TO LEAD OR NOT TO LEAD – REVERTING PRESIDENT TRUMP'S RETREAT FROM THE UNITED STATES' TRADITIONAL LEADING ROLE IN PROMOTING HUMAN RIGHTS THROUGH TRADE

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ABSTRACT

Traditionally, the United States has long been the promoter of human rights (especially labor rights) protection through trade measures and agreements. But the "America first" policy adopted by the Trump Administration has created negative impressions of the United States being hostile toward existing Free Trade Agreements (hereinafter "FTAs") and being unenthusiastic about promoting labor rights or human rights protection through FTAs. The paper argues that the "America first" policy and the human rights promotion can co-exist. If the United States can make it clear that its position of promoting human rights and labor rights protection through its FTAs and its Generalized System of Preferences (hereinafter "GSP") has not been changed under the "America first" policy, it could enhance the justification of its position in renegotiating agreements with its trading partners. On the other hand, if the impression that the United States is giving up its leadership in promoting human rights and labor rights protection through trade measures and agreements is continued, the justification of its policy in renegotiating the trade agreements would be weakened. Hence it should be important for the United States to remove such negative impression of retreating from its

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traditional leading role.

KEYWORDS: *"America first", core labor standards, free trade agreement (FTA), Generalized System of Preferences (GSP), human rights, labor rights*

I. INTRODUCTION

Traditionally, the United States was considered as not only the strongest economic and political power, but also a leader in helping enhance human rights and other important fundamental values[1] at international arenas and in other countries. These two roles mutually support each other because of the United States' strong economic and political power and its promotion of human rights was effective to certain extent. Additionally, because of the United States' willingness to take up the role of promoting human rights protection, its political influence is enhanced and morally justified.

Although not all countries and their people are fond of the United States' role in human rights promotion, one cannot deny the fact that its leadership contributed to the improvement of human rights protection and the enhancement of other important human values. The United States' leadership in these areas is partly reflected in its approach of "linking" and "de-linking" international trade with such fundamental values, especially with labor rights protection.

But after President Trump's inauguration in January 2017, people have legitimate concerns about whether the United States has already given up its leadership because of President Trump's "America first" policy and whether there will be negative implications for the promotion and protection of human rights.

In Part II of this paper, there will be a brief discussion on the trade aspect of Trump Administration's "America first" foreign policy. This will serve as the basis for further elaborations on the possible change of the United States' leading role in relying on trade to promote human rights protection in other countries. Part III of this paper will focus on the United States' traditional role in leading to promote human rights and other important human values, especially through "linking" labor protection with trade and later through "de-linking" labor protection with trade and making labor protection partly independent from trade. In Part IV, there will be arguments about the possible negative implications of human rights protection arising from the "America first" policy. Part V of this paper concludes by suggesting the possible co-existence of the "America first" policy and the promotion of human rights through its trade with its partners.

Although no clear statutory provision in the United States' trade legislation states that there is the policy of using FTAs as a tool to promote

[1] The fundamental values indicated here include not only human rights (which in turn include core labor rights and standards), but also other values of high importance, such as the protection of environment. For the purpose of this paper, the focus of discussion is on the labor rights or human rights (in some contexts of the discussion in the paper).

human rights protection, and although the linkage of trade and labor protection in the United States' FTAs had been mainly motivated to remove the advantages gained by foreign countries arising from the poor labor protection and the consequential cheaper labor costs, the paper still considers that the promotion of human rights (labor rights) protection is among or in line with the overall purposes of United States' trade policy. Further, the paper is not arguing that the United States' current practice of linking trade and human rights (labor rights) protection is effective enough; rather, the paper is suggesting that maintaining or strengthening the use of trade (or trade measures) as a tool to enhance human rights protection should be considered a positive direction. The impression that pure trade gain will be the only concern of the United States' new administration could have negative implications for human rights protection.

