

91. *See* Ronald A. Cass & Richard D. Boltuck, *Antidumping and Countervailing-Duty Law: The Mirage of Equitable International Competition*, *in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FAIR TRADE? LEGAL ANALYSIS 351 (Jagdish Bhagwati & Robert Hudec eds., vol. 2, 1996); Tarullo, *supra* note 87, at 554-555 and sources cited therein.

foundations in the notion of dumping itself, or anywhere else in trade law or economic theory. It cannot ground an account of labor obligations without an independent account of why they receive priority among the myriad of possible competitive advantages that could be harmonized in the interests of creating a level international playing field.

Second, the structure of current U.S. trade agreement labor chapters is not consistent with the idea that their sole or primary purpose is to advance human rights or development goals.[92] They do seek to advance some human rights, because so many labor rights are human rights. They do seek to advance development goals that can be advanced by fostering respect for labor rights. But the primary goal is to foster labor rights themselves. The structure and wording of recent labor chapters, explained further below, support these conclusions.

Labor chapters in trade agreements to which the United States is party begin with a statement of shared commitment. While the wording of those statements has evolved over time, its focus is invariably on matters such as ensuring that labor principles and labor rights are recognized and protected by law,[93] and/or on the obligations of parties as members of the International Labour Organization.[94] There is no direct mention of human rights or development goals. The substantive obligations of labor chapters are organized under and correspond closely to headings such as "Fundamental Labor Rights," "Enforcement of Labor Laws," and "Procedural Guarantees and Public Awareness," the latter being with respect to the administration and enforcement of labor laws.[95] In the more recent USMCA, the set of headings and obligations has expanded to include specific labor rights issues such as forced or compulsory labor, violence against workers, migrant worker rights, and discrimination in the workplace.[96] In each agreement, the language of obligations is straightforwardly about the protection of worker rights and makes no direct reference to human rights more generally or to development. While some agreements make reference to advancing

92. While my focus here is on US trade agreements, I note that labor chapters in Canada's international trade agreements and Labour Cooperation Agreements that Canada has negotiated in tandem with its free trade agreements have similar structures and wording.

93. *See, e.g.*, Dominican Republic-Central America Free Trade Agreement, *supra* note 3, art. 16.1; U.S.-Chile Free Trade Agreement, *supra* note 2, art. 17.1.

94. *See, e.g.*, U.S.-Colombia Free Trade Agreement, *supra* note 2, art. 17.1; U.S.-Korea Free Trade Agreement, *supra* note 2, art. 19.1. See more generally the statements of shared principles found at the beginning of each of the labor chapters, *supra* note 2.

95. *See* sources cited in *supra* note 2.

96. USMCA, *supra* note 4, art. 23.

development under headings such as "Labor Cooperation and Capacity Building Mechanism," the provisions in question focus on capacity building to meet labor chapter obligations.[97]

Many labor rights are human rights.[98] But if labor chapters were included in trade agreements primarily to advance a human rights agenda, one might expect other human rights also to be protected in those agreements, and one would expect labor obligations to extend beyond state action or inaction that is "in a manner affecting trade." The focus of trade agreements on labor rights in traded sectors is inconsistent both with the indivisibility of human rights and with the extant theories of priorities among rights—the at times competing organizing principles of the human rights field.[99] Many labor rights also stand to advance economic and social development. There are good arguments that protecting labor rights can advance human development, which in turn advances economic and social development, and that this, in turn, fosters better respect to labor standards, in a virtuous circle. For example, many have argued that the labor rights often included in labor chapters stand to advance human development, by enhancing the capabilities workers to resist coercion, exert voice, and separate their private lives from their work lives, among other things.[100] But if labor chapters were included in trade agreements primarily to

97. *See, e.g.*, US - Colombia Free Trade Agreement, *supra* note 2, article 17.6, Annex 17.6.

