Journal of International Economic Law, 2020, 23, 25–43
doi: 10.1093/jiel/jgz033
Advance Access Publication Date: 14 January 2020
Article

OXFORD

Reimagining Trade-Plus Compliance: The Labor Story

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ABSTRACT

Trade agreements today are omnibus instruments characterized by extensive commitments in areas referred to as 'trade-plus' because they expand the traditional notion of trade. This Article offers an original challenge to the jumbled consensus that including trade-plus provisions in trade agreements and treating them like 'ordinary' trade issues subject to dispute settlement is all positive. Nowhere was this more obvious than in the outcome of the USA–Guatemala labor case under the US trade agreement with the Central American states. The Article critically considers for the first time the broader implications of the USA–Guatemala case for the framing of the system and concludes that the trade dispute settlement system is not well suited for these types of questions in its present iteration. In so doing, the Article seeks to draw attention to the disparity in theory and design in free trade agreements and to make some critical policy recommendations for the ongoing debate about the content and structure of trade agreements in the USA and beyond.

INTRODUCTION

In November 2018, the USA, Mexico, and Canada signed a new agreement to replace the twenty-five-year-old North American Free Trade Agreement (NAFTA). In the US Congress, there were two major problems with the new agreement: labor and enforcement.[1] That these two issue areas were inadequately addressed was a view

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1 While criticisms of the USA—Mexico—Canada Agreement (USMCA) take many forms, labor and enforcement have dominated the headlines. See, e.g. Isabelle Hoagland, *Senate Democrats Call on USTR to Modify NAFTA Labor Chapter Language*, Inside U.S. Trade, 17 November 2017; Isabelle Hoagland, *Lawmakers, Labor Advocates Call on Trump to Prioritize Enforcement in New Year*, Inside U.S. Trade, 29 December 2017; *Q&A: Levin on Labor, TPP, NAFTA*, Inside U.S. Trade, 08 March 2018; Alex Lawson, *Dems Want USTR to Press Mexican Labor Reforms in NAFTA*, Law360, 19 April 2018; Allison Martell and Julie Gordon, *Dispute Resolution in Focus as NAFTA Talks Drag*, Reuters, 31 August 2018; Isabelle Hoagland, *AFL-CIO Has 'Serious Doubts' That Labor Rules in USMCA Will Be Effective*, Inside U.S. Trade, 01 November 2018; William Mauldin

shared by lawmakers from both major political parties,[2] but not by the White House, leading to a stalemate on the entry into force of the agreement that has lasted more than nine months at the time of writing.

Why has labor enforcement become the center of the USA–Mexico–Canada Agreement (USMCA) approval debate? In this Article, I posit that the labor enforcement story is part of a bigger problem with trade agreement design. The larger challenge facing lawmakers is how to manage commitments that go beyond the traditional tariff and non-tariff barrier commitments, so-called trade-plus commitments.[3] This problem was highlighted for the first time shortly after the Trump Administration came into office, for reasons unrelated to that Administration, but with important effects on any trade negotiation strategy it would pursue. The focus of that attention was a report issued in June 2017 by a dispute settlement panel constituted under the Dominican Republic—Central America—USA free trade agreement (CAFTA-DR) in a case between USA and Guatemala regarding labor. The report concluded that Guatemala had not breached the provisions of the CAFTA-DR labor chapter as argued by the USA, even though the panel found that Guatemala had failed to effectively enforce its labor laws as the agreement required. The outcome turned on the panel's determination that Guatemala's failure to effectively enforce its labor laws was not shown to be 'in a manner affecting trade,' a condition under the CAFTA-DR. The timing of the decision was significant: just as negotiations began on an updated NAFTA, the USA faced its first loss under a trade agreement labor chapter.

Until that moment, the 'trade-plus' legalization trend in regional and bilateral trade agreements continued with very few tests of the language. Almost no disputes have arisen under free trade agreements (FTAs) at all, let alone concerning the trade-plus subjects,[4] despite a significant growth in the number of agreements concluded with provisions that cover these topics in the last quarter century.[5] Thus, the USA–Guatemala dispute was an important test case. The case underscored discord in two longstanding and ongoing debates in trade law: first, what ought to be the purposes or goals of trade-

and Vivian Salama, *New Nafta Is Threatened by Partisan Split Over Enforcement*, Wall Street Journal, 13 February 2019.

2 See, e.g. Mauldin and Salama, above n 1. See also *Republican Senators Knock USTR's NAFTA Approach as 'Outdated'*, Inside U.S. Trade, 04 April 2018.

3 A number of commentators have used the 'plus' suffix to capture concepts that go beyond an existing trade agreement. Those commentators coin phrases like 'GATT-plus' or 'TRIPS-plus'. I lump those together to use simply 'trade-plus,' though I am not the first to use that expression. See, e.g. Jacques deLisle, 'China's Rise, the U.S., and the WTO: Perspectives from International Relations Theory', 57 University of Illinois Law Review Online (2018); Manjiao Chi, 'Trade-Plus Effects of WTO Dispute Settlement on China: an Ideal or Illusion?', 47 Journal of World Trade 1349 (2013).

4 See Geraldo Vidigal, 'Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement', 20 Journal of International Economic Law 927 (2017).

5 With respect to labor on which this Article focuses, see Ebert, F., Posthuma, A. 2011. Labour Provisions in Trade Arrangements: Current Trends and Perspectives. White Paper. Others have done extensive work following trade-plus provisions over the years; with respect to labor, among USA-based legal academics, those include Steve Charnovitz, David Gantz, and Alvaro Santos, to name just three. Given that space does not permit a thorough appreciation for their many contributions here, particularly their contributions to the narratives that have informed the relationship between trade and labor, I refer the reader only to select works hereafter with recognition of the foundation to the literature they and others have provided.

plus commitments in trade agreements? And, second: what is the best way to achieve such goals? These uncertainties cross political lines and geographic boundaries.

As the USA and other countries move forward with negotiating new trade agreements, the lack of clarity about the goals and means of trade-plus commitments has become particularly salient even if negotiators do not fully appreciate it as such. Across the literature and more importantly across diplomatic channels, trade-plus commitments proliferate, but the policy considerations involved in marrying the substance with appropriate compliance mechanisms merit further attention. For many years, trade-plus advocates have sought to ensure that trade-plus commitments are subject to the same dispute settlement mechanisms as tariff-related commitments to elevate the importance of trade-plus commitments in the trade policymaking system. While they have been largely successful in doing so, this Article takes the view that their position misses certain key elements to subjecting trade-plus commitments to dispute settlement. In the case of labor, the conversation about ensuring that trade-plus commitments are subject to dispute settlement tools has overshadowed the conversation about what compliance frameworks might be most appropriate. The result is that the USA has built a regime of labor enforcement without considerable analysis of what trade dispute settlement requires for labor. As the USA–Guatemala case indicates, the present approach may work more against labor advocates' interests than another compliance model could.