II. TRADE ASPECT OF THE "AMERICA FIRST" POLICY

In order to understand the "America first" policy's implications for trade aspect on labor rights protection the policy itself must be briefly reviewed.

According to the White House website,[2] there are various aspects involved in the "America first" policy. Among these aspects, "trade deals that work for all Americans" is a very important component of it. According to the description of the policy, the main points of the "America first" policy relating to trade include the following: First, the Trump Administration considers that the trade deals concluded by the previous administrations were bad and had "put the interests of insiders and the Washington elite over the hard-working men and women of this country" which resulted in "factories close and good-paying jobs move overseas" and caused "a mounting trade deficit and a devastated manufacturing base."[3] Of course, there are different views about whether American factories being closed and American jobs moving abroad are actually caused by the bad trade deals or by other internal factors instead.

Second, the Trump Administration considers that "[w]ith tough and fair agreements, international trade can be used to grow [the United States'] economy, return millions of jobs to America's shores, and revitalize . . . [its] communities."[4] Again, there could be different views about whether a tough trade agreement will actually contribute to bringing jobs or job-creating investments back to the United States.

Third, the Trump Administration's initial action to implement the

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[2] *America First Foreign Policy*, WHITE HOUSE, https://www.whitehouse.gov/america-first-foreign-policy (last visited Sept. 6, 2017).
[3] *Id*.
[4] *Id*.

"America first" policy is to withdraw from the Trans-Pacific Partnership (hereinafter "TPP") (although the TPP had not yet become effective at the time when the United States withdrew) and to renegotiate some free trade agreements (especially the North American Free Trade Agreement (hereinafter "NAFTA") and the U.S.–Korea FTA).[5] On this aspect, different views exist as to whether withdrawing from the TPP would mean that the United States is actually giving up its dominant role in economic affairs and its strategic position in the Asia-Pacific region and whether this is a wise move from the United States' perspective.

Fourth, the Trump Administration is "to identify all trade violations and to use every tool at the federal government's disposal to end these abuses."[6] The United States, like all other countries, undoubtedly has its right to identify the violation of trade agreements committed by its trading partners. But other countries have feared that that the violations are defined by the United States and that the counter-measures are unilaterally adopted and implemented by it.

The main concern of this paper is that although the "America first" policy does not explicitly mention that the United States is giving up its leading role in promoting certain human values, especially protecting the human rights and the workers' rights, the implications from the "America first" policy seem to be apparent that promoting human rights protection in other countries would neither be a priority in the United States' trade policy nor have an important role in the new policy. This could be quite different from the previous practice of the United States considering in the past the United States was considered by many people as willing to assume the leading role of promoting human rights protection through various means, especially through trade approaches.

In the next part of this paper, there will be explanations about the previous practices of the United States in using trade agreements or trade interests to enhance human rights protection, so that they can be compared with the situation under the new policy.

III. THE UNITED STATES' TRADITIONAL ROLE IN LEADING TO PROMOTE HUMAN RIGHTS AND OTHER HUMAN VALUES

The United States' traditional leading role in promoting human rights and other important human values is quite obvious. There are mainly three related approaches to connect international trade with human rights (especially labor rights) protection. One of the approaches is to use trade interests as an inducement to enhance human rights protection in other

[5] *Id*.
[6] *Id.*

countries. Another one is to include the requirements of human rights (especially labor rights) protection in trade agreements (especially in FTAs). The final one is to use trade measure as a sanction to force a country to comply with the requirements of human rights protection. An example of the last approach (i.e., using trade sanction to force a country to cease human rights violations) is the trade sanctions multilaterally adopted by international organizations or concurrently adopted by some major countries to respond to the human rights violations in South Africa under its apartheid regime before 1994. For the purpose of discussing the United States' trade policy in this paper, the first two approaches are more pertinent and will be explained below.