98. On the relationship between human rights and labor rights, see Virginia Mantouvalou, *Are Labour Rights Human Rights?*, 3 EUR. LAB. L.J. 151 (2012); Human Rights at Work: Perspectives on Law and Regulation (Colin Fenwick & Tonia Novitz eds., 2010); Kevin Kolben, *Labor Rights as Human Rights?*, 50 VA. J. INT'L L. 449, 450, 461 (2010); Labour Rights as Human Rights (Philip Alston ed., 2005); HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance Compa & Stephen Diamond eds., 1996).

99. Within the realm of human rights, there are clearly rights at least of equal moral weight to labor rights - such as rights to life, liberty or security of the person - that fall outside of the ambit of any trade agreement. Further, even under their broadest application, labor chapters generally cover only the application of labor rights to employers or industries engaged in international trade. If labor chapters served simply to enlist trade agreements in the service of labor rights, this restriction would make no sense. The human rights of workers outside of trade are surely of equal moral weight to those of workers engaged in trade. On the indivisibility of human rights and its arguable implications for international labor law, see Philip Alston & James Heenan, *Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?*, 36 N.Y.U. J. INT'L L. & POL. 221 (2004). On the longstanding debate over priorities within human rights and its implications for international labor law, see Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?,* 29 COMP. LAB. L. & POL'Y J. 29 (2007).

100. *See generally* Brian A. Langille, *What Is International Labour Law For?*, 3 L. & ETHICS HUM. RTS. 48 (2009); Kevin Kolben, *A Development Approach to Trade and Labor Regimes*, 45 WAKE FOREST L. REV. 355 (2010); Virginia Mantouvalou, *Labour Rights in the European Convention on Human*

advance an economic development agenda, one might expect to see obligations with respect to other fields that feature more prominently in development policy agendas.[101] Similarly, if labor rights aimed primarily to advance a social development agenda, one might expect to see obligations related to such matters as democratization, or a broader set of equality rights.

Of course, this last argument meets an easy rejoinder. It has never been the role of trade agreements to serve as an omnibus vehicle for advancing economic and social policies, however desirable. The linkage between policies and trade law must be more than opportunistic. With this in mind, it might be argued that the focus of trade agreements to which the United States and Canada are party on labor rights (and environmental) protection is based on their particular vulnerability among human rights and development goals to competitive pressures created by international economic integration. Arguments for this concern have a long history. The founders of the International Labour Organization saw their task largely as that of preventing destructive forms of international competition between nations. They were convinced that international competitive pressures held states back from developing national laws and programs for the benefit of workers and would continue to do so due to fear that such measures would undermine the international competitiveness of their producers and drive investment abroad.[102] The theory behind this concern is that high labor standards can raise unit labor costs, and capital owners will therefore seek to avoid such standards by relocating to avoid them or seeking to ensure that governments do not raise standards by threatening to leave if they do so.[103] There is good evidence that these dynamics play out in some parts of the international political economy.[104]

There are, however, two important limits on the capacity of this argument to account for labor chapters found in U.S. and Canadian trade agreements. The first, discussed above, is the apparent inattention of the language of labor chapters to human rights and development agendas. If the primary animating concern behind labor chapters were

Rights: An Intellectual Justification for an Integrated Approach to Interpretation, 13 Hum. Rts. L. Rev. 529 (2013).

101. *See, e.g.*, DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH (2007).

102. *See* THE ORIGINS OF THE INTERNATIONAL LABOUR ORGANIZATION (James T. Shotwell ed., 1934).

103. *See* Kevin Banks, *Must Canada Change Its Labour and Employment Laws to Compete with the United States?*, 38 Queen's L.J. 419, 426–46 (2013).

