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2018

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Note

Effectiveness of Labor Provisions within Free Trade Agreements Between the United States and Latin American Countries

Cayla D. Ebert*

The state of human rights around the globe has become more visible and a high priority for many due to the financial crisis of 2008, recent and current political and military conflict, globalization, raised awareness, and new technology and communications.[1] This has occurred through the increase in national and international watchdog organizations,[2] international laws and treaties that can trigger "transnational cooperation between governments,"[3] and the era of twenty-four-hour news and social media.[4] It is at the crossroads of human

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1. *See generally* Daniel Drache & Lesley A. Jacobs, *Introduction*, *in* LINKING GLOBAL TRADE AND HUMAN RIGHTS: NEW POLICY SPACE IN HARD ECONOMIC TIMES [hereinafter LINKING GLOBAL TRADE AND HUMAN RIGHTS] 1, 1–10 (2014) (explaining that the 2008 financial crisis state action extended into new areas and put a focus on failure of government protections); Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L COMP. L. REV. 273 (2002) (addressing the intersections of globalization and promotion and violation of human rights).

2. *See* Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 261–79 (2004) (discussing the emergence of intergovernmental and nongovernmental organizations that serves as watchdogs to human rights).

3. Drache et al., *supra* note 1, at 11.

4. *See generally* Christoph Koettl, *Twitter to the Rescue? How Social Media is Transforming Human Rights Monitoring*, AMNESTY INTERNATIONAL: HUMAN RIGHTS NOW (Feb. 20, 2013), http://blog.amnestyusa.org/middle-

rights and international treaties where this note will focus; when labor rights provisions are included in trade agreements.

Due to the changing nature of international trade relations, agreements are becoming more and more comprehensive. Overall, in recent decades there has been a shift away from multilateralism toward bilateralism and plurilateralism in trade relations between states due to the failed multilateral negotiations of the World Trade Organization (WTO) at the Seattle Ministerial Conference in 1990.[5] The trend towards bilateralism and plurilateralism is reinforced by states' ability to go beyond the coverage of the WTO and reach "a new level of international policy-making,"[6] and creates a "domino effect" further undermining large scale multilateral treaty negotiations.[7] These formats allow the agreements to be more flexible and have a much broader scope to include issues such as investment provisions, intellectual property rights, environmental protection, and human rights protection.[8]

Human rights protections within trade treaties, the focus of this Note, generally take the form of labor rights provisions. The United States' policy can be generally categorized into four stages regarding such provisions. The United States-Chile Agreement and the United States-Colombia Agreement, used as

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east/twitter-to-the-rescue-how-social-media-is-transforming-human-rights-monitoring/ (discussing how social media is used to monitor human rights emergencies and for evidence of human rights violations).

5. *See* Simon Lester, Bryan Mercurio & Lorand Bartels, *Introduction*, *in* BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 3, 3–5 [hereinafter BILATERAL AND REGIONAL TRADE AGREEMENTS] (Simon Lester, Bryan Mercurio & Lorand Bartels eds., 2015). Before 1999 it was uncommon for the major trading powers to sign bilateral agreements, but following the failure of the WTO negotiations, "all major trading nations (including the East Asian nations) almost immediately launched multiple negotiations." *Id.* at 3. The steep increase in bilateral agreements "has created a competitive process among nations, with all of the major trading powers pushing hard to conclude these agreements so as not to lose particular markets to their competitors." *Id.* at 4. There has also been an increase in plurilateral or semi-regional agreements, often between states within proximity to each other, but not always. *See id.* But, it is important to note that bilateral PTAs are not entirely new, as it was the predominant form of trade agreements in the 1800's and was ushered away by a wave of multilateralism during and after the World Wars. *See id.* at 3.

6. *Id.* at 5.

7. David Evans, *Bilateral and Plurilateral PTAs*, *in* BILATERAL AND REGIONAL TRADE AGREEMENTS, *supra* note 5, at 53, 53–73 (explaining that as more countries engage in PTAs, the cost of staying on the sidelines increases because of the continued failure of multilateral negotiations at the WTO).

8. Lester et al., *supra* note 5, at 5.

case studies in this analysis, fall into the third and fourth generations of these types of provisions. Their structure, effectiveness, and consequences will be discussed in detail.

The goal of this Note is to address the effectiveness of labor rights provisions within bilateral free trade agreements (FTAs) between the United States and Latin American countries. Section I seeks to explain free trade agreements briefly, why they have popularized and evolved over time, how human rights, specifically labor rights, have been included, and why parties agree to them. Section II will examine the structure of labor provisions within FTAs more in-depth, and focus on two agreements, the United States-Chile Free Trade Agreement and the United States-Colombia Trade Promotion Agreement. While many measurements of labor rights are used in this Note, it will analyze the two agreements in the context of domestic legislation and policies put into place, and the enforcement thereof, specifically looking at freedom of association, minimum wage, and working conditions, among other labor rights. Through this analysis, this Note argues that FTAs including hard labor standards are more effective than those including soft standards, but only countries with decent current labor rights laws will agree to such treaties, therefore undermining the effectiveness. Section II proposes implementing labor provisions within FTAs on a graduated scale in exchange for economic benefits such as tariff elimination as a solution to this problem. Due to the increasing popularity and use of FTAs to not only achieve economic benefits, but also human rights progress, this Note concludes the current language of such agreements is insufficient to enact the maximum potential change and therefore the provisions should be implemented using different mechanisms.

I. BACKGROUND

A. REGIONAL FREE TRADE AGREEMENTS AND PREFERENTIAL TRADE AGREEMENTS

In recent decades, world trade has seen a shift away from large multilateral trade agreements, usually negotiated and ratified through the WTO, towards regional and bilateral FTAs, or what some refer to as preferential trade agreements (PTAs).[9]

9. "Free trade agreements" (FTAs) is the most commonly used term for

This shift has been due to various economic and political reasons, but the most significant is the failure of the recent and still-ongoing WTO negotiation round at Doha.[10] A multilateral agreement has yet to be achieved as the developed and undeveloped countries are unable to reach a "collective position on provisions regarding trade liberalization which needed to be included in the future multi-trading system."[11] While the majority of the disagreement involves agriculture subsidies and tariffs, under the collective WTO system, for an agreement to enter into force, it must be concluded and agreed to by *all* WTO members; essentially, all states must agree on everything.[12] Since 1999, the number of bilateral agreements has increased rapidly and "created a competitive process among nations, with all of the major trading powers pushing hard to conclude these agreements so as not to lose particular markets to their competitors."[13] In 1995, forty-two percent of exported goods were being traded under a bilateral or regional FTA, and in 2014, this had increased to fifty-five percent of exported goods.[14]

This trend suggests there is a "more effective means of market opening than multilateral trade negotiations."[15] This shift has made international trade rules highly complex and hierarchical including the original WTO agreement and rules (of which 161 countries are members), regional trade integrations

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trade agreements, but not all agreements create free trade, some create discriminatory trade, and it does not include all trade structures, such as customs unions, which is why the term "preferential trade agreements" (PTAs) was created. Lester et al., *supra* note 5, at 5.

10. Jorge Heine & Joseph F. Turcotte, *Free Trade Agreements and Global Policy Space after the Great Recession, in* LINKING GLOBAL TRADE AND HUMAN RIGHTS, supra note 1, at 65, 71–72 ("[N]egotiational stalemate is symptomatic of the diametrically opposed beliefs on the nature of the Round between developed and developing countries."). The Round was launched at the WTO's Fourth Ministerial Conference in Qatar in November 2001 with the main focus on the needs of developing countries. *The Doha Round*, WORLD TRADE ORG. [hereinafter WTO], https://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Sept. 19, 2017).

11. Beginda Pakpahan, *Deadlock in the WTO: What is next?*, WTO, https://www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/art19.htm (last visited Sept. 19, 2017).

12. *See id.*; World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) ¶ 47.

13. Lester et al., *supra* note 5, at 4.

14. INT'L LABOUR ORG., STUDIES ON GROWTH WITH EQUITY: ASSESSMENT OF LABOUR PROVISIONS IN TRADE AND INVESTMENT ARRANGEMENTS 1 (2016), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_498944.pdf.

15. Heine & Turcotte, *supra* note 10, at 75.

or customs unions (e.g. European Union), and the loose regional and bilateral free trade agreements.[16] In sum, there are over 400 agreements, which can be very extensive, reaching not only into a state's domestic trade policies, but also to its human rights standards, intellectual property rights, environmental standards, and anti-competition laws.[17] Some agreements are more narrowly focused, while others can be more comprehensive. Examples include the Australia-Chile FTA (includes IP provisions), Central America-Dominican Republic-United States Free Trade Agreement (includes labor rights provisions), and the United States Colombia Trade Promotion Agreement (includes labor and environmental protections and IP rights).[18] Some scholars argue that "FTAs are seen as a key instrument to assert domestic interests at the bilateral level and secure mutually beneficial results" and promote growth.[19]

One policy argument in favor of liberalized trade, or free trade, for the Latin American region is that "free (or freer) competition will inevitably foster economic development" because it lowers consumer prices, and increases industry efficiency and productivity.[20] Both things are said to boost the domestic economy and make domestic products more competitive abroad, which would in turn boost domestic employment and increase foreign investment.[21] Other commonly cited pro-liberalized trade arguments stipulate that it creates

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16. Lester et al., *supra* note 5, at 4.

