

Columbia University
Graduate School of Arts & Sciences
Human Rights Studies Master of Arts Program

A HUMAN RIGHTS BASED APPROACH TO TRADE:
AN ANALYSIS OF LABOR PROVISIONS IN US TRADE AGREEMENTS

Jessica Dalton

Thesis Advisor: Rainer Braun

Submitted in partial fulfillment of the
requirements for the degree of
Master of Arts

January 2016

ABSTRACT

The current approach to trade is intrinsically contradictory to the enhancement of human rights. Criticisms of trade liberalization have begun to push the boundaries of this discussion, claiming that the affect of trade on labor standards should have a more significant role in the discourse on trade. As such, a Human Rights Based Approach (HRBA) is utilized in this thesis as the policy tool to evaluate labor provisions in US trade agreements. A HRBA requires assessing trade agreements, including the processes associated with negotiating and implementing them, against the human rights principles of participation, equitable development and accountability. This study concludes that the unequal participation of states, business and labor in the negotiations of US trade agreements results in ineffective labor provisions. This is evident in the textual modifications to labor chapters in trade agreements, as well as the implementation of labor provisions through legal and institutional reform, which did not always result in the enhancement of labor rights. Moreover, a gap in governance left workers without effective accountability mechanisms at multiple levels. Trade policies should be designed to enhance the realization of human rights of all stakeholders, and a HRBA is a contribution to that objective.

ACKNOWLEDGEMENTS

I would like to express my deep gratitude to Professor Rainer Braun, my thesis advisor, who introduced me to the Human Rights Based Approach, and who provided insight and constructive suggestions that greatly assisted this research. His willingness to give his time so generously has been greatly appreciated.

I would also like to extend my sincere thanks to Kristina Eberbach and Gergana Halpern for their guidance and encouragement throughout the M.A. Human Rights Studies program at the Institute for the Study of Human Rights.

I wish to thank my fellow classmates in the Lehman Support Group for their invaluable support and encouragement to persevere with the work required to complete this research project. You kept me going, and provided me my most cherished memories from the graduate program.

I would like to acknowledge with gratitude the support of my friends and mentors, Nicholas Rees and Sara Robinson, for challenging me and showing confidence in my work.

And finally, thank you to my family for their encouragement to pursue my goals and dreams. I can never fully express to you how much I appreciate your steadfast love.

Any errors in interpretations and conclusions of this paper are my own.

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“It is true that human rights are predicated on the equality of all human beings, while the imperative of comparative advantage in trade inevitably creates winners and losers. And it is also true that human rights priorities lie in the protection and empowerment of the vulnerable and the marginalized, while success in trade rewards those who possess a competitive edge in navigating the global markets. Further, human rights law insists on State obligations, while the liberalization of trade may make the role of States progressively shrink. I maintain, however, that as engines of human well-being, progress and mutual understanding, the common and potentially reciprocally reinforcing aspects of human rights and trade far outweigh their contrasting features.”¹

– Navi Pillay, former UN High Commissioner for Human Rights

¹ “Pacific Trade and the Right to Health” (Office of the High Commissioner for Human Rights, United Nations Development Program, 2011), 2.

² Manuel Couret Branco and Pedro Damiao Henriques, “The Political Economy of the Human Right to

1. INTRODUCTION

The current approach to trade is intrinsically contradictory to the enhancement of human rights. Moreover, the approach not only competes with human rights but also imposes obstacles to achieving them.² Still others go further, asserting that human rights rhetoric is misused to legitimize the economic interests of global and domestic actors.³ They point to an inherent contradiction: trade is commonly promoted as creating conditions conducive for protecting rights, while simultaneously leading to considerable violations of rights.⁴

The recognition of trade's adverse affects on human rights is a relatively new framework for evaluating trade's impact.⁵ The age-old discourse on the relationship between trade and labor has focused on assessing how trade's influence on labor affects economic productivity. Criticisms of trade liberalization have begun to push the boundaries of this discussion, claiming that the affect of trade on labor standards should have a more significant role in the discourse on trade.

² Manuel Couret Branco and Pedro Damiao Henriques, "The Political Economy of the Human Right to Water," *Review of Radical Political Economics* 42, no. 2 (June 2010): 3-4; Dommen, Caroline, "Raising Human Rights Concerns in the World Trade Organization: Actors: Processes and Possible Strategies," *Human Rights Quarterly* 24, no. 1 (February 1, 2002): 14.

³ Tony Evans, "Citizenship and Human Rights in the Age of Globalization," *Sage Publications, Inc.* 25, no. 4 (2000): 415-38.

⁴ *Ibid.*, 418.

⁵ This paper discusses human rights in reference to the international human rights framework. The standards are grounded in the binding commitments established in the Universal Declaration of Human Rights (UDHR) in 1948. Together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), these documents make up the International Bill of Human Rights. Workers rights are delineated in all three of the documents. Further, labor standards are defined by numerous conventions and recommendations passed by the International Labor Organization (ILO), an international organization mandated to protect workers rights.

While human rights organizations and some economists have recognized the need for human rights to be analyzed in the context of trade, international economic organizations have failed to keep up with the changes resulting from globalization. Trade liberalization has played a significant role in globalization, yet the extent of those benefitting from trade policies has come into question. It is increasingly recognized that trade policies are not limited to economic impacts, but go far beyond to include a range of social issues including human rights. As explained so eloquently above in the introductory quote, Pillay describes that trade has led to inequality, has disempowered marginalized populations in the prioritization of strengthened markets, and has weakened the role of states, which are relied upon to promote human rights.⁶ As such, analysis measuring the economic impact of trade policies and efficiencies on its own is not sufficient. A human rights based perspective offers a critical analysis of the impacts and effectiveness of trade policy formation and implementation on non-economic impacts of trade, thereby addressing a shortcoming to the current approach.

Although some institutions, such as the World Trade Organization, the International Labor Organization and the US Government, now recognize the social impacts resulting from trade, they have yet to incorporate human rights in a structurally significant way. Further, the predominant state-based approach, known as the 'statist model,' limits state accountability to the domestic sphere in an age of transnational policies. This has led to governance gaps in the case of many human rights violations resulting from trade policies.

⁶ "Pacific Trade and the Right to Health," 2.

This thesis seeks to reconstruct the mainstream debate by adding a human rights perspective to the international trade literature. As such, and as will be further elaborated in my methodology section, a human rights based approach (HRBA) is utilized as the policy tool to evaluate US trade agreements. A human rights based approach to trade requires assessing trade agreements, including the processes associated with negotiating and implementing them, against the human rights principles of participation, equitable development and accountability.⁷

While the entirety of trade agreements impact human rights, this thesis will focus on the labor chapters in US trade agreements. To date, these chapters reference the ‘core labor standards’ as defined by the International Labor Organization (ILO). These include freedom of association, collective bargaining, freedom from forced labor and child labor, and non-discrimination.⁸ Using the principles outlined in the HRBA, the successes and failures of US trade agreements to achieve these core labor standards will be evaluated.⁹

This thesis first argues that the unequal participation of states, business and labor in the negotiations of trade agreements ultimately results in ineffective labor provisions. By using textual analysis, evaluation of recent changes to labor chapters in US trade agreements reveals that, despite modifications, the provisions remain unlikely to be effective. This claim is further substantiated in the following section

⁷ “Pacific Trade and Human Rights” (United Nations Development Programme; World Health Organization; Office of the High Commissioner for Human Rights, 2014), 19, http://www.wpro.who.int/southpacific/publications/trade_and_human_rights.pdf?ua=1.

⁸ International Labour Organization, “ILO Declaration on Fundamental Principles and Rights at Work,” n.d., <http://www.ilo.org/declaration/lang--en/index.htm>.

⁹ “ILO Declaration on Fundamental Principles and Rights at Work: Background,” *International Labour Organization*, accessed January 21, 2016, <http://www.ilo.org/declaration/thedeclaration/background/lang--en/index.htm>.

through an assessment of the impact of labor provisions on legal and institutional reform in countries that are trading partners with the US. While legal and institutional reform could support changes on the ground, current efforts have not resulted in the enhancement of labor rights. And last, the lack of comprehensive international oversight, the limited nature of state duties, and the lack of binding obligations on business together result in a governance gap, leaving workers without an effective accountability mechanism.

2. BACKGROUND INFORMATION

This section contextualizes the current mainstream economic discourse on trade, showing how human rights have yet to be systematically incorporated, and provides a description of how labor provisions were first adopted in trade agreements. Next, a brief overview of the effects of trade on equality, among and within states, will provide the basis for evaluating human rights impacts of trade agreements beyond economic terms. And finally, the human rights based approach to trade will be explained as the selected methodology.

2.1 Contextualizing the Current Economic Discourse on Trade

Instead of applying human rights principles as an evaluative framework of trade, current liberal economic policies operate with the underlying assumption that economic development yields improved human rights.¹⁰ Before analyzing the

¹⁰ Anja Mihr and Mark Gibney, eds., *The SAGE Handbook of Human Rights: Two Volume Set* (SAGE Publications Ltd, 2014), 375.

shortcomings of this fundamental assumption, it is important to understand its origin and main tenets.

Today's liberal economic policies are a result of the intricate link between trade and globalization. The world has globalized not only because trade has increased exponentially but also as a result of trade reaching farther and wider than ever before. Globalization has been significantly influenced "...according to the rules, norms and ideas of the regime of economic liberalization."¹¹ Liberal economic policies are characterized by freer markets, the removal of protective barriers, privatization and deregulation.¹²

Spurred by globalization, liberal market economies soon became the norm. "By the mid-1990s," Sachs wrote, "...almost the entire world had adopted the fundamental elements of a market economy..."¹³ Taking this idea a step further, Ake likened liberalized markets to "something close to a global theology."¹⁴

Trade policies emerged as part of this liberal economic agenda. Developed countries¹⁵, such as the US, viewed the utility of trade in terms of its effect on its domestic workforce including how trade impacted skilled versus unskilled labor and its implications for outsourcing jobs. The discourse often ended there; the rights of workers were relevant only in so much as they influenced American employment

¹¹ Ibid.

¹² Michael Freeman, *Human Rights : An Interdisciplinary Approach* (Malden, MA: Blackwell, 2002).

¹³ Jeffrey D. Sachs, "Twentieth-Century Political Economy: A Brief History of Global Capitalism," *Oxford Review of Economic Policy*, 1999, 90–101.

¹⁴ Claude Ake, *Democracy and Development in Africa* (Washington, D.C.: Brookings Institution, c1996).

¹⁵ While I recognize that categorizing countries based on developed and developing is narrow, the mainstream dialogue excludes a more nuanced discussion.

opportunities. Trade's impact on worker's rights as a whole was often excluded from the discourse.¹⁶

When labor rights were first introduced, developed countries included labor provisions because they were able to use them to justify adjustments to the terms of trade outlined in trade policies. Labor provisions thus serve as a tool to further material interests of such states by allowing for protection against competitive imports from the violating state, and thus increasing US production.¹⁷

In terms of developing countries, economists promoted trade liberalization as a significant component of the process of development; economic growth resulting from trade was considered to have a positive role in a developing country's collective development. Increased development was thought to be the natural gateway to improved human rights.¹⁸

Moreover, Krugman argues that job creation, no matter the associated labor standards, can further the economy of a developing country as a whole. A question raised frequently is whether a job earning a low wages or without adequate labor standards is better than the alternative of no job. Krugman points out that low wages have provided developing countries a comparative advantage to trade in the global market.¹⁹ He takes a consequentialist perspective of "Third World export industries" which is that denying cheap labor has the potential consequence of costing the countries industrialization, and thus growth. His argument, therefore, is

¹⁶ David Wessel and Bob Davis, "Pain From Free Trade Spurs Second Thoughts," *The Wall Street Journal*, March 28, 2007.