104. *Id.*

those things, one would expect to find direct reference to them, as one finds in, for example, the European Union's free trade agreement with Vietnam, which embeds labor rights provisions in a chapter entitled "Trade and Sustainable Development."[105] The second is that the effects of economic integration on labor standards are much more likely to be felt in developing countries than in advanced industrialized ones.[106] Yet the *demandeurs* of labor chapters, with a few exceptions, have tended to be wealthy industrialized states. While such demands may be made in part out of concern for development and human rights in trading partners, those implementing such chapters on behalf of the United States clearly understand their role as making sure that U.S. trade agreements are "fair for U.S. workers and workers around the world."[107]

Some might argue that if the goal of labor chapters is not to advance broadly shared goals like sustainable development or human rights, then it must fall back into protectionism. But protectionism cannot account well for labor chapters either. Labor standards account for a relatively small fraction of the labor cost advantage of the developing world.[108] Labor chapters are quite precisely focused on labor rights and their enforcement and do not lend themselves well to vaguely defined claims with protectionist aims. Protectionist interests have long recognized this and shown little enthusiasm for labor rights chapters as a response to their concerns.[109]

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105. *See* Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam, EU-Viet., ch. 13, June 30, 2019, 2020 O.J. (L 186) 130.

106. *Id.* Many of the states most successful in international trade and in attracting international investment have implemented high labor standards. Their competitive advantage depends not on low labor costs but on advantages such as good infrastructure, the rule of law, a highly trained workforce, or large domestic markets enabling economies of scale. As a result, the logic of competitive pressures based on labor standards simply does not operate at the level of the national economy of such countries. On the other hand, there is no reason to think that states that do not enjoy such advantages and rely heavily on low labor costs for competitiveness will be immune from competitive pressures on their capacity to set national labor policy.

107. *See* Trade Negotiation & Enforcement, BUREAU OF INT'L LAB. AFFAIRS, https://www.dol.gov/agencies/ilab/our-work/trade (last visited Mar. 7, 2021).

108. *See* CHRISTIAN BARRY & SANJAY REDDY, INTERNATIONAL TRADE AND LABOR STANDARDS: A PROPOSAL FOR LINKAGE 36–40 (2008); RICHARD B. FREEMAN & KIMBERLY ANN ELLIOT, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 14–22 (2003).

109. *See, e.g.*, *Membership and Participation by the United States in the International Trade Organization: Hearings on H.R.J. Res. 236 Before the H. Comm. on Foreign Affairs*, 81st Cong. 269–94 (1950) (statement of Stanley H. Ruttenberg, Director, Department of Education and Research, Congress of Industrial Organizations) (explaining among other things that the prospect of a fair labour standards clause in the draft International Trade Organization Charter was of no comfort or value to protectionist members within his organization, and that the task of justifying his organization's support for the Charter to some of its members was therefore very difficult).

The purposes of labor chapters therefore cannot originate in policy concerns external to the relationship of labor standards to trade itself. To account for labor chapters in U.S. trade agreements, one must turn to the role of labor norms themselves within international trade. As a first step, it is helpful to begin by considering the more general role that socially constructed normative ground rules play in defining the political legitimacy of economic activity. Societies tend to set ground rules for economic competition to ensure that such competition does not undermine their values and institutions.[110] At the most basic level, prohibitions on theft, assault, murder, and extortion protect human life, security, and property, and separate legitimate business from organized crime. There are of course more nuanced elements to the definition of socially legitimate forms of economic competition, expressed most notably in competition law, environmental law, consumer protection laws, and labor laws. Labor and employment laws embody, and when effective, enact social norms of decency, respect for freedom and dignity, and distributive justice at work.[111] They may do so in imperfect, compromised, and at times internally inconsistent ways. But they are nonetheless understood within many polities to embody strongly held social norms. Regulating economic competition through such laws thus serves at least three notions of justice. First, it protects socially valued interests that might otherwise be harmed. Second, it protects norm-abiding businesses from losing out for being norm-abiding. Third, it prevents norm-breaking businesses from unjustly benefitting from the harms that they inflict. If done effectively, such regulation ensures that economic competition does not serve to propagate wrongfully harmful behaviours by incentivizing them. Such rules of economic competition may be essential to the political and social legitimacy of the economic system itself, since the harms that it causes in terms of job and investment loss and community dislocation may prove politically and socially unacceptable without political and social acceptance that the system that generated them is fair.[112]

But rule systems set at the national or subnational level can be disrupted by international trade agreements that require non-

110. *See, e.g.*, KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (2d. ed. 2001); DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 29–48 (1997).