A. Trade Interests Used as Inducement by the United States

There could be substantial trade interests unilaterally granted by a country under certain conditions set forth by the granting country to be met by the beneficiary countries. The most frequently used mechanism to unilaterally grant trade interest to other countries is the GSP. The GSP is based on the "Decisions on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries" (hereinafter "Enabling Clause") adopted under the General Agreement on Tariffs and Trade in 1979. Under the Enabling Clause, developed countries are entitled to provide non-reciprocal preferential treatment in tariffs (i.e., to provide either zero tariff or lower tariffs) for the goods imported from the beneficiary developing countries so as to enhance their exports to the developed countries.[7]

A GSP status can be unconditionally given to the developing countries selected by a developed granting country. It can also be linked to other issues so as to ensure that certain practices of the beneficiary countries meet the expectations of the granting country. As early as 1984, a labor right clause was adopted by the United States Congress in conjunction with the GSP in the GSP Renewal Act of 1984.[8] Under the law, a beneficiary country must take steps to afford the internationally recognized worker rights (i.e., the right of association; the right to organization and bargain collectively; a prohibition on the use of any form of forced or compulsory labor; a minimum age for the employment of children; and acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health) in order to benefit from the GSP. From then

[7] *Special and Differential Treatment Provisions*, WTO, http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited Sept. 6, 2017).

[8] Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, 98 Stat. 3019 (1984).

on, the benefit of the GSP was linked to the efforts to protect labor rights.[9]

The unilateral granting of benefits to the developing countries under the GSP was the salient example of showing the possible linkage between trade and human rights protection (or the enhancement of certain human values) and that such benefits can be granted not necessarily to receive return economic interests from the beneficiary developing countries. The genuine purpose is to enhance the human rights (especially the labor rights) protection in the beneficiary developing countries. This approach is therefore "altruistic" in the sense that it is to help other countries to improve their human rights status without asking for a return.

B. Human Rights Protection Incorporated in FTAs

In recent decades, it has become increasingly common to include human rights protection in FTAs. This is another example showing that a proper link can be established between trade and human rights protection under trade agreements.

It has been more than twenty years since the FTAs first included human rights provisions (especially labor rights provisions). It started from the North American Agreement on Labor Cooperation (hereinafter "NAALC") signed in 1993, which was made effective from 1994 as a side agreement to the NAFTA. Since then, all FTAs negotiated by the United States include certain labor provisions.[10] Although the history of human rights provisions in FTAs is not very long, we can still draw some features or trends from the development after NAFTA as follows:

First, it should be fair to say that more and more FTAs have included human rights related provisions or chapters. The United States is one of the main promoters of incorporating human rights (especially labors' rights) related provisions in FTAs. The other promoters include the European Union and Canada. Since there are a large number of FTAs being negotiated and concluded by these countries (especially by the United States and the European Union), the substantive and symbolic importance of their FTAs is high. The fact that their FTAs with other countries include human rights (or labor rights) provisions or chapters indicates the direction or trend of the development.

Second, the human rights provisions or chapters are mainly to protect the fundamental rights of labors (basically the core labor standards).

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[9] Lance A. Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LABOR L. & POL'Y J. 199, 202 (2001), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1172&context=articles.

[10] UNITED STATES FREE TRADE AGREEMENTS (FTAs), http://ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115531/lang--en/index.htm (last visited Sept. 9, 2017).

Currently, the provisions are basically not expanded to cover overall human rights protections, with limited exceptions of FTAs where human rights (instead of merely the labor rights) are specifically mentioned.

