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Of Labor Inspectors and Judges: Chilean Labor Law Enforcement After Pinochet (and What the United States Can Do to Help)

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OF LABOR INSPECTORS AND JUDGES: CHILEAN LABOR LAW ENFORCEMENT AFTER PINOCHET (AND WHAT THE UNITED STATES CAN DO TO HELP)

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I. INTRODUCTION: LABOR LAW ENFORCEMENT AS AN ISSUE OF ACADEMIC STUDY AND INTERNATIONAL POLICY

The study of labor law enforcement in Latin America and the Caribbean has become increasingly important among academic researchers[1] not insignificantly because many of the region's countries have free trade agreements (FTA) with the United States that incorporate a labor clause, or "side agreement" in the case of the North America Free Trade Agreement (NAFTA), calling for each party to enforce its national labor laws, broadly defined to include both collective and individual rights.[2] FTAs, except NAFTA, include further commitments in favor of promoting internationally

1. *See, e.g.*, Vera Jatobá, INT'L. LAB. OFFICE, NO. 148 INSPECCIÓN DEL TRABAJO EN EL MARCO DE LA MODERNIZACIÓN DE LA ADMINISTRACIÓN DEL TRABAJO: SERIE CONFERENCIA INTERAMERICANA DE MINISTROS DEL TRABAJO 3, 6 (2002); Michael Piore & Andrew Schrank, *Toward a Managed Flexibility: The Revival of Labour Inspection in the Latin World*, 147 INT'L LAB. REV. 1, 23–25 (2008) [hereinafter Piore & Schrank]; Roberto Pires, *Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil*, 147 INT'L LAB. REV. 199, 199–201 (2008); Andrew Schrank, *Professionalization and Probity in the Patrimonial State: Labor Inspectors in the Dominican Republic*, 51 LATIN AM. POL. & SOC'Y. 91, 91 (2009) [hereinafter Schrank, *Professionalism and Probity*]; ANDREW SCHRANK & MICHAEL PIORE, ECLAC/MEXICO, SERIE ESTUDIOS Y PERSPECTIVAS: NORMS, REGULATIONS AND LABOR STANDARDS IN CENTRAL AMERICA at 43–47, U.N. DOC. 77, U.N. Sales No. E.07.II.G.44 (2007) (calling for increased labor inspection) *available at* http://www.cepal.org/publicaciones/xml/3/28113/Serie%2077.pdf.

2. MARY JANE BOLLE, CRS REPORT FOR CONGRESS, NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATES (2002), *available at* http://fpc.state.gov/documents/organization/8118.pdf.

recognized core labor rights.[3] The stress on national enforcement in all of these FTAs, although criticized by some labor activists for being inadequate and ineffective, has spurred modest but important institutional modernization of some of the region's labor law enforcement bodies with some improvements in the enforcement of the labor laws.[4]

Chile is one of the countries with an FTA with the United States that contains a labor clause calling for each party to respect core labor rights as well as its national labor laws.[5] The U.S.-Chile FTA establishes that when matters arise regarding the parties' commitment to enforcing their national labor laws, the parties may request cooperative consultations to resolve the matter.[6] If such consultations do not resolve the dispute, then the parties may resort to arbitration[7] and sanctions.[8]

Today, Chile is effectively in violation of the labor clause of the U.S.-Chile FTA for failing to enforce its 2006 Subcontracting Law (or "anti-subcontracting law").[9] In 2008, the Chilean Supreme Court effectively rendered unconstitutional Chile's Dirección del Trabajo, or Labor Directorate's (hereinafter referred to by its Spanish acronym, "DT") administrative enforcement of the subcontracting law by holding that the DT acted as a so-called illegal "special commission" when it administratively adjudicated matters related to "contractual controversies" arising from its enforcement of the anti-subcontracting law.[10] The DT is the sole administrative agency in charge of enforcing all of the country's labor laws. Thus, absent constitutional reform in Chile enabling the DT to adjudicate contractual controversies without being regarded as an illegal "special commission," which seems highly unlikely in the near future, or packing the courts with liberal judges, enforcement of some labor laws, such as the anti-subcontracting law, will have to be achieved through the courts rather than through administrative activity.[11]

3. U.S.-Chile Free Trade Agreement, art. 18.1, (2004), *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file535_3989.pdf [hereinafter U.S.-Chile FTA].

4. *See* Schrank, *Professionalism and Probity*, *supra* note 1, at 91–92; Piore & Schrank, *supra* note 1, at 1.

5. U.S.-Chile FTA, Art. 22.6.

6. *Id*. arts. 18.6, 22.4, 22.5; *see also id.*, Annex 18.5.

7. *Id.* art. 22.6.

8. *Id.* art. 22.16.

9. Cód. Trab., Title VII (Chile) (codifying Chile Law No.20.123) (Sp.).

10. Supreme Court of Chile Rol. Nos. 877-2008, 953-2008, 1062-2008, 1063-2008, 1073-2008, 1074-2008, 1075-2008, 1076-2008, 1150-2008, May 12, 2008. The Codelco cases have not been the only ones where the Supreme Court of Chile has determined that the DT acted as an illegal "special commission." *See* José Luis Ugarte Cataldo, *Inspección del trabajo en Chile: vicisitudes y desafíos*, 6 REVISTA LATINO AMERICANA DE DERECHO SOCIAL 187, 188 (2008).

11. BUREAU OF INT'L. LAB. AFF., DEP'T OF LAB., NO. 2738, LABOR RIGHTS REPORT: CHILE 6 (2003), *available at* http://www.dol.gov/ilab/media/reports/usfta/hr2738chilelaborrights.pdf.

Since no procedural avenues exist for workers to make group claims before the courts—such as those that arise from most of the subcontracting cases—judicial avenues for enforcing labor laws affecting group rights, such as the anti-subcontracting law, are inadequate. This procedural inadequacy renders the anti-subcontracting law effectively unenforceable and puts Chile in violation of the U.S.-Chile FTA.

This paper first discusses the challenges that Chile faces in labor law enforcement. Having higher-quality state institutions than most of its Latin American and Caribbean cousins, Chile faces a different set of challenges when it comes to labor law enforcement: its appellate courts' and Supreme Court's zealous protections of their jurisdiction, private property rights, and concomitant distrust of administrative activity and regulation, particularly in the key area of subcontracting.[12] The paper then details Chilean labor law, explains how the country is not enforcing its important subcontracting statute, and explains how the United States, through the U.S.-Chile FTA, can play a useful role in promoting institutional reforms to effectively enforce labor laws in Chile.

II. LABOR LAW ENFORCEMENT IN CHILE

Prior to the military coup of 1973, Chile was a country of strong unions and active state intervention in social affairs.[13] Pinochet's military dictatorship, installed through violence in 1973, banned unions, sharply curtailed social rights, including the rights of labor, and promoted a laissez faire, free-market political project which spurred neoliberalism in Latin America.[14] In 1979, the dictatorship relaxed some of its most radical measures and lifted the ban on collective bargaining, but only at the enterprise level.[15] Industrial level or multiemployer bargaining was not protected by law.[16] Since then, unions and sectors of the Chilean left have advocated for the reestablishment of multiemployer bargaining. The center-left governments of the *Concertación de Partidos por la Democracia* ("*Concertación*") that ruled the country from 1991–2010, however, did not amass the required internal consensus or political capital—or perhaps political will—to do so.[17]

12. Ugarte Cataldo, *supra* note 10, at 192.

13. RICHARD SANDBROOK ET AL., SOCIAL DEMOCRACY IN THE GLOBAL PERIPHERY: ORIGINS, CHALLENGES, PROSPECTS 149–50 (2007); BUREAU OF INT'L. LAB, *supra* note 11, at 1–2.

