

## ARTICLE

# EVOLUTION OF THE CHINESE LABOR PROBLEM IN TRADE AND INVESTMENT AGREEMENTS: NOTIONAL GAP AND NORMATIVE NECESSITY FOR ACCESSION TO CPTPP

Lizhen Zheng\*

### ABSTRACT

*China's perspective on labor regulation has impeded its integration into the global market. Although evidence indicates an attempt to assimilate to the dominant global markets' perspectives, major challenges in labor exist. This article will assess the manner and likelihood that China will overcome these challenges to join critical trade agreements and partnerships, with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") as the latest analytical sample. The main issue is how China can prove its compliance with CPTPP labor provisions rather than bargaining over the division of relevant rights or obligations. China's linkage efforts with free trade agreements and bilateral investment treaties since 2005 have used some initial normative labor elements, such as the "not lowering requirement," the "effective domestic enforcement," and the use of a "panel of experts in inter-governmental labor disputes settlement" for negotiation. However, critical divergences on the interpretation of freedom of association, effective recognition of collective bargaining, and the right to strike, are predicted to dominate the accession negotiation in labor topic. Further, these are ideas that are rooted in notional gaps that have formed for years from the dynamic interaction between China and external parties under the framework of the International Labor Organization ("ILO"), the World Trade Organization ("WTO"), and*

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\* The author is an associate professor of international labor law, Law School of Fujian Normal University, China; Visiting professor of ILR, Cornell University, USA between 2018-2019. This article is a phased achievement of Research Project No. 17 BFX217 and Research Project No. TZH2022-12.

*trade and investment agreements. These gaps occurred through the difference in viewing the freedom of association, the effective recognition of collective bargaining, and the right to strike as “politically sensitive issues [versus] trade-related social issues”, “internal affairs [versus] international labor cooperation” or “priority of domestic regulation [versus] with C87 and C98 as the minimum basis of international legitimacy for trade cooperation.” Based on these challenges, critical points for China’s accession negotiation in labor topics as an Aspirant Economy of CPTPP lie in whether the implementation of required provisions will be before or after accession, and a possible choice of compliance strategies that emulate the Vietnamese mode or Mexican mode. Recognizing that the final result is up to the complicated compromise and consensus between China and the eleven original Signatories of CPTPP, it is an opportunity for the accession negotiation to act as a lever to push forward China’s bottom-up labor law reform.*

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### I. INTRODUCTION

Twenty years after China's entry into the WTO, the world saw that the second largest economy had many issues of disputed labor protection. As of the end of 2021, China's working population of 746,520,000 was the largest in the world and produced 18.5% of the world's GDP.<sup>1</sup> Accordingly, the external conception of China's labor problems have gradually shifted from a problem of human rights to social dumping.<sup>2</sup> There is a great divergence between China's conception of its labor law problems and the external view, especially from China's developed trade partners, such as the

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1. *China's Share of Global GDP in 2022*, WORLD ECONOMIES, <https://www.worldeconomics.com/Share-of-Global-GDP/China.aspx> [https://perma.cc/Z7CX-3JRD] (last visited Mar. 31, 2023); see *Number of Employed People in China from 2012 to 2022*, STATISTA, <https://www.statista.com/statistics/251380/number-of-employed-persons-in-china> [https://perma.cc/65X2-KKQ6] (last visited Mar. 31, 2023).

2. See generally Robin Emmott & Michel Rose, *At EU Summit, Macron Pleads for Limits to Foreign Takeovers*, REUTERS (June 22, 2017), <https://www.reuters.com/article/us-eu-summit-macron/at-eu-summit-macron-pleads-for-limits-to-foreign-takeovers-idUSKBN19D2HY> [https://perma.cc/QAZ9-HFH2]; see also Stephen S. Golub, *Are International Labor Standards Needed to Prevent Social Dumping?*, 34 FIN. & DEV. 20, 23 (1997).

United States and European Union. This divergence has made labor one of the most contentious topics in China's economic cooperation with the European Union and United States. China's application to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP")<sup>3</sup> is a sign that China would like to change its opposition to labor violations and the connected trade sanctions, and that China may attempt to understand more of its developed trade partners' labor concerns. This is especially true with the United States, which has linkage preference regarding trade sanctions.<sup>4</sup> China's application also indicates that it may start responding to comments from contracting parties and welcoming engagement to make its labor law reform consistent with the CPTPP. Therefore, the CPTPP's provisions are a good model for understanding how China would improve its labor protections and potentially prepare for more strict requirements from the European Union and United States in future trade agreement negotiations.

There is a rich collection of legal research on labor provisions in free trade agreements ("FTAs") or bilateral investment treaties ("BITs") globally. However, little research has touched on China's labor law cooperation with FTAs or BITs. The absence of research into China's FTA or BIT practices regarding labor issues becomes more evident when compared with the amount of research on legal issues within commercial topics such as Chinese subsidies for state-owned enterprises and intellectual property.<sup>5</sup>

Professor Ronald C. Brown had earlier noticed China's general weak linkage style in trade and investment agreements and

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3. Kandy Wong, *What is the CPTPP and why is China eager to join?*, SOUTH CHINA MORNING POST (May, 5, 2022), <https://www.scmp.com/economy/china-economy/article/3176487/what-cptpp-and-why-china-eager-join> [<https://perma.cc/6D9B-57WM>].

4. See Jeffrey S. Vogt, *The Evolution of Labor Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership*, 18 J. INT'L ECON. L. 827, 853 (2015).

5. For example, take the relevance of China and CPTPP. As of March 2, 2023, the Heinonline law journal database shows the tracking results of the key words: "CPTPP China state-owned enterprises," "CPTPP China intellectual property," and "CPTPP China labor." There are zero articles on the relevance of CPTPP labor issue and China, but there are at least seven articles touching on the relevance of CPTPP state-owned enterprise issues and China, and at least eight articles touching on the relevance of CPTPP intellectual property issue and China. This shows that labor issue for China's application to accede to CPTPP is greatly neglected, if not completely ignored.

highlighted the necessity of strict modern labor provisions in China's Belt and Road Initiative and China-EU BIT negotiation.<sup>6</sup> Professors Alan Hyde and Myriam Oehri have reflected on how to involve China in global labor regulations and the valued the role of bilateral labor cooperation agreements in China's acceptance of FTA and BIT conventions.<sup>7</sup> But researchers have not explored China's logic beneath its attitude toward global labor regulation. Moreover, the research does not specifically analyze the normative elements in China's FTA or BIT linkage practice.

This Article seeks to help close the gap in the current research by exploring the social dimension affecting China's engagement in economic globalization. Specifically, China's conservative attitudes and practices in terms of the strong linkage between labor standards and FTAs or BITs that contain arbitration and economic sanctions as key elements. This is based on a systematic study of how China's notion has conflicted with the external conceptions dynamically held by the developed world and the International Labor Organization ("ILO"),<sup>8</sup> and the evolution of interactions between these ideologies since 1978, when China first announced its national policy of reform and opening up its economy to the global markets.<sup>9</sup> More critically, this Article aims to track the most recent linkage efforts of China as an updated study. Methodologies of vertical historical analysis and horizontal normative comparison will be applied.

Part II will survey the development of external conceptions towards China's labor law problems with examples of its engagement into economic globalization at different stages, especially after the announcement of national reform and the opening policy in 1978. Part III tracks the evolution of normative labor factors in China's linkage efforts in FTA and BIT initiatives. Both positive and negative normative labor elements will be

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6. See Ronald C. Brown, *EU-China Bit and FTA Enhance Labor Cooperation and Protection*, 4 U. BOLOGNA L. REV. 367, 371 (2019).

7. See generally Alan Hyde, *Getting China into the Game: Bilateral Labor Agreements in the System of Global Labor Rights*, 23 THEORETICAL INQUIRIES IN L. 205 (2022); see generally Myriam Oehri, *Labour Rights Promotion in the Absence of Conditionality? How the EU and the US Engage China and India*, 22 EUR. FOREIGN AFF. REV. 137 (2017).

8. See *infra* Part II.

9. See Mark Preen, *Economic Reform in China: Current Progress and Future Prospects*, CHINA BRIEFING (Apr. 18, 2019), <https://www.china-briefing.com/news/economic-reform-china-opening-up-future-prospects/> [<https://perma.cc/L4UY-FR9D>].

observed. Section IV explores China's social challenges as an aspirant economy of CPTPP, addressing the strong and weak points of the Chinese labor law system compared to the labor requirements of CPTPP. These points are measured through a lens of legislative coverage of core labor standards, and the enforcement of standards via administrative and judicial action, public participation in supervision, and the final remedies of labor arbitration and economic sanctions. Part V envisions the possible path for China in implementing CPTPP labor obligation as an aspirant economy. Additionally, the time requirement as to before accession or after, and the choices of Vietnamese mode or Mexican mode will be discussed as for points of reference.

## *II. EXTERNAL CONCEPTIONS OF CHINESE LABOR ISSUES AND THE CONFLICTS*

Under the rule of the then Republic of China ("ROC") Government from 1912 to 1948, China joined the ILO which was established in 1919 and based on the labor provisions of the Treaty of Versailles' original Constitution.<sup>10</sup> China was one of the founding members of the ILO, and ratified its first ILO labor convention in 1930.<sup>11</sup> China had become more closely connected with the ILO by contributing to the adoption of international labor conventions and ratifying an additional thirteen conventions before 1949.<sup>12</sup> This was when the Communist-led People's Republic of China

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10. See Chen Yifeng, *The International Labor Organization and Labor Governance in China 1919-1949*, in *CHINA AND ILO FUNDAMENTAL PRINCIPLES AND RTS. AT WORK* 15, 29 (Roger Blanpain et al. eds., 2014).

11. See *China ILO cooperation*, INT'L LAB. ORG. (Mar. 2023), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms\\_550919.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_550919.pdf) [https://perma.cc/2Z2G-EGSD]; see also *Ratifications for China*, INT'L LAB. ORG., [https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103404](https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103404) [https://perma.cc/WFM9-RVCG] (last visited March 3, 2023).

12. See *China ILO cooperation*, INT'L LAB. ORG., (Mar. 2023), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms\\_550919.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_550919.pdf); see also *Ratifications for China*, INT'L LAB. ORG., [https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103404](https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103404) [https://perma.cc/WFM9-RVCG] (last visited March 3, 2023). The ROC Government was led by the then Kuomintang/Nationalist Party during this period. In 1949, the ROC Government retreated to Taiwan Island of China, but still took the delegations seats of China in the UN and all related organizations including the ILO until 1971.

(“PRC”) Government was established and formally claimed the representative status of membership in international organizations, including the United Nations (“UN”) and the ILO.<sup>13</sup> There was a disputed cooperation between the “so-called ROC” Government (operating from Taiwan)—the term in various international organizations for the delegation representing China— and the ILO regarding China’s twenty-three ratifications of the ILO conventions from 1949 to 1970.<sup>14</sup> In 1971, the Government of PRC replaced ROC and became the sole legal representative of China in the ILO<sup>15</sup>and, simultaneously, China’s membership in UN was recognized in 1971 with UN General Assembly Resolution 2758.<sup>16</sup> This Article assesses the “Chinese labor issues” against the background of the transnational labor regulation after 1971. Taking the “1989 student demonstrations” and China’s accession to the WTO in 2001 as two nodes, “Chinese labor issues” against the background of transnational labor regulation externally conceived by international organizations or other countries can be classified into three stages: (1) 1949–1988; (2) 1989–2000; and (3) 2001–2023.

#### *A. INTERNALIZATION ISSUES CONCERNING RECOGNIZED INTERNATIONAL LABOR CONVENTIONS (1949–1988)*

After the Government of PRC succeeded the so-called ROC as the sole legal representative of China in the ILO in 1971, the PRC also recognized the fourteen labor conventions that were ratified by the ROC Government between 1919-1949, and denied the twenty three conventions ratified by the so-called ROC Government (Taiwan) during the period of 1949-1970.<sup>17</sup> It was not

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13. *Mao Zedong Declares a New Nation (1949)*, ALPHA HIST., <https://alphahistory.com/chineserevolution/mao-declares-new-nation-1949/> [<https://perma.cc/47LP-VKTH>] (last visited Mar. 3, 2023).

14. This is because the representatives of so-called ROC Government (Taiwan), which was appointed to ILO by its governor Chiang Kai-shek (Jiang Jieshi), was announced to be illegal at the same time that the lawful rights of the PRC Government as the only lawful representatives of Chinese people was restored in the UN with the UN General Assembly Resolution 2758 (XXVI) in 1971. See G.A. Res. 2758 (XXVI) (Oct. 25, 1971).

15. See Wen-Chen Chang, *The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison*, 36 UNIV. N.C. 594, 597-98 (2011).

16. See *id.* at 598.

17. *China Relations with the ILO- Executive China Commission Roundtable on Labor Rights*, at 1, U.N. Doc. A/CN.4/ 215 (Mar. 18, 2002) [hereinafter *China Relations with the ILO*].

until 1983 that the PRC Government began to delegate government representatives to attend the annual International Labor Conference.<sup>18</sup> Further, it was not until 1988 that the Government of the PRC ratified its first international labor convention (i.e., C159 on vocational rehabilitation and employment of disabled persons).<sup>19</sup> From 1978 to 1988, the labor market gradually developed to match the demand of laborers from foreign-investment companies and China's privately-owned enterprises, to the supply of the surplus rural labor force that resulted from increased efficiency in agriculture production after the practice of Household Contract Responsibility System.<sup>20</sup>

During this period, there were very limited interactions between the Chinese economy and the outside world. China only ranked eleventh in GDP globally with a minimal percentage of 1.7275% in 1978.<sup>21</sup> Moreover, China only ranked thirty-eighth in foreign exchange reserves with US\$ 0.17 per capita in 1978.<sup>22</sup> At

18. China was absent from ILO activities between 1971 and 1982 because of some unsolved historical issues such as the arrears of dues by the so-called ROC Government (Taiwan) and its illegal ratifications of international labor convention during the period of 1949-1970. China and ILO kept discussing the unsettled historical issues until in 1980, when both parties reached an initial consensus during Director Francis Blanchard's visit to China. It was not until 1983 that the Government of the PRC began to delegate government representatives to attend the annual International Labor Conference. This was headed by the then Minister of Labor and Personnel Zhao Shouyi and Deputy Minister Li Yunchuan. Ever since then the government of PRC has been actively participating in ILO legislative and technical activities. See Zhang Longping (张龙平), (国际劳工组织与中国百年历史回顾) [The International Labor Organization and China: A Centennial History Review], NAT'L OFF. FOR PHIL. AND SOC. SCI. (June 5, 2019), <http://www.nopss.gov.cn/n1/2019/0605/c373410-31121834.html> [<https://perma.cc/KK2Y-MDFR>]; see also *China's Relation with the International Labor Organization*, P.R.C. MINISTRY FOREIGN REL (Sept. 27, 2003), [https://www.fmprc.gov.cn/eng/wjb\\_663304/zzjg\\_663340/gjs\\_665170/gjzyhy\\_665174/2594\\_665176/2600\\_665188/200309/t20030927\\_598051.html](https://www.fmprc.gov.cn/eng/wjb_663304/zzjg_663340/gjs_665170/gjzyhy_665174/2594_665176/2600_665188/200309/t20030927_598051.html) [<https://perma.cc/W4FN-R5JM>].

19. See *China Relations with The ILO*, *supra* note 17.

20. See Judith Banister & Jeffrey R. Taylor, *China: Surplus Labor and Migration*, 4 *ASIA-PACIFIC POPULATION* J. 3, 8 (1989) (With the shift from collective agriculture to household contracts (1978-1984), the number of farmers in crop production declined by 28 million).

21. 1978 GDP 年世界各国数据 [GDP Data of Countries in the World in 1978], (快易理财网) [EASY MONEY NETWORK], [https://www.kylc.com/stats/global/yearly/g\\_gdp/1978.html](https://www.kylc.com/stats/global/yearly/g_gdp/1978.html) [<https://perma.cc/DF7J-4989>] (last visited Jan. 9, 2023).

22. (统计局：1978年以来我国经济社会发展的巨大变化) [Great Changes in China's Economic and Social Development Since 1978], NAT'L BUREAU STAT.,



that time, China's exportation ability fell behind its importation needs and therefore the income from international trade was negative. Although China had a working population of 559,000,000, who were subject to the strictly planned administration,<sup>23</sup> its global effect was limited at the time. By 1988, China's ranking of GDP in the world increased slightly to tenth,<sup>24</sup> although the percentage of Chinese GDP decreased to 1.6150% of the world total.<sup>25</sup> At the same time, China's foreign exchange reserves were negative in 1985, 1986, and 1988,<sup>26</sup> and its international trade deficit remained and only represented a minimal share of the world trade total.

Against this background, the external conceptions of Chinese labor issues connected to the international labor cooperation were focused on China's internalization of the recognized and newly ratified international labor conventions rather than outward transnational labor cooperation. The ILO resumed the qualification of the PRC Government as a Member of chief industrial importance and with an expectation for China to play a significant role moving forward.<sup>27</sup>

For the PRC Government, the formal recognition of its status as the sole Chinese representative in the ILO was more politically significant than economically and socially important. Therefore, what the PRC valued most was the guarantee from the ILO of its exclusive status in ILO governance. Also, to show its positive attitude toward performing the obligations prescribed in ILO C159

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[http://www.gov.cn/jrzq/2013-11/06/content\\_2522445.htm](http://www.gov.cn/jrzq/2013-11/06/content_2522445.htm) [<https://perma.cc/9STD-SN77>] (last visited Jan. 9, 2023).