Third, the reason that FTAs are basically dealing with labor rights (instead of the full range of human rights) is partly because the protection of labors' rights can be more properly connected with international trade and hence it can be more easily justified for the inclusion of protecting of such rights. The four fundamental principles and rights at work for labors (i.e., the "core labor standards", including freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labor, effective abolition of child labor, and elimination of discrimination in respect of employment and occupation) are parts of human rights. These rights have a close connection with international trade, mainly because the non-protection of the core labor standards in an exporting country could result in producers in this country exploiting the workers and hence their costs of production could become artificially lower. This will enhance the price competitiveness of the products produced by such producers. Therefore, it is more theoretically and practically justifiable to have a wider range of core labor standards, or even a wider range of the workers' rights beyond the core labor standards to be included in the FTAs. This explains why countries include the labor standards into many FTAs. It is basically to address the genuine fear that cheap labor in the counterpart countries will become a threat to those countries where labors are more strictly protected. The inclusion of labor provisions in FTAs is also to ease domestic industries and unions in countries with strict labor protection from opposing the conclusion of FTAs with countries where labors are less protected.

Fourth, the requirement of protecting labors in the counterpart country in an FTA is basically to protect the jobs and interests of the workers in the requiring country. As an author commented, "The NAALC was developed to mitigate concerns that NAFTA would distort labor markets in both the United States and Mexico. The two main labor concerns were that Mexico has poorer working conditions and labor standards, and that low Mexican wages and poor enforcement of Mexican labor standards would attract investment to Mexico, depriving U.S. workers of jobs and driving down U.S. wages."[11] Thus the original idea of human rights protection under the FTAs is not "altruistic" for the purpose of helping other countries to improve their human rights status. It is "egoistic" in the sense that it is to enhance the trade interests of countries of the countries promoting the inclusion of labor provisions in FTAs.

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[11] Jacqueline McFadyen, *NAFTA Supplemental Agreements: Four Year Review* (Peterson Inst. for Int'l Econ., Working Paper No. 98-4, 1998), https://piie.com/publications/working-papers/nafta-supplemental-agreements-four-year-review.

Fifth, the human rights provisions in FTAs can be either binding or non-binding. But the labor provisions in those FTAs to which the United States is a Party impose hard obligations on countries. They are imposed with "teeth" and are legally enforceable through dispute settlement mechanisms, although the ways of enforcing the provisions are different depending on the types of human rights provisions in FTAs. Countries with lower standards of labor protection are therefore not merely expected to be good. In a way, they are "forced to be good."[12]

Sixth, the United States adopted the "New Trade Policy with America" (agreed by United States House Ways and Means Committee ranking member Jim McCrery and United States Trade Representative (USTR) Susan Schwab in May 2007),[13] which requires FTAs concluded by the United States to have core labor standards provisions with the following features: First, "[a] fully enforceable commitment that FTA countries will adopt, maintain and enforce in their laws and practice the five basic international labor standards, as stated in the 1998 International Labor Organization *Declaration on Fundamental Principles and Rights at Work*." Second, "[a] new, fully enforceable, binding commitment prohibiting FTA countries from lowering labor standards." Third, "[n]ew limitations on 'prosecutorial' and 'enforcement' discretion—FTA countries cannot defend the failure to enforce laws related to the five basic standards due to resource limitations or decision to prioritize other enforcement issues." Fourth, the "[s]ame dispute settlement mechanism/penalties as other FTA obligations" must be there.[14] These profoundly affect the FTA practice of the United States. This last trend helps establish the systemic link between trade and labor rights protection.

C. The United States' Recent Strengthening of Labor Rights Protection in FTAs—U.S.–Korea FTA as an Example

In addition to the general trend of the United States incorporating labor rights provisions in its FTAs with other countries, the recent development shows that the labor rights provisions are further expanded in their scope. The U.S.–Korea FTA is a good example to illustrate the essence of the expanded labor protection, including whether there is an independent labor chapter, whether the labor protection is explicitly linked with trade, whether

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[12] The idea of "forced to be good" is seen in the paper of EMILIE HAFNER-BURTON, FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS (2009).

[13] The discussion of "A New Trade Policy for America" is seen at Andrea R. Schmidt, *A New Trade Policy for America: Do Labor and Environmental Provisions in Trade Agreements Serve Social Interests or Special Interests?*, 19 IND. INT'L & COMP. L. REV. 167 (2009).

