# LABOR OBLIGATIONS IN THE U.S.-CHILE FREE TRADE AGREEMENT

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## I. INTRODUCTION

The Office of the United States Trade Representative (USTR) negotiated the U.S.-Chile Free Trade Agreement (U.S.-Chile FTA)[1] and, simultaneously, the U.S.-Singapore Free Trade Agreement[2] as the first free trade agreements (FTAs) under the recently passed Bipartisan Trade Promotion Authority Act of 2002 (BTPAA).[3] A particularly contentious aspect of the U.S.-Chile FTA is its Chapter 18 labor provisions.[4] Labor advocates, free trade advocates, and economic protectionists have hotly debated the proper role of labor obligations in FTAs since the signing of the North America Free Trade Agreement (NAFTA) side agreement on labor, North American Agreement on Labor Cooperation (NAALC). This debate ranged over various issues, including: whether it was preferable to address labor standards within the context of bilateral free trade agreements instead of the more static World Trade Organization or the International Labor Organization,[5] whether labor standards should be in the main body of FTAs or negotiated separately,[6] the

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1. U.S.-Chile Free Trade Agreement (June 6, 2003), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html (final text).

2. U.S.-Singapore Free Trade Agreement (May 6, 2003), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html (final text).

3. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801–3813 (2003).

4. U.S.-Chile Free Trade Agreement, *supra* note 1, at ch. 18.

5. *See* Hilary K. Josephs, *Symposium: Global Trade Issues in the New Millennium: Upstairs, Trade Law; Downstairs, Labor Law*, 33 GEO. WASH. INT'L L. REV. 849 (2001) (exploring the possibility of including labor enforcement procedures in either the WTO or ILO setting).

6. *See NAFTA: House Panel OKs Fast-Track Bill; Kantor Cries Foul*, GREENWIRE (American Political Network, Inc.), Sept. 22, 1995.

appropriate labor standards to be covered, and whether labor standards should be mere goals or enforceable obligations under a dispute settlement mechanism.[7] The passage of BTPAA and its congressional negotiating objectives have made labor provisions in U.S. FTAs a settled reality for most future U.S. trade agreements. The standard for labor obligations in U.S. FTAs, however, is still in flux.[8]

The U.S.-Chile FTA offers a first glance at a possible template for U.S. labor provisions in future FTAs. With the passage of BTPAA, the United States is aggressively seeking to catch up for lost time on free trade agreements. During the eight years the executive lacked fast track negotiating authority,[9] the United States saw other Western nations move forward with bilateral trade negotiations and agreements while it lagged behind. Chile, originally intended to be a NAFTA member, signed an FTA with Canada in 1997.[10] Recently, the USTR announced that the U.S.-Australia Free Trade Agreement went into effect[11] and the U.S.-Morocco Free Trade Agreement was approved by the U.S. Senate[12] and House of Representatives.[13] The United States also signed an FTA with Latin American countries El Salvador, Guatemala, Honduras, Nicaragua, Costa Rica, and the Dominican Republic, which will comprise the U.S.-Dominican Republic-Central American Free Trade Agreement (U.S.-D.R.-

7. *See* Marley S. Weiss, *Symposium: Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 703–06 (2003) (discussing the NAALC's emphasis on national sovereignty and its effect on determining which labor standards are subject to "hard" sanctions versus those that are effectively unenforceable and, therefore, mere goals).

8. *See id*. at 697–702 (discussing differences between recent trade agreements).

9. Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More Than a Name Change*, 35 GEO. WASH. INT'L L. REV. 1 (2003).

10. Press Release, Dep't of Foreign Affairs & Int'l Trade, Trade Agreement with Chile Shows Positive Results (May 11, 2001), *available at* http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104179.htm (reporting that Canada was the only nation whose exports to Chile increased following the 1997 FTA).

11. Press Release, Office of the United States Trade Representative, Landmark U.S.-Australia Free Trade Agreement Goes Into Effect Today (Jan. 1, 2005), *at* http://www.ustr.gov/Document_Library/Press_Releases/2005/January/Lmark_U.S.-Australia_Free_Trade_Agreement_Goes_Into_Effect_Today.html.

12. Press Release, Office of the United States Trade Representative, Statement of U.S. Trade Representative Robert B. Zoellick Following Senate Approval of Morocco Free Trade Agreement (July 22, 2004), *at* http://www.ustr.gov/Document_Library/Press_Releases/2004/July/Statement_of_U.S._Trade_Representative_Robert_B._Zoelicck_Following_Senate_Approval_of_Morocco_Free_Trade_Agreement.html.

13. Press Release, Office of the United States Trade Representative, Statement of U.S. Trade Representative Robert B. Zoellick Following House Approval of Morocco Free Trade Agreement (July 22, 2004), *at* http://www.ustr.gov/Document_Library/Press_Releases/2004/July/Statement_of_U.S._Free_Trade_Representative_Robert_B._Zoellick_Following_House_Approval_of_Morocco_Free_Trade_Agreement.html.

CAFTA).[14] Further, the USTR initiated negotiations for an FTA with the Southern African Customs Union (SACU) in 2002.[15] In January of 2004, the USTR announced the opening of FTA negotiations with Bahrain (now signed) and proposed FTA negotiations with Thailand.[16] In addition, U.S. Trade Representative Robert B. Zoellick notified Congress on November 18, 2003, that the George W. Bush Administration[17] intends to launch negotiations for a FTA with Columbia, Peru, Ecuador, and Bolivia,[18] as well as a separate FTA with Panama.[19] These individual free trade agreements with South American countries are intended to facilitate consummation of the Free Trade Agreement of the Americas (FTAA), scheduled for completion in 2005.[20] The BTPAA requires these free trade agreements to include labor provisions if they are submitted under trade promotion negotiating authority.[21] One of the basic requirements that has been successfully negotiated in recent FTAs is the commitment of each trading partner to enforce domestic labor laws.[22] The status and enforcement of labor standards in Australia's domestic labor law, however, are extremely different from El Salvador's.[23] It is with less developed countries that the United States

14. Press Release, Office of the United States Trade Representative, Dominican Republic Joins Five Central American Countries in Historic FTA with U.S. (Aug. 5, 2004), *at* http://www.ustr.gov/Document_Library/Press_Releases/2004/August/USTR_Zoellick_Statement_at_Signing_of_U.S.-D.R.-Central_America_FTA.html.

15. United States Trade Representative, U.S.-SACU Free Trade Agreement (Nov. 5, 2002), *at* http://www.ustr.gov/new/fta/sacu.htm. SACU's member countries are Botswana, Lesotho, Namibia, South Africa, and Swaziland.

16. Press Release, Office of the U.S. Trade Representative, U.S. and Costa Rica Reach Agreement on Free Trade: Costa Rica Will Join Recently Concluded Central American Trade Pact (Jan. 25, 2004), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2004/January/U.S._Costa_Rica_Reach_Agreement_on_Free_Trade.html.