23. Abul Rizvi, *China versus USA: The Demographic Dimensions*, INDEP. AUSTL. (Oct. 12, 2021), <https://independentaustralia.net/politics/politics-display/china-versus-usa-the-demographic-dimensions,15617> [<https://perma.cc/2JG9-X3BX>].

24. 1988 GDP 年世界各国数据 [GDP Data of Countries in the World in 1988], KYLC, [https://www.kylc.com/stats/global/yearly/g\\_gdp/1988.html](https://www.kylc.com/stats/global/yearly/g_gdp/1988.html) [<https://perma.cc/SH2C-MYLU>] (last visited Jan. 9, 2023).

25. *See id.*

26. China's foreign exchange reserves had: (1) - \$11.417 billion in 1985; (2) - US\$7.034 billion in 1986; and (3) US \$3.802 billion in 1988. *See* Department of Comprehensive Statistics of National Bureau of Statistics (edited); CHINA STATISTICS PRESS, COMPREHENSIVE STATISTICAL DATA AND MATERIALS ON 50 YEARS OF NEW CHINA. 73 (1999).

27. *See Composition of the Governing Body: Criteria for geographical and country representation within the Governing Body*, ILO 1, 5 (Nov. 2007), [http://ilo.ch/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_084513.pdf](http://ilo.ch/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_084513.pdf) [<https://perma.cc/MLF4-GN5R>].

that bound China starting February 1988, China formulated the “Five-Year Work Program for China’s Disability Affairs” (1988-1992) to promote vocational rehabilitation and employment of disabled persons as a typical means of national social plans.<sup>28</sup> Admittedly, the Chinese national social plan was merely a preliminary step, compared to the key requirements of “universal coverage,” “equality of opportunity and treatment,” and “consultation with the representative organizations of employers and workers” in Convention No. (C159).<sup>29</sup>

In summary, Chinese labor problems aroused little attention from the international labor community before 1989 due to its limited integration to the world economy. Accordingly, no external pressure was imposed on China. But China held a politically vigilant and socially experimental attitude towards international labor cooperation, and had cautiously chosen to ratify C159, which was not politically or domestically controversial, and consistent with China’s priority social development plan.<sup>30</sup>

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28. The program was approved by Chinese State Council for implementation after the joint formulation among the then State Planning Commission of China, the State Education Commission, the Ministry of Civil Affairs, the Ministry of Finance, the Ministry of Labor, the Ministry of Health and the China Disabled Persons’ Federation in September 1988. See *Employment of People with Disabilities: The Impact of Legislation (Asia and the Pacific)*, *China Country Profile*, ILO 1,12-13 (March 2003), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---ifp\\_skills/documents/publication/wcms\\_107858.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_107858.pdf) [<https://perma.cc/UH2Y-QT67>]; 中国残疾人事业五年工作纲要 [Five-Year Work Program for China’s Disability Affairs], 中华人民共和国国务院 [Sup. People’s Ct. Gaz.] 803, 809-19 (promulgated Nov. 25, 1988, effective Dec. 6, 1988), <http://www.gov.cn/gongbao/shuju/1988/gwyb198825.pdf> [<https://perma.cc/8EWT-LGUC>] [hereinafter Five-Year Work Program].

29. This plan was merely a preliminary step by putting forth legislation plans for the protection of disabled people in labor and employment, taxation of welfare enterprises, enrollment of the disabled, special education allowances, welfare relief, and etc. It was not realized until 2008 when the first relevant law, the Disabled Persons Protection Act, was enacted. Even in this long-anticipated Act, only the principles of “the right to work” and that “the state implements a system of proportional employment of disabled persons” are prescribed, without explicit provisions on the key requirements of “equality of opportunity and treatment” and “consultation with the representative organizations of employers and workers” that were required by C159. Compare Five-Year Work Program, *supra* note 28, 813, with Convention on the Rights of Persons with Disabilities, arts. 30, 33, U.N. Doc. A/RES/61/106, (Dec. 30, 2006), and *Vocational Rehabilitation and Employment (Disabled Persons) Convention*, ILO, arts. 4, 5 (June 20, 1983), [https://www.ilo.org/dyn/normlex/fr/?p=NORMLEXPUB:55:0::NO::P55\\_TYPE,P55\\_LAN\\_G,P55\\_DOCUMENT,P55\\_NODE:CON,en,C159,/Document](https://www.ilo.org/dyn/normlex/fr/?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LAN_G,P55_DOCUMENT,P55_NODE:CON,en,C159,/Document) [<https://perma.cc/2LRP-BK6W>].

30. There was a large disabled population with 51.64 million out of 1.11 billion total with disabilities in the first sample survey in 1987 when China formally ratified the C159 of ILO. According to “The First National Sample Survey on Disability” in 1987, the disabled

## B. HUMAN RIGHTS ISSUES (1989–2000)

### 1. IN THE NAME OF FREEDOM OF ASSOCIATION

External conceptions of Chinese labor during this period were initiated by the Chinese student demonstration in 1989, which addressed varied issues of both democracy and human rights, and was later centered on the right to enjoy freedom of association in the early 2000s.<sup>31</sup> The demonstrations saw a mix of labor and labor-related issues, such as the so-claimed suppression of union leaders who had participated in the student demonstrations, as well as the so-claimed denial of freedom of association and collective bargaining in interest-based labor disputes arising from the privatization of publicly-owned enterprises and the bankruptcy or restructuring of publicly-owned enterprises.<sup>32</sup> Five complaints were brought against China by the ILO's Committee on Freedom of Association ("CFA") between 1989 and 2000, with only two or three years between the complaints.<sup>33</sup> Case No. 1500 discussed the student demonstrations of 1989 where the PRC Government claimed that the worker organization was not formed to fight for workers' rights but for political reasons.<sup>34</sup>

Labor issues in all five complaints were embedded in human rights to the CFA's eyes, which were typically narrated as a "violation of trade union rights."<sup>35</sup> For example, it was written in

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population was 60 million, accounting for 4.89 percent of the total population. See Xu Lan, The National Sample Survey on Disability, DEP'T POPULATION AND EMP. NAT'L BUREAU STAT. CHINA, <https://unstats.un.org/unsd/demographic-social/meetings/2016/bangkok—disability-measurement-and-statistics/Session-7/China.pdf> [https://perma.cc/T5RT-A9DZ] (last visited Mar. 31, 2023).

31. Lei Guang, *Elusive Democracy: Conceptual change and the Chinese democracy movement, 1978-79 to 1989*, 22 *Modern China* 417, 438-39 (1996)

32. See *id.*

33. *Freedom of association cases*, ILO, <https://www.ilo.org/dyn/normlex/en/f?p=1000:20060::FIND:NO::> [https://perma.cc/MZU6-KP6L] (last visited April, 20, 2023).

34. See International Confederation of Free Trade Unions [ICFTU], Complaint against the Government of People's Republic of China presented by International Confederation of Free Trade Unions [ICFTU]: 268th Report (Case No. 1500), ¶¶ 687, 689 [hereinafter ILO Complaint Case No.1500, Report 268].

35. See generally ICFTU, Complaint against the Government of People's Republic of China presented by ICFTU: 286th Report (Case No. 1652)[hereinafter ILO Complaint Case No.1652, Report 286]; ICFTU, Complaint against the Government of People's Republic of China presented by ICFTU: 304th Report (Case No. 1819) [hereinafter ILO Complaint Case No.1819, Report 304]; ICFTU, Complaint against the Government of People's Republic of

one complaint that “many provisions of the Trade Union Act adopted in April 1992 are contrary to the ILO’s fundamental principles concerning the right of workers without distinction whatsoever to form and join organizations of their own choosing without previous authorization and the right of trade unions to establish their constitutions, organize their activities, and formulate their programmes.”<sup>36</sup> In another, “[t]he Committee urges the Government to guarantee and respect the rights of seafarers to form trade unions of their choice and to affiliate with organizations freely chosen by them, including directly with an international organization if they so wish.”<sup>37</sup> External conceptions of these labor issues were condemnation of the Chinese Government’s failure to protect basic human rights and uphold its commitments to the ILO Constitution regarding freedom of association. All of the complaints were filed by the International Confederation of Free Trade Unions (“ICFTU”). After examining the information from both the ICFTU and the Chinese Government, the CFA strongly recommended that China amend the relevant provisions of the Trade Union Law of 1992 or the Labor Law of 1995.<sup>38</sup> The recommendation stated that the amendment should ensure that overseas seafarers, migrant rural workers in private enterprises, laid-off workers in state-owned enterprises, and those who had lost their jobs due to their employer’s financial woes, shall be free to form trade unions of their own choosing, conduct political activities to promote social objectives, and enjoy freedom of opinion and expression, including publication and distribution of news and information about trade unions.<sup>39</sup>

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China presented by ICFTU: 310th Report (Case No. 1930) [hereinafter ILO Complaint Case No.1930, Report 310]; ICFTU, Complaint against the Government of People’s Republic of China presented by ICFTU: 321th Report (Case No. 2031) [hereinafter ILO Complaint Case No.2031, Report 321].

36. ILO complaint case no.1652, Report 286, *supra* note 35, ¶ 728(a).

37. ILO complaint case no.1819, Report 304, *supra* note 35, ¶ 156.

38. *See* ILO complaint case no.1652, Report 286, *supra* note 35, ¶ 728(a); ILO complaint case no.1930, Report 310, *supra* note 35, ¶¶ 343,344,367; ICFTU, Complaint against the Government of People’s Republic of China presented by ICFTU: 316th Report (Case No. 1930), ¶¶ 362, 378(a) [hereinafter ILO Complaint Case No.1930, Report 316]; ILO complaint case no.2031, Report 321, *supra* note 35, ¶¶165,176(a).

39. *See* ILO complaint case no.1819, Report 304, *supra* note 38, ¶156; ILO complaint case no.1652, Report 286, *supra* note 35, ¶728(a); ILO complaint case no.1930, Report 310, *supra* note 38, ¶¶343, 344, 367; ILO complaint case no.1930, Report 316, ¶¶362, 378(a); ILO complaint case no.2031, Report 321, *supra* note 35, ¶¶165,176(a).

There are two notable aspects of logic regarding the CFA's view of China's labor issues based on the complaints during this period. First, Chinese labor issues had an intentional spillover into the international realm because of its membership in the ILO. As stated in the CFA Interim Report of Case No. 1500, once a State becomes a member of the ILO, it must accept the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, especially those relating to the freedom of association.<sup>40</sup> As a result, allegations concerning violations of trade union rights could not be considered an internal matter and the Committee must examine the submitted complaints.<sup>41</sup> Second, the CFA held that the freedom of association prescribed in the ILO Constitution was an international obligation that bound China as a member. Therefore, China should implement the freedom through domestic labor statutes, regulation, or policy.<sup>42</sup>

In these two aspects of logic, the CFA did not agree with the Chinese Government regarding the priority status of the law of the land in compliance with C87. The CFA Interim Report No 275 of Case No 1500 (China) and Report No 321 of Case No 2031 stressed the priority of the principle of freedom of association in the ILO Constitution.<sup>43</sup> Specifically, workers and their organizations should respect the law of the land in exercising their right to freedom of association, provided that the law of the land does not impair, nor be applied in a manner that impairs the principles of freedom of association.<sup>44</sup>

The Chinese Government held a different conception of the complaints than the CFA, focusing arguments on three aspects. First, the complaints interfered in the internal affairs of China. The decisions and actions of the Chinese Government were based on the fact that the worker organizations were established illegally

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40. See ICFTU, Complaint against the Government of People's Republic of China presented by ICFTU: 275th Report (Case No. 1500) [hereinafter ILO Complaint Case No.1500, Report 275].

41. *Id.*

42. *Id.*

43. See ILO Report No. 275, ILO complaint case no. 1500, ¶ 351; ILO Report No. 321, ILO complaint case No. 2031, ¶ 166, 176(a)

44. See ILO Report No. 275, ILO complaint case no.1500, ¶ 351; ILO Report No. 321, ILO complaint case no.2031, at ¶ 166, 176(a).

because of inconsistencies with the Trade Union Act.<sup>45</sup> Second, the activities of the so-called worker organizations were illegal because of their suspected political intention and violation against state security.<sup>46</sup> Third, the sovereignty right of the Chinese Government to deal with its social and political issues were fully supported in Article 8 of C87 because the latter expressly provided that workers, employers, and their respective organizations should respect the law of the land in exercising rights of freedom of association.<sup>47</sup> Through these arguments, the Chinese Government conveyed to the CFA that the standard of living, the fundamental rights of workers, and their working conditions had all improved considerably in concert with considerable progress in the development of democracy and legislation in China since 1978.<sup>48</sup> Furthermore, the Chinese Government argued to the CFA that unexpected problems were inevitable given the country's level of economic development and that the social security system was in a transitional phase, as it was still being developed despite the enormous efforts that the government had undertaken.<sup>49</sup> Following the Chinese Government's logic, over politicization of their labor problem had caused the external negative conception of Chinese labor issues as violations of basic human rights and the basic labor right of freedom of association.

## 2. IN THE NAME OF "SWEATSHOPS"

Chinese enterprises, especially private enterprises, have gradually integrated into the global supply chain since the national policy of reform and opening in 1978, but they began to encounter "sweatshop" accusations by western non-governmental organizations ("NGOs") in the 1980s.<sup>50</sup> The narratives included

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45. See ILO complaint case no.1500, Report 268, *supra* note 34, ¶688; ILO complaint case no.1930, Report 310, *supra* note 35, ¶331.

46. See ILO complaint case no.1500, Report 268, *supra* note 34, ¶688; ILO complaint case no.1930, Report 310, *supra* note 35, ¶331; ILO complaint case no.2031, Report 321, *supra* note 35, ¶160.

47. See ILO complaint case no.2031, Report 321, *supra* note 35, ¶159.

48. See ILO complaint case no.1652, Report 268, *supra* note 35, ¶693; ILO complaint case no.1819, Report 304, *supra* note 35, ¶¶139, 147; ILO complaint case no.1930, Report 310, *supra* note 35, ¶324; ILO complaint case no.2031, Report 321, *supra* note 35, ¶57.

49. See ILO complaint case No. 2031, Report 321, *supra* note 35, ¶157.

50. See *Sweatshops in China*, WAR ON WANT (Oct. 12, 2009), <https://waronwant.org/news-analysis/sweatshops-china> [https://perma.cc/U6WU-WZJE]; Kathy Chu & Bob Davis, *China, Levi Strauss and the Long-Simmering Battle Over*

claims of freedom of association violations, collective bargaining violations, forced labor, child labor, discrimination, unacceptable minimum wages, long hours of work, and occupational safety.<sup>51</sup> Sweatshop issues were delivered in the discourse of basic human rights under the combined frameworks of the Universal Declaration of Human Rights, the Covenant on Economic, Social, and Cultural Rights, and eight conventions that were subsequently listed as fundamental labor conventions in the ILO Declaration of 1998.<sup>52</sup> Accordingly, the matter was labeled as a human rights issue.<sup>53</sup>

Western media and NGOs drew attention to the issue which drove a sizeable number of multinational companies to require Chinese suppliers in the sectors of clothing, textile, footwear and toys to correct the violations of labor rights through corporate codes of conduct, which became the mainstream means of corporate social responsibility (“CSR”) in China.<sup>54</sup> For example, in 1993 Levi Strauss announced that China would be excluded from the country catalog of its purchase.<sup>55</sup> In 1994, in response to criticism over Chinese labor problems, the Clinton Administration required all American multinational companies with Chinese suppliers or investors to formulate corporate codes of conduct on labor issues.<sup>56</sup> At the same time, some European multinational companies such as C&A and Pentland Group announced similar

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*Labor Rights*, WALL ST. J. (Nov. 23, 2015), <https://www.wsj.com/articles/BL-CJB-28173> [<https://perma.cc/TB4A-6Q76>].

51. See Chu & Davis, *supra* note 50.

52. See *Conventions and Recommendations*, ILO, <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm> [<https://perma.cc/3FTT-YUFQ>] (last visited Apr. 20 2023); See Debra Cohen Maryanov, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 LEWIS & CLARK L. REV. 397, 448 (2010); Gare Smith & Dan Feldman, *Company Codes of Conduct And International Standards: An Analytical Comparison*, WORLD BANK 11, 18-23, 29 (Oct. 2003).

53. See Maryanov, *supra* note 52; See Smith & Feldman, *supra* note 52.

54. See Katie Quan, *China and The American Anti-Sweatshop Movement*, CHINA RTS. FORUM, 62-63 (2003), [https://laborcenter.berkeley.edu/pdf/2003/china\\_american.pdf](https://laborcenter.berkeley.edu/pdf/2003/china_american.pdf) [<https://perma.cc/3MUY-E9M7>].

55. See David J. Doorey, *The Transparent Supply Chain: from Resistance to Implementation at Nike and Levi-Strauss*, 103 J. BUS. ETHICS 587, 596 (2011).