[14] A NEW TRADE POLICY FOR AMERICA, https://democrats-waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/media/pdf/NewTradePolicy.pdf (last visited Sept. 24, 2017).

international labor standards and treaties are cited, whether there is harmonization required, whether there are institutional arrangements, whether labor protection is mandatory and whether there are dispute settlement mechanisms available for the disputes arising from labor protection.

First, about the form of labor provisions in the FTA: The U.S.–Korea FTA contains Chapter Nineteen, which is entitled "Labor".[15] Thus, this FTA adopts the form of a separate labor chapter and does not follow the previous practice in the NAFTA, under which a parallel agreement (i.e., the NAALC) was concluded.

Second, whether the labor protection is explicitly linked with trade: Although Chapter Nineteen is included in the FTA, some of its provisions are not explicitly linked with trade between the Parties. For instance, both Parties reaffirm their obligations as members of the International Labor Organization (hereinafter "ILO") (Article 19.1 of the U.S.–Korea FTA) and they are required to adopt and maintain in its statutes, regulations and practices the rights stated in the ILO Declaration on Fundamental Principles (Article 19.2). The Parties are also required by the agreement to effectively enforce its labor laws (Article 19.3). All these substantive obligations are imposed without referring to whether or not the bilateral trade between the two countries has been affected as a result. Hence, in these parts, there is a "de-linkage" between the labor protection and the bilateral trade under the FTA. The only "linkage" is that these provisions are provided in the FTA.

However, Article 19.2, paragraph 2, of the U.S.–Korea FTA provides instead that "Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations implementing paragraph 1 in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph." This seems to be inconsistent with the obligations set forth in Article 19.1 and paragraph 1 of Article 19.2, in which the Parties are unconditionally required to observe fundamental labor rights. Whereas under Article 19.2.2, it seems that as long as a waiver or derogation from a Party's statutes or regulations (which implement Article 19.2.1) is not made "in a manner affecting trade or investment between the Parties", it would not be considered as a breach of the obligations under the U.S.–Korea FTA.

Article 19.3.1(a) of the U.S.–Korea FTA has a similar qualification that limits the failure of labor law enforcement to the situation where trade or investment is affected. It reads: "Neither Party shall fail to effectively

[15] Free Trade Agreement Between the United States of America and the Republic of Korea, U.S.–S. Kor., ch. 19, June 30, 2007, https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.

enforce its labor laws, including those it adopts or maintains in accordance with Article 19.2.1, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties, after the date this Agreement enters into force." Hence, as long as the failure of enforcing labor laws through a sustained or recurring course of action or inaction is not done "in a manner affecting trade or investment between the Parties", it would not be considered as a breach of the obligations under the FTA.

Third, whether international labor standards and treaties are cited: The obligations of the Parties as members of the International Organization have been cited (Article 19.1 of the U.S.–Korea FTA). The Labor Chapter also requires Parties to adopt and maintain in their laws and practices the fundamental labor rights, which include (a) freedom of association, (b) the effective recognition of the right to collective bargaining, (c) the elimination of all forms of compulsory or forced labor, (d) the effective abolition of child labor and a prohibition on the worst forms of child labor, and (e) the elimination of discrimination in respect of employment and occupation (Article 19.2.1). Apparently, the Labor Chapter applies the ILO standards of labor protection to decide the standards of protection.

Fourth, whether harmonization is required: The Labor Chapter of U.S.–Korea FTA only sets forth international standards of labor protection to be followed by the Parties. It also provides possible waivers or derogations from the standards, as long as the bilateral trade is not affected. But there is no requirement for the Parties to harmonize their labor laws and practices. It must be noted that requiring to follow common international standards does not mean that their laws and practices must be the same.

Fifth, about the institutional arrangements: The Labor Chapter of U.S.–Korea FTA requires the establishment of the Labor Affairs Council, which is comprised of appropriate senior officials from the labor ministry and other appropriate agencies or ministries of each Party "to oversee the implementation of this Chapter, including activities of the Labor Cooperation Mechanism established under Article 19.6" and at each meeting of the Council, to "include a session in which members of the Council have an opportunity to meet with the public to discuss matters related to the implementation of this Chapter" (Article 19.5.2).