In short, I maintain that the trade-plus obligations as presently framed suffer from a mismatch between the standards that they demand and their compliance mechanisms. To be sure, my approach challenges the common refrain on the place of labor in international economic law. Most advocates continue to push for strengthening the present disciplines rather than reevaluating their foundations. Thus, this Article offers the first sustained challenge to the jumbled consensus that the legalization and judicialization of trade-plus provisions in trade agreements is all positive.

The Article proceeds in three parts. Part I reviews recent trends in the codification of trade-plus norms, particularly labor, in trade agreements. It maps four compliance models that the USA has used to monitor and enforce those norms. Part II summarizes lessons for trade-plus compliance from the USA–Guatemala labor case. Among the primary takeaways is that the road to trade-plus compliance may be more easily traveled through what I call management practices than through litigation. Finally, Part III critically considers for the first time the broader implications of the USA–Guatemala case for the framing of the system and argues that the trade dispute settlement system was not adequately designed for these types of questions.[6] In so doing, it seeks to draw attention to the disparity in theory and design.

6 Certainly, some recent works have referred to the USA–Guatemala case in brief as part of larger arguments about redesigning trade agreements to support labor issues. See, e.g. Gregory Shaffer, *'Retooling Trade Agreements for Social Inclusion'*, University of Illinois Law Review 1 (2019), at fn. 219 and accompanying text.

I. TRADE-PLUS INSTITUTION-BUILDING: THE LABOR STORY

Concerns about labor have long occupied the agendas of policymakers in the context of the global economy.[7] None of these larger concerns precipitated multilateral coordination in codifying a linkage between labor and trade as the trade law regime developed. Rather, policymakers integrated labor into unilateral, bilateral, and regional instruments.

The first Section of this Part outlines in brief the development of substantive labor provisions in international economic arrangements, focusing on recent activities and steps taken by the USA, which has led the world in integrating labor into trade commitments.[8] It describes how throughout the legal universe, labor commitments tend to act as 'standstill' provisions that preserve the status quo on labor in the domestic legal system of the countries involved. The following Section reviews the institutional structures for monitoring and enforcement of these substantive provisions.

A. The evolution of substantive labor commitments

In the USA, the story about the relationship between modern trade and labor regulation dates back to the turn of the twentieth century.[9] Labor was not the driving force of these legislative actions (economic advantage was), but it was a consideration. For several decades, legislation prohibiting imports of goods made contrary to basic labor standards was the primary way in which the USA addressed labor and trade. During that period, US commercial agreements included only vague references to labor issues.[10]

Beginning in the 1980s, the US Congress enacted a number of statutes that promoted labor rights in trade and offered conditional non-reciprocal benefits to selected developing countries under preference programs. Those countries' eligibility for such treatment turned in part on their demonstration that they were effectively adopting and enforcing labor laws. These include, among others, the Caribbean Basin Recovery Act

7 Lance Compa, 'International Labor Standards and Instruments of Recourse for Working Women', 17 Yale Journal of International Law 151 (1992), at fn 61 and accompanying text (discussing French–Italian accords of the early twentieth century; Hispaniola; Social Charter of the European Community; efforts toward a working group on labor standards in various rounds of negotiation toward the General Agreement on Tariffs and Trade).

8 What follows are some highlights and updates in this history of the development of labor standards in US trade agreements. For a comprehensive overview up to the NAFTA, see Steve Charnovitz, 'Fair Labor Standards and International Trade', 20 Journal of World Trade Law 6 (1986). For recent developments, see also Jeffrey Vogt, 'The Evolution of Labor Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership', 18 Journal of International Economic Law 827 (2015); David Gantz, *Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements*, University of Arizona Working Paper 11–13 (March 2011).

9 See, e.g. *Act to reduce the revenue and equalize duties on imports, and for other purposes*, 01 October 1890, ch. 1244, 26 Stat. 567 (the McKinley Tariff Act), Sec. 51 (prohibiting entry of goods manufactured by 'convict labor'); Tariff Act of 1930, 66 Stat. 1, 19 U.S.C. § 1307 (restricting imports of goods made by prisoners).

10 For example, Friendship, Commerce, and Navigation treaties largely only refer to non-discrimination in the workplace and do not address labor standards. See, generally, Gregory S. Lane, 'Friendship, Commerce, and Navigation Treaties: An Analysis of the Foreign Corporation's Exemption from United States Labor Standards', 16 Pepperdine Law Review 383 (1989).

(1983);[11] the US Generalized System of Preferences (GSP) program statute (1984);[12] the Andean Trade Preference Act (1991);[13] and the African Growth and Development Act (2000).[14] US presidents have occasionally suspended or terminated benefits to certain countries benefiting from these programs on the basis of those countries' not upholding labor standards.[15]

The entry into force of two side agreements to the NAFTA—the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environment Cooperation (NAAEC)—represented a turning point in linking labor to trade, although they remained the product of a delicate compromise.[16] That compromise was re-upped in 2007 in what is today known as the 'May 10 agreement.'[17] The May 10 agreement was a bipartisan deal that permitted the inclusion of stronger labor, environment, and intellectual property language, among other topics, in US trade agreements. It also required, among other things, that the labor and environment provisions would be subject to the same enforcement disciplines as the commercial provisions. The language agreed between US Republicans and Democrats on 10 May 2007 set the scene for all the US agreements that entered into force since that time. In other words, the 'May 10 language' has been hardwired—acting as both a ceiling and a floor for the language of those chapters since that time in light of their political sensitivities.[18]

Across the world, the inclusion of labor commitments in trade agreements is on the rise. At the end of 2005, only 21 trade agreements notified to the WTO had labor provisions.[19] As of 2016, 77 out of 267 FTAs included labor provisions.[20]

11 P.L. 98-67, 19 U.S.C. §2701ff. For example, a GSP candidate country 'must have taken or is taking steps to afford internationally recognized worker rights.'

12 Title V of the Trade Act of 1974, P.L. 93–618, as amended.

13 Title II of P.L. 102–182, 19 U.S.C. §3201ff.

14 Title I of P.L. 106–200 (19 U.S.C. §3701–3741), as amended.

15 At least a dozen countries have had their GSP eligibility terminated or suspended at various points for labor reasons. See Elliott, K.A. 1998. Preferences for Workers? Worker Rights and the US Generalized System of Preference. Peterson Institute for International Economics (naming Nicaragua, Romania, Burma, Central African Republic, Chile, Liberia, Maldives, Mauritania, Pakistan, Paraguay, Sudan, and Syria).