14. SANDBROOK ET AL., *supra* note 13, at 159–60; BUREAU OF INT'L. LAB, *supra* note 11, at 1–2.

15. BUREAU OF INT'L. LAB. AFF., *supra* note 11, at 2.

16. *Id.*

17. Guillermo Campero, *La Economía Política de las Relaciones Laborales 1990–2006*, in 37 SERIE ESTUDIOS SOCIO ECONÓMICOS 28–30 (2007), *available at* http://www.cieplan.org/inicio/codigo.php?documento=cieplan%2037.pdf; Volker Frank, *Politics Without Policy, in*

Despite the lack of progress that labor unions and others on the left desired after the restoration of democracy in Chile, particularly on the restoration of multiemployer collective bargaining, the *Concertación* administrations clearly reformed the labor laws.[18] Among other reforms, they reestablished just cause dismissal, adjusted minimum wages to inflation, placed new restrictions on employer lockouts, and strengthened public institutions to better enforce the labor laws.[19]

A. The Labor Directorate

The Decreto con Fuerza de Ley No. 2 of 1967 (DFL No. 2), enacted during the centrist, Christian Democratic Presidency of Eduardo Frei Montalva, is the organic law of the DT. The law intends to provide an "agile and capable" agency to "conveniently realize" the "technical and fiscal" tasks for labor regulation in the country.[20] It was enacted to provide for the "adequate economic and social development of the country," to "scrutinize the correct application of the laws that guarantee the social rights of workers," to implement the labor laws, and to "aid the government in developing the country's social policy."[21] In this manner, the DT was created as an integrated, labor law enforcement agency where one agency enforces all or most of the country's labor laws as is commonplace in Franco-Hispanic jurisdictions.[22]

As Professor José Luis Ugarte Cataldo has described, the DT has an array of functions: policing, administrative interpretation of the law, conciliation and

VICTIMS OF THE CHILEAN MIRACLE: WORKERS AND NEOLIBERALISM IN THE PINOCHET ERA, 1973–2002, at 70 (Peter Winn ed.) (Duke 2004) (2006). However, note that there has never been an overall attempt to revamp the entire *Plan Laboral* since the return of democracy in Chile. Rather, reform has been attempted in a piecemeal fashion (I thank Professor José Luis Ugarte for identifying this point).

18. *See generally* Campero, *supra* note 17, at 28–30. For a more critical view of post-Pinochet attempts to reform labor institutions, see generally Frank, *supra* note 17, at 70.

19. *See generally* Campero, *supra* note 17, at 16–23 (detailing the changes in Chilean labor law in 1991 and the affects of those changes) (internal citations omitted).

20. DECRETO CON FUERZA DE LEY NO. 2, Preamble (Chile) [hereinafter DFL No.2].

21. *Id*.

22. Cód. Trab. art. 505 (Chile), *available at* http.//www.dt.gob.cl/legislacion/1611/articles-59096_recurso_2.pdf. In France, Spain, and most of those European countries' former colonies, labor laws are enforced by one "generalist" government agency, rather than by an array of "specialist" agencies, as in the United States. Moreover, rather than taking a principally punitive orientation to enforcement, Franco-Hispanic systems attempt to "educate" employers about how to implement labor laws and regulations through dissemination of best practices, labor laws, and regulations, among other information, before imposing sanctions on employers. Therefore, in contrast to the "specialist' and "punitive" Anglo-American model of labor law inspection, Franco-Hispanic labor law enforcement systems are characterized by their integrated or generalist quality and pedagogic orientation to law enforcement. Michael J. Piore & Andrew Schrank, *Trading Up*, BOSTON REV., Sept.–Oct. 2006, at 11, *available at* http://bostonreview.net/BR31.5/pioreschrank.php.

mediation, filing formal complaints in the courts, providing a public registry ("*registro*") of temporary employment agencies ("temp agencies"), and attesting documents ("*fe pública*").[23] I would add a fledgling seventh function to Professor Ugarte Cataldo's categories of the DT: a "pedagogical" one similar to that undertaken by other Franco-Hispanic labor law enforcement bodies, which aims to educate employers on how to comply with the law. I discuss these functions below, although not necessarily in the order listed above.

1. Policing

The policing function is performed by the country's labor inspectors employed by the DT, who can visit workplaces at any time, either *de oficio*—without a preceding charge having been made by an employee against the employer—or after receiving a charge.[24] Inspectors can inspect the physical premises and business records of employers at any time of the day or night.[25] Persons who interfere with the inspectors' duties can be fined.[26] Employers could be held directly and personally liable for such interferences, as well as for any moral, physical, and material damages suffered by inspectors while performing their duties.[27] Inspectors can also summon public law enforcement officials, including the *carabineros*, Chile's respected national police, for assistance.[28]

Once inspectors find that an employer committed a violation of a labor law, they can fine the employer, order the suspension of work activities, and even close a workplace if there is an immediate hazard to the life and health of employees, or if employers are otherwise violating the labor laws.[29]

The focus on fines and other coercive measures makes labor inspection particularly punitive in Chile, which is at odds with the more traditional Franco-Hispanic systems of labor inspection that are generally pedagogically oriented.[30] As detailed below, the punitive orientation has been softened somewhat with the introduction of some pedagogic inspections, which include the substitution of fines for training and compliance assistance programs for unionized employers. These programs, however, are still limited in scope.[31]

23. Ugarte Catado *supra* note 10, at 193–96.
24. DFL No.2, art. 27.
25. *Id.* art. 25.
26. DFL No.2, art. 25.
27. *Id.* art. 25.
28. *Id.* art. 26.
29. *Id.* arts. 28, 31, 34, and 38.
30. *See* Piore & Shrank, *Trading Up*, *supra* note 22 and accompanying text.
31. *See infra* Part II.A.2.

2. Pedagogical Inspections

Notwithstanding its primary punitive orientation, the DT has used more than mere fines to compel employer compliance with the country's labor laws. Until the late 1990s, the DT issued "*actas de instrucción*" (writs of instruction), whereby inspectors noted employer infractions and gave the employer fifteen days to comply with the law before issuing a fine.[32] These writs of instruction had a quasi-pedagogical element to them, as employers could avoid a fine by proving that they remedied the infraction and complied with the law within that fifteen-day period.[33]

By the late 1990s, however, the DT discontinued writs of instruction and installed more formalized programs including the compliance assistance inspection policy[34] and the "training-for-fines program."[35] The compliance assistance program is limited to unionized employers, who are a small minority of employers in Chile, and is administered by a small but highly professional service within the national office of the DT.[36] The training-for-fines program provides that small employers with nine employees or fewer can request assistance implementing the labor laws in lieu of fines levied by a labor inspector.[37]

The training-for-fines program also provides medium-sized employers, with twenty-five employees or fewer, an alternative to the fine. This alternative is available only for violations of an occupational health and safety rule if the employer requests the removal of a fine after issued by the DT.[38] Rather than merely attending a course, mid-size employers, with ten to twenty-five employees must institute a program of voluntary compliance with the law that they violated in lieu of the fine.[39]

The training-for-fines program has been regarded as a successful program in Chile by authorities such as the ILO.[40] It contains the elements of the

32. Interview with María Ester Feres, Director of Chile's Labor Directorate from 1994–2004 (May 13, 2008) (on file with author); s*ee also* Heleen F.P. Ietswaart, *Labor Relations Litigation: Chile, 1970–1972*, 16 L. & SOC'Y. REV. 625, 642–45 (1981–82) (describing a historical account of the informal administrative practice).

33. Interview with María Ester Feres, *supra* note 32.

34. DIRECCIÓN DEL TRABAJO, 3 ORDEN DE SERVICO (May 14, 2004) (Chile), *available at* http://www.dt.gob.cl/1601/articles-65345_OS_3.pdf.

35. CÓD. TRAB art. 506 (Chile), *available at* http://www.dt.gob.cl/legislacion/1611/articles-59096_recurso_2.pdf [hereinafter CÓD. TRAB art. 506].

36. César F. Rosado Marzán, ethnographic fieldnotes of June 4, 2009 (on file with author).

37. CÓD. TRAB art. 506.

38. *Id.* art. 506.

39. *Id.*

40. Schrank & Piore, NORMS, REGULATIONS AND LABOUR STANDARDS IN CENTRAL AMERICA, *supra* note 1, at 15 n.3.

traditional assistance-for-compliance aspects of the Franco-Hispanic systems.[41] The training-for-fines programs, however, remain limited only to smaller employers.[42]

3. Administrative Interpretation of the Law

The DFL No. 2 provides that the Director of the DT can determine the meaning and scope of labor legislation in the country[43] so that its career servants can uniformly implement the law across the different regions of the country.[44] This type of administrative interpretation of the law is accomplished in Chile through a procedure known as *dictamen*—an opinion or report issued by the director of a specific administrative agency.[45] A *dictamen* directly binds all the officers of the administrative agency.[46] It also indirectly binds private parties regulated by the law, as they must adapt their behavior to the *dictamen* if they want to reduce their chances of being fined or otherwise penalized by the government agency.[47]

4. Conciliation and Mediation

The DT, through its inspectors, also has the authority to summon parties and documents to resolve disputes between individual employees and employers.[48] The inspectorate can fine any party that fails to appear without just cause after being summoned.[49] The DT has used these powers to resolve alleged labor law violations before formally issuing sanctions[50] or to settle matters extra-judicially.[51] As more fully explained below, conciliation at the DT has recently become mandatory for some categories of wage and salary cases.[52]

41. *Id.* at 10.