17. Hereinafter all references to President Bush refer to George W. Bush.

18. Press Release, Office of the U.S. Trade Representative, USTR Notifies Congress of Intent to Initiate Free Trade Talks with Andean Countries (Nov. 18, 2003), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2003/November/USTR_Notifies_Congress_of_Intent_to_Initiate_Free_Trade_Talks_with_Andean_Countries.html.

19. Press Release, Office of the U.S. Trade Representative, USTR Notifies Congress of Intent to Initiate Free Trade Talks with Panama (Nov. 18, 2003), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2003/November/USTR_Notifies_Congress_of_Intent_to_Initiate_Free_Trade_Talks_with_Andean_Countries.html.

20. *See* USTR Notifies Congress of Intent to Initiate Free Trade Talks with Andean Countries, *supra* note 18.

21. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. § 3803(b)(2) (2003).

22. *See e.g.*, U.S.-Chile Free Trade Agreement, *supra* note 1, at art. 18.2(1)(a).

23. *Compare* Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC), *The U.S.-Australia Free Trade Agreement*, Mar. 12, 2004, at 3 (although critical of the U.S.-Australia FTA, the LAC report states: "The LAC is not opposed in principle to expanding trade with Australia, a country with a democratic government and a vibrant domestic labor movement"), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Reports/asset_upload_file298_3385.pdf, *with* Human Rights Watch, *Deliberate Indifference: El Salvador's Failure to Protect Workers' Rights* 1 (2003), *available at*

is poised to influence the standard for labor to a significant degree.[24] As such, an evaluation of the U.S.-Chile FTA's labor provisions may be helpful to understand the current state of labor obligations and trade as well as to critique their effectiveness looking toward future trade agreements.

The premise upon which this article is based is that free trade is economically and normatively desirable in order to increase the overall welfare of trading partners, and that labor obligations in FTAs are an important means to encourage an acceptable international standard for labor, while simultaneously encouraging development and trade for all parties. This article builds upon the notion that free trade and an acceptable floor for international labor standards are not mutually exclusive.

This article explains the labor provisions in the U.S.-Chile FTA and the context in which they were negotiated in order to evaluate their legitimacy and effectiveness. Section II.A. sets the stage for this examination by illuminating the legal structure that necessitates labor provisions in U.S. FTAs. It focuses on the passage of BTPAA and its inclusion of labor obligations as trade negotiating objectives. Also, it details the BTPAA's specific legal requirements for labor provisions in FTAs. Section II.B. turns to the U.S.-Chile FTA and its specific labor provisions in the context of past FTAs. Section III.A. explores whether the U.S.-Chile FTA labor provisions violate congressional negotiating objectives under the BTPAA. This section concludes with an analysis of Congress' options if trade provisions fail to meet negotiating objectives. Section III.B. asks whether the U.S.-Chile FTA labor provisions are effective on their own terms. Finally, section III.C. offers some possible ways in which the effectiveness of labor provisions in future FTAs may be enhanced.

## II. DISCUSSION

### *A. Trade Promotion Authority and Congressional Negotiating Objectives Regarding Labor*

The story of U.S. trade negotiations and resulting FTAs is closely tied to the rise and fall of presidential negotiating authority under fast

http://www.hrw.org/reports/2003/elsalvador1203/elsalvador1203.pdf (stating that El Salvador has weak labor laws and fails to enforce them effectively).

24. *See* Sandra Polaski, *Trade and Labor Standards: A Strategy for Developing Countries* (Carnegie Endowment for International Peace) 8 (2003), *available at* http://www.ceip.org/files/Publications/Polaski_Trade.asp?from=pubauthor.

track authority, and now trade promotion authority (TPA).[25] In 1994, the Clinton Administration failed to gain a renewal of fast track authority largely because of disagreement over the proper role of labor and environment obligations in the proposed inclusion of Chile in the NAFTA.[26] The Clinton Administration's first fast track renewal proposal, two Democrat-sponsored versions and a compromise version, all linking free trade negotiations to trading partners' environmental and labor obligations, were unable to overcome the Republicans in Congress that opposed linkage.[27] As a result, the executive lacked fast track authority for eight years.

Fast track authority, however, gained new vigor under a new administration and a new name.[28] In its "Super 301" report on trade expansion priorities, the USTR notified Congress that TPA was one of the Bush Administration's "top priorities" regarding future trade legislation.[29] The U.S. House of Representatives passed TPA legislation after intense debate on December 6, 2001.[30] The BTPAA, despite its name, was not the product of a unified Congress.[31] Its passage required negotiating and concessions, largely on party lines.[32] Despite the political wrangling, the Senate approved a different version of the bill and both houses approved the conference report and passed TPA as a part of the Trade Act of 2002.[33]

In its final version, the BTPAA grants the president the power to negotiate and secure trade agreements by a simple majority vote from both houses of Congress and without fear of subsequent congressional amendment.[34] The law includes negotiating objectives, which are a

25. Shapiro & Brainard, *supra* note 9, at 4.

26. Lenore Sek, Congr. Res. Srvc., Pub. No. IB10084, *Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107th Congress*, (May 14, 2001) (updated Jan. 14, 2003), at 3; *see also* American Political Network, *supra* note 6 (reporting opposing views of the Clinton Administration and the GOP. The Clinton Administration wanted labor and environmental provisions to be in the main body of an agreement for Chile to enter NAFTA, while the GOP proposed a fast track bill that would only allow an agreement on labor in the context of a side agreement.).

27. Joseph G. Block & Andrew R. Herrup, *Addressing Environmental Concerns Regarding Chilean Accession to NAFTA*, 10 CONN. J. INT'L L. 221, 229–33 (1995).

28. Report on Trade Expansion Priorities Pursuant to Executive Order 13116 ("Super 301"), 66 Fed. Reg. 23,064, 23,065 (May 7, 2001).

29. *Id*.

30. Sek, *supra* note 26, at 3.

31. *See* Michael M. Phillips, *House Passes Fast-Track Bill, But Margin of Victory Is Slim*, WALL ST. J., July 29, 2002, at A3.

32. *Id*.

33. Sek, *supra* note 26, at 3. For a more detailed account of the congressional battle over trade promotion authority, *see* Shapiro & Brainard, *supra* note 9, at 19–27.

34. 19 U.S.C. § 2191 (2004); *see also* Shapiro & Brainard, *supra* note 9, at 5 n.21 (explaining that the simple majority vote in both houses, in contrast to the constitutionally contemplated

minimum set of guidelines that the executive must follow as it negotiates FTAs.[35] The inclusion of labor standards under specific enforcement procedures as negotiation objectives differs significantly from the former fast track version.[36]

One of Congress' enumerated powers is to "regulate commerce with foreign nations."[37] Constitutionally, TPA is a legislative grant of power to the executive branch. Hal Shapiro and Lael Brainard write that "[a] close examination suggests that fast track is a highly conditional grant of authority from a legal point of view; its considerable power in practice has derived from convention and the implicit political compact between the president and Congress."[38]

This "highly conditional grant of authority" is premised upon the president upholding the negotiation objectives set out by Congress.[39] The BTPAA states that "[a] trade agreement may be entered into under this subsection only if such agreement makes progress in meeting the applicable [negotiating] objectives . . . and the President satisfies the conditions set forth in section 2104 [19 USCS § 3804]."[40]

The BTPAA lists labor standards as trade negotiating objectives under two categories: overall trade negotiating objectives and principal trade negotiating objectives.[41] The overall negotiating objectives concerning labor are:

> to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO . . . and an understanding of the relationship between trade and worker rights [and] to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade.[42]

The principal negotiating objective for labor requires the executive to seek "to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its . . . labor laws, through a

two-thirds Senate approval of trade agreements, developed as a constitutionally contentious doctrine).

35. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801–3813, 3802 (2003).

36. *See* Shapiro & Brainard, *supra* note 9, at 28.

37. U.S. CONST. art. I, § 8.

38. Shapiro & Brainard, *supra* note 9, at 4.

39. *Id*.

40. 19 U.S.C. § 3803(b)(2).

41. 19 U.S.C. § 3802(a)–(b).

42. 19 U.S.C. § 3802(a)(6)–(7).

sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party. . . ."[43]

In addition, BTPAA also sets out objectives for dispute settlement and enforcement "to seek provisions that treat United States principal negotiating objectives equally with respect to–(i) the ability to resort to dispute settlement under the applicable agreement; (ii) the availability of equivalent dispute settlement procedures; and (iii) the availability of equivalent remedies."[44]

### *B. U.S.-Chile FTA Labor Provisions*

Until recently, the U.S.-Chile FTA was the neglected child of a dysfunctional relationship between the executive and Congress over TPA and the role of labor in FTAs. At the Summit of the Americas in 1994, President Clinton stated that Chile would become the next NAFTA member under NAFTA's member accession provision.[45] This proposal followed the expiration of fast track authority and ultimately failed due to the inability of the Clinton Administration to secure its renewal.[46] Attention then turned to entering into a bilateral FTA with Chile as an incremental step toward Chile's membership in the NAFTA once Congress renewed fast track legislation.[47] Although trade negotiations were launched in 2000, Chile made it clear that it was not interested in serious negotiations until the U.S. Congress reinstated fast track.[48] Passage of the BTPAA enabled the Bush Administration to finally move forward on the U.S.-Chile FTA and in the summer of 2003 it passed both houses with President Bush signing the U.S.-Chile FTA on September 3, 2003.[49]

To appreciate the U.S.-Chile FTA and the controversy surrounding its Chapters on labor and enforcement, it is necessary to first have an overview of the labor provisions in preceding FTAs. The NAFTA was the first comprehensive U.S. FTA to cover significant

43. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801–3813, 3802(b)(11)(A) (2003). An additional primary labor negotiating objective is "to strengthen the capacity of United States trading partners to promote respect for core labor standards." 19 U.S.C. § 3802(b)(11)(C).

44. 19 U.S.C. § 3802(b)(12)(G).

45. S. REP. NO. 108–116, at 2 (2003).

46. Carol Pier, *Labor Rights in Chile and NAFTA Labor Standards: Questions of Compatibility on the Eve of Free Trade*, 19 COMP. LAB. L. & POL'Y J. 185, 186 (1998).

47. *Id.* at 188; S. REP. NO. 108–116, at 2 (2003).

48. Stephen Fidler, *Chile Gloomy on NAFTA Prospects*, FIN. TIMES, Nov. 3, 1995, at 6.

49. Bill Summary & Status, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR02738:@@@L&summ2=m&; *see also* Proclamation No. 7746, 68 Fed. Reg. 75,789 (Dec. 30, 2003) (proclaiming the implementation of the U.S.-Chile FTA as of Jan. 1, 2004).

labor obligations.[50] The labor provisions are not in the main body of the NAFTA text, but instead, the Clinton Administration negotiated the NAALC as a side agreement.[51] One primary objective of the NAALC was to promote enforcement of the parties' domestic labor laws.[52] The structure and wording of the NAALC, however, greatly limit parties' ability to effectively enforce this obligation.[53] Subsequent experience under the NAALC has shown the difficulty in evaluating whether a country has failed to enforce its labor laws.[54] A further impediment to making labor standards a serious obligation is that the NAALC maintains a high level of respect for member sovereignty and does not prevent member countries from legislating domestic labor standards to less stringent regulations in their domestic laws.[55]

The U.S.-Jordan Free Trade Agreement (U.S.-Jordan FTA)[56] is considered by many labor advocates to be a "gold standard" for labor provisions in free trade agreements.[57] The Clinton Administration negotiated the U.S.-Jordan FTA without TPA and incorporated stronger labor and labor enforcement provisions than those in the NAALC.[58] The U.S.-Jordan FTA contains two main innovations on labor obligations in free trade agreements. Unlike the NAALC, the U.S.-Jordan FTA brought labor provisions into the main body of the text.[59] Second, labor obligations come under the same dispute

50. Jack I. Garvey, *Current Development: Trade Law and Quality of Life: Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439 (1995).

51. Jack I. Garvey, *A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*, 5 U.C.L.A. J. INT'L L. & FOR. AFF. 1, 9 (2000).

52. *Id*. at 6.

53. *See* Weiss, *supra* note 7, at 710–11 (noting that the NAALC provisions require that the failure to enforce domestic labor laws be both related to trade and a persistent practice.)

54. Evaluating whether a country has failed to enforce its labor laws is a complex analysis. The following articles looked at Mexico as an example. Barry LaSala, *NAFTA and Worker Rights: An Analysis of the Labor Side Accord After Five Years of Operation and Suggested Improvements*, 16 LAB. LAW. 319, 320 (2001) (stating that Mexico has failed to adequately enforce its labor laws); Michael Joseph McGuinness, *The Landscape of Labor Law Enforcement in North America: An Examination of Mexico's Labor Regulatory Policy and Practice*, 29 LAW & POL'Y INT'L BUS. 365, 401 (1998) (analyzing the inspection process and concluding that although the inspection process is better than had been previously claimed, many barriers to enforcement remain).

55. *See* Weiss, *supra* note 7, at 711.

56. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, 41 I.L.M. 63 [hereinafter U.S.-Jordan FTA].

57. Weiss, *supra* note 7, at 700.

58. Shapiro & Brainard, *supra* note 9, at 46; *see also* Notice and Request for Comments, 65 Fed. Reg. 37,594 (June 15, 2000) (announcing the negotiation of the U.S.-Jordan FTA and inviting public comment).

