

NOTE

LABOR RIGHTS IN THE PERU AGREEMENT: CAN VAGUE PRINCIPLES YIELD CONCRETE CHANGE?

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This Note explores problems with the U.S.-Peru Free Trade Agreement's labor chapter. These problems result from the ambiguity in its novel and celebrated provision obligating both countries to uphold the principles in the International Labor Organization's Declaration on Fundamental Principles and Rights at Work. While the Bush Administration and pro-labor members of Congress hailed the provision as a substantial improvement on labor protections in previous trade agreements, the potential effectiveness of the new obligation is limited by the inherent vagueness of the ILO Declaration's principles. The Peru Agreement exacerbates this vagueness by explicitly detaching the principles from the ILO jurisprudence that informs them. Beyond the potential threat to the labor chapter's effectiveness, this vagueness can encourage flexible and divergent interpretations of the ILO's principles and further obscure their content. This Note proposes two possible solutions to overcome this limitation: (1) interpret the obligation with reference to the relevant ILO jurisprudence, and/or (2) establish a cooperative program with the ILO in which it would monitor compliance. The labor chapter in the U.S.-Peru Agreement could set the template for future free trade agreements, and it is thus important that its new obligation function effectively. As the United States continues to link free trade agreements with labor standards, it is increasingly important that these standards result in more than just lip service to international labor norms.

INTRODUCTION

On December 14, 2007, President Bush signed legislation¹ implementing the United States-Peru Trade Promotion Agreement (the Peru Agreement). The Peru Agreement embodies the latest in U.S. efforts to link trade agreements with labor rights.² Premised on the notion that “unfair labor practices can have the same trade-distorting effect as subsi-

1. United States-Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138, 121 Stat. 1455 (2007).

2. A fact sheet from the U.S. Trade Representative said the Peru Agreement had “the strongest labor protections ever in an FTA.” Office of the U.S. Trade Representative, Real Results on Labor Rights 1 (2007), at http://ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file726_13231.pdf (on file with the *Columbia Law Review*); see also Paul Krugman, Op-Ed., Divided Over Trade, N.Y. Times, May 14, 2007, at A19 (“The key element of the new trade deal is its inclusion of ‘labor standards’: [Parties to U.S.] free trade agreements will have to allow union organizing [and] abolish[] child and slave labor [T]he inclusion of these standards in the deal represents a real victory for workers.”); Editorial, A Winning Deal on Trade, N.Y. Times, May 13, 2007, at WK11 [hereinafter Editorial, Winning Deal] (“The Bush administration and Congressional

dies,”³ such efforts seek to eliminate obstacles to free trade.⁴ The Peru Agreement’s labor chapter—the result of a bipartisan deal that the Administration and members of Congress hailed as a breakthrough⁵—obligates both the United States and Peru to uphold international labor rights as recognized by the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work (ILO Declaration).⁶

These improvements appear to signal growing interest in linking labor and trade, and an increasing political will to provide effective and innovative linkage regimes.⁷ As opposed to the hortatory language in past free trade agreements (FTAs) to “strive to ensure”⁸ conformance with international labor law, the Peru Agreement requires mutual conformance with international labor rights that the ILO has established.⁹ It therefore provides the foundation for a binational labor program that incorporates and augments the ILO system and creates the potential for a labor regime that can make real progress in protecting workers in both

Democrats have reached a broad understanding on trade that should benefit American workers, American businesses and global economic growth.”).

3. Representative Charles B. Rangel, *Moving Forward: A New, Bipartisan Trade Policy that Reflects American Values*, 45 Harv. J. on Legis. 377, 380 (2008). “In fact,” as Rangel notes, “the recognition that labor practices can constitute an unfair trade practice goes back at least as far as 1890, when Congress enacted legislation [the McKinley Tariff Act of 1890, ch. 1244, § 51, 26 Stat. 567, 624 (codified at 19 U.S.C. § 1307 (2006))] to restrict imports produced by prison labor.” Rangel, *supra*, at 380 n.25; see also *infra* notes 28–31 and accompanying text (describing origins of international labor rights movement and underlying motive of preventing unfair competition through use of substandard labor practices).

4. See *infra* Part I.B.1 (explaining that goal of free trade agreements is to reduce intraregional trade barriers).

5. U.S. Trade Representative Susan C. Schwab stated, with regard to the deal, “We have seized an historic opportunity to restore the bipartisan consensus on trade with a clear and reasonable path forward for congressional consideration of Free Trade Agreements.” Office of the U.S. Trade Representative, *Bipartisan Trade Deal 1* (2007), at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file127_11319.pdf (on file with the *Columbia Law Review*); see also *infra* notes 162–165 and accompanying text (describing statements from Democratic Congressmen regarding significance of Peru Agreement’s improved labor chapter).

6. The labor chapter is located in the Peru Agreement’s main body and is enforceable under the same mechanism as its commercial obligations. Trade Promotion Agreement, U.S.-Peru, art. 17.7(6), Apr. 12, 2006, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html (on file with the *Columbia Law Review*) [hereinafter U.S.-Peru TPA] (providing that unresolved disputes between United States and Peru regarding alleged violations of labor chapter are subject to Peru Agreement’s dispute resolution provisions in Article 21).

7. See *infra* Part II.A (discussing political enthusiasm for enhanced labor protections in U.S.-Peru TPA).

8. See *infra* note 78 and accompanying text (noting inclusion of “strive to ensure” language in U.S.-Jordan Agreement).

9. U.S.-Peru TPA, *supra* note 6, art. 17.2.

states.¹⁰ If the Peru Agreement's labor chapter can achieve such success, it will set the standard for future linkage in U.S. trade agreements.¹¹ However, as this Note will explore, ambiguity in the novel provisions of the Peru Agreement's labor chapter may prevent it from realizing its full potential.

The inherent vagueness of the Peru Agreement's obligation to uphold the ILO Declaration prevents it from providing the guidance necessary to determine whether a party has violated its labor chapter. As a result, its novel obligation is unlikely to result in any improvement upon past, generally unsuccessful, U.S. attempts to link labor rights and trade.¹² Additionally, the ambiguity of the obligation allows for flexible interpretations that can sanction insufficient labor standards.¹³ This risk has the potential not only to undermine the Peru Agreement's labor regime, but also to exacerbate the proliferation of divergent international labor standards and further divest the ILO Declaration's principles of meaning.¹⁴ This Note proposes two possible remedies to elucidate the Peru Agreement's obligations, accordingly allowing the provision to fulfill its purpose as a substantial improvement on labor protections in previous trade agreements. As the United States continues to link FTAs with labor standards, it is increasingly important that these standards live up to international labor norms.

Part I presents a brief background and critique of past U.S. efforts at linking labor rights and trade, as well as the history and development of the ILO. It reveals flaws in both spheres and lays the foundation for understanding the Peru Agreement's innovations, as well as its potential deficiencies. Part II highlights the risk that the Peru Agreement's enhanced labor provisions lack sufficient content and are too vague to achieve the intended goal of conformance to international labor standards. It begins by assessing the Peru Agreement's congressional reputation and the actual improvements in its labor chapter. It then explores the meaning of the ILO Declaration in the context of the ILO, highlighting its ambiguity

10. See Rangel, *supra* note 3, at 394 (“[T]he inclusion—and enforcement—of these standards will help raise standards of living for workers and help build a middle class. But the United States will also benefit when countries like Peru adopt and enforce basic labor standards . . .”).

11. See Steven R. Weisman, *Bush in Accord with Democrats on Trade Deals*, N.Y. Times, May 11, 2007, at A1 (“Officials in Washington predicted that the agreement’s effect would go beyond those countries and could be a template for all trade deals, including a possible worldwide accord.”); Editorial, *Winning Deal*, *supra* note 2 (“A commitment to basic labor standards—including bans on child labor and forced labor and guarantees of the right to organize—will be written into pending and future trade agreements.”).

12. See *infra* Part I.B (describing previous U.S. attempts at linking labor rights and trade).

13. See *infra* Part II.C.1 (explaining how ambiguities of ILO Declaration’s principles limit effectiveness in application).

14. See *infra* notes 197–199 and accompanying text (discussing preexisting vagueness of ILO Declaration’s principles and risk that flexible interpretations by dispute panels under Peru Agreement will further obscure their meaning).

and analyzing the normative debates over the desirability and danger of its vagueness. Finally, Part III proposes two methods to give more concrete content to the Peru Agreement's obligation: (1) incorporating ILO jurisprudence¹⁵ as a reference point for interpreting the scope and meaning of the ILO Declaration's principles and the parties' obligations, and (2) creating a hybrid program with the ILO that allocates fact finding and analysis to the international organization.

I. U.S. LINKAGE OF LABOR AND TRADE AND THE INTERNATIONAL LABOR ORGANIZATION

This Part addresses the developments in both domestic and international efforts to link labor rights and trade, focusing on U.S. trade agreements and the ILO. It reveals the limitations of these attempts and the difficulties in effectively developing and implementing international labor rights. These developments provide the background against which the Peru Agreement's labor chapter was drafted. Part I.A provides a brief introduction to the origins of labor rights. Part I.B discusses the evolution of the United States's attempts to link labor rights to bilateral and multilateral FTAs, including: (1) the North American Free Trade Agreement (NAFTA), (2) the U.S.-Jordan FTA, and (3) the Central American Free Trade Agreement (CAFTA-DR).¹⁶ Part I.C gives an overview of the ILO with a focus on the development and role of the ILO Declaration. The limitations of both ILO and domestic attempts to internationally enforce labor rights provide a perspective from which to view the Peru Agreement's novel attempt to construct a hybridized labor regime by incorporating ILO principles into its bilateral labor obligations.

15. For the purposes of this Note, the term "ILO jurisprudence" includes both the ILO conventions and the reports from ILO supervisory bodies such as the Digest of Decisions and Principles from the ILO Committee on Freedom of Association, Int'l Labour Org., *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th rev. ed. 2006), available at <http://www.ilo.org/ilolex/english/23e2006.pdf> (on file with the *Columbia Law Review*) [hereinafter ILO, CFA Digest], and reports from the ILO Committee of Experts, such as Int'l Labour Org., *Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labor Conference, 97th Sess.* (2008), available at http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meeting_document/wcms_090991.pdf (on file with the *Columbia Law Review*) [hereinafter ILO, 2008 COE Report].

16. Philip Alston suggested dividing the development of labor rights in U.S. free trade agreements into three stages—NAFTA, the U.S.-Jordan FTA, and CAFTA-DR—since these three agreements manifest the different stages of incorporating labor rights in U.S. free trade agreements. Phillip Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime, 15 *Eur. J. Int'l L.* 457, 498–99 (2004) [hereinafter Alston, *Transformation*] (identifying "three phases in the evolution over the past decade of free trade agreements . . . linked to labour standards initiatives").

A. *A Brief Introduction to the Origins of Labor Rights*

Labor rights include substantive rights—such as maximum working hours, minimum wages, and health and safety protections—and procedural rights, such as the right to union formation and collective bargaining.¹⁷ Impediments to labor rights and just working conditions arise from workers' lack of bargaining power in contractual relationships with employers.¹⁸ As recognized by a 1902 congressionally created Industrial Commission, “the aggregation of capital’ . . . made individual self-representation unrealistic.”¹⁹ Labor law can effect a change in bargaining disparities and unjust labor conditions by both regulating the bargaining process and by mandating specific labor conditions.²⁰

Scholars have described the origins of the labor movement in the United States as a reaction to the economic disparities that resulted from the rapidly expanding economy in the nineteenth and early twentieth centuries,²¹ coupled with laissez-faire governance and the courts' rejection—as interference with property rights—of political attempts to regulate the contractual process between labor and employer.²² The move-

17. See Brian Langille, *Core Labour Rights—The True Story* (Reply to Alston), 16 *Eur. J. Int'l L.* 409, 428–29 (2005) [hereinafter Langille, *True Story*] (explaining substantive and procedural labor law).

18. “The objective of labour law is justice in employment, or at work, or perhaps most broadly in productive relations. This will not be obtained because workers in the labour market will, as Adam Smith and others have long observed, be at a bargaining power disadvantage in that contracting process.” *Id.* at 428.

19. Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law: Unionization and Collective Bargaining* 4 (2d ed. 2004).

20. As Langille explains:

The first way to secure justice in the face of this problem is by simply rewriting the substantive deal (mostly by statute) between workers and employers—providing for maximum hours, vacations, minimum wages, health and safety regulations, and so on Labour law's second technique of responding to the perceived problem is . . . by way of procedural protection: in short, protecting rights to a fair bargaining process . . . by[, for example,] legally protecting freedom of association and free collective bargaining.

Langille, *True Story*, *supra* note 17, at 428–29.

21. These disparities are illustrated in a speech by Senator Robert Wagner, a primary proponent of the National Labor Relations Act:

The tremendous disparity between the few and the many became most pronounced in that glittering era which we regarded as the zenith of American prosperity. Between 1922 and 1929 the real wages of employees increased by slightly less than 10 percent. But during the same period industrial profits rose by 86 percent, while in the shorter span from 1926 to 1929 dividend payments mounted by 104 percent.