16 See, generally, Robert E. Herzstein, 'The Labor Cooperation Agreement Among Mexico, Canada, and the United States: Its Negotiation and Prospects', 3 United States-Mexico Law Journal 121 (1995).

17 Office of the United States Trade Representative, Bipartisan Trade Deal, May 2007, available at https://ustr.gov/sites/default/files/uploads/factsheets/2007/ asset_upload_file127_11319.pdf.

18 Kathleen Claussen, 'Separation of Trade Law Powers', 43 Yale Journal of International Law 315 (2018), p. 342.

19 Cathleen D. Cimino-Isaacs, Labor Enforcement Issues in U.S. FTAs, Cong. Research Serv. (07 September 2018).

20 Ibid.

The language used in these agreements largely tracks the language used by the USA in its FTA labor chapters.[21] Given the outsized role of the US Congress in determining that language in light of the May 10 compromise, as other countries have adopted the US trade agreement language on labor, the US Congress has become, *de facto*, a primary drafter of the only transnationally enforceable labor law provisions in the world.[22]

Thus, despite a diverse geography of negotiations, there is considerable convergence in labor chapters as trading partners borrow text from models around the globe. Textual borrowing, however, has its downsides. Often, it comes without appropriate consideration or testing of effectiveness. These issues were only theoretical until 2018 when the Trump Administration sought to negotiate the USMCA in light of the outcome of the USA–Guatemala case. The next Section outlines the trade-plus compliance models that have developed and begins to illustrate the institutional dissonance that has emerged.

B. Mapping compliance models

US trade agreements have created elaborate and diverse institutional mechanisms to ensure compliance with trade-plus issues in trade agreements. Before these issues were subject to traditional dispute settlement mechanisms, policymakers used other means of policing trading partners in these respects. Unsurprisingly, most of these mechanisms have been and are used by the USA to monitor its trading partners rather than the other way around, but hybrid tools permitting private submissions to government offices have led to some scrutiny of US practices, as well.

Although one could develop a taxonomy of institutional mechanisms on the basis of many different factors such as the type of penalty or level of engagement, I find it most useful here to examine models on the basis of *who decides* whether trading partners are acting consistently with their obligations.[23] From this perspective, the USA has used four institutional models for compliance. The US government adopts the term 'monitoring and enforcement,' but its activities go far beyond monitoring and there is very little formal enforcement.

21 The European Union (EU), for example, has adopted the same language and now incorporates it into its own trade agreements. The same labor chapter language from the Trans-Pacific Partnership (TPP) Arrangement appears also in Article 15.10 of the Sustainable Development Chapter of the EU–Vietnam Free Trade Agreement. A still better example comes from the EU–Ukraine Association Agreement (a less traditional trade agreement) which entered into force in May 2014 and includes the same text for labor and environment. The same labor obligations in the TPP form part of the recently concluded Canada–EU Comprehensive Economic Trade Agreement. See CETA, Art. 23.4 et seq. Canada likewise has a number of labor side agreements and a labor chapter in its agreement with Korea. Government of Canada, Negotiating and Implementing International Labour Cooperation Agreements, available at https://www.canada.ca/en/employment-social-development/services/labour-relations/ international/agreements.html. One finds similar language also in certain Asian agreements, led by Korea. As explained further below, almost all of these include only promotional language without the option of sanction in case of noncompliance. A notable absence from the trend: Mercosur and Pacific Alliance do not include any labor references in their founding instruments.

22 Claussen, above n 18, p. 351.

23 Note that what I describe here are simply the US models currently or previously in force—not a survey of possible or future contemplated enforcement institutions. A comparative institutional analysis of enforcement mechanisms is the subject of other of my forthcoming work.

First among the compliance models is what I call the 'gatekeeper' model—meaning that the US executive branch acts as the gatekeeper deciding to which trading partners it will allow access to certain incentives and from whom to withhold access. This model is demonstrated in the non-reciprocal preference programs maintained by the USA.[24] As noted above, the US trade preference programs include conditions that permit the US Trade Representative (USTR) to give and take tariff concessions from applicable developing countries. The criteria to determine eligibility for those programs, including the maintenance of internationally recognized labor standards, are articulated in statute, but the USTR otherwise has unfettered discretion in determining whether those criteria are met.

Other US statutes also permit the US executive to take trade-related action on the basis of trading partners' diminished commitment to labor standards. Section 301 of the Trade Act of 1974 as amended provides a basis for executive action against a US trading partner on certain conditions relating to labor.[25] If the USTR concludes that a trading partner is engaged in an act, policy, or practice that 'constitutes a persistent pattern of conduct' that denies certain labor rights or that 'constitutes a persistent pattern of conduct by the government of a foreign country under which that government fails to effectively enforce commitments under agreements to which the foreign country and the United States are parties, including with respect to . . . labor,'[26] it may recommend to the president that the president undertake action such as the imposition of tariffs on products from the partner in question. A Section 301 investigation may begin with the filing of a petition by an individual or group, or through executive self-initiation. Although civil society groups have filed petitions seeking investigations into labor practices of US trading partners, no US president has imposed sanctions on a US trading partner in response.[27] The Section 301 approach falls within the gatekeeper model, although in a more active way than the preference programs, in that it allows the US executive branch to determine whether particular countries get access to the US market with or without tariffs in relation to those countries' labor practices.

A second compliance model formerly used by the USA is the 'outsourced' model. Under this model, the USA left the determination of compliance with trade-plus commitments to a third party. This model is exemplified by the USA–Cambodia textile agreement negotiated in 1999 and modified in 2000 to include monitoring by the International Labor Organization (ILO), agreed by both governments as well as by employers and labor unions in Cambodia.[28] In contrast with the 'gatekeeping'

24 Other developed states also have preference programs that work similarly. Among them are Japan, the EU, and Canada. The EU GSP program over the years has permitted the withdrawal of trade preferences in case of 'systematic and serious violations' of the ILO fundamental conventions. See Vivian C. Jones, Generalized System of Preferences (GSP): Overview and Issues for Congress, Cong. Research Serv. (08 January 2019).

25 19 U.S.C. § 1411.

26 Ibid.

27 The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) has used Section 301 at least three times in recent history to prompt an investigation into labor practices in China. See, e.g. Doug Palmer, *Labor Updating Petition on China Workers' Eights*, Reuters, 15 June 2010.