¹⁷ Robert Howse, "The World Trade Organization and the Protection of Workers' Rights," *The Journal of Small and Emerging Business Law* 131 (1999).

¹⁸ Evans, "Citizenship and Human Rights in the Age of Globalization," 419.

¹⁹ Paul Krugman, *The Accidental Theorist and Other Dispatches from the Dismal Science* (New York, London: W.W. Norton & Company, 1998).

prioritizing the outcome of overall economic growth via trade as ultimately better for a country, despite the potential implications for human rights violations in the process.

In a similar vein, many developing countries oppose labor provisions in trade because it works against their comparative advantage to improve their economies. Developing countries endowed with labor find their strongest tool used against them and interfering in trade, and thus economic growth. Developing countries have argued that developed countries were not burdened by this standard when they were in a similar stage of development.²⁰ Such arguments go back to the economic principle that improved economic growth should be the paramount objective for developing countries with less regard to human rights standards.

While current economic discourse regarding trade has marginally changed over the years, the focus remains on liberal economic policies. When it comes to developed countries, trade is analyzed in terms of its affect on the domestic employment. And in developing countries, economists still maintain that trade yields economic growth and development, which in turn paves the way for improved human rights. As will be discussed below, this discourse falls short and instead ought to be replaced with a human rights based approach.

2.2 International Governance Structures and the Introduction of Labor Provisions

The relevant international institutions on labor and trade are the World Trade Organization and the International Labor Organization. The main international

²⁰ Howse, "The World Trade Organization and the Protection of Workers' Rights."

economic institution of relevance is the World Trade Organization (WTO), which facilitates cooperation amongst states, defines trade policies, and aims to construct reliable and freer markets.²¹ However, the WTO does not recognize labor as a legitimate rationale or justification for interfering with trading policies, and has conferred responsibility to cover the trade and labor link to the International Labor Organization (ILO).²²

While the ILO recognizes the potential of trade policies in contributing to the improvement of labor standards, the ILO does not engage in trade policy formation or implementation except in select cases, such as the US-Cambodia Textile Agreement.²³ Accordingly, there are no multilateral agencies regulating trade policies for their impact on labor rights.

As such, states are not held accountable by an international organization in the design and content of trade policies, which have direct repercussions on the realization of rights. The global market is perceived as “weakly embedded,” due to a lack of institutions and regulation at the global level.²⁴

Acknowledgement of the negative implications for human rights resulting from economic liberalization has led to reform efforts of international economic institutions; “[h]owever, these reforms have followed the rules and norms inherent in these very institutions and therefore have not dissolved the cemented separation

²¹ “The WTO,” *World Trade Organization*, accessed November 1, 2015, https://www.wto.org/english/thewto_e/thewto_e.htm.

²² World Trade Organization, *Singapore Ministerial Declaration*, 1996, https://www.wto.org/english/news_e/pres96_e/wtodec.htm.

²³ Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing, 2013).

²⁴ Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, Chapter 4: “Bretton Woods, GATT, and the WTO” (New York and London, 2011); Freeman, *Human Rights*, 2002.

from the human rights framework.”²⁵ An inability to modify the international trading system is evidenced in the recent collapse of Doha Round negotiations, the so called Development Round of trade negotiations between WTO member governments, aimed to remove inequalities in the trading system itself that hinder benefits of developing countries.²⁶ Numerous initiatives are currently underway with the aim of redesigning institutions to meet the complexities of trade, further evidence of the failure of current institutions to modernize.²⁷

The lack of effective global institutions to adequately address the intersection of trade and labor has meant that industrialized developed nations are able to dominate on the international arena. As argued by Stiglitz, “[e]conomics has been driving globalization...But politics has shaped it. The rules of the game have been largely set by the advanced industrial countries...and, not surprisingly, they have shaped globalization to further their own interests.”²⁸ While the international economic institutions have disregarded labor, developed countries have incorporated social clauses in bilateral and regional trade agreements, as has been the practice of the US and the European Union in particular. Preferring not to lose out on the economic benefits within a trade agreement, developing countries include labor provisions in trade agreements.

²⁵ Mihr and Gibney, *The SAGE Handbook of Human Rights: Two Volume Set*, 375.

²⁶ Joseph E. Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (Oxford University Press, 2006).

²⁷ Richard Baldwin, “21st Century Regionalism: Filling the Gap between 21st Century Trade and 20th Century Trade Rules” (WTO Staff Working Paper ERSD-2011-08, May 23, 2011); Robert M. Stern, “Globalization and International Trade Policies,” *World Scientific Publishing Co*, 2009; “Everybody’s Business: Strengthening International Cooperation in an Interdependent World - Report of the Global Redesign Initiative” (World Economic Forum, 2010).

²⁸ Joseph E. Stiglitz, *Making Globalization Work* (W. W. Norton & Company, 2007), 4.

The US was one of many actors who advocated that the WTO include social clauses in international trade policies in the 1990's. It is now customary in the US to include social clauses in trade agreements, comprising of labor and environmental provisions.²⁹ The first trade agreement to include labor provisions was the North American Free Trade Agreement (NAFTA), which came into force in 1994. Since NAFTA, the US has entered into 14 trade agreements between 20 countries that all include labor provisions.³⁰

The US is one of 12 countries that recently concluded negotiations on the Trans-Pacific Partnership (TPP). This trade agreement, which includes labor provisions, could be the largest agreement to date if subsequently passed by US Congress, representing approximately 40% of the world economy.³¹ Given the frequent inclusion of labor provisions in US trade agreements, evaluating their effectiveness is one important aspect to understanding their influence on workers.

2.3 Effects of Trade on Inequality Among and Within States

It is widely acknowledged that trade liberalization has produced both positive and negative effects in terms of development. While increased trade may lead to economic growth as measured in GDP, GDP growth alone is not an indicator of social development.³² Winners and losers exist not only on the national level where the

²⁹ "Trade Agreements: Home Page," *Office of the United States Trade Representative*, accessed November 5, 2015, <https://ustr.gov/trade-agreements>.

³⁰ Ibid.

³¹ Pedro Nicolaci da Costa and Cathleen Cimino-Isaacs, "TPP Nears the Goal Line: The Trade Deal at a Glance," *Peterson Institute for International Economics*, October 2, 2015, <http://blogs.piie.com/trade/?p=435>.

³² Thomas Carothers and Diane De Gramont, *Development Aid Confronts Politics: The Almost Revolution*, Chapter 2: "Apolitical Roots" (Washington, DC: Carnegie Endowment for International

rich are getting richer, the middle class is narrowing and the poor are left at the margins;³³ but as well at the international level studies show that trade liberalization benefits the wealthiest countries most.³⁴ A study by the World Bank found that more than 70 percent of the gains from trade liberalization are estimated to go to rich countries.³⁵ This is evidence that current trade institutions are not structured in a way that leads to equal development.³⁶

A holistic lens that incorporates social indicators is needed in order to provide a more nuanced perspective on the impact of liberal economic trade policies on equity and welfare.³⁷ However, the approach currently taken remains one that focuses on the economic implications of trade policies as opposed to equitable development.

Liberal economic policies are “politically contentious because [they have] important domestic distributional consequences and because [they generate] clashes between values and institutions in different nations.”³⁸ In 1999, the Peterson Institute for International Economics published a policy brief concluding that equitable distribution is not ensured from the market process, and that “equity-

Peace, 2013); F Rodriguez and D Rodrik, *Trade Policy and Economic Growth: A Skeptic's Guide to the Cross National Evidence*, 1999, <http://ksghome.harvard.edu/~drodrik/skepti1299.pdf>.

³³ Martin Rama, “Globalization and Workers in Developing Countries,” *World Bank Policy Research Working Paper*, no. 2958 (2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=636320; Michael Freeman, *Development and Globalization, Economics and Human Rights*, Human Rights (Polity, 2002).

³⁴ Frank Ackerman and Kevin P. Gallagher, “The Shrinking Gains from Global Trade Liberalization in Computable General Equilibrium Models,” *International Journal of Political Economy* 37, no. 1 (April 1, 2008): 50.

³⁵ Rama, “Globalization and Workers in Developing Countries.”

³⁶ Stiglitz, *Making Globalization Work*, xii.

³⁷ John Gerard Ruggie, “International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order,” *International Organization* 36, no. 02 (1982): 379–415.

³⁸ Rodrik, *The Globalization Paradox*.

oriented policies” should be implemented alongside market and trade policies.³⁹ Speaking from a human rights perspective, Donnelly argues that markets are problematic because they “systematically deprive some individuals in order to achieve the collective benefits of efficiency.”⁴⁰ A HRBA would rectify the challenges identified by these scholars.

Data reveals substantial growth of the global economy from the early 1990’s to the mid 2000’s; however, during the same time period “...income distribution showed systemic losses for labour despite an increase in global employment rates.”⁴¹ A number of studies evidence the decline in the labor share of national income distribution in developing countries, which can have a significant impact on household income and consumption.⁴² A combination of factors contributes to labor’s income share decreasing, of which include globalization and international trade.⁴³

International bodies such as the Office of the High Commissioner of Human Rights (OHCHR) have recognized that the “ideological edifices of the dominant economic models of the nineteenth and twentieth centuries are crumbling under the

³⁹ Cline, “Trade and Income Distribution: The Debate and New Evidence,” *Peterson Institute for International Economics*, September 1999, <http://www.iie.com/publications/pb/pb.cfm?ResearchID=94>.

⁴⁰ Jack Donnelly, “Human Rights, Democracy, and Development,” *Human Rights Quarterly* 21, no. 3 (1999): 628.

⁴¹ “Statement Submitted by ITUC, EI, PSI and EFJ to the Eight Session of the General Assembly Open Working Group on Sustainable Development Goals,” *International Trade Union Confederation*, n.d., 2–3, http://www.ituc-csi.org/IMG/pdf/owg8_mg_workers_and_trade_unions_gender_equality.pdf.

⁴² “Global Wage Report 2014/2015: Wages and Income Inequality” (Geneva: International Labour Organization, 2015), 10.

⁴³ *Ibid.*, 11.

weight of the realities of the twenty-first.”⁴⁴ Practically speaking, the incorporation of human rights in trade policies depends upon modification of international structures that would constrain the influence currently wielded by developed states.⁴⁵ There is little incentive for developed and powerful states to concede power control within financial and trade institutions, due to the considerable economic implications that any changes could have for them.