79 *Cong. Rec.* 7567 (1935).

22. As Jonathan P. Hiatt and Deborah Greenfield explain:

[The] U.S. economy [was] undergoing a profound transition from agriculture to industry, from local to national markets, from household enterprises to giant corporations. The economic transformation created vast fortunes alongside widespread urban poverty. Frenetic growth alternated with savage recession. Calls for reform and regulation were rejected in the name of laissez faire

ment sought to improve workers' bargaining position²³—as a means to benefit their social welfare and the economy by increasing their purchasing power²⁴—and to regulate the bargaining process to reduce industrial strife.²⁵ It culminated in the passage of the National Labor Relations Act (NLRA)²⁶ in 1935, in which Congress protected the basic right of labor to organize.²⁷

The idea of protecting labor rights on the international level began as a means to avoid the competitive disadvantages of unilateral regulation.²⁸ Early efforts to create international labor treaties generally failed

orthodoxy. The courts zealously protected the rights of property owners, while outlawing worker attempts to form unions, and striking down state attempts to set minimum standards for wages, health, and safety as illegal restraints on trade, or a taking of property. Ultimately, however, workers organized, muckrakers exposed the sweatshops, populist movements erupted, social reformers demanded change, and a Republican, Teddy Roosevelt, advised by enlightened corporate leaders, laid out a reform agenda that eventually led to the enactment of legal and regulatory protections for workers, consumers, and the environment.

Jonathan P. Hiatt & Deborah Greenfield, *The Importance of Core Labor Rights in World Development*, 26 *Mich. J. Int'l L.* 39, 39–40 (2004).

23. As Senator Wagner explained in support of the NLRA: “Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, [the worker] can attain freedom and dignity only by cooperation with others of his group.” 79 *Cong. Rec.* 7565.

24. See Leon H. Keyserling, *Wagner Act: Its Origin and Current Significance*, 29 *Geo. Wash. L. Rev.* 199, 218–20 (1960) (describing Senator Wagner’s argument for NLRA as based on economic and social grounds).

25. This policy concern is clearly articulated in the NLRA. See *infra* notes 26–27 and accompanying text. Congress explained:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151 (2006).

26. 29 U.S.C. §§ 151–169.

27. In the NLRA, Congress declared to be federally protected “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” *Id.* § 157. It also declared illegal certain employer acts that interfered with the exercise of these rights. *Id.* § 158. These unfair labor practices were to be monitored through judicial-type proceedings by a new administrative agency, the National Labor Relations Board. *Id.* §§ 153–156. The Supreme Court upheld the NLRA against a constitutional attack in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). For a detailed background on the history of U.S. labor law, see Gorman & Finkin, *supra* note 19, at 1–8.

28. See Steve Charnovitz, *Trade Law and Global Governance* 63 (2002) [hereinafter Charnovitz, *Trade Law*] (“Even as the first ‘factory acts’ to protect workers were being enacted in Europe during the early 19th century, a few visionaries began to recognise that foreign competition made it difficult for nations to regulate alone.”); Edward E. Potter, *The Growing Significance of International Labor Standards on the Global Economy*, 28

because national sovereigns disfavored agreements that would terminate their competitive labor advantages.²⁹ Eventually, concern over these incentives for substandard labor conditions and the resulting “race to the bottom,” as well as a more universal movement towards just labor standards,³⁰ resulted in the formation of an international consensus on minimum labor standards, the ILO.³¹ The ILO was born in 1919 out of the Treaty of Versailles that ended World War I, in which nations pledged to “endeavour to secure and maintain fair and humane conditions of labour.”³² In 1996, the WTO ministerial³³ reaffirmed the ILO’s

Suffolk Transnat’l L. Rev. 243, 244 (2005) [hereinafter Potter, Labor Standards] (“The idea of removing labor conditions as a factor in international competition is not a new idea. In the early 1800s it was advocated by two industrialists, Robert Owens of Wales and Daniel Legrand of France.”). Because increased labor standards—such as minimum wages and maximum working hours—result in increased costs of manufacturing, a nation acting alone to regulate labor would be concerned that it would be at a competitive disadvantage with respect to nations that did not regulate labor and could thus produce goods more cheaply. *Id.*

29. See Potter, Labor Standards, *supra* note 28, at 244 (“The concern that differing labor conditions could create a competitive advantage for one country’s goods and services over those of another was one of the main reasons the ILO was formed.”). Examples of such early efforts include a proposal by a British member of Parliament in 1833 and a congress convened by Otto von Bismarck in 1890 for the purpose of establishing multilateral conventions on labor. *Id.*

30. See Int’l Labour Org., About the ILO: Origins and History, at http://www.ilo.org/global/About_the_ILO/Origins_and_history/lang-en/index.htm (last visited Dec. 22, 2008) (on file with the *Columbia Law Review*) (quoting preamble to ILO Constitution to note that creation of ILO was reaction to “conditions of labour . . . involving . . . injustice hardship and privation” and fact that “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries”). The humane labor conditions to which the ILO Constitution refers are

the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures.

Constitution of the International Labour Organization pmbll., Oct. 9, 1946, 62 Stat. 3490, 3490, 15 U.N.T.S. 40, 40 [hereinafter Amended ILO Constitution].

31. See *infra* Part I.C (describing creation and development of the ILO).

32. Treaty of Versailles, June 28, 1919, 225 Consol. T.S. 188, 204.

33. The WTO Ministerial is “[t]he topmost decision-making body of the WTO . . . [and] has to meet at least every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements.” World Trade Org., Ministerial Conferences, at http://www.wto.org/english/thewto_e/minist_e/minist_e.htm (last visited Dec. 22, 2008) (on file with the *Columbia Law Review*).

central function as the international body to develop and promote labor rights.³⁴

B. *The Developing Linkage of Labor and Trade in U.S. Free Trade Agreements*

1. *Free Trade Agreements.* — Bilateral and regional free trade agreements (FTAs) seek to eliminate barriers, such as tariffs and quotas, on all trade between partner countries. In particular, they aim to “[l]ower[] intraregional trade barriers [in order to] expand[] trade among partner countries and encourage[] economies of scale of production together with intra and interindustry specialization.”³⁵ Such agreements distinguish themselves from multilateral forums that deal with international trade, such as the WTO, by their greater depth of reform coupled with fewer participants.³⁶ Scholars have debated whether FTAs benefit the world economy by furthering trade liberalization and strengthening trade relations, or whether they threaten efforts at globalization by diverting trade and investment to take advantage of the preferential trading regime they establish.³⁷

34. See *infra* note 146 (describing WTO’s statement at ministerial that propelled issue of labor rights back to ILO).

35. Jeffrey J. Schott, *Free Trade Agreements: Boon or Bane of the World Trading System?*, in *Free Trade Agreements: US Strategies and Priorities* 3, 11 (Jeffrey J. Schott ed., 2004) [hereinafter *US Strategies*].

36. See, e.g., Larry Crump, *Global Trade Policy Development in a Two-Track System*, 9 *J. Int’l Econ. L.* 487, 497–501 (2006) (discussing differences between bilateral and multilateral trade agreements); see also Schott, *supra* note 35, at 12 (“In general, FTAs are easier to conclude than WTO accords because they require agreement among a small number of ‘like-minded’ countries rather than among the larger and more diverse WTO membership.”). This factor will become more salient as this Note discusses the implications of the ILO and the Peru Agreement’s differing contexts. See *infra* Part II.C.

37. Larry Crump notes that multilateralists have three “primary concerns” regarding harmful effects of bilateral trade agreements. First, they “create distortions in the international economy through trade diversion” that “make the global economy less efficient and can harm countries that are not a party to the treaty.” Second, they increase transactions costs for business and government. Third, they “serve to unravel or undermine the multilateral system.” Crump, *supra* note 36, at 488; see also Richard N. Cooper, Comment, in *US Strategies*, *supra* note 35, at 20, 20–24 (expressing doubt that FTAs “make a positive contribution to overall human well-being” since they discriminate against one country over others, cause investment diversion, breed protectionism, and have not been proven to result in increased trade liberalization); Guy de Jonquières, Comment, in *US Strategies*, *supra* note 35, at 30, 31 (arguing that whether FTAs support multilateral trade liberalization is debatable); Renato Ruggiero, Comment, in *US Strategies*, *supra* note 35, at 25, 26 (arguing that FTAs should be exceptions to multilateral trade system and its foundational most favored nation principle); Schott, *supra* note 35, at 12 (noting advocates argue that FTAs “creat[e] and spur positive welfare gains . . . by stimulating growth in the FTA region”). For a detailed tabulation of the economic impact of U.S. FTAs, see Dean A. DeRosa & John P. Gilbert, Technical Appendix, *Quantitative Estimates of the Economic Impacts of US Bilateral Free Trade Agreements*, in *US Strategies*, *supra* note 35, at 383, 390–416.

Along with regulating trade, FTAs have begun to include other policy concerns,³⁸ mostly relating to the environmental and social effects of trade liberalization.³⁹ These policy issues are linked to trade agreements for a variety of reasons, including to make one or both of the economic and social policies more effective,⁴⁰ to “offset spillovers resulting from a policy change,” “to build coalitions necessary to get either or both policies adopted,” and to consolidate multiple negotiations that would have been necessary absent linkage.⁴¹ The remaining sections will discuss U.S. efforts to link labor rights and trade in FTAs, beginning with NAFTA.

2. *NAFTA*. — NAFTA was the first FTA that had a significant link to workers’ rights.⁴² It signaled a break from the unwritten rule under WTO negotiations that labor standards would not be part of global trade talks.⁴³ The NAFTA agreement negotiated by President George H.W.

38. For examples of FTAs including such policy concerns see, e.g., Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, art. 5, Oct. 24, 2005, 41 I.L.M. 63, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf (on file with the *Columbia Law Review*) [hereinafter Jordan FTA] (providing environmental regulations in U.S.-Jordan Free Trade Agreement); North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 3, Sept. 14, 1993, 32 I.L.M. 1480, available at http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=english (on file with the *Columbia Law Review*) [hereinafter NAAEC] (containing environmental side agreement to NAFTA).

39. See, e.g., Rangel, *supra* note 3, at 383 (noting that “international trade, and globalization more generally, may contribute to growing income inequality and real income stagnation in the US, with estimates generally ranging from somewhere between 12% and 33% of the total growth in income inequality”); *id.* at 394 (noting that without inclusion of labor rights in FTAs with developing countries, U.S. workers would have to compete with “workers whose rights are suppressed”); *id.* at 397 (noting “the nascent recognition that to prevent environmental abuse as a means to gain an advantage in international trade, development of international environmental standards may be needed”).

40. The social policies could be made more effective by linking them to trade agreements because the trade agreements provide a clear economic incentive for compliance, whereas social goals such as environmental and labor protections may present only indirect economic incentives. Cf. Charnovitz, *Trade Law*, *supra* note 28, at 17–19 (describing linkage of trade policy and social policy as means of enhancing effectiveness of both).

41. See *id.* at 19–23 (describing reasons for, and critiques of, linkage in free trade agreements).

42. Mary Jane Bolle, Cong. Research Serv., Trade Promotion Authority (TPA)/Fast-Track Renewal: Labor Issues 5 (2007), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1027&context=crs> (on file with the *Columbia Law Review*).

43. Thomas J. Manley & Luis Laurodo, International Labor Standards in Free Trade Agreements of the Americas, 18 *Emory Int’l L. Rev.* 85, 86 (2004) (“It has always been the rule under the [GATT]—and its successor, the [WTO]—that labor standards are ‘not on the agenda’ for global trade talks. The long standing taboo on linking trade and labor issues was broken, however, in the labor side letter to [NAFTA].” (footnote omitted)); see also Jack I. Garvey, *Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 *Am. J. Int’l L.* 439, 439–40 (1995) [hereinafter Garvey, *Trade Law*] (discussing GATT’s lack of mechanism to introduce social interests at negotiations).

Bush lacked a labor chapter. However, the effect of free trade on jobs and labor rights became an important campaign issue in the 1992 presidential race,⁴⁴ spurring presidential candidate Bill Clinton to promise to negotiate a labor side agreement with Mexico and Canada that would establish certain requirements regarding enforcement of labor rights.⁴⁵ The resulting agreement, the North American Agreement on Labor Cooperation (NAALC), was integral to winning support for NAFTA from the Democratic base.⁴⁶

However, Mexico and Canada opposed negotiating a labor side agreement that seemed independent from and arguably antithetical to the development of free trade.⁴⁷ Their opposition resulted in a relatively weak agreement.⁴⁸ NAALC's structure underscores the Parties' strong concern for maintaining national sovereignty and limiting external influence on domestic labor legislation.⁴⁹ For example, its core obligations involve the effective enforcement of domestic labor law and certain domestic procedural guarantees that promote private actions.⁵⁰

Scholars have criticized NAALC's emphasis on domestic law and lack of supranational labor standards.⁵¹ NAALC does not obligate the parties

44. This is exemplified by Ross Perot's invocation of the "great big sucking sound" that would result from NAFTA's ratification and the movement of jobs south. Marley S. Weiss, *Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. Rev. 689, 702 (2003); see also Garvey, *Trade Law*, supra note 43, at 440 (discussing Ross Perot's and other NAFTA opponents' stirring of public opposition).