59. Weiss, *supra* note 7, at 713.

resolution procedures as commercial obligations.[60] If parties cannot settle their dispute regarding a violation of the labor obligations after a dispute settlement panel has issued a report stating that a violation exists, the article on dispute settlement entitles the "affected Party . . . to take any appropriate and commensurate measure."[61]

In contrast, many labor advocates consider the U.S.-Chile FTA to be a "step back" from the U.S.-Jordan FTA.[62] Although labor provisions are included in the main body of the text, only the prohibition against a party violating its domestic labor laws is enforceable in a meaningful way, and even that provision does not come under the same enforcement procedures as the commercial provisions.[63]

Chapter 18 of the U.S.-Chile FTA lays out the framework for the status of labor standards in the agreement. The labor obligations are easily broken into two practical groupings based on the enforcement procedures available to each of them. In the first category, parties "reaffirm" obligations as members of the International Labor Organization (ILO) and as parties to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998).[64] They also "strive" to ensure internationally recognized labor rights in their domestic law, including:

> (a) right of association; (b) right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor; (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[65]

The agreement also states that it is "inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws."[66] The standard by which parties will be evaluated is simply that they must "strive" not to weaken their labor laws to reap trade advantages.[67]

The second category relates to domestic labor law enforcement. Parties are prohibited to fail to enforce their domestic labor laws by a

60. *Id*. at 714.
61. U.S.-Jordan FTA, art. 17.2(b).
62. *Weiss*, *supra* note 7, at 700, 721.
63. U.S.-Chile Free Trade Agreement, *supra* note 1, art. 18.2(1)(a), art. 18.6(7), art. 22.16(1)–(2).
64. *Id*. at art. 18.1(1).
65. *Id.* at art. 18.1(1), art. 18.8.
66. *Id*. at art. 18.2(2).
67. *Id*.

"sustained or recurring course of action or inaction, in a manner affecting trade between the Parties."[68] However, if such lack of enforcement results from a "reasonable exercise" of discretion regarding enforcement resource allocation, the party will not be found to be in violation of the above provision.[69]

The first category of labor obligations, and thus the majority of labor obligations covered by the U.S.-Chile FTA, is restricted to what essentially amounts to cooperative state consultations. In fact, cooperative consultations between the parties are the main dispute mechanism for all violations of labor obligations. First, parties must attempt to resolve all perceived violations of Chapter 18 labor obligations through party consultations.[70] Only after consultations fail may parties request the Labor Affairs Council to convene.[71] The Labor Affairs Council "shall endeavor to resolve the matter" through recourse to "good offices, conciliation, or mediation."[72] The Labor Affairs Council, however, cannot pass binding decisions without the parties' mutual consent.[73]

Only violations of a category two labor obligation, the obligation for parties to enforce their domestic labor laws, may ever eventually be resolved under Chapter 22 on dispute settlement.[74] These Article 18.2(1)(a) violations can reach Chapter 22 dispute settlement only sixty days after going through consultations as set out above.[75] Supposing that a category two violation were to meet all the procedural requirements, the annual damage award for such violations is capped at $15 million per year[76] and is paid by the offending country into a fund that it may use to "improve or enhance labor . . . law enforcement."[77]

68. *Id*. at art. 18.2(1)(a).
69. U.S.-Chile Free Trade Agreement, *supra* note 1, art. 18.2(1)(b).
70. *Id*. at art. 18.6(1), (4), (6), (8).
71. *Id*. at art. 18.6(4).
72. *Id*. at art. 18.6(5).
73. *Id*. at art. 18.4(5).
74. U.S.-Chile Free Trade Agreement, *supra* note 1, art. 18.6(7).
75. *Id*. at art. 18.6(8).
76. *Id*. at art. 22.16(2).
77. *Id*. at art. 22.16(4).

## III. ANALYSIS

### *A. Do the U.S.-Chile FTA Labor Provisions Violate Congressional Negotiating Objectives Under the BTPAA?*

The principal method to determine whether the U.S.-Chile FTA's labor provisions satisfy the congressionally mandated negotiating objectives is to compare the two texts. The congressional overall negotiating objectives for labor in FTAs, to "promote" ILO labor standards in the agreement and to "seek" provisions whereby parties "strive" not to weaken their current domestic labor laws,[78] have been textually upheld in the U.S.-Chile FTA, although, at a minimal level.[79] The corresponding provisions in the U.S.-Chile FTA state that parties "reaffirm" their ILO obligations and "shall strive" not to "weaken or derogate from" these "internationally recognized labor rights."[80] Congress' overall negotiating objectives do not require specific procedures or dispute resolution mechanisms by which to ensure that these obligations are upheld.[81] On their face, the corresponding U.S.-Chile FTA labor provisions mirror the language used in the BTPAA negotiating objectives and therefore are arguably sufficient under the Act.

Reiterating the language in the BTPAA regarding the prohibition on weakening domestic labor laws is arguably insufficient, however, if one takes a broader reading of the word "strive" in the context of the U.S.-Chile FTA. To strive means to "devote serious effort or energy" to ensure that the obligation set out in the text is upheld.[82] The procedural mechanisms by which such obligations are guaranteed, then, are equally as important as the language that defines the obligations to ensure that they have real force. Although parties agree to "strive" not to weaken their domestic labor laws,[83] the

78. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801–3813, 3802(a)(6), 3802(a)(7); *see also* Table 1, *infra* (comparing congressional negotiating objectives to the key corresponding U.S.-Chile FTA labor provisions).

79. *Compare* 19 U.S.C. §§ 3802(a)(6), (7), *with* U.S.-Chile Free Trade Agreement, *supra* note 1, at art. 18.1(1); s*ee also* Table 1, *infra*.

80. U.S.-Chile Free Trade Agreement, *supra* note 1, art. 18.1(1); *see also* Table 1, *infra*.

81. *See* 19 U.S.C. §§ 3802(a)(6), (7); *see also* Tables 1 & 2, *infra* (Table 2 compares the enforcement procedures for commercial obligations, the obligation to enforce domestic labor laws, and the remaining labor provisions in the context of congressional negotiating obligations. Note that under congressional negotiating obligations, the enforcement procedures for commercial provisions and the obligation to enforce domestic labor laws should be equivalent in regards to access, procedure, and remedy.).

82. The Merriam-Webster Dictionary defines "strive" as: "to devote serious effort or energy," or "to struggle in opposition." Merriam-Webster Online Dictionary, *at* http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=strive.

83. 19 U.S.C. § 3802(a)(7).

enforcement procedures are not sufficient to ensure that parties are "devot[ing] serious effort"[84] toward this obligation. For example, if a party passed legislation that set domestic labor standards substantially below the ILO core labor standards in a way that gave them trading advantages over the opposing party, the opposing party's recourse is essentially state consultation or mediation via the Labor Affairs Council that is composed of cabinet-level officials from both parties.[85] The enforcement mechanism for such a violation, then, is purely political. This stands in sharp contrast with the enforcement mechanisms available under Chapter 22 for commercial violations, which include the possibility of imposing trade sanctions or monetary penalties.[86] Because politics is often a cost-benefit balancing act, it is questionable if this mechanism is sufficient to encourage parties to put forth the serious effort the term "strive," and therefore Congress, requires.[87]

The U.S.-Chile FTA labor provisions that correspond with the principal negotiating objectives do not satisfy Congress' negotiating objectives. Congress stipulated that equivalency between principal negotiating objectives must be sought in three ways: "(i) the ability to resort to dispute settlement under the applicable agreement; (ii) the availability of equivalent dispute settlement procedures; and (iii) the availability of equivalent remedies."[88] The only principal labor provision that falls under this section is the requirement that a party "not fail to effectively enforce its . . . labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party."[89] Accordingly, failure to enforce a party's labor laws under the U.S.-Chile FTA should have equivalent recourse to dispute settlement, equivalent dispute settlement procedures, and equivalent dispute settlement remedies as other principle negotiating objectives.[90]

The dispute settlement provisions of the U.S.-Chile FTA regarding the principal negotiating objective to guarantee

84. *See* Merriam-Webster Online Dictionary, *supra* note 82.