The US has failed to address structural inequality and promote equitable development via US trade agreements. The Labor Advisory Committee (LAC) to the USTR did a review in 2015 of US trade agreements implemented since NAFTA and found that, despite evidence that liberal policies lead to inequality, the US has continued in a ‘business-as-usual’ approach in formulating the recent TPP trade policies.⁴⁶ The Executive Director of a Mexican human rights organization puts into context the effects neo-liberal NAFTA policies have had:

For Mexico, the signing of NAFTA, which is the closest reference for what may occur with the implementation of the TPP, led to the implementation of structural reforms that have meant the loss of fundamental human rights... The signing of these trade agreements, in which transnational corporations play a determining role, ... cause the implementation of policies, translated into structural reforms, which shall increase violations of rights and lead to the government’s failure to fulfill its principle obligations: to protect, respect and guarantee human rights.⁴⁷

⁴⁴ Navi Pillay, “Introduction Statement: Essays in Commemoration of 25 Years of the United Nations on the Right to Development,” *Office of the High Commissioner for Human Rights*, accessed November 16, 2015, <http://www.ohchr.org/EN/Issues/Development/Pages/IntroductionStatement.aspx>.

⁴⁵ Margot E. Salomon, “Legal Cosmopolitanism and the Normative Contribution of the Right to Development” LSE Law, Society and Economy Working Papers 16/2008 (2008), <http://ssrn.com/abstract=1272582>.

⁴⁶ The Labor Advisory Committee on Trade Negotiations and Trade Policy, “Report on the Impacts of the Trans-Pacific Partnership,” December 2, 2015, 9–10.

⁴⁷ “Top UN Human Rights Experts Say TPP a Concern: Human Rights Assessments Must Precede Negotiations,” *The Council of Canadians*, n.d., <http://canadians.org/media/top-un-human-rights-experts-say-tpc-concern-human-rights-assessments-must-precede-negotiations>.

Without addressing the structural inequalities of the global system, including those related to international trade, access to equitable development will continue to be impeded.

The US fails to use trade agreements to address the inherent inequalities present in the international economic system. As Stiglitz explains, “...while increased trading opportunities are good for development countries, liberalization need to be managed carefully—the task is much more complex than the simple prescriptions of the Washington Consensus, which blithely exhorts developing countries to liberalize their markets rapidly and indiscriminately.”⁴⁸ Stiglitz goes on to discuss the kinds of changes that are required: “There are, of course, no magic solutions. But there are a multitude of changes to be made—in policies, in economic institutions, in the rules of the game, and in mindsets—that hold out the promise of helping... developing countries.”⁴⁹ While trade should of course not be abandoned, the US should find a constructive balance that includes complementary policies to offset the losses to those negatively impacted by trade policies.⁵⁰

The current international economic institutions and the global governance structures are unable to fulfill human rights obligations, and instead foster growing inequalities among and within states. Structural inequality, arguably the biggest impediment to equitable development, will remain unless the US and other states take action to advance equality within international economic institutions. From a

⁴⁸ Stiglitz and Charlton, *Fair Trade for All: How Trade Can Promote Development*.

⁴⁹ Stiglitz, *Making Globalization Work*, xi.

⁵⁰ L. Alan Winters, “International Trade and Poverty: Cause or Cure?,” *The Australian Economic Review* 39, no. 4 (2006): 347–58, doi:10.1111/j.1467-8462.2006.00425.x.

human rights based approach, it is essential to understand what this means in the context of equitable development.

2.4 Methodology: Human Rights Based Approach to Trade

A focus on economic impacts of trade agreements has led to limitations and fundamental flaws that prevent the respect and protection of human rights. The human rights based approach, the selected methodology for this thesis, provides an analytical framework that addresses the shortcomings of the current trade institutions. Using a human rights based approach to trade, including the promotion of participation, equitable development and accountability, will lead to more effective trade policies that result in improved human rights outcomes.

Equity, participation and accountability all build upon one another: in order for a process to be transparent, it must be participatory; and in order for a policy to be accountable, it must be designed inclusive of society. This inclusive participation must take place across each step of the process: design, implementation, impact and monitoring.⁵¹ Moreover, understanding an approach in this way represents an evolution from the top-down and silo approach to development that the world had taken up until the Cold War Era,⁵² and in many regards continues today.

Fundamental to the HRBA is the realization of human rights, understood not only as a goal, but a means to achieve the goal.⁵³ Thus, the promotion of rights is integral to the process of rights realization, not only important as an outcome. This

⁵¹ United Nations Development Programme, "Governance for Sustainable Human Development," UNDP Governance Policy Document (New York, 1997).

⁵² Brigitte I. Hamm, "A Human Rights Approach to Development," *Human Rights Quarterly* 23, no. 4 (2001): 1005-31, doi:10.1353/hrq.2001.0055.

⁵³ "HRBA Portal," accessed November 11, 2015, <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>.

implies that trade policies ought to uphold rights as objectives, as well as integrate rights into the process of policy formation, implementation and impact.

A HRBA affirms the universalism of rights as inherent to each individual derived from the mere fact of being human. Rights do not stem from a single nationality, culture, religion, or race but apply to all humans indiscriminately. Rather, all individuals are entitled to all rights from civil and political rights to economic, social and cultural rights, all understood to be indivisible and interdependent.⁵⁴ The principle of interdependence recognizes multiple causalities as opposed to a more limited vision of cause and effect, demonstrating the indivisibility of rights.⁵⁵

The HRBA is a participatory approach that requires a reversal of top-down thinking; and instead includes actors at all levels, with special attention to matters of inequality, discrimination and inclusion of marginalized groups.⁵⁶ Participation is seen as a tool for empowerment, whereby individuals are agents of change in the realization of rights.⁵⁷ The approach is meant to apply to all phases of a program, from design to implementation, with monitoring taking place throughout each phase. Hamm considers it to be a duty of those with authority to ensure participation, as opposed to paternalism or charity. Uvin similarly deems important that opportunities to participate “...are not dependent on the whim of a benevolent

⁵⁴ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 1993, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>.

⁵⁵ J Harrison, “Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments,” A background Paper for the expert seminar on human rights impact assessments of trade and investment agreements (Geneva, June 23, 2010), 5.

⁵⁶ Milan Brahmbhatt and Otaviano Canuto, *The Economics of Human Rights and MDGs in Practice*, MDGs and Human Rights: Past, Present and Future (Cambridge: Cambridge University Press, 2013).

⁵⁷ Hamm, “A Human Rights Approach to Development.”

outsider, but rooted in institutions and procedures.”⁵⁸ Therefore, participation constitutes a fundamental component of a HRBA.

Finally, the HRBA moves beyond rights as merely ‘doing good’ and assumes legal obligations to human rights.⁵⁹ States have a common duty to uphold the human rights treaties respectively signed, requiring the structuring of policies and efforts to maintain accordance with these legal obligations. Grounded in rights, the HRBA structures obligations jointly among states.⁶⁰ This offers a significant contribution to the structure of accountability within the rights framework; a dual structure of accountability is important for rights holders considering that trade policies have inter-state impact.

The HRBA is being interpreted by a wide range of relevant actors; nevertheless, a set of principles overlapping throughout the range of interpretations includes: participation, non-discrimination, equality and accountability. While these are not new principles, the features having preceded even the human rights framework, the real strength of the HRBA hinges on its successful operationalization.⁶¹

While the HRBA is relatively new, the operationalization of the framework has drawn parallels to the anti-colonial social movements for self-determination.⁶²

⁵⁸ Peter Uvin, “From the Right to Development to the Rights-Based Approach: How ‘Human Rights’ Entered Development,” *Development in Practice* 17, no. 4/5 (August 1, 2007): 603, doi:10.1080/09614520701469617.

⁵⁹ “Human Rights and Human Development,” Human Development Report (New York: United Nations Development Programme, 2000).

⁶⁰ Hamm, “A Human Rights Approach to Development.”

⁶¹ Celestine Nyamu-Musembi and Andrea Cornwall, “What Is the ‘Rights-Based Approach’ All about? Perspective from International Development Agencies” (Institute of Development Studies, November 2004).

⁶² *Ibid.*, 6–8.

The post-cold war environment, with a push for the interdependence of all rights, as well as the entry of development countries within the United Nations (UN) system demanding reforms for an equitable international order, contributed to the integration of rights and development. The Vienna Conference in 1993 is highlighted in particular for promoting the integration of rights and development. Followed by the World Social Development Summit in Copenhagen in 1995 where a group of NGOs campaigned for a HRBA.⁶³ The UN Programme for Reform called for the mainstreaming of human rights in policy and practice within all UN bodies, across all sectors, and throughout international, regional and local offices. A HRBA has been commonly selected as the method to employ this objective.⁶⁴

To date, the HRBA has been utilized most commonly in international development programming and has not been common practice in the context of economic institutions. Nevertheless, a variety of actors, working on a wide range of topics, have successfully adapted the HRBA. Thus, there is no indication that the framework would not work for implementation in economic policies.

In December 2012, the UN General Assembly passed resolution 67/171 that calls for trade institutions and trade policies to pursue economic justice as an objective.⁶⁵ In order to achieve the aims of a HRBA to trade, the existing framework must transform “from engines of economic growth into a multi-purpose framework

⁶³ Ibid., 10–11.

⁶⁴ “HRBA Portal.”

⁶⁵ United Nations General Assembly, *General Assembly Resolution 67/171, A/RES/67/171*, 2012, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/171.

for the promotion of holistic, people-centered development.”⁶⁶ The Office of the High Commission for Human Rights (OHCHR) has been directed to take forward this mandate, and OHCHR has promoted a HRBA to trade as the policy tool to operationalize the aim of economic justice in trade policies.

A HRBA will be used in this paper to analyze the approach taken by the US to formulate and implement labor provisions in trade agreements. The human rights focus will be on the labor chapter of trade agreements. Labor provisions are the most relevant to a discussion on the impacts to labor rights of workers in partner countries and offer the best area for analysis.

The position taken in this paper is that the US has an obligation in the realization of the labor rights of those workers impacted by its transnational trade policies. By entering into a trade agreement, all parties to the policy have responsibility to the human rights implications both within and between the trading partner countries.

3. EVALUATION OF PARTICIPATION AND ITS EFFECT ON LABOR PROVISIONS

This section demonstrates how US trade policy formation lacks transparency: trade agreements are negotiated behind closed doors and drafts of trade agreements are not made public until after negotiations have been completed. This top-down drafting of trade policies devalues and sometimes even lacks the important contributions and consensus of relevant actors. As they stand currently, trade

⁶⁶ “Human Rights, Trade and Investment,” *Office of the High Commissioner for Human Rights*, accessed November 11, 2015, <http://www.ohchr.org/EN/Issues/Globalization/Pages/GlobalizationIndex.aspx>.

policies cater to the economic interests of those at the negotiating table, namely government and business. These powerful actors are able to benefit from trade agreements as a tool to negotiate their interests. Labor workers are significantly impacted by trade policies, yet are underrepresented at the negotiating table. Without meaningful participation, labor provisions in particular will be ineffective, and the social costs of trade will fail to take precedence to the economic benefits of trade policies.

3.1 Participation in the Negotiation of US Trade Agreements

The lack of transparency and the undemocratic process of drafting US trade agreements make it impossible to analyze and evaluate the strength of labor provisions in advance. The unequal distribution of power among the actors involved in trade negotiations, including government, business, and labor, translates into ineffective labor provisions, affecting both US workers and workers abroad.