45. Governor Bill Clinton, Remarks at the Student Center at North Carolina State University (Oct. 4, 1992), available in LEXIS, Federal News Service (on file with the *Columbia Law Review*).

46. Kate E. Andrias, *Gender, Work, and the NAFTA Labor Side Agreement*, 37 U.S.F. L. Rev. 521, 538–39 (2003) (noting that President Clinton's effort to balance "social concerns of his Democratic base with the market-opening policies of his economic advisers" led to side agreement negotiations).

47. Weiss, supra note 44, at 702.

48. *Id.*

49. See *id.* at 703–04 ("Throughout the negotiation[s] . . . Canada, Mexico, and the United States all evinced great concern that every aspect of the agreements maximize preservation of national sovereignty . . . [T]his unifying concern is evident in both the structural arrangements and the substantive commitments of both NAFTA and the NAALC." (footnotes omitted)).

50. The Parties must "effectively enforce [their] labor law[s]" and provide domestic private rights of action. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., arts. 3–4, Sept. 14, 1993, 32 I.L.M. 1499, 1503–04 (1993) [hereinafter NAALC]. Adjudicative proceedings must be "fair, equitable, and transparent," and private complainants must be afforded a number of due process rights, including the right to present evidence, to receive reasoned and written decisions along with adequate remedies, and to be afforded a process of review. *Id.* art. 5, 32 I.L.M. at 1504.

51. See, e.g., Jack I. Garvey, *A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*, 5 UCLA J. Int'l L. & Foreign Aff. 1, 19–20 (2000) (discussing NAFTA's lack of supranational labor standards and exploring feasibility of incorporating such standards within NAFTA); Clyde Summers, *NAFTA's Labor Side Agreement and International Labor Standards*, 3 J. Small & Emerging Bus. L. 173, 179 (1999) ("Limiting the obligation of each country to

to adopt any new standards or to conform to internationally recognized labor rights. While NAALC does establish a set of eleven principles covering a broad and ambitious range of labor rights,⁵² they merely serve as guideposts to the Parties' labor obligations rather than enforceable obligations. Limiting language expressly precludes their role in providing substantive standards that the Parties must uphold. In particular, while the Parties are "committed to promoting" the eleven principles, NAALC only requires enforcement of each state's domestic law relating to each principle.⁵³ Furthermore, NAALC emphasizes that the principles only "indicate broad areas of concern" and "do not establish common minimum standards for the [] [Parties'] domestic law."⁵⁴

Scholars have also criticized NAALC's enforcement mechanism for its dependence on political and diplomatic negotiation rather than adjudication.⁵⁵ When a party state or a public entity alleges that one of the Parties has breached their obligation to effectively enforce domestic labor law or provide a fair and transparent labor law system,⁵⁶ it can initiate NAALC's enforcement mechanism.⁵⁷ This mechanism is divided into three stages: consultation, evaluation, and dispute resolution.⁵⁸ The

observing and enforcing its own laws seriously undercuts the significance of the submission process in developing or enforcing labor standards."); Weiss, *supra* note 44, at 726–27 ("Overemphasis on domestic labor law as the benchmark undercuts pressure for upward harmonization, whether to a newly-created, mutual standard, or to one incorporated from the ILO, or another source of . . . international labor rights." (internal quotation marks omitted)).

52. These principles are: (1) freedom of association and protection of the right to organize, (2) the right to bargain collectively, (3) the right to strike, (4) prohibition of forced labor, (5) labor protections for children and young persons, (6) minimum employment standards with regard to wages, (7) elimination of employment discrimination, (8) equal pay for men and women, (9) prevention of occupational injuries and illnesses, (10) compensation in cases of occupational injuries and illnesses, (11) protection of migrant workers. NAALC, *supra* note 50, annex 1, 32 I.L.M. at 1515–16.

53. The commitment to promoting the principles is "subject to each Party's domestic law." *Id.*

54. *Id.*

55. See Garvey, Trade Law, *supra* note 43, at 442–43 ("[T]he attribute evoking perhaps the greatest skepticism concerning enforcement is the repeated provision, at virtually every stage in the dispute resolution process, that the complained-against government can exercise significant control over the process by engaging political modalities of negotiation and conciliation well before any sanction is possible.").

56. These obligations are elaborated in NAALC, *supra* note 50, arts. 3–5, 32 I.L.M. at 1503–04.

57. NAALC's enforcement mechanism is described in Weiss, *supra* note 44, at 710–11. Each party is required to set up a mechanism for the receipt of "public communications on labor law matters arising in the territory of another Party." NAALC, *supra* note 50, art. 16(3), 32 I.L.M. at 1507. The initiation of NAALC enforcement proceedings has depended on this mechanism for public communications because no government has submitted a complaint. Weiss, *supra* note 44, at 730 ("While the process can, in theory, be initiated by any of the three governments, in practice it has been driven entirely by submissions initiated by private actors.").

58. See NAALC, *supra* note 50, arts. 22–29, 32 I.L.M. at 1508–10; see also Weiss, *supra* note 44, at 730 (describing three stages of enforcement proceedings).

consultation stage begins when the National Administrative Office (NAO) of a Party⁵⁹ has accepted a public submission,⁶⁰ or a government has initiated proceedings and requests consultation with the NAO of the allegedly breaching Party. If the NAOs cannot settle the case, they will send it to ministerial consultations.⁶¹

If ministerial consultations do not resolve the issue, either Party can initiate the evaluation stage by requesting the establishment of an Evaluation Committee of Experts (ECE) to investigate alleged violations in a nonadversarial manner⁶² and to publish a report with conclusions regarding the Party's performance and recommendations of remedial steps.⁶³ However, claims regarding freedom of association, collective bargaining, and the right to strike cannot give rise to this stage of the enforcement process; even a claim that is covered must allege systemic failure with significant effects on trade.⁶⁴ Accordingly, scholars criticized NAALC for its absence of sanctions for violations of a number of labor rights.⁶⁵

Once the ECE report is complete, if the Parties still cannot settle the issue, then the complaining Party can initiate dispute resolution—the final stage of NAALC's enforcement mechanism.⁶⁶ Only claims involving ineffective enforcement of three of the eleven labor law areas—occupational health and safety, minimum wage, and child labor—can give rise to dispute resolution.⁶⁷ Such application of different degrees of enforcement for different classes has attracted much criticism.⁶⁸

An arbitral decision can eventually result in a monetary enforcement assessment, which is to be used to improve the breaching Party's labor

59. NAALC requires each Party to establish a National Administrative Office to serve as the contact point for other Parties, to provide information to the public, and to receive and evaluate public submissions. NAALC, *supra* note 50, arts. 15–16, 32 I.L.M. at 1507.

60. The process by which the NAO reviews public submissions is established by each Party state. *Id.* art. 16(3), 32 I.L.M. at 1507. The U.S. NAO's submission procedures are outlined in Notice of Renaming of the National Administrative Office as the Office of Trade Agreement Implementation and Designation of That Office as the Contact Point for Labor Provisions of Free Trade Agreements, §§ F–G, 69 Fed. Reg. 77,129, 77,130 (2004).

61. NAALC, *supra* note 50, art. 22, 32 I.L.M. at 1508. The Ministerial Council consists of each Party's labor minister. Since the Council is higher up the hierarchy than the NAO, it may have a greater ability to resolve disputes. See Weiss, *supra* note 44, at 705 (describing NAALC ministerial council).

62. NAALC, *supra* note 50, art. 23, 32 I.L.M. at 1508.

63. *Id.* art. 25, 32 I.L.M. at 1508–09.

64. *Id.* arts. 23(2), 49(1), 32 I.L.M. at 1508, 1513–14.

65. See, e.g., Roy J. Adams & Parbudyal Singh, *Early Experience with NAFTA's Labour Side Accord*, 18 *Comp. Lab. L.J.* 161, 162 (1997) (“[T]he fact that violating the right to organize and the right to bargain collectively can be done with impunity under the agreement, [causes] the labour side deal [to] appear farcical in intent and destructive in outcome.” (internal quotation marks omitted)).

66. NAALC, *supra* note 50, art. 28, 32 I.L.M. at 1509.

67. *Id.* art. 29, 32 I.L.M. at 1509–10.

68. See *supra* note 65 (describing criticism of lack of sanctions that results from limitations on enforcement mechanism).

enforcement system.⁶⁹ If the Party fails to pay the assessment, then any complaining Party can institute trade sanctions to the extent necessary to cover its value.⁷⁰ Critics have noted that missing in this enforcement process is an application of the same standards of due process and transparency that NAALC applies to domestic processes.⁷¹

Many scholars and labor rights activists have criticized NAALC for failing to provide any real protection of labor rights. As a result of NAALC's flaws, critics have argued that it has had little success in protecting against violations of labor rights.⁷² As NAALC has provided the foundation for future labor agreements in U.S. FTAs,⁷³ many of the concerns expressed regarding NAALC remain salient throughout the development of the United States's experiment in linkage.

3. *The U.S.-Jordan Free Trade Agreement.* — The Jordan FTA was signed on October 24, 2000.⁷⁴ In response to critiques of the NAALC,⁷⁵ the Jordan FTA contained labor provisions that were broader than NAALC's in four important respects.⁷⁶ First, the labor provisions are incorporated in the body of the Jordan FTA,⁷⁷ as opposed to the placement of NAALC in an annex to NAFTA, thus giving the provisions more symbolic prominence. Second, the parties reaffirmed their obligations as members of the ILO, and the Jordan FTA commits the parties to "strive to ensure" that domestic law protects certain internationally recognized labor principles and rights.⁷⁸ This reaffirmation incorporates international labor

69. NAALC, *supra* note 50, art. 39(4)(b), (5)(b), 32 I.L.M. at 1511–12; see also *id.* annex 39, 32 I.L.M. at 1516 (explaining calculation of monetary enforcement assessment).

70. *Id.* art. 41, 32 I.L.M. at 1512–13.

71. See, e.g., Weiss, *supra* note 44, at 699 ("It would be most apt to say that the NAALC fails to meet its own articulated standards regarding domestic labor law: of transparency, access for private actors to appropriate tribunals to redress violations, due process, and effective enforcement." (footnotes omitted)).

72. See Alston, Transformation, *supra* note 16, at 501–02 (describing reports that recount NAALC's failures); Marisa Anne Pagnattaro, The "Helping Hand" in Trade Agreements: An Analysis of and Proposals for Labor Provisions in U.S. Free Trade Agreements, 16 Fla. J. Int'l L. 845, 877–78 (2004) [hereinafter Pagnattaro, Helping Hand] (describing persistence of inadequate enforcement of labor rights in Mexico and describing NAALC as "more window dressing than real protection for workers").

73. Weiss, *supra* note 44, at 689–90 ("Subsequently concluded free trade agreements . . . with Jordan, Chile, and Singapore, draw upon the NAFTA/NAALC model of trade-labor rights linkage . . .").

74. Office of the U.S. Trade Representative, Jordan FTA, at http://ustr.gov/Trade_Agreements/Bilateral/Jordan/Section_Index.html (last visited Feb. 12, 2009) (on file with the *Columbia Law Review*).

75. Weiss, *supra* note 44, at 717 (arguing that several provisions of Jordan FTA—including its "incorporation of international labor rights standards, . . . recognition that a Party should not use relaxation of its labor laws to attract foreign trade, and . . . prohibition on derogating from . . . labor laws as a means of increasing trade"—were "intended to serve as a response to widespread criticism of the NAALC").

76. For an in-depth treatment of the Jordan FTA's changes, see *id.* at 713–18.

77. Jordan FTA, *supra* note 38, art. 6, 41 I.L.M. at 70–71.

78. *Id.* art. 6(1), 41 I.L.M. at 70.

norms, while NAALC focused only on domestic labor law.⁷⁹ Third, the labor provisions include a clause providing that “it is inappropriate to encourage trade by relaxing domestic labor laws,” and a promise that the parties “shall strive to ensure that [they] do[] not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party.”⁸⁰ These provisions also create new obligations beyond domestic labor law, as opposed to NAALC’s sole focus on domestic labor laws.⁸¹ Fourth, unlike NAALC’s multitiered and limited enforcement mechanism,⁸² the Jordan FTA’s labor provisions are enforced under the same mechanism as are all other obligations in the FTA. As such, unresolved violations can lead to the parties’ institution of any “appropriate and commensurate measure,” including trade sanctions.⁸³

Though the Jordan FTA contains more expansive requirements than do some of NAALC’s provisions, certain deficiencies have nevertheless led critics to consider it regressive and ineffective.⁸⁴ The Jordan FTA’s enforcement of labor provisions through the same mechanism that applies to its commercial obligations may in fact result in a weaker enforcement process than NAALC’s. For example, its lack of a process for public submissions or the provision of public reports, and the absence of any separate FTA institution to conduct investigations, will likely preclude any issues from reaching the arbitral stage, let alone result in the imposition of sanctions.⁸⁵ Further regressing from NAALC’s obligations, the Jordan FTA does not require the Parties to provide domestic procedural rights.⁸⁶ There is no obligation to provide private complainants with access to tribunals or a fair and transparent system of redress that complies with due process.⁸⁷

Additional shortfalls in the Jordan FTA raise doubts as to whether it improves upon NAALC. While NAALC established eleven labor principles, the Jordan FTA includes only five.⁸⁸ Like NAALC, the Jordan FTA

79. See *supra* notes 49–52 and accompanying text (describing NAALC’s focus on domestic labor law).

80. Jordan FTA, *supra* note 38, art. 6(2), 41 I.L.M. at 70.

81. See *supra* notes 49–52 and accompanying text (discussing fact that NAALC’s obligations relate only to domestic law).