85. U.S.-Chile Free Trade Agreement, *supra* note 1, art. 18.6(7), 18.4; *See also* Table 2, *infra*.

86. *See* U.S.-Chile Free Trade Agreement, *supra* note 1, art. 22.14(2), 22.15(6); *see also* Table 2. Note that monetary awards and the possibility of trade sanctions are only available for the violation of one particular labor obligation: article 18.2(1)(a). They do not apply to all other labor obligations. *See* discussion, *infra*.

87. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801–3813, 3802(a)(7); *see also* Section III.B., *infra*.

88. 19 U.S.C. § 3802(b)(12)(G).

89. 19 U.S.C. § 3802(b)(11)(A).

90. *See* 19 U.S.C. § 3802(b)(12)(G); *see also* Tables 1 & 2, *infra*.

enforcement of domestic labor laws are contrary to congressional intent.[91] First, commercial complaints (i.e., other principal negotiating objectives in the U.S.-Chile FTA) have full access to Chapter 22 on dispute resolution.[92] Article 22.15, importantly, includes recourse to "suspension of benefits of equivalent effect" if the parties either cannot come to an agreement following the arbitration panel's final report,[93] or the complaining party thinks the offending party has not upheld the agreed upon resolution to the dispute.[94] In contrast, labor obligations have restricted access to Chapter 22 dispute resolution and are explicitly excluded from recourse to Article 22.15.[95] Thus, there are important differences as to access to dispute resolution.

More important, the remedy available for the failure to enforce a party's domestic labor laws is not equivalent to the remedy for the violation of other commercial obligations.[96] Where an arbitral panel finds a violation of a commercial obligation, "the resolution, whenever possible, shall be to eliminate the non-conformity or the nullification or impairment"[97] until the violating behavior ceases.[98] This means that monetary assessments and other compensation will usually be roughly equivalent to the benefit lost by the complaining party due to the violation.[99] Commercial obligations are not restricted by a monetary cap.[100] If the parties agree to the panel's determination or their own resolution and the offending member does not comply, the complaining party may suspend "benefits of equivalent effect."[101] The remedy for failing to enforce domestic labor laws is, however, undermined in three ways. First, when an arbitral panel finds a violation of Art. 18.2(1)(a) (the obligation to enforce domestic labor laws), the complaining party may only ask for a monetary assessment.[102] If awarded, the monetary assessment may not exceed $15 million annually.[103] Second, if the offending party fails to pay the

91. *Compare* 19 U.S.C. § 3802(b)(12)(G), *with* U.S.-Chile Free Trade Agreement, *supra* note 1, art. 22, *and* U.S.-Chile Free Trade Agreement, *supra* note 1, art. 18; s*ee also* Tables 1 & 2, *infra*.

92. U.S.-Chile Free Trade Agreement, *supra* note 1, art. 22.2.

93. *Id.* at art. 22.15(1)–(2).

94. *Id*. at art. 22.15(2)(b).

95. *Id*. at art. 22.15(8).

96. *Compare* U.S.-Chile Free Trade Agreement, *supra* note 1, art. 22, *with* U.S.-Chile Free Trade Agreement, *supra* note 1, art. 18; s*ee also* Table 2.

97. U.S.-Chile Free Trade Agreement, *supra* note 1, art. 22.14(2).

98. *Id*. at art. 22.14(2) n.1.

99. *See id.* at art. 22.14(2).

100. *See id*.

101. *Id*. at art. 22.15(2).

102. *Id*. at art. 22.16(1).

103. U.S.-Chile Free Trade Agreement, *supra* note 1, art. 22.16(2).

monetary assessment, the complaining party "may take other appropriate steps to collect the assessment," which includes suspending tariff benefits.[104] Unlike the commercial obligations, this action may not exceed the pre-determined damage cap.[105] Third, in contrast with commercial awards that are normally paid to the complaining party,[106] if a monetary assessment is awarded for a violation of Art. 18.2(1)(a), it is paid into a fund to be used by the offending party to address its labor enforcement problems.[107] These distinctions not only have the potential to foster violations of the labor provisions, but also do not meet Congress' principal negotiating objectives.[108]

A more narrow interpretation of the BTPAA language on enforcement provisions for principal negotiating objectives, however, is that Congress only requires the president to "seek" equivalent provisions in the treaty.[109] If the president put forth serious effort in obtaining such provisions, yet failed to do so in the end, the president arguably fulfilled the negotiating objective. The problem with restricting an interpretation of the negotiating objectives under this approach is that it leaves an inordinate amount of discretion to the president. In most cases it will be difficult for those outside the negotiating process to evaluate whether the principal labor provisions were seriously bargained for. Because reasonable interpretations exist both that the labor provisions do and do not violate the congressional negotiating objectives, and because the setting in which

104. *Id*. at art. 22.16(5).
105. *See id.*
106. *Id*. at art. 22.15(6).
107. *Id*. at art. 22.16(4).
108. This conclusion is supported by the LAC: Pursuant to the Trade Act of 2002 and of 1974, the Labor Advisory Committee for Trade Negotiations and Policy provides the President, the USTR, and Congress with an advisory report within thirty days of presidential notification of intent to enter into a trade agreement. Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC), *The U.S.-Chile and U.S.-Singapore Free Trade Agreements*, Feb. 28, 2003, at 1, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR02738:@@@L&Summ2=m&. The LAC submitted a report on the U.S.-Chile and U.S.-Singapore Free Trade Agreements on February 28, 2003, strongly criticizing both FTAs' labor provisions. *Id*. Among other flaws, the LAC found that the U.S.-Chile FTA directly violated congressional negotiating objectives as set out in the Trade Act of 2002. *Id*. at 3. Specifically, the LAC reported that the labor dispute resolution procedures do not meet the equivalency objectives as defined by Congress in 19 U.S.C. § 3802(b)(12)(G). *Id*. at 7. LAC is, however, one of thirty-one trade advisory committees that submitted reports on the U.S.-Chile FTA. Press Release, Office of the U.S. Trade Representative, Trade Advisory Groups Report on Singapore and Chile FTAs (Feb. 28, 2003), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2003/February/Trade_Advisory_Groups_Report_on_Singapore_Chile_FTAs.html. The USTR stated in a press release that the majority found that the negotiating objectives were met. *Id.*
109. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801–3813, 3802(b)(12)(G); *see also* Table 1, *infra*.

such disputes are often handled is political, it is useful to look at the key players' interpretations of the U.S.-Chile FTA in the context of the congressional negotiating objectives.