28 For a full description of the arrangement, see the International Labor Organization, Handbook on Assessment of Labor Provisions in Trade and Investment Arrangements (2017).

model, the outsourcing of monitoring and reporting to the ILO provides an independent assessment on the party's compliance. Although still non-reciprocal, this agreement went farther than the preference programs in that it created also incentive rewards by linking an export quota bonus to the requirement of improving working conditions.[29]

Turning now to trade agreements currently in force, beginning in the 1990s, the NAALC sought to settle complaints regarding labor enforcement primarily via dialogue and consultations through specialized national administrative offices and at the ministerial level. I call this an 'institutional' model because it creates a number of elaborate institutions, including a partly independent secretariat, to enhance engagement on labor issues, even if it ultimately provides for adjudication. The NAALC creates roles for a consultative committee, national contact points, a Labor Council, a Council of Ministers, and advisory bodies, and it creates an opportunity for civil society to file communications regarding labor issues in the three NAALC parties.[30] These institutions work in tandem to address labor issues primarily through protracted consultations between the labor ministries.[31]

The FTA between the USA and Jordan concluded in 2000 has served as the foundation for all the subsequent US trade agreements for trade-plus commitments. That agreement manifests an 'adjudicatory' model in which labor issues are subject to the same disciplines as other issues. Particularly since 10 May 2007, US trade agreements subject the labor and other trade-plus commitments to the same dispute settlement procedures and remedies, including potential recourse to trade sanctions, as apply to other FTA obligations. A wider trend toward adjudicatory models in trade agreements

29 Ibid, Chp. 7.

30 Since the entry into force of the NAALC and subsequent agreements, the Department of Labor (DOL) has reviewed at least 13 communications (submissions from members of civil society) related to Mexico, one related to Guatemala, two related to Peru, one related to Bahrain, one related to Dominican Republic, one related to Honduras, and one related to Colombia. US trading partners also receive petitions under the same mechanisms. See U.S. DOL, Bureau of International Labor Affairs, Submissions Under the Labor Provisions of Free Trade Agreements, available at https://www.dol.gov/agencies/ilab/our-work/trade/fta-submissions. Notably, these numbers are imperfect because, due to a recent change in policy, the U.S. DOL no longer makes available on its website communications received by the public unless it accepts that communication for review. For example, the AFL-CIO submitted a communication on 25 January 2018, arguing that Mexico was acting in breach of its obligations in the NAALC. The submission sought to draw attention to these issues as the USMCA negotiations were ongoing. DOL did not accept the communication for review. The result of not posting these communications is not only that the public is unaware of the submission but also that the DOL's reasons for rejection are not publicly available unless made so by the submitted.

31 The Secretariat, plagued by political tension, ceased operations in 2010. The role of the DOL in this process is symptomatic of a more systemic issue in US trade lawmaking. US trade law is also the most fragmented areas of lawmaking in US law. US trade law is made by no fewer than 14 US governmental entities, even apart from the numerous additional executive sub-agencies, as well as at least two international entities to which the USA has delegated authority. See also U.S. Government Accountability Office, Report to Congressional Committees: Information on U.S. Agencies' Monitoring and Enforcement Resources for International Trade Agreements, April 2017.

beyond the USA may be underway, although the USA–Guatemala case could serve as a deterrent to any such nascent trend.[32]

Although the current US model is adjudicatory on paper, USA is still very much in the business of *managing* the labor commitments of its trading partners through close cooperation, as well. There is near constant engagement with foreign partners by USTR and the US Department of Labor (DOL) on these matters, even if only one has reached the dispute settlement stage. Arguably, these management mechanisms have a greater impact on prompting reforms.[33] For example, the USTR and DOL are often engaged in the development of action plans with FTA partners as a means of insisting partners improve their own labor enforcement and build capacity in concrete ways.[34] Spending numbers reflect that commitment: in fiscal year 2016, US agencies oversaw distribution of $256 million in funding for trade capacity-building projects intended to help partner countries meet their obligations as parties to FTAs. About 80% of project funding was related to helping partner countries comply with labor or environmental commitments.[35] Forty-one (51%) and 32 (40%) of the 80 trade capacity-building projects were related to labor or the environment, respectively.[36]

II. EXPERIMENTAL ENFORCEMENT: THE USA–GUATEMALA CASE

The USA–Guatemala case was a test case in many ways. It was the first case under a US FTA since the NAFTA cases of the 1990s.[37] It was also the first case brought under a labor provision of an FTA anywhere in the world. Perhaps most important, it was the first case to test language that the several US legislators adopted in a political compromise more than a decade before and which appears in all but two current US trade agreements.[38] By significantly limiting the scope of the delicate 'manner affecting trade' language, the panel called into question the place of labor commitments in trade law. Because this same language appears in other trade agreements beyond the USA and

32 The EU recently initiated consultations with Korea about its labor practices. European Commission Directorate-General for Trade, *EU Steps Up Engagement with Republic of Korea over Labour Commitments under the Trade Agreement*, Press Release, 17 December 2018. An important distinction between the EU and US treatments, however, is that the EU typically treats issues of labor as related to sustainable development or human rights, whereas the USA treats it as matter of competitive advantage as is clear in US negotiating objectives for some time. This makes the EU gatekeeping institutions more promotional whereas the US institutions are more conditional.

33 Hannah Monicken, *Ways and Means Dems Question Whether USMCA Will Lead to Mexican Labor Reform*, Inside U.S. Trade, 11 April 2019 (noting that Democrats in Congress sought 'meaningful change' in Mexican labor practices through the entry into force of the USMCA).

34 The DOL and USTR detail these commitments on their respective websites. There are or have been action or enforcement plans with Bahrain, Colombia, Honduras, and Peru. For a useful summary and appraisal, see Vogt, above n 8.

35 U.S. Government Accountability Office, above n 43, p. 15.

36 Ibid.

37 For a description of those cases, see David Gantz, Addressing Dispute Resolution Institutions in a NAFTA Renegotiation, White Paper, April 2018, available at https://www.bakerinstitute.org/media/files/files/fa4d9adf/mex-pub-nafta-040218-1.pdf, p. 17.

38 Those are the Israel–US Free Trade Agreement and the NAFTA.

Guatemala,[39] the USA–Guatemala panel effectively cast doubt on the enforceability of labor provisions in several trade agreements around the world.