82. See *supra* notes 53–70 and accompanying text.

83. Jordan FTA, *supra* note 38, arts. 16–17, 41 I.L.M. at 76–78.

84. See, e.g., Weiss, *supra* note 44, at 752 (arguing that “the U.S.-Jordan FTA enforcement and dispute provisions may move more backwards than forwards [and] are much like a truncated NAALC system”).

85. See *id.* at 753 (“Given that no country has yet openly initiated a consultations proceeding under the NAALC without the impetus of a public submission, this lack [in the Jordan FTA] of structured opportunity for public input and an established procedure for investigating cases is a serious flaw . . .”).

86. *Id.* at 714–15.

87. See *id.*; cf. NAALC, *supra* note 50, arts. 4–6, 32 I.L.M. at 1503–04 (outlining domestic procedural requirements).

88. These include:

defines the domestic labor law that the Parties are required to enforce as those laws that relate to the five principles,⁸⁹ significantly narrowing the scope of substantive labor rights covered by its obligations. Though the Jordan FTA's incorporation of the Parties' obligations under the ILO Declaration⁹⁰ seems like an improvement over NAALC's lack of supranational standards, NAALC's failure to refer to international rights "may be because a country's legislation already facially incorporates a level of labor rights which is 'higher.'"⁹¹ Furthermore, the international rights⁹² recognized by the Jordan FTA serve only to identify domestic labor laws subject to the Jordan FTA rather than incorporating international rights.⁹³

Although many viewed the Jordan FTA's labor provisions as the gold standard in linkage,⁹⁴ the issues highlighted above provided substantial grounds for concern that these provisions will fail to adequately protect labor rights.

4. *The Central American Free Trade Agreement.* — The United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua signed CAFTA-DR⁹⁵ in August 2004. All parties have rati-

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

Jordan FTA, *supra* note 38, art. 6(6), 41 I.L.M. at 71. The Jordan FTA does not explicitly refer to the right to strike, the elimination of employment discrimination on the basis of race, sex, age, or religion, equal pay for men and women, compensation for occupational injuries, or the protection of migrant workers, in contrast to the provisions in NAALC. Compare *id.*, with NAALC, *supra* note 50, annex 1, 32 I.L.M. at 1515.

89. Jordan FTA, *supra* note 38, art. 6(6), 41 I.L.M. at 71.

90. *Id.* art. 6(1), 41 I.L.M. at 70; see also *infra* Part II.C.1 (describing obligations under ILO Declaration).

91. Weiss, *supra* note 44, at 716–17.

92. Jordan FTA, *supra* note 38, art. 6(6), 41 I.L.M. at 71 (listing international labor rights that define category of domestic labor laws that Jordan FTA requires Parties to enforce).

93. The Jordan FTA provides that [f]or purposes of [the article on labor], 'labor laws' means statutes and regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor; (d) a minimum age for the employment of children; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

Id., 41 I.L.M. at 71.

94. See, e.g., Pagnatarro, *Helping Hand*, *supra* note 72, at 878 ("[T]he Jordan FTA is considered the high-water mark for labor provisions in a trade agreement."); Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 U.C. Davis J. Int'l L. & Pol'y 13, 18–19 (2003) ("The U.S.-Jordan FTA . . . is generally considered to have the most rigorous labor provisions of any trade agreement . . .").

95. Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004, available at http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-

fied CAFTA-DR. Implementing legislation for CAFTA-DR passed the U.S. Senate in June 2005,⁹⁶ the House of Representatives in July 2005,⁹⁷ and was signed by the President in August 2005.⁹⁸

CAFTA-DR's labor provisions reflect both improvements and regressions from the Jordan FTA. Unlike the Jordan FTA, CAFTA-DR's labor chapter includes obligations to provide domestic procedural protections and due process.⁹⁹ Furthermore, CAFTA-DR establishes a Labor Cooperation and Capacity Building Mechanism meant "to strengthen each Party's institutional capacity to fulfill the common goals of the Agreement."¹⁰⁰ The Mechanism requires the Parties to establish contact points that will meet to develop capacity-building activities, exchange information on labor practices, and seek support from international organizations.¹⁰¹ This "[m]echanism may initiate bilateral or regional cooperative activities on labor issues."¹⁰²

In contrast to these expanded labor protections, CAFTA-DR narrows the range of obligations that are enforceable under its dispute resolution mechanism. While the Jordan FTA's enforcement procedures apply to all aspects of its labor provisions¹⁰³—even to the vague obligation to "strive to ensure" that domestic law protects certain international rights¹⁰⁴—CAFTA-DR's dispute resolution mechanism applies only to the obligation to enforce domestic labor law.¹⁰⁵ Like NAALC, there is no enforceable obligation to conform to international labor rights.¹⁰⁶

DR_Final_Texts/Section_Index.html (on file with the *Columbia Law Review*) [hereinafter CAFTA-DR].

96. Press Release, Office of the U.S. Trade Representative, Statement of USTR Rob Portman Regarding Senate Passage of CAFTA-DR and House Ways and Means Approval, (June 30, 2005), available at http://www.ustr.gov/Document_Library/Press_Releases/2005/June/Statement_of_USTR_Rob_Portman_regarding_Senate_passage_of_CAFTA-DR_House_Ways_Means_Approval.html (on file with the *Columbia Law Review*).

97. Press Release, Office of the U.S. Trade Representative, Statement of USTR Rob Portman on House Passage of CAFTA-DR (July 27, 2005), available at http://www.ustr.gov/Document_Library/Press_Releases/2005/July/Statement_of_USTR_Rob_Portman_On_House_Passage_of_CAFTA-DR.html (on file with the *Columbia Law Review*).

98. Press Release, Office of the U.S. Trade Representative, Statement of USTR Rob Portman on Signing of U.S.-Central American-Dominican Republic Free Trade Agreement (Aug. 2, 2005), at http://www.ustr.gov/Document_Library/Press_Releases/2005/August/Statement_of_USTR_Rob_Portman_on_Signing_of_US-Central_American-Dominican_Republic_Free_Trade_Agreement.html (on file with the *Columbia Law Review*).

99. These include, among others, access to impartial and independent tribunals, "fair, equitable, and transparent" procedures, and a right of review. CAFTA-DR, *supra* note 95, art. 16.3.

100. *Id.* art. 16.5(2).

101. *Id.* art. 16, annex 16.5.

102. *Id.*

103. See *supra* note 83 and accompanying text (describing applicability of Jordan FTA's enforcement procedures).

104. Jordan FTA, *supra* note 38, art. 6(1), 41 I.L.M. at 70.

105. CAFTA-DR, *supra* note 95, arts. 16.6(7), 16.2(1)(a).

106. See Marianne Hogan, DR-CAFTA Prescribes a Poison Pill: Remediating the Inadequacies of Dominican Republic-Central American Free Trade Agreement Labor

Additionally, the remedies available for violations of CAFTA-DR's labor provisions¹⁰⁷ are significantly more limited than both the remedies available for violation of its commercial obligations¹⁰⁸ and the remedies provided in the Jordan FTA.¹⁰⁹ Sanctions are not available to remedy violations of CAFTA-DR's requirement to enforce domestic labor law.¹¹⁰ Only an assessment capped at \$15 million can be imposed, and this fine is paid into an escrow account used to promote labor initiatives.¹¹¹ To determine the amount of the fine, CAFTA-DR instructs the panel to consider a number of factors beyond the amount of harm caused by the violation,¹¹² while the panel has no corresponding limitation when determining the amount of sanctions for commercial violations.¹¹³ These additional factors have attracted criticism for limiting the panel's inquiry into the appropriate amount of a fine.¹¹⁴

These and other deficiencies in CAFTA-DR's labor chapter—particularly its failure to require adoption of international labor rights—have led

Provisions, 39 *Suffolk U. L. Rev.* 511, 528 (2006) (stating that CAFTA-DR “fails to require compliance with even the most fundamental of internationally recognized labor norms”); Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 *Fordham Int'l L.J.* 386, 437 (2006) [hereinafter Pagnattaro, CAFTA] (“Failure to comply with internationally recognized labor standards is not actionable.”); Brandie Ballard Wade, *CAFTA-DR Labor Provisions: Why They Fail Workers and Provide Dangerous Precedent for the FTAA*, 13 *Law & Bus. Rev. Am.* 645, 658 (2007) (“CAFTA-DR's labor chapter fails to require that the national labor legislation of the parties uphold the ILO principles and fully protect the rights of workers.”).

107. Remedies available for violations of the labor provisions are elaborated in CAFTA-DR, *supra* note 95, art. 20.17.

108. For an elaboration of available remedies for violation of commercial obligations see *id.* art. 20.16.

109. The remedies for labor violations under the Jordan FTA are elaborated in *Jordan FTA*, *supra* note 38, arts. 16–17, 41 I.L.M. at 76–78.

110. Compare CAFTA-DR, *supra* note 95, art. 20.17(2)–(4) (providing monetary penalty as remedy for violation of labor obligations), with *id.* art. 20.16(2) (providing for availability of sanctions when Parties fail to agree on compensation for violation of commercial obligation), and *Jordan FTA*, *supra* note 38, arts. 16–17, 41 I.L.M. at 76–78 (permitting institution of any “appropriate and commensurate measure” to remedy violations of labor obligations).

111. CAFTA-DR, *supra* note 95, art. 20.17(2) (limiting monetary penalty to maximum of \$15 million (as adjusted with inflation)). For a critique of the cap on monetary sanctions, see Pagnattaro, CAFTA, *supra* note 106, at 437 (“The cap on the assessments may not be sufficient to deter violations, especially as the volume of trade increases—fifteen million U.S. dollars will likely be a minimal sum compared to the competitive advantage to be gained by violating labor laws.”).

112. The factors include: (1) the violation's effect on trade; (2) the pervasiveness and duration of the violation; (3) the reason for the violation; (4) the level of the enforcement that could be reasonably expected; (5) effort to remedy the violation; and other relevant factors. CAFTA-DR, *supra* note 95, art. 20.17(2).

113. *Id.* art. 20.16(2) (providing that trade sanctions can be imposed that are equivalent to effect of violation).

114. For a critique of the effect of these factors, see Pagnattaro, CAFTA, *supra* note 106, at 438 (“[T]he ‘factors’ to be considered by the dispute resolution panel inherently circumscribe the extent of the assessment . . .”).

critics to argue that it will fail to promote labor rights in the Central American party states.¹¹⁵

C. *The International Labor Organization and the Development of the 1998 Declaration*

As the Peru Agreement's key point of departure from previous FTAs is its incorporation of the 1998 ILO Declaration,¹¹⁶ an analysis of the Peru Agreement must engage the ILO's goals and institutional nature, its process of developing international labor standards and monitoring their implementation, and the creation and role of the ILO Declaration. Such an investigation suggests that the United States can and should effectively utilize the ILO in its efforts to link labor rights and free trade agreements.

The ILO was created in 1919 with the goals of developing, promoting, and protecting international labor rights on the fundamental principle that "universal and lasting peace can be established only if it is based upon social justice."¹¹⁷ The Organization was founded with three functional principles: (1) universal membership and acceptance of labor standards adopted by the Organization (universality); (2) lawmaking that was sufficiently flexible to account for socioeconomic and geographic differences among member states (flexibility); and (3) centralization of monitoring and a system of information gathering and distribution (centralization).¹¹⁸

To address these principles, the ILO developed a system of international labor conventions¹¹⁹ that each provide detailed minimum labor standards in the particular area on which they focus.¹²⁰ This system of

115. See Labor Advisory Comm. for Trade Negotiations and Trade Policy, *The U.S.-Central America Free Trade Agreement 6-10* (2004), available at http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/CAFTA_Reports/asset_upload_file63_5935.pdf (on file with the *Columbia Law Review*) (arguing that CAFTA-DR's failure to obligate conformance with international standards "will encourage rampant workers' rights violations to continue").

116. See *infra* note 156 and accompanying text (describing Peru FTA's key addition of obligation to uphold principles in ILO Declaration).