17. *Id.* at 4–5.

18. *Australia-Chile FTA*, AUS. GOV'T, DEP'T OF FOREIGN AFFAIRS AND TRADE, http://dfat.gov.au/trade/agreements/aclfta/Pages/australia-chile-fta.aspx (last visited Sept. 19, 2017); *CAFTA-DR (Dominican Republic-Central America FTA),* OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta (last visited Sept. 19, 2017); United States-Colombia Trade Promotion Agreement, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa (last visited Sept. 19, 2017).

19. Heine & Turcotte, *supra* note 10, at 65. *See also* INT'L LABOUR ORG, *supra* note 14, at 13.

20. Thomas H. Hill, *Introduction to Law and Economic Development in Latin America: A Comparative Approach to Legal Reform*, 83 CHI-KENT L. REV. 3, 11 (2008). *See generally* Eddy Lee, *Trade Liberalization and Employment*, U.N. DEP'T OF ECON. AND SOCIAL AFFAIRS, (Oct. 2005), http://www.un.org/esa/desa/papers/2005/wp5_2005.pdf (referring to agreements that reduce or eliminate tariffs and encourage free movement of goods and services as liberalized trade).

21. Hill, *supra* note 20, at 11–12.

specialization[22] and economies of scale,[23] allowing countries to have a comparative advantage in a certain good or service area, which increases efficiency and reduces the amount of resources used in production, and that it creates an overall higher standard of living. Comparative advantage in the trade context is the idea that countries will produce goods in the area in which their economy and resources give them the largest margin of advantage in comparison to other countries.[24] Bilateral agreements, specifically, allow for more flexibility, therefore allowing for some of these protectionist characteristics. Two main reasons are defensive interests where "sensitive sectors can be carved out of the agreement" and offensive interests where "new disciplines can be promoted in some sectors of high interest where multilateral consensus is yet to emerge."[25]

Opponents to liberalized trade, specifically through regional or bilateral agreements, argue that it leads to trade diversion, rather than trade creation, which in turn reduces the overall welfare of the country.[26] Trade diversion is the idea that reduction of trade barriers between two or a few countries leads only to exchange between the member states and disincentivizes countries to trade with those outside of their agreements.[27] Studies have shown empirical proof of trade diversion such as in Mercosur,[28] where the largest increase in intra-regional trade during the early 1990's was in countries that lack comparative

22. Specialization was an early idea and strategy in trade. Plato explains trade specialization: "So the conclusion is that more things will be produced and the work be more easily and better done, when every man is set free from all other occupations to do, at the right time, the one thing for which he is natural fitted." Gilbert R. Winham, *The Evolution of the World Trading System – The Economic and Policy Context, in* THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 5, 8 (Daniel Bethlehem et al. eds., 2009).

23. *See* JOOST H.B. PAUWELYN, ANDREW GUZMAN & JENNIFER A. HILLMAN, INTERNATIONAL TRADE LAW 11–17 (3d ed. 2016).

24. *Id.* at 11–13.

25. Olivier Cattaneo, *The Political Economy of PTAs, in* BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 28, 37 (Simon Lester, Bryan Mercurio & Lorand Bartels eds., 2015).

26. Prof Rajagopal, *Where Did the Trade Liberalization Drive Latin American Economy: A Cross Section Analysis*, 6–2, APPLIED ECONOMETRICS & INT'L DEV. 89, 90 (2006).

27. *See* PAUWELYN ET AL., *supra* note 23, at 371.

28. Claire Felter & Danielle Renwick, *Mercosur: South America's Fractious Trade Bloc*, COUNCIL ON FOREIGN RELATIONS (Sept. 13, 2017), https://www.cfr.org/backgrounder/mercosur-south-americas-fractious-trade-bloc ("Mercosur is an economic and political bloc comprising of Argentina, Brazil, Paraguay, Uruguay, and Venezuela.").

advantage.[29] Opponents argue that trade creation would have increased countries' comparative advantage, or the largest increase in trade would have been seen in those countries that have a large comparative advantage.

B. HUMAN RIGHTS PROVISIONS WITHIN PREFERENTIAL TRADE AGREEMENTS

Latin America (which includes Central America, South America and sometimes the Caribbean) has extremely low economic growth rates as compared to other regions of the world, even developing regions.[30] But, Latin American economies are categorized by periods of growth and then major setbacks.[31] A general sentiment of today's capitalistic world is "let the market be free, and human rights will follow," assuming that human rights come second to trade and economic growth.[32] Evidence of this shows through the previous FTAs signed with developing Latin American countries as they have only focused on economic matters in the past.[33] To combat some of this idea and the potential negative backlash and consequences of liberalized trade, and also spark growth, there has been an increase of countries including additional non-trade specific provisions within FTAs and PTAs. The agreements, as mentioned before, now tend to include other provisions including intellectual property rights, environmental standards, and anti-competition laws. Parties now try to "piggy back" liberalization with human rights ideals in trade agreements, mostly through the addition of labor rights provisions.[34] These provisions also serve a highly political function for agreements and attempt to provide protection for all parties.

In 1994, the North America Free Trade Agreement (NAFTA) was the first FTA to include human rights provisions, and every United States agreement since has included some

29. Pravin Krishna, *The Economics of PTAs, in* BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 11, 15 (Simon Lester, Bryan Mercurio & Lorand Bartels eds., 2015).

30. Hill, *supra* note 20, at 6.

31. *Id.*

32. Marcilio Toscano Franca-Filho, et al., *Protection of Fundamental Rights in Latin American FTAs and MERCOSUR*, 20 EURO L. J. 811, 811 (2014).

33. *Id.* at 815.

34. *Id.* at 812.

human rights provisions.[35] Technically, labor rights were added to NAFTA through a separate, supplemental document titled the North American Agreement on Labor Cooperation (NAALC).[36] The purpose of the sub-agreement is to "improve working conditions and living standards" in Canada, Mexico, and the United States and to "resolve issues in a cooperative manner."[37] The Agreement creates both international (the Commission for Labor Cooperation) and domestic institutions (National Administrative Offices) to work together on labor issues through "cooperative consultations."[38] Such issues "includ[e] occupational safety and health, child labor, benefits for workers, minimum wages, industrial relations, legislation on the formation of unions and the resolution of labor disputes."[39] The NAALC obligates parties to: 1) ensure that its labor laws and regulations provide for high labor standards and to continue to strive to improve those standards; 2) promote compliance with and effectively enforce its labor law through appropriate government action; 3) ensure that persons with a legally recognized interest have appropriate access to administrative, quasi-judicial, judicial, or labor tribunals for enforcement of its labor law and that proceedings for the enforcement of its labor law are fair, equitable and transparent; and 4) ensure that its labor laws, regulations, procedures, and administrative rulings of general application are promptly published or otherwise made available to the public and promote public awareness of its labor law.[40]

As of 2002, the United States includes such provisions in all trade agreements, but the depth, scope, and enforceability of them varies greatly.[41] As of December 2015, there were 76 trade agreements in place, which covered 135 economies, which include labor provisions.[42] Over eighty percent of trade agreements entered into since 2013 include human rights provisions.[43]

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35. INT'L LABOUR ORG., *supra* note 14, at 1, 42.

36. *North American Agreement on Labor Cooperation: A Guide*, U.S. DEP'T OF LABOR (Oct. 2005), https://www.dol.gov/ilab/trade/agreements/naalcgd.htm.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id. See also* North American Agreement on Labor Cooperation, Can.-Mex.-U.S., Sept. 1993, 32 I.L.M. 1499.

41. INT'L LABOUR ORG., *supra* note 14, at 45.

42. INT'L LABOUR ORG., *supra* note 14, at 1.

43. *Id. See also id.* at 11 ("Labor provisions are defined as any standard

Not all human rights provisions included within treaties are similar and the subject sparks much debate.[44] In particular, the United States and its trade partners tend to focus more on workers' and children's rights, whereas European agreements tend to focus more on fundamental freedoms and rights.[45] The United States has two basic models for specific enumeration of labor rights within their treaties; the first, what some will call more soft standards, and the second, hard (or enforceable) standards.[46] The first, which can be seen in NAFTA, or the NAALC, is a long list of theoretical labor principles and standards and usually an agreement of the parties to follow their own labor laws.[47] In NAFTA, eleven labor principles were listed but only three were made actionable through dispute resolution and enforcement mechanisms.[48] Soft standards usually refer to the "simple mentioning of human rights practices in a treaty, while an enforcement mechanism is not given."[49] The second model is a result of the United States Congress' "New Trade Policy with America" in which labor rights provisions include five principles, all of which are actionable.[50] These principles follow the International Labour Organization's (ILO) Fundamental Labour Rights and include: "1) freedom of

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which addresses labor relations or minimum working terms or conditions, mechanisms for monitoring or promoting compliance, and or a framework for cooperation.").