111. *See, e.g.*, HARRY W. ARTHURS, FAIRNESS AT WORK: FEDERAL LABOUR STANDARDS FOR THE 21ST CENTURY (2006); Brian Langille, *Labour Law's Back Pages*, *in* THE BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 13 (Guy Davidov & Brian Langille eds., 2006).

112. *See* BARRY & REDDY, *supra* note 108, at 3–5.

discriminatory market access for goods and services that may be produced under very different legal and moral regimes. When goods and services supplied from foreign states circulate within a national economy, they bring market pressures and create winners and losers, competing under a multiplicity of different labor standards regimes.[113] There is also ample evidence that under certain conditions international competition can negatively impact worker rights and interests that national labor laws seek to protect, such as access to effective collective bargaining, or decent wages and safe working conditions.[114] Trade agreements can thus propagate economic benefits, harms, and incentives in ways that run contrary to the moral order of national and sub-national economies. This, in turn, leads to the potential for conflict between the values underlying rule systems of the domestic economy on the one hand and the apparent moral exemption granted to foreign competitors on the other. Concern about the impacts of trade on the moral order of an economy was perhaps most pithily expressed by President Franklin Delano Roosevelt in arguing for a new Fair Labor Standards Act in 1937 to govern interstate commerce in the United States when he stated that "[g]oods produced under conditions which do not meet a rudimentary standard of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate commerce."[115] In this sense, failures to provide for and effectively enforce internationally recognized labor rights can constitute breaches of fairness ground rules for economic competition. The social salience of these concerns increases with the extent of economic disruption connected to trade.[116]

An international agreement on labor standards in a trade agreement labor chapter can be understood as a response to this problem. While national norms about decency, dignity, freedom, and distributive justice in the workplace may be imperfectly reflected in international standards, a state may nevertheless seek an international agreement to implement such standards in a trading relationship as a compromise,

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113. 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, 64 (2011).

114. Kevin Banks, *Workplace Law Without the State?*, *in* THE DAUNTING ENTERPRISE OF THE LAW: ESSAYS IN HONOUR OF HARRY W. ARTHURS (S. Archer, D. Drache & P. Zumbansen eds., 2017).

115. Terry Collingsworth, J. William Goold & Pharis J. Harvey, *Time for a Global New Deal*, 73 FOREIGN AFF. 8, 10 (1994). Roosevelt was of course referring to clashes between the labor standards of sub-national states with national norms, but the logic of his argument applies to international trade as well.

116. *See, e.g.*, Ethan B. Kapstein, *Workers and the World Economy*, 75 FOREIGN AFF. 16, 16–18 (1996); RODRIK, *supra* note 109.

avoiding potential conflicts between differing national conceptions of moral legitimacy. The fact that many labor rights are also internationally recognized human rights can serve to bridge international differences and help establish a common moral framework for international competition.[117] Internationally agreed upon norms could also include sustainable social and economic development values. In this view, the human capabilities fostered by labor rights could serve to ensure that economic opportunities and benefits created by trade agreements, particularly but not only in the developing world, are fairly distributed and operate to lift people out of poverty. These normative aims would constitute part of the ground rules for enhanced economic integration.

Such an international agreement may serve not only to close gaps in the fabric of social ground rules, but it might also preserve the capacity of states to establish and maintain that fabric. If international trade liberalization creates competitive pressures that chill the development and enforcement of labor standards, the issue is not simply one of fairness in competition but also of national policy autonomy.[118]

There are at least three specific ways or approaches in or through which labor chapters can enact social ground rules in trade.[119] First,

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117. The eight core Conventions of the International Labour Organization have been ratified by between 155 and 187 of 187 member states, with an average of 173 ratifications. *See Ratifications of Fundamental Conventions by Country*, INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F (last visited Mar. 10, 2021). The International Labour Organization's Declaration on Fundamental Principles and Rights at Work declares constitutional obligations of all member states to respect promote and realize principles and rights related to freedom of association and the right to bargain collectively, freedom from discrimination at work, the elimination of forced labor, and the elimination of child labor. *See* Kevin Banks, *The Role and Promise of International Law in Canada's New Labour Law Constitutionalism*, 16 CAN. LAB. & EMP. L.J. 233, 270–71 (2011).