117. Amended ILO Constitution, *supra* note 30, pmbll., 62 Stat. at 3490, 15 U.N.T.S. at 40. For a detailed discussion of the ILO's history and structure prior to the development of the ILO Declaration, see Ignacio A. Donoso Rubio, *Economic Limits on International Regulation: A Case Study of ILO Standard-Setting*, 24 *Queen's L.J.* 189, 193-207 (1998); Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 *Vand. L. Rev.* 649, 671-708 (2006).

118. See Helfer, *supra* note 117, at 679 (describing three "broad functional objectives" of universality, flexibility, and centralization that motivated the ILO's founders).

119. When a country ratifies a particular convention it is bound to "take such action as may be necessary to make effective the provisions of such Convention." Amended ILO Constitution, *supra* note 30, art. 19(5)(d), 62 Stat. at 3522, 15 U.N.T.S. at 72.

120. See Donoso Rubio, *supra* note 117, at 195 ("The central means chosen for achieving ILO objectives was the development of a system of international labour conventions representing minimum standards uniformly applicable to all member

over 180 conventions¹²¹ balances two goals: mitigating the harm to a country's economic competitiveness that would result from unilaterally improving labor standards¹²² and respecting state sovereignty by requiring that each party ratify a particular convention before it applies.¹²³

The design of the ILO's standard-setting mechanism balances concerns of uniformity and flexibility to better advance its goal of universal applicability and acceptance. The ILO conventions are developed by the ILO's tripartite International Labor Conference (ILC), consisting of government, labor, and employer representatives.¹²⁴ The ILO prohibits states from ratifying ILO conventions with reservations,¹²⁵ as they would undermine the goal of uniformity, subvert the ILC's tripartite balance,

states.”). The conventions can be found at Int'l Labour Org., ILOLEX: Database of International Labour Standards, available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited March 6, 2009) (on file with the *Columbia Law Review*).

121. According to the ILO, as of June 2007, 188 conventions were adopted, covering subjects such as “freedom of association and collective bargaining, equality of treatment and opportunity, abolition of forced and child labour, employment promotion and vocational training, social security, conditions of work, labour administration and labour inspection, prevention of work-related accidents, maternity protection, and the protection of migrants.” Int'l Labour Org., About the ILO, Labour Standards, at http://www.ilo.org/global/About_the_ILO/Mainpillars/Theightsatwork/Labour_Standards/lang-en/index.htm. (last visited March 6, 2009) (on file with the *Columbia Law Review*).

122. See *supra* notes 28–29 and accompanying text (describing competitive disadvantages resulting from unilateral implementation of labor rights).

123. Amended ILO Constitution, *supra* note 30, art. 19(5), 62 Stat. at 3520–24, 15 U.N.T.S. at 70–72 (describing ratification process). Professor J.F. McMahon describes this accommodation of sovereignty by the ILO legislative process as

a compromise . . . between endowing the [ILO's legislative body] with powers of merely an advisory character and giving it supra-national authority. The obligation incumbent on governments [under Article 19(5)] to lay before their national parliaments for consideration such instruments as were adopted by [the ILO] still left the parliaments free to . . . reject or implement the conventions or recommendations.

J.F. McMahon, *The Legislative Techniques of the International Labour Organization*, 41 *Brit. Y.B. Int'l L.* 1, 3 (1968). But, McMahon continues, “it was expected that pressure of public opinion, together with the pressure exerted by the labour movement within the various countries, would constitute two cogent factors in favour of implementation and compliance.” *Id.*

124. Int'l Labour Org., ILO at a Glance 3–5 (2007), available at http://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—webdev/documents/publication/wcms_082367.pdf (on file with the *Columbia Law Review*).

125. A reservation is a state's explicit statement, upon acceptance of a treaty, that it will not be bound (or will be bound only to some particular extent) by one or more of the treaty's provisions. For an example of a reservation by the United States with respect to another international convention, see Elizabeth A. Wilson, *Is Torture All in a Day's Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 *Rutgers J.L. & Pub. Pol'y* 175, 235 n.189 (2008) (describing U.S. reservation to Convention Against Torture that interprets treaty's reference to “cruel and inhuman” treatment as meaning “cruel and inhuman” in sense of Eighth Amendment).

and weaken protections against a race to the bottom.¹²⁶ However, the ILO Constitution does provide for flexibility by instructing the ILC to account and provide for local conditions, such as “climatic conditions” or “the imperfect development of industrial organization,” in the ILO conventions.¹²⁷ After a state ratifies a particular ILO convention, it must submit reports to the ILO on compliance with that convention.¹²⁸ Thus, unlike the broad international labor rights incorporated in U.S. FTAs, such as the Jordan FTA and CAFTA-DR, which rely on the parties’ domestic law for substance,¹²⁹ the ILO conventions provide specific detailed labor rights that apply to a party upon ratification. While this specificity may seem to be a better approach, problems with the ILO’s enforcement power and with increasing nonratification of ILO conventions, as discussed below, create obstacles to implementation of the ILO conventions’ standards.¹³⁰

The ILO has two general mechanisms of enforcement: a supervisory system that enhances transparency and encourages compliance through information distribution,¹³¹ and a complaint process with the potential to result in sanctions against noncomplying states.¹³² While the supervisory

126. See Helfer, *supra* note 117, at 686 (“[The ILO] successfully resisted attempts by member states to file reservations to the treaties after they had been adopted . . . justif[ying] this position . . . on the ground that reservations were inconsistent with the ILO’s tripartite structure and with its objective of . . . prevent[ing] states from entering a race to the bottom . . .”).

127. See Amended ILO Constitution, *supra* note 30, art. 19(3), 62 Stat. at 3520, 15 U.N.T.S. at 68–70 (instructing ILC, when framing conventions, to have “due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different and [to] suggest the modifications, if any, which it considers may be required to meet the case of such countries”).

128. *Id.* art. 22, 62 Stat. at 3532, 15 U.N.T.S. at 82. The ILO Constitution also provides the ILO with a mechanism to request reports from states regarding the extent of compliance with unratified conventions. *Id.* art. 19(5)(e), 62 Stat. at 3522–24, 15 U.N.T.S. at 72.

129. See *supra* notes 92–93, 105–106 and accompanying text (describing role of international labor rights in Jordan FTA and CAFTA-DR as defining category of domestic labor law that Parties are obligated to enforce).

130. See *infra* notes 131–136 and accompanying text (describing problems regarding limited use of ILO’s enforcement mechanism); *infra* notes 137–145 (describing problems regarding proliferation and nonratification of conventions).

131. Elliot and Freeman describe how the ILO’s supervisory mechanism works and explain that its purpose is “to direct a spotlight on labor standards and improve compliance.” Kimberly Ann Elliot & Richard B. Freeman, *Can Labor Standards Improve Under Globalization?* 96–100 (2003).

132. Any association of workers or employers can file a complaint alleging a member state’s noncompliance with a ratified convention. If informal consultations fail to resolve the issue, an ILO delegate can file a complaint, upon which the ILO Governing Body will try to resolve the issue informally or, if this fails, will appoint a Commission of Inquiry to suggest compliance measures. The target state may appeal the commission’s findings to the International Court of Justice (ICJ). If the findings stand, the ILO will request that the state report on its implementation of the Commission’s recommendation. If there is no satisfactory resolution, the Governing Body may recommend that the ILC institute any

mechanism has successfully generated information and promoted compliance,¹³³ the complaint system has remained relatively dormant, with an average of only six complaints per decade.¹³⁴ Furthermore, the complaint system culminated in sanctions only once.¹³⁵ Critics have argued that the ILO's reliance on the "soft" enforcement mechanisms of information distribution and "shaming" does not provide adequate protection of labor rights.¹³⁶

The proliferation of ILO conventions has also attracted criticism. Because there had been no explicit ranking of ILO conventions, all were of theoretically equal importance, regardless of whether they involved highly technical standards or fundamentally important rights.¹³⁷ This absence of distinction undermined the importance of ILO conventions that ILO officials viewed as critical to an adequate labor rights regime.¹³⁸ Furthermore, the growing number of ILO conventions burdened the ILO's supervisory mechanism—as each ratified ILO convention required reporting¹³⁹—and forced the ILO to reduce reporting requirements.¹⁴⁰

appropriate measures—including economic sanctions—to secure compliance. Amended ILO Constitution, *supra* note 30, arts. 24, 26, 29, 33, 62 Stat. at 3534–42, 15 U.N.T.S. at 84–92 (outlining parameters of ILO's complaint mechanism).

133. Donoso Rubio, *supra* note 117, at 196 n.19 ("ILO reporting systems have generally been considered successful at promoting compliance.").

134. See Elliot & Freeman, *supra* note 131, at 103. One possible reason for such little use is that

the founding countries never intended this to be a major tool for improving labor standards. Article 26 was artfully devised to avoid the imposition of penalties, except in the last resort, when a State has flagrantly and persistently refused to carry out its obligations under a Convention. It can hardly be doubted that it will seldom, if ever, be necessary to bring these powers into operation.

Id. (internal quotation marks omitted). Other possibilities are "the fact that in the great majority of cases the regular machinery, based on the examination of reports by the Committee of Experts and the Conference, was sufficient," or, on a different note, the fact "that the parties concerned felt that the end result . . . may not be worth all the effort, expense, and risk involved." Efrén Córdova, *Some Reflections on the Overproduction of International Labor Standards*, 14 *Comp. Lab. L.J.* 138, 150 (1993).

135. For an in-depth treatment of the Burma case—the one instance in which Article 33 sanctions were invoked—see Francis Maupain, *Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience*, in *Labour Rights as Human Rights* 85, 95–107 (Philip Alston ed., 2005).

136. See Elliot & Freeman, *supra* note 131, at 102 ("The most frequent complaint about the ILO is that it lacks enforcement power—that it is the proverbial toothless tiger.").

137. See Córdova, *supra* note 134, at 151 ("In the eyes of those who look at the Chart of Ratifications as a reference, Convention No. 87 [on freedom of association] and Conventions dealing with less prominent questions are placed at the same level."). Since the ILO established the eight core conventions, this is no longer the case. See *infra* notes 146–150 and accompanying text (describing core conventions and their development).

138. See Córdova, *supra* note 134, at 150–51 (explaining how "[l]esser instruments tend to undermine the significance of landmark Conventions"); Helfer, *supra* note 117, at 698 (explaining how this proliferation resulted in normative incoherence).

139. *Supra* note 128 (explaining reporting requirement).

140. Donoso Rubio, *supra* note 117, at 210 & n.87.

The ILO conventions have also received criticism for being too rigid and impeding ratification.¹⁴¹ This rigidity arose from the lack of “flexibility devices” in the majority of ILO conventions¹⁴² and the ILO’s tendency to favor “uniformly high standards rather than regional standards, and detailed standards over general language.”¹⁴³ Industrialized states have criticized this rigidity for “hamper[ing] their ability to respond to . . . economic changes and impos[ing] excessive costs on the public purse.”¹⁴⁴ Less developed states have criticized it for precluding labor standards that are “adaptable to new domestic conditions.”¹⁴⁵

Responding to these problems and to a variety of external factors¹⁴⁶ that required reexamination of the organization’s role, the ILO underwent changes that culminated in the passage of the ILO Declaration in 1998. One of the more significant developments was the ILO’s creation of a hierarchy of ILO conventions with a small number at the apex.¹⁴⁷ The ILO Declaration identifies eight fundamental—or “core”—ILO conventions.¹⁴⁸ It also obligates all ILO members, regardless of whether they have ratified the core conventions, to adhere to the “principles concerning the fundamental rights which are the subject of those Conventions.”¹⁴⁹ These principles are (1) freedom of association and collective bargaining, (2) elimination of forced labor, (3) abolition of

141. *Id.* at 211–14.

142. *Id.* at 211.

143. *Id.*

144. *Id.* at 213.

145. *Id.* at 213–14.

146. These factors were wide-ranging and included the fall of the Soviet Union, the growth of the informal labor sector, and the mandate issued by the WTO at the 1996 Singapore ministerial meeting which established the ILO as the lead actor in promoting international labor rights. See Helfer, *supra* note 117, at 705–06, 709–10 (describing “exogenous catalysts for change” in ILO in mid-1990s); Langille, *True Story*, *supra* note 17, at 420 (summarizing events that led to promulgation of ILO Declaration); Potter, *Labor Standards*, *supra* note 28, at 248–49 (describing WTO and GATT debates over linkage that eventually led to adoption of ILO Declaration); cf. Alston, *Transformation*, *supra* note 16, at 463–70 (providing cynical account of influences leading to passage of ILO Declaration that focuses on pressure exerted on ILO by United States).

147. Int’l Labour Org., *International Labour Conference: ILO Declaration on Fundamental Principles and Rights at Work and Annex*, June 18, 1998, 37 I.L.M. 1233, 1237 [hereinafter *ILO Declaration*].