Sixth, whether labor protection is mandatory: The Labor Chapter of U.S.–Korea FTA imposes legal obligations on both Parties to the agreement. So it is not merely a soft expectation. The Parties are legally obliged to implement the rules in this Labor Chapter. But it should also be borne in mind that the possible waiver and derogation have made the obligation softer, because only when a violation of the obligation that results in affecting bilateral trade would such violation be considered as

breaching the obligation.

Seventh, concerning the dispute settlement mechanisms available for the disputes arising from labor protection, there are two aspects of dispute resolutions under the Labor Chapter: The first aspect is about the domestic procedures which need to be made available for private parties. Under the Labor Chapter, Parties to the agreement are also required to ensure that persons with recognized interests under their law have appropriate access to tribunals for the enforcement of their labor law and that the related proceedings are fair, equitable, and transparent (Article 19.4). This is to ensure that the private parties' labor rights will be effectively protected under domestic laws.

The other aspect is about the bilateral procedures for the Parties to resolve their disputes. Under the Labor Chapter of the U.S.–Korea FTA, a Party may request consultations with the other Party regarding any matter arising under this Chapter by delivering a written request to the contact point of the other Party and the Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter (Articles 19.7.1 and 19.7.2). If the consultations fail to resolve the matter, either Party may request that the Labor Affairs Council be convened to consider the matter by delivering a written request to the contact point of the other Party.

D. TPP's Improvement in Labor Rights Protection

The TPP also has a "Labor" Chapter (i.e., Chapter 19) that includes many elements of labor protection. Three of them are considered to be different from previous methods of protection and are important enhancements in the protection of workers' rights.[16]

First, the TPP requires its parties to adopt and maintain statutes, regulations, and practices under the following rights as stated in the ILO Declaration: freedom of association and effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.[17] The scope of requirements is similar to those in the U.S.–Korea FTA in regard to the provision that the elimination of employment and occupational discriminations is required. But what is improved in the TPP is the requirement of all parties to "adopt and maintain statutes and regulations,

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[16] Steve Charnovitz, *An Appraisal of the Labor Chapter of the Trans-Pacific Partnership: Remarks Submitted to the Committee on Ways and Means Democrats*, COMM. ON WAYS & MEANS (2016), https://democrats-waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Labor%20Forum%20Remarks%20-%20Steve%20Charnovitz.pdf.

[17] Trans-Pacific Partnership, art. 19.3.1, Feb. 4, 2016, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."[18]

Second, the TPP requires its parties not to waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations: (a) implementing the labor rights; or (b) implementing the labor rights provisions, if the waiver or derogation would weaken or reduce adherence to a labor right in a special trade or customs area, such as an export processing zone or foreign trade zone, in the respective parties' territories, in a manner affecting trade or investment between the parties.[19] The non-derogation requirement is stricter than that provided in the U.S.–Korea FTA in that, unlike the U.S.–Korea FTA, the non-derogation requirement applies to the labor protection without regard to whether the derogation is adopted "in a manner affecting trade or investment between the Parties." This provision further de-links bilateral trade and labor protection so as to separately and independently require TPP parties to provide labor protection, whether or not it affects regional trade or investment.

Third, and very importantly, the TPP requires each party to "discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor."[20] This is authorizing and requiring TPP parties to use trade restriction to directly address the products arising from forced or compulsory child labor, although Footnote 6 of the Labor Chapter in the TPP clarifies that "nothing in this Article authorizes a Party to take initiatives that would be inconsistent with its obligations under other provisions of this Agreement, the WTO Agreement or other international trade agreement."