Turning now to the adjudicatory model in action, the next Section summarizes the proceedings of the long-winding USA–Guatemala case and the panel's final report.[40]

A. Overview of the case

The facts under evaluation in the USA–Guatemala case date to a 2008 communication to the US DOL.[41] The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and six Guatemalan labor organizations submitted a communication in accordance with Chapter 16 of the CAFTA-DR. The communication alleged that in five separate cases Guatemala failed to effectively enforce its domestic labor laws with regard to freedom of association, the right to organize and bargain collectively, and acceptable conditions of work.[42] The allegations related to freedom of association and the right to collective bargaining included impunity for threats and violence against trade union leaders and members, creating a climate in which trade union rights cannot be freely exercised; unlawful dismissals of union leaders and a subsequent failure to reinstate workers in violation of court orders as well as other forms of anti-union retaliation; failure to protect workers' associational and other rights in cases where ownership interests have changed in an enterprise; and failure to enforce provisions of Guatemalan labor law requiring employers to negotiate in good faith with recognized unions.[43]

DOL concluded in a report issued in the last days of the Bush Administration on 16 January 2009 that Guatemala had demonstrated a willingness to work together with the US government on addressing the issues discussed in the public communication.[44] On that basis, DOL did not recommend moving to enforcement proceedings.

The newly arrived Obama Administration faced renewed pressure from labor stakeholders to press forward to enforcement proceedings despite DOL's earlier recommendation.[45] A panel was constituted on 30 November 2012 and subsequently suspended

39 It also appears in other chapters such as the environment and anti-corruption chapters of US trade agreements.

40 One scholar has done a thorough review of the case, although he reaches different conclusions about the efficacy of the process. Phillip Paiement, 'Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute', 21 Georgetown Journal International Law 675 (2018).

41 American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), et al., *Public Submission to the Office of Trade and Labor Affairs (OTLA) Under Chapters 26 (Labor) and 20 (Dispute Settlement) of the Dominican Republic—Central America Free Trade Agreement (DR-CAFTA) Concerning the Failure of the Government of Guatemala to Effectively Enforce Its Labor Laws and Comply with Its Commitments Under the ILO Declaration on Fundamental Principles and Rights At Work*, 23 April 2008.

42 Ibid.

43 U.S. Department of Labor, Public Report of Review of Office of Trade and Labor Affairs U.S. Submission 2008-01 (Guatemala), 16 January 2009, p. i.

44 Ibid.

45 Letter of Ron Kirk and Hilda L. Solis (U.S. Trade Representative and U.S. Secretary of Labor) to Erick Haroldo Coyoy Echeverria & Edgar Alfredo Rodriguez (Guatemalan Ministers of Economy and Labor and Social Protection), 30 July 2010, available at https://www.dol.gov/ilab/reports/pdf/20100730-Letter.pdf.

while the disputing parties sought to negotiate an agreed outcome.[46] In April 2013, the USA and Guatemala agreed on a labor enforcement plan according to which Guatemala would implement labor law enforcement efforts along 18 different measures such as strengthening labor inspections, improving the monitoring and enforcement of labor court orders, and establishing mechanisms to ensure that workers are paid what they are owed when factories close.[47] After 15 months of engagement on the plan, the USA concluded that Guatemala had not taken steps sufficient to constitute compliance with US expectations and announced that it would reactivate the suspended panel.[48]

In accordance with the dispute settlement rules of the CAFTA-DR, the parties subsequently provided the panel with written submissions including more than 300 exhibits. Much of the US evidence in the case took the form of worker statements from which identifying information had been redacted for the safety of the workers.[49] Despite Guatemala's objections, the panel admitted this evidence.[50] Non-governmental entities also applied to participate in the case; some of those were invited to submit comments where the panel found that they met the CAFTA-DR criteria for amicus participation.[51]

In its final report issued on 14 June 2017, the panel found that, on the basis of many of the worker statements together with other elements of the documentary record, Guatemala had failed to effectively enforce its labor laws as required by Article 16.2.1(a) of the CAFTA-DR.[52] However, the panel went on to find that Guatemala's failure was not 'through a sustained or recurring course of action or inaction' 'in a manner affecting trade' as the CAFTA-DR also required.[53]

The panel reached its decision for both procedural and legal interpretation reasons. First, with respect to procedure, the panel highlighted the 'difficulty' of the task before it, given the absence of rules to provide for the handling of evidence, the appearance of witnesses, and the testing of evidence through examination.[54] In the absence of those additional tools, the panel decided to attribute little to no weight to several of the redacted worker statements, concluding that they were not credible because they did not have sufficient 'indicia of reliability' that the panel developed.[55] Thus, although the panel admitted the statements, in some cases, that meant that the panel did not attribute any weight to certain of them because they were not accompanied by corroborating evidence[56] or had insufficient detail[57] or lacked precision.[58]

46 Final Panel Report, *In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (14 June 2017), para 3 [hereinafter Final Panel Report].
47 Laura Buffo, *United States and Guatemala Sign Groundbreaking Agreement on Labor Rights Enforcement Plan*, Tradewinds: The Official Blog of the United States Trade Representative (April 2013).
48 Final Panel Report, para 10.
49 Ibid, para 231.
50 Ibid, para 22.
51 Ibid, para 26.
52 Ibid, para 594.
53 Ibid.
54 Ibid, para 232.
55 Ibid, para 246.
56 Ibid, para 304.
57 Ibid, para 535.
58 Ibid, para 551.

Second, with respect to substance, the core interpretive issue was the meaning of the phrase 'affecting trade'[59]—language that is memorialized in US congressional negotiating objectives and which appears in other chapters. The panel concluded that 'affecting trade' means that an act 'confers some competitive advantage on an employer or employers engaged in trade between the Parties.'[60] The panel developed three criteria for making that determination: '(1) whether the enterprise or enterprises in question export to CAFTA-DR Parties in competitive markets or compete with imports from CAFTA-DR Parties; (2) identifying the effects of a failure to enforce; and (3) whether these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises.'[61] Applying these standards to the facts, the panel decided that the USA had not shown that Guatemala's failure to effectively enforce its labor laws occurred in a manner affecting trade as required to demonstrate a breach of the CAFTA-DR. In particular, the panel found that the USA did not demonstrate that any of the companies in question were afforded a competitive advantage.[62]

B. Reactions to and implications of the panel report

The day of the final report's release was viewed by many as the day the May 10 political compromise broke. The delicate language agreed by Democrats and Republicans suddenly seemed unsustainable in the face of a panel dismissing its key tenets. The panel's interpretation of 'manner affecting trade' reopened this highly sensitive debate in the US Congress about exactly how to manage best labor in FTAs. The US government and civil society widely denounced the panel's analysis. USTR was critical of the panel's findings, saying that the panel 'incorrectly concluded' that Guatemala's failure to enforce its labor laws was not 'in a manner affecting trade.'[63] Members of Congress from both parties likewise disapproved.[64] Some commentators attributed the outcome to the makeup of the panel, arguing that the panel was made up of only trade experts and not labor experts.[65] These commentators take the position that if only the panel had properly understood *labor* issues, the result would have been different. The critique goes too far, but it underlines the central dilemma as identified by this Article: litigating the intersection of trade-plus issues and traditional concepts of trade before an adjudicatory panel may not be the best model for ensuring trading partners