148. These conventions are: *Worst Forms of Child Labour Convention* (No. 182), adopted June 17, 1999, 2133 U.N.T.S. 161; *Minimum Age Convention* (No. 138), adopted June 26, 1973, 1015 U.N.T.S. 297; *Discrimination (Employment and Occupation) Convention* (No. 111), adopted June 25, 1958, 362 U.N.T.S. 31; *Abolition of Forced Labour Convention* (No. 105), adopted June 25, 1957, 320 U.N.T.S. 291.; *Equal Remuneration Convention* (No. 100), adopted June 29, 1951, 165 U.N.T.S. 303; *Right to Organise and Collective Bargaining Convention* (No. 98), adopted July 1, 1949, 96 U.N.T.S. 257; *Freedom of Association and Protection of the Right to Organise Convention* (No. 87), adopted July 9, 1948, 68 U.N.T.S. 18; *Forced Labour Convention* (No. 29), adopted June 28, 1930, 39 U.N.T.S. 55. Links to these conventions can be found at <http://www.ilo.org/ilolex/english/convdisp1.htm>.

149. *ILO Declaration*, *supra* note 147, para. 2, 37 I.L.M. at 1237.

child labor, and (4) nondiscrimination in employment and occupation.¹⁵⁰

The implications of the ILO's reorientation, exemplified by its promulgation of the ILO Declaration in 1998, bear heavily on the significance of the Peru FTA's incorporation of the ILO Declaration. The significance of a shift in focus from detailed legalistic standards to broad fundamental rights, and the extent to which the relevant ILO conventions inform the ILO Declaration's principles, have been the subjects of substantial debate and are key issues in assessing the Peru FTA's incorporation of the ILO Declaration. Part II explores these issues and the insight they give on the significance and potential pitfalls of the Peru Agreement's labor chapter.

II. THE POTENTIAL OF THE PERU AGREEMENT'S LABOR CHAPTER

This Part discusses the development of the Peru Agreement's labor chapter and the nature of its requirement to uphold the ILO Declaration's principles. It exposes the limitations of the Peru Agreement's supposedly stronger labor protections and the pitfalls of its vague obligation to uphold abstract and undefined principles. Part II.A provides background to the development of the Peru Agreement's labor chapter, focusing on the compromise between Congress and the Administration that led to the adoption of more protective features. It highlights the optimism and importance attached to the Peru Agreement's new labor template and its ability to provide real protection for labor rights. Part II.B examines the improvements of the Peru Agreement's labor chapter upon past free trade agreements, focusing on its obligation to uphold the ILO Declaration. Finally, Part II.C explores the nature of the ILO Declaration within the context of the ILO to better assess the significance of the Peru Agreement's obligation. It reveals the lack of a clear understanding regarding the relationship of the ILO Declaration to ILO jurisprudence and explores the normative debate over this ambiguity. This Part concludes that while the ILO Declaration's vague content may be justified in the context of the ILO, these justifications fail to support its ambiguity as obligations under the Peru Agreement. Beyond the potential threat to the effectiveness of the Peru Agreement's labor chapter, this vagueness can encourage flexible and divergent interpretations of the ILO's principles and further obscure their content.

150. *Id.* The ILO also developed the "Follow-up to the Declaration," which established the reporting mechanism with regard to the ILO Declaration's obligations. *Id.*, 37 I.L.M. at 1238.

A. *Background to the Peru Agreement—The Bipartisan Deal and Congressional Passage*

On April 12, 2006, the U.S. Trade Representative and the Peruvian Minister of Foreign Trade signed the Peru Agreement.¹⁵¹ It languished in Congress, and the Democratic victory in the November congressional elections further stalled any progress.¹⁵² On May 10, 2007, the White House and congressional Democrats finally broke the standstill and reached an agreement to include more stringent labor protections in future FTAs,¹⁵³ “signaling a new bipartisan consensus aimed at shoring up crumbling U.S. public support for economic globalization.”¹⁵⁴ The Peru Agreement adopted a new template for the labor side of future FTAs that included an “[e]nforceable reciprocal obligation for the countries to adopt and maintain in their laws and practice the five basic internationally-recognized labor principles,¹⁵⁵ as stated in the ILO Declaration on Fundamental Principles and Rights at Work.”¹⁵⁶

The May 10 deal brought the Peru Agreement back on the path to implementation. On June 27, 2007, the Peruvian Government ratified the amendments to the Peru Agreement resulting from the deal.¹⁵⁷ The Peru Agreement finally reached Congress in September. The House of Representatives passed the United States-Peru Trade Promotion

151. Press Release, Office of the U.S. Trade Representative, United States and Peru Sign Trade Promotion Agreement (Apr. 12, 2006), at http://www.ustr.gov/Document_Library/Press_Releases/2006/April/United_States_Peru_Sign_Trade_Promotion_Agreement.html (on file with the *Columbia Law Review*).

152. The main impediment in negotiations between U.S. Trade Representative Susan Schwab and key congressional committee chairmen was the Democrats’ insistence on tougher labor standards. See Peter S. Goodman, Sides Get Closer to a Deal on Trade, *Wash. Post*, May 10, 2007, at D1 (noting Democratic demands to include “standards barring forced labor and child labor in other countries”).

153. The May 10 deal also involved changes to environmental, intellectual property, investment, procurement, and port security provisions. See Office of the U.S. Trade Representative, Bipartisan Agreement on Trade Policy 2–5 (2007), available at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file127_11319.pdf (on file with the *Columbia Law Review*) [hereinafter USTR, Bipartisan Agreement].

154. Sarah Lueck, John D. McKinnon & Greg Hitt, *Bush, Congress Agree on Trade Standards*, *Wall St. J.*, May 11, 2007, at A2.

155. Because the Peru Agreement, unlike the ILO Declaration, separates freedom of association and collective bargaining, it lists five core rights while the ILO Declaration lists four. See text accompanying *infra* note 175 (listing Peru Agreement’s five core rights).

156. USTR, Bipartisan Agreement, *supra* note 153, at 1.

157. Press Release, Office of the U.S. Trade Representative, Ambassador Schwab Statement on Peruvian Legislature Approving Amendments to U.S.-Peru Trade Promotion Agreement (June 28, 2007), at http://www.ustr.gov/Document_Library/Press_Releases/2007/June/Ambassador_Schwab_statement_on_Peruvian_Legislature_approving_amendments_to_US-Peru_Trade_Promotion_Agreement.html (on file with the *Columbia Law Review*). The Peruvian Congress had already ratified the Peru Agreement, so only ratification of the amendments was necessary. See, e.g., Peru Ratifies US Free Trade Deal, *BBC News*, June 28, 2006, at <http://news.bbc.co.uk/2/hi/americas/5125852.stm> (on file with the *Columbia Law Review*).

Agreement Implementation Act¹⁵⁸ on November 8, by a vote of 285 to 132,¹⁵⁹ and the Senate did the same on December 4, by a vote of 77 to 18.¹⁶⁰ President Bush signed the Act into law on December 14, 2007.¹⁶¹

Statements by Democratic congressmen supporting the Peru Agreement reveal the perceived significance of the enhanced labor chapter that resulted from the May 10 bipartisan deal. Senator Levin, for example, called the Peru Agreement's new "fully enforceable commitment" to uphold the ILO Declaration a "historic breakthrough . . . of critical importance."¹⁶² Senator Kerry called the Peru Agreement a "landmark bipartisan agreement" that "for the first time ever in a free trade agreement . . . encompasses meaningful and enforceable labor . . . protections."¹⁶³ Senator Kohl supported the Peru Agreement because "it is a new model for trade agreements that includes enforceable labor . . . protections[, and] [f]or the first time, the U.S. will have the right to hold a trading partner accountable if labor . . . issues become a problem."¹⁶⁴ Moreover, statements made during congressional debates highlight the significance of the Peru Agreement's labor chapter as a template for future FTAs and the importance of these provisions in effectively protecting labor rights.¹⁶⁵

158. United States-Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138, 121 Stat. 1455 (2007).

159. House Approves Free-Trade Accord with Peru, Wall St. J., Nov. 9, 2007, at A2.

160. Senate Approves Peru Trade Pact, Boosting Bush's Agenda, Wall St. J., Dec. 5, 2007, at A6.

161. Press Release, Office of the U.S. Trade Representative, Statement by USTR Schwab on Today's Signing of the U.S.-Peru Trade Promotion Agreement (Dec. 14, 2007), at http://www.ustr.gov/Document_Library/Press_Releases/2007/December/Statement_by_USTR_Schwab_on_todays_signing_of_the_US_Peru_Trade_Promotion_Agreement.html (on file with the *Columbia Law Review*).

162. 153 Cong. Rec. S14,721 (daily ed. Dec. 4, 2007) (statement of Sen. Levin).

163. *Id.* at S14,728 (statement of Sen. Kerry).

164. *Id.* at S14,720 (statement of Sen. Kohl). Other Congressmen also made similar statements. Senator Baucus remarked that the Peru Agreement is "a very significant and unexpected breakthrough" that includes labor provisions that "many of us in Congress in the labor and environmental movements have been seeking to include in trade agreements for decades." *Id.* at S14,717 (statement of Sen. Baucus). Senator Lieberman stated that while he felt that past FTAs did not go far enough to protect labor, the Peru Agreement, "by including basic worker rights recognized by the International Labor Organization, with full enforceability equal to all other provisions . . . addresses my concerns." *Id.* at S14,724-25 (statement of Sen. Lieberman).

165. As Senator Lieberman observed, "[t]he inclusion of strong labor provisions . . . means this agreement's significance will extend beyond Peru. Indeed, this FTA represents a strong standard for our future bilateral free trade agreements." *Id.* at S14,725 (statement of Sen. Lieberman). Senator Kohl remarked that the Peru Agreement is "the first step in a new direction for trade policy that will enforce labor and environmental standards and help U.S. businesses gain access to new markets." *Id.* at S14,720 (statement of Sen. Kohl). Representative McCollum called the Peru Agreement "[a]n opportunity to change the template we will use for future trade agreements away from the flawed policies of the past and towards fair trade [and] labor protections for all workers." 153 Cong. Rec. H13,309 (daily ed. Nov. 8, 2007) (statement of Rep. McCollum).

Congressmen opposed to the Peru Agreement expressed doubt regarding its capacity to protect labor rights, even while recognizing the importance of the improvements made. “The inclusion of labor . . . protections in the Peru deal is an important and positive development,” Senator Boxer said, “but without an administration willing to enforce these provisions, the promises ring hollow.”¹⁶⁶ Expressing similar concern, Representative Solis remarked that “[a]lthough efforts were made to incorporate international labor standards in the Peru FTA, it is unclear whether the Bush Administration will enforce th[ese] provision[s].”¹⁶⁷ Such doubts over the effectiveness of the enhanced labor provisions focused on the unlikelihood of adequate enforcement.

However, the problem runs deeper. Even if the Peru Agreement’s enforcement problem is solved—by, for example, a pro-labor administration—the labor standards to be enforced remain vague and undefined.¹⁶⁸ The root of the problem is the nature of the Peru Agreement’s ambiguous obligation to uphold the ILO Declaration.

B. *The Peru Agreement’s Labor Chapter*

The Peru Agreement embodies key improvements on previous U.S. attempts at linking FTAs and labor rights. One major improvement is the application of the Peru Agreement’s dispute resolution mechanism to all provisions of the labor chapter. Unlike previous FTAs, the obligation to enforce domestic labor laws¹⁶⁹ is protected by the Peru Agreement’s enforcement mechanism.¹⁷⁰ Violations of both the obligation to conform to international labor principles¹⁷¹ and the obligation to provide procedural and due process protections¹⁷² can also result in dispute procedures and the implementation of sanctions.¹⁷³ Unlike CAFTA-DR, the remedies available for violations of the labor chapter are the same as those available for trade violations.¹⁷⁴ There is no separate system of capped fines.

The most significant aspect of the Peru Agreement’s improvement is its enforceable obligation to uphold the ILO Declaration’s principles. Article 17.2 states that the parties must “adopt and maintain in [their] statutes and regulations, and practices thereunder, the following rights,

166. 153 Cong. Rec. S14,719 (daily ed. Dec. 4, 2007) (statement of Sen. Boxer).

167. 153 Cong. Rec. H13,307 (daily ed. Nov. 8, 2007) (statement of Rep. Solis).

168. Representative Green raised this issue during debates, saying, “The absence of clear, enforceable labor standards as detailed by the . . . ILO, in the Peru FTA make this an agreement I cannot support.” *Id.* at H13,309 (statement of Rep. Green).

169. U.S.-Peru TPA, *supra* note 6.

170. *Id.* art. 17.7(6).

171. *Id.* art. 17.2.

172. *Id.* art. 17.4.

173. *Id.* arts. 17.7(6), 21.15–17.