Fourth, and even more importantly, there are three bilateral consistency plans concluded between the United States on the one hand and three other individual participating countries of the TPP on the other. The first one is the *Malaysia—United States Labor Consistency Plan*, which requires Malaysia to ensure that trade unions have a right to judicial review of administrative decisions regarding their registration, suspension, cancellation of registration, and determinations of strike illegality, among other things. The second one is the *Brunei Darussalam—United States Labor Consistency Plan*, which requires Brunei Darussalam to undertake legal reforms to clarify that unlawful activities refers only to serious breaches of law; to amend relevant laws to ensure that workers' organizations have adequate protection from acts of interference by

[18] *Id.* art. 19.3.2.
[19] *Id.* art. 19.4.
[20] *Id.* art. 19.6.

employers and public authorities; and to ensure that workers enjoy adequate remedies for all acts of anti-union discrimination in respect of their employment, among other things. The third one is the *United States—Vietnam Plan for Enhancement of Trade and Labor Relations*, which requires legal reforms by Viet Nam to ensure workers the right to freely form and join a labor union of their choosing, to ensure labor unions the autonomy to administer their affairs, and to ensure the rights-based strikes, among other things.

These consistency plans are more than merely "plans". They actually include tailor-made substantive provisions, which contain obligations assumed by these three countries that specifically concern their respective practices, which had been considered by the United States' previous administration as not being in line with the international standards of protecting labor rights. This aspect is particularly important in showing that the United States under its previous administration was actually taking a leading role in ensuring its trading counterparts to actually meet the international standards of labor protection. As will be indicated below again, the Trump Administration's withdrawal from the TPP can be considered as a setback with regard to the apparent improvement of labor protections in this most recently negotiated FTA of the TPP.

IV. IMPLICATION OF THE "AMERICAN FIRST" POLICY IN THE PROMOTION OF HUMAN RIGHTS

A. Will Labor/Human Rights Provisions Still Be in the FTAs and Still Play the Same Role Under the "America First" Policy?

One can draw a preliminary conclusion from the above discussions that although protecting certain human rights (especially labor rights) is mainly connected with the correction of uneven competitive positions between the United States and its trading partners concerning the costs arising from and associated with the strictness of protection of labor rights, it is also true that protections of labor rights are increasingly included with a lower extent of connection with the competitive positions between the United States and its counterparts. This trend is more obviously reflected in the recent FTAs concluded by the United States.

Although it is not absolutely clear whether the labor chapter will still be included in future FTAs concluded under the Trump Administration's "America first" policy, it seems there is no apparent reason that it will give up the inclusion of a labor chapter in its future FTAs. This is because traditionally, the labor chapters and labor provisions are linked with the competitive positions between the United States and its trading partners. Such linkage should be in line with the "America first" policy in that

correcting the competitive positions between the American producers and foreign producers in their production costs will help the competition of American products. However, it must be noted that it might not be the interest of the Trump Administration to de-link the labor rights protection with bilateral trade (if the related FTA is bilateral) or regional trade (if the related FTA is regional) through making labor protection requirement a separate and independent obligation, such as the labor protection requirements in the U.S.–Korea FTA's labor chapter and the TPP. If this situation holds true, it could be considered as a setback for human rights protection through FTAs.

In other words, the labor rights provisions in the future FTAs concluded by the new Administration might not play exactly the same role as those played by the recent FTAs concluded by the previous administrations.

Also, as mentioned above, the TPP has a more advanced set of labor protection provisions. The Trump Administration's withdrawal from the TPP has a symbolic implication that the greater labor protection requirements might not be promoted as a genuine policy. This seems to indicate that the human rights protection situations in other countries are of no concern of the United States. If this is the case, then the United States will lose its leading role in promoting the global protection of labor rights and the enhancement of human values.