There is relatively little congressional testimony directly addressing whether the labor provisions meet the congressional negotiating objectives. Senator Biden, however, hinted at possible non-compliance when he said: "these trade agreements fail to treat labor and environmental issues as seriously as commercial disputes, as our trade law now requires."[110] Many Congressmen chose to address problems with the labor provisions in more general terms: Senator Corzine was adamant that the agreement did not adequately provide for labor standards[111] and Congressman Evans thought that the agreement missed an important chance to advance minimum labor standards.[112] Much of the criticism in Congress, however, centered on the concern that the labor provisions in the Chile agreement would be used as a template for future free trade agreements. Representative of this concern, Senator Kerry stated:

> Although the Chile and Singapore agreements should be the next step forward in this evolution towards strong and effectively enforced labor and environmental standards, they are in fact a step back. Unlike the United States-Jordan FTA, the only labor provision subject to dispute settlement is the requirement that each trading partner enforce its existing labor laws. . . . The administration's one-size-fits-all approach will not work. Many of the nations considering inclusion in CAFTA and FTAA have no or low standards to protect workers and the environment and enforcement is nonexistent in some areas.[113]

Congress is signaling that, while there may be a legal argument that the negotiating objectives were not met, those in Congress who would normally object to weak labor provisions are willing to look the other way when the systemic setting for the FTA indicates that the party will be reasonably able to uphold minimal labor standards.[114] This conclusion is supported by information and testimony Congress had before it when deciding whether to ratify the U.S.-Chile FTA.[115]

110. 149 CONG. REC. S10,578, S10,580 (daily ed. July 31, 2003) (statement of Sen. Biden).

111. 149 CONG. REC. S10,586, S10,587 (July 31, 2003) (statement of Sen. Corzine),

112. 149 CONG. REC. E1540 (July 24, 2003) (statement of Rep. Evans).

113. 149 CONG. REC. S10,578 (July 31, 2003) (statement of Sen. Kerry); *see also* 149 CONG. REC. S10,530, S10,530–31 (July 31, 2003) (statement of Sen. Baucus); 149 CONG. REC. S10,586 (July 31, 2003) (statement of Sen. Kohl); 149 CONG. REC. H7204 (July 21, 2003) (statement of Rep. Solis).

114. *See id.* This result may be due in part to a political compromise between the pro-labor and pro-business representatives in Congress.

115. Sandra Polaski testified before the Senate Committee on Finance:

Specifically, the President submitted the Labor Rights Report on Chile to Congress as required by the BTPAA.[116] It noted that since the fall of the Pinochet regime, Chile has taken significant steps toward bringing its labor code up to acceptable international standards.[117] For example, Chile passed stronger labor legislation in 1991, 1995, and most recently in 2001. Also, in 1999 Chile ratified ILO Conventions No. 87 and 98 on the freedom of association and the right to organize and on the right to organize and bargain collectively.[118]

The administration's response has been simplistic. President Bush merely stated that the U.S.-Chile FTA meets the labor negotiating objectives.[119] In response to the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC) report, the USTR countered that Chile's labor laws reflected ILO core standards and that Chile had in fact elevated its labor standards in order to meet the FTA labor objectives.[120]

It is arguable that Chile's commitment to uphold its strong labor laws and democratic regime makes the end result equivalent. The process by which equivalency is secured, however, matters. The point of the congressional negotiating objectives is not whether outside forces may bring about the same end result, but whether the FTA itself ensures it. Viewed in this light, the U.S.-Chile FTA's labor provisions, specifically those on enforcement, violate the congressional negotiating objectives.

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> I believe that the only appropriate and useful basis for evaluating labor provisions of free trade agreements is whether those provisions are likely to be an effective means of protecting labor rights in the specific countries party to the agreement. . . . This approach can protect and reinforce labor rights and be a meaningful trade discipline where- and only where- the country's labor laws are adequate. Otherwise we would simply lock in low and unacceptable labor standards through our trade agreements . . . both Singapore and Chile enforce their labor laws with reasonable vigor.

*Hearing on the Ratification of the U.S.-Chile Free Trade Agreement Before the Senate Committee on Finance*, 108th Cong. 1–2 (2003) (testimony of Sandra Polaski).

116. Labor Rights Report: Chile, July, 8, 2003, at 2–3, *available at* http://waysandmeans.house.gov/media/pdf/chile/hr2738ChileLaborRights.pdf (prepared by the Secretary of Labor, the Secretary of State, and the U.S. Trade Representative).

117. *Id*. at 2–3.

118. *Id*. For a criticism of Chile's labor laws as largely unsatisfactory, *see* Pier, *supra* note 46.

119. "This Agreement meets the labor and environmental objectives provided by the Congress in the Trade Act." 149 CONG. REC. S1809–01 (Jan. 30, 2003) (statement of Pres. Bush).

120. Office of the U.S. Trade Representative, Response to Labor Advisory Committee Report on the Proposed Chile and Singapore FTAs at 2, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Reports/asset_upload_file763_3221.pdf [hereinafter USTR Response].

If one accepts that the labor provisions of the U.S.-Chile FTA violate the congressional negotiating objectives, what may be done about it? It is doubtful that a legal course of action is available to challenge the U.S.-Chile FTA for violating congressional negotiating objectives after it has been negotiated, ratified by Congress, and signed by the president. The BTPAA is silent on judicial review.[121] Establishing standing for such a suit may also prove difficult. Further, in an executive order delegating the President's authority under the BTPAA to negotiate treaties to the USTR, President Bush specified that "this order . . . is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person."[122] The door to enforcing the congressional negotiating objectives through judicial review is likely closed.

The principal means of addressing a violation of Congress' negotiating objectives is through political recourse. Congress has several options. First, before ratification, Congress could pass a "procedural disapproval resolution."[123] This would allow Congress to revoke the trade bill's TPA status as a signal of its disapproval of the agreement and would also make passage much more unlikely.[124] Second, if there were insufficient support for the FTA, Congress could simply vote down the agreement under TPA. This would present a unified and strong statement that Congress did not think the President met congressional negotiating objectives. After an agreement has been passed, however, the only remedy is prospective. Congress may warn the administration that it will not pass future agreements if they have similarly unsatisfactory provisions. As a last and somewhat more drastic measure, Congress could refuse to renew TPA or could repeal it outright.[125]

In this particular situation, it is doubtful that Congress has the will to do anything more forceful than to warn the president to "do better" on future agreements. This, in fact, has been Congress' principal means of responding to the unsatisfactory labor provisions. One of the U.S.-Chile FTA's co-sponsors, Senator Baucus, stated that if future agreements did not adequately deal with labor concerns, he

121. *See* Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801–3813.
122. Exec. Order No. 13,277, 67 Fed. Reg. 70,305, 70,307 (Nov. 19, 2002).
123. 19 U.S.C. § 2903(c)(1)(a); *see also* Shapiro & Brainard, *supra* note 9, at 18.
124. Shapiro & Brainard, *supra* note 9, at 18.
125. *Id*. at 17–19.

would not support them.[126] While such saber-rattling may not be a satisfactory answer to failing to meet the negotiating objectives for some labor advocates, it has the potential for real impact if Congress can rattle their sabers together.