The Office of the United States Trade Representative (USTR) is responsible for the development and administration of US trade agreements. The USTR is supported by the Advisory Committee for Trade Policy and Negotiations (ACTPN) who counsel and assist in the formation of trade policies. The Trade Representative and trade advisors are not elected officials, but are appointed by the US President, and have traditionally consisted predominantly of business representatives. Breaking down the trade advisors on the ACTPN, one can see the degree to which interests are represented: labor is represented by 5 percent, government is represented by 10 percent and the overwhelming majority, or 85 percent of

advisors, represent business interests.⁶⁷ Thus, the voice of workers is not well represented while the voice of business, which has an incentive to maximize profits and reduce labor costs, is over-represented.

Further, the trade representatives are not experts in assessing the social impact of labor standards.⁶⁸ When the US Government performs social impact assessments forecasting impact on workers, it narrowly measures economic effects. Once again, this reinforces trade concerns to be primarily an economic perspective and not a human rights issue. As has been established, trade agreements impact human rights in all trading countries. As such, human rights impact assessments are required from the onset of negotiations and throughout the agreement, if social impacts of labor provisions are to be meaningful.

Moreover, trade liberalization "...is not gender neutral nor a uniform process."⁶⁹ Trade policies create differentiated opportunities as well as adversities for women, which is why the United Nations Conference on Trade and Development (UNCTAD) has called for the mainstreaming of gender in trade policies. This entails application of a gender lens during the design and implementation of trade policies,

⁶⁷ AFL-CIO, "Labor's So-Called 'Seat at the Table' at TPP Negotiations," *AFL-CIO*, n.d., <http://www.aflcio.org/Issues/Trade/Fast-Track-Legislation/Labor-s-So-Called-Seat-at-the-Table-at-TPP-Negotiations>.

⁶⁸ Marceline White, "Look FIRST from a Gender Perspective: NAFTA and the FTAA," *Gender and Development* 12, no. 2 (July 1, 2004): 3.

⁶⁹ Lisa B Meyer, *International Trade Liberalization and Gender Relations in Labor Markets: A Cross-National Analysis, 1970-1998* (Ann Arbor, US: UMI Dissertations Publishing, 2001), Abstract; Kate Higgins, "Gender and Free Trade Agreements: Best Practices and Policy Guidance" (The North-South Institute, October 2012), 2.

with attention to impacts on empowerment and inequality in particular, and to identify remedies when women are negatively impacted.⁷⁰

Other committees exist, such as the Labor Advisory Committee (LAC). However, the USTR is not mandated to meet or provide access to documents to any committee other than the ACTPN. Moreover, the USTR has been criticized for keeping the ACTPN meetings and records closed, including restriction to important information that impedes the ability of the LAC to advise on matters of trade negotiations.⁷¹ A blatant example of the lack of transparency is evidenced in that the USTR did not substantively consult with the LAC on the formation of the TPP labor side agreements with Brunei, Vietnam and Malaysia.⁷²

Members of Congress have raised frustrations with the manner that the US Government negotiates trade agreements. Only select members of Congress have limited access to the text during negotiations, and are unable to seek input from civil society or labor representatives.⁷³ Still more concerning, due to the use of Fast Track Authority, there is not room for negotiating once the agreement is signed by the President and subsequently delivered to Congress for an up or down vote. The accelerated process does not allow Congress to amend any portion of the text. The use of Fast Track Authority is controversial in and of itself, and should be

⁷⁰ UNCTAD Secretariat, "Mainstreaming Gender in Trade Policy" (Geneva: UNCTAD, Trade and Development Commission, March 19, 2009), 13–15.

⁷¹ Andrea M Ewart, "The Role of Civil Society in Shaping Trade Policy" (FOCAL Research Paper, December 2009); The Labor Advisory Committee on Trade Negotiations and Trade Policy, "Report on the Impacts of the Trans-Pacific Partnership," 11.

⁷² The Labor Advisory Committee on Trade Negotiations and Trade Policy, "Report on the Impacts of the Trans-Pacific Partnership," 11–12.

⁷³ AFL-CIO, "Labor's So-Called 'Seat at the Table' at TPP Negotiations."

reconsidered as a policy.⁷⁴ Hence, Congress and thus the public are left to take the President and US Trade Representative at their word when they claim labor provisions are strong and enforceable; which has not proven dependable.⁷⁵

Both US labor and labor groups abroad are not sufficiently valued in trade negotiations. In terms of US labor, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), an umbrella organization representing over fifty unions or 12.5 million workers, is engaged as a member of the LAC. However, AFL-CIO is quick to reprimand those who confuse access with influence. Members of LAC do not have full access to the trade agreement while being negotiated, and thus the AFL-CIO criticizes the process for not allowing the LAC to effectively influence the text of the agreement. Draft text that AFL-CIO has prior access to review is deemed confidential, which limits them from mobilizing allies on behalf of their shared interests to counter the powerful economic elites they are up against.⁷⁶

In its own words, the AFL-CIO describes the ineffectiveness of LAC from its perspective as a member:

Perhaps the best proof, however, that the LAC has not been a valuable tool in creating people-centered trade agreements is the actual content of the final agreements.... If these trade agreements worked to create good jobs for workers, the AFL-CIO would be fighting for them as hard as or harder than Wall Street and the global corporations do. The tragic fact is that—despite some marginal progress over the years in some chapters—the model hasn't changed. This flawed model has led to many trade agreements that skew their benefits toward the 1% and have exacerbated trade deficits, wage suppression, the dismantling of our manufacturing sector and income inequality.⁷⁷

⁷⁴ Eli J. Kirschner, "Fast Track Authority and Its Implication for Labor Protection in Free Trade Agreements," *Cornell International Law Journal* 44, no. 2 (2011): 385.

⁷⁵ Prepared by the Staff of Senator Elizabeth Warren, "Broken Promises: Decades of Failure to Enforce Labor Standards in Free Trade Agreements," 2015.

⁷⁶ AFL-CIO, "Labor's So-Called 'Seat at the Table' at TPP Negotiations."

⁷⁷ *Ibid.*

So while unions like the AFL-CIO are considered a significant voice representing US labor, in reality, their overall access to trade negotiations, including via their membership in LAC, fails to yield considerable influence on labor provisions.

Having faced barriers to meaningfully participate directly with US trade policy formation, labor unions, civil society organizations (CSOs) and other labor advocates have resigned to input through external efforts. These efforts resulted in the drafting of a model trade policy through bipartisan efforts, like the May 2007 Bipartisan Agreement on Trade Policy (May 10th Agreement). Like all policies, trade representatives, government officials, unions and CSOs conceded in some regard in order to come to agreement; but labor advocates have criticized the policy for not going far enough to protect workers rights.⁷⁸ Recommendations for a new framework were introduced almost immediately following the passage of the 2007 Policy.⁷⁹ The LAC has further criticized application of the May 10th Agreement, which was anticipated to serve as the “...floor for standards, not the ceiling.”⁸⁰

While a model serves to provide a basic minimum standard, the importance of participation in negotiating each trade agreement cannot be understated. And this is where a model trade policy alone is not sufficient. Labor representatives are vital to discussion if the goal is to implement effective policies. Discussions need to

⁷⁸ M. Angeles Villarreal, “U.S.-Peru Economic Relations and the U.S.-Peru Trade Promotion Agreement,” Congressional Research Service: Report for Congress, (July 27, 2007); Travis McArthur and Todd Tucker, “A Year after Implementation of Peru Free Trade Agreement, U.S. and Peru Left with Broken Promises and No New Trade Model,” *Public Citizen*, February 1, 2010, <http://www.citizen.org/documents/PeruFTA-OneYear.pdf>; Michael A. Cabin, “Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?,” n.d.

⁷⁹ *A Way Forward for Workers' Rights in US Free Trade Accords* (Human Rights Watch, 2008).

⁸⁰ The Labor Advisory Committee on Trade Negotiations and Trade Policy, “Report on the Impacts of the Trans-Pacific Partnership,” 53.

contextualize the labor standards, as well as the human rights impact a trade policy will have across industries and society in both trading states.

The discussion thus far has centered on the input, or lack thereof, of US labor interests into the negotiation process but has not yet touched on the critical voice of workers of US trading partners. While most discussions of labor and trade end with its influence on US labor interests, this thesis emphasizes the effect of US trade on labor in the trading partner countries.

Using the most recent negotiation process of the TPP as an example, it is clear that the voice of workers of US trading partners is also excluded from negotiations. The TPP has been criticized along the same lines as previous agreements for being non-transparent, non-participatory and un-democratic.⁸¹ The US joined the TPP negotiations in 2008, and the text of the trade agreement was not released for public reading until negotiations concluded in November 2015, seven years later.⁸²

Facing similar impediments to contribute as US laborers, workers organizations and unions from Australia, Canada, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and the US drafted a TPP 'Model Labour & Dispute Resolution Chapter' during the negotiations process in 2012.⁸³

⁸¹ Alfred de Zayas, et al., "UN Experts Voice Concern over Adverse Impact of Free Trade and Investment Agreements on Human Rights," *UN Human Rights Office of the High Commissioner*, June 2, 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031>.

⁸² "Civil Society Reacts to Finally-Released TPP Text," *Citizens Trade Campaign*, November 5, 2015, <http://www.citizenstrade.org/ctc/blog/2015/11/05/civil-society-reacts-to-finally-released-tpp-text/>.

⁸³ "The Trans-Pacific Partnership Agreement Model Labour & Dispute Resolution Chapter" (International Trade Union Confederation, et al., July 3, 2012), http://www.ituc-csi.org/IMG/pdf/full_ituc_transpacific_partnership_labor_chapter.pdf.

The President of the Malaysian Trades Union Congress (MTUC), which represents 800,000 workers across Malaysia, voiced concerns with the TPP negotiations process. Namely that “...the ‘optimism’ expressed by government leaders over the ability to settle the broad framework of trade issues that will have momentous consequences for the ordinary citizens of Malaysia was bewildering, given the total absence of consultation with sectors of the population, particularly workers....”⁸⁴ He continued that the MTUC had not been consulted, leaving workers with little understanding of what would be the implications of the trade deal, despite the fact that workers in particular would “...bear the brunt of the costs of the Free Trade Agreements (FTAs).”⁸⁵

In Brunei, concerns go beyond issues of participation and transparency in the policy formation process of trade agreements. Due to extreme restrictions of human rights in general, and labor rights in particular, Brunei has only one union that is active in the country representing Shell Petroleum workers called the Brunei Oilfield Workers Union (BOWU). The national government prohibits strikes, limits free speech, and has no protections for collective bargaining.⁸⁶ Hence, the participation of Brunei workers is not only shut out at international discussions of trade policies but are exceedingly restricted domestically as well. Negotiations of trade agreements present an opportunity for labor groups in the trading partner countries to be consulted; yet, in most cases, their interests go unrecognized.

⁸⁴ Fauwaz Abdul Aziz, “Suhakam Urged to Probe Rights Impact of FTAs,” *Aliran*, April 5, 2012, <http://aliran.com/civil-society-voices/2012-civil-society-voices/suhakam-urged-to-probe-rights-impact-of-ftas/>.

⁸⁵ *Ibid.*

⁸⁶ “The Trans-Pacific Partnership: Four Countries That Don’t Comply With U.S. Trade Law” (American Federation of Labor and Congress of Industrial Organizations, n.d.), 5, <http://www.aflcio.org/content/download/150491/3811471/file/TPPreport-NO+BUG.pdf>.

3.2 The Result of Poor Participation: Ineffective Labor Provisions in US Trade Agreements

The results of a non-participatory and non-transparent negotiating processes become evident upon examination of the evolution of labor provisions in US trade agreements over the last three decades.