174. The remedies available for violations of the Peru Agreement—including violations of the labor provisions—include trade sanctions “equivalent [to the violation’s] effect.” *Id.* arts. 17.7(6), 21.16(2).

as stated in the ILO Declaration on Fundamental Principles and Rights at Work.” These rights include (1) freedom of association, (2) the effective recognition of the right to collective bargaining, (3) the elimination of all forms of compulsory or forced labor, (4) the effective abolition of child labor and a prohibition on the worst forms of child labor, and (5) the elimination of discrimination in respect of employment and occupation.¹⁷⁵ In contrast to the tenuous requirement in past FTAs that the parties “strive to ensure” that their domestic laws protect these internationally recognized rights,¹⁷⁶ the Peru Agreement provides an enforceable obligation to adopt and maintain the principles recognized in the ILO Declaration within domestic law.

While the inclusion of this enforceable obligation appears to be a substantial improvement over past FTAs, the nature of the obligation is unclear. A footnote to Article 17.2 limits the obligation and further obscures its actual significance: “The obligations set out in Article 17.2, as they relate to the ILO, refer only to the ILO Declaration.”¹⁷⁷ This footnote unhinges the ILO Declaration’s principles from the standards developed in the corresponding ILO conventions.¹⁷⁸ Two key issues arise from the footnote’s detachment of the ILO Declaration’s principles from the ILO conventions that inform them: What exactly is the ILO Declaration’s role within the ILO’s scheme and what is its significance in isolation from the ILO’s other facets?

C. *The ILO Declaration and Its Significance as Incorporated into the Peru Agreement*

This section explores the Peru Agreement’s incorporation of an enforceable obligation to uphold the ILO Declaration by analyzing the ILO Declaration’s language and the scholarly debate over its significance. This exploration reveals the potential pitfalls inherent in the ambiguities of the Peru Agreement’s obligation. At the same time, however, the analysis sheds some light on how the Peru Agreement can avoid those pitfalls and effectively protect labor rights.

1. *The ILO Declaration, the Core Conventions, and the Danger of Ambiguity.* — The ILO Declaration was the result of frustration with the proliferation of ILO conventions, the lack of any hierarchy,¹⁷⁹ and the

175. *Id.* art. 17.2.

176. See *supra* note 78 and accompanying text (describing Jordan FTA’s obligation).

177. U.S.-Peru TPA, *supra* note 6, art. 17.2 n.2.

178. Steve Charnovitz, *The ILO Convention on Freedom of Association and Its Future in the United States*, 102 *Am. J. Int’l L.* 90, 97 (2008) (noting that footnote “was apparently added to clarify that the parties did not intend to incorporate by reference the rules of the fundamental ILO conventions”).

179. See, e.g., Alston, *Transformation*, *supra* note 16, at 459–60 (“[T]he concept of ‘core’ standards constituted a very significant departure from the insistence within the international human rights regime on the equal importance of all human rights.”).

ILO's failure to achieve universal ratification of the ILO conventions.¹⁸⁰ The ILO Declaration was a breakthrough because it identifies a set of core labor rights that are universally endorsed and universally applicable regardless of whether a particular state has ratified the corresponding ILO conventions.¹⁸¹ The identification of certain core labor rights removes from domestic political arenas the issue of whether the rights should be recognized.¹⁸²

Because the ILO Declaration applies universally, its obligations must be separate from the underlying ILO core conventions.¹⁸³ The disconnect arises because, while all parties have agreed to ratify the ILO Declaration, not all have ratified the ILO core conventions.¹⁸⁴ The ILO Declaration accordingly cannot obligate all ILO members to uphold all

180. See *supra* notes 146–150 and accompanying text (describing adoption of ILO Declaration). For more about the effect of decreased ratification on the credibility of ILO labor standards, see Breen Creighton, *The Future of Labour Law: Is There a Role for International Labour Standards?*, in *The Future of Labour Law*, QC 253, 273 (Catherine Barnard, Simon Deakin & Gillian S. Morris eds., 2004).

181. ILO Declaration, *supra* note 147, para. 2, 37 I.L.M. at 1237 (“[A]ll Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize . . . the principles concerning the fundamental rights which are the subject of th[e] [core] Conventions . . .”).

182. Bellace argues that the ILO Declaration “removed the issue [of what are core labor rights] from the arena of national partisan politics” because if “a right has been declared to be a fundamental human right by the United Nations, and if the ILO has identified it as a human right that must be observed in the workplace, it becomes extremely difficult for any government or political party to oppose acknowledging this right.” J.R. Bellace, *The ILO Declaration of Fundamental Principles and Rights at Work*, 17 *Int'l J. Comp. Lab. L. & Indus. Rel.* 269, 272–73 (2001); see also James A. Gross, *A Long Overdue Beginning: The Promotion and Protection of Workers' Rights as Human Rights*, in *Workers' Rights as Human Rights* 1, 9 (James A. Gross ed., 2003) [hereinafter *Workers' Rights*] (noting that “AFL-CIO general counsel John Hiatt anticipates that the main achievement of the declaration could be to end the debate over whether those core universal labor rights are applicable to every worker in every country” (internal quotation marks omitted)).

183. The Conventions corresponding to the Declaration's principles are as follows: (1) Freedom of Association—Convention 87, (2) Collective Bargaining—Convention 98, (3) Abolition of Forced Labor—Conventions 29 and 105, (4) Nondiscrimination—Conventions 100 and 111, (5) Abolition of Child Labor—Conventions 138 and 132. For further information on these conventions see *supra* note 148.

184. For ratification statistics see Int'l Labour Org., *ILOLEX, Ratifications of the Fundamental Human Rights Conventions by Country*, at <http://www.ilo.org/ilolex/english/docs/declworld.htm> (last visited Feb. 7, 2009) (on file with the *Columbia Law Review*). During debates at the 1998 International Labor Conference, the employer delegates conditioned their approval of the ILO Declaration on a number of conditions, including that the ILO Declaration “should not impose on member States detailed obligations arising from Conventions they had not freely ratified” and should also “not be concerned with technical and legal matters but only with making an overall policy assessment of whether member States were achieving the goals and objectives of the fundamental principles and values of the ILO.” Int'l Labour Office, *International Labour Conference, Eighty-Sixth Session, Record of Proceedings Volume I: Provisional Record Index of Speakers* 20/3 (1998), available at <http://www.ilo.org/public/english/>

the standards in the ILO core conventions. As such, the principles that the ILO Declaration obligates the parties to uphold must be distinct from the ILO core conventions related to these principles. The ILO Declaration's bases, therefore, are the general principles found in the ILO Constitution and the ILO's 1944 Declaration of Philadelphia¹⁸⁵ that are the subject of the ILO core conventions¹⁸⁶—but not the ILO core conventions themselves.¹⁸⁷

However, the degree of the ILO Declaration's isolation from the relevant ILO conventions is unclear. The language of the ILO Declaration suggests that the ILO conventions inform the core labor rights to at least some degree: Core labor “principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.”¹⁸⁸ Therefore, according to the ILO Declaration's language, there is at least some relationship between the principles that the ILO Declaration obligates the parties to uphold and the ILO core conventions related to these principles. The extent of this relationship has been the subject of much debate.

Statements regarding the ILO Declaration from scholars, governments, and organizations suggest that there is a strong relationship between the principles elaborated by the ILO Declaration and the corresponding ILO conventions. One scholar has argued that “[a] fuller understanding of the meaning of [the core] rights comes from the eight core ILO conventions underlying them.”¹⁸⁹ Francis Maupain, the former ILO legal adviser, stated that “[t]here is no danger that the principles

standards/rem/ilc/ilc86/com-decl.htm (on file with the *Columbia Law Review*) [hereinafter ILC, Report of the Committee].

185. See ILO Declaration, *supra* note 147, para. 1, 37 I.L.M. at 1237 (noting that ILO members are obligated to uphold Principles of ILO Constitution and Declaration of Philadelphia, and that these principles “have been expressed and developed in the form of specific rights and obligations” in core conventions).

186. See *supra* note 148 (listing fundamental conventions).

187. See Int'l Labour Org., Stopping Forced Labour 13 (2001), available at <http://se1.isn.ch/serviceengine/FileContent?serviceID=ISN&fileid=EADCBF3-2978-5901-743F-856E1EE5A1E7&lng=en> (on file with the *Columbia Law Review*) (“The ILO Declaration is about principles and rights, not specific provisions of Conventions.”).

188. ILO Declaration, *supra* note 147, para. 1, 37 I.L.M. at 1237; see also Alston, Transformation, *supra* note 16, at 490 (noting, with regard to paragraph 1, that “[r]ather than making any formal statement about the legal relationship between the [core labor rights] and pertinent ILO conventions, the 1998 Declaration instead contents itself with a statement of fact, into which legal significance might or might not be read”). Attempting to clarify the ILO Declaration's reference, but shedding no real light on the issue, the ILO Legal Adviser explained that “the reference to the fundamental Conventions allows the clear identification of the principles which the Members have committed themselves to ‘respect, to promote and to realize, in good faith’ by their adherence to the Constitution and to its values.” ILC, Report of the Committee, *supra* note 184, at 20/94.

189. Bellace, *supra* note 182, at 275. Bellace goes on to describe how the conventions and the jurisprudence, developed from the ILO Committee of Experts's compliance reports, elaborate the core principles. *Id.* at 275–78.

and their content [will] be liberated from the anchor of the relevant conventions and painstakingly constructed jurisprudence in relation to these rights for the simple reason that they are the anchors.”¹⁹⁰ Similarly, a European Commission policy document explains that the “four core labour standards are currently covered by eight ILO conventions.”¹⁹¹ According to an AFL-CIO policy statement, the ILO Declaration’s “core labor standards are based on international human rights law” and the relevant ILO conventions “give content to these core standards.”¹⁹² While these statements assume that the relevant ILO conventions inform the ILO Declaration’s principles, they avoid any precise elaboration of the nature of this relationship.

Statements from ILO officials and drafters of the ILO Declaration during debates regarding its adoption further obscure the issue. These remarks suggest that some relationship between the ILO conventions and the principles exists, but simultaneously assert that the principles are unhinged from the jurisprudence elaborated by the ILO conventions and the ILO supervisory bodies. The Canadian government, whose ambassador chaired the drafting committee, stated that the ILO Declaration “should be based on the principles of the Constitution, reflected in the Conventions, but not on specific provisions of conventions.”¹⁹³ Government representatives from the United States, Chile, Sweden, France, and Brazil stated that “the Declaration referred to adherence to principles and values and not to specific Conventions.”¹⁹⁴ Reflecting this point, the ILO legal adviser remarked, “[T]he Declaration contemplated the implementation, not of specific provisions of Conventions, but rather of the principles of those Conventions.”¹⁹⁵ The meaning of this relationship was so unclear that during the debates the government of Uganda “requested clarification of how the proposed Declaration would relate to ILO Conventions.”¹⁹⁶ The precise nature of the relationship remains undefined.

The lack of definite content in the ILO Declaration’s principles raises concerns relevant to the Peru Agreement’s incorporation of the ILO Declaration. The ILO Declaration’s promotion of undefined and

190. Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights*, 16 *Eur. J. Int’l L.* 439, 450 (2005) [hereinafter Maupain, *Revitalization*] (emphasis omitted) (internal quotation marks omitted) (footnote omitted).

191. Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation 5 (July 18, 2001).

192. AFL-CIO, *Common Questions about ILO Core Labor Standards and Trade 1* (2002), at <http://www.aflcio.org/mediacenter/resources/upload/commonquestionsonfastrackilo.pdf> (on file with the *Columbia Law Review*).

193. ILC, Report of the Committee, *supra* note 184, at 20/6.

194. *Id.* at 20/66.

195. *Id.* at 20/19.

196. *Id.* at 20/8.

open-ended principles potentially undermines ILO rights and jurisprudence, and encourages the proliferation of divergent, ephemeral, and inadequate international labor standards.¹⁹⁷ The ILO Declaration's vague and abstract principles, which the parties are obligated to uphold, are subject to weak and elastic interpretations in the context of the Peru Agreement. This flexibility allows dispute panels to find the Peru Agreement's obligations satisfied by divergent and inadequate domestic measures.¹⁹⁸ Besides the risk of endorsing insufficient standards and perpetuating inadequate domestic labor regimes, the ability for flexible interpretation can undermine the significance of the ILO's jurisprudence.¹⁹⁹ Understanding the meaning and purpose of the ILO Declaration and its principles within the context of the ILO is, therefore, paramount to establishing an effective labor regime under the Peru Agreement.