59 Ibid, para 164.

60 Ibid, para 190.

61 Ibid, para 196.

62 It is not the purpose of this Article to evaluate the strength of the panel's conclusions or the contrasting US argument. The disparity between the two positions primarily turns on whether 'manner affecting trade' requires a showing of 'competitive advantage' and how that could be shown, or whether it means something like 'trade-related' as was used in the NAALC. As there appears to be no legislative or negotiating history available from the original four-month negotiation of that language in 2000 in the context of the USA–Jordan FTA, both parties and the panel had to rely on customary tools of treaty interpretation. For the USA, the new language in the USMCA discussed further below suggests that it intends for a 'trade-related' concept to apply to 'manner affecting trade' interpretations in the future, although it has not gone so far as to conclude clarifying letters with its current trade-agreement partners.

63 *USTR faults panel ruling that Guatemala labor violations did not affect trade*, Inside U.S. Trade (29 June 2017).

64 Ibid.

65 Lance Compa, Jeffrey Vogt, and Eric Gottwald, Wrong Turn for Workers' Rights: The U.S. Guatemala CAFTA Labor Arbitration Ruling—and What To Do About It (March 2018).

are meeting trade-plus standards. The USA–Guatemala dispute outcome has prompted a reconsideration of certain aspects of trade-plus commitments in trade agreements, but that reconsideration has not gone far enough.

Assessing trade-plus commitments after the USA–Guatemala case requires a review of both their goals and their means of compliance. Since the early 1990s, the haphazard introduction into trade agreements of substantive labor commitments reflected a cacophony of rationales and basic principles.[66] Different theories buttressed the idea that trade and labor should be linked: protectionism, work protection, fairness, development, human rights, the absence of any other labor enforcement mechanism, and others.[67] Scholars likewise continue to speculate as to the sources of the trade-labor narrative.[68] On both sides of the US political aisle, there remains some divergence of view,[69] but it is not clear over what lawmakers necessarily disagree.

It is still more difficult to measure the 'success' of trade-plus provisions such as these labor provisions in international economic agreements. The absence of a case ever being brought could be a sign of success—raising standards and deterring governments from falling below those standards. By a different measure, they are regularly used and invoked. Cooperative activities thrive, and by most accounts, there is at least some improved capacity-building among labor authorities across the world.[70] To the extent labor chapters have served as mechanisms to encourage reform in certain countries, the answer is also mixed. The threat of litigation or the lead-up to the Trans-Pacific Partnership (TPP) Agreement led to significant changes in certain countries under pressure from the USA.[71] And as noted, both the chapters and the side agreements serve as avenues for the public to seek action through their communications to the relevant governments.

66 As Steve Charnovitz puts it, there have been many attempts to 'reinvent the wheel'. Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime—A Historical Overview', 126 International Labour Review 565 (1987), at 580. See also Steve Charnovitz, *The Labor Dimension of the Emerging Free Trade Area of the Americas*, in Philip Alston, ed., Labour Rights as Human Rights (Oxford, 2005) (discussing how there is no consensus about the value of labor in trade agreements).

67 For a thorough discussion of these values, see Kevin Kolben, 'A New Model for Trade & Labor? The Trans-Pacific Partnership's Labor Chapter and Beyond?', 49 New York University Journal of International Law and Politics 1063 (2017). As one lawmaker said: 'there has to be some relationship of practices to trade because it's a trade agreement.' *Q&A Levin*, above n 1.

68 See, e.g. Chantal Thomas, 'Trade and Development in an Era of Multipolarity and Reterritorialization', 44 Yale Journal of International Law Online 77 (2019); Billy Melo Araujo, 'Labour Provisions in EU and US Mega-regional Trade Agreements: Rhetoric and Reality', 67 International and Comparative Law Quarterly 233 (2018); Dani Rodrik, 'Can Trade Agreements Be a Friend to Labor?', Project Syndicate, 14 September 2018; Vinod K. Aggarwal, 'U.S. Free Trade Agreements and Linkages', 18 International Negotiation 89 (2013), at 91 (asking whether the linkage of trade-plus issues to trade agreements is tactical or substantive).

69 Compare comments and questions from members of Congress at a 2019 hearing on labor enforcement. See Committee on Ways and Means, Trade Subcommittee, Hearing of 22 May 2019, available at https://www.youtube.com/watch? v=7jHFddZ0MKM.

70 See, e.g. U.S. GAO, above n 43; ILO Handbook, above n 40.

71 This was true both in the case of the consistency plans with certain Asian countries as well as with respect to Mexico until the US withdrawal. The same phenomenon can be seen in the engagement with Mexico under the USMCA negotiations. For an elaboration of this point, see, e.g. Alvaro Santos, The Lessons of TPP and the Future of Labor Chapters in Trade Agreements, IILJ Working Paper 2018/3, MegaReg Series (2018).

More important here than whether trade-plus chapters like labor chapters are succeeding is whether the frame in which they operate is *appropriate* for guaranteeing compliance. It would not serve policymakers' ends if the ability to monitor and enforce certain trade-plus obligations is compromised from the outset for structural reasons.[72]

The record in the USA–Guatemala case reveals that, in addition to the conceptual difficulty surrounding the meaning of 'manner affecting trade,' the application of traditional trade enforcement mechanisms with a high standard of proof and limited evidentiary disciplines may have complicated the presentation of the US case. In other words, there are also procedural or evidentiary elements that make labor commitments more challenging to illustrate than traditional trade areas such as tariffs or subsidies. For one, unlike traditional trade actions involving a challenge to a measure or policy that has an impact on US business, labor cases typically involve the demonstration of an omission with at best an indirect or unidentifiable harm to any US constituent. Although the US government relies in part on civil society as much as it does on business for gathering this information, assembling evidence of an omission through often disadvantaged workers in other states is not insignificant. Not only do these barriers lower incentives to pursue such cases, but they demand preparation for a unique adversarial exercise. While other types of unwritten measures may give rise to trade agreement breaches in traditional trade areas, they are rarely adjudicated. Even then, in those instances, companies can often substantiate the measure through communications and testimony.[73] By comparison, workers may be fearful to have their identities revealed as was the case according to the USA or they themselves may lack sufficient documentation.[74] Further, it may not be possible for US government officials to collect information in the country due to physical or legal barriers.