Since NAFTA, US labor provisions have changed in scope and content. This thesis reviews three fundamental textual shifts in the way labor provisions have developed over time in US trade agreements. First, labor provisions have moved from a side agreement to the main text of the trade agreement. This signifies that labor is no longer an after-thought; rather it is discussed during the negotiations along with other aspects of the trade policy. Second, the specific set of rights included has changed. Rights are now derived from international standards, namely the 1998 ILO Declaration on Fundamental Principles and Rights at Work (1998 ILO Declaration), instead of solely from domestic legislation. Third, labor provisions now have the same dispute settlement procedures as all other terms of trade, including commercial disputes.

While in theory, these three textual modifications all sound like progress, the effectiveness of these changes has been negligible. Employing a case study of the TPP, the trade agreement that allegedly represents the most progressive labor provisions to date, will further prove this contention by demonstrating how the TPP labor provisions fall short of effective and meaningful change.

Shift 1: Labor Chapter Moves to Main Agreement

While moving the labor chapter to the main agreement is a step in the right direction, this change is more symbolic than it is effective. This move signifies that the discussion on labor takes place alongside traditional trade issues in the main agreement, as opposed to on the side or after as was the case with NAFTA. And it also means that the labor chapter is integral to the trade agreement, and is dependent upon the passage of the entire accord. While this can be perceived as progress, the mere moving of the location of these provisions does not lead to strengthened text and this is due in part to the un-democratic method that trade agreements are negotiated.

Moving the labor chapter has not meaningfully changed the negotiation process to a more inclusive or consultative process. Rather, the process continues as a technocratic approach to liberal economic policy formation.

Shift 2: Beyond Domestic Legislation, Reference to International Law

US labor provisions have moved beyond solely referencing domestic labor law, which varied in relative strength and scope by country, to now include reference to international labor standards. In theory, this change broadens protections for workers by compensating for any weak domestic labor laws.

However, the use of international standards does not necessarily maximize effectiveness of labor provisions. First, the 1998 ILO Declaration is problematic

based on the nature of the declaration.⁸⁷ Considering it the “root of the problem,” Cabin critiques the use of the ILO Declaration in trade agreements as vague and ambiguous, leading to problems of “flexible and divergent interpretations of the ILO’s principles and further obscure[ing] their content”⁸⁸ Cabin suggests that while the declaration has purpose within the ILO, it is not well suited for the purpose of trade agreements. Second, similar to the issue of ambiguity, it remains unclear if the core labor standards are mere principles or if they are in fact linked to legally binding conventions. This question has been widely debated.⁸⁹ Third, the 1998 ILO Declaration can be thought of as delinking rights from ratified conventions, and thus downgrading states responsibility and enforceability.⁹⁰ And last, the 1998 ILO Declaration is controversial in that it creates a hierarchy of rights. UN efforts in the 1990’s to mainstream human rights and advocate for the indivisibility and interdependence of the full spectrum of rights is contradicted by the declaration limiting to a set of core labor standards.⁹¹ This prevents a holistic and interrelated conception of labor rights, and implicitly rejects the connection of labor standards to other human rights principles like the right to a decent wage, food, health, among many others. These arguments show that the incorporation of international legal

⁸⁷ Philip Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime,” *European Journal of International Law* 15, no. 3 (2004): 457–521; Cabin, “Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?”

⁸⁸ Michael A. Cabin, “Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?,” *Columbia Law Review* 109, no. 5 (June 1, 2009): 1047–93.

⁸⁹ *Ibid.*

⁹⁰ Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime.”

⁹¹ Jean-Philippe Thérien and Philippe Joly, “‘All Human Rights for All’: The United Nations and Human Rights in the Post-Cold War Era,” *Human Rights Quarterly* 36, no. 2 (2014): 373–96.

standards do not necessarily mean that the labor provisions will become more effective.

Shift 3: Dispute Settlements

In cases where labor standards have been violated, US labor provisions now utilize the same dispute settlement procedures as other aspects of trade, such as intellectual property rights and other commercial issues. Further, the set of rights that can be taken to dispute settlement has also progressed. With NAFTA, only a limited set of rights could go so far as dispute settlement. Now, any labor right covered under a given agreements labor provisions can be heard in dispute settlement proceedings.

While this may be perceived as a step in the right direction when it comes to advancing labor rights, it does not guarantee that labor provisions are now better enforced. While a possibility may exist to bring a case, this does not lead to automatic acceptance of a case for review or to successful enforcement of labor standards. The record of cases brought through trade agreements remains quite low.⁹² A total of seven submissions have been filed across all US trade agreements, with the exception of NAFTA.⁹³ Under NAFTA's labor side agreement, the North American Agreement on Labor Cooperation, a total of 39 submissions have been filed.⁹⁴ Overall, only one submission, Guatemala, has been taken to dispute

⁹² "Submissions under the Labor Provisions of Free Trade Agreements," *US Department of Labor: Bureau of International Labor Affairs*, accessed August 8, 2015, <http://www.dol.gov/ilab/trade/agreements/fta-sub.html>.

⁹³ *Ibid.*

⁹⁴ "Submissions under the North American Agreement on Labor Cooperation (NAALC)," *US Department of Labor, Bureau of International Labor Affairs*, August 9, 2015, <http://www.dol.gov/ilab/trade/agreements/naalc.html#>.

settlement. The lack of accessibility and other practical barriers to dispute settlement mechanisms for workers claiming rights violations and seeking redress represent major challenges that most workers are unable to overcome.

3.3 Case Study: TPP Labor Provisions

The last section analyzed three fundamental shifts in the ways US labor provisions have been approached over time. The most recent US trade agreement, the Trans-Pacific Partnership, has been heralded by the Obama Administration as unprecedented. Specifically, on the White House website, President Obama claims that, “[u]nder the TPP, tough, fully-enforceable standards will protect workers’ rights... for the first time in history.”⁹⁵ This enthusiasm is misguided. While the TPP includes new elements, analysis of its labor provisions ultimately point to a repeat of previous errors. The lack of participation in the negotiating process has resulted in a high probability of ineffective labor provisions affecting both US labor and labor abroad.

The recently released text of the TPP reveals elements within the labor chapter that are unique to this agreement. First, in addition to the core labor rights as outlined in the 1998 ILO Declaration, the TPP also states that countries must adopt and maintain “...acceptable conditions of work with respect to minimum wages, hours or work, and occupational safety and health.”⁹⁶ Unlike the core labor standards, this new element is not linked to international standards, a fact that is

⁹⁵ “The Trans-Pacific Partnership: What You Need to Know about President Obama’s Trade Agreement,” *The White House*, accessed November 5, 2015, <https://www.whitehouse.gov/issues/economy/trade>.

⁹⁶ “Trans-Pacific Partnership,” *Office of the United States Trade Representative*, November 2015, 19–2, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

explicitly stated in a footnote in the agreement. While this may be perceived as solving the issues previously identified about the ambiguous nature of the international legal standards, it creates additional problems for labor. Instead of uniform, unambiguous and effective labor standards that would adequately address previous criticism, the TPP depends on the domestic legislation of the involved trading partners. National laws vary in scope and content, showing that the relevant labor standards will significantly differ among the trading partner countries. This variance in domestic legislation will correspond to differing levels of respect and protection of labor standards among trading partners. Such variance calls into question the overall effectiveness of this labor provision in the TPP.

Second, according to Article 19.6 of the TPP, “...each Party shall also *discourage*, through initiatives it considers appropriate, the importation of goods... produced... by forced or compulsory labour, including forced or compulsory child labour” (emphasis added).⁹⁷ The use of the word ‘discourage’ results in more of a symbolic gesture than a meaningful effort toward elimination of child and forced labor. Instead of ‘discourage,’ trading partners could have phrased the provision by stating that trading partners are ‘barred,’ ‘prevented’ or ‘prohibited’ from using forced or child labor. The fact that such terms were not chosen signals to trading partners that the provision is not meaningful. Further, a vague word like ‘discourage’ calls into question the enforceability of such a provision. States can easily argue that they discouraged child and forced labor, without taking significant

⁹⁷ Ibid., 19–4.

action. The text lacks indicators and methods of monitoring this provision, further limiting its enforceability.

Third, according to Article 19.4, “The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party’s labour laws. Accordingly, no Party shall waive or otherwise derogate from, its statutes or regulations... in a manner affecting trade... between the Parties.”⁹⁸ On its face, this provision appears to address a weakness present in previous trade agreements. In the past, developing nations set up ‘export processing zones’, where domestic laws, including those related to labor standards, did not apply. Developing countries believe that such zones would attract additional trade. Explicitly stating that nations are prohibited from “weakening or reducing the [labor] protections” would seem to address this previous issue.

However, like with other sections of the TPP, this provision is limited to areas “affecting trade... between the Parties.” This adds an unnecessary element of complexity. The burden is now placed on workers to not only prove that their labor rights were violated, but also that their work was related to international trade. This leaves open substantial room for exploitation. Just as businesses previously manipulated export processing zones, this provision may lead business to set up activity in a sufficiently complex manner so as to minimize the link between specific sites of production and trade. This adds an unnecessary burden on workers to prove that labor violations occurred in the context of international trade and so violations of labor standards may remain unaddressed.

⁹⁸ Ibid., 19-3.

Fourth, while corporate social responsibility has been briefly mentioned in the annex of previous agreements, it was featured more prominently in the TPP in a stand-alone article within the main labor chapter. The text merely “...encourages enterprises to voluntarily adopt corporate social responsibility initiatives...”⁹⁹ Similar to the use of the word “discourage” above, this provision simply “encourages” enterprises to “voluntarily” adopt initiatives. This vague language does not obligate actors to enforce labor rights. So even though this represents one of the first times the responsibilities of business is explicitly mentioned in the labor chapter, the weak language mitigates the responsibility of business to respect and protect labor standards.

And finally, labor side agreements have been agreed upon with Malaysia, Brunei and Vietnam.¹⁰⁰ The side-agreements intend to serve as implementation plans to ensure legal, institutional and social reform. Each of the plans varies in scope and strength. The Vietnam side agreement is the most detailed in scope and on its face, may seem to be the most encompassing of labor standards. However, this side agreement remains ineffective and again shows how the main actors involved in trade negotiations ultimately devalue labor standards.

Specifically, this side agreement grants a five-year extension from the signing of the TPP to comply with the core labor standard of allowing workers to freely establish and join labor unions of their choosing.¹⁰¹ During this time period, the enforceability through consultation or dispute settlement is therefore inaccessible

⁹⁹ Ibid., 19–4.

¹⁰⁰ “TPP.”

¹⁰¹ US-Vietnam Plan for Enforcement of Trade and Labor Relations (Trans-Pacific Partnership 2015).

to Vietnamese workers who wish to join a labor union. Ironically, this derogates from Article 19.4 of the TPP, which states that it is inappropriate to waive labor rights inconsistent with those outlined within the labor chapter.¹⁰²

Granting a five-year window to comply with this provision may seem reasonable given the time it takes to reform domestic legislation and procedures regarding labor unions. However, other options existed that both parties ignored. First, negotiations of the TPP began seven years ago. At this time, parties could have insisted that labor provisions represented a non-negotiable aspect of the agreement and that the expectation was that interested parties would begin preparing their domestic institutions. In the case of Vietnam, this would include the needed reforms to ensure that labor unions could be established and freely joined. Alternatively, parties could agree now to the agreement, but only begin its implementation once all partners, including Vietnam, had the necessary domestic infrastructure needed to comply with the labor provisions. Instead, the parties prioritized economic interests over human rights, facilitating up to five years of derogation from this core labor standard.