118. *See, e.g.*, DANI RODRIK, STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY 63 (2017); Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 1 UNIV. ILL. L. REV. 1, 3 (2019).

119. A fourth potential approach of a labor chapter might be to constitute a transnational political community. The justification for such an approach would lie in the idea that workers and consumers become, in effect, citizens of such a space once international trade agreements and private sector supply chains constitute it as such. Theorists have argued that consumers, as participants in a transnational economic system that can incentivize and produce injustices, should have obligations and rights to use markets as an arena within which to change labor practices. Kevin Kolben, *A New Model for Trade and Labor? The Trans-Pacific Partnership's Labor Chapter and Beyond*, 49 N.Y.U. J. INT'L L. & POL. 1063, 1071–74 (2017). Workers and consumers may also need to call upon actors other than states to ensure respect for labor standards. Developing countries may lack enforcement capacity, and the root causes of labor standards violations may lie in the sourcing practices of powerful multinational lead firms in supply chains. *Id.*; *see generally* RICHARD M. LOCKE, THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING

trade agreement labor chapters can prohibit and seek to remedy particular breaches of fairness in international conditions of competition. Second, they can seek to establish systemic conditions needed for fair conditions of competition. Third, they can establish fairness frameworks as preconditions for close economic ties. Each approach directly implies certain things about the extent of labor standards obligations.

1. Prohibiting and Remedying Particular Breaches of Fair Conditions of Competition

If labor chapters seek to establish fair conditions of competition through labor obligations, prohibiting and remedying conduct that breaches those obligations will be the minimum steps required to advance that aim. Under this approach, enforcement responds to instances of misconduct. Labor obligations tailored to this approach would cover conduct affecting such conditions of competition. Conduct occurring within traded industries but not affecting conditions of competition could justifiably be excluded from the ambit of obligations. Action or inaction with respect to labor standards would fall within the extent of obligations when it had some effect on conditions of competition, that is, when it conferred some economic advantage on an employer or employers engaged in trade that is not too small or brief to be a competitive advantage.

2. Establishing or Maintaining Systemic Conditions of Fair Competition

Many have argued that international trade liberalization does not just create the potential for particular breaches of fair conditions of competition, but can also create competitive pressures that chill the development and enforcement of labor standards, especially in the developing world.[120] Labor chapters in trade agreements might be seen as responses to those systemic pressures. As Namgoong points out, a labor

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LABOR STANDARDS IN A GLOBAL ECONOMY (2013). The impact of these economic conditions on the rights and responsibilities of consumers and workers may thus justify the creation of a transnational, cosmopolitan political community in which consumers, workers or their representatives have rights to bring claims against foreign states or businesses directly. Under this view of labor chapters, the application of obligations would be governed by considerations similar to those outlined above with respect to the international political settlement model. But the chapter would attach obligations to and vest rights directly in private parties. However, this set of purposes is not reflected in any labor chapter currently in effect. While there are elements of procedures under current labor chapters that enable the participation of non-governmental entities, none at this time vests transnational rights of action in non-state parties.

120. For a discussion of such arguments, see Banks, *supra* note 112, at 60–75.

chapter could represent a recognition that the trade agreement itself affects conditions of competition, by heightening competitive pressures on labor standards and remuneration.[121] Moreover, experience in many countries, including decades of experience with trade-related labor obligations, demonstrates that improvement in labor rights compliance and enforcement often requires complex systemic change in the face of such pressures.[122] Extending a labor chapter to all economic activity involved in trade could be seen as a proactive response to such competitive pressures on the development path of labor rights compliance and enforcement systems. Requiring effective enforcement of labor laws with respect to all employers engaged in trade would help to offset them.