42. *See* CÓD. TRAB art. 506.

43. DFL NO.2, art. 1.

44. E-mail communication with Sergio Mejía Viedma, Partner, Arthur, Hinzpeter, Pizarro, Huméres & Cía; Former Sub-Director, DT (1994–2000) (Mar. 5, 2008) (on file with author).

45. Ugarte Cataldo, *supra* note 10, at 191. Other Chilean administrative agencies with similar interpretative functions include the Controlaría General de la República (comptroller), Servicios de Impuestos Internos (treasury), Servicio Nacional de Aduanas (customs), and Superintendencia de Bancos e Instituciones Financieras (financial regulatory agency), among others. *Id.* at 191 n.4.

46. *Id*. at 192.

47. *Id.* at 192 n.6 (internal citations omitted).

48. DFL NO.2 art. 29.

49. *Id.* art. 30.

50. Ugarte Cataldo, *supra* note 10, at 194.

51. *See* Antonio de la Jara, *BPH Wants Chile Mediation on Spence Strike*, REUTERS, Oct. 1, 2009, http://www.reuters.com/article/idusn0141049420091001.

52. *Infra* Part III.A. Note, the practice historically has been that most employees conciliate their charge against employers at the DT because the DT is seen as more responsive to workers

Finally, as with French labor inspectors, the Chilean labor inspectorate at the DT can also mediate collective bargaining disputes.[53] If a union declares a strike, the union or the employer can request that the DT mediate the conflict.[54] The strike is suspended until the mediation process is exhausted.[55]

5. Filing Complaints

Notwithstanding its authority to generally administer and enforce all labor laws in Chile, the DT does not have authority to adjudicate all matters, and sometimes must file a complaint in the labor courts when it determines a violation of the law has occurred. These violations include "anti-union" and disloyal practices by unions,[56] and violations of "fundamental rights."[57] Anti-union activities and disloyal practices in Chile resemble what in the United States we call "unfair labor practices." These practices include discrimination against employees who belong to a union, not providing information required for collective bargaining, and interfering in the internal matters of the union, among other actions.[58] Employees may also commit similar illegal acts called "disloyal" actions against employers, which the DT should also refer to the courts.[59] "Fundamental rights" include the right to life and physical integrity, the right to private communications, the right to honor, conscience and religion, free speech, freedom to enter into employment contracts, and freedom from sexual harassment.[60]

6. Registry of Temporary Employment Agencies

Under the new anti-subcontracting law, which is further detailed below, agents that provide temporary employees to principals that will be under the control of the principal—"*empresas de servicios transitorios*" or "enterprises

claims than the more conservative courts of justice. *See* Ietswaart, *supra* note 32, at 642–46, 648. After a recent labor justice reform, most wage claims will now be first conciliated at the DT before being heard by the labor judge in response to this known fact that conciliations tend to be very effective in resolving wage cases. *Infra* Part III.A.

53. Ugarte Cataldo, *supra* note 10, at 194. For the role of French labor inspectors in mediating labor disputes see generally Donald Reid, *Putting Social Reform into Practice: Labor Inspectors in France, 1892–1914*, 20 J. OF SOC. HIST. 67 (1986); Donald Reid, *'Les Jeunes Inspecteurs': Ideology and Activism Among Labour Inspectors in France After May 1968*, 8 FRENCH HIST. 296 (1994).

54. Ugarte Cataldo, *supra* note 10, at 194.

55. *Id.*

56. CÓD. TRAB art. 292.

57. *Id.* art. 485–86; *see also* Ugarte Cataldo *supra* note 10, at 194–95.

58. *Id.* art. 289.

59. CÓD. TRAB, art. 290.

60. Ugarte Cataldo, *supra* note 10, at 194–95; CÓD. TRAB. art. 485; CONST. CHILE, art. 19.

of temporary services" ("temp agencies")—must register with the DT.[61] If the DT cancels their registration that temp agency becomes, for all practical effects, "extinct" and cannot transact business.[62]

7. Attesting Documents

Finally, the DT, through its inspectors, also acts as a *ministro de fe*, or a sort of official witness.[63] As *ministros de fe*, factual determinations contained in the labor inspectors' official documents can be used as evidence in court, and their contents are presumed to be true unless proven otherwise.[64] This function is especially useful in those cases where the courts serve as the ultimate adjudicator of a complaint under the labor law.

8. Labor Inspections After Pinochet

The Chilean government has done an outstanding job reviving the DT after Pinochet's rule left the institution in tatters.[65] As Table 1 shows, the number of labor inspections increased from 26,868 to 53,973 during 1993, more than doubling three years after democracy was restored.[66] Today labor inspections total more than 100,000 inspections per year. As Table 2 shows, while in 1990, only about 8% of all inspections were performed *de oficio*—or unsolicited—the number increased dramatically in 1992 to 23%.[67] *De oficio* inspections peaked in 1996, amounting to more than 50% of all inspections.[68] Since then, the percent of all inspections that have been performed *de oficio* has oscillated between 51% and 32%, with the exception of 2002, when only 13% of all inspections were made *de oficio*.[69]

61. *El Funcionamiento de las Empresas de Servicios Transorios de Servicios y el Contrato de Trabajo de Servicios Transitorios*, Law No.20.123, *in* BOLETIN OFICIAL DE LA DIRECCION DEL TRABAJO (November 2006); Ugarte Cataldo, *supra* note 10, at 195.

62. Ugarte Cataldo, *supra* note 10, at 195.

63. DFL NO.2, art. 23.

64. Ugarte Cataldo, *supra* note 10, at 196.

65. BUREAU OF INT'L. LAB. AFF., *supra* note 11, at 1–2.

66. Dirección del Trabajo, SERIES ESTADÍSTICAS 1990–2008, CAP. IV. ACTIVIDAD INSPECTIVA 4, *available at* http://www.dt.gob.cl/documentacion/1612/w3-article-95234.html.

67. *Id.*

68. *Id.*

69. *Id.*

Table 1: Number of Labor Inspections, 1990–2008

Year	No. of Inspections
1990	26,868
1991	30,936
1992	41,218
1993	53,973
1994	54,359
1995	65,090
1996	76,084
1997	76,943
1998	79,327
1999	87,545
2000	95,255
2001	101,259
2002	74,255
2003	97,947
2004	94,981
2005	114,937
2006	131,891
2007	139,108
2008	118,434

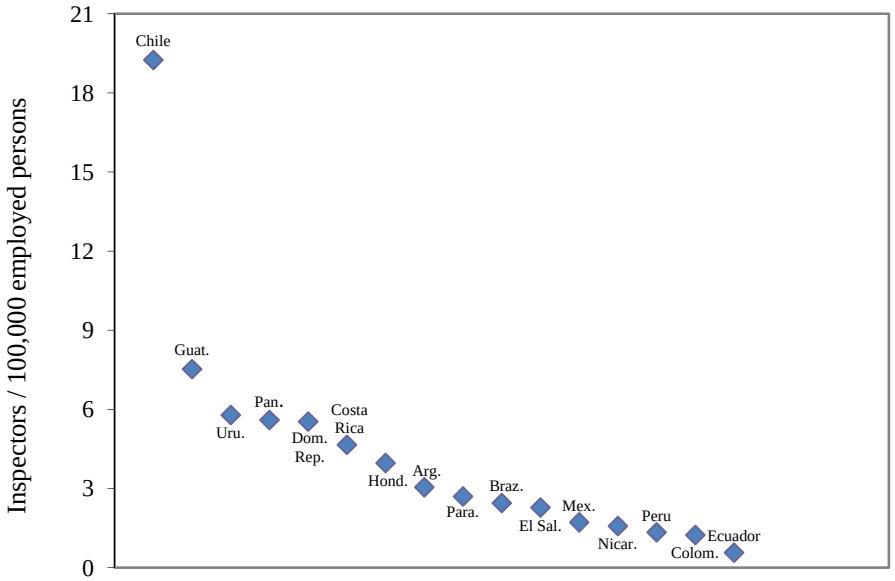
Source: Adapted from Dirección del Trabajo, *Series Estadícas Cap. IV Actividad Inspectiva*