Following publication of the labor chapter of the TPP, the International Trade Union Confederation (ITUC), one of the worker organizations that drafted the TPP ‘Model Labour & Dispute Resolution Chapter’ mentioned above, indicated that trade unions were not appeased by minor concessions in the labor chapter. Instead, they are “deeply disappointed” that the labor chapter failed to include a number of “critical amendments” proposed in the model labor chapter, which include: no direct

¹⁰² “TPP,” 19–3.

reference to ILO Conventions; dispute settlement continues to rely on state-state discretion and prolonged timelines; and protections for migrant workers were not enhanced.¹⁰³

It is clear that the negotiation of US trade agreements is not participatory nor is it transparent. Despite the impact of agreements on workers, the approach to draft trade continues top-down without the voice of workers. Workers, in the US and abroad, are not represented in the drafting of US trade agreements. While these actors have made efforts to contribute in innovative ways such as model agreements, efforts have not been meaningfully incorporated, as is evidenced in the final text of agreements. The significant adverse impacts from a non-participatory process in formulating trade agreements will impact the outcomes of the policies. The following section will analyze how effective labor provisions are at promoting labor rights.

4. ASSESSING IMPLEMENTATION OF CORE LABOR STANDARDS

The previous section argued that poor participation by labor has led to the inclusion of ineffective labor provisions in trade agreements. By using textual analysis, it became clear that the labor provisions were unlikely to be effective. This section goes further than the textual level and analyzes the implementation of these provisions, ultimately showing that they have been ineffective on the ground.

¹⁰³ "Fears Over Trans-Pacific Partnership Confirmed," *International Trade Union Confederation*, November 10, 2015, <http://www.ituc-csi.org/fears-over-trans-pacific>.

An explicit objective of a human rights based approach is the realization of human rights as well as the respect for rights as central to the process of implementing policies. As such, this section will analyze the process of implementation and monitoring of core labor standards outlined in the labor provisions of trade agreements in select US trading states. In line with the previous section, this analysis will show how trade agreements fall short of yielding the full implementation of labor standards.

Criticism abounds regarding the failure to implement labor standards in trade agreements. US Senator Elizabeth Warren, one of the most outspoken critics in Congress of the recent trade negotiations of the Trans-Pacific Partnership (TPP), published a 2015 report on US Trade Agreements titled “Broken Promises: Decades of Failure to Enforce Labor Standards in Free Trade Agreements.”¹⁰⁴ In the report, she highlights how, like a broken record, virtually all US Presidents and US Trade Representatives have made claims that the FTA under negotiation is the most progressive, including the strongest labor provisions yet to protect workers rights. Despite such rhetoric, Warren’s report finds that “the United States repeatedly fails to enforce or adopts unenforceable labor standards in free trade agreements.”¹⁰⁵ Warren, joined by several human rights organizations and other actors, insists that US trade agreements have a long way to go in order to achieve the realization of labor standards both in the US and its trading partners.

¹⁰⁴ Prepared by the Staff of Senator Elizabeth Warren, “Broken Promises: Decades of Failure to Enforce Labor Standards in Free Trade Agreements.”

¹⁰⁵ Ibid.

In order to evaluate such criticism, considerable research was analyzed concerning the implementation of trade agreements. Such research includes a number of US governmental reports administered by the Office of the United States Trade Representative, US Department of Labor, the US Department of State and the Government Accountability Office (GAO). While this research is comprehensive in nature, it is important to point out that a GAO report released in November 2014 found that the USTR and DOL lack a systematic approach to monitoring and enforcing labor provisions in trade agreements.¹⁰⁶ While this is reflective of the US Government's overall approach to labor provisions, it also represents a weakness in research. As such, these reports are augmented with research conducted by outside groups including human rights organizations.¹⁰⁷

4.1 Impact of Labor Provisions on Legal Reform

Following passage of the 2007 Trade Policy Template, the standard requirement made by the US in recent agreements is that trading partners must align domestic labor law with the ILO core labor standards, more specifically the 1998 ILO Declaration.¹⁰⁸ As mentioned previously, the use of such international standards can often present additional obstacles, as vague obligations often give room for states to obfuscate their responsibilities.

At the beginning stages of trade negotiations, the United States always identifies its commercial interests. This sharply contrasts with assessments of labor

¹⁰⁶ "Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed" (U.S. Government Accountability Office, November 6, 2014).

¹⁰⁷ *A Way Forward for Workers' Rights in US Free Trade Accords*.

¹⁰⁸ Labour: Chapter Summary (Trans-Pacific Partnership 2015).

standards in trading partner countries.¹⁰⁹ Unlike with commercial interests, the US has not made it common practice to address insufficiencies in the core labor standards within the legal framework of its trading partners in advance of submitting the trade agreement to Congress for approval.¹¹⁰

More commonly, efforts to correct labor deficiencies take place either shortly before the trade agreement concludes or after it has already been enacted.¹¹¹ Such was the case from the previous section describing the TPP side agreement between the US and Vietnam. This agreement is an example of addressing labor deficiencies after the agreement is enacted. Specifically, it grants Vietnam five years to change its domestic infrastructure to allow for workers to establish and join labor unions.¹¹²

While the example of the side agreement with Vietnam points to an instance where labor deficiencies are only addressed after the enactment of the trade agreement, the US-Peru trade agreement required labor deficiencies to be addressed prior to its enactment. But despite this difference, efforts were inadequate to address labor deficiencies on the ground.

In the case of Peru, the US Congress insisted that labor deficiencies be addressed before the trade agreement was approved. But because the evaluation of labor standards in trading partner countries was not taken seriously from the onset of negotiations, Congress' insistence lead to a rush by Peru's Government to amend domestic statues, as opposed to thorough and thoughtful solutions. Specifically, "Peru issued piecemeal, controversial labor-related executive decrees on the eve of

¹⁰⁹ *A Way Forward for Workers' Rights in US Free Trade Accords*, 13–14.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² US-Vietnam Plan for Enforcement of Trade and Labor Relations (Trans-Pacific Partnership 2015).

congressional consideration of the US-Peru agreement, in lieu of more effective and comprehensive but time-intensive labor law reforms.”¹¹³ The haphazard plan failed to show a commitment to meaningful reform of complex labor standards.

Whether labor standards in trade partner countries are addressed prior to or after the enactment of a trade agreement, it cannot be denied that such a system means that labor standards are often addressed after the economic considerations have already been finalized. In the case of Vietnam, the economic benefits of the TPP will be determined long before the country changes domestic policy to allow for the establishment of trade unions. As such, the available incentives present at trade negotiations are not available to be used as a means to promote better and more comprehensive reform in Vietnam. In the case of Peru, the “quick-fix” labor reforms were sufficient to persuade the US Congress to approve of the agreement. Any needed amendments and other changes to these new policies, which were probably large in number given the quick process by which the initial reforms were enacted in the first place, were also isolated from the trade negotiations process.¹¹⁴ In both cases, the fact that the economic incentive had already been realized meant that states had little incentive to undergo serious labor reform.

While the above analysis points to vast room for improvement, it is important to point out that this policy has had a marked impact on legal reform in the domestic legislation of some US trading partners. In the case of Oman and Colombia, both countries worked to reform their labor laws ahead of trade

¹¹³ *A Way Forward for Workers' Rights in US Free Trade Accords*, 14.

¹¹⁴ *Ibid.*, 13–14.

discussions out of a desire to enter into a trade agreement with the US.¹¹⁵ Select countries have continued to strengthen legal statutes after the passage of a trade agreement, as was the case in Jordan.¹¹⁶

Despite these few successes, most trading partner countries underwent institutional reform after the trade agreement had been finalized. As will be argued in the next section, this did not necessarily result in improved labor standards for workers.

4.2 Trade and Institutional Reform

The labor provisions of trade agreements often result in institutional reform in the trading partner countries. As part of trade agreements, the US provides funding and technical guidance for institutional capacity building efforts. The objective of such institutional reform is to improve labor law enforcement.¹¹⁷

The US is engaged with and funding programs to improve labor standards with select trading partners, including Jordan, Chile, Morocco, Guatemala, Honduras, Panama, Oman, Colombia and Peru.¹¹⁸ The USTR and DOL cite limited funds as justification for selecting these priority countries to monitor compliance with labor provisions.¹¹⁹

Trade agreements with Panama, Peru, Jordan and Morocco each require the creation of labor councils or committees consisting of high-level government representatives from each trading partner. Councils *typically* hold meetings annually

¹¹⁵ “Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed.”

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

or bi-annually to discuss labor issues in terms of institutional capacity, policy reform and to review labor obligations within the trade agreement.¹²⁰

In Jordan, Peru and Panama, the Labor Councils have held meetings open to public, and included interaction with stakeholders beyond the government officials who represent the councils.¹²¹ In other instances, such as in Jordan and Colombia, Labor Action Plans (LAPs) have been established. LAPs and Labor Councils have the added value of being contextual and thus address critical labor issues specific to the relevant trading country. In Jordan, the LAP focuses on labor issues of foreign workers.¹²² The Governments of the US and Colombia continue their collaboration to implement the 2011 Colombian Action Plan Related to Labor Rights that includes a project to increase accountability of perpetrators who commit violence against unions.¹²³

After reviewing the legal and institutional reforms that result from the labor provisions of trade agreements, one could easily be convinced that the US and its trading partners are doing their due diligence. However, the critical measure of effectiveness is the implementation of these legal and institutional reforms in the lives of workers. While the first two measures support the third, they do not automatically result in improvements to working conditions. The following section will look at the impact of legal and institutional reform on workers rights.

¹²⁰ Michael B.G. Froman, “2015 Trade Policy Agenda and 2014 Annual Report of the President of the United States on the Trade Agreements Program” (Office of the United States Trade Representative, March 2015), https://ustr.gov/sites/default/files/2015%20AR%20Compiled%20FINAL_0.pdf.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

4.3 The Impact of Legal and Institutional Reforms on Labor

The GAO reviewed the implementation of labor commitments in trade agreements and concluded that, “[s]takeholders reported limited enforcement capacity and gaps in labor rights...”¹²⁴

While in some cases institutional reform resulted from the labor provisions of trade agreements, improvements in the realization of labor rights did not always result. The GAO reviewed documents and interviewed unions and other non-governmental stakeholders. According to their research, these groups in El Salvador, Guatemala, Colombia and Peru all voiced an inability to benefit from legal rights within their respective labor laws.¹²⁵ In the case of Oman, domestic workers found that labor laws were respected; however, foreign workers did not benefit from the labor laws, suggesting that implementation of labor law is discriminatory.¹²⁶

This trend continued in other trading partner countries. For example, stakeholders in El Salvador, Colombia and Guatemala did not find that efforts to improve capacities and efficiency of labor inspectorate or court processes were effective.¹²⁷

Specifically, in El Salvador, courts significantly improved the timeline for accepting labor cases, from two years to six months. Nevertheless, court decisions have not been enforced in fifty one percent of court sentences.¹²⁸ In Guatemala, union leaders were paid to leave their jobs and to discourage unionization. In other

¹²⁴ “Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed,” 23.