44. *See* Robert A. Rogowsky and Eric Chyn, *U.S. Trade Law and FTAs: A Survey of Labor Requirements*, 1 J. INT'L COM. & ECON. 113, 115 (2008). "Trade agreements and trade promotion authority hang precariously on (1) the inclusion of labor rights in future negotiations and on (2) the question whether workers would be better off with more or with fewer trade agreements." *Id.*

45. Franca-Filho et al., *supra* note 32, at 814.

46. EMILIE M. HAFNER-BURTON, FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS 142 (2009) (citing EMILIE M. HAFNER-BURTON, TRADING HUMAN RIGHTS: HOW PREFERENTIAL TRADE ARRANGEMENTS INFLUENCE GOVERNMENT REPRESSION (2005)). These models can loosely be compared to hard and soft international law where the former refers to actual binding legal instruments and the latter carries no legally binding force. *See generally* Gregory C. Shaffer & Mark A. Pollack, *Hard Vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 712–16 (2009).

47. Joshua M. Kagan, *Making Free Trade Fair: How the WTO Could Incorporate Labor Rights and Why It Should*, 43 GEO. J. INT'L L. 195, 213–15 (2011).

48. *Id.*

49. Gabriele Spilker & Tobias Bo hmelt, *The Impact of Preferential Trade Agreements on Governmental Repression Revisited*, 8 REV. INT'L ORGS. 343, 344 n. 1 (2013).

50. Kagan, *supra* note 47, at 214.

association; 2) the effective recognition of the right to collective bargaining; 3) the elimination of all forms of compulsory or forced labor; 4) the effective abolition of child labor and a prohibition on the worst forms of child labor; and 5) the elimination of discrimination in respect of employment and occupation."[51] This model creates rights that cannot be derogated or waived and can be seen in numerous FTAs concluded by the United States including those with Peru, Korea, Panama, and Colombia.[52] Almost all agreements require the parties to maintain their current labor standards, and to ensure that "laws are effectively enforced and are consistent with certain labour standards," but earlier agreements, or soft standards agreements, do not necessarily require states to increase them. [53]

The United States' labor provisions policy has changed over the years and can be generally categorized into four different "generations" of provisions.[54] The first generation includes commitment to the eleven labor principles as seen in NAFTA and to follow domestic labor laws.[55] The second, which is exemplified by the United States-Jordan agreement (2000), references the 1998 ILO Declaration and "internationally recognized labor rights."[56] This generation also introduces a commitment of the parties to "not waive or derogate from domestic labour laws as a means to encourage trade" and "the labour rights and principles referred to in the agreement are recognized and protected by domestic law."[57] The third generation of United States labor provisions within agreements includes those signed between 2003 and 2006 with Australia, Bahrain, Chile, and the Dominican Republic.[58] The shift was due to the policy change in 2002, described above, that resulted in promotion of worker's rights and the rights of children consistent with the ILO labor standards.[59] They do include some procedural guarantees but there is no recourse through dispute settlement

51. *Id. See also ILO Declaration on Fundamental Principles and Rights at Work and its Follow Up*, International Labour Conference, 86th Session, (June 18, 1998, Annex revised June 15, 2010).

52. Kagan, *supra* note 47.

53. INT'L LABOUR ORG., *supra* note 14, at 2.

54. *Id.* at 42.

55. *Id.*

56. *Id.* at 43.

57. *Id.*

58. INT'L LABOUR ORG., *supra* note 14, at 43.

59. *Id.*

mechanisms.[60] Finally, the fourth and most recent generation of provisions can be found in the agreements signed after 2006, including those with Colombia, Korea, Panama, and Peru. These agreements recognized each fundamental principle of labor rights laid out by the ILO, and the parties agreed to incorporate and enforce these rights under domestic labor laws.[61] This last generation also provides for dispute resolution through arbitration for all provisions, thereby strengthening the parties' obligations to comply.[62]

Recent United States FTAs rely mostly on cross-state reporting as their enforcement or monitoring system. This allows individuals or non-state entities to file submissions with their domestic state-party alleging that another state party has violated the agreement's labor obligations, and then that state will decide if they will pursue the claim.[63] Remedies that may result from dispute resolution may take the form of implementation of standards, compensation, or retaliation, depending on the parties' agreement.[64] While implementation mechanisms at the domestic level are crucial in the application of these provisions, in practice, existing dispute resolution mechanisms are rarely used.[65] As of 2016, the only state-to-state arbitration for the enforcement of labor provisions is the arbitration happening between the United States and Guatemala.[66]

C. STATES' REASONS FOR INCLUSION OF HUMAN RIGHTS PROVISIONS IN TRADE AGREEMENTS

These provisions have been viewed as unilateral, because large powerful states such as the United States or the European Union can attach labor provisions to the agreements and developing countries have no choice but to meet certain criteria to gain access to a beneficial market.[67] In some ways though, this increases the effectiveness of such provisions. It appears these types of agreements are mostly concluded by a large state that

60. *Id.* at 44.
61. *Id.*
62. *Id.* at 45.
63. Kagan, *supra* note 47, at 215.
64. *Id.* at 220.
65. INT'L LABOUR ORG., *supra* note 14, at 2, 5.
66. *Id.* at 45.
67. *Id.* at 15.

has respectable labor practices and a small state that has poor practices, but similar treaties have been concluded between states with poor human rights records. But, why do parties include these provisions in the first place? Each side of the agreement has their own reasons for pursuing such treaties, and not all are based in an altruistic goal of protecting laborers.

The first reason is self-explanatory, to increase and protect human rights, especially in the Latin American region.[68] The region's "income inequality levels are among the highest in the world," which are related to low growth, poor education, and economic volatility, among other factors.[69] Inclusion of labor rights in particular can help prevent a "race to the bottom," or pressure to decrease labor standards across the board.[70] A common anti-trade argument postulates that exporting countries will lower labor standards in order to gain a comparative advantage over countries who respect labor rights.[71] While it is unlikely that a developed country would lower its standards, there is a higher risk for developing countries who are seeking foreign investment.[72] Contrary to this argument, however, countries with weak core labor standards generally tend to have very little foreign direct investment.[73] This may be due to an increase of corporate social responsibility[74] and the consequences of negative publicity involving the treatment of workers. The inclusion of social aspects to international agreements is a step toward combatting these issues and increasing the overall value of life for the region. But of course, human rights issues take the back seat in such agreements due to the economic and political nature of them.

68. Rogowsky & Chyn, *supra* note 44, at 117 ("[P]olls consistently show that Americans support trade liberalization when it leads to improved conditions for foreign and domestic workers.").

69. Franca-Filho, et al., *supra* note 32, at 816.

70. Kagan, *supra* note 47, at 201.

71. *Id.*

72. *Id.* at 202.

73. *Id.* at 203.

74. Antonio Vives, *Corporate Social Responsibility: The Role of Law and Markets and the Case of Developing Countries*, 83 CHI. KENT L. REV. 199, 201 (2008) (explaining that The idea of corporate social responsibility holds that a corporation is "responsible for the impact of its activities" and has an obligation to carry out those activities "with respect toward those affected.").

The second reason hinges more on domestic policy strategy and congressional support.[75] Linking trade agreements and trade liberalization with social rights tends to allow for more domestic support of such an agreement, therefore catering to the policymakers.[76] For instance, in the United States, the power of the labor unions in Congress at the time the treaties are formed has significant effects. American labor unions tend to oppose free trade agreements and argue they have negative effects,[77] support protectionist policies and oppose provisions which could lead to a "race to the bottom" in terms of costs, and consequently, labor rights and workers' welfare.[78] Labor protections are then needed to increase the cost of labor and therefore control competition between states, theoretically protecting American jobs. On the other hand, corporate influence in Congress has a significant effect as well in pushing these agreements through. FTAs provide multi-national corporations many benefits and unique legal rights such as ISDS and the ability to use cheap labor sources.[79] Some liberal American lawmakers, Latin American countries, and human rights groups tend to have domestic support in favor of labor standards provisions in FTAs because they intend to serve as an enforcement mechanism.[80] As American and other western companies move their manufacturing facilities to Latin America, Latin workers then have more choices of where to work, and naturally, they chose the western companies which are obligated to enforce high labor standards due to their home countries.[81] This pushes domestic companies to improve the treatment of their workers and results

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75. "Presidents, however, do not pass trade agreements into law. Congress does." HAFNER- BURTON, *supra* note 46, at 66.

76. *See generally* Lisa Lechner, *The Domestic Battle over the Design of Non-Trade Issues in Preferential Trade Agreements,* REV. INT'L POL. ECON. 4–6 (2016) (stating that large differences between member states regarding civil and political rights protection levels should trigger NGO activity).

77. AFL-CIO argues, "[i]n reality, [trade] deals have failed to promote much in the way of jobs at all, and have certainly failed to provide quality employment." AM. FED'N OF LABOR AND CONG. OF INDUS. ORGS., NAFTA AT 20, 6 (2014).

78. The AFL-CIO holds that NAFTA "allows companies to move labor intensive components of their operations to locations with weak laws and lax enforcement" which then interferes with worker's "fundamental rights" and undermine bargaining power while providing foreign and multi-national businesses with "unique legal rights." *Id.* at 4–5. *See also id.* at 17 (depicting a photo of a union members' opinion that fast track is a race to the bottom).

79. *Id.* at 6, 8.

80. *Id*. at 11

81. *Id*.

in a higher bar for everyone.

If treaties cover more ground and seek to combat negative effects of trade liberalization, more politicians are likely to be on board—on both ends of the agreement. It allows opportunities for policymakers to add in provisions that are important to them and it helps garner domestic support in Latin American countries where labor provisions are more of a necessity. But, due to the recent political and governmental policy shifts, particularly in the United States, this argument may be becoming less persuasive, or irrelevant.