Table 2: *De Oficio Inspections* 1990–2008

Year	No. of *De Oficio* Inspections	As a % of all Inspections
1990	2179	8%
1991	2353	8%
1992	9378	23%
1993	19,729	37%
1994	22,044	41%
1995	30,779	47%
1996	39,217	52%
1997	39,024	51%
1998	38,044	48%
1999	42,601	49%
2000	39,225	41%
2001	34,302	34%
2002	9647	13%
2003	36,348	37%
2004	33,627	35%
2005	37,276	32%
2006	53,543	41%
2007	59,800	43%
2008	37,593	32%

Source: Adapted from Dirección del Trabajo, *Series Estadícas Cap. IV Actividad Inspectiva*

Fig. 1: Labor Inspectors in Latin America



Source: Adapted from ANDREW SCHRANK AND MICHAEL PIORE, ECLAC/MEXICO, SERIE ESTUDIOS Y PERSPECTIVAS NO. 77, NORMS, REGULATIONS AND LABOR STANDARDS IN CENTRAL AMERICA 22 (2007). Years vary (Argentina 1999; Brazil 2005; Chile 2005; Dominican Republic 2005; Ecuador 2006; Guatemala 2004; Honduras 2005; Mexico 2002; Nicaragua 2005; Panama 2006, Paraguay 2005; Peru 2003; Uruguay 2006).

In 1999, Chile signed ILO Convention No. 87 (on freedom of association, protecting the right to organize) and Convention No. 98 (on the right to organize and bargain collectively).[70] After a period of military dictatorship and repression of labor leaders, activists, and ordinary workers, the ratification of the ILO conventions signaled Chile's commitment to respect workers' right to organize.[71] In 2000, Chile also ratified ILO Convention No. 182 concerning child labor.[72] At about that time, Chile also doubled the size of its labor inspectorate[73] to attain the largest labor inspector per citizen in Latin America.[74] The country now boasts about nineteen inspectors per every 100,000 employed persons,[75] a figure significantly higher than the rest of the

70. BUREAU OF INT'L. LAB. AFF., *supra* note 11, at 6.

71. *Id.* at 1, 3.

72. *Id.* at 3.

73. Piore & Schrank, *supra* note 1, at 3.

74. According to María Ester Feres, the Director of the DT from 1994 to 2004, she left the DT with more than 2000 functionaries, a huge improvement over the tattered, eighty-person body that remained when Pinochet gave up the reins of power in 1990. Interview with María Ester Feres, *supra* note 32.

75. *See* Piore & Schrank, *supra* note 2, at 22. Although the Chilean DT and other labor inspection experts claim the Chilean DT is among the most active in Latin America, through my

region. As Figure 1 shows, the country with the highest per capita number of inspectors after Chile is Guatemala, with 7.53 inspectors per every 100,000 workers, followed by Uruguay with 5.79 inspectors per every 100,000 workers and Panama with 5.6 inspectors per every 100,000 workers.[76]

Finally, we should note that Chile increased its commitment to enforce core labor rights and its own labor laws when it signed the U.S-Chile FTA, which took effect on January 1, 2004.[77] Since the early 1990s, when NAFTA was negotiated between the United States, Canada, and Mexico, the United States has been negotiating FTAs with labor clauses, a "side agreement" under NAFTA where each party promises to enforce its own labor laws so as to not use non-enforcement as an instrument of unfair trade.[78] The United States and its trade partners attempt to enforce the parties' obligations under the FTA's labor clauses through bilateral "consultations."[79] There is no enforcement mechanism under the current FTAs to enforce core labor rights.[80] Consultations are geared to find solutions to any disputes regarding possible violations of the labor clauses, and, if such consultations fail, parties can seek mediation, arbitration, and/or request monetary sanctions against the adverse party.[81]

B. The Labor Courts

Courts in Chile have exclusive jurisdiction over several categories of labor-law-related claims, including nonpayment of wages and other remunerations, unfair dismissal cases and unfair labor practices.[82] Jurisdiction of ordinary labor law complaints is exercised in Chile in the first instance by

fieldwork in Chile's DT it has come to my attention that the 19/100,000 labor inspector figure may be inflated due to the fact that the DT considers most of its rank-and-file officers "*fiscalizadores*," or labor inspectors, even if these are mostly doing clerical work at one of the DT offices.

76. *See* Piore & Schrank, *supra* note 1, at 22.

77. DIRECCIÓN DEL TRABAJO-DIVISIÓN DE ESTUDIOS, 32 CUADERNOS DE INVESTIGACIÓN: LOS DERECHOS LABORALES DEL TRATADO DE LIBRE COMERCIO CHILE-ESTADO UNIDOS EN LA INDUSTRIA FORESTAL Y EN LA INDUSTRIA DEL SALMÓN 9 (2007).

78. *See* BOB HEPPLE, LABOUR LAW AND GLOBAL TRADE 107–09 (2005).

79. U.S.-Chile FTA, art. 22.4.

80. *See generally*, U.S.-Chile FTA.

81. U.S.-Chile FTA, arts. 18.5, 18.6, 22.4, 22.5, 22.6, 22.16, and Annex 18.5. Note, under NAFTA/NAALC, private parties can also file "submissions"—a kind of complaint—in a National Administrative Office ("NAO") of labor law violations of the NAALC against the U.S., Canada, or Mexico. There are three NAOs, one in each NAFTA/NAALC signatory country. A party must file a submission in a NAO that is not located in the country being complained of in the submission. If the NAO accepts the submission, and finds a violation, it may recommend consultations between the signing members of NAFTA/NAALC to resolve the alleged violations. HEPPLE *supra* note 78, at 110.

82. CÓD. TRAB., art. 420.

the labor courts.[83] Labor court decisions can be appealed in the court of appeals and thereafter in the Supreme Court.[84]

Labor courts can also review the actions of the DT through ordinary appeal procedures.[85] In addition, courts of appeals may review the DT's action through a special injunctive procedure called "*recurso de protección*," or protection procedure.[86] Protection procedures are available only to those plaintiffs who allege a violation of their constitutional rights under Article 19 of Chile's political constitution.[87] Hence, while labor inspectors have the authority to assess violations of most labor laws and impose sanctions or other penalties on employers, courts retain exclusive jurisdiction over some matters and have authority to review the actions of the DT.

1. Wage Claims

Under Chilean labor law, the DT may compel parties to attend a conciliation hearing regarding wage claims, although it cannot officially adjudicate the claims.[88] Conciliation has generally not been a jurisdictional requirement for wage claims, but the labor laws have recently been amended to create a new procedure called the "*proceso monitorio*," or monitoring procedure, where wage claims regarding the nonpayment of wages totaling ten monthly minimum wage salaries or less must first be conciliated by the DT.[89] The worker–plaintiff files a complaint with the DT, which will summon both the employer and the worker in an attempt to conciliate the matter.[90] The parties must take all relevant evidence to that hearing.[91] If the matter is not settled at conciliation, the DT produces a report that the worker–plaintiff can then file in the labor court with his or her complaint, along with the rest of the documentary evidence presented at the DT.[92] Once filed in court, the judge

83. *Id.* arts. 420, 474.

84. Ugarte Cataldo, *supra* note 10, at 193–94.

85. CÓD. TRAB., art. 420(e).

86. CONST., art. 20 (Chile).

87. CÓD. TRAB., art. 420(e).

88. Ugarte Cataldo, *supra* note 10, at 193–94.

89. CÓD. TRAB, art. 496–97. *See also* RODOLFO WALTER DÍAZ & GABRIELA LANATA FUENZALIDA, REGIMEN LEGAL DEL NUEVO PROCESO LABORAL CHILENO 285–95 (2009). In 2005, the minimum monthly salary in Chile was 120,000 Chilean pesos a month, or roughly about U.S. $221, Oanda.com, http://www.onada.com/convert/fxhistory (last visited Oct. 8, 2009) (using the exchange rate of January, 1, 2005). Ten minimum wage monthly salaries, therefore, would amount to about US $2210. For minimum wage rates in Chile in 2005 *see* Dirección del Trabajo, PROYECTO DEBERÁ SER DESPACHADO EN 2 DÍAS POR EL SENADO, SALARIO MÍNIMO AUMENTARÁ EN 3.8%, *available at* http://www.dt.gob.cl/1601/article-63791.html.