¹²⁵ “Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed.”

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid., 23.

instances, union workers were fired.¹²⁹ And in Peru, the practice of informal contracting has led to fear to exercise ones rights to freedom of association and to collective bargaining.¹³⁰

The International Trade Union Confederation (ITUC) confirmed this stark evidence presented by the GAO. For over thirty years, the ITUC has collected data on the rights violations of trade unions around the world. In its 2015 publication of the Global Rights Index, Colombia and Guatemala ranked in the ten worst countries for working condition in the world. The report highlighted in both countries the issue of murder of union workers attempting to bargain for better working conditions. In Colombia, 22 union workers were murdered in this country alone.¹³¹ While labor provisions in US trade agreements with these countries specifically promote core labor standards, such as the right to establish and freely join unions, this evidence shows that the implementation of such provisions is significantly lacking.

The ITUC points to the murder of union workers to demonstrate the lack of respect by the Colombian Government of the right to freely join unions. While the US references this right in most trade agreements, including most recently in the TPP, the enforcement of this provision is undermined by the lack of seriousness by the US towards ensuring this obligation is fulfilled by trade partner countries. For example, testifying to the US Senate Finance Committee about the TPP, Richard Trumka, the President of the AFL-CIO, said that the General Counsel of the USTR had personally

¹²⁹ "Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed."

¹³⁰ Ibid.

¹³¹ "ITUC Global Rights Index Names World's Ten Worst Countries for Workers," *International Trade Union Confederation*, June 10, 2015, <http://www.ituc-csi.org/ituc-global-rights-index-names>.

told him, “that murdering a trade unionist doesn’t violate these standards, that perpetuating violence against a trade unionist doesn’t violate these agreements.”¹³² The right to freely join a union cannot be respected when labor organizers and trade union workers are routinely murdered in the trading partner country. The fact that the US does not recognize this basic principle reflects the lack of seriousness the US applies to the enforcement of these labor provisions.

While the US has been an advocate for the inclusion of labor provisions in trade agreements, and has professed its intention to draft provisions that are enforceable, it has largely failed to ensure implementation of these provisions in trading partner countries.¹³³ Efforts to promote labor rights are no longer a development choice to be made out of goodness, rather trade agreements now mean that states are obligated to protect, respect fulfill labor rights. Nevertheless, the US and trading partner countries have no real obligation or incentive to monitor or enforce the implementation of labor provisions. Instead, the enforcement of labor provisions in trade agreements is subject to the political will of state governments.¹³⁴ As such, while the inclusion of labor provisions may be viewed as a positive step, the fact that these standards are not enforced means that the rights of workers are often violated without recourse.

¹³² Michael McAuliff, “AFL-CIO’s Trumka: USTR Told Us Murder Isn’t A Violation Under U.S. Trade Deals,” *Huffington Post*, April 22, 2015, http://www.huffingtonpost.com/2015/04/22/fast-track-trade_n_7113412.html?1429702351.

¹³³ Don Wells, “‘Best Practice’ In The Regulation Of International Labor Standards: Lessons Of The U.S.-Cambodia Textile Agreement,” *Comparative Labor Law & Policy Journal* 27 (April 1, 2006): 357–513.

¹³⁴ “The Trans-Pacific Partnership: Four Countries That Don’t Comply With U.S. Trade Law,” 1.

5. ACCOUNTABILITY AND THE GOVERNANCE GAP

A human rights based approach requires that involved actors are held accountable to the conduct and results of policies. Yet, the traditional statist model of accountability is no longer sufficient to ensure the promotion of human rights. The gap in global governance when it comes to trade undermines the accountability of involved actors. Specifically, this section analyzes the governance gap and its effect on accountability in three realms: a) international institutions, b) the national level and c) business as a relevant actor.

Human rights treaties do more than define norms and standards, they are legal instruments that states are obligated to uphold. The governance gap becomes glaringly apparent when discussing the weakness of the global, national and corporate accountability mechanisms of transnational policies. While trade is inherently transnational, no multilateral actor currently monitors states in their obligations to enforce labor rights in trade agreements. Meanwhile, business has been a major contributor to growing inequality,¹³⁵ and yet the international community lacks a monitoring system to ensure their responsibility to operate business ethically. This leaves states with no system of international oversight to ensure that trade agreements respect, protect and fulfill rights obligations. The combination of these factors leaves workers without an effective accountability mechanism.

¹³⁵ Ruggie, "International Regimes, Transactions, and Change."

5.1 International Institutions and the Gap in Global Governance

The WTO has been explicit in claiming that its mandate does not include labor provisions in trade agreements. Instead, the WTO points to the ILO as the organization expected to address these issues. However, the ILO claims its mandate is limited to issuing general recommendations and responding when approached by specific states. As such, there exists a gap in global governance, namely that no international organization exists to ensure that labor rights are promoted in a realizable fashion in trade agreements. The ILO has been successful in fostering effective labor provisions when asked, indicating that expansion of the organization's mandate could help close the gap in global governance.

The relevant multilateral agencies, WTO and ILO, both have unique associations with the United Nations system. While both coordinate with the UN, the WTO is not a UN agency and the ILO predates the UN and is thus not established by the General Assembly, as is the case of other UN programs or funds.¹³⁶ As such, they are founded on their own mandates, and both the WTO and ILO operate with more autonomy than other UN bodies.

As mentioned previously, the WTO is the global institution that sets the rules of international trade. It would therefore seem that the organization might play a role in the discussion on the social impact of trade. However, the WTO offers no protections for labor rights. In fact, the WTO barred any justification for using labor

¹³⁶ "The WTO"; "About the ILO," *International Labour Organization*, accessed November 1, 2015, <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

violations as a motive for interfering with trade law.¹³⁷ The WTO's refusal to incorporate labor rights into its framework is a prime example of how economic institutions have failed to incorporate the intersection of trade and human rights.

The WTO's official statement on the integration of labor standards in trade can be found in their 1996 Singapore Ministerial Declaration, which states that the WTO is committed to "the observance of internationally recognized core labour standards."¹³⁸ The statement continues that the WTO as an organization "believe[s] that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards."¹³⁹ Hence, the WTO recognizes that trade impacts growth and development, and promotes the core labor standards. If it recognizes the positive impact of trade, then by logic it must also recognize the intersection has potential for negative impact, such as increasing inequality in spite of growth, and placing downward pressure on labor standards.

Nevertheless, the WTO's commitment to rights is constrained by subsequent text from the Ministerial Declaration. The document states that the WTO "reject[s] the use of labour standards for protectionist purposes, and agree[s] that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question."¹⁴⁰ At the same time as pledging itself to core

¹³⁷ Sandra Polaski, "Protecting Labor Rights through Trade Agreements: An Analytical Guide," *UC Davis J. Int'l L. & Pol'y* 10 (2003): 13.

¹³⁸ World Trade Organization, *Singapore Ministerial Declaration*.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

labor standards, the WTO undermines its commitment by prioritizing trade as a tool for economic development.

As such, attempts to link labor to trade policy have been unsuccessful within the economic institution that represents the ultimate authority on trade. As the WTO considers labor outside its domain, this major player within the global economic arena disregards the incorporation of human rights as a significant element of trade.¹⁴¹

The Ministerial Declaration goes on to place responsibility of trade's impact on labor standards on the International Labor Organization (ILO).¹⁴² The ILO, a normative body with a mandate to protect labor standards, recognizes a significant relationship between labor and trade.¹⁴³ As such, one might presume that the ILO would be enthusiastically engaged on this issue.

However, engagement by ILO on matters related to the promotion of labor rights via trade agreements has remained limited. In 2008, the *ILO Declaration on Social Justice for a Fair Globalization* clarified that the agenda of the ILO would remain within its constitutional mandate of supporting member states voluntarily.¹⁴⁴ The ILO has no explicit mandate to regulate member states trade agreements and has not taken an official position on the usefulness of labor provisions as a tool for enforcing labor rights.¹⁴⁵ The organization fears that taking a

¹⁴¹ Drusilla K. Brown, Alan V. Deardorff, and Robert M. Stern, "Labor Standards and Human Rights: Implications for International Trade and Investment," 2011, <http://ipc.fordschool.umich.edu/working-papers/pdfs/ipc-119-brown-deardorff-stern-labor-standards-human-rights-international-trade-investment.pdf>.

¹⁴² World Trade Organization, *Singapore Ministerial Declaration*.

¹⁴³ "About the ILO."

¹⁴⁴ Maupain, *The Future of the International Labour Organization in the Global Economy*, 16.

¹⁴⁵ Maupain, *The Future of the International Labour Organization in the Global Economy*.

position could undermine the normative framework that the ILO has operated upon since its inception, namely the relevant strength of using conventions and recommendations to change norms.¹⁴⁶ Hence, the ILO insists that its mandate is limited to clarifying and recommending labor standards, only intervening in trade agreements when asked.

Nevertheless, the organization does publish generalized reports about the effect of trade policies on labor rights. One such report found that “[r]espect for labour rights, whether through free trade agreements, in the context of regional integration or at a more global level, can make a significant contribution to a fair globalization in which economic development and social justice may progress hand in hand.”¹⁴⁷ While such generalized recommendations relate to the intersection of trade and labor, the ILO does not fully engage this issue as part of its mandate.

Further, while it is not standard practice for the ILO to participate in an official capacity in trade agreements, the US has commonly reviewed ILO labor evaluations to assess the labor law of trading partners in relation to the ILO international labor standards.¹⁴⁸ The US then makes recommendations to trading partners on how to amend or adopt strengthened labor laws ahead of signing a trade agreement.¹⁴⁹ Regardless of this practice, ILO engagement in such matters remains limited.

¹⁴⁶ Ibid.

¹⁴⁷ Eric; Delpuch Gravel, “The Comments of the ILO’s Supervisory Bodies: Usefulness in the Context of the Sanction-Based Dimension of Labour Provisions in US Free Trade Agreements,” Publication, (March 21, 2013), http://www.ilo.org/global/research/papers/WCMS_207860/lang--en/index.htm.

¹⁴⁸ Polaski, “Protecting Labor Rights through Trade Agreements.”

¹⁴⁹ Ibid., 17.

When the ILO is approached by states, the organization is willing to be involved in trade agreements. For example, the US has sought out and engaged the ILO with the US-Cambodia Textile Agreement in 1999. The ILO was invited by the US and Cambodian Governments to participate in the role of monitoring.¹⁵⁰ Among the US trade agreements, the US-Cambodia agreement has been heralded as a model agreement, "...where there have been significant and widespread improvements in wages, working conditions and respect for workers' rights."¹⁵¹ By being present at the trade negotiations, the ILO was able to facilitate the addition of economic incentives for the successful implementation of labor provisions.

In response to the success from the US-Cambodia trade agreement, the ILO initiated a monitoring program, named 'Better Work,' that operates in eight countries. However, the 'Better Work' program is not linked to trade agreements in all its programs.¹⁵² While this ILO activity shows that the organization can be successful at monitoring labor rights on the ground, unfortunately, the ILO has not leveraged this success to take on a more prominent stance when it comes to enforcing labor provisions in trade agreements.