56. See David E. Sanger, *Clinton to Urge a Rights Code For Businesses Dealing Abroad*, N.Y. TIMES (Mar. 27, 1995), <https://www.nytimes.com/1995/03/27/business/clinton-to-urge-a-rights-code-for-businesses-dealing-abroad.html> [<https://perma.cc/F34W-V2V6>].

codes of conduct as the American multinationals, targeting the sweatshop issue in China.<sup>57</sup>

Differing from China's response to the external criticisms of the CFA, the Chinese Government did not intervene with official refutations or counter measures against the waves of corporate codes of conduct in the 1980s and 1990s. However, these codes of conduct were criticized by the public propaganda as "blue barriers" that disfavored China's international trade later in 2000s.<sup>58</sup> The Chinese Government gradually began realizing the irreversible trend of social protection requirements in international trade. In 2005, it amended the Company Law to insert Article 5 on corporate social responsibility, so that companies engaged in business activities must: (1) abide by laws and administrative regulations, social and business ethics; (2) be honest and trustworthy; (3) accept the supervision of the government and the public; and (4) assume social responsibilities.<sup>59</sup> This amendment prompted Chinese companies, including state-owned companies, to practice social responsibility, particularly in the traditional export industries of textile and the emerging financial industry.<sup>60</sup> One example is in 2005, the China National Textile and Apparel Industry Association took the lead in publishing the industry codes of conduct based on the "CSC9000T China Social Compliance For Textile & Apparel Industry Principles and Guidelines (2005)".<sup>61</sup>

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57. See *Case Study: Cheaper Through Exploitation?*, INT'L BUS.SOC'Y MGMT 1,2 (Apr. 2006), <http://www.ib-sm.org/CaseC&A.pdf> [<https://perma.cc/RX9-S5XF>]; see also Smith & Feldman, *supra* note 52, at 5, 6, 11.

58. For example, alerts against "blue barrier" that were published by two official news organs of China, China Industrial Economic News and China Gate Times, were reproduced on the official website of the Chinese Ministry of Commerce. See e.g. Yan Qin (晏琴), (警惕"蓝色壁垒", 别落入贸易保护的陷阱) [Be Alert to the "Blue Barrier" and Don't Fall Into the Trap of Trade Protection], CHINA INDUS. ECON. NEWS (Jan. 13, 2010), <http://chinawto.mofcom.gov.cn/article/ap/p/201001/20100106751540.shtml> [<https://perma.cc/5ZHB-ZFPJ>]; see e.g. (警惕"蓝色贸易壁垒"对我国劳动密集型企业的影响) [Be Alert to the Impact of 'Blue Trade Barriers' on The Country's Labor-Intensive Enterprises], CHINA GATE NEWS (Nov. 19, 2015), <http://trb.mofcom.gov.cn/article/zuixindt/201511/20151101171655.shtml> [<https://perma.cc/LKM4-YNT7>].

59. See *Zhonghua Renmin Gongheguo Gongsì Fa* [Company Law of the People's Republic of China], Standing Comm. Nat'l People's Cong., Oct. 27, 2005 (effective Jan. 1, 2006), art. 5 [hereinafter 2005 PRC Company Law].

60. See May Tan-Mullins and Peter S. Hofman, *The Shaping of Chinese Corporate Social Responsibility*, 43 J. OF CURRENT CHINESE AFF. 7-8 (2014).

61. See *CSC9000T China Social Compliance For Textile & Apparel Industry Principles and Guidelines (2005)*, CHINA NAT'L TEXTILE & APPAREL COUNCIL (2005).



These currently effective codes of conduct are based on Chinese domestic labor laws and regulations on labor and the relevant human right conventions and labor conventions, The positive response by Chinese suppliers to foreign corporate codes of conduct could also be observed from the fact that quite a number of Chinese companies have accepted the Fair Labor Association (“FLA”) codes of conduct of the UN Global Compact.<sup>62</sup> Even domestically listed enterprises were prompted to practice corporate codes of conduct.<sup>63</sup> In 2006, the Shenzhen Stock Exchange promulgated the “Guidelines for Social Responsibility of Listed Companies,” which required listed companies to abide by business ethics in addition to the requirements of the law to protect the legitimate rights and interests of consumers, and to protect the health and safety of workers in their business operations.<sup>64</sup> The Guidelines are still effective and binding on all the listed companies, including foreign-invested enterprises in China.<sup>65</sup> In general, China did not show antagonism against the

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<http://www.csc9000.org.cn/d/file/p/2023/02-03/876e38a82f9021c6444d422517f4eeca.pdf> [https://perma.cc/M4L7-526P].

62. As of March 2023, three Chinese suppliers, such as Kingdom, joined the FLA as suppliers. See *Participating Suppliers*, FAIR LAB., [https://www.fairlabor.org/members/suppliers/?location=cn&member\\_type=fla-accredited%7Cparticipating-company%7Cparticipating-supplier](https://www.fairlabor.org/members/suppliers/?location=cn&member_type=fla-accredited%7Cparticipating-company%7Cparticipating-supplier) [https://perma.cc/NK7X-HL8A] (last visited Mar. 27, 2023); 703 Chinese suppliers participate in the UN Global Compact. See *Who’s Involved*, U.N., [https://www.unglobalcompact.org/what-is-gc/participants/search?page=3&search%5Bcountries%5D%5B%5D=38&search%5Bkeywords%5D=&search%5Bper\\_page%5D=10&search%5Bsort\\_direction%5D=asc&search%5Bsort\\_field%5D=&utf8=%E2%9C%93](https://www.unglobalcompact.org/what-is-gc/participants/search?page=3&search%5Bcountries%5D%5B%5D=38&search%5Bkeywords%5D=&search%5Bper_page%5D=10&search%5Bsort_direction%5D=asc&search%5Bsort_field%5D=&utf8=%E2%9C%93) [https://perma.cc/manage/create] (last visited Mar. 27, 2023)..

63. Carlos Noronha, et al., *Corporate Social Responsibility Reporting in China: An Overview and Comparison with Major Trends*, 20 CORPORATE SOC. RESPONSIBILITY AND ENV’T MGMT, 29, 32 (2013).

64. Jia Wei, *Shenzhen Stock Exchange issued the “Guidelines for Social Responsibility of Listed Companies”*, ECON. DAILY (Sep., 26, 2006), [http://www.gov.cn/banshi/2006-09/26/content\\_399213.htm](http://www.gov.cn/banshi/2006-09/26/content_399213.htm) [https://perma.cc/5YAC-ZQ58].

65. The Guidelines remain influential through integration into the social responsibility chapter of “Shenzhen Stock Exchange Listed Companies Self-Regulatory Guidelines No. 1—Standardized Operation of Main Board Listed Companies” (2022), as of January 2023. See generally 深圳证券交易所上市公司自律监管指引 第1号——主板上市公司规范运作 [Shenzhen Stock Exchange Listed Companies Self-Regulatory Guidelines No. 1—Standardized Operation of Main Board Listed Companies], SHENZHEN STOCK EXCH. (2022),

<http://docs.static.szse.cn/www/lawrules/rule/stock/supervision/mb/W020220107718977234246.pdf> [https://perma.cc/ZL35-MD2F].

external criticism over the Chinese labor issues that were in the name of human rights. During the waves of CSR in the 1980s, 1990s, and early 2000s, China recognized human rights as an issue of market discipline, and accordingly, had managed to respond actively with promotional legislation that placed self-regulation of labor by companies at the center.

*C. THE ISSUES OF SOCIAL DUMPING/UNFAIR TRADE (2001– 2023)*

The human rights discourse regarding the “Chinese labor issues” continued into the first twenty years of the twenty-first century against the backdrop of transnational labor regulation, but the intervals became much longer. There was a greater time gap between the sixth and seventh complaint, filed on March 27, 2002, and February 15, 2016, the seventh case is still in process as of May 3, 2023.<sup>66</sup> Since the two recent complaints centered on interest-based labor disputes, without the influence of political demonstrations, the Chinese Government has been less politically vigilant and has been focusing on the technical legal issues, with efforts to clarify that its action against certain individuals was based on their violation of mandatory public law, such as criminal law, instead of denying the freedom of association or collective bargaining.<sup>67</sup> While the CFA has been reiterating similar logic in the previous five complaints against China, China has shown more willingness to carry out investigations and exchange information with the complainant and the CFA.<sup>68</sup> This is an indication that both parties and the CFA have recognized that the denial of freedom of association as a traditional human rights issue would not be solved in a short time, but needs sustainable efforts. Also, negative impact of corporate codes of conduct on Chinese enterprises is seen to be weakened because of the inclusive attitude of the Chinese Government, including active responses from Chinese industries,

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66. See ICFTU, Complaint against the Government of People’s Republic of China presented by ICFTU: 330th Report (Case No. 2189)[hereinafter ILO Complaint Case No.2189, Report 330]; ICFTU, Complaint against the Government of People’s Republic of China presented by ICFTU: 380th Report (Case No. 3184) [hereinafter ILO Complaint Case No.3184, Report 380].

67. See ILO complaint case No. 2189, Report 330, *supra* note 66, ¶435; see generally ILO complaint case No. 3184, Report 380, *supra* note 66.

68. See ILO complaint case No. 2189, Report 330, *supra* note 66, ¶444.

and exporting enterprises since 2005.<sup>69</sup> Therefore, external conception of the “Chinese labor issues” as an “issue of human rights” gradually faded during this period.

However, ever since China’s entry into the WTO, new external conceptions of “Chinese labor issues” have arisen as one of the causes of unfair trade.<sup>70</sup> A giant Chinese labor force was rapidly integrated into labor-intensive industries in the global supply chain with exceptional comparative advantages, but Chinese labor protection, especially the average wage growth rate of Chinese workers, lagged behind its GDP development between 2000 and 2012.<sup>71</sup> The so-called “social dumping” or “unfair trade” discourse was formed, and it is especially reflected under the framework of the WTO multilateral trading system, the FTA regional trade system, and the bilateral investment system.

#### 1. LABOR FACTORS IN THE DETERMINATION OF A NON-MARKET ECONOMY COUNTRY UNDER THE WTO

Although labor standards are not explicitly linked with GATT or WTO, they are implicitly embedded in the treaties’ trade remedy mechanisms of anti-dumping and countervailing by structuring labor factors into determinations of the market economy country.<sup>72</sup> The GATT and WTO are recognized for lowering trade barriers with most-favored nation treatment as its central pillar and contracting parties are presumed to run on the basis of the market economy system in order to maintain fair competition.<sup>73</sup> Therefore, any country that applies to join the WTO or its predecessor, the GATT, needs to accept the review of the foreign trade system as to whether it has functioned within the market

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69. Johan Graafland & Lei Zhang, *Corporate Social Responsibility in China: Implementation & Challenges*, 23 BUS. ETHICS: A EUR. REV. 34, 34 (2014).

70. Lance Compa, *Free Trade, Fair Trade, and the Battle for Labor Rights*, in REKINDLING THE MOVEMENT: LABOR’S QUEST FOR RELEVANCE IN THE 21ST CENTURY 316–17 (Lowell Turner, Harry C. Katz & Richard W. Hurd, eds., 2001).

71. *Wages, Productivity, and Labor Share In China*, ILO 1, 5 (Apr. 2016), [https://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms\\_475254.pdf](https://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms_475254.pdf) [<https://perma.cc/8NTR-Y347>].

72. See Kimberly A. Tracey, *Non-Market Economy Methodology Under US Anti-Dumping Laws: A Protectionist Shield from Chinese Competition*, 15 CURRENTS: INT’L TRADE L. J. 81 (2006); see also *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36092 (June 21, 2011).

73. See Chieh Huang, *Non-Market Economies’ Accessions to the WTO: Evolution of the Approach and Implications for the Organization*, 4 HAGUE J. DIPL. 61, 70–71, (2009).

economic system.<sup>74</sup> As there is no uniform rule for determination of a market economy country, each member has its own standard theoretically, and the European Union and the United States have a clearer and more stable legal criteria on this issue than other WTO members.

Since the 1990s, when China applied to the WTO, the economy has been shifting from a centrally planned economy to a market economic system; this required China to restrict itself in the accession negotiation, including a commitment to a fifteen year “non-market economy status” in determining comparable prices for subsidies and dumping.<sup>75</sup> This is why the “surrogate country standard” was used in determinations of dumping and subsidy margins, which led to a higher retaliation tariff imposed on China than the original commitments of tariff concession.<sup>76</sup> Today, China understands that its market economy transformation is not fully completed, but China insists that it is being unfairly discriminated against in anti-dumping and countervailing as the fifteen year transition expired in December 2016.<sup>77</sup> Contrary to China’s self-proclaiming, both the United States and European Union do not think the lapse of the fifteen year transition period is equal to the invalidity of the determination of “non-market economy” and the inapplicability of “surrogate country standard” in anti-dumping and countervailing cases. Rather than resting determinations on the passage of time, both economies prefer to base the application of “surrogate country standard” on whether China is currently a “non-market economy country” in regard to anti-dumping and countervailing.

Linkage between labor standards and determinations of a “non-market economy” have long been applied by the United States and European Union before December 2016, but labor content has been even more emphasized after 2016. Both the United States and European Union have been taking the situation of “deviation” from the so-called liberal market economic

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74. *See id.* at 73.

75. World Trade Organization, Accession of the People’s Republic of China: Decision of November 1, 2001, WTO Doc. WT/L/432, at 9 (Nov. 23, 2001).

76. *See Foreign Market Access Report: 2005 of the Ministry of Commerce People’s Republic of China*, P.R.C. MINISTRY COM. 1, 127–29 (2005), <http://images.mofcom.gov.cn/trb/table/2005en.pdf> [<https://perma.cc/BXX5-WBHQ>].

77. *China’s Status as a Nonmarket Economy (NME)*, CONG. RSCH. SERV. (Jan. 10, 2019), <https://sgp.fas.org/crs/row/IF10385.pdf> [<https://perma.cc/AD6K-Y8L7>].

principles as “non-market economic conditions” or “trade distortion.” For example, according to Article 771(18)(B) of the US Tariff Act of 1930, when judging whether a country constitutes a non-market economy condition for anti-dumping and countervailing, the Department of Commerce needs to consider six factors, the second of which is the extent to which wage rates in the foreign country are determined by free bargaining between labor and management.<sup>78</sup> As one of the necessary conditions, if a foreign country’s labor factor is determined to be inconsistent with Article 771(18)(B), it may lead to the conclusion of non-market economy status for the country in anti-dumping and countervailing.<sup>79</sup> The European Union shows similar concerns to that of the United States but with different expressions. In the EU Regulations on anti-dumping or countervailing, there is a consistent consideration of significant state interference in labor costs in the determination of a non-market economy country.<sup>80</sup>

Both the United States and the European Union issued increased labor content in the determination of a nonmarket economy to China. This was after their most recent determination on December 11, 2016, the date China believed was the deadline for the application of “surrogate country standard”.<sup>81</sup> For instance, the United States’ Department of Commerce’s International Trade Administration issued a Memorandum on October 26, 2017 on China’s Status as a non-market economy.<sup>82</sup> The Memorandum systematically concluded that there were still significant institutional constraints on the extent to which wage rates were determined through free bargaining between labor and

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78. See Tariff Act of 1930, Title VII, §771(18)(B) (codified at 19 U.S.C. §1671-1677 2000).

79. See *id.*

80. See, e.g., Commission Regulation 905/98, art. 1 (c), 1998 O.J. (L 128) (EC); Commission Regulation 597/2009, art. 1, 2009 O.J. (L 188) (EC); Commission Regulation 2016/1036, art.2.7, 2016 O.J. (L 176) (EU).

81. Ben Blanchard & David Lawder, *China Launches WTO Complaint Against U.S., EU Over Dumping Rules*, REUTERS (Dec. 12, 2016), <https://www.reuters.com/article/us-china-trade-wto/china-launches-wto-complaint-against-u-s-eu-over-dumping-rules-idUSKBN14112M> [<https://perma.cc/S73X-FA44>].

82. See Memorandum from Leah Wils-Owens, Office of Pol’y, Enforcement & Compliance, to Gary Taverman, Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations, China’s Status as a Non-Market Economy, Inv. No. A-570-053 (U.S. Dep’t of Com. Oct. 26, 2017) [hereinafter Memorandum, China’s Status as a Non-Market Economy].

management in China.<sup>83</sup> Aspects of the Chinese labor market that were assessed, including China's legal and institutional framework for labor, constraints on wage formation including the setting of the minimum wage, wage arrears, collective bargaining on wage, labor costs, and labor protection brought about by restrictions on labor mobility (Hukou).<sup>84</sup>

Similarly, the European Union has strengthened the examination of labor law issues in trade distortion determination concerning anti-dumping and countervailing measures with "wage costs being distorted" as one of the criteria to determine significant distortion in regulation.<sup>85</sup> It is shown in the preamble of EU Regulation 2017/2321 that relevant international standards, including core conventions of the ILO, should be taken into account where appropriate when assessing the existence of significant distortions.<sup>86</sup> The European Union has conducted its first country report on significant distortion in the economy of China,<sup>87</sup> where labor is listed as one of the five key production factors to assess trade distortion. In the elaboration of the labor factors, the European Union has systematically examined China's labor law and its enforcement via administration and judicial action, centering on the wage level, wage formation mechanism, and the flow of labor factors, with a conclusion that significant distortion exists in the labor factors of production.<sup>88</sup> This means that one of the external conceptions is that "Chinese labor issues" are one of the causes of unfair competition in bilateral economic relationship between the United States and European Union, which was strengthened after the expiration of the fifteen year transition period in 2016.

By contrast, China believes that it should be waived from the application of "surrogate country standard" as the fifteen year transition lapsed by November 10, 2016, based on point 15(d) of Part 1 in the Protocol on the Accession of the People's Republic of

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83. *See id.*

84. *See id.*

85. Commission Regulation 2017/2321, pmb. ¶ 3, 2017 O.J. (L 338) (EU).

86. *See id.* pmb. ¶ 4.