### *B. Are the U.S.-Chile FTA Labor Provisions Effective On Their Own Terms?*

The second question this article seeks to answer is whether the U.S.-Chile FTA's labor provisions are effective regardless of whether they comply with the congressional negotiating objectives. In other words, do they tend to discourage or promote low labor standards? While it is too early to definitively answer this question, the structural framework does provide some insight as to the provisions' effectiveness.

Like the NAALC, labor provisions in the U.S.-Chile FTA are designed to allow states to resolve disputes through state mediation whenever possible rather than to act as a hard deterrent against labor violations.[127] First, non-governmental actors do not have the right to bring binding claims under the U.S.-Chile FTA.[128] Public comments may be submitted to the Labor Affairs Council and must be publicized, but the parties do not have an obligation to respond.[129] If a government party is compelled to do so, the parties must first attempt resolution through consultations and cabinet-level mediation before penalties may be applied.[130] Moreover, penalties are only available if a party fails to enforce its domestic labor laws.[131] All other labor obligations must be resolved through party agreement.[132] If the complained-of act is failure to enforce domestic labor laws, capped monetary damages are the standard penalty and are only applied after parties have once more had a chance to come to an agreement.[133] Trade sanctions are only available as a recourse to secure a party's non-payment of a monetary award.[134] Last, the U.S.-Chile FTA

126. 149 CONG. REC. S11,634, S 11,635 (Sept. 17, 2003) (statement of Sen. Baucus).
127. *See* Garvey, *supra* note 51, at 17.
128. *See* U.S.-Chile Free Trade Agreement, *supra* note 1, ch. 18; *see also* Garvey, *supra* note 51, at 14 (noting that while a private citizen may bring a non-binding petition, he or she does not have "private rights of enforcement").
129. U.S.-Chile Free Trade Agreement, *supra* note 1, art. 18.4(7) (if the public outcry were serious enough, this provision could in theory put significant pressure on the state actors to take up a labor issue).
130. *See id.* at art. 18.6, 18.4, 22.6(1).
131. *Id*. at art. 18.6(6).
132. *Id*. at art. 18.4-.6.
133. *Id*. at art. 22.16(1).
134. *Id*. at art. 22.16(5).

establishes a Labor Cooperation Mechanism that is charged with prospectively promoting cooperation between the two states on labor matters.[135]

This cooperative approach has the advantage that it is highly respectful of state sovereignty.[136] It will likely fail, however, to ensure worthwhile enforcement of labor obligations. First, for the majority of the labor provisions, enforcement will depend on the will of the state to bargain for their enforcement.[137] This means that the violations must be large enough to motivate a state to enter into contentious negotiations. The state's willingness to do so may depend significantly on the particular administration's ideology concerning labor. Enforcement, under purely political mechanisms, then, will likely be sporadic and incongruous with violations.

Second, economic theory implies that the domestic labor law enforcement provision, while subject to monetary penalties, will also likely be ineffective. Economic theory as applied to law assumes rational actors, where "rationality means . . . a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have."[138] This leads most actors to weigh benefits and costs when choosing a course of action: "A person commits a crime because the expected benefits of the crime to him exceed the expected costs."[139]

To begin with, the damage award seeks to effect the state's behavior. It penalizes the state so as to deter it from turning a blind eye to advantageous labor violations.[140] By construction, it does not have a direct deterrent affect on the industries that are actively violating domestic labor laws.[141] The state, then, must weigh the costs of failing to enforce its labor laws against the benefits of ignoring violations. In Chile's case, the first potential cost would be a monetary assessment of up to $15 million annually.[142] Second, there would be political costs domestically and vis-à-vis the United States.[143] Last, this action could negatively affect Chile's reputation on an international level as to other trading partners and future trade

135. *Id*. at art. 18.5; Annex 18.5.

136. *See* Garvey, *supra* note 51, at 12–13.

137. *See id* at 17 (noting that the NAALC's primary means of dispute resolution is through political negotiations; this is analogous to the U.S.-Chile FTA's labor provisions).

138. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 17 (5th ed. 1998).

139. *Id*. at 242. Deterring crime is analogous to deterring violations of labor obligations. Like the criminal actor, a state will be aware of both the benefits and costs of illegal action.

140. *See* Garvey, *supra* note 51, at 14.

141. *See id*. at 15.

142. U.S.-Chile Free Trade Agreement, *supra* note 1, art. 22.16(1)–(2).

143. *See* USTR Response, *supra* note 120, at 2.

agreements. On the other hand, the benefits would include increased trade gains based on lower input costs. Also, Chile would save money and resources that would otherwise have to be spent on enforcement activities. Most notably, the construction of the treaty requires damage awards to be paid into a fund used to remedy the enforcement shortcomings.[144] This opens the door for Chile to use the monetary award as a budgeting device thus turning a cost into a benefit.[145]

On balance, this system creates incentive for a state to fail to enforce its domestic labor laws. If Chile acts rationally to maximize its net gain, one would expect to see violations go unchecked. Based on this analysis, there are two possible outcomes. Taking a "good faith" approach to the process (assuming the monetary damages will not be used as a budgeting device), the costs of failure to enforce would outweigh the benefits as long as the value of the beneficial labor violations is under $15 million. This might, however, lead a state to Senator Biden's conclusion: "if $15 million is the maximum fine, it is an incentive to commit more than $15 million worth of violations."[146] However, political costs are the primary counterweight. Thus, if a state is not particularly sensitive to political pressures, artificially capping the damage award may give a state incentive to ignore labor violations rather than deterring this behavior. Second, assuming a "bad faith" approach where the damage cap is essentially a benefit to the offending state, one may expect to see less egregious behavior. This is because the state is already receiving benefits greater than the costs and does not have to create more than $15 million dollars worth of labor violations in order for them to be beneficial overall. A state may, however, seek to maximize its net gain, but the cap does not itself create this incentive. Under either scenario, the political costs will be the main deterrent. In Chile's particular case, the political costs would likely be very high.[147] Chile has a relatively strong democratic system to hold it accountable[148] and leads South America as one of its most open economies.[149] Under this cost-benefit analysis, one may more reasonably expect to see more small scale violations than those Senator Biden envisioned, but violations nonetheless.

144. U.S.-Chile Free Trade Agreement, *supra* note 1, art. 22.16(4).

145. *See* Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC), *supra* note 108, at 8.

146. 149 CONG. REC. S10,578, S10,580 (July 31, 2003) (statement of Sen. Biden).

147. *See* USTR Response, *supra* note 120, at 2.

148. *See id.*

149. Anna Teo, *Chile Takes Role on World Stage—and in Asia*, BUS. TIMES SINGAPORE, Jan. 19, 2004 (on file with author).

Further, labor advocates have noted that there remain other serious enforcement gaps in the treaty. The LAC pointed out that "a country that is challenged for failing to enforce its existing labor laws could simply weaken or eliminate those laws to avoid dispute settlement."[150] While this may not be likely in a country such as Chile, it may be a more serious concern for other potential FTA partners.