5.2 Accountability at the National Level

Without a multilateral agency holding government accountable in trade policies, states are left to implement labor provisions without consistent international oversight. And as was noted above, the statist model limits the duty to enforce labor

¹⁵⁰ Ibid., 21.

¹⁵¹ Ibid.

¹⁵² "Better Work Works in 8 Countries Across 3 Continents Reaching 1000 Enterprises and One Million Workers," *Better Work*, n.d., http://betterwork.org/global/?page_id=314.

rights within the domestic context. Moreover, the statist dynamic is no longer sufficient in an age of transnational trade policies.

While human rights are universal in nature, and conventions are international, they are implemented domestically. State commitments are commonly explained by states duties to respect, protect and fulfill rights obligations. Beyond respecting rights in principle, states must ensure policies do not interfere with rights obligations, states must actively protect against third party violations and finally states must take action to secure rights where they have not yet been realized.¹⁵³

This shows clear levels of accountability: states are the duty bearers and individuals are rights holders. Thus, rights holders can hold states accountable, often via a legal mechanism by which to claim rights violations and seek redress. But while this obligation applies to all rights holders, regardless of their nationality and location, state obligations have traditionally been duties to respect, protect and fulfill the rights only of their citizens.

This raises a weakness when it comes to holding states accountable. While there may be clear obligations, there exists an inherent paradox in the framework as it is heavily protectionist of state sovereignty. Freeman describes the relationship between duty bearers and rights holders as a “traditional statist model” that is inadequate for the “complex global system.”¹⁵⁴ Considering the impacts of transnational policies on human rights, how might states be obligated to ensure

¹⁵³ *Masstricht Guidelines on Violations of Economic, Social and Cultural Rights*, 1997, http://www1.umn.edu/humanrts/instate/Maastrichtguidelines_.html.

¹⁵⁴ Freeman, *Human Rights*, 2002.

human rights transnationally? For example, the US involvement in trade policies impacts a trading partner's available resources for development and improvements to human rights, as well as has an impact on an individuals' access to economic and material resources.¹⁵⁵ Is the US therefore accountable to the human rights impacts of laborers in trading partner states? While there are varying approaches to answering this question, Skogly and Gibney define transnational duties of states as "...obligations relating to the human rights effects of their external activities, such as trade, development cooperation, participation in international organizations, and security activities."¹⁵⁶ Such analysis seems to apply international obligations onto states, where individuals regardless of citizenship can hold states accountable for rights violations.

This is particularly relevant for discussion on international trade, as the relationship is of an international nature and thus the responsibilities of states are not as clearly defined. The US enters into trade agreements with trading partners and those policies impact the human rights of domestic and foreign laborers. Under the traditional model, the US would be obligated only to the labor rights within its domestic realm. Under a globalized model that recognizes the interconnectedness of transnational policies, the US obligations would recognize the international impact of its trade policies on human rights of foreign workers as well. Nevertheless, states refrain from transnational obligations, considering human rights of foreigners to be

¹⁵⁵ Mark Gibney and Sigrun Skogly, "Transnational Human Rights Obligations," *Human Rights Quarterly* 24, no. 3 (August 1, 2002): 783.

¹⁵⁶ *Ibid.*, 780.

matters outside their obligatory domain, justified out of respect for the principle of sovereignty.¹⁵⁷

This leads the discussion back to global governance. It has been found that denationalization is often complemented with an increase in global institutions to fill a governance gap.¹⁵⁸ Yet, as explained in the previous sub-section, international institutions have not accepted the intersection of trade and labor as part of their mandates. Without global structures to provide accountability, and without the willingness of states to be held accountable to rights holders outside their jurisdictions, those responsible for violations of the labor provisions in trade agreements may not be held accountable.

Alongside these actors, business has emerged as increasingly influential in their role as violators of labor standards. The next section discusses the lack of accepted mechanisms to hold business accountable for the violations of labor standards.

5.3 Business and the Lack of Accountability

While the impact of business practices on human rights has been incorporated in the discourse since the 1970's, there is no accepted global governance mechanism that currently regulates international business.¹⁵⁹ Efforts to create an accountability

¹⁵⁷ Ibid., 795–798.

¹⁵⁸ Michael Zürn, “Globalization and Global Governance: From Societal to Political Denationalization,” *European Review* 11, no. 3 (July 1, 2003): 341.

¹⁵⁹ Freeman, *Human Rights*, 2002.

structure for business operations have mostly been voluntary frameworks, not legal infrastructures.¹⁶⁰

The Norms on Transnational Corporations and Other Business Enterprises (the Norms) represents one of the only attempts to create a binding accountability mechanism for business. This effort, which took place between 1999 and 2003, was an attempt to promote corresponding legal duties to business practices.¹⁶¹ Unsurprisingly, the Norms were intensely debated and did not garner much support.¹⁶²

However, the need for standardized guidance became apparent and resulted in the appointment of a UN Special Representative of the Secretary General (SRSG) in 2008.¹⁶³ In 2011, then Special Representative John Ruggie developed authoritative guidelines for business and human rights.¹⁶⁴ He wrote that the “state-based system of global governance has struggled for more than a generation to adjust to the expanding reach and growing influence of transnational corporation.”¹⁶⁵ The Ruggie framework, known as the UN Guiding Principles on Business and Human Rights (UNGPs), are an attempt to balance state obligations to

¹⁶⁰ John Gerard Ruggie, “Business and Human Rights: The Evolving International Agenda,” *The American Journal of International Law* 101, no. 4 (October 1, 2007): 819–40.

¹⁶¹ “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (United Nations, 2003), <http://www1.umn.edu/humanrts/business/norms-Aug2003.html>.

¹⁶² Susan Ariel Aaronson and Ian Higham, “Re-Righting Business’: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms,” *The Johns Hopkins University Press, Human Rights Quarterly*, 35, no. 2 (May 2013): 333–264.

¹⁶³ United Nations Human Rights Office of the High Commissioner, “Guiding Principles on Business and Human Rights,” 2011, http://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_en.pdf.

¹⁶⁴ Andrea Shemberg, “New Global Standards for Business and Human Rights,” *Business Law International* 13, no. 1 (January 2012): 27–33.

¹⁶⁵ Ruggie, “Business and Human Rights.”

protect human rights with the responsibility of business to respect rights abuses in their operations.¹⁶⁶

As a whole, the UNGPs have been criticized for falling short in that they are not legally binding, are vague and fail to address governance gaps.¹⁶⁷ Specific to trade, the 9th Principle of the UNGPs calls on governments to ensure that trade agreements do not constrain the obligations states accepted to ensure human rights.¹⁶⁸ In addition to being subjected to the same criticisms as the rest of the document, this Principle simply states that international legal obligations also apply to trade negotiations. As explained above, states, like the US, do reference standards from international legal documents when forming the labor provisions of trade agreements. However, as previously explained, this is far from ensuring that labor standards will be realized on the ground. Instead of attempting to improve enforcement of labor standards, this Principle merely states that governments should respect international obligations.

As was referenced in the textual analysis of the TPP, corporate social responsibility is referenced in the main text of the labor chapter; however, business is merely encouraged to adopt voluntary initiatives. Further, as was discussed in the

¹⁶⁶ United Nations Human Rights Office of the High Commissioner, “Guiding Principles on Business and Human Rights.”

¹⁶⁷ Christiana Ochoa, “The Future of Corporate Accountability for Violations of Human Rights,” Proceedings of the Annual Meeting (American Society of International Law, March 2009); Aurora Voiculescu, “Challenges and Innovation in the Legal Discourse: Achieving Corporate Responsibility for Human Rights,” *Society and Business Review* 6, no. 3 (2011): 278–91; Penelope C. Simons, “International Law’s Invisible Hand and the Future of Corporate Accountability for Violations on Human Rights,” *Journal of Human Rights and the Environment* 3, no. 1 (2012): 5–43; Annie Delaney, Maria Montesano, and Rosaria Burchielli, “Regulatory Challenges in the Australian Garment Industry: Human Rights in a Post-Ruggie Environment,” *Labour & Industry: A Journal of the Social and Economic Relations of Work* 23, no. 1 (April 1, 2013): 69–88, doi:10.1080/10301763.2013.769858.

¹⁶⁸ United Nations Human Rights Office of the High Commissioner, “Guiding Principles on Business and Human Rights.”

section on participation, business is overrepresented at the negotiating table of US trade agreements. As such, the interests and voice of business is influential in shaping the trade policies, and yet, business is not accountable to the outcomes.

While the UNGPs are a step forward in bringing business into the realm of responsible parties, they do not go far enough in ensuring that business is held accountable, especially in the realm of trade. In the global arena, the lack of international organization to comprehensively address the intersection of trade and labor leads to a gap in governance. The inherently transnational nature of trade agreements makes the statist model outdated. Without significant changes to accountability mechanisms at the national level, states will continue to be accountable only to their citizens. Given this analysis, workers are left without an appropriate system to hold actors accountable for violations of labor provisions in trade agreements.

6. CONCLUSION

The unequal participation of states, business and labor in the negotiations of US trade agreements results in ineffective labor provisions. This is evident in the textual modifications to labor chapters in trade agreements, as well as the implementation of labor provisions through legal and institutional reform, which did not always result in the enhancement of labor rights. Moreover, a gap in governance left workers without effective accountability mechanisms at multiple levels.

The application of a human rights based approach applied to trade policies is unique, with both academic and practical implications. Utilizing a HRBA provides

new perspectives and dimensions for future research on trade and economic policies. It incorporates human rights into the economic discourse in a structurally significant way, including a broader assessment of cause and impact. In terms of practice, the operationalization of a HRBA matters in the lives of workers. Such an approach reflects their important contributions and consensus, resulting in better policies with tangible impacts. Trade policies should be designed to enhance the realization of human rights of all stakeholders, and a HRBA is a contribution to that objective.

As one of the core principles of the HRBA, this thesis contributed to the discussion of participation. While the limited participation of labor in comparison to actors like governments and business has been recognized, this thesis links this relative lack of participation to ineffective labor provisions. Without the equal inclusion of labor from the beginning of the negotiating process, labor standards are unlikely to be realized on the ground. Further, this thesis promotes inclusion of the workers of US trading partners as integral to the process.

In addition to participation, this thesis also looked at how the intersection of trade and labor relates to equitable development. While trade has often been linked to economic growth and thus development, this thesis goes a step further by analyzing how trade exacerbates structural inequality both within and among states.

While many researchers have analyzed the role of international organizations, the gap in mandates of both the WTO and the ILO when it comes to trade and labor is not explored in relation to other levels of governance. Connecting

this gap in global governance to ineffective labor provisions and the lack of adequate accountability mechanisms shows the very real effect this gap plays in the lives of workers.

There are several areas of additional research needed in order to further advance the themes in this thesis. First, future research could apply a HRBA to the entirety of trade agreements, well beyond labor provisions. Second, while the TPP is in its final stages, practitioners can still use a HRBA to evaluate its various chapters and intended effects on workers. The impending approval and implementation of the TPP will present opportunities for researchers to continue exploring the relative effectiveness of labor provisions. Third, while the principle of participation is well established, additional work could focus on potential incentives for both states and business to better and more equally incorporate labor in trade negotiations. And last, future research could explore potential alternative platforms aimed at closing the governance gap at the international level. Specifically, such work could focus on needed reforms of international organizations to ensure that human rights issues as a function of trade are continuously being advanced.

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