B. Whether There Will Be an Overall Retreat from Leading Human Rights Promotion Through International Trade?

The Trump Administration's overall FTA policy remains unclear. However, it is apparent that the Administration does not favor plurilateral FTAs. Hence President Trump withdrew from the plurilateral TPP. Although he has not adopted an actual step to undermine the NAFTA and the U.S.–Korea FTA, the Administration has already started renegotiating these agreements with the purpose of reducing trade deficits with the United States' trading partners.[21] The Administration also warned the possibility of withdrawal from the agreements if negotiations were not satisfactory to the United States. Hence, President Trump is not quite friendly to the current FTAs concluded by the previous administration

[21] See the following news report concerning the NAFTA renegotiation: Kimberly Amadeo, *Would Trump Dump NAFTA?*, BALANCE (Aug. 22, 2017), https://www.thebalance.com/donald-trump-nafta-4111368; see the following news reports concerning the U.S.–Korea FTA renegotiation: Hyong-ki Park , *US Formally Demands FTA Renegotiation*, KOREA TIMES (July 13, 2017, 17:14), http://www.koreatimes.co.kr/www/biz/2017/07/488_232959.html; Kanga Kong & Andrew Mayeda, *South Korea Rejects U.S. Request to Revise Trade Agreement*, BLOOMBERG POL. (Aug. 22, 2017, 11:15 AM), https://www.bloomberg.com/news/articles/2017-08-22/south-korea-u-s-start-talks-on-revising-horrible-trade-deal.

either.

Although there have no reports about the United States' intention to modify the labor chapters in the respective FTAs, the general tendency of being not friendly or even hostile to FTAs creates an impression that the promotion of human rights or labor rights protection through FTAs does not have a meaningful position in the mind of the current Administration.

The enthusiastic position about modifying the existing FTAs and non-enthusiastic position about pursuing the protection of labor rights and other human rights are by-products of the "America first" policy. The negative implications include that there will be no super power policing the labor rights protection through international trade or through trade agreements either at a bilateral, regional or multilateral level, and that people are not to unrealistically expect that labor protection will be actively enhanced by the United States through trade agreements and hence promoters of human rights will have to be on their own in enhancing human rights (or labor rights) protection.

V. CONCLUDING REMARKS

The positive aspect of the current situation is that the Trump Administration has not declared that it will give up the linkage between trade and human rights (or labor rights) protection or even separate labor rights protection in the FTA from bilateral trade (if it concerns a bilateral FTA) or regional trade (if it concerns a regional FTA). But the "America first" policy has negative implications such as the general impression that the Administration is not fond of existing FTAs and its unenthusiastic attitude toward promoting the protection of labor rights or human rights through FTAs.

This paper argues that the "America first" policy is not as devastating as one might think for the promotion of labor or human rights protection as long as it is properly perceived. In fact, the policy and the human rights promotion can co-exist. The core trade issue under the "America first" policy that needs to be addressed is the trade deficits under the respective FTAs. Although the trade deficits might not be purely created by these FTAs, it is the right of the United States and its trading partners to decide whether and how to modify their FTAs to address trade deficit issues. The requirement by the United States to modify the FTAs is one thing. Whether or not bilateral trade deficits will actually be reduced is another. But these do not conflict with the possibility that the United States is still promoting human rights or labor rights protections in the FTAs. If the United States can make it clear that its position of promoting human rights and labor rights protection through its FTAs and its GSP has not been changed under the "America first" policy, it could help its position in justifying

renegotiating its agreements with its trading partners. On the other hand, if the impression that the United States is giving up its leadership in promoting human rights and labor rights protection through trade measures and agreements is continued, the moral justification of its policy in renegotiating the trade agreements would be further weakened. The author is neither suggesting nor commenting the legal justification of renegotiation, because legally speaking the United States has its obligations to honor the rights and obligations under a treaty, unless a renegotiation is based on a procedure provided in the treaty. What the author does suggest is that showing leadership in enhancing the protection of certain fundamental human values would morally support a policy that the United States is promoting. It is therefore paramount for the United States to cleanse the negative impression of its withdrawal from leading the promotion of human rights protection.

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