Apart from increased evidentiary barriers to showing government failure, substantiating a trade effect from that failure is likewise more difficult for labor (and likely for other trade-plus commitments) than substantiating trade effect in traditional trade areas. These difficulties again relate back to the nature of the government (in)action. For example, the USA or other governments may not have access to data that would demonstrate that a company received a competitive advantage in a labor case owing to (1) the absence of any traditional market indicators such as the complex econometric data that would be tracked as a matter of course and available in other sorts of cases, or (2) the difficulty of identifying the elements of the breach with precision such as a start date for the government inaction, or (3) again, the lack of access to workers with

72 A natural counterargument to this statement is that perhaps the current structure, however compromised from advocates' perspective, is exactly as intended. But recent statements from both political parties belie that position.

73 See, e.g. Panel Report, *Argentina—Measures Affecting the Importation of Goods*, WT/DS438/R, WT/DS444/R, WT/DS445/R (adopted 22 August 2014).

74 While the panel and Guatemala appeared willing to treat worker identities in confidence and indeed the CAFTA-DR provides for it, USA indicated that the workers were fearful of the government learning their identities even if that information was restricted to a handful of government officials. Final Panel Report, para 239.

relevant information.[75] In the absence of an ability to subpoena data from companies, substantiating a competitive advantage to a single foreign company on the basis of a set of highly discrete government omissions is practically impossible.[76]

To be sure, just because building a case is exceedingly challenging does not mean that lawmakers did not intend to set the bar that high. For those policymakers concerned with obvious government failures in major violations of workers' rights that have a substantial impact on trade, the compliance model and the substantive content may be sufficient in their present forms. Likewise, for policymakers with an interest in enforcing workers' rights without regard to trade impact, but in using trade agreements as the vehicle for so doing, then the model may work and merely the substantive content be changed. The point here is not to advocate striking or embracing the adjudicatory model outright but to call attention to the possibility that simply clarifying the substantive standard may not resolve advocates' concerns. Rather than one side seeing the standard and the model as all bad and the other seeing increased stringency in both as all good, there may be a middle ground on both standard and on model that has yet to be uncovered.

III. NAFTA 2.0 AND REIMAGINING

This Part takes up the proposed USMCA. While policymakers sought to address the conceptual misstep in the USA–Guatemala panel report in the USMCA, they have neglected to address the other institutional challenges that make dispute settlement mechanisms a poor fit.

A. Conceptual clarity

In the period since the publication of the panel's final report in the USA–Guatemala case, discussions have focused on what to do about the 'manner affecting trade' language which commentators felt the panel got wrong in interpretation. With this in mind as the problem, the USA faced at least three different plausible responses: first, negotiators could have wished to insert a footnote clarifying the intended meaning of the language as the USA has done in past agreements. Especially considering 'manner affecting trade' is May 10 language that now appears in the Trade Promotion Authority legislation guiding all trade agreement negotiations as decided by the US Congress,[77]

75 In fact, economists have for many years disputed the premise for any trade effects. These scholars have concluded that, contrary to what is generally believed, low labor standards may diminish competitive advantage or create a competitive *dis*advantage, among other counterintuitive findings. This literature is surveyed in Samira Salem & Faina Rozental, 'Labor Standards and Trade: A Review of Recent Empirical Evidence', 2012 Journal of International Commerce & Economics 63.

76 The USA–Guatemala panel notes this in paragraphs 176–178 of its final report but suggests that facts from an individual employer may not be required. '[C]ompetitive advantage may be inferred on the basis of likely consequences.' Final Panel Report, para 194. The panel later makes such an inference in one instance where all the members of the union leadership at a particular company were dismissed. Ibid, para 483. In other instances, however, the panel seeks evidence that the costs of certain employers were sufficiently reduced to be considered a competitive advantage. Ibid, para 454.

77 See Claussen, above n 18 and sources cited therein.

this approach was to be expected, even if belatedly.[78] Second, one could imagine an attempt at renegotiating the language in question, although as noted above the politics surrounding the phrase, the product of the 10 May 2007 compromise, make that difficult. Third, and perhaps most easily, the USA could maintain the 'manner affecting trade' language and simply defend its prior positions as to its meaning.[79] After all, there is no concept of precedent under FTAs. However, this approach would risk that a future panel would again reject the US position and further entrench the interpretation of the phrase that the USA seeks to avoid.

With respect to the USMCA negotiations, as in the past, the USA maintained tight control over the language. The Trump Administration first tabled the TPP labor text in the USMCA negotiations in October 2017.[80] (Notably, in that same round, the USA also tabled text on a dispute settlement chapter that would allow countries to disregard panel decisions.[81]) In March 2018, USTR shared new labor language with cleared advisers and members of Congress. It was reported that the sense among those reviewing the text was that it 'needed more refinement.'[82] In April 2018, the negotiating parties considered new text modified from what was tabled in October (the TPP language) by adding footnotes to clarify contentious parts of the May 10 deal. The resulting labor text as signed in November 2018 closely tracks the TPP with a small handful of notable exceptions.[83]

Unsurprisingly, the proposed USMCA approach to correcting the errant panel from the *Guatemala* case is to add a 'for greater certainty' footnote each time the critical phrase appears:

> 9 For greater certainty, a 'course of action or inaction' is 'in a manner affecting trade or investment between the Parties' where the course involves: (1) a person or industry that produces goods or provides services traded between the Parties or has investment in the territory of the Party that has failed to comply with this obligation; or (2) a person or

78 It was clear that the concept was vague from the beginning, but repeatedly used. As early as 2002, Senator Charles Grassley, then chairman of the Senate Finance Committee, commented: '[N]o one really knows what the [standard for labor commitments] is. In fact, ... one of the most controversial issues raised [in these debates] was what the labor ... provisions of the Jordan Free Trade Agreement actually mean .... Ambassador Michael Smith, former Deputy United States Trade Representative and the first American Ambassador to the General Agreement on Tariffs and Trade, testified that "Articles 5 and 6 [of the Jordan FTA] as written are largely fluff, open to widely differing, even if plausible, interpretations."' 148 Congressional Record S9107, S9107–08 (daily ed. 24 September 2002) (statement of Sen. Grassley).

79 Some members of Congress recommended this approach. See *Q&A Levin*, above n 1.

80 Hoagland, *Lawmakers, labor advocates*, above n 1.

81 Ibid. That extreme view was likely a bargaining chip for later trade-offs.

82 Brett Fortnam & Jenny Leonard, *Sources: U.S. Won't Make a New Labor Offer During Mexico City Round*, Inside U.S. Trade, 02 March 2018.