87. *See generally* Eur. Commission (EC), Corrigendum to Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defense Investigations, at 327-45 SWD (2017) 483 final/2 (Dec. 20, 2017) [hereinafter Commission Staff Working Document].

88. *See id.*

China, which reads “[i]n any event, the provisions of subparagraph (a)(ii) (surrogate country standard) shall expire 15 years after the date of accession.”<sup>89</sup> Bearing this understanding, China sued the European Union and the United States against the application of “surrogate country standard.” As of January 2023, there is no definite award from the WTO dispute settlement body, with DS515 (the U.S. as the defendant) still being in consultation, and with DS516 (the EU as the defendant) being withdrawn because of the lapse of authority for a panel.<sup>90</sup> This means that the conceptual conflict between China and the European Union, and the United States respectively, will continue and Chinese industries are still subject to the “surrogate country standard.”

## 2. LABOR PROTECTION IN FTA AND BIT

Negative effects on the social dimensions by trade and investment liberalization was noticed in 1940s when fair labor standards were included in Article 7 of Chapter 2 in the aborted Havana Charter draft that planned to establish the International Trade Organization.<sup>91</sup> The linkage between labor standard and international trade systems continued in the GATT and WTO negotiation rounds until a basic consensus on the dis-linkage in the Singapore Ministerial Declaration in 1996.<sup>92</sup> Due to the failure of explicit and general linkage between labor standards, and the GATT and WTO trading system, some of the developed countries that had favored the linkage during the GATT negotiation rounds, such as the United States, Canada, Iceland, Finland, Sweden, New Zealand, and Japan, have shifted the efforts to FTA or BIT for the linkage after the GATT turned into the WTO.<sup>93</sup> Some other developed countries or economic unions like Switzerland, the European Union and even some developing country like Chile,<sup>94</sup>

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89. World Trade Organization, *supra* note 75, at 9.

90. See Mirek Tobiaš Hošman, *China's NME status at the WTO: Analysis of the Debate*, 20 J. OF INT'L TRADE L. AND POL'Y 4-6 (2021).

91. See generally U.N. Conference on Trade and Employment, Havana Charter for the International Trade Organization, U.N. Doc. E/Conf.2/78 (Apr. 1948) [hereinafter 1948 Havana Charter].

92. See generally World Trade Organization, Ministerial Declaration of December 13, 1996, WTO Doc. WT/MIN(96)/DEC (1996).

93. See BOB HEPPLE, *LABOUR LAWS AND GLOBAL TRADE* 130 (2005).

94. Chile practices FTA linkage not only with developed countries such as the United States, Canada, but also with developing countries such as Turkey in 2011, China in 2013,

have joined the FTA linkage practice. Despite of some phenomena of protectionism ever since the 1970s, it can't be denied that a growing interdependence among countries and the internationalization of production play a role in the mainstream.<sup>95</sup> Hence, China's labor issues against the backdrop of its great economic volume and immense work force have become a trade or investment topic when negotiating FTAs or BITs with trade partners.

By the end of 2022, China has four effective FTAs in place with New Zealand, Switzerland, Iceland and Chile respectively.<sup>96</sup> Also, China negotiated two BITs with the United States in 2008 and the European Union in 2013, and both BITs explicitly included labor topics before they were suspended in 2017 and 2021 respectively.<sup>97</sup> Both BIT initiatives had sticky negotiations on labor topics because of considerable disconnects.<sup>98</sup> Only an initial consensus was reached on the labor provisions in the China-European Union BIT/Comprehensive Agreement on Investment ("CAI") draft in December 2020, and there were more conflicting opinions on labor in the United States and China's BIT negotiation.<sup>99</sup> China did not initiate the labor discussions in the

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and Thailand in 2015. For texts of relevant Chilean FTAs, see *Regional Trade Agreements Database*, WTO, <http://rtais.wto.org/UI/publicPreDefRepByCountry.aspx> [https://perma.cc/V8TQ-KBQH].

95. As of January 2023, China has concluded twenty-four FTAs and 145 BITs. See *China FTA Network*, P.R.C. MINISTRY COM., <http://fta.mofcom.gov.cn/english/index.shtml> [https://perma.cc/RHJ4-LTF4] (last visited Mar. 8, 2023); *Investment Policy Hub*, U.N. CONF. ON TRADE AND DEV., <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> [https://perma.cc/X8DA-QGZ7] (last visited Mar. 8, 2023).

96. See *China FTA Network*, *supra* note 95.

97. See *The US-China Bilateral Investment Treaty (BIT)*, PUB. CITIZEN, <https://www.citizen.org/wp-content/uploads/china-bit-fact-sheet.pdf> [https://perma.cc/7XFR-7K9V] (last visited Mar. 8, 2023); see also Henry Ridgwell, *EU Suspends China Trade Deal as Tensions Grow Over Xinjiang, Hong Kong*, VOA NEWS (May 10, 2021), [https://www.voanews.com/a/east-asia-pacific\\_voa-news-china\\_eu-suspends-china-trade-deal-tensions-grow-over-xinjiang-hong-kong/6205673.html](https://www.voanews.com/a/east-asia-pacific_voa-news-china_eu-suspends-china-trade-deal-tensions-grow-over-xinjiang-hong-kong/6205673.html) [https://perma.cc/W5PG-FRT7].

98. See *infra*, Appendix Table 1.

99. See *Policy Considerations for Negotiating a US-China Bilateral Investment Treaty*, US-CHINA ECON. & SEC. REV. COMM'N 1, 8, 10 (Aug. 1, 2016), [https://www.uscc.gov/sites/default/files/Research/Staff%20Report\\_Policy%20Considerations%20for%20Negotiating%20a%20U.S.-China%20Bilateral%20Investment%20Treaty080116.pdf](https://www.uscc.gov/sites/default/files/Research/Staff%20Report_Policy%20Considerations%20for%20Negotiating%20a%20U.S.-China%20Bilateral%20Investment%20Treaty080116.pdf) [https://perma.cc/7VFX-TFZ7].



negotiations of the four effective FTAs, nor that of the two suspended BIT negotiation.<sup>100</sup>

China made great efforts to soften the labor provisions in all these negotiations in order to leave enough policy space for domestic labor regulation or labor reform. One example was China and the European Union's initial negotiations on labor topics, before it was suspended in 2021. The draft on the Section on Investment and Sustainable Development was much simpler than the Trade and Sustainable Development Chapters in other FTAs concluded by the European Union after 2009.<sup>101</sup> The China-EU BIT/CAI draft, published in December 2020, did not contain a definition of labor law.<sup>102</sup> While social justice has been an important facet of labor negotiations in existing FTAs and unsuccessful BIT initiatives, concerns over unfair competition have increased the emphasis on protections afforded by domestic labor laws. This is demonstrated by the draft on the Section of Investment and Sustainable Development in the suspended China-EU BIT/CAI, which contains more dense normative labor factors than the four effective FTA linkage practices of China, including a non-lowering requirement, effective enforcement, and a reaffirmation that violations of fundamental labor rights cannot create a legitimate comparative advantage.<sup>103</sup> Moreover, labor standards cannot be used for protectionist purposes.<sup>104</sup> Therefore, it is logical that China's ascension of labor protections in these four FTAs and the two suspended BITs are mainly driven by external concerns from economic partners, who bear the notion that unfair competition arises from lower domestic labor protection and weaker labor enforcement.

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100. *See id.* at 8; Commission Staff Working Document, *supra* note 87.

101. The former draft had missed a critical obligation of the latter as to respect, promote and realize recognized core labor standards that are embodied in the fundamental ILO conventions, or consistent with their commitments in ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998.

102. *See generally* Gisela Grieger, *EU-China Comprehensive Agreement on Investment: Levelling the Playing Field with China*, MEMBERS' RSCH. SERV. (Mar. 2021), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/679103/EPRS\\_BRI\(2021\)679103\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/679103/EPRS_BRI(2021)679103_EN.pdf) [HTTPS://PERMA.CC/66FA-SFA2].

103. *See id.*; *see infra*, Appendix Table 1.

104. *See* Investment Negotiation, EU-China (draft, 2020), § IV. subsec. 3 art. 2 [hereinafter China-EU BIT/CAI Draft].

More challenging is China's accession negotiations into the CPTPP. China has formally applied to accede to CPTPP.<sup>105</sup> The labor provisions of the CPTPP have substantially taken after the labor provisions of its predecessor, the United States-led TPP,<sup>106</sup> which are much stricter than China's current Trade agreements.<sup>107</sup> Concerns have arisen from the fact that China has never accepted the arbitration procedure and economic sanctions as the final procedural and substantial implementation guarantee in any FTA linkage practice.<sup>108</sup> One of main intentions of the Obama Administration in the TPP labor provisions was to redress the unfair advantage arising from lower worker standards outside of the United States.<sup>109</sup> So, the deep objective of preventing unfair competition arising from labor is likely to remain in the CPTPP. Based on the CPTPP accession process, aspirant economies must (1) demonstrate the means by which they will comply with all of the existing rules contained in the CPTPP; and (2) undertake to deliver the highest standard of market access.<sup>110</sup> Some contracting parties such as Australia and Japan have reacted to China's application to join the CTPP with the explicit expectations that China be ready to meet the high standards, including labor standards, of this agreement before the accession.<sup>111</sup> Also,

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105. See Rahul Nath Choudhury, *Will China Reshape the Global Trade Landscape by Joining CPTPP?*, India Council of World Aff. (Oct. 12, 2021) [https://www.icwa.in/show\\_content.php?lang=1&level=3&ls\\_id=6465&lid=4447](https://www.icwa.in/show_content.php?lang=1&level=3&ls_id=6465&lid=4447) [<https://perma.cc/YU39-FDA6>].

106. See James McBride et al., *What's Next for the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN RELATIONS (Sep. 20, 2021), <https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tp> [<https://perma.cc/2A39-M8J6>].

107. The former is stricter than the latter in terms of legislative coverage, restriction on discretion in allocation of enforcement resources, private action and domestic procedure guarantee, CSR promotion, public submission/communication, arbitral panel as the last resort, and economic sanction as the final implementation guarantee, see Appendix Table 1.

108. See Choudhury, *supra* note 105.

109. See *The Trans-Pacific Partnership: What You Need to Know about President Obama's Trade Agreement*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/issues/economy/trade> [<https://perma.cc/VT42-DKWB>] (last visited Jan. 19, 2023).

110. See Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Accession Process, Annex to CPTPP/COM/2019/D002, ¶ 3.3, 5.1(b).

111. See *Quote-Unquote: China's Pitch for CPTPP Membership*, INSIDE US TRADE (Sept. 23, 2021), <https://insidetrade.com/trade/quote-unquote-china's-pitch-cptpp-membership> [<https://perma.cc/APB2-9VN7>].

stakeholders in the CPTPP's contracting nations, such as New Zealand, have raised concerns over the inconsistency between China's domestic labor law and the requirements of the CPTPP.<sup>112</sup> These concerns further demonstrates that the rhetoric of labor protections in fair competition are important facets of China's integration into Asia Pacific Region market.

Internally, China has gradually become aware of the external concerns over its labor issues in terms of fair trade. China recognized the much stricter labor provisions in the TPP/CPTPP than its previous FTA linkage practice, but it had held an open attitude toward the TPP, the precedent of the CPTPP since the early negotiation stages. China continuously tracked the progress of labor negotiation and assessed their impact before announcing its formal application for accession in September 2021.<sup>113</sup> Although China's primary goal of ratifying C29 and C105 on forced labor in August 2022 was to meet the requirement of the suspended China-EU BIT/CAI,<sup>114</sup> with an effort to push the approval process forward, the ratification shows China's intention to fulfil its commitment to respect, promote, and realize the basic labor standards of the ILO, which is also a focus of the CPTPP labor provisions. These ratifications also indicate China's recognition of the challenges arising from the strong linkage between trade sanctions and labor violations in their formal application for accession.

C29 and C105 are forced labor provisions, which the ILO enacted in 1930 and 1957 respectively.<sup>115</sup> China's formal acceptance of them in 2022 shows a shift away from an antagonist attitude toward the external concerns about its labor problems causing unfair trade advantages. It also signals China's willingness to engage with trade partners about how to internalize the CPTPP labor obligations, as the China-EU BIT negotiations incentivized the ratifications. China has gradually understood the significant

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112. See generally *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Accessions: Consultation Outcomes*, N.Z. FOREIGN AFF. & TRADE 13 (June 2021).

113. See Joseph Boris & Li Jiabao, *Door to TPP is Open for China, Says US*, CHINA DAILY (Mar. 22, 2013), [https://usa.chinadaily.com.cn/business/2013-03/22/content\\_16332233.htm](https://usa.chinadaily.com.cn/business/2013-03/22/content_16332233.htm) [<https://perma.cc/5HN9-YG73>].

114. See *Investment Negotiation, EU-China (draft, 2020)*, § IV subsec. 3 art. 4.2.

115. See ILO, *The Forced Labour Convention, Convention No. 29 (1930)*; ILO, *The Abolition of Forced Labour Convention, Convention No. 105 (1957)*.

role of labor standards in future international economic cooperation, rather than its previous view of external concerns of its labor issues as an interfere in China's internal affairs.

### III. EVOLUTION OF NORMATIVE FACTORS IN CHINA'S FTA AND BIT LINKAGE EFFORTS

The gradual shift of China's self-conception of its labor issues from being solely politically significant, to being socially and economically important, to its integration into economic globalization has paved the way for China's FTA and BIT linkage efforts after its entry into the WTO. As of January 25, 2023, China has twenty effective FTAs,<sup>116</sup> four of which contain labor standards. However, all the Chinese FTA linkage practices are quite vague in normative factors. For example, the China-Iceland FTA only expresses an intent to further communication and cooperation on labor issues in Article 96.<sup>117</sup> Also, most of the cooperation agreements, including those about labor, are signed between sub-State entities. Only the Memorandum of Understanding ("MOU") on Labor Cooperation of the China-New Zealand FTA are signed by the two central governments.<sup>118</sup>

In addition to FTA linkage practices, China also negotiated labor provisions in BITs with the European Union and the United States respectively.<sup>119</sup> Labor provisions in the Section of Investment and Sustainable Development under the China-European Union BIT/CAI draft were agreed on and announced on December 30, 2020 by the EU Commission, together with other parts of the BIT initiative.<sup>120</sup> No text on labor provisions in the

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116. See China FTA Network, *supra* note 95.

117. See Free Trade Agreement between the Government of Iceland and the Peoples Republic of China IC-PRC, Apr. 30, 2013, WT/TPR/G/361 .

118. See *e.g.* Memorandum of Understanding on Labour Cooperation NZ-CH, Apr. 6, 2022, WT/TPR/S/426.

119. See US-CHINA ECON. & SEC. REV. COMM'N, *supra* note 99, at 8; see also C. Fred Bergsten, et al., *Towards a US-China Investment Treaty*, PETERSON INST. FOR INT'L ECON. 1, 3 (Feb. 2015), <https://www.piie.com/publications/piie-briefings/toward-us-china-investment-treaty> [<https://perma.cc/4NEZ-WL49>]; Joe Zhang, *The EU-China Investment Deal is a Missed Opportunity for Sustainable Development*, CHINA DIALOGUE (March 9, 2021) <https://chinadialogue.net/en/business/the-eu-china-investment-deal-is-a-missed-opportunity-for-sustainable-development/>.

120. See *EU and China Announce an "In Principle" Investment Agreement*, INT'L INST. FOR SUSTAINABLE DEV. (Mar. 23, 2021), <https://www.iisd.org/itn/en/2021/03/23/eu->

China-US BIT were announced before it was suspended in 2017 by the Trump Administration.<sup>121</sup> But it was reported by the Peterson Institute for International Economics that the United States had negotiated the BIT with China based on the 2012 US Model Bilateral Investment Treaty.<sup>122</sup> Negotiating labor provisions that were consistent with labor provisions in 2012 US Model Bilateral Investment Treaty was a precondition for ratification by the US Congress.<sup>123</sup> It was a great social challenge for China to wholly accept labor provisions based on these requirements because some of the requirements, such as freedom of association and collective bargaining, were much stronger than Chinese labor law.<sup>124</sup> Moreover, China had only accepted limited linkage practices in FTAs that imposed no substantial pressure to significant reform of domestic labor law prior to the China-US BIT negotiation.<sup>125</sup>

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and-china-announce-an-in-principle-investment-agreement/ [https://perma.cc/WVR9-NFEC].

121. See PUB. CITIZEN, *supra* note, 97.

122. See US-CHINA ECON. & SEC. REV. COMM'N, *supra* note 99, at 8; See C. Fred Bergsten, et al., *supra* note 119.

123. This is because a two-thirds vote of the Senate is required for the approval of BITs by the United States. See PETERSON INST. FOR INT'L ECON., *supra* note 119, at 4.