90. Ugarte Cataldo, *supra* note 10, at 192.

91. CÓD. TRAB., art. 497.

92. *Id.* art. 497.

must accept or deny the worker's complaint based on the merits of the case.[93] Thereafter, any of the parties has ten days to oppose the court's decision.[94] If there is no filed opposition to the judge's resolution within the ten-day period, then *res judicata* prevents the action from being appealed. If any of the parties files a timely opposition, then the judge must schedule a hearing within fifteen days of the opposition and thereafter issue a decision.[95] The court's decision can be appealed through ordinary appeals procedures available for labor matters, except through the procedure of "*unificación de jurisprudencia*," or unification of jurisprudence, established by article 483 *et seq*. of the Chilean Labor Code.[96]

2. Unfair Labor Practices and Violation of Fundamental Rights

Labor courts also retain exclusive jurisdiction over unfair labor practices in Chile.[97] Labor inspectors cannot adjudicate unfair labor practices, but they can investigate these charges and thereafter file a complaint in the courts if their investigation sustains an infraction of law.[98] Sanctions in these cases include fines[99] and "shaming naming," as the DT must keep a record of employers who commit unfair labor practices and publicize it.[100] Currently, this list is publicized on the DT's website.[101]

The labor courts also have a "tutelary" procedure where individual employees and labor unions can seek protection of "fundamental rights"[102] that are violated at work.[103] Fundamental rights include the right to life and physical integrity,[104] privacy,[105] conscience and religion,[106] free speech,[107] and

93. *Id.* art. 499.

94. *Id.* art. 500.

95. *Id.* art. 500–01.

96. CÓD. TRAB, art. 502. Unification of jurisprudence joins several cases concerning the same legal question or questions, but were decided disparately by the lower courts, so that they can be heard and decided collectively by one court of appeals and provide consistency to the jurisprudence. *Id.* art. 483.

97. CÓD. TRAB, art. 420(e).

98. *Id.* art. 292.

99. *Id.* art. 389.

100. *Id*. art. 390.

101. GOBIERNO DE CHILE DIRECCIÓN DEL TRABAJO, EMPRESAS Y/O EMPLEADORES (AS) CONDENADOS POR PRÁCTICAS ANTISINDICALES SEGUNDO SEMESTRE 2007, *available at* http://www.dt.gob.cl/1601/articles-95482_recurso_1.pdf.

102. CÓD. TRAB, Title VII.

103. Due to space limitations I have very briefly sketched the tutelary procedure, but for a much more in depth description see WALTER DÍAZ & LENATA FUENZALIDA, *supra* note 89, § 10.

104. *See* CONST. CHILE, art. 19(1).

105. *See id.* arts. 4–5.

106. *See id.* art. 6.

107. *Id.* art. 7.

freedom to make employment contracts.[108] The courts' tutelary proceeding can also be used to bring sexual harassment complaints.[109] Courts have exclusive jurisdiction over those complaints. Labor inspectors must file a complaint in the court if, as result of their investigation, they take notice of an infraction of fundamental rights.[110] The DT may also become a party in the suit.[111] Before filing a complaint in the court, however, the Inspections Division of the DT must attempt to mediate the controversy.[112] Finally, the labor union of the aggrieved worker named in the suit can also join as an aggrieved party, either a "*tercero coayudante*," third co-helper, or as a primary party if it originally filed the complaint in court.[113]

3. Labor Justice Reforms

Labor courts have been in existence in Chile since 1924, with an original role to "compensate for economic inferiority with legal superiority."[114] However, they were not considered to be effective guardians of workers' rights by some commentators and analysts of the court system.[115] Perhaps as a result of those criticisms the government of Chile reformed its labor courts. In 2005 the country enacted a "Labor Justice" reform, which promises rapid, oral, and adversarial trials for labor controversies, in contrast to the allegedly slow and written proceedings of the past. It increased the number of labor courts from twenty to eighty-four.[116] It also seeks to hire almost 500 new functionaries to assist the new judges, as well as 137 legal aid lawyers that will represent plaintiffs free of charge.[117] These new resources and procedures for bringing labor law complaints before the courts are intended to speed up labor law decisions, from about three years to ninety days.[118]

II. THE UNENFORCEABLE ANTI-SUBCONTRATING LAW

An important and recent labor law development in Chile has been the anti-subcontracting law, which limits employers' use of subcontracting.[119] Even though Chilean lawmakers gave the DT authority to enforce the new anti-

108. *Id.* art. 16.
109. CÓD. TRAB, art. 485.
110. *Id.* art. 486.
111. *Id.*
112. *Id.*
113. *Id.*
114. Ietswaart, *supra* note 32, at 656.
115. *Id.* at 656–58.
116. Dirección del Trabajo, *Judicatura especializada comenzó a regir en regiones de Atacama y Magallanes*, *available at* http://www.dt.gob.cl/1601/printer-95490.html.
117. *Id.*
118. *Id.*
119. CÓD. TRAB Title VII.

subcontracting law, the Chilean appellate-level courts and its Supreme Court have determined that any adjudication of contractual matters performed by the DT, even under the new law, would violate the constitutional right to not be judged by so-called "special commissions" because adjudications of contractual controversies reside exclusively within the province of the courts.[120] These decisions by the Supreme Court of Chile have led the DT to clash with the courts, rendering Chile's labor law enforcement system, at least in the eyes of one prominent commentator, "difficult."[121]

A. The Anti-Subcontracting Law

Labor activists and advocates maintain that subcontracting is currently abused by employers. Since Chilean labor law only protects single-employer collective bargaining, subcontracting has become a major tool for employers to evade collective bargaining and to be able to hire and fire workers more easily.[122] Subcontracting blemished the social record of the center-left Chilean governments of 1991–2010 that championed the causes of workers as the sharpest increases in subcontracting occurred during its tenure. The mining industry, which is mostly state-owned, was one of the industries that expanded the use of subcontracting during the years of the *Concertación*.[123] In 1990, only about 13% of employees in the mining industry were subcontracted, but by 2004 the figure reached 61%.[124] In some regions of the country, subcontracting has become the employment norm. For example, in the Copaipó agricultural valley, researchers recently estimated that about 95% of all employed persons were employed as subcontracted employees.[125] Moreover, the general rate of growth in subcontracting has been significant. In 1999, about 32.7% of all Chilean workers employed by general industry were subcontracted, and just five years later the figure increased to 43.3%.[126]

120. Supreme Court of Chile, Rol. Nos. 877-2008, 953-2008, 1062-2008, 1063-2008, 1073-2008, 1074-2008, 1075-2008, 1076-2008, 1150-2008, May 12, 2008. After consulting with various members of the Chilean bar, there seems to be no clear definition of what a "special commission" is in Chilean jurisprudence. Rather, "special commissions" have been declared by courts *ex post*, without defining them, and merely seem to mean a body that is not officially a court of justice.

121. Ugarte Cataldo, *supra* note 10, at 187.

122. DIRECCIÓN DEL TRABAJO Y DEPARTMENTO DE ESTUDIOS *El Otro Trabajo: El Suministro De Personas En Las Empresas*, NO. 7 CUADERNO DE INVESTIGACIÓN 44 (2001); Rodrigo Figueroa Valenzuela, *Regulación de la subcontratación y el suministro de trabajadores en Chile*, 16 VEREDAS 129 (2008) (MEXICO). Dirección del Trabajo, División de Estudios, *Los Riesgos Laborales de la Subcontratación*, 19 APORTE AL DEBATE LABORAL 47 (2006).

123. Dirección del Trabajo, División de Estudios, *Los Riesgos Laborales de la Subcontratación*, 19 APORTE AL DEBATE LABORAL 47 (2006).