Other positive justifications for linking labor standards to trade treaties include coordination of labor standards on an international level, protecting labor rights as a subset of international human rights, building a middle class which can participate in and increase the market, and an increase of economic benefits and productivity of firms that comply with fundamental labor rights.[82] Regarding the first justification, FTAs and PTAs provide a "venue for states to coordinate their labor standards"[83] and facilitate a conversation, thereby encouraging a race to the top, rather than the bottom. This coordination and facilitation changes labor standards into a public good, rather than a cost to business.[84] As to the second, poor labor practices may be more often viewed as violations of universal human rights. Labor rights are present in numerous international documents and treaties. The International Covenant on Civil and Political Rights (ICCPR) includes the right to form and join trade unions.[85] The International Covenant on Economic, Social and Cultural Rights (ICESCR) includes the rights to just and favorable conditions of work, fair wages, safe and healthy working conditions, equal opportunity for promotion and reasonable limitation of working hours and periodic holidays with pay.[86] Increased labor rights will create a more productive workforce which will then strengthen the middle class and increase the market for domestic benefit, and also for foreign importers.[87] Additionally, a stable middle class "is believed to be positively correlated with social peace and

82. Kagan, *supra* note 47, at 202–06.
83. *Id.* at 204.
84. *Id.*
85. *Id.* at 204–05.
86. *Id.*
87. *Id.* at 206.

stability."[88] An increase in labor rights can lead to productivity and profits in other ways as well. For instance, consumers may be willing to pay higher prices for a good or service they know was made in compliance with high, or international, labor standards.[89] These reasons create justifications for including labor provisions with trade agreements. The next section will examine the results of such agreements.

II. ANALYSIS

This Note will now turn to an examination of FTAs between the United States and Latin American countries to analyze the effectiveness of their labor provisions. First, it will explore which countries enter into agreements with labor provisions and the nature of their labor rights. This analysis will next look at the obligations an agreement creates through the language it uses and the standards it sets, and the enforcement mechanism the agreement creates through potential consequences of a violation and dispute resolution mechanisms, or lack thereof. Furthermore, this section will compare two agreements—the United States- Chile Free Trade Agreement (Chile Agreement) and the United States-Colombia Trade Promotion Agreement (CTPA). Through this analysis and these case studies, this section will argue that labor provisions included in FTAs between the United States and Latin America can improve labor rights in Latin American countries, but do not effect significant changes in quality of working conditions, worker's right to associate, and other labor standards. Agreements including hard labor standards are more effective as they create higher levels of accountability. While this is a positive outcome in some instances, evidence shows only countries with already decent labor standards will agree to them, therefore resulting in little to no change on a wide scale basis. Additionally, even when provisions include hard standards and the threat of dispute resolution, these mechanisms are not put into use and undermine the power of the provisions. This section will then suggest the United States only enter into trade treaties with hard labor standards and employ a gradual implementation schedule of the trade benefits when certain levels of labor standards are met.

88. *Id.*
89. *Id.* at 206–07.

A. TRENDS IN TRADE AGREEMENTS BETWEEN THE UNITED STATES AND LATIN AMERICA

The United States currently has six FTAs with eleven countries in Latin America, including the Dominican Republic Central America FTA which includes Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua, the United States-Chile FTA, United States-Peru FTA, United States-Colombia Trade Promotion Agreement, United States-Panama Trade Promotion Agreement, and NAFTA (which includes the NAALC).[90]

As of 2016, seventy-two percent of all trade-related labor provisions reference the ILO instruments, including the Declaration of Fundamental Rights listed earlier.[91] This clear trend shows governments' awareness of the need for economic and social integration, but countries have taken different approaches. The United States has focused on the effective enforcement of labor rights through legal and policy reform before the ratification of the agreement and also through "cooperative activities to build[] capacity and monitoring to assess progress."[92] Chile has implemented an "approach that relies mostly on cooperative activities to find more innovative and far-reaching ways to address issues with respect to labour practices in trading partner countries."[93] In addition to these cooperative policy mechanisms put into place by the United States and Chile, other countries are also using "technical cooperation" which provides technical assistance and financial resources to the partner country, "monitoring" systems to review the progress (usually in the form of reports), dispute settlement mechanisms, and economic disincentives as part of an agreement's labor provisions.[94] The goal of such provisions is to help ignite change within the institutional framework of a country and its labor laws and policies.

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90. Sabina Dewan & Lucas Ronconi, *U.S. Free Trade Agreements and Enforcement of Labor Law in Latin America* 3–4 (Inter-American Dev. Bank: Dept. of Res. & Chief Economist, Working Paper No. IDB-WP-543 2014), https://publications.iadb.org/bitstream/handle/11319/6724/U.S.%20Free%20Trade%20Agreements%20and%20Enforcement%20of%20Labor%20Law%20in%20Latin%20America.pdf;jsessionid=ABB5D492E20B406323A4C7A6C3A50B54?sequence=1.

91. INT'L LABOUR ORG., *supra* note 14, at 2.

92. *Id.* at 3.

93. *Id.*

94. *Id.* at 72–73.

The issue of whether this trade strategy is making a difference still remains. In general, "estimating causal effect is difficult due the uniqueness of each country," but also because data on the issue is relatively sparse and the agreements are still relatively new.[95] Many of the large international organizations that collect labor data on a global scale only have the ability to do it every few years, which means there is rarely data to use to assess the results or effects of recently signed agreements. Many states do collect their own data, but the methods and measurements vary greatly, making it difficult to compare transnationally. Lastly, because the agreements and data are so new, and many other factors cannot be accounted for yet, it is only possible to speculate the effects of an agreement, rather than find an actual causation. There is also a self-sorting bias by states as well;[96] this issue will be discussed in further detail later. Additionally, it also greatly depends on how labor rights and their enforcement are being measured.

For the Latin American region as a whole, income inequality is growing and those who are losing jobs and income due to trade are not being adequately compensated.[97] But, the employment rate for Latin America and the Caribbean increased by five percent from 1991 to 2014, while the world employment rate decreased by two percent.[98] It must be noted though, that the vulnerable employment rate for Latin America and the Caribbean was at thirty-three percent in 2014.[99] But, this may be insignificant as vulnerable workers have little access to social protection and enforcement of labor laws.[100]

Despite this, the Inter-American Development Bank (IDB) claims that, in general, "signing an FTA with the United States appears to improve enforcement of labor law" when looking at the number of inspectors and inspections.[101] According to the IDB from 2000 to 2012, for the region, there has been an increase of nine additional inspectors per one million workers and an

95. Dewan & Ronconi, *supra* note 90, at 8.
96. *Id.* at 9.
97. INT'L LABOUR ORG., *supra* note 14, at 4.
98. *World Development Indicators: Decent Work and Productive Employment*, THE WORLD BANK, http://wdi.worldbank.org/table/2.4?tableNo=2.4 (last updated, Jan. 3, 2017).
99. *Id.*
100. *See* Bureau of International Labor Affairs, *Employment & Social Protection*, U.S. DEP'T LAB. https://www.dol.gov/agencies/ilab/our-work/employment.
101. Dewan & Ronconi, *supra* note 90, at 14.

increase of almost four inspections per one-thousand workers.[102] The productivity of labor law enforcement has increased by almost fifty percent.[103] In contrast, the ILO data claims there has been a twenty percent increase in labor inspectors and a sixty percent increase in the number of inspections.[104] But, since this is a regional average estimated by the ILO, naturally some states have seen more improvement and others have seen a decline in inspections. The effectiveness of the provisions, measured by the ILO, is based off the implementation mechanisms or policies at the domestic level.[105]

As mentioned earlier in Section I, the United States' labor provisions can be loosely categorized into two groups; soft standards and hard standards.[106] The former is more similar to international human rights treaties where domestic governments manage their own policy commitments and are "soft on implementation."[107] These standards tend to be difficult to enforce, or lack enforcement regulations all together, on the international level, and are, therefore, unlikely to change the status of labor rights, especially in developing and oppressive countries.[108] Human rights agreements' (and also soft standards in labor provisions within PTAs') "greatest strength is to mobilize human rights advocates and supply countries with information and motivations to internalize new norms of appropriate behavior."[109] But, this usually requires domestic non-governmental organizations (NGOs) and human rights advocates to take a stand against abusive governments.[110]

The second category, agreements that include "hard" labor standards, requires parties to respect their own domestic labor laws, and sets actionable standards by creating dispute resolution mechanisms. "These fair trade regulations protecting human rights have cooperation benefits that are in some way

102. *Id.* at 9–10.

103. *Id.*

104. INT'L LABOUR ORG., *supra* note 14, at 78.

105. *Id.* at 5.

106. HAFNER-BURTON, *supra* note 46, at 142.

107. *Id.* at 142.

108. For example, the NAALC "commits the three countries to enforce their own labor regulations and to promote, through domestic law, 11 fundamental labor principles. There is no obligation to adopt stronger laws or adhere to international labor standards." AM. FED'N OF LABOR AND CONG. OF INDUS. ORGS., *supra* note 77, at 11.

109. HAFNER- BURTON, *supra* note 46, at 144.

110. *Id.*

conditional on countries' human rights actions, and the human rights language is embedded in an enforceable incentive structure designed to provide the economic and political benefits of preferential market access."[111] Another scholar put it differently: "by linking highly attractive gains from trade to the compliance with human rights, PTAs offer a way to withhold economic benefits or impose economic sanctions in the case of abuse, torture, or repression."[112] This quote accurately sums up the incentives for countries to follow the standards set by the PTAs and describes one of the reasons why hard standards tend to be more effective.