124. For example, the Chinese Trade Union Law has set up a unitary trade union system led by the All-China Federation of Trade Unions, and independent grassroots trade unions are not allowed to establish outside the system. Also, strikes are strictly limited in collective bargaining. Comparatively, labor provisions in the 2012 U.S. Model Bilateral Investment Treaty are based on the US practice in allowing the establishment of independent unions, and strikes and other concerted activities in order to ensure effective collective bargaining. Based on the difference, Chinese Government is concerned with the political motivations behind the practice of freedom of association or collective bargaining in the CFA cases against it. Particular responses that shows the political sensitivity in view of the Chinese Government are exemplified in so-replied concerns of rebellion. See ILO complaint case no.1500, Report 268, *supra* note 34, ¶687; ILO complaint case no.1652, Report 286, *supra* note 35, ¶702 (discussing subversion); ILO complaint case no.1930, Report 310, *supra* note 35, ¶332 (discussing state security); ILO complaint case no.2189, Report 330, *supra* note 66, ¶433(discussing public security); ILO complaint case no.2189, Report 330, *supra* note 66, ¶433 (discussing public order); ICFTU, Complaint against the Government of People's Republic of China presented by ICFTU: 380th Report (Case No. 3184), ¶222 [hereinafter ILO Complaint Case No.3184, Report 380]; ILO complaint case no.2189, Report 330, *supra* note 66, ¶433 (discussing terrorism and sabotage).

125. That was why it was reported in 2016 by International Business, who was under the auspices of the Chinese Ministry of Commerce, that negotiation on labor topic was sticky, and would be a challenge for China to further domestic labor reform if China concluded the BIT with the United States, or join into other possible FTA initiatives such as the then TPP and TTIP negotiations, even though China had announced both parties had successfully made several rounds of exchange on negative lists under the China -US BIT

Based on the above observations, labor provisions in China's FTAs with Chile, New Zealand, Iceland, and Switzerland, and the labor provisions in the China-EU BIT/CAI draft and in the US proposal in the China-US BIT initiative, are used to understand the evolution of labor normative factors in China's linkage efforts of FTA and BIT before it applied to join the CPTPP. With reference to the general normative structure of CPTPP labor provisions. Appendix Table 1 observes the evolution of these normative labor factors from the lens of legislative coverage, domestic enforcement, public supervision, third-party dispute settlement, and legal remedy, Appendix Table 1 shows four positive observations on the evolution of normative labor factors in China's linkage efforts of FTA and BITs as follows.

First, normative labor elements have gradually increased from nearly zero obligation in the labor MOU under the China-Chile FTA in 2006 to two additional aspects of express obligations on "not lowering requirement" and "effective domestic enforcement" in the labor MOU under the China-New Zealand FTA in 2008 and the Cooperation Agreement On the field of Labor and Employment under the China-Switzerland FTA in 2014. There is one more aspect of express obligations on third-party dispute settlement in the China-EU BIT/CAI draft that both parties had agreed in principle in December 2020.<sup>126</sup> In the 2020 China-EU BIT/CAI draft China planned to accept a neutral third party, known as a "panel of experts," as the final resort for intergovernmental labor disputes for the first time.<sup>127</sup> In general, all of the samples see low precision of labor obligations, the definition of labor law or internationally recognized labor rights are missing in all of China's FTA linkage practices and the 2020 China-EU BIT/CAI draft.<sup>128</sup>

Professor Kenneth W. Abbott and others describe the three "dimensions of legalization," which can be used to assess the labor provisions in China's international agreements and

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negotiation by September 2016. Therefore, art. 13 (i.e., Investment and Labor) in the 2012 U.S. Model Bilateral Investment Treaty could be observed as labor provisions that China could accept at most in its BIT negotiation with the United States, if it could be concluded by both parties.

126. See INT'L INST. FOR SUSTAINABLE DEV., *supra* note 120.

127. See China-EU BIT/CAI Draft, *supra* note 104, art. IV.3.

128. See *generally id.*

negotiations.<sup>129</sup> The dimensions include obligation, precision, and delegation.<sup>130</sup> The dimension of obligation, varies from nonlegal norm to jus cogens. The dimension of precision ranges from vague principle to highly elaborated rules, and the dimension of delegation roams between diplomacy, international court, organizations, and domestic application.<sup>131</sup>

Chinese FTA linkage practices and the 2020 China-EU BIT/CAI draft have limited dimensions of obligation, as there is only effective enforcement in principle, without precise or elaborated discretion in allocation of enforcement resources, and without domestic private action or domestic procedure guarantees.<sup>132</sup> More obviously, Chinese FTA linkage practices and the China-EU BIT/CAI draft lack a dimension of precision without a definition of labor law. Critically, Chinese FTA linkage practices and China-EU BIT/CAI draft have a limited dimension of delegation, investor-state labor disputes and third-party dispute settlement procedures do not delegate a binding effect of the awards or delegate contracting parties to take economic sanctions as the final remedy against intergovernmental labor disputes.<sup>133</sup> Objectively speaking, there are signs of legalization in the evolution of Chinese FTA and BIT linkage efforts, but in its early and immature development, it is soft legalization.

Secondly, in terms the role of labor standard in trade and investment agreements, China has begun to accept the notion of labor standard as a factor that might influence fair economic competition. While iterating prohibitions on trade protectionism by means of labor standard in certain linkage efforts, such as the China-New Zealand MOU on labor cooperation and labor provisions in the China-EU BIT/CAI initiative, China did plan to accept a prohibition against gaining an illegitimate comparative advantage through violations of fundamental principles and rights at work in the 2020 China-EU BIT/CAI draft.<sup>134</sup> This indicates that China began to recognize the economic functions of labor standard

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129. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 405-06 (2000).

130. *See id.*

131. *See id.*

132. *See* China-EU BIT/CAI Draft, *supra* note, 104; *see infra* Appendix Table 1.

133. *See* China-EU BIT/CAI Draft, *supra* note 104, §IV I art.1.1-2.

134. *See* China-EU BIT/CAI Draft, *supra* note 104, §II art. 2.6.

as a way to ensure fair economic competition and planned to respond more actively to the concerns of trade partners.

Thirdly, regarding domestic enforcement, China has accepted detailed provisions on cooperation activities in employment, training, labor inspection policies and social securities, including the means of cooperation.<sup>135</sup> This shows that China is relatively more confident in fulfilling its commitment of effective enforcement of its existing labor law or policy, and meeting the requirements against weakening, lowering, or waiving its domestic enforcement for a purpose of encouraging trade or investment.

Fourthly, relatively speaking, the labor provisions in the China-EU BIT/CAI draft that both parties agreed to in December 2020 was the strictest linkage that China had ever accepted.<sup>136</sup> Not only because it accepted CSR as a discretionary obligation of contracting parties, but also because it included an arbitration procedure that was applied to labor disputes and amicus curiae submissions were allowed in arbitration.<sup>137</sup> Also, the draft of the China-EU BIT/CAI did not exclude mutually agreed compensation as a legal remedy choice, since it allowed a mutually agreed solution to a disagreement at any time.<sup>138</sup> Most noticeably, the China-EU BIT/CAI initiative set a definite and specific obligation for contracting parties to ratify C29 and C105 on forced labor.<sup>139</sup> The provision essentially only bound China because all the EU members have ratified these forced labor conventions.<sup>140</sup> Despite the suspended status of the China-EU BIT/CAI Initiative, China met this requirement to signal a positive attitude towards the resumption of the approval procedure of the BIT initiative.<sup>141</sup>

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135. See, e.g., China-New Zealand FTA NZ-China (2008), arts. 1.3, 1.4; see China-EU BIT/CAI Draft (2020), *supra* note 132, § II arts. 5, 6, 7.

136. See *infra* Appendix Table 1.

137. See China-EU BIT/CAI Draft (2020), *supra* note 104, § IV subsec. 1 art. 2, subsec. 4 art. 3, 6.

138. See China-EU BIT/CAI Draft (2020), *supra*, note 104, § IV subsec. 4 art.2.

139. See China-EU BIT/CAI Draft (2020), *supra*, note 104, § IV subsec. 3 art. 4.

140. See *Proposal for a Ban on Goods Made Using Forced Labour*, EU PARLIAMENT 1, 3 (Sep. 4 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739356/EPRS\\_BRI\(2023\)739356\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739356/EPRS_BRI(2023)739356_EN.pdf) [<https://perma.cc/23D9-8RYA>].

141. See *Q&A: EU-China Comprehensive Agreement on Investment (CAI)*, EUR. COMM'N, [https://ec.europa.eu/commission/presscorner/detail/pt/qanda\\_20\\_2543](https://ec.europa.eu/commission/presscorner/detail/pt/qanda_20_2543) [<https://perma.cc/X46J-6QLD>] (last visited Mar. 8, 2023).



These ratifications were expected to simultaneously serve other purposes for China, such as responding to international accusation of so-called forced labor in the Xin Jiang Province of China.<sup>142</sup>

There are also some obvious weak links in China's FTA and BIT linkage efforts. Five of these are described below. First, in terms of the right to regulate, though China's self-conception, which has evolved since the CFA cases of the 1990s,<sup>143</sup> the sovereignty right to regulate is frequently emphasized in most of China's linkage efforts in negotiation of FTAs or BITs. The China-New Zealand FTA and the draft of China-EU BIT/CAI are two prime examples. China attempts to exclude discretion in allocation of enforcement resources in all its FTA linkage practice and the 2020 China-EU BIT/CAI draft.<sup>144</sup>

Second, the internationally recognized definition of labor law, and the obligation of legislative coverage of core labor standards proclaimed in the 1998 ILO Declaration are excluded from China's FTA linkage efforts and the 2020 China-EU BIT/CAI draft.<sup>145</sup> It is quite unusual for the European Union as all its FTA linkage practices after the Liston Treaty<sup>146</sup> insisted on the legislative coverage of core labor standards.<sup>147</sup> China's self-conception views of freedom of association and collective bargaining as politically sensitive issues speak to its hesitance of linkage to the international definition of labor rights and legislative coverage of the ILO's core labor standards.<sup>148</sup>

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142. See *China Ratifies International Labor Treaties as Scrutiny of Treatment of Ethnic Minorities Mounts*, France 24 (Apr. 20, 2022), <https://www.france24.com/en/asia-pacific/20220420-china-ratifies-international-labour-treaties-as-scrutiny-of-treatment-of-ethnic-minorities-mounts> [<https://perma.cc/3ZDZ-6EE8>].

143. As Part II.C of this Article has mentioned, China's self-conception of labor issues has evolved to be less politically vigilant and more technically focused on legal issues from the first five complained freedom association cases between 1989 and 2000 to the latest two cases between 2001 and 2023. See ILO complaint case No. 2189, Report 330, *supra* note 66, ¶435; see generally ILO complaint case no.3184, Report 380, *supra* note 66.

144. See China-EU BIT/CAI Draft, *supra* note, 104; see *infra* Appendix Table 1.

145. See *infra* Appendix Table 1; see generally China-EU BIT/CAI Draft (2020), *supra* note 104.

146. See generally Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007, O.J. (C 306).

147. See *Proposal for a Ban on Goods Made Using Forced Labour*, EU PARLIAMENT 1, 3 (Sep. 4, 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739356/EPRS\\_BRI\(2023\)739356\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739356/EPRS_BRI(2023)739356_EN.pdf) [<https://perma.cc/23D9-8RYA>].

148. Politically sensitive issues.

Third, the provisions in China's trade agreements that enumerate cooperation and information sharing between parties are largely discretionary. Compared to the limited normative labor factors that have hardly squeezed into the public policy provisions of China's FTA linkage practice and the 2020 China-EU BIT/CAI draft,<sup>149</sup> China has accepted detailed provisions on cooperation activities in employment, training, labor inspection policies and social securities, including the means of cooperation.<sup>150</sup> Such provisions have included exchanges of information and expertise, reciprocal visits of experts and delegations, co-organized seminars, consultations within the framework of multilateral discussions, as well as budget issues.<sup>151</sup> However, cooperation activities shall depend on the budgets available and shall be governed by the laws and regulations applicable in each country.<sup>152</sup> Effectively, the cooperative activities are largely subject to the broad discretion of contracting parties, specifically, the financial resources and the political will to do so.

Fourth, negotiations were deadlocked when a trade partner required China to accept a clear definition of labor law and ensure definitive protections for investors. China encountered stern negotiations with the United States, who insisted on China's acceptance of the legislative coverage of core labor standards in the 1998 ILO Declaration, and the mechanism of investor-state arbitration on investment-related labor disputes as the final safeguard for investors in the China-US BIT initiative.<sup>153</sup> Admittedly, the legislative coverage of core labor standards in the 1998 ILO Declaration was encountered in prior negotiations of FTAs or BITs with parties other than the United States. It appeared in the negotiation of the China-EU BIT/CAI, but China successfully excluded the factor when the draft text of the BIT was agreed principally by both parties in December 2020.<sup>154</sup> However, China

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149. See *infra* Appendix Table 1.

150. See Labour Cooperation NZ-China, *supra*, note 118.

151. See Memorandum of Understanding on Labor and Social Security, China-Chile, art. 2 (2012); Labour Cooperation NZ-China, *supra*, note 118, § IV art. 96.

152. See Memorandum of Understanding on Labor and Social Security, China-Chile, art. 3.2 (2012); Labour Cooperation NZ-China, *supra*, note 118, § IV subsec. 4 art. 3.

153. See US-CHINA ECON. & SEC. REV. COMM'N, *supra* note 99, at 8, 10.

154. The argument is based on three aspects of observations. First, FTA linkage practice of the European Union after the effectiveness of the Lisbon Treaty (no matter the FTAs with Colombia and Peru, and Central America before the negotiation of EU-China

could not evade a clear requirement on the definition of labor law from the United States, including China's self-conceived politically sensitive issues of freedom of association and collective bargaining. The United States insisted a definition of labor law was a necessary element in the 2012 US Model Bilateral Investment Treaty to ensure approval by the United States Congress. Similar conflicts of conception laid in the United States requirement of a mechanism of investor-state arbitration on investment-related labor disputes, which China has never encountered in previous FTA or BIT linkage efforts. In a nutshell, stark divergences existed until the China-US BIT initiative was put on hold by the Trump Administration and maintains the status quo as of February 2023 in the Biden Administration.<sup>155</sup>

Fifth, even though the China-US BIT negotiation before 2017 had imposed severe social challenges on China by referencing the 2012 US Model Bilateral Investment Treaty as the basis of negotiations for labor provisions, these labor requirements were the tip of the iceberg compared to the labor requirements of CPTPP. In the negotiation of FTA linkage practice, the 2020 China-EU BIT/CAI draft, and the China-US BIT initiative, China has never agreed to similar key factors in the CPTPP labor provisions, such as effective enforcement through administrative and judicial action, public submission to initiate the dispute settlement, an arbitration as a dispute settlement guarantee, and economic sanction as the final remedy guarantee for inter-governmental labor dispute. The CPTPP labor provisions are heavily influenced by the incorporation of the United States led TPP.<sup>156</sup> Accordingly,

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BIT/CAI in 2013, or FTAs with Moldova, Georgia, Ukraine, Korea, Japan, Vietnam, Canada, UK after 2013) contains a legislative obligation of the parties in respecting, promoting, and realizing recognized core labor standards that are embodied in the fundamental ILO conventions, or consistent with their commitments in ILO Declaration of 1998 in the Chapter of Trade and Sustainable Development. Second, the European Union did list the factor of "prohibition on encouragement of foreign direct investment be relaxing core labor standards to encourage" as one of the operational objectives in EU-China BIT/CAI negotiation. Third, such normative factor is not included in the EU-China BIT/CAI draft (2020). See Initial appraisal of a European Commission Impact Assessment: European Commission proposal on EU-China Investment Relation,, EUR. PARLIAMENT, IMPA, 185, SWD (2013) of art. 4.3 ¶ 23 (Dec. 2013); Labour Cooperation NZ-China, *supra*, note 118, § IV.

155. See *The US-China Bilateral Investment Treaty (BIT)*, *supra* note 97.

156. See James McBride et al., *What's Next for the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN RELATIONS (Sep. 20, 2021), <https://www.cfr.org/background/what-trans-pacific-partnership-tpp> [<https://perma.cc/2A39-M8J6>].

CPTPP labor provisions are similar to the US FTA linkage practice and contain the key aspects stated above. These factors did not appear in the negotiation of China-US BIT initiative because there were dual tracks of linkage under the framework of FTA and BITs respectively before the Bipartisan Trade Deal of May 10, 2007.<sup>157</sup>

Between 1994 and 2007, the United States linked labor standard with its FTAs unexceptionally.<sup>158</sup> Labor factors such as elaborated effective enforcement through administrative and judicial action, public submission as one of the means to initiate the dispute settlement procedure, and arbitration and economic sanction as the final dispute settlement guarantee and legal remedy for inter-governmental labor dispute, were included in all of the United States' FTAs concluded in this period.<sup>159</sup> The United States had only linked labor standards with two BITs, the 2006 Uruguay BIT and 2012 Rwanda BIT, out of all of its forty-one effective BITs, and the relevant labor factors BITs were relatively much weaker.<sup>160</sup> To sum up, China has never experienced negotiations regarding most of the key normative factors in the CPTPP, other than the principles of "not-lowering requirement" and "not fail to effective enforcement" in its negotiations of labor provisions in FTAs or BIT initiatives. China had managed to exclude a definition of labor law from the China-2020 EU BIT/CAI draft that had been expected by the European Union to contain the legislative obligation of freedom of association and effective recognition of collective bargaining.<sup>161</sup>

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157. See Vid Prislán & Ruben Zandvliet, *Labor Provisions in International Investment Agreements: Prospects for Sustainable Development*, (Grotius Ctr. Working Paper 2013/003-IE).

158. See generally *Labor Enforcement Issues in U.S. FTAs*, CONG. RSCH. SERV. (Mar. 23, 2023), <https://crsreports.congress.gov/product/pdf/IF/IF10972/7> [<https://perma.cc/HQJ9-F2ZJ>].