Similarly, where one or more state parties to a trade agreement has major systemic weaknesses in its labor law enforcement capacity, other parties might seek an agreement applying to trade without regard to proof of effect on conditions of competition. By creating a risk that any sustained or recurring course of action or inaction that fails to effectively enforce labor laws at an employer or employers engaged in trade could result in withdrawal of trade benefits, a labor chapter might induce authorities to avoid the risk of trade consequences and might align employers concerned about market access with this objective.

These systemic approaches shift the focus of obligations away from the effects of particular failures to enforce labor standards and onto the effects of the trade agreement as a whole on legal systems underpinning the ground rules for traded production. From this approach to the purposes of labor chapters, the effect on conditions of competition exists prior to and independently of any particular failure to effectively enforce labor laws. Labor chapter obligations could therefore apply to all employment or work relations related to international trade between the parties, regardless of the particular effects of any given failure to enforce labor standards.

3. Establishing a Fairness Framework as a Precondition for Closer Economic Ties

A third way that labor chapters can advance fair conditions of competition is to set a fairness framework that would be understood by the parties to constitute preconditions to closer economic ties. The aim of

121. Namgoong, *supra* note 8 at 502 (arguing that mere participation in trade or investment is enough to affect trade for this purpose, because it may be sufficient to constitute downward pressure on the labor standards of their workers).

122. Banks, *supra* note 113, at 84–106.

this framework is to assure social stakeholders in advance that new or deeper trade ties will respect basic social norms, and that the actions of employers and consumer will not serve to undermine respect for labor rights. This approach treats labor chapters as going beyond remedying particular breaches of or systemic effects on fair conditions of competition. As Professor Kevin Kolben argues, an agreement to respect labor rights (whether restricted to universally accepted human rights or reaching more broadly into norms like minimum wages) may provide a fairness framework within which the members of a polity tolerate the concentrated costs imposed by the disruptive forces of international competition.[123] It can also provide a normative framework addressing the concerns of citizens as consumers that their consumption of goods and services meet ethical standards.[124] Because the purpose of the labor chapter is to assure parties and stakeholders within their citizenry that the agreement will respect ground rules, the extent of obligations could reach all traded activity, and not simply respond to breaches of fair conditions of competition after they occur. The fact that labor rights compliance may face systemic challenges would reinforce the need for such an approach. The purpose of labor obligations would be to establish proactive and foundational assurances upon which the trade agreement is based. Labor chapter obligations might even extend more widely than traded sectors if the normative foundations for trade include developmental goals, such as ensuring that economic opportunities and benefits created by trade agreements are fairly distributed and operate to lift people out of poverty, which could be advanced by applying labor chapter obligations to a broader segment of the workforce.

In summary, the extent of labor chapter obligations should, in principle, correspond to and vary with their purposes and the approach chosen by the parties to realize those purposes. Limiting the extent of labor chapter obligations to matters affecting conditions of competition is consistent with remedying particular breaches of fair conditions of competition. On the other hand, the reach of obligations could be extended in a principled way to cover labor rights issues arising at all employers engaged in trade if the purpose and approach of a labor chapter is to offset systemic effects of trade or lack of labor law enforcement capacity on conditions of competition, or to implement a fairness framework as a precondition to economic integration to make its disruptive effects normatively acceptable within the polity of one or more

123. Kolben, *supra* note 119, at 1069–71.

124. *Id.* at 1071.

trading partners. Pursuing development goals might justify extending the reach of labor standards obligations further still. Under the latter approaches, there is no need for proof of effects on any aspect of trade. If parties are concerned with screening out de minimis violations, this could be done simply by limiting actionable violations according to their extent, for example, by requiring that they be sustained or recurring.