Next, this analysis must examine whether the language in the provisions makes a difference to see if the soft standard provisions have different outcomes than the hard standards provisions. This Note argues the hard standards do tend to effect positive change, at least in human rights or labor rights regulations, sometimes simply because countries would not have otherwise adopted such policies if there was not an economic benefit to gain as reward.[113] While agreements with hard standards do include enforcement power and there is an incentive to enter into them, labor provisions within FTAs do not create strong coercive power.[114]

According to Hafner-Burton, most of those who enter into hard standards treaties are guilty of human rights abuses.[115] But, a strong argument can be made that most countries that agree to hard standards already have a relatively strong human rights record, so the labor provisions are not helping areas where the worst labor rights violations occur. Otherwise that states "agree on hard human rights standards in PTAs only if they have a general propensity to abide by human rights in the first place."[116] This means that these FTAs are being implemented in areas where they are somewhat unnecessary.

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111. *Id.* at 146.

112. Gabriele Spilker & Tobias Bohmelt, *supra* note 49, at 344 (citing EMILIE M. HAFNER-BURTON, TRADING HUMAN RIGHTS: HOW PREFERENTIAL TRADE ARRANGEMENTS INFLUENCE GOVERNMENT REPRESSION (2005)).

113. *See infra* Section II.B.

114. *Id.*

115. *Id.*

116. *Id.* at 345.

B. UNITED STATES-CHILE FREE TRADE AGREEMENT

The United States and Chile entered into a FTA in 2004 with goals pursuant to the United States' Bipartisan Trade Promotion Authority Act of 2002, which changed United States' policy to include standards consistent with the core labor standards of the ILO.[117] Chile has had a history of having bad standards for their workers [118] which motivated both parties to agree to labor provisions. Additionally, the United States buys twenty percent of Chile's exports so Chile stood to gain a lot from a free trade agreement.[119] The agreement would effectively eliminate tariffs on ninety percent of all goods thereby expanding Chilean exports to the United States and improving its international trade reputation.[120] This helped to persuade those who were against improving workers' rights.

The Chile Agreement was the first agreement the United States entered into where the labor provisions were explicitly within the treaty in their own chapter, whereas previous treaties had labor provisions as a side agreement. The agreement was an example of a PTA effecting change and reform even before it was ratified.[121] In 1999 Chile ratified the ILO conventions of the freedom of association and the freedom to organize and bargain collectively.[122] In 2001, the United States succeeded in encouraging Chile to pass a new Labor Code, which "expands protections for union members, creates a system of punishments for unfair firings, and expands laws on freedom of association and the right to organize."[123] Through this, Chile showed good faith in their FTA negotiations with the United States and quieted criticizing American policymakers. This FTA shows the possible effects of an agreement; Chile was willing to make significant changes to get the United States to enter an agreement and so it could comply with the treaty's obligations while receiving the economic trade benefits. While the language

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117. INT'L LABOUR ORG., *supra* note 14, at 31, n.22.

118. *See generally* HUMAN RIGHTS WATCH, *World Report 2016: Chile: Events of 2015*, https://www.hrw.org/world-report/2016/country-chapters/chile#befd9b (discussing past abuses and violations, specifically during the military rule of 1973–1990).

119. HAFNER-BURTON, *supra* note 46, at 149.

120. *Id.*

121. *See generally* Rogowsky & Chyn, *supra* note 44, at 127–28 (discussing the changes in labor standards in Chile beginning in 1995).

122. *Id.* at 128.

123. HAFNER-BURTON, *supra* note 46, at 150.

and dispute mechanism of this treaty, which will be discussed next, suggest that the Chile Agreement is a soft standards treaty, one could argue it has some of the effects or coercive power of a hard standards treaty because it resulted in improvements and compliance in exchange for economic benefits.

When examining FTAs and their effectiveness, one must consider the language used within the treaty itself and the subsequent standards it creates. Chapter Eighteen of the Chile Agreement holds that "[e]ach Party shall strive to ensure that such labor principles and the internationally recognized labor rights . . . are recognized and protected by its domestic law."[124] The phrase "*strive* to ensure" does not create a hard and enforceable obligation. Rather, it reads more as a goal or commitment. Chilean law now provides for the "rights of workers to voluntarily form and join unions of their choice, bargain collectively, and conduct strikes," while also prohibiting antiunion practices by requiring compensation or rehiring of workers if terminated for unionizing.[125]

While the labor provisions in the Agreement included stricter obligations than other FTAs the United States had entered into, the enforcement or dispute resolution clauses of these provisions only permitted arbitration as a sole mechanism for failure to comply with the obligation to enforce its own labor laws, rather than violating the ILO core labor standards, which were included in the provisions.[126] This agreement, along with many others categorized into the "third generation" of American FTAs, is highly criticized for its exclusion of dispute resolution mechanisms for all of the provisions.[127] The agreement does provide for more cooperation, consultation, and review though, through the Labor Cooperation Mechanism and Cooperative Consultations.[128] The Labor Cooperation Mechanism holds that each party designate a specific office within their labor department to "carry out the work . . . by developing and

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124. United States-Chile Free Trade Agreement, Chile-U.S., art. 18.1, June 6, 2003, 42 U.S.T. 1026 [hereinafter U.S.–Chile FTA].

125. U.S. Dep't of State, Off. of Inv. Aff., *Chile - 9.2-Labor Policies & Practices*, EXPORT.GOV, https://www.export.gov/article?id=Chile-Labor (last visited Nov. 19, 2016) [hereinafter *Chile - 9.2-Labor Policies & Practices*].

126. *See* U.S.–Chile FTA, *supra* note 124, art. 18.2; INT'L LABOUR ORG., *supra* note 14, at 45.

127. INT'L LABOUR ORG., *supra* note 14, at 43.

128. *See* U.S.–Chile FTA, *supra* note 124, art. 18.5, 18.6, Annex 18.5.

pursuing cooperative activities on labor matters."[129] These activities include exchanging information regarding labor policies and their application in the Parties' territory, advance better understanding of how to effectively implement the ILO Declaration on Fundamental Principles and Rights at Work and its Follow Up, arrange review sessions at the request of either Party, and develop recommendations to their respective governments.[130] The Cooperative Consultations clause provides that a "Party may request consultations with the other Party regarding any matter arising under" the labor provisions through a written request.[131]

After addressing the treaty itself, this analysis must now turn to an examination of the results and effects of the treaty. While an important step toward change and improvement in the human rights arena is creating awareness and reforming the legal standards, it does not always effect immediate change in the real world. The analysis of statistics here is relatively speculative as no statistical tests or scientific analysis of data has been carried out. However, a comparison of different benchmarks and time points from a variety of sources are available. According to Export.gov, a site that aims to advise foreign investors, there are "no gaps in compliance with international labor standards that may pose a reputational risk to investors."[132] But statistics and general sentiment seem to suggest otherwise; significant improvement is visible in some areas but not in others.

Before General Pinochet's period of military rule, Chile's labor and employment regime included strong firm-level unions and "active state intervention in the determination of wages, prices, and other aspects of the industrial relations," while Chilean workers "enjoyed numerous protections and social service benefits."[133] During the Pinochet era, almost all labor rights, among other human rights, were suspended, but in 1979 a new labor code was adopted which provided again for firm-level unions, and temporary or subcontracted workers.[134] Later,

129. *Id.* at Annex 18.5.

130. *Id.*

131. *Id.* art. 18.3.

132. *Chile - 9.2-Labor Policies & Practices*, *supra* note 125.

133. U.S. DEP'T OF LABOR, PUB. NO. 2738, LABOR RIGHTS REPORT: CHILE 1 (2003), https://www.dol.gov/ilab/reports/pdf/HR2738ChileLaborRights.pdf [hereinafter LABOR RIGHTS REPORT: CHILE].

134. *Id.* at 1–2.

in 1988, due to Chile's "regular abuse of worker rights" and lack of compliance with internationally recognized worker rights, the United States suspended its trade benefits with the country.[135] Finally, in the 1990s after Pinochet had been ousted, the Chilean government started to restore its labor code, and bring it into compliance with the international standards at the time.[136]

Trade union membership grew substantially. In 2001, 10.3% of the workforce were union members and 37,000 members were added in 2002.[137] The Ministry of Labor and Social Welfare, more specifically, the Labor Directorate, is responsible for administering and enforcing labor and employment laws.[138] In 2003, The Chilean government had committed to hiring 300 more inspectors nationwide.[139]

In 2004, the year the treaty was to take effect and a few years after Chile's new Labor Code was passed, approximately ten percent of the workforce was unionized, minimum wage was $196 a month, which "did not provide a worker and family with a decent standard of living," and the work week was forty-eight hours.[140] In 2008, thirteen percent of the workforce was unionized, minimum wage was $305 per month, but still did not provide a decent standard of living, and the work week usually consisted of forty-five hours per week.[141] In 2015, the minimum wage was $345 per month, which was significantly above the poverty line.[142] This was the first time that this minimum wage requirement also applied to domestic workers, as the rule was implemented in 2011.[143] The ILO database holds that the trade

135. *Id.* at 2.