159. See *id.*

160. See Bertram Boie, *Employment Sector: Employment Working Paper No. 126*, ILO 1, 10-14, 22-23 (2012), [HTTPS://WWW.ILO.ORG/WCMSP5/GROUPS/PUBLIC/---ED\\_EMP/DOCUMENTS/PUBLICATION/WCMS\\_191245.PDF](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_191245.pdf) [[TTPS://PERMA.CC/T6B5-JQ66](https://perma.cc/T6B5-JQ66)]; *United States of America*, UN CONF. ON TRADE AND DEV.: INV. POLCY HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/223/united-states-of-america> [<https://perma.cc/KSF3-W2CW>] (last visited Apr. 22, 2023).

161. See US-CHINA ECON. & SEC. REV. COMM'N, *supra* note 99, at 8, 10; See Initial appraisal of a European Commission Impact Assessment: European Commission proposal on EU-China Investment Relation, EUR. PARLIAMENT, IMPA, 185, SWD (2013) of art. 4.3 ¶ 23 (Dec. 2013).

China's self-conception of labor law issues resulted in an attitude against cooperation on transnational labor regulation under the background of economic globalization. This attitude has gradually changed to recognition of the necessity of social protection and fair trade as the main objectives of labor provisions in FTAs or BIT initiatives. Even though the shift is mainly driven by external actors- including the ILO, labor communities, labor organizations, and trading partners of both developed and developing countries- it has shown some phasic consensus during the tense and complex conceptional interaction between China and the external actors beneath the negotiation of FTA or BIT initiatives. However, China's linkage efforts in FTA and BIT initiatives are experimental and selective, with an intent to seek as much public space and broad discretion in labor law reform as possible. But, China should recognize that failure to accept strict labor standard in FTAs or BITs has been one of the obstacles that prevents China from deepening economic cooperation with developed trading partners such as the United States and European Union.

#### IV. LABOR CHALLENGES IN CHINA'S ACCESSION TO CPTPP

Different from China's labor provision negotiation in previous FTAs or BIT initiatives, negotiations on accession into the CPTPP have posed greater challenges for China. Not only because the agreement contains much stricter labor obligations, but also because of the difference between the accession and original negotiations. As of January 2023, the CPTPP has entered into force for nine of its eleven contracting parties,<sup>162</sup> and China is the second aspirant economy (right after the United Kingdom) that has notified New Zealand, the CPTPP depositary, of the formal request to accede to the CPTPP.<sup>163</sup> China is still waiting for the CPTPP Commission to make a decision on whether to commence

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162. See *CPTPP: Overview and Issues for Congress*, CONG. RSCH. SRV. 1, 1 (Oct. 17, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF12078> [<https://perma.cc/NLS6-9ZXY>].

163. See *Second-largest Economy's Accession to CPTPP Would Prove Mutually Beneficial: China Daily editorial*, CHINA DAILY (Apr. 24, 2023), <https://www.chinadaily.com.cn/a/202304/24/WS64467511a310b6054facf7e0.html> [<https://perma.cc/NJ3G-5SR4>].

negotiations.<sup>164</sup> A consensus from all eleven contracting parties is needed for the commencement of the accession process.<sup>165</sup> Singapore supports China's interest into the CPTPP, and optimistically believe that China is able to meet all the CPTPP requirements through accession negotiations.<sup>166</sup>

After China's announcement of formal application for accession to CPTPP on September 16, 2021, it further demonstrated its motive and desire to join the trade bloc via a press conference.<sup>167</sup> Three points of notable information came from the announcement. First, China recognizes that the CPTPP is a high-standard international economic and trade agreement, based on the fact that some of its provisions, such as state-owned enterprises and digital data, are complex and sensitive to its acceptance.<sup>168</sup> But China is open to the high standards of the CPTPP and believes that the standards are consistent with China's efforts towards deepening reform and expanding opening up.<sup>169</sup> Despite the challenges, China views accession to the CPTPP as an opportunity to promote deep domestic reforms that will help boost high-quality development.<sup>170</sup>

Second, China is determined to fully comply with all the existing rules of the CPTPP. Its accession decision is based on comprehensive research and analysis of the CPTPP provisions, which was conducted by the Ministry of Commerce.<sup>171</sup> Third, China

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164. See Hugh Stephens & Jeff Kucharski, *The CPTPP Bids of China and Taiwan: Issues and Implications*, ASIA PAC. FOUND. CANADA (Nov. 15, 2022), <https://www.asiapacific.ca/publication/cptpp-bids-of-china-and-taiwan-issues-and-implication>.

165. See *id.*

166. See PM Lee Hsien Loong's, *Remarks on China's application to the CPTPP*, MINISTRY OF FOREIGN SINGAPORE (Nov. 14 2022) <https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2022/11/20221114-cptpp> [<https://perma.cc/7V9P-25FU>].

167. See 申请加入 CPTPP 是中国新时代扩大对外开放的一个重要举措 [Applying to join the CPTPP is an Important Measure for China to Expand Its Opening Up in the New Era], STATE COUNCIL INFO. OFF. P.R.C. (Mar. 1, 2022), <http://www.scio.gov.cn/xwfbh/xwfbh/wqfbh/47673/47949/zy47953/Document/1721002/1721002.htm> [<https://perma.cc/UKH8-7TC3>].

168. See *id.*

169. See *id.*

170. See *id.*

171. See Zhang Hongpei, *China Has Willingness, Capability to Join CPTPP: Senior Trade Official*, GLOB. TIMES (Apr. 23, 2023), <https://www.globaltimes.cn/page/202304/1289617.shtml> [<https://perma.cc/5UKH-BP6B>].

undertakes to deliver market access that is expected to exceed all existing accession commitments of the contracting parties.<sup>172</sup> The goal is to provide more market access opportunities for the contracting parties of the CPTPP and further comprehensive cooperation in the trade bloc, including the trade of goods and services and investment.<sup>173</sup>

Unlike the original labor negotiation of the CPTPP where original signatories had bargained intensely before a consensus was reached,<sup>174</sup> the CPTPP now has an established criteria for accession negotiations in labor.<sup>175</sup> Therefore, negotiations now focus on how the aspirant economy would comply with the labor obligations according to the CPTPP accession process, China must consult with the original signatories of the CPTPP to obtain the consensus to start the accession procedure.<sup>176</sup> These consultations will include labor topics, China should begin to listen to comments from contracting parties in terms of whether its domestic labor law is consistent with the CPTPP labor provisions, and if not, there will be discussion about reform procedures.<sup>177</sup>

China's positive attitude toward CPTPP compliance in labor topics are not without reason. The CPTPP labor provisions are not the strictest, especially when compared to United States-Mexico-Canada Agreement's ("USCMA") labor provisions.<sup>178</sup> Therefore, it still leaves some latitude for contracting parties in the implementation of required provisions. In this case, there is a need

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172. *See id.*

173. *See id.*

174. *See* Christopher F. Corr et al., *The CPTPP Enters into Force: What Does it Mean for Global Trade?*, WHITE & CASE (Jan. 21, 2019), <https://www.whitecase.com/insight-alert/cptpp-enters-force-what-does-it-mean-global-trade> [https://perma.cc/MX7F-74GS].

175. *See id.*

176. *See* Comprehensive and Progressive Agreement for Tran-Pacific Partnership Accession Process, CPTPP/COM/2019/D002, annex ¶ 2.2 (2019).

177. *See id.*

178. *See* Kimberly Breier et al., *USMCA Labor-related Provisions: An Assessment After 20 Months*, COVINGTON & BURLING LLP (Mar. 30, 2022), <https://www.globalpolicywatch.com/2022/03/usmca-labor-related-provisions-an-assessment-after-20-months/> [https://perma.cc/WQ6N-VV6N] (explaining that the USMCA is the only FTA to require a party (Mexico) to pass legislation recognizing the right of workers to organize and engage in collective bargaining, and through the Rapid response labor mechanisms ("RRM") allows one USMCA Party to petition another to investigate complaints that specific facilities are violating labor right.).

to explore how easy or difficult it is for China to comply with the requirements.

*A. LEGISLATIVE COVERAGE OF CORE LABOR STANDARD (ARTICLE 19.3)*

The CPTPP requires contracting parties to adopt and maintain their statutes and regulations, and practice the four aspects of core labor standards, in accordance to the original 1998 ILO Declaration as well as acceptable conditions of acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.<sup>179</sup> As shown in Part III, China has excluded the legislative coverage of core labor standards and the definition of internationally recognized labor law in all four of its effective FTA linkage practice and the 2020 China-EU BIT/CAI draft.<sup>180</sup> This would be the first time China attempts to accept this obligation.

Regarding the CPTPP reference to the original ILO declaration, the ILO maintains four core standards that would not be difficult for China to accept. These core labor standards are: (1) freedom of association; (2) effective recognition of collective bargaining; (3) effective abolition of forced labor (including compulsory child labor); and (4) elimination of discrimination in employment and occupation.<sup>181</sup> Even weaker legal effect is seen in the legislative obligation of acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, because there is no international document reference; thus, contracting Parties are not obliged to meet the original ILO Declaration (1998). Admittedly, China's domestic labor statutes and regulations are not fully consistent with the five aspects of the core labor standards prescribed in the ten core labor conventions that are listed in the 2022 amendment of the 1998 ILO Declaration. But considering the vague and weak international legal effect of the CPTPP,<sup>182</sup> it will not be difficult for China to argue its compliance in this aspect, since all the five aspects of labor standard in Article

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179. See Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), art. 19.3, Mar. 8, 2018.

180. See *supra*, Part III.

181. See *ILO Welcomes China's Move Towards the Ratification of Two Forced Labour Conventions*, ILO (Apr. 20, 2022).

182. See CPTPP, *supra* note 179.



19.3 of the CPTPP are covered by the Chinese labor law system,<sup>183</sup> even if they are not substantially reviewed.

Critical divergences that exist in the interpretation of core labor standards (e.g., freedom of association, effective recognition of collective bargaining, and the right to strike) between China and developed contracting parties of the CPTPP is predicted to make the consultations for the commencement of the accession process quite uncertain. The CPTPP sets no uniform rule for understanding of its provisions in Article 19.3.<sup>184</sup> Each contracting party has its own understanding according to their unique different development of industrial organization's circumstances.

For example, in China's self-conception, Chinese workers' right to freedom of association is guaranteed by Chinese Labor Law and Chinese Trade Union Law through the system of the Chinese Federation of Trade Unions ("ACFTU").<sup>185</sup> China claimed this understanding in response to the first six complaints filed against it in the CFA.<sup>186</sup> Also, in China's self-understanding, the political and social essence of its trade union system manifests through the unitary nature of the ACFTU, which was shaped by the historical and present context of China as a socialist country.<sup>187</sup> The ACFTU is expected to bridge the Communist Party of China with masses of workers, and it is obliged to represent the interests of employees and safeguard their legitimate rights and interests in accordance with the law.<sup>188</sup> However, all of the developed contracting parties of the CPTPP have independent trade unions, and recognize it as an integral element of a free labor market institution and a critical actor in industrial relationships.<sup>189</sup> Also, most of the developed

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183. See, e.g., LABOR LAW [Lab. L.] 1995 (China); LABOR CONTRACT LAW [LAB. CONT. L.] 2012 (China); TRADE UNION LAW [TRADE UNION L.] 2021 (China); SAFE PRODUCTION LAW [SAFE PROD. L.] 2021 (China), OCCUPATIONAL DISEASE PREVENTION LAW [OCC. DISEASE PREVENTION L.] 2011 (China).

184. See CPTPP, *supra* note 179.

185. See LABOR LAW [Lab. L.] 1995 (China); LABOR CONTRACT LAW [LAB. CONT. L.] 2012 (China); TRADE UNION LAW [TRADE UNION L.] 2021.

186. See reports *supra* note, 42.

187. See ILO complaint case no.1652, Report 286, *supra* note 35, ¶696.

188. See *id.*, TRADE UNION LAW [TRADE UNION L.] 2021 art 2.

189. C87 has been ratified by Canada (1972), Japan (1965) and Australia (1973); C98 has been ratified by New Zealand (2003), Singapore (1965), Canada (2017), Japan (1953), and Australia (1973). See *Ratifications by Country*, ILO, <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11001:0::NO::> [<https://perma.cc/J3N2-V7HU>] (last visited Mar. 8, 2023).

contracting parties of the CPTPP, such as Japan, Australia, and Canada, ratified the ILO convention on freedom of association by the 1970s.<sup>190</sup> Most developed ILO members tend to agree with the judgements of the CFA in the six complaints against China and support the recommendation of the CFA that China's domestic laws shall not impair the principles of freedom of association in ILO Constitution.

Another divergence is in the effective recognition of collective bargaining between China's self-conception and the opinion of the outside world in the previous practice of transnational labor regulation. Chapter III of Chinese Labor Law, Chapter V of Chinese Labor Contract Law (2008), and the Regulation on Collective Contract Provisions (2004) are thought to have laid necessary and basic procedural requirements for collective bargaining on topics including, but not limited to, remuneration, working hours, rest and vacation, occupational safety and health, vocational training, and insurance benefits.

In Chinese collective bargaining, the ACFTU is empowered to take consultation with employers and to conclude collective contracts.<sup>191</sup> The ACFTU claims that its mission includes safeguarding the labor rights and interests of employees, helping improve the coordination mechanism of labor relationship and building a harmonious labor relationship.<sup>192</sup> The local branches of ACFTU are established and administrated in the same way as the administrative division of the governments.<sup>193</sup>

Counter-Parties in collective bargaining can be divided into three types: individual enterprises at enterprise-level, China Enterprise Confederation, and All-China Federation of Industry and Commerce at industrial or regional level respectively.<sup>194</sup> Collective bargaining at the industrial or regional level does happen, but it is not as frequent or comprehensive as the collective bargaining at the enterprise level, because the law limits the industry-level collective bargaining to industries of construction,

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190. *See id.*

191. *See* Ming Wei Liu, *Union Organizing in China: Still a Monolithic Labor Movement?*, 64 *ILR Rev.* 30, 32 (Oct. 2010).

192. *See* TRADE UNION L., *supra* note 185, art. 6

193. *See* Angelina W.K. Yuen-Tsang & Sibin Wang, *Revitalization of social work in China: The Significance of Human Agency in Institutional Transformation and Structural Change*, 1 *China J. Social Work.*, 5, 10 (2008).

194. *See* LAB. CONT. L., *supra* note 185, arts. 52, 53.

mining, and the catering service industry.<sup>195</sup> The law also limits the regional-level collective bargaining to below the county level, which is inferior to province and city levels.<sup>196</sup> There is no definite legal rule to safeguard the right of collective bargaining for Chinese employer associations;<sup>197</sup> instead, both Articles of China Enterprise Confederation and that of the All-China Federation of Industry and Commerce do not view themselves as one party in collective bargaining, but only vaguely state their role as coordinating labor relations.<sup>198</sup> [It purports] The China Enterprise Confederation claims to protect the rights and interests of entrepreneurs.<sup>199</sup> However, there is no legal duty to protect entrepreneurs or represent members in collective bargaining.<sup>200</sup> The China Enterprise Confederation is subject to the supervision of the State-owned Assets Supervision and Administration Commission of the Chinese State Council. The All-China Federation of Industry and Commerce has explicitly proclaimed its dual attributes as a “people’s organization” which is of the political and social essence, as well as a “commercial organization,” which is of the economic essence.<sup>201</sup> In collective bargaining, the role of the competent government, at or above the county level, is to supervise the negotiation, conclusion, and performance of collective labor contracts within their administrative regions, and the government is responsible for reviewing the collective contracts before they become effective.<sup>202</sup>

By doing this, China has built up its own government-dominated top-down collective bargaining model. In the understanding of the Chinese Government, this “top-down” style of collective bargaining suits its current development stage in

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195. *See id.* art. 53.

196. *See id.*

197. *See* LAB. L., *supra* note 185, art. 33; TRADE UNION L., *supra* note 185, art. 6.

198. *See generally* Judith Shuqin Zhu & Chris Nyland, *Chinese Employer Associations, Institutional Complementarity and Countervailing Power*, 31 WORK, EMP. & SOC’Y 301 (Apr. 2017).

199. *See id.* at 296.

200. *See id.*

201. *See* Preamble of the Constitution of the All-China Federation of Industry and Commerce (2017).

202. *See id.* art. 4; Preamble of the Articles of the All-China Federation of Industry and Commerce (2017).

political, economic, and social dimensions, which is evidenced with some initial successful cases, with Collective Bargaining.<sup>203</sup>

However, Chinese collective bargaining has been criticized by external parties. The CFA reports in the complaints filed against China, that the autonomy of the bargaining parties are not provided autonomy and the prior authorization of collective agreements to make an agreement valid might discourage the use of voluntary collective bargaining between employers and workers for the settlement of conditions of employment.<sup>204</sup> Put simply, critics believe that a top-down monolithic government-led union may not act in the interests of the parties when the interests of the “commercial” and the “people” diverge.<sup>205</sup> Failure to meet the requirements of free bargaining between labor and management in the determination of wage rates is one of the reasons why the European Union and the United States have decided to continue the WTO’s determination on China’s “non-market economy” status in anti-dumping and countervailing.<sup>206</sup> Japan, as one of the developed contracting party of the CPTPP, has explicitly joined the United States and European Union in the criteria of a “non-market economy” country.<sup>207</sup> Therefore, the gap between China’s conceptualization of collective bargaining and the conceptualization of collective bargaining by the ILO and by the developed contracting parties of the CPTPP, would make the accession negotiations challenging for China. Another aspect of divergence in the interpretation of Article 19.3 of the CPTPP is on the issue of strikes. It is implied in the core labor standard of freedom of association and recognized by most developed

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203. See generally Chang-Hee Lee et al., *What Sort of Collective Bargaining Is Emerging in China?*, 54 *BRITISH J. EMP. REL'S.* 214 (2014); *Collective Bargaining Nets Honda Workers in Foshan a 611 Yuan Increase in Pay for 2011*, *CHINA LAB. BULL.* (Mar. 7, 2011), <https://clb.org.hk/content/collective-bargaining-nets-honda-workers-foshan-611-yuan-increase-pay-2011> [<https://perma.cc/G7JX-CY47>]; *Environmental, Social and Governance Report*, *JD.COM* 57 (2021).