This ultimately presents the question of whether the U.S.-Chile FTA is a good model looking toward future FTAs with other trading partners. The answer to this question is that it depends on who the trading partner is. Countries with strong internal checks on their labor standards will not likely benefit by violating labor standards due to the political costs. On the other hand, countries that have endemic labor problems and weaker internal checks will likely have greater incentives to violate basic labor obligations. Ironically, these are precisely the countries that labor provisions could have the largest impact on. This is Congress' primary concern with the U.S.-D.R.-CAFTA agreement. Senator Kohl made his stance explicit:

> Chile and Singapore have shown they are willing to play by the rules, and have democracies who will hold them accountable if they undermine their own labor . . . laws. . . . However, future agreements with countries with lower standards will have to do more to secure labor . . . rights before I will support them.[151]

The labor provisions for each FTA, then, should be tailored to fit the trading partner the United States is seeking to encourage to maintain minimal labor standards.

### *C. Strengthening Future FTAs' Labor Provisions*

One possible solution to the labor quagmire would be to follow the Jordan model whereby labor provisions do not have separate enforcement mechanisms, but are resolved under the same mechanism as all other commercial obligations.[152] The strength of this approach is the notion that countries seek FTAs primarily to ensure commercial trading advantages.[153] In order to give commercial provisions real force, parties will attach more stringent dispute

150. Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC), *supra* note 108, at 7.

151. 149 CONG. REC. S10,586 (July 31, 2003) (statement of Sen. Kohl); *see also* 149 CONG. REC. S11,634 (Sept. 17, 2003) (statement of Sen. Baucus).

152. Weiss, *supra* note 7, at 714.

153. *See* Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885, 886 (2003) (arguing that one side of the labor debate is the concern that labor obligations will interfere with the net gain states may get through trade liberalization).

resolution mechanisms to commercial obligations. By including labor obligations under the umbrella of a general dispute mechanism for the entire treaty, the incentive to create trading advantages will be harnessed in order to secure real enforcement provisions of labor obligations as well. Whether the Jordan agreement taken as a whole is truly the gold standard for labor obligations, however, is open to some skepticism. While the procedural aspects on enforcement are stronger, the U.S.-Chile FTA contains stronger language on the soft prohibition against lowering labor standards in domestic law.[154] This illustrates the point that tough enforcement provisions are meaningless unless the obligations to be enforced are substantive. Because this provision is little more than a promise to strive not to lower labor standards in domestic law, this language is primarily important for the tone it sets for the trading partners. A substantial drawback to the Jordan model, however, is that in a practical sense, many potential trading partners will likely strongly resist this approach.[155] Further, even if trading partners were willing to negotiate a Jordan-model FTA, it is still reliant on state action for a labor violation to reach an arbitral panel for resolution.[156]

Second, future agreements could provide for a private right of action.[157] Even more effective would be a Jordan-like agreement with a private right of action. Under this model, parties with an interest in the enforcement of labor obligations would be able to initiate a dispute resolution mechanism without needing the capability of asserting sufficient political pressure on their governments. Thus, more violations would come to the forefront and, under the enforcement provisions of the Jordan model, substantial enforcement of all the labor provisions would be possible. A less controversial model would be to grant a private right of action in the Chile model (under separate dispute resolution procedures than the commercial obligations). Allowing private parties to have a meaningful role in enforcement would put more pressure on governments to seriously address labor problems, even in the context of a labor regime such as

154. *Compare* U.S.-Chile FTA, art. 18.1(1) (recognizing "that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws"), *with* U.S.-Jordan FTA, art. 6.3 ("[r]ecognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations. . . .").

155. *See* Polaski, *supra* note 24, at 13–14 (explaining that some G-77 countries have resisted linking trade to enforceable labor standards).

156. Weiss, *supra* note 7, at 752–53 (noting that it is highly unlikely, even under the Jordan FTA, for states to agree to arbitrate a labor dispute that may result in trade sanctions).

157. *See* Garvey, *supra* note 51, at 14.

the U.S.-Chile FTA. However, the trade-off for private enforcement is forgoing political dialogue as the primary means of dispute resolution.[158] Because labor obligations in the trade setting involve both foreign relations and important domestic public policies, many governments would be reluctant to turn the process over to self-serving private enforcement.[159]

The U.S.-Chile FTA does provide for public submissions regarding labor violations.[160] The "point of contact" for each party under the Labor Affairs Council must review these submissions, but is not required to take action based on them.[161] The best approach to third-party involvement may be to further develop this provision[162] to require states to issue a response to reasonable comments qualifying why the allegations do or do not violate the treaty. This would increase state accountability for inaction on labor violations under FTAs without turning over the dispute resolution mechanism to private litigants.

A third solution is to maintain separate dispute mechanisms, but to either increase the monetary damages cap or eliminate it altogether.[163] This would be a significant improvement upon the U.S.-Chile FTA. First, the focus of labor dispute resolution would remain on state consultations. Further, trade sanctions would remain a fail-safe instead of a means of recourse in the first instance. This allows states multiple opportunities to resolve disputes through negotiation before penalties would be applied. However, the threat of a monetary penalty equivalent to the harm done by the violations would motivate parties to seriously attempt to mend the violations in a substantive way. Second, this approach removes the incentive for a state to maximize its net gain by amassing labor violations valuing more than the damage cap.[164]

158. *See id.* at 14–17 (explaining that the NAALC does not have a private right of action and that labor disputes are intended to be accomplished through political maneuvering).

159. Weiss, *supra* note 7, at 750.

160. U.S.-Chile Free Trade Agreement, *supra* note 1, art. 18.4(7).

161. *Id*.

162. *See* E-mail from David A. Gantz, Visiting Professor at the George Washington University Law School, to Stacie E. Martin, Author (Feb. 11, 2004, 20:47:30 EST) (on file with author).

163. *See* Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC), *supra* note 108, at 8 (discussing the inadequacy of the monetary cap).

164. *See* discussion *supra,* Section III.B.

## IV. CONCLUSION

Free trade and labor have never been so closely linked as they are now. One of the world's most developed economies, the United States, is positioned to greatly influence the status of labor obligations with its trading partners. The surge in the USTR's concluded, negotiated, and proposed FTAs since the reintroduction of TPA promises that the impact of the policy the United States pursues will not be minimal.

The U.S.-Chile FTA's inclusion of labor obligations under the umbrella of free trade represents the Executive's first attempt under TPA to comply with congressional negotiating objectives for labor and to establish minimal, but meaningful, labor standards in an FTA. While taking some positive strides toward serious labor obligations, it ultimately fails to achieve either goal. The inability to impose trade sanctions in the first instance for labor violations and the cap on monetary assessments significantly weaken the effectiveness of labor obligations in the U.S.-Chile FTA. Also, the labor provisions do not meet their own objectives because countries will have an economic incentive to violate their domestic labor laws and allow for weakening them without penalty.

Ultimately, the success or failure of future labor provisions depends on the parties' willingness to take labor obligations seriously. Whether the solution is tougher dispute resolution mechanisms, allowing for greater public participation, or true equivalency between labor and commercial obligation enforcement, states must decide to consent to a mechanism that ensures meaningful labor standards in trade agreements.

**Table 1**
**Congressional Negotiation Objectives vis-à-vis the United States-Chile FTA Labor Provisions**

**Table 2**
**Enforcement**