C. *Reflections on the Language of Current and Future Agreements*

Which of these approaches is appropriate for understanding and interpreting any given trade agreement will of course depend upon its wording and construction. In CAFTA-DR Article 16.2.1(a) and other identically worded provisions, the term "affecting trade" specifies the "manner" in which a party "shall not fail."[125] It thus identifies a way of failing to effectively enforce what is prohibited, making this way of failing constitutive of the prohibited behavior. As the parties argued and the panel accepted in *Guatemala – Labor Obligations*, the ordinary use and plain meaning of the term "affecting" indicates that a party must not fail in a way that influences or makes a material impression upon "trade."[126] If "trade" is understood as a form of international economic exchange, then a failure "affecting" trade must, in the plain meaning of the term, have influenced or made a material impression upon some aspect of that exchange. The influence or impression might be indirect. A failure might, for example, affect trade by affecting conditions of competition. But it must produce an influence or material impression upon something that either is trade or by definition affects trade, whether it be conditions of competition or something else. On this understanding of the word "affecting," not every course of failure to enforce labor laws in a traded industry or employer engaged in trade would necessarily do so.[127] Indeed, the only way that every such course could be "in a manner affecting trade" is if the term "affecting" does necessarily refer to producing an influence, a material impression, or indeed any material effect at all on behavior or incentives for behavior

125. *See* Final Report, *supra* note 3.

126. *See Final Report, supra* note 3 ¶ 167.

127. On this understanding, a party seeking to prove, for example, that a course of action or inaction is affecting conditions of competition must demonstrate, either directly or by inference, its effects on such conditions. It then becomes difficult to avoid the propositions that to have effects on conditions of competition a course of action or inaction must create some competitive advantage, and that not every course of failure to enforce labor laws in relation to a workplace or workplaces producing internationally traded goods or services necessarily does so.

connected to trade. If the purposes of parties to trade agreements using language such as that found in Article 16.2.1(a) of the CAFTA-DR require that its obligations reach beyond particular courses of state conduct with such material effects, that language invites some further clarification or new arguments by the parties to the agreement with respect to its meaning or purposes.

Of course, the plain or usual meaning of a term is not always the correct meaning. A special meaning must be given to a term if it is established that the parties so intended.[128] Where the parties stipulate another, as they have done in the recent USMCA,[129] that meaning must prevail, and labor chapter purposes must be understood consistently with that meaning. The footnote stipulating the meaning of the phrase "in a manner affecting trade" in the USMCA labor chapter is not consistent with the view that USMCA labor obligations serve only to provide a remedy for particular breaches of fair conditions of competition. It most likely indicates that USMCA labor obligations serve to establish systemic conditions of fair competition, or a fairness framework that is a precondition to the Agreement as a whole, or both. While it is beyond the scope of this Article to develop a complete textually-based analysis of this proposition, note that the Preamble to the USMCA states that the parties enter into the Agreement resolving to "replace the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets . . .;" and that in Article 23.13 the parties state that they "recognize the goal of trading only in goods produced in compliance with this Chapter."[130] Taken together with stipulations that obligations effectively apply without regard to influence or effects on trade, these statements suggest that the Agreement aims to establish a fairness framework governing all production for trade. In this context, "affecting trade" might refer to simply being contrary to standards that the Agreement seeks to implement within trade, and thus attainting trade with a contravention of norms.[131]

Even where parties do not make such clear stipulations, convincing arguments about the purposes of agreement terms may shift their interpretation away from plain or usual meanings and towards another

128. Vienna Convention on the Law of Treaties, art. 31.4, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

129. *Id.*

130. USMCA, *supra* note 4, art. 23.2.

131. *See, e.g.*, Affect, The Compact Edition of the Oxford English Dictionary (1971) (including among the meanings of "affect" the phrase "to attaint with a crime or offense").

required by purpose and context.[132] There is nothing in the *Guatemala – Labor Obligations* decision that rules out the possibility of such a meaning. The panel's decision in that case dealt only with the argument presented to it that the proven course of failure to enforce labor rights affected conditions of competition by influencing or making a material impression upon them.