136. *Id.*

137. *Id.* at 3 (recognizing revisions of the national labor code in 2001 by the Chilean National Congress as one of the reasons that has led to the rise in union memberships).

138. *Id.* at 5.

139. *Id.*

140. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004: CHILE (2005), http://www.state.gov/j/drl/rls/hrrpt/2004/41753.htm.

141. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2008: CHILE (2009), http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119152.htm [hereinafter CHILE HUMAN RIGHTS REPORT 2008].

142. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2015: CHILE (2016), https://www.state.gov/documents/organization/253211.pdf [hereinafter CHILE HUMAN RIGHTS REPORT 2015].

143. Ravi Kanbur, Lucas Ronconi, & Leigh Wenoja, *Labor Law Violations in Chile,* 152 INT'L LAB. REV. 431, 433 (2013).

union density as a percentage of total paid employment was 11.6% in 2004 and 15.7% in 2012.[144] From 1991 to 2016, the employment rate increased by 7.4% (as compared to the 5% increase within Latin America and the Caribbean overall) as well.[145] Overall, there was low compliance to minimum wage requirements from 1990–2006, but an increase in compliance from 2006–2009.[146] Furthermore, there was a large reduction in violations in general during 2006–2009, which could be attributed to the increased government enforcement due to the trade agreement.[147] These statistics show improvement since the implementation of the FTA and its labor provisions, but the majority were made before the treaty went into effect. See *Figure 1* for a summary of these statistics.

	2001	2004	2008	2011	2015
Union Membership	10%	10%	13%	NA	NA
Minimum Wage (per month, USD)	NA	$196	$205	Minimum wage applicable to domestic workers	$345

Figure 1: Summary of Chilean Workers' Conditions

Chilean workers are guaranteed the freedom to associate or unionize, without prior approval, and cannot be forced to join or withdraw from a trade union as a condition for employment.[148] In 2003, strikes by public sector workers were prohibited and thirty companies were designated at essential services, in which strikes are prohibited as well.[149] According to the new labor code, passed in 2001, employers can hire replacement workers after fifteen days of strikes, save a few exceptions.[150] The ILO suggested to the Chilean government to change that portion of its labor code, but the legislature refused.[151] But, the new code

144. International Labour Organization, *Industrial Relations Indicators: Trade Union Membership Statistics*, http://www.ilo.org/global/docs/WCMS_408983/lang--en/index.htm (last updated Sep. 10, 2017).
145. *World Development Indicators, supra* note 98.
146. Kanbur et al, *supra* note 143, at 435.
147. *Id.* at 443.
148. LABOR RIGHTS REPORT: CHILE, *supra* note 133, at 7.
149. *Id.* at 8.
150. *World Development Indicators, supra* note 98.
151. LABOR RIGHTS REPORT: CHILE, *supra* note 133, at 9.

"significantly enhances the legal protections given to trade unionists against unfair dismissal," as prior to the reform, employers regularly terminated employees for participation in strikes.[152] The code also provides for higher compensations for those workers unfairly terminated,[153] but this has not completely fixed the issue. Additionally, a 2007 International Trade Union Confederation Report "identified continuing antiunion practices like barring union's leaders' access to companies, replacement of striking workers, and threatening dismissal to prevent formation of trade unions."[154] The Labor Directorate had 720 labor inspectors as of 2015, but the report expressed a need for more and claimed that fines did not have a deterrent effect on labor violations for larger employers.[155]

Overall, improvement can be seen since the passing of the 2001 labor code and the signing of the United States-Chile FTA, but more work is needed in terms of enforcement, conviction and fine collection, and overall effectiveness of the legal labor and employment obligations. It is important to note that most of the changes came from the reformed labor code in 2001, before the agreement was signed. This shows a country's willingness to prove its commitment to labor rights improvements to receive the economic and political benefits of an FTA with the United States, but a lack of coercive power from soft standards.

The next section will analyze the United States-Colombia FTA which is included in the "fourth generation" of America's labor provision with FTAs. After examining the language and effects of the treaty, this Note will compare the two agreements to see if one had a significantly different outcome.

C. UNITED STATES-COLOMBIA TRADE PROMOTION AGREEMENT

The United States and Colombia signed the Trade Promotion Agreement (CTPA), which included detailed hard labor standards, in 2006, but it did not go into effect until 2012. CTPA is considered "comprehensive" as it eliminates tariffs, removes barriers to United States services and includes provisions regulating customs administration, trade facilitation, government procurement, investment, telecommunications,

152. *Id.* at 10.
153. *Id.*
154. CHILE HUMAN RIGHTS REPORT 2008, *supra* note 141.
155. CHILE HUMAN RIGHTS REPORT 2015, *supra* note 142.

electronic devices commerce, intellectual property (IP) rights, environmental and labor protections.[156] Once again, both countries had a lot to gain from such a trade deal. For the United States, Colombia has the third largest economy in Latin America, and eighty percent of American consumer and industrial goods exports from Colombia would no longer be subject to tariffs, with the rest being gradually phased out.[157] For Colombia, the United States is its largest trading partner, making up almost thirty-four percent of its total trade, making elimination of tariffs highly beneficial.[158]

The parties also created a side accord titled the Colombian Action Plan Related to Labor Rights (the Plan) in 2011 to address labor standards and meet the laid out requirements in the larger agreement.[159] The Plan required twenty-five different measures be taken by Colombia before the deal would be submitted to United States Congress for approval, another example of reform before the treaty was put into effect.[160] This was the first time that Congressional approval of a trade treaty was contingent on achieving specific labor benchmarks.[161] Similar changes were made before the signing of the Chile Agreement to show good faith, but, distinct from the Colombian agreement, it was not required in writing.[162] CTPA was not put into effect until May 2012 when the requirements of the Plan had been deemed met.[163]

The analysis will now move to the specified standards set out by the Agreement and the Labor Action Plan and analyze the language used. The Plan's requirements included a creation of a specialized Labor Ministry, criminal code and criminal justice reform for employers "that undermined the right to

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156. *FACT SHEET: Benefits of the U.S.-Colombia Trade Promotion Agreement: More American Exports, More American Jobs*, OFFICE U.S. TRADE REPRESENTATIVE, [hereinafter *FACT SHEET*], https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2012/april/benefits-us-colombia-trade-promotion-agreement-more-ame.

157. *U.S.-Colombia Trade Promotion Agreement,* INT'L TRADE ADMIN., http://trade.gov/fta/colombia/.

158. *Colombia Free Trade Agreement*, U.S. DEP'T ST., https://www.state.gov/e/eb/tpp/bta/fta/c26415.htm.

159. Dewan & Ronconi, *supra* note 90, at 7.

160. *Id*. *See* Colombian Action Plan Related to Labor Rights, Colom.-U.S., Apr. 7, 2011 [hereinafter Colombian Action Plan Related to Labor Rights].

161. Dewan & Ronconi, *supra* note 90, at 7–8.

162. *See infra* Section II.B. (discussing the changes made before an agreement between the United States and Chile was achieved).

163. *U.S.-Colombia Trade Promotion Agreement, supra* note 157.

organize and bargain collectively," implementation of "a regime to prevent the use of temporary service agencies to circumvent labor rights," cooperation with the ILO, and broaden the scope of its protection programs, among others.[164] Chapter Seventeen of CTPA, the Chapter dedicated to labor, reaffirms the parties' obligation as members of the ILO and stipulates that "each Party shall adopt and maintain in its statutes and regulations, and practices" the principles laid out in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*.[165] These principles include: "1) freedom of association; 2) effective recognition of the right to collective bargaining; 3) the elimination of all forms of compulsory or forced labor; 4) the effective abolition of child labor and a prohibition on the worst forms of child labor; and 5) the elimination of discrimination in respect of employment and occupation."[166] While "a Party shall not fail to effectively enforce its labor laws," there leaves a lot of room for discretion of implementation: "[e]ach Party retains the right to the reasonable exercise of discretion and to a bona fide decision with regard to the allocation of resources between labor enforcement activities among the fundamental labor rights enumerated."[167] Additionally though, parties must guarantee citizens access to tribunals for enforcement of states' labor laws.[168] The Agreement's dispute resolution chapter, Chapter Twenty-One, provides that mechanisms may be triggered in regard to any and all provisions within the Agreement.[169] This means that all of the included labor provisions are enforceable through consultations, interventions of the Commission, or arbitration. The CTPA clearly lays out the stipulations and guidelines of an arbitral panel if one is needed.[170]

It is clear from a close analysis of the language of the CTPA that it creates hard, more tangible and enforceable standards as compared to other agreements. However, one must look to see if this results in more significant changes and improvements in real life. Because the agreement is so recent, it is difficult to measure the change since its implementation, but some

164. Colombian Action Plan Related to Labor Rights, *supra* note 160.

165. United States-Colombia Trade Promotion Agreement, Colom.-U.S., art 17, Nov. 22, 2006 [hereinafter CTPA].

166. *ILO Declaration on Fundamental Principles and Rights at Work and its Follow Up*, *supra* note 51.

167. CTPA, *supra* note 165, art. 17.3.

168. *Id.* art. 17.4

169. *Id.* art. 21.