124. *Id.*

125. Figueroa Valenzuela, *supra* note 122, at 132.

126. Dirección del Trabajo, *supra* note 123, at 52.

Subcontracted employees generally suffer worse conditions and terms of employment than regular employees.[127] Given that only single-employer collective bargaining is protected by Chilean law, subcontracted workers cannot bargain with the principal. Subcontracting constrains unionization and has become one of the main targets of labor activists and organizations.[128] Labor organizations have every reason to be concerned about their current condition and future in Chile. General labor union density in 2007 stood at a mere 11%.[129] Having been at 12.4% in 1991,[130] union density has diminished under the *Concertación* administrations.[131]

To limit subcontracting, the Chilean government approved an anti-subcontracting law in 2006.[132] In addition to forcing temp agencies to register with the DT, the law only permits employer–principals to hire workers that are going to be under the principal's control only for specific and "irregular" reasons: to substitute a regular employee that is taking a leave of absence; for "extraordinary events," such as organizing a conference; for "new and specific projects" including the construction of new facilities or the expansion of existing ones; to fill vacancies during the opening days of new enterprises; or for "urgent" tasks.[133] If employers subcontract employees under the principal's control for other purposes, the law will consider the subcontracted workers to be regular employees of the principal and the employees will obtain all the rights of regular employees.[134] Finally, the law provides the DT with the authority to enforce the new law.[135] The statute reads:

> The Labor Directorate will enforce compliance with the norms of [the law in the] place or places where such services are rendered and in the enterprise providing temporary services . . . .[136]

127. In the mining industry, for example, the DT has discovered that the average hours worked by miners, which are generally excessive—or 2300 hours worked a year—is much higher for subcontracted miners, who generally work 2600 hours in one year. Dirección del Trabajo, *supra* note 123, at 51. Also, subcontracting hinders unionization and collective bargaining because Chilean law does not protect workers' right to engage in multiemployer collective bargaining. Figueroa Valenzuela, *supra* note 122, at 133 n.8. Subcontracting is thus a strategy for union busting.

128. Figueroa Valenzuela *supra* note 122, at 132–33.

129. División de Estudios: Dirección del Trabajo SERIES ESTADÍSTICAS, *Cuadro 1: Cantidad de huelgas legales efectuades trabajadores, involucrados, días de duración y costo días-persona, a nivel nacional, años 1990 a 2008*, at 4 (1990–2008).

130. *Id.*

131. *See id.*

132. CÓD. TRAB, art.183(A–AE).

133. *Id.* art. 183(Ñ).

134. *Id.* art. 183(U).

135. *Id.* art. 183(G).

136. *Id.* (translation by author).

B. The Codelco Decisions

Notwithstanding the new policy against subcontracting abuse, the state-owned mining company Codelco, nationalized by Salvador Allende in 1971 to develop national capital and redistribute the country's wealth among the popular classes, challenged the DT when it imposed fines on Codelco for violating the anti-subcontracting law. The DT determined that Codelco had illegally subcontracted about 5000 employees under the anti-subcontracting law.[137] Codelco claimed, however, and the Supreme Court later affirmed, that the DT violated the constitutional rights of the state mining company and its subcontractors because the DT did not have the authority to adjudicate contractual disputes related to the subcontracting arrangements.[138] The Supreme Court decided that the DT violated the constitutional rights of employers, including the right of persons to be judged by a court rather than "special commissions,"[139] the right to freely make labor contracts,[140] the right to engage in legal economic activities,[141] and the right to private property.[142] Moreover, the court determined that the DT had exceeded its jurisdiction by adjudicating ("*calificar*") contractual matters. Finally, the Supreme Court deemed the actions of the DT arbitrary and illegal because the DT did not allow the subcontractors to participate in the proceedings which led to its determination that Codelco had to absorb the 5000 employees.[143]

In a concurring opinion, one justice agreed with the majority's result, reasoning that Codelco had appropriately hired the employees under the anti-subcontracting law.[144] However, the concurring opinion distanced itself from the majority by arguing that the DT had the authority to decide whether or not an employer was violating the anti-subcontracting law. According to the concurring justice, the DT performed an otherwise legitimate "administrative act" when it attempted to determine if Codelco violated the anti-subcontracting law; therefore, the DT's decision did not amount to an unconstitutional act of a "special commission."[145] According to the Judge:

> The administrative authority is sanctioned to legally describe the facts, being this part of the administrative activity. Indeed, it is precisely this juridical adjudication [*calificación jurídica*] the one that is indispensable for the

137. Supreme Court of Chile, Rol No. 887-2008, May 12, 2008.

138. *Id.*

139. *See* CONST., art. 19 §, 3.

140. *See id.* art. 19, § 16.

141. *See id.* art. 19, § 21.

142. *See id.* art. 19, § 24.

143. Supreme Court of Chile Rol. No. 887-2008, May 12, 2008.

144. A panel of three career justices and one "*abogado integrante*"—a practicing attorney that Chilean law gives authority to participate in the Supreme Court decisions—decided the cases.

145. Supreme Court of Chile Rol. No. 887-2008, May 12, 2008, concurring opinion of Judge Pierry.

> exercise of that activity, in particular for the administrative sanction, reason why *the Labor Inspectorate has not violated article 19 No. 3* . . . of the Political Constitution of the Republic by acting as a special commission, rather, *it has done so in the performance of an administrative activity.*[146]

Additionally, the concurring opinion stated that the DT was especially justified in adjudicating the matter given its lack of standing to take subcontracting cases to the courts.[147] The concurring judge said that because the Supreme Court took away the DT's authority to adjudicate matters through the administrative process, the Supreme Court was effectively making it impossible to enforce the anti-subcontracting law except through the complaints of individual workers, a remedy he considered "illusory."[148] The judge likely found that enforcing the anti-subcontracting law through individual complaints would be "illusory" due to classic collective action problems associated with large groups of plaintiffs who have individual claims worth relatively little compared to the cost of the suit. Also, workers would possibly fear losing their jobs by bringing their claims to the courts as individuals.

After the Codelco decisions were made public, the DT requested that the Chilean Congress enact laws providing the DT with standing to represent aggrieved workers under the anti-subcontracting law.[149] Although some lawmakers discussed the matter and agreed to pursue it, to date, the DT has not received these powers. The matter was left to die a slow and almost anonymous death.[150] The rest of the paper now discusses the policy options to

146. The Spanish-language original citation reads:

> La autoridad administrativa está facultada para calificar jurídicamente los hechos, siendo esto parte de la actividad administrativa. En efecto, es precisamente dicha calificación jurídica la que es indispensable para el ejercicio de esa actividad, en particular para la sanción administrativa, por lo que al hacerlo la Inspección del Trabajo no ha vulnerado lo dispuesto en el artículo 19 N° 3 inciso 4° de la Constitución Política de la República actuando como comisión especial, sino que lo ha hecho en el desempeño de una actividad administrativa.

Supreme Court of Chile, Rol No. 887-2008 (emphasis added in English translation).

147. *Id.*

148. *Id*.

149. G. Orellana et al., *Justicia da duro golpe a la Dirección del Trabajo y revierte dictámenes contra Codelco*, EL MERCURIO, May 13, 2008 at B2. A. Chaparro & C. Palma; *Directora del Trabajo: "Hubo Cierta Disparidad de Criterio's,"* LA NACIÓN, May 13, 2008, at 10, *available at* http://www.lanacion.cl/prontus_noticias_v2/site/artic/20080512/pags/20080512205003.html; H. Cisternas, P. Obregón y L. Castañeda, MINISTROS PÉREZ YOMA Y ANDRADE REBATEN A CUEVAS Y DICEN QUE CODELCO CUMPLE ACUERDOS, EL MERCURIO, May 14, 2008, at B2; H. Cisternas, P. Obregón y L. Castañeda, *La Corte Suprema Dictaría Precedente: Expertos: fallo apunta a excesos históricos del ente fiscalizador*, EL MERCURIO, May 14, 2008, at B2.

150. César F. Rosado Marzán, fieldnotes of December 18, 2009 (on file with author).

enforce the anti-subcontracting law after these events and legal decisions, including the DT's request to obtain standing to file complaints in the labor courts under the anti-subcontracting law.