204. See ILO complaint case no.1930, Report 310, *supra* note 35, ¶¶ 346, 367.

205. Qiu Yang, *ILO Fundamental Conventions and Chinese Labor Law: From a Comparative Perspective*, 2 *U. PA. E. ASIA L. REV.* 18, 23-24 (2006).

206. See Commission Regulation 905/98, 1998 O.J. (L 128) (EC); Commission Regulation 597/2009, 2009 O.J. (L 188) (EC); Commission Regulation 2016/1036, 2016 O.J. (L 176) (EU); Leah Wils-Owen, *China’s Status as a Non-Market Economy*, *US DEPT. COM. INT’L TRADE ADMIN.*, A-570-053 E&C VI: MJH/TB. (Oct. 2017).

207. See Press Release, Off. US Trade Rep., Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union (May 31, 2018).

countries as an effective concerted activity for collective bargaining, although it is not explicitly listed in C87 or C98.<sup>208</sup> In China's perception its domestic labor law is meant to prevent and resolve labor disputes in a manner that establishes a sound and harmonious labor relationship.<sup>209</sup> Hence the antagonist feature of strikes does not best serve this purpose. Essentially, China's hesitation to recognize the right to strike stems from its conception of strikes as a solely political action.

In the opinion of outside actors like the CFA, it is important for Chinese workers and organizations to maintain the right to strike as leverage in potential negotiations to defend their social and economic interests.<sup>210</sup> Basically, the CFA's logic focuses on the economic essence of the right to strike, especially as an concerted action in seeking positive economic interests and benefits for workers, by incentivizing both parties of the labor relationship back into constructive collective bargaining.<sup>211</sup> The CFA's concerns echo the current insufficiency of China's legal remedy for interest-based collective labor disputes. Chinese collective labor disputes are classified as rights-based and interest-based types.<sup>212</sup> However only rights-based labor disputes that are explicitly stipulated by laws and regulations have legal foundation to turn to the Labor Dispute Arbitration Committee or to sue in court. In contrast, interest-based types can only turn to amicable collective bargaining that has no efficient mechanism to resolve deadlocks during the negotiation. In the face of a deadlock in collective bargaining, the law offers no other choice than for both parties to accept a final coordination agreement by the competent government sector of labor and social security.<sup>213</sup>

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208. The right of strike is interpreted to be implied in article 3.1. and article 3.2. of C87 in that workers' organizations shall have the right to organize their activities and to formulate their programmes, and the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof, according to some publications from ILO such as. See e.g. David Tajzman & Karen Curtis, *Freedom of Association: A User's Guide*, ILO 1, 20 (2020).

209. See ILO complaint case no.1930, Report 316, *supra* note 38, ¶351 (showing the committee's requests to be kept informed of development).

210. See *id.* ¶ 348.

211. See TAJZMAN & CURTIS, *supra* note 208, at 25

212. See Stefan Brehm, *Collective Bargaining: New Hope for China's Workers?*, INST. FOR SEC. & DEV. POL'Y 2 (Mar. 31, 2017).

213. See REG. COLLECTIVE CONT. PROVISIONS, arts. 49–54.

The above three aspects of divergence are critical in China's accession negotiation into the CPTPP due to their intentionally recognized "enabling rights."<sup>214</sup> Still, there are other issues under the title of legislative coverage, such as the inadequate coverage of labor protection stemming from the strict definition of "employees," which refers only to those who have a registered and recognized employer within the territory of China as the counter party in the labor relationship.<sup>215</sup> So workers that fall into the informal economy are not eligible for the status of "employee," and thus are excluded from the basic labor protections of the law.

*B. ENFORCEMENT VIA ADMINISTRATIVE & JUDICIAL ACTION*  
*(ART.19.4-ART.19.8)*

As analyzed in Part III, China shows its confidence in fulfilling the principle of the "not-lowering requirement" and "not fail to effective enforcement" in the effective China-New Zealand FTA and China-Switzerland FTA, as well as China-EU BIT/CAI draft (2020). But compared with the elaborate and strict obligation of effective labor enforcement in CPTPP, China still has space for significant improvements in its labor enforcement. One of the improvements is to devote more resources to strengthening capacity building.<sup>216</sup> As it is now the second largest economy by volume in the world, China has fewer difficulties providing adequate enforcement resources than before.<sup>217</sup> Hence, there are fewer problems of discretion in the allocation of enforcement resources on labor that is required by Article 19.5.2 of the CPTPP. Also, few legal barriers deter China from promoting public awareness of its labor laws and provisions with procedural guarantees because it is also part of China's obligation to keep its laws or policies transparent as a member of WTO. China has constructed a remedy system for individual labor disputes, which includes "mediation (discretionary) - arbitration (obligatory, be composed of tripartite

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214. DANIEL MAUL, *THE INTERNATIONAL LABOR ORGANIZATION: 100 YEARS OF GLOBAL SOCIAL POLICY* 262 (2019).

215. *See* LAB. L., *supra* note 185, art. 2.

216. *See* Giuseppe Casale & Changyou Zhu, *Labor Administration Reforms in China*, ILO 99 (2013).

217. *See Biggest economies in 2021 by Gross Domestic Product*, WORLD DATA.INFO, <https://www.worlddata.info/largest-economies.php> [https://perma.cc/98Y8-BTJW] (last visited Apr. 22, 2023).

representatives, pre-procedure for litigation)- litigation (last resort, with the appellate procedure as the final)".<sup>218</sup>

However, the real problem lies in the remedy mechanism for individual and collective labor disputes. For example, Chinese Labor Law and Chinese Labor Contract Law protects working conditions.<sup>219</sup> But arbitration awards on disputes arising from the implementation of national labor standards, such as working hours, rest and vacation, and social insurance are final.<sup>220</sup> Accordingly, the basic litigation right is not available as a last resort for disputes on working conditions other than wage and occupational safety and health. Although this simplified dispute settlement procedure sometimes does increase the efficiency of dispute settlements.<sup>221</sup>

As mentioned in Section A of Part IV, disputes arising from collective bargaining have no recourse other than accepting the coordination of the competent government sector, with an coordination agreement as the final remedy.<sup>222</sup> Although Article 11 of Trade Union Law, amended in 2021 and Article 21 of Chinese Labor Contract Law, amended in 2012, do empower the trade unions to sue the court for their members. The above mentioned defects are vulnerable to inconsistencies with the enforcement requirements of the CPTPP and hence may be a barrier in China's accession negotiation.

### *C. PUBLIC PARTICIPATION IN SUPERVISION (ART.19.14, ART.19.9)*

China has accepted a discretionary requirement on the establishment of a national advisory body that is composed of social partners in its FTA with New Zealand.<sup>223</sup> Although this obligation is mandatory in the CPTPP,<sup>224</sup> it will not be a substantial legal obstacle in China's implementation of this obligation. The

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218. Haina Lu, *New Developments in China's Labor Dispute Resolution System: Better Protection for Workers' Rights*, 29 COMPAR. LAB. L. & POL'Y J. 247, 249-53 (2008).

219. See LAB. L., *supra* note 185, art. 36-76; LAB. CONT. L., *supra* note 185, art. 17.

220. Law on Labor Dispute Mediation and Arbitration (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008), art. 47, 49, LAWINFOCHINA (last visited Dec. 31, 2008) (P.R.C.).

221. See Haina Lu, *New Developments in China's Labor Dispute Resolution System: Better Protection for Workers' Rights*, 29 COMPAR. LAB. L. & POL'Y J. 247, 72 (2008).

222. See REG COLLECTIVE CONT. PROVISIONS *supra* note 213.

223. See Labour Cooperation NZ-China, *supra* note 118, art. 3.6.

224. See CPTPP, note 179, art. 19.14.

transition will be eased by China's regular practice of tripartite consultation in formulating the social policy.<sup>225</sup>

Nevertheless, China's real challenge lies in the broad definition of "the public," as well as the explicit timetable and procedure mechanism of public submission that could initiate intergovernmental labor dispute settlement procedure. China has never negotiated or accepted public submission in its previous FTA linkage practice. According to Article 19.9.1 of the CPTPP, those who are entitled to file a submission are persons of a party.<sup>226</sup> Although there is no definition of "persons of a Party" in the CPTPP, some members, such as Canada and Mexico, have rich practices to define parties as one or more individuals, non-governmental organizations, labor organizations, partnerships, associations, corporations, or legal representatives.<sup>227</sup> A variety of "Persons" have filed forty submissions under NAALC, as complainants, as of July 2016.<sup>228</sup> The mechanism of public submission is deeply rooted in the independent roles of domestic social partners within a contracting party. Additionally, it is greatly reliant on an open environment with external supervision from the social partners of other parties, thus posing at least three challenges for China's accession negotiation.

First, based on the observation of Section A of Part IV it would be extremely difficult for Chinese social partners to take joint efforts with the public of other contracting parties to file a submission against China's failure to comply with the CPTPP. This difficulty is because of the politically dependent status and multiple roles of both the trade unions (i.e., ACFTU) and employer associations of the China Enterprise Confederation and All-China

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225. See generally Shen Jie & John Benson, *Tripartite Consultation in China: A First Step towards Collective Bargaining*, 147 INT'L LAB. REV. 236 (2008).

226. See Christopher F. Corr et al., *The CPTPP Enters into Force: What Does it Mean for Global Trade?*, WHITE & CASE (Jan. 21, 2019), <https://www.whitecase.com/insight-alert/cptpp-enters-force-what-does-it-mean-global-trade> [https://perma.cc/MX7F-74GS].

227. U.S. National Administrative Office and Procedural Guidelines, 59 Fed. Reg. 61419 (Apr. 7, 1994).

228. *Submissions Under the North American Agreement on Labor Cooperation (NAALC)*, US DEP'T LAB., [https://www.dol.gov/agencies/ilab/submissions-under-north-american-agreement-labor-cooperation-naalc?combine=&field\\_naalc\\_office\\_target\\_id=All&field\\_status\\_target\\_id=All&field\\_issue\\_target\\_id=All&items\\_per\\_page=10&page=0](https://www.dol.gov/agencies/ilab/submissions-under-north-american-agreement-labor-cooperation-naalc?combine=&field_naalc_office_target_id=All&field_status_target_id=All&field_issue_target_id=All&items_per_page=10&page=0) [https://perma.cc/4XN4-G6SL] (last visited Jan. 6, 2023).



Federation of Industry and Commerce. Second, it is equally challenging for Chinese social partners to file a public submission to contact points in other party states because of the absence of direct experience in dealing with complaints under the framework of China's FTA linkage practice.<sup>229</sup> Chinese social partners also lack indirect experience with all ILO and CSR initiatives.<sup>230</sup> Third, it would also be difficult for China to radically shift its traditional conception of the independent role of social partners as threats to political and social security. In other words, it needs a reconstruction of the labor or trade union law to build up the politically independent status of social partners from the government and the ruling political party.

*D. LABOR ARBITRATION AND ECONOMIC SANCTION (ART.28.7, ART.28.20)*

There are few issues for China accepting dispute settlement procedure of arbitration for intergovernmental labor disputes in FTAs, because China has accumulated quite rich experience in dealing with inter-governmental commercial arbitration, with its participation in 264 cases under the WTO.<sup>231</sup> Accordingly, China has legal experience that can be used to argue against economic sanctions, based on the integrated dispute settlement procedure and remedy mechanism between labor disputes and commercial disputes in the CPTPP. In particular, there is a high benchmark for the complainant to prove non-compliance. Inter-governmental dispute settlement is usually lengthy, so the losing party often has time to institute domestic reforms before a trade sanction is

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229. As of January 2023, no labor disputes are complained under China's FTA linkage practice because no dispute settlement is provided in the MOU On Labour and Social Security Cooperation under the framework of China-Chile FTA (2006) or China-Iceland FTA; only consultation is allowed for labor disputes according to Art.4 of both the MOU on Labor Cooperation under the framework of the China-New Zealand FTA (2008) and the Cooperation Agreement On the field of labor and employment China-Switzerland (2014).

230. As of January 2023, only six instances under the OECD Guidelines involve China as host country, but none of them are filed by Chinese social partners. OECD, [https://mneguidelines.oecd.org/database/searchresults/?q=\(Host:\(China%20\(People%E2%80%99s%20Republic%20of\)\)\)](https://mneguidelines.oecd.org/database/searchresults/?q=(Host:(China%20(People%E2%80%99s%20Republic%20of)))) (last visited 8 March 2023).

231. *Disputes by member*, WTO (last visited Apr. 23, 2023) [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) [https://perma.cc/E34U-GMBE].

finalized.<sup>232</sup> For example, the Guatemala- Dominican Republic dispute under CAFTA-DR took about nine years, between the public submission by the AFL-CIO and six Guatemalan unions in 2008, and the delivery of the final Ruling in 2017.<sup>233</sup> It may have taken longer if both parties had moved to negotiate mutually acceptable compensation, or if the complainant party had tried to seek economic sanctions. So, China will have time to make domestic labor reform or adjustments if it had a labor dispute as a party of the CPTPP.

Nevertheless, practical difficulty does exist because there is always a possibility for real economic sanctions for noncompliance of labor obligation of the CPPTP after accession. There will be critical notional challenges for China if economic sanctions were levied on China. China is not on the list of countries supporting the linkage between labor standard and trade sanctions in the WTO.<sup>234</sup>

One recent example is China's objection to the United States' proposal to add a forced labor abolition in the WTO Agreement on Fisheries Subsidies.<sup>235</sup> Also, as mentioned above, China has never negotiated the key normative factor of economic sanctions in FTAs or BITs labor provisions.<sup>236</sup> China's previous negative practice and attitude towards transitional labor cooperation by means of economic sanctions can be analyzed from political and economic perspectives.

Politically, China's disapproval of economic sanctions was deeply rooted in its strict notion of sovereignty and the right to craft its development. In this China understands domestic labor affairs as an internal affairs, and no other country should interfere.<sup>237</sup> Also, China views labor rights as collective rights,

232. See Robert A. Green, *Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes*, 23 *YALE J. INT'L L.* 79, 79-82 (1998).

233. See Ciaran Cross, *Failure by Design: Did the US Choose to Lose the Guatemala Labour Dispute?*, 24 *Int'l Union Rts.* 23, 23(2017).

234. See BOB HEPPLE, *LABOUR LAWS AND GLOBAL TRADE* 130 (2005).

235. See Simon Lester, *Negotiating Text Addresses Forced Labor*, *CHINA TRADE MONITOR*, (Nov. 09, 2021) <https://www.chinatradedemonitor.com/latest-wto-fisheries-subsidies-negotiating-text-addresses-forced-labor/> [<https://perma.cc/RK64-VWR2>].

236. See *infra* Appendix Table 1.

237. See Lei Guang, *Realpolitik Nationalism: International Sources of Chinese Nationalism*, 31 *MOD. CHINA* 487, 501(2005); See *The Right to Development: China's Philosophy, Practice and Contribution* The State Council Information Office of the People's Republic of China (Dec. 1, 2016)

which should be determined by China's national condition, and should serve the purpose of comprehensive national development. This conception was evidenced in China's ratification practice of labor conventions with a basic principle of "avoid[ing] political conventions . . . and choos[ing] technical conventions that have certain political influences."<sup>238</sup> It was also witnessed with China's persistent hesitancy to ratify C87 and C98, and with a reservation of Article 8.1 (a) (freedom of association) when ratifying the UN Covenant on Economic, Social, and Cultural Rights in 2001.<sup>239</sup> In short, it remains to be seen whether China would shift its conservative notions of sovereignty and the right to development in connecting labor issues with economic sanctions, in order to harvest the overall benefits from the one-single package commitments of the CPTPP. This is a difficult and complicated notional balance for China.

#### V. PATH FOR LABOR IMPLEMENTATION AS AN ASPIRANT ECONOMY

Linkage of labor standards with the trade and investment administration in the CPTPP directly reflects the values of fair trade, with the prohibition of protectionism through labor standards on one hand, and the prohibition of illegitimate comparative advantages through violations of fundamental principles and rights on the other. Among labor provisions of the CPTPP, freedom of association, effective collective bargaining, and the right to strike are core issues that dominate the substantial obligations, especially the legislative coverage enforcement via judicial or administrative action, and public participation in supervision.<sup>240</sup>

As China is making efforts to gain more international recognition of their status as a market-economy country and gain

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[http://english.www.gov.cn/archive/white\\_paper/2016/12/01/content\\_281475505407672.htm](http://english.www.gov.cn/archive/white_paper/2016/12/01/content_281475505407672.htm) [<https://perma.cc/ZY95-ZUCW>].