83 I do not discuss in this Article the widely discussed (and debated) wage requirements for certain auto workers in the rules of origin chapter of the USMCA. See, e.g. William Mauldin, *In Nafta Talks, U.S. Pushes Mexico to Raise Wages for Its Auto Workers*, Wall Street Journal, 07 May 2018. While those have relevance to labor standards, they are not part of the compendium of labor standards as intended in my analysis.

> industry that produces goods or provides services that compete in the territory of a Party with goods or services of another Party.[84]

It remains to be seen whether this additional language will help if the agreement comes into force and if any disputes materialize under this chapter.[85] The clarification gives greater definition to the terms, but still leaves considerable space for panel interpretation.

After the deal was signed, in November 2018, some Democratic senators argued that the new footnote did not go far enough—that the text must strike or 'narrowly define' the 'sustained or recurring' and 'manner affecting trade' language. They also called for independent labor compliance and monitoring body, something the AFL-CIO advocated since June 2017 and that would have been akin to the outsourced or institutional management models used in the past.[86] So far, those ideas have not gained traction.[87]

A significant question remains whether Mexico will implement the labor law reforms that it recently passed as required by the annex to the USMCA labor chapter. That implementation could take years. Thus, the US Congress may be forced to vote on this agreement without knowing whether Mexico will even begin at the intended threshold when it comes to remedying its labor law issues. Just as the problem in the USA–Guatemala case was not the law on the books but rather its successful implementation and enforcement, it will take more than the passage of legislation to make these provisions effective in achieving the goals of labor advocates.

B. Institutional incongruity

Apart from the discussions surrounding 'manner affecting trade' that dominated the debates in 2018 and through which both political parties sought conceptual clarity, conversations in 2019 about what remains to be done in the labor enforcement context have largely focused on the panel blocking problem in the dispute settlement chapter and the resultant implications for forcing Mexico to implement the labor reforms to which it agreed in the labor chapter annex. The USMCA dispute settlement chapter is very similar to the dispute settlement chapter of NAFTA 1.0. The flaws of the NAFTA dispute settlement chapter have long been lamented.[88] By turning back to the NAFTA rather than using at least the TPP modern baseline, the likelihood of enforcing any of these labor provisions through adjudicatory proceedings is now quite low. Keeping supranational dispute settlement limited in this way was a point on which the Trump

84 USMCA draft text, Chp. 23—multiple appearances. The footnote also appears in the Environment chapter. It does not, however, appear in the Anticorruption chapter where 'manner affecting trade' also appears. See USMCA, Art. 27.8.

85 See Isabelle Hoagland and Jack Caporal, Sources: *New U.S. NAFTA Labor Text Clarifies May 10, CAFTA Language*, Inside U.S. Trade (26 April 2018).

86 See, e.g. Isabelle Hoagland, *Lawmakers, Labor Advocates*, above n 1.

87 If anything, they have moved in the opposite direction with USTR suggesting that Section 301 could and should be used to address labor violations. See, e.g. *Trumka Says Lighthizer Still Pushing Section 301 as USMCA Enforcement Tool*, Inside U.S. Trade, 23 April 2019.

88 See Simon Lester, Inu Manak, and Andrej Arpas, *Access to Trade Justice: Fixing NAFTA's Flawed Dispute Settlement Process*, Cato Institute White Paper, 05 October 2017.

Administration felt strongly, and won.[89] But then it seems all the more prudent for the legislative and executive branches to look to other models—a point to which I will return.

Should the US government and other governments continue to employ an adjudicatory model as Democratic legislators have insisted, the USA–Guatemala case provides important lessons for the procedural aspects of that process that have yet to be taken up. First, apart from adopting a different type of dispute settlement chapter such as what was used in TPP, the parties could provide for an appointing authority upon which they may call for appointment of an arbitrator should there be a problem with the roster or with one side. This practice is common in investor-state dispute settlement, for example.[90] A further recommendation would be to ensure that a complete dispute settlement mechanism is in place (including rosters where appropriate) before the entry into force of the agreement to avoid any possibility of delay.

Second, to the extent part of what the USA–Guatemala panel exposed was a problem with the rules and ability of a party to present appropriate evidence, then it is on those elements that lawmakers should focus their attention. The panel expressly highlighted this as a limitation on its ability to consider the US evidence so lawmakers should take up this strong request for better rules and guidance on evidentiary matters.

A further potential improvement to the traditional dispute settlement mechanism assuming the substantive content remains the same could be a reversal in the normal burden of proof on trade-plus issues such as labor. Where a respondent trading partner did not present sufficient evidence on any element of the relevant standard (act, causality, etc.), a presumption could be entered against it. A panel could also be empowered to penalize frivolous claims to avoid a race to the courthouse by typical enforcer states that could pose a heavy financial onus on respondent states.

These changes could serve labor advocates better than simply demanding traditional dispute settlement without more. But what this study has shown is that, knowing what we know now, advocates ought also to query whether the procedural and practical aspects of dispute settlement make it a less than ideal approach for ensuring compliance when considered across the range of potential options. Rather than rely on an adjudicatory model in which each state is right or wrong, engaging in a non-binary exercise instead could, for instance, create benchmarks for improvement and include third-party adjudicated sanctions on a sliding scale. A variety of actors could be involved (state or non-state). Within the US system, streamlining the work of the various agencies that deal with trade-plus issues would also help, including for engaging the private sector.[91] Every trading partner relationship is different as will be their trade-plus priorities and challenges. A one-size-fits-all approach may be counterproductive.

89 *Seade: Mexico Demanded Cultural Exemption in USMCA after Canada Got One*, Inside U.S. Trade, 11 October 2018.

90 See, e.g. the UNCITRAL Arbitration Rules 2010, Art. 6.

91 For one, whereas commercial interests can reach out to the US Department of Commerce through a phone hotline, labor and environmental interests face a long, overly complicated petition process.

This work seeks to serve as a call to policymakers to bring alternatives back to the negotiating table.[92] Addressing the roots of the institutional incongruities illuminated by the USA–Guatemala decision could do more for upholding workers' rights abroad than the quick-fix approach taken in the signed version of the USMCA. Any reassessment ought to begin with a comprehensive discussion about what trade-plus management *could* look like.

CONCLUSION

Whatever the outcome with the USMCA, the institutional design for trade-plus commitments in future agreements must strike the right balance between legalization and management to build confidence in the trade rule of law. Ensuring state compliance with these commitments requires more than just an average, unstructured, commercial adjudicatory proceeding. Trade-plus commitments, especially labor, are never a driving force for trade agreements; there is no reason they should be treated the same way as the forces that are.

92 Space does not permit a full review of all prospective alternatives here. As noted above, a review of trade's enforcement conundrum is the subject of other of my forthcoming work.