IV. SOME POLICY CHOICES

Chile confronts not only internal difficulties in enforcing its domestic labor laws, particularly its anti-subcontracting law, but also cannot meet its commitments under the labor clause of the U.S.-Chile FTA. Reforms are required. To help, labor and human rights activists could pressure the United States government to start a process of consultations under the U.S.-Chile FTA to seek enforcement of the anti-subcontracting law. The United States could resolve this stalemate by pursuing a two-pronged approach to make the anti-subcontracting law enforceable: (1) Extend the scope of pedagogical labor inspections in Chile, and (2) provide standing to the DT, as its Director requested after the Codelco decisions in 2008, so that it can file complaints in the labor courts under the anti-subcontracting law.

A. Extending Pedagogical Inspections

Perhaps the one policy option which would likely face less opposition from Chilean employers and the right-wing is the expansion of the DT's pedagogical inspections. Pedagogical inspections stress compliance assistance rather than punitive fines and strive to obtain voluntary compliance with labor laws through eventual "self-regulation."[151] Scholars have maintained that pedagogical inspections historically aided some countries in implementing their labor laws in a manner that promotes organizational innovation at the workplace while safeguarding comparative advantage and social stability.[152] Chile should not shy away from extending these programs.

Already, Chile has instituted at least two programs with pedagogical elements.[153] One, the "training-for-fines" program, has been heralded as a success by many sectors because it provides smaller employers with some needed wherewithal to comply with the labor laws.[154] Extending the program to larger employers, such as Codelco, could better facilitate understanding of

151. For a general overview of the "self-regulation" literature, termed to be part of the "new governance" school of legal thought see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2005); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 319 (2005).

152. *See generally* Piore & Schrank, *supra* note 1, art. 1; Donald Reid, *Putting Social Reform into Practice: Labor Inspectors in France, 1892–1914*, 20 J. OF SOC. HIST. 67, 76–78 (1986); Donald Reid, *'Les Jeunes Inspecteurs': Ideology and Activism Among Labour Inspectors in France After May 1968*, 8 FRENCH HIST. 296, 297–98 (1994).

153. *See supra* notes 30–31.

154. Piore & Schrank, *supra* note 1, at 15.

the labor laws among managers and facilitate ways to implement the law efficiently.

Another program with pedagogical elements is the compliance-assistance inspections policy, which is implemented mainly at organized workplaces where labor unions can serve as a monitoring body.[155] But since most employers have no unionized employees, compliance assistance remains a very limited inspection policy in Chile.[156]

To increase the scope and breadth of pedagogical inspections, Chilean labor inspectors need to think of themselves as more than a mere police force and act, at least at times, as human resource consultants and innovators of production processes. This is particularly important to implement in Chile since its compliance orientation is primarily punitive, leading to conflicts with employers, which result in litigation where the DT is ultimately reprimanded and its authority formally limited. Here, Chile's enforcement orientation policy contrasts with that of its much poorer cousin, the Dominican Republic, which, even though it generally lacks quality state institutions, has recently overhauled its inspection service to persuade employers that labor law compliance is not only a legal requirement, but also good for business, in the mold of the traditional French model.[157] As sociologist Andrew Schrank asserts for the Dominican Republic:

> While scofflaw employers frequently assert an inability to comply with the law and remain profitable, professional inspectors respond—at least occasionally—by pointing to their compliant neighbors and their organizational differences: What differentiates the compliant firms from their non-compliant neighbors? They train their managers. They use modular production . . . . They pursue vertical integration. And they sometimes diversify . . . into more remunerative activities. By distributing information on training and best practices . . . the inspectors overcome an important market imperfection and thereby make compliance good for business.[158]

Professional labor inspectors should provide a service to employers that helps them innovate and establish best practices. In the United States, firms purchase such advice from human resource management professionals.[159] In Franco-Hispanic jurisdictions, labor inspectors serve a similar role when they are properly trained and provided with the appropriate resources.[160] Such a service, provided as a public good to employers, can prove invaluable for the

155. César F. Rosado Marzán, ethnographic fieldnotes of June 4, 2009.
156. *See id.*
157. *See supra* note 126.
158. Schrank *supra* note 1, at 16–17.
159. *See supra* note 130.
160. Schrank, *supra* note 1, at 16; *see* Piore & Schrank, *supra* note 1, at 1, 10–11.

Chilean economy. It could also prove crucial for the enforcement of Chilean labor law.

Pedagogical inspections require a highly professionalized labor inspectorate, which may be difficult to create in cash-strapped developing economies. But Chile could at least promote further professionalization of its existing inspectorate by providing its new inspection school (which opened in 2009) with resources to develop inspection professionals that view themselves as more than a labor police.[161] Targeted courses and specific resources aimed at teaching inspectors about developing best practices from their field inspections and then disseminating those best practices to other workplaces could go a long way towards creating a different compliance culture in Chile.

The United States also could play a useful role in the professionalization of the labor inspectorate of Chile through cooperative consultations under the FTA. While it has been argued that the United States has followed a more "punitive" model of labor law enforcement common to Anglo-American jurisdictions,[162] with little resemblance to the Franco-Hispanic model, this does not mean that the United States lacks professionals experienced in instructing employers on compliance with labor laws and cementing cultures of labor law compliance. Because the United States federal government has been "administratively weak," it has depended on civil society, namely human resource management professionals, to instruct employers on how to comply with the country's labor laws and protect themselves against expensive lawsuits.[163] United States labor and employment attorneys representing management have developed sophisticated practices to "bullet proof" employers from liability arising from labor and employment law violations and have disseminated these prophylactic practices to other countries.[164] While cooperative consultations between Chile and the United States must be sensitive to particular types of labor law violations, industries, employer types, institutional contexts, and substantive legal differences between both countries,

161. In my recent fieldwork, I discovered that while the DFL No.2 stated in 1967 that an inspection school had to be created, no school was developed at all until 2009—forty-two years after the statute was enacted—and the current school still remains embryonic, has no physical premises, and requires substantial work before it is an institution that, in truth, forms labor inspectors.

162. *See* Piore & Schrank, *supra* note 1, at 13.

163. For details on how human resource professionals help enforce United States labor laws see Frank Dobbin & John R. Sutton, *The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions*, 104 AM. J. SOC. 441, 470–72 (1998). For details on the role of the management-side labor law bar in creating prophylactic methods for employers to evade labor and employment law claims, see Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and Export of American Lawyering Styles to the Global Worksite*, 25 COMP. LAB. & POL'Y J. 257, 264 (2004).

164. *See* Bisom-Rapp, *supra* note 163, at 266–67.

there can be fruitful exchanges between Chilean labor law enforcement agents—namely, the labor inspectorate—and American professionals who specialize in instructing employers regarding means to compliance with labor and employment laws. Experimenting with these consultations may prove to be an innovative strategy for cross-border labor diplomacy under the U.S.-Chile FTA.[165]

B. Granting Standing to the DT

In addition to the promise of self-regulatory strategies oriented by pedagogical inspection programs, Chile also realistically needs to threaten violators of labor laws with punitive sanctions when persuasion proves insufficient, especially since the DT was substantially weakened by the *Codelco* decisions.

Recent social science literature has shown that purely self-regulatory strategies are insufficient to compel employers to comply with the labor laws.[166] State-backed punitive sanctions for insistent, lawbreaking employers are needed.[167] The DT, therefore, was correct to request that the Chilean legislature allow it standing to sue on behalf of aggrieved workers under the

165. In addition to extending pedagogical inspections to foment self-regulated workplaces, Chile could also provide labor unions with added institutional support and legal rights to better represent workers through collective industrial activity and/or judicial actions. However, given the general weakness of labor unions in Chile, including the under-inclusive character of its mainly voluntary, enterprise-level unions and the over-representative nature of "negotiating committees," what amount in many cases to *de facto* company unions, the topic of collective labor law reform deserves its own discussion, separate and apart from the scope of this paper. For further, general information on Chilean labor unions' current weaknesses see Diego López Fernández, *La Ineficacia del Derecho a Negociar Colectivamente*, in DIRECCIÓN DEL TRABAJO, NEGOCIACIÓN COLECTIVA EN CHILE: LA DEBILIDAD DE UN DERECHO IMPRESCINDIBLE 43, 53 (2010), *available at* http://www.dt.gob.cl/documentacion/1612/articles-97510_recurso_1.pdf. (I thank my colleague Henry H. Perritt, Jr. for raising this point.)