170. *See generally id.*

improvements can be seen. Colombia has since implemented laws that strengthen workers' protections, and employ new labor inspectors and police investigators to enforce the laws and counter the violence against unions.[171]

In 2004, the United States Department of State reported large scale human rights violations, violence against union members, and prevalence of anti-union discrimination, including arbitrary detention of unionists by the government.[172] Only four percent of the labor force belonged to a union and there were very few successful prosecutions of alleged crimes against union members.[173] Additionally, "47% [sic] of workers earned wages that were insufficient to cover the costs of the Government's estimated low-income family shopping basket."[174] While the actual legislation in place at the time did provide for comprehensive protection of workers, there was a lack of government inspectors, thereby undermining the laws.[175] According to the 2008 Colombia Labor Rights Report,[176] labor law was administered by the Ministry of Social Protection (Ministerio de la Protección Social) (MPS) which encompassed the Ministries of Labor, Social Security and Health.[177] The Vice Minister of Labor Affairs oversaw the departments of Labor Protection (responsible for enforcing rights of workers), Employment Promotion (encompassing employment creation and skill development programs), and the Labor Inspectorate (responsible for enforcing labor and employment law).[178] In 2008, the Colombian Constitution and Labor Code provided that all employees (except police and armed forces) had a right to join a trade union and employers were prohibited from modifying

171. *FACT SHEET*, *supra* note 156.

172. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004: COLOMBIA (2005), http://www.state.gov/j/drl/rls/hrrpt/2004/41754.htm.

173. *Id.*

174. *Id.*

175. *Id.*

176. The Trade Act of 2002 (Pub. L. No. 107-210) requires the Executive to submit a "meaningful labor rights report" of any country it is negotiating a trade treaty with. The President assigned his responsibilities to the Secretary of Labor who then assigned the responsibilities to the Secretary of State, United States Trade Representative, and the Secretary of Labor in 2002. U.S. DEP'T LAB., COLOMBIA LABOR RIGHTS REPORT 3 (2008) [hereinafter COLOMBIA LABOR RIGHTS REPORT 2008], https://www.dol.gov/ilab/reports/pdf/ColombiaLaborRights.pdf.

177. *Id.* at 5.

178. *Id.* at 6.

working conditions or terminating employment in retaliation of union membership.[179] Despite this, the United States State Department reported only 742,000 workers, or about four percent of the workforce, were union members in 2007.[180] In 2010, the United States reported a 4.4% union membership rate.[181] Additionally, government regulations pertaining to union formation and registration made the process extremely slow, and many claim it was used as a way to block unionization, but the Colombian government denies this.[182] Statistics regarding union membership since the Plan were unable to be found, so its effect is unclear. This notion was supported by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), which also noted the Colombian government was engaging in arbitrary rejections of new unions and union rules and using discretion beyond the parameters given to it by the relevant legislation.[183] Workers, except those in essential public services, had the right to strike and employers were prohibited from hiring replacement workers, except for essential personal, during a legal strike.[184] But, the MPS had relatively broad authority to determine the legality of strikes, which would then allow employers to hire replacement workers and punish strike participants.[185] Furthermore, the ILO CEACR held that Colombia's labor code strike prohibitions covers too wide a range of services that are not considered essential.[186]

According to the 2011 United States Department of Labor Report, in conjunction with the Plan, Colombia re-established a separate Ministry of Labor and made a commitment to hire 480 new inspectors.[187] As of 2016, the Colombian government has come close to carrying out this commitment as it has hired over

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179. *Id.* at 8.

180. *Id.*

181. U.S. DEP'T. OF LABOR, REPUBLIC OF COLOMBIA LABOR RIGHTS REPORT 16 (2011), https://www.dol.gov/ilab/reports/pdf/colombia_LRR.pdf [hereinafter COLOMBIA LABOR RIGHTS REPORT 2011].

182. *Id.* at 10–11.

183. Committee of Experts of the Application of Conventions and Recommendations, Rep. III, Part 1A, International Labour Conference, 95th Sess., 72–73 (2006).

184. COLOMBIA LABOR RIGHTS REPORT 2008, *supra* note 176, at 12–13.

185. *Id.* at 13.

186. Committee of Experts of the Application of Conventions and Recommendations, *supra* note 183, at 73.

187. COLOMBIA LABOR RIGHTS REPORT 2011, *supra* note 181.

400 new inspectors.[188] Colombia's Congress passed legislation establishing criminal penalties for those who undermine workers' rights to organization and collective bargaining in June 2011.[189] Even though additional prosecutors were added to focus solely on these crimes and 278 cases have been initiated, only five of them have gone or are currently at trial.[190] Also, in response to the CEACR's claim, Colombia agreed to collect Colombian doctrine and case law to create guidelines narrowing the definition of "essential services" and to provide this information to the judiciary, inspectors, unions, and employers.[191] Due to these improvements caused by the CTPA and the Plan, United States estimates there are 150,000 new union members since 2011.[192] In 2015, the United States Department of State reported that training of labor inspectors has continued and increased, and two successful collective bargaining agreements were reached in areas they never had been before.[193]

While many labor rights laws were already in place before the CTPA and the Plan were effected, it is widely held that they were not enforced. One group goes as far as to hold that Colombia is the most dangerous place to be a trade union member.[194] This group also holds that the Colombian government has devoted resources to a public relations campaign in order to convince the international community that they are tackling anti-union violence.[195] While a certain political bias must be considered, this gives a glimpse of Colombian Nationals' attitudes towards the issue. In 2006, the United

188. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, U.S. DEP'T OF LABOR, THE COLOMBIAN LABOR ACTION PLAN: A FIVE YEAR UPDATE 4 (2016) [hereinafter THE COLOMBIAN LABOR ACTION PLAN: A FIVE YEAR UPDATE], https://www.dol.gov/ilab/reports/pdf/2016_Colombia_action_plan_report_FINAL.pdf.

189. COLOMBIA LABOR RIGHTS REPORT 2011, *supra* note 181, at 16.

190. THE COLOMBIAN LABOR ACTION PLAN: A FIVE YEAR UPDATE, *supra* note 188, at 2, 5.

191. COLOMBIA LABOR RIGHTS REPORT 2011, *supra* note 181, at 13.

192. THE COLOMBIAN LABOR ACTION PLAN: A FIVE YEAR UPDATE, *supra* note 188, at 1.

193. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2015: COLOMBIA (2016) [hereinafter COLOMBIA HUMAN RIGHTS REPORT 2015], https://www.state.gov/j/drl/rls/hrrpt/2015/wha/253001.htm.

194. *End Anti-Trade Union Violence in Colombia*, JUSTICE FOR COLOMBIA, http://www.justiceforcolombia.org/campaigns/union-rights/.

195. *Id.*

States said that there was a high rate of violence against trade union members, and in 2008, held that it was still a persistent problem, but there had been a decline in this violence since 2002.[196] One incident, for instance, resulted in the death of the Treasurer of the Union of Judicial Employees in 2015, among others in recent years.[197] In 2016, the United States Department of Labor recognized the success of Colombia's protection program that was implemented in 2011, and that there was a decline in the homicide rate against trade union members.[198] But, there seems to be a long way to go to completely eradicate this violence.

Colombia does not have a great record in terms of working conditions and minimum wage either. In 2008, only 1.9 million of the 7.4 million people in the formal workforce were receiving the government mandated minimum wage.[199] Specific violations were cited in the cut flower industry (one of the largest industries for Colombia) due to workers working past the 48 hour maximum and not being sufficiently compensated for their overtime.[200] The minimum wage per month was $216 in 2015, a 4.6% increase.[201] Colombia's Labor Code requires "employers to provide equipment and workplaces that guarantee the security and health of workers and to adopt safety and health measures to 'protect the life, health, and morality of workers in their service'."[202] Workers also have the right remove themselves from dangerous working conditions, but research reveals that many do not due to fear of job loss or other employer retaliation.[203] Overall, in 2008, the United States found a high level of accidents and unsafe working conditions in Colombia.[204] Additionally, while there has been an increase in enforcement of punishment for international labor rights violations through fines, there reportedly is not a system put in place to collect those fines and it is still one of the largest undermining factors of

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196. COLOMBIA LABOR RIGHTS REPORT 2008, *supra* note 176, at 44–45.

197. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, *supra* note 193.

198. THE COLOMBIAN LABOR ACTION PLAN: A FIVE YEAR UPDATE, *supra* note 188, at 2–3 (discussing the rate decrease from 100 murders per year in 2000–2010 to 18 per year in 2015).

199. COLOMBIA LABOR RIGHTS REPORT 2008, *supra* note 176, at 40.

200. *Id.* at 42.

201. COLOMBIA HUMAN RIGHTS REPORT 2015*, supra* note 193 at 56.

202. COLOMBIA LABOR RIGHTS REPORT 2008, *supra* note 176, at 42.

203. *Id.*

204. *Id.* at 43.

Colombia's labor laws.[205]

Through speculation of these statistics, it appears, in its short tenure, CTPA and the Plan has effected some positive change, but more still must be done. Specifically, the international community should watch for the trends in anti-union labor violence as that is one of the ILO core labor rights Colombia agreed to. It is very important to consider the structure and timing of the changes, as most changes occurred in 2011 due to hard standards included in the Plan, before the United States Congress would agree to put the treaty into effect. This acts somewhat as self-imposed hard standards by Colombia and proves the effectiveness of economic incentives.