That said, making such arguments may raise new questions about how to construe the purposes of earlier agreements and their labor chapters. Legislative and policy debates within the United States, the main *demandeur* of such language, leave their purposes unclear.[133] There may therefore be little in the negotiating history of trade agreements that sheds light on specific labor chapter purposes and intended approaches to realizing them. Further, the language in Article 16.2.1 (a) of the CAFTA-DR originates in mandates set in the Bipartisan Trade Promotion Authority Act of 2002.[134] That statute enacted a hard-fought comprise between Republican and Democratic legislators upon the negotiating mandate with respect to labor chapters in future trade agreements to which the United States would be a party. Republican legislators had initially resisted including labor chapters at all within the Trade Promotion Authority mandate of the U.S. executive.[135] It was something that had never been done before. It would not be surprising, given the narrowness of the majority supporting the mandate and the polarization at the time of legislators on the issue, if the original purposes reflected in the wording of the Act's labor chapter mandate, which is closely reflected in the trade agreements themselves, were themselves relatively narrow. On the other hand, the wording found in Article 16.2.1(a) of the CAFTA-DR is now almost twenty years old. The position of both U.S. political parties on labor chapters appears to have shifted considerably.[136] Any originally intended meaning of the phrase "in a manner affecting trade" in CAFTA-DR Article 16.2.1(a) may well

132. Vienna Convention, *supra* note 128, 1155 U.N.T.S. art. 31.

133. *See* Claussen, *supra* note 8 at 37.

134. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3803–05 (2002).

135. *See* Marley S. Weiss, *Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 UNIV. S.F. L. REV. 689 (2003); *Rep. Levin Blasts Bush Trade Policy As Incoherent*, INSIDE U.S. TRADE (May 7, 2002), https://insidetrade.com/content/rep-levin-blasts-bush-trade-policy-incoherent.

136. *Texas Lawmaker: Labor, Environment Updates Would Garner Democratic NAFTA Votes,* INSIDE U.S. TRADE (July 13, 2017, 5:26 PM), https://insidetrade.com/inside-us-trade/texas-lawmaker-labor-environment-updates-would-garner-democratic-nafta-votes; Emily Cochrane & Ana Swanson, *Revised North American Trade Pact Passes House*, N.Y. Times, Dec. 19, 2019, https://www.nytimes.com/2019/12/19/us/politics/usmca-deal.html (Jan. 29, 2020).

reflect an approach to fairness purposes that is now out of date, having been overtaken by ones that go deeper and require a broader extent of obligations. If so, it may be necessary to consider to what extent the meaning of a phrase like "in a manner affecting trade" might evolve in light of contemporary purposes.[137]

V. Conclusion

The wording of Article 16.2.1(a) of the CAFTA-DR, as interpreted by the panel in the *Guatemala – Labor Obligations* decision, workably implements the purpose of remedying unfair conditions of competition created by particular failures to effectively enforce labor laws. Enforcement of such obligations could be improved by procedural reforms, such as those adopted under the recent USMCA. But remedying unfair conditions of competition caused by particular failures to effectively enforce labor rights is a relatively narrow approach for a labor chapter, and it corresponds to a relatively narrow extent of obligations. The time may have come for labor chapters to serve broader purposes addressing systemic challenges to labor rights compliance and setting ground rules for deepening economic integration. While the *Guatemala – Labor Obligations* decision does not rule out the possibility that the CAFTA-DR Labor Chapter could serve other purposes calling for a wider extent of obligations, the ordinary meaning and structure of Article 16.2.1(a) pose challenges to arguments that it does. If contemporary purposes of labor chapters require that they apply to all failures to enforce labor laws regardless of effects by particular failures on conditions of competition, achieving such purposes may require novel arguments based on them, or clarifications of the phrase "in a manner affecting trade" such as those recently included in the USMCA. Negotiators of future agreements might also ask themselves whether the phrase "in a manner affecting trade" would better be replaced by other language that more directly relates the extent of obligations to their contemporary purposes.

137. *See generally* Odile Ammann, Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example 199–222 (2020).