166. *See* Pires, *supra* note 1. GAY W. SEIDMAN, BEYOND THE BOYCOTT 29 (2007).

167. For example, in the Dominican Republic, labor inspections have become more effective as a result of both the extension of pedagogical inspections enhanced by professionalization and the promise of real sanctions made possible through the recruitment of an incorruptible *esprit de corps* to join the inspectorate. Schrank, *supra* note 1, at 7. In her recent study of effective enforcement of voluntary codes of conduct through "stateless" strategies organized by consumer advocacy groups, sociologist Gay Seidman uncovered that even "self regulatory" strategies such as codes of conduct depended on the threat of trade sanctions by nation–states. SEIDMAN, *supra* note 166, at 29. Another recent study in Brazil showed that employers were most likely to comply with the law in a "sustainable" fashion, meaning that they would not revert to noncompliance, when the labor inspectorate of the country offered a pedagogical orientation to labor law infractions while maintaining punitive sanctions in the background as a last resort against recalcitrant employers. Pires, *supra* note 1, at 201.

anti-subcontracting law.[168] The request likely was controversial because the political right-wing has opposed extending the DT's powers.[169] Political opposition against providing the DT with standing to bring claims under the anti-subcontracting law, however, could be blunted by packaging that reform with one that would extend both pedagogical inspections and a model of voluntary compliance in the country.

V. CONCLUSION: FROM STORM TROOPERS TO LABOR INSPECTORS AND JUDGES

Enforcing the anti-subcontracting law matters deeply because it goes to the heart of a history full of broken promises. Chilean working-class history is riddled with events where workers struggle to defend their rights, only to either face brutal repression or indifference from the state. As an example, in April of 1971, more than 1500 workers at the largest textile mill in Chile took over the mill in response to unaddressed, decades-old workplace grievances, including wage theft and refusal to recognize their union.[170] The workers seized the mill from the owner after Salvador Allende, the Socialist *Compañero Presidente* of the Unidad Popular political coalition, won the elections and gave the workers confidence to create a new future for themselves.[171] According to historian Peter Winn, the takeover of the large textile mill symbolically marked the country's official "road to socialism," as it showed workers' willingness to participate as active members of the political process.[172]

Before the textile workers took over the mill, they had depended for decades on "ill-paid" and "venal" labor inspectors who "turned a blind eye to [the employer's] violations of the labor laws and repression of union democracy. . . ."[173] With the triumph of Allende and Unidad Popular in 1970,

168. G. Orellana et al., *Justicia da duro golpe a la Dirección del Trabajo y revierte dictámenes contra Codelco*, EL MERCURIO, May 13, 2008 at B2; A. Chaparro & C. Palma, *supra* note 149, at 10; H. Cisternas & P. Obregón y L. Castañeda, MINISTROS PÉREZ YOMA Y ANDRADE REBATEN A CUEVAS Y DICEN QUE CODELCO CUMPLE ACUERDOS, EL MERCURIO, May 14, 2008, at B2.; H. Cisternas & P. Obregón y L. Castañeda *La Corte Suprema Dictaría Precedente: Expertos: fallo apunta a excesos históricos del ente fiscalizador*, EL MERCURIO, May 14, 2008, at B2.

169. For example, in a recent report drafted by an array of experts representing various political tendencies in Chile, the more conservative voices advocated for limiting the authority of the DT by splitting the agency into various "specialized" agencies. PATRICIO MELLER, INFORME FINAL 120–23 (CONSEJO ASESOR PRESIDENCIAL) (2008), http://www.trabajoyequidad.cl/view/index.asp.

170. PETER WINN, WEAVERS OF REVOLUTION 173, 178 (1986).

171. *Id.* at 53.

172. *Id.*

173. *Id.*

those textile workers, along with millions of other Chileans, felt that the government was finally responsive to their material and moral needs.[174] Workers not only took to the streets and seized some plants, but also filed charges with the DT in pursuit of workplace justice.[175]

Working-class mobilizations at the street, workplace, and bureaucratic levels suffered a huge setback with the 1973 military coup, which occurred with the acquiescence, if not direct support, of the United States.[176] The military coup, led by General Augusto Pinochet, quickly dissolved working class organizations and dismantled state institutions that served workers' interests. Several years after the coup, the Pinochet dictatorship started an aggressive neoliberal political project with the aid of the so-called "Chicago Boys."[177]

However, even the military dictatorship could not completely crush Chilean workers' resilience and combativeness for a more democratic society.[178] Indeed, miners became the backbone of the organized opposition to the dictatorship, many times leading heroic labor strikes and other concerted actions that defied the regime's brutal repression.[179] In 1991, almost twenty years after the coup, democracy was restored in Chile, but not until after scores of ordinary workers had been pauperized, harassed, arrested, tortured, and killed.[180] By the 1990s, similar to 1970, Chilean workers expected dramatic change. Even after significant reconstruction of the DT, change with tangible results for the working class has been slow to materialize.[181] So the miners continued to strive for labor rights. In 2006, more than 28,000 subcontracted miners led a massive demonstration in Santiago demanding the same benefits as regular employees.[182] The DT's subsequent actions against Codelco for violating the anti-subcontracting law were likely motivated by this national mobilization of subcontracted miners. However, two years later, the Supreme Court of Chile stopped the DT's attempts to compel Codelco, a government-owned and run institution, to abide by the anti-subcontracting law, making the statute effectively unenforceable. In this manner, Chile's labor law is starting

174. *Id.*

175. Ietswaart, *supra* note 32.

176. *See* PETER KORNBLUH, LOS EEUU Y EL DORROCAMIENTO DE ALLENDE: UNA HISTORIA DESCLASIFICADA (2003).

177. *Id.*

178. *See supra* note 20–22.

179. Lance Compa, *Laboring for Unity*, REPORT ON THE AMERICAS: CHILE 21, 23 (March/April 1988); Thomas Miller Klubock, *Class, Community, and Neoliberalism in Chile: Copper Workers and the Labor Movement During the Military Dictatorship and Restoration of Democracy*, *in* VICTIMS OF THE CHILEAN MIRACLE 209–10 (Peter Winn ed., 2006).

180. Frank, *supra* note 17, at 59.

181. *See infra* notes 148–50.

182. Figueroa Valenzuela, *supra* note 122, at 132–33.

become a mere "aspirational" law, such as is the ill-reputed Mexican labor laws, for example, where the laws "on the books" clash with reality. I cannot imagine that proudly-legalistic Chile wants to develop such a lackluster reputation regarding its legal institutions.

Despite the recent developments in Chilean labor law, there are reasons to be optimistic. First, Chile seems to be part of the general trend in Latin America to break away from violent resolution of industrial conflict. In the past, the capitalist class of Chile, as in other Latin American countries, counted on bayonet-wielding storm troopers to resolve workplace disputes. Today, the same capitalist class counts on conservative appellate-level courts to protect their private property rights. While labor advocates may still see these courts as adversaries, conservative courts are an improvement over state-backed violence. To paraphrase sociologist Andrew Schrank, Latin American governments used to resolve "industrial conflict by hiring death squads; today, they pursue a similar goal by hiring lawyers and labor inspectors."[183] Lawyers—including judges—and inspectors may not be always adequate, but "their mere existence constitutes progress of a sort and provides a block on which to build in the rest of the century."[184] Second, the United States, rather than instigating right-wing coups to crush working-class movements and leftist governments in Latin America, as it did during the Cold War, can enforce labor rights through the FTAs.[185] In Chile, it can provide technical knowledge to improve Chilean justice and help Chile enforce its anti-subcontracting law. It can also legitimately throw its weight behind such an initiative. This is certainly an improvement over the past. However, laws, norms, and agreements are never self-executing. We need to put our efforts and energies into materializing the possibilities that the new national laws and transnational norms and agreements provide. The path may seem difficult, but there is a path, nevertheless.

183. Andrew Schrank, *Labor Standards in the CAFTA Region: Constructive, Cosmetic, or Counterproductive?*, *in* OBSERVING GLOBAL TRADE 45 (Miguel Centeno, et al. eds.,) (draft manuscript) *available at* http://www.princeton.edu/~cenmiga/works/Observing%20Trade%20all.pdf#page=129.

184. *Id.*

185. *See supra* notes 129–31.