D. HARD OR SOFT STANDARDS: ARE EITHER EFFECTIVE?

In comparing the Chile Agreement and the CTPA, it appears the latter has been more effective, especially in terms of policy changes, even in its short time. Both agreements did trigger statutory and regulatory change before they were signed by both parties, but the CTPA has clearer, higher, and enforceable standards.[206] PTAs do not have high coercive power, nor can they force states into doing something, meaning they lack strong enforcement power, which is rarely triggered anyway. PTAs may help to induce domestic policy change and enforcement if they include hard human rights standards "by linking highly attractive gains from trade to the compliance with human rights, PTAs offer a way to withhold economic benefits or impose economic sanctions in the case of abuse, torture, or repression."[207]

There are two problems to address in increasing the effectiveness of labor provisions within FTAs. The first is that countries will agree to and even implement improved labor laws to gain an economic advantage through a trade treaty, but will not enforce these new laws. One can argue that governments oppose human rights provisions and do not plan on implementing them domestically. This can be seen in Chile's case, and somewhat in Colombia's case, as the countries now have the proper framework, but lack the commitment to enforce those laws and regulations.

205. *See generally* COLOMBIA LABOR RIGHTS REPORT 2008, *supra* note 176.
206. *See infra* II.C.
207. Spilker & Böhmelt, *supra* note 49, at 344.

The second issue is that while "hard standards" treaties seem to be better, it is likely that only countries with already decent labor rights records or laws will agree to such "hard standards" agreements.[208] Or, one could argue that countries enter such agreements only if they have a general tendency to comply with the human rights provisions. Colombia's Constitution, labor code, and relevant administrative agencies already legally guaranteed relatively strong labor rights, but was lacking an effective investigation and enforcement system. Following this argument, this means that labor rights provisions are not being implemented in areas that have the worst records, or areas that could benefit the most from such an agreement. According to a study where data was collected on PTAs from 1976 to 2009, such agreements are unlikely to affect human rights compliance when controlling for the selection bias.[209]

E. Proposed Solution: Gradual Implementation of Hard Standards with Enforcement Mechanisms

To overcome and reduce these identified issues with labor provisions within PTAs between the United States and Latin America, the United States should employ a policy in which all treaties are negotiated with hard labor standards, but implemented at a gradual rate. It can be somewhat of a hybrid of the types of agreements examined in this Note—the United States should require a minimum level of compliance to enter into the treaty, and gradually increase the level of standards or level of compliance allowing the governments to meet the new standards over time. To create an incentive for gradual implementation, a simultaneous gradual decrease and elimination of tariffs and other trade barriers will occur. Such a policy will address both issues because it will increase the coercive power of treaties by increasing the ability and incentive for states with poor labor rights records and laws to enter into treaties with hard standards. This approach is likely to be more effective than agreements including soft labor standards because it allows time for a nation's laws and practice to adjust while creating enforcement power.

208. *Id.* at 345.
209. *Id.*

Implementing this approach would be somewhat similar to what the United States did with Chile and Colombia, implementing change before signing the agreement, but would increase the benefits and incentives on both sides. In Colombia, the United States Department of Labor has installed a full-time attaché in order to monitor and assist the implementation of the standards required by the Plan and the CTPA.[210] The United States has stated that "fully and effectively addressing" the standards of the Plan and the CTPA will require "intensive and continued engagement over time."[211] This proves that achievement of such hard labor standards does take time and cannot occur quickly, further supporting the need for a gradual implementation scheme. Instead of the United States waiting to receive any benefits while the Latin American country meets the agreement's requirements, the United States could share in the reciprocity of decreased trade barriers. This could also increase the incentive for faster implementation of the core labor rights and new domestic policies. A counter argument to this approach is that it requires a large amount of resources on the part of the United States. The United States funded an almost $10 million project from 2012 – 2016 in conjunction with the ILO to assist Colombia in strengthening the capacity of their Ministry of Labor.[212] One could refute this argument in that the economic and political access and relationship gained from a PTA is worth those resources to the United States.

Gradual implementation of treaty provisions has been used in the implementation of international human rights treaties. Labor provisions in PTAs are similar to human rights treaties in that they must be integrated at the domestic level.[213] An argument can be made that they also share legal factors which

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210. THE COLOMBIAN LABOR ACTION PLAN: A FIVE YEAR UPDATE, *supra* note 188, at 6.

211. *Id.*

212. *Id.*

213. *See generally* Veronica Bilkova et al., *Report on the Implementation International Human Rights Treaties in Domestic Law and the Role of the Courts*, EUR. COMMISSION FOR DEMOCRACY THROUGH L. (VENICE COMMISSION) 4 (2014), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)036-e ("Human rights treaties with a judicial system of control, such as the three regional systems of protection (European, American and African), have special characteristics. Indeed, not only the human rights treaties as such need to be integrated in the domestic legal orders, but in addition the case-law of the respective judicial bodies imposes specific obligations concerning compliance with the judgments issued and with the interpretation given to the conventions by the international bodies.").

impact the implementation of human rights provisions (either from a human rights treaty or a PTA). These factors include: "the conceptualisation of the relation between international and domestic legal orders (1); the status of treaties in the domestic legal order and their place in the hierarchy of norms (2); the direct and indirect effect and the interpretation of conformity clauses in the domestic constitutions (3); and the existence of legislation enabling the reception of human rights treaties into the domestic legal order (4)."[214] In terms of realistic and potential solutions to increase the effectiveness of the implementation of labor provisions (and human rights provisions), it makes the most sense to focus on the fourth factor—domestic legislation. The first three factors are very entrenched in the constitutional system of a country and therefore much more difficult to change. Additionally, "states may not invoke their own domestic law as a justification" for a treaty violation, and must conform their domestic law to that of their international obligations.[215] All of this means implementing labor provisions in PTAs goes hand in hand with implementing new domestic legislation and regulations. But, it is well-known that changes to domestic policy, in any country, takes significant time, and even more time to successfully implement and enforce that policy, hence the need for a graduated implementation policy.

The general idea is that economic trade benefits such as tariff reduction or elimination would occur in exchange for progress made in regard to labor rights in parties' domestic systems. This progress could be measured simply by the passing of new legislation, but it will likely be more effective if it also requires implementation of new policies, regulations and enforcement systems of those new policies. Objective measures could also be employed, for example, requiring a specific amount of new labor inspectors or requiring the government to grant a certain number of new trade unions. This system could create a required benchmark system following the ILO standards and the obligations set forth within the agreement which uses more readily available and easily accessible data. Following the information and measurements mentioned earlier in this Note, the agreement could require a certain monthly wage, working hours per week, passage of new working conditions (safety and health) regulations, or an increase in labor union participation,

214. *Id.* at 6.
215. *Id.* at 17.

or a clear effort to encourage labor union participation. Such a system would create an incentive for the other party, likely the Latin American country, to actually bring the labor provisions into law and enforce them, as it would then be receiving economic benefits. While this may seem like a one sided, powerful versus powerless situation, it would also create an incentive for the United States to help its treaty partners to implement such provisions as the United States stands to benefit substantially from reduced or eliminated tariffs or other concessions agreed upon in the PTA as they are met.

III. CONCLUSION

With a shift in the nature of international trade agreements from large scale multilateral WTO agreements to bilateral or Plurilateral FTAs, the nature of agreements and the obligations they create are also shifting. It is increasingly common for States to enter comprehensive bilateral or regional FTAs including human rights provisions. Due to the increased attention to human rights, specifically labor rights, in recent years, the world has seen the frequency and the extent of violations in these fields, by both private and public parties. Such provisions show an awareness of these violations and the need for progress and change, especially regarding labor rights, but the results of such provisions do not seem to meet their maximum potential effect.

This Note has discussed the structure and language of different types of labor provisions within FTAs, specifically between the United States and Latin American countries (where labor rights violations are too common). It has examined the motivations behind labor rights provisions and the results of the different types of provisions. The United States-Chile and United States-Colombia FTAs were used as case studies to allow comparison between a treaty including somewhat soft standards, and a treaty including hard standards, respectively. Using specific agreements allowed for an analysis of the circumstances of labor rights before and after the agreements were signed to be done, speculating the effectiveness of such provisions.

In the case of Chile, the act of entering into the agreement was effective as Chile made significant improvements to their labor laws and inspections system in order to show their good faith in continuing out such behavior once the treaty was signed. This evidence supports the notion that countries are more likely

to meet strict, albeit unofficial, benchmarks when there is an economic reward as a result. But, what seems to be because of poor enforcement systems and lack of strong obligations, there has not been significant changes to labor rights in Chile since the treaty was put into effect. After the Colombia TPA, which included stricter language of labor standards and stronger enforcement mechanisms, some noticeable legal changes have been made, but the country has been less successful in implementing and enforcing these changes in a short amount of time. These results show once again that benchmarks can be met, but a better implementation plan is necessary.

This Note holds that FTAs including hard labor standards are more likely to be effective, but countries with the worst violations are not likely to enter into them due to the high and enforceable standards, which decreases their coercive power. This Note suggests that the United States only enter into agreements requiring objective measurable change through hard standards and creating enforcement mechanisms. The proposed solution, the requirement of gradual implementation of labor standards coupled with gradual access to economic trade benefits, will increase the coercive power and effectiveness of FTAs through more attainable and realistic benchmarks and mutual benefits to both parties. FTAs between the United States and Latin American countries have immense potential to enact significant change to labor rights in Latin America, but must be implemented through more effective means.