238. See DEP'T POPULATION AND EMP. NAT'L BUREAU STAT., *supra* note 30.

239. See *Paying the Price: Worker Unrest in Northeast China*, 14 HUM. RTS. WATCH 1, 47-49 (Dec. 22, 2008), <https://www.hrw.org/report/2008/12/22/paying-price> [<https://perma.cc/9F73-NB4P>].

240. See *CPTPP Outcomes: Labour*, AUSTRALIAN GOV'T, DEP'T FOREIGN AFF. AND TRADE, <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/outcomes-documents/cptpp-outcomes-labour> (last visited Apr. 22, 2023).

acceptance to the CPTPP through the original contracting parties, issues of freedom of association, effective recognition of collective bargaining, and the right to strike are determinative in the accession negotiations, and thus are objects of analysis on the path of labor reform for China.

*A. TIME REQUIREMENT: BEFORE OR AFTER ACCESSION*

There was no requirement on domestic labor reform in the main text in the TPP, which is the predecessor to the CPTPP.<sup>241</sup> However, the United States required Vietnam and Malaysia to make partial domestic labor reform before the TPP could be binding between them and the United States.<sup>242</sup> The United States was a critical to making these labor plans possible with extra tariff concessions as “carrots” for Vietnam, and Malaysia. But labor reform in these countries was obviously slowed or even had nearly paused, when the United States opted out of the TPP and the other eleven contracting parties suspended these bilateral labor plans in the CPTPP. The developing parties of the CPTPP mentioned above did not comply with the bilateral labor plans after the United States exited the TPP.<sup>243</sup> Vietnam even obtained a provisional waivers from the CPTPP with three contracting parties, Australia, New Zealand and Canada.<sup>244</sup> In the CPTPP negotiations Vietnam’s major labor law reform efforts occurred only after the CPTPP came into effect.<sup>245</sup> Although Vietnam’s efforts to fulfil the domestic labor law reform and international labor cooperation requirements of the CPTPP occurred after the CPTPP became binding, the primary

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241. See Trans Pacific Partnership, Ch 19, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour.pdf>, [last visited Mar.31,2023]; Corr et al., *supra* note 174.

242. See *Pacific Trade Pact Tackles Malaysia Trafficking, Vietnam Labor*, Reuters (Nov. 5, 2015), <https://www.reuters.com/article/us-trade-tpp-labor/pacific-trade-pact-tackles-malaysia-trafficking-vietnam-labor-idUSKCN0SU10J20151105> [<https://perma.cc/BYN3-L4SA>].

243. See Daniel C.K. Chow et al., *How the United States Withdrawal from the Trans-Pacific Partnership Benefits China*, 4 UNIV. OF PENN. J. L. & PUB. AFF., 37, 41-44 (2018).

244. See *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Signed*, INV. TREATY NEWS (Apr. 24, 2018) <https://www.iisd.org/itn/en/2018/04/24/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp-signed/> [<https://perma.cc/7YDZ-PAE4>].

245. See *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Signed*, INV. TREATY NEWS (Apr. 24, 2018), <https://www.iisd.org/itn/en/2018/04/24/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp-signed/> [<https://perma.cc/7YDZ-PAE4>].

motivation was the Vietnam-EU FTA approval by the European Union.<sup>246</sup> Similarly, Malaysia only passed the amendment of the Employment Act of 1955 in 2020, before the CPTPP became binding in 2021, but three years after the CPTPP became effective. The agreement with Malaysia has been criticized for the lack of progress in its other two domestic law reform initiatives, the amendment of the Industrial Relations Act 1967 and the Trade Union Act 1959.<sup>247</sup> The TPP had originally required the initiatives to be completed before the TPP became binding the US-Malaysia Labor Consistency.<sup>248</sup>

The United States played a significant role in encouraging Mexico to complete labor legislation by postponing the ratification of USMCA until the Mexican Federal Labor Law became effective in 2019.<sup>249</sup> The USMCA case illustrates that the external impact of key contracting parties as supervisors is significant to achieving substantial domestic labor reform in targeted contracting parties. However, the enacting nation's internal motivations are also a key factor.

Unlike Vietnam and Malaysia, China is vulnerable to the requirements on domestic labor law reform prior to ratification because of the consensus mechanism during the CPTPP accession process. Two factors in particular cause uncertainty. First, Vietnam and Malaysia were not directly pressured from the United States,<sup>250</sup> who has been concerned with China's labor law issues

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246. See generally Kristoffer & Marslev, *Towards a stronger EU approach on the trade-labor nexus? The EU-Vietnam Free Trade Agreement, social struggles and labor reforms in Vietnam*, REV. OF INT'L POL. ECON. (June 20, 2022) [<https://www.tandfonline.com/doi/full/10.1080/09692290.2022.2056903>] [<https://perma.cc/MNB8-3TVT>].

247. See Ng Yap Hwa, *Whither Labor Law Reform In Malaysia?*, NEW MANDALA (May 4, 2021), <https://www.newmandala.org/whither-labour-law-reform-in-malaysia/> [<https://perma.cc/7GHC-YBPV>].

248. See Sanchita Basu Das, *Labour Provisions of the Trans-Pacific Partnership (TPP) and how they may Affect Southeast Asian Countries*, YUSOF ISHAK INST., PERSP. 1, 1 (Jun 28, 2016), [[https://www.iseas.edu.sg/wp-content/uploads/2015/07/ISEAS\\_Perspective\\_2016\\_37.pdf](https://www.iseas.edu.sg/wp-content/uploads/2015/07/ISEAS_Perspective_2016_37.pdf)] [<https://perma.cc/W7PR-RAHK>] (describing the original arrangement).

249. See David A. Gantz, *The U.S.-Mexico-Canada Agreement: Labor Rights and Environmental Protection*, Rice Univ. Int. for Pub. Pol'y (June 13, 2019), <https://www.bakerinstitute.org/research/protecting-labor-rights-and-environment-under-usmca> [<https://perma.cc/8L7F-CAKB>].

250. See Chow et al., *supra* note, 243; see *supra* Part V. A.

ever since the 1990s.<sup>251</sup> It is unclear whether contracting parties will take after the United States in promoting China's labor law reform before the accession procedure begins or before the final approval. Second, the accession negotiation creates the possibility of bargaining labor commitments for commercial ones. One example is China successfully removing the definition of "internationally recognized labor law" from the investment and sustainable development Chapter in China-BIT draft in December 2020.<sup>252</sup>

#### *B. REFERENCE COUNTRY: VIETNAMESE MODE OR MEXICAN MODE*

As developing contracting parties of the CPTPP, both Vietnam and Mexico published amended labor laws in 2019.<sup>253</sup> Both Vietnam and Mexico have encountered a mix of normative, political, and economical factors both domestically and internationally in implementing labor provisions of the CPTPP and other FTA or BIT linkage practices.<sup>254</sup> Recognizing these factors, the nations have turned to different tracks of domestic labor law reform.

Labor law reform in Vietnam was first externally driven by the TPP negotiations. In the original US-Vietnam Plan for Enhancement of Trade and Labour Relations under TPP, the focus of Vietnam's legal reform rested in the establishment of grass-roots trade unions, cross-affiliations to form a broader national

251. Anshu Siripurapu & Noah Berman, *The Contentious U.S.-China Trade Relationship*, COUNCIL ON FOREIGN RELATIONS (Dec. 2, 2022) [cfr.org/background/contentionous-us-china-trade-relationship](https://perma.cc/3ULJ-FDUS) [https://perma.cc/3ULJ-FDUS].

252. See EUR. PARLIAMENT, IMPA *supra* note 154.

253. See *Summary of All New Points in the Labor Law 2019 in Vietnam*, ASL LAW FIRM, <https://aslgate.com/summary-of-all-new-points-in-the-labor-law-2019-in-vietnam/> [https://perma.cc/X5Q6-6CNU] (last visited Apr. 25, 2023); *Labor Law Reform in Mexico 2019: Everything You Need to Know*, BORDER ASSEMBLY SAN DIEGO, (Oct. 19, 2019) <https://borderassembly.com/labor-law-reform-in-mexico-2019/#:~:text=The%20Labor%20Reform%20of%20Mexico,obligated%20to%20join%20such%20organizations> [https://perma.cc/C4HY-S4Q4].

254. See Anh Hong, *Vietnam Faces Challenges in Implementing New Generation FTAs*, HANOI TIMES (Oct. 11, 2019), <https://hanoitimes.vn/vietnam-faces-challenges-in-implementing-new-generation-ftas-45260.html> [https://perma.cc/NHF7-NG3L]; Cathy Feingold, *Mexico's Labor Reform: Opportunities and Challenges for an Improved NAFTA*, AFL-CIO (June 25, 2019), <https://aflcio.org/testimonies/mexicos-labor-reform-opportunities-and-challenges-improved-nafta> [https://perma.cc/5UVV-MVCZ].

federation, and strengthening the right to strike in collective bargaining.<sup>255</sup> Conversely, Vietnam's labor law reform under the CPTPP without the United States, were not as strong as those under ILO, specifically regarding the freedom of association and effective recognition of the right to collective bargaining.<sup>256</sup> For example, registration of an internal employee organization in an enterprise still must be approved by the competent authority.<sup>257</sup> Registration can be canceled if an internal employee organization acts against the objectives and principles of the Vietnam Labor Code. It also affords broad discretion to the competent authority in deterring the establishment of an internal employee organization.<sup>258</sup> An internal employee organization that wishes to join the trade union must obey the Trade Union Law, which is highly restrictive to cross-affiliations. The Trade Union Law is awaiting further reform that has no clear timetable.<sup>259</sup> Similarly, Vietnam's Labor Code (2019) allows broad discretion for strikes to be considered illegal, postponed, or canceled by a competent authority.<sup>260</sup>

Similarly, the TPP labor negotiation and USMCA had pushed the labor law reform of Mexico, in addition to NAALC (1994). Comparatively, the amended Federal Labor Law (2019) of Mexico moves much closer to the C87 and C98 of the ILO than the Vietnam Labor Code. For example, unions shall not be dissolved, suspended or canceled by competent authorities.<sup>261</sup> Other important reforms have been made regarding electing union officials, establishing labor courts, and lawful strikes. While it remains to be seen if the labor law reform of Mexico will yield better labor protection, it is quite clear that the judicially oriented dispute settlement procedure for freedom of association, collective bargaining, and

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255. See generally *US-Vietnam plan for the Enhancement of Trade and Labor Relations*, *supra* note 242.

256. See Joe Buckley, *The Limits of Vietnam's Labor Reforms*, THE DIPLOMAT (Jan. 01, 2022) <https://thediplomat.com/2021/12/the-limits-of-vietnams-labor-reforms/> [<https://perma.cc/THA2-D5F8>].

257. See VIE. LABOUR CODE ART. 172.1.

258. The registration can be canceled if the organization violates objectives likelawful rights and interests of the members in labor relations in the enterprise, cooperate with the employer in resolving issues relevant to the rights, obligations and interest of the employer and employees" and "develop progressive, harmonious and stable labor relation." *Id.* art.172.2, 174.1(b).

259. See *id.* art.172.3.

260. See *id.* art.204.6, Art.211.

261. See Artículo 376(v) de la Ley Federal del Trabajo (2019).

strikes in Mexico better meets the requirements of C87 and C98 of the ILO, if compared with the administratively oriented dispute settlement procedure in Vietnam.

The Vietnamese mode of labor law reform will provide a basic reference to understand China's possible labor law reform in the accession procedure. China and Vietnam have similar socialism in comprehensive domestic governance, and a similar framework and structure in their labor laws.<sup>262</sup> China could make similar labor law reform as the Vietnamese mode, which would allow China to maintain a top-to-down labor regulation, which would preserve the leadership of the political party, social security, and the status of the ACTFU. China can make similar reforms as the Vietnamese mode without significant difficulties. However, China will face higher labor law reform expectations than Vietnam from the CPTPP parties.<sup>263</sup> Hence, it is less likely that developed contracting parties will accept a lower level of commitments from China, unlike Vietnam.

Strict normative factors in Mexican labor law may be a better predictor of the expectations of contracting parties, particularly the developed ones. China and Mexico have similar comparative advantages in exporting and labor issues, both have been constantly blamed for unfair trade.<sup>264</sup> As discussed, China still has a long way to march towards the labor requirements of the CPTPP.<sup>265</sup> The long march is due to key elements of China's labor law, including the role of social partners, substantive and procedural factors of collective bargaining, the highly administrative settlement procedure for collective labor disputes, and the expectations of some contracting parties.

## VI. CONCLUSION

Conflicting conceptions of labor issues between China and its trade partners have evolved in the WTO, FTAs and BITs, with the three key topics: freedom of association; effective recognition of

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262. See generally Ying Zhu & Stephanie Fahey, *The Challenges and Opportunities for the Trade Union Movement in the Transition Era: Two Socialist Market Economies—China and Vietnam*, 6 *ASIA PAC. BUS. REV.* 282 (2000).

263. See Choudhury, *supra* note 105.

264. See Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 *L. & POL'Y IN INT'L BUS.* 165, 165, 172, 190 (1993).

265. See MAUL, *supra* note 214.



collective bargaining; and the right to strike. The conflicts have been long rooted in the different choices of political, economic, and social systems between China and major developed trade partners such as the United States and the European Union. China's application for accession to the CPTPP provides an opportunity for China to remove trade friction by eradicating labor issues under the regional trading and investing system. But it is a process of balance or re-balance between sovereignty rights and human rights, human right and development rights, individual human rights and collective human rights, free trade and fair trade for China. The application to accede to the CPTPP is a sign that China would like to change its previous opposition to strong linkage between trade sanctions and labor violations, and that China may be more understanding of their developed trade partners concerns of unfair trade caused by labor standards. Admitting the extreme difficulties in solving all of China's labor problems in a single FTA negotiation, such as the CPTPP, these labor negotiations could be a lever to push China's labor law reform forward with the public submission as the supporting point, and with the conceptional shock of freedom of association, effective recognition of collective bargaining, and the right to strike as the input force, to ignite a greater output force of bottom-up labor law reform.

APPENDIX TABLE 1

TABLE 1 EVOLUTION OF NORMATIVE FACTORS IN CHINA'S FTA AND BIT LINKAGE EFFORTS

Counter- Party		Chile FTA (2005)	New Zealand FTA (2008)	Iceland FTA (2013)	Switzerland FTA (2014)	EU BIT Initiative (2020 agreed in principle)	US BIT Initiative Acceptance of 2012 US BIT model at most	CPTPP
Legislative Coverage	4 aspects of core labor standard in ILO 1998 Declaration	x	x	x	x		Five items of Core labor standard ; <sup>266</sup>	√ Five items of Core labor standard; Added: Elaboration of forced labor prohibition <sup>267</sup>
Enforcement via administrative & judicial action	Not lowering/ relaxing/ derogating / weakening/ reducing	x	√	x	√	√ illegitimate advantage and protectionism on labor are prohibited	√	√ Added: Emphasis on application to special zones. <sup>268</sup>
	Not fail to effectively enforce	x	√	x	√	√ illegitimate advantage and protectionism on labor are prohibited	√	√
	Restriction on discretion in allocation of enforcement resources	x	x	x	x	x	x	√ More assertive than previous US FTA linkage practice <sup>269</sup>

266. Not only the four aspects of core labor standard in ILO Declaration (1998), but also the item of acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health are included.

267. Art. 19.6 of CPTPP states that each Party shall also discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labor.

268. Art. 19.4(b) of CPTPP emphasizes contracting parties' obligation to enforce labor law in a special trade or customs area such as an export processing zone or foreign trade zone, in the Party's territory.

269. According to Art. 19.5.2 of CPTPP, the bona fide decisions in allocation of enforcement resources shall not excuse the inconsistency with the agreement's labor obligations. Accordingly, a member's bona fide decisions to allocate enforcement resources are only compliant to the extent that they are consistent with the labor provisions in this agreement.

	Private action and domestic procedure guarantee	x	x	x	x	x	x	√
	CSR <sup>270</sup>	x	x	x	x	√ (agree to promote)	x	√( shall encourage)
Public participation in supervision	National advisory committee/	x	√ (discretionary) domestic consultation with with national stakeholders in formulating these policies and implementation	x	x	x	x	√ (obligatory)
	Public submission/ communication	x	x	x	x	x	x	√ substantial and procedural requirements are elaborated <sup>271</sup>

270. Corporate social responsibility initiatives on labor issues.

271. As Art. 19.9.3 of CPTPP provides, substantial conditions for a eligible submission include at a minimum: (a) raise an issue directly relevant to this Chapter; (b) clearly identify the person or organization making the submission; and (c) explain, to the degree possible, how and to what extent the issue raised affects trade or investment between the Parties. Transparency in procedures, including timelines, for the receipt and consideration of written submissions are also required.

Third-party dispute settlement	Arbitral panel/panel of experts	x	x	x	x	√ transparency are strengthened, including the mechanism of Amicus Curiae Submissions	Inter-governmental Arbitration are excluded.  Investor-State Arbitration are not excluded	Complete coverage: all relevant disputes Added: panelists other than the chair shall have expertise or experience in labor law or practice
Legal remedy	Mutually agreed compensation	x	x	x	x	√ (discretionary)  Mutually agreed solution, not excluding compensation	Inter-governmental Arbitration are excluded.  Investor-State Arbitration are not excluded	√
	Monetary enforcement assessment	x	x	x	x	x	x	50% of trade benefits of equivalent effect decided by the pane or claimed by the complaining Party. period: a maximum of 12 months unless extension is otherwise agreed by the complainant.
	Suspension of trade benefits	x	x	x	x	x	x	Full execution