2. *The Declaration and the ILO: Vagueness Justified?* — The lack of clarity in the relationship between the ILO Declaration's principles and the underlying ILO conventions can be better understood in light of normative concerns regarding the desirability of endowing the ILO

197. See Philip Alston, Facing up to the Complexities of the ILO's Core Labour Standards Agenda, 16 *Eur. J. Int'l L.* 467, 476 (2005) [hereinafter Alston, Facing Up] ("To the extent that the 1998 Declaration is treated as a freestanding statement of 'principles' and is detached from the various international sources which give it content, this system breaks down."). Alston argues that the ILO Declaration's vagueness and resulting dilution of ILO labor standards was one of the main motivators behind its adoption. Supporting his argument that the ILO Declaration's vagueness allows governments to define the principles in whatever manner they see fit, he argues that the United States pushed for its adoption in order to escape political heat for having ratified only one of the core conventions while maintaining its moral high ground by simultaneously imposing labor obligations on other nations backed by sanctions in domestic legislation. Alston, Transformation, *supra* note 16, at 466–69. The ILO Declaration's vagueness leaves room for governments to endow its principles with minimal content providing little protection. See Brian A. Langille, The ILO and the New Economy: Recent Developments, 15 *Int'l J. Comp. Lab. L. & Indus. Rel.* 229, 254 (1999) [hereinafter Langille, New Economy] ("[E]fforts to gain universal acceptance of the core rights . . . has led to a Declaration in which members of the ILO could only agree on language which fails to take the core rights as seriously as they should be taken."); Emily A. Spieler, Risks and Rights: The Case for Occupational Safety and Health as a Core Worker Right, *in* Workers' Rights, *supra* note 182, at 78, 97 (arguing that ILO's approach of simply asserting that core rights are human rights raises danger "that any undefined labor right has the tendency to migrate to an unsatisfactory least common denominator").

198. These deficiencies in the Peru Agreement probably resulted from the political compromise that was necessary to secure its passage in light of powerful interest groups. See, e.g., Goodman, *supra* note 152 ("Democrats and labor would get standards barring forced labor and child labor in other countries, while elevating the rights of workers to organize unions. American industry would gain assurances that such provisions would not influence U.S. laws."). Concerns that a more elaborate labor side to the Peru Agreement would influence U.S. laws are not necessarily warranted. As the proposals in Part III suggest, more concrete labor standards can be implemented while still permitting a degree of flexibility for specific domestic laws.

199. See *supra* note 15 (explaining content of ILO jurisprudence).

Declaration's principles with more specific content. These concerns revolve around two factors: the "process oriented" nature of the core rights and the desire for universal consensus. These issues suggest that the vagueness of the ILO Declaration's principles is necessary and important within the context of the ILO, an argument that could similarly apply to rejecting concrete standards in the Peru Agreement.

Universal acceptance of the ILO Declaration was necessary to legitimate its establishment of core labor principles applicable to all members of the ILO. A lack of consensus would cast doubt on the "immutable" and "fundamental" nature of the principles.²⁰⁰ The need for consensus required sufficiently broad and vague principles to ensure that member states would ratify the ILO Declaration and not be discouraged by the possibility of new legal obligations.²⁰¹ The diversity of interests represented in the ILO's tripartite structure—including employers, labor organizations, and governments of states that have achieved various degrees of development—precluded establishing anything but labor rights constituting the "lowest common denominator."²⁰² Further, broad and abstract principles were necessary to encompass the numerous idiosyncrasies in domestic labor legislation covering the core areas.²⁰³ The abstract, undefined nature of the ILO Declaration's principles was therefore necessary to achieve the universal consensus essential to its establishment of baseline core labor rights as universally accepted human rights.

The other factor justifying the abstract and undefined nature of the ILO Declaration's principles is their characterization as enabling, or process oriented, rights. Enabling rights seek "to realise the conditions reflected in the . . . assumptions underlying neo-classical economic models, namely freedom of choice, equal bargaining power, and full informa-

200. ILO Declaration, *supra* note 147, pmb., 37 I.L.M. at 1237. Universal consensus also supplied an "effective answer to the argument that the countries of the South should not be obliged to respect labor rights because these rights reflect the cultural values of developed countries." Hiatt & Greenfield, *supra* note 22, at 44.

201. See *supra* notes 193–195 and accompanying text (describing statements by government representatives during debates over adoption of ILO Declaration, expressing concern over whether it would create new legal obligations); see also Maupain, *Revitalization*, *supra* note 190, at 453 ("[W]hen the specificity [of core rights], in terms of detailed provisions is too great it tends to become an obstacle to ratification" (emphasis omitted)); Edward E. Potter, *A Pragmatic Assessment from the Employers' Perspective*, in *Workers' Rights*, *supra* note 182, at 118, 120 [hereinafter Potter, *Pragmatic Assessment*] ("[I]nternational consensus on whether something is a human right quickly breaks down . . . if the right is not viewed as being basic . . . or if it is defined in too detailed a manner.").

202. See Spieler, *supra* note 197, at 85 (describing how need for consensus from developing nations, business interests, and political conservatives required that ILO Declaration recognize only limited scope of rights).

203. See Langille, *True Story*, *supra* note 17, at 424–25 (explaining difficulty of ratifying detailed labor provisions that are not entirely consistent with domestic legislation).

tion.”²⁰⁴ Such rights are meant to establish the procedures necessary for workers to achieve more detailed substantive rights. As opposed to outcome-oriented rights, such as occupational safety conditions or minimum wage, the ILO Declaration’s core rights focus on ensuring that every worker can participate in setting substantive standards.²⁰⁵ Because, it is argued, these rights are not concerned with setting detailed substantive standards, there is little problem with the ILO Declaration’s failure to spell out their content.²⁰⁶

These two concerns justifying the ILO Declaration’s vagueness in the ILO context are inapposite in the context of a bilateral trade agreement. While the notion of a self evident “basic grammar”²⁰⁷ of procedural labor rights is appealing in the context of an international organization to the extent it incorporates diverse interests and numerous sovereigns, it does little to convey an understanding of how this grammar will function in practice. Though the core rights are process oriented, they nonetheless require substantive content. While murdering union leaders might clearly violate any notion of freedom of association,²⁰⁸ it is much less clear whether, for example, forbidding union organizers from entering the parking lot outside the factory or preventing union members from

204. Maryke Dessing, *The Social Clause and Sustainable Development 3* (ICTSD Resource Paper No. 1, 2001), available at <http://www.ppl.nl/bibliographies/wto/files/1496.pdf> (on file with the *Columbia Law Review*); see also Langille, True Story, *supra* note 17, at 429 (“[T]he point [of procedural labor rights] is not to rewrite the deal between the parties but to ensure that a fair contracting process occurs so they can write it themselves.”); Maupain, *Revitalization*, *supra* note 190, at 448–49 (explaining that core rights are procedural in that they focus on autonomy of the individual, with respect to nondiscrimination and freedom from forced and child labor, and of the collective, with respect to freedom of association and collective bargaining). For more on the distinction between the nature of substantive and procedural rights, see Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 29 *Comp. Lab. L. & Pol’y J.* 29, 60–65 (2007). Fudge explains that the distinction between procedural and substantive rights can be seen as the distinction between civil and social rights, and elaborates the theory that procedural rights “are the means by which institutional environments can be shaped to ensure that all individuals can convert their endowments into a range of possible functionings [sic].” *Id.* at 64.

205. See, e.g., Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 *J. Int’l Econ. L.* 43, 51 (2000) (noting that ILO Declaration’s rights “may be seen as rights to a process, not rights to a particular outcome . . . They are linked . . . by an attempt to protect freedom of choice”). Language from the Declaration’s preamble supports viewing the rights as procedural:

[T]he guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential.

ILO Declaration, *supra* note 147, *pmb.*, 37 *I.L.M.* at 1237.

206. See Langille, True Story, *supra* note 17, at 422 (explaining that ILO Declaration capitalizes on “basic ‘grammar’ of the right; that is, a core set of restrictions and entitlements that any account of the right must respect”).

207. *Id.* (referring to concept of “basic grammar” of rights in ILO Declaration).

208. *Id.*

meeting on factory property also violates the basic grammar of the right.²⁰⁹ This vagueness limits the potential effectiveness of a bilateral agreement, like the Peru Agreement, that incorporates the ILO Declaration.

Giving content to the procedural rights is too contentious to be accomplished within the ILO and would require sacrificing universal consensus. However, endowing the procedural rights with more concrete content will face fewer obstacles in the context of a bilateral trade treaty like the Peru Agreement. The necessity of universal consensus and basic abstract procedural principles is not implicated to the same degree by the Peru Agreement, as there are only two sovereigns. The normative justifications for the ILO Declaration's vague and abstract rights within the ILO's scheme are not therefore directly applicable in the context of this bilateral treaty.

In the context of the Peru Agreement, governments—or dispute resolution bodies assigned the task of interpretation—can accordingly endow these general principles with greater content without undermining international consensus regarding their status as human rights or attenuating the “core grammar” of procedural principles. Governments can look to ILO conventions and Expert Reports to interpret the Peru Agreement's obligations. In fact, Peru had expressed willingness to interpret the obligations under the Peru Agreement by looking to the relevant ILO conventions: “[T]he President of Peru, Alejandro Toledo, offered to incorporate the ILO labor rights into the text of the Peru FTA during the original negotiations with the United States, but U.S. negotiators dismissed the offer.”²¹⁰ Drawing substance from the ILO's jurisprudence and investigatory procedures in this manner would allow for a degree of flexibility and provide international credibility.²¹¹

209. Maupain explains:

While it is true that the Declaration rights are enabling rights that provide workers . . . with the tools and processes to enable them to achieve respect for other rights (like health and safety), this does not mean that the Declaration rights involve only obligations of means rather than of result.

Maupain, *Revitalization*, supra note 190, at 448 n.44. Maupain argues that, for example, putting in place systems for collective bargaining in accordance with the Declaration is a means-related step; the actual conclusion and implementation of collective bargaining agreements (CBA) are results. This is even more the case with the rights to freedom from forced labor, employment discrimination, and the worst forms of child labour.

Id.; see also Fudge, supra note 204, at 61–62 (“It may be that there is a fundamental grammar to labor law theory and to the right to freedom of association, but it will take more than assertion to establish its existence, especially in light of the evidence that these matters are controversial.”); Spieler, supra note 197, at 96 (“[T]he idea that the four core labor rights included in the 1998 declaration are self-defining and universal . . . is nonsense: these four core rights also require definition, are intrinsically ambiguous, and are context-dependent.”).

210. Rangel, supra note 3, at 393.

211. See supra Part I.C (discussing ILO jurisprudence).

Supporters of the Peru Agreement's vague labor obligations can point to familiar arguments such as the difficulty of creating concrete standards acceptable to developing nations,²¹² or the looming fear of protectionism.²¹³ However, the fear of protectionism is less salient with regard to the Peru Agreement because the procedural hurdles to finding a violation—a complaint by one of the Party governments,²¹⁴ a finding by a neutral arbitral panel,²¹⁵ and the limitation on penalties to the amount equivalent to the violation's effect²¹⁶—make it unlikely that such a finding would be motivated by protectionism in disguise.²¹⁷

Involving more concrete requirements in the Peru Agreement's obligation to uphold the ILO Declaration would avoid the risk of dispute panels interpreting it too flexibly and as requiring only minimal standards. Only then can the intention of Democratic legislators with regard to the Peru Agreement's improved labor chapter be fully realized²¹⁸ and the template provide actual protection for labor in this and in future agreements.²¹⁹ Part III explores possible means of providing more content to the Peru Agreement's obligation to uphold the ILO Declaration.

III. PROVIDING CONTENT TO THE PRINCIPLES

This Part proposes two solutions to the problem of the Peru Agreement's vague obligation to uphold the ILO Declaration, resulting in a truly improved labor section for the Peru Agreement that lives up to the rhetoric of congresspersons and the Administration. These solutions interpret the Peru Agreement's labor chapter to provide more concrete obligations for the parties. While future FTAs can provide for more spe-

212. See Rangel, *supra* note 3, at 393 (noting that “opponents have argued that developing countries would refuse to accept labor standards, or at least would require the United States to make major concessions in return”).

213. See *id.* at 392 (“Opponents of including enforceable basic labor standards in trade agreements . . . have argued that these standards would be used as a thinly veiled excuse to limit imports from developing countries by ‘protectionists’ in the United States.”); see also Elliot & Freeman, *supra* note 131, at 80 (“The major worry of globalization enthusiasts is that including labor standards in . . . trade agreements, and authorizing trade sanctions to enforce them, would lead to protectionist abuse.”).

214. U.S.-Peru TPA, *supra* note 6, art. 17.7(6).

215. *Id.* art. 21.6–14.

216. *Id.* art. 21.16(2).

217. Rangel, *supra* note 3, at 393 (arguing that party governments and impartial third parties would be less prone to protectionism motivations than companies or unions).

218. See *supra* notes 162–165 and accompanying text (describing comments from Democratic legislators during debates over Peru Agreement's implementation legislation regarding significance and substantial improvements of Peru Agreement's labor chapter).

219. As previously noted, there is also a serious problem regarding the enforcement of the Peru Agreement. See *supra* notes 166–168 and accompanying text. While future agreements might provide a new type of labor regime that does not depend on political will for enforcement, the Peru Agreement fails to do so. The nature of such a structure is beyond the scope of this Note, which seeks to provide a more effective regime within the framework of the Peru Agreement by interpreting it to provide more concrete requirements.

cific requirements, or an entirely new and more effective regime,²²⁰ this Note focuses on ways in which the current labor chapter can function more effectively. Part III.A explores how the Peru Agreement can be read to require compliance with ILO conventions and other ILO jurisprudence. It shows that the Peru Agreement can and should be read to require Peru to conform to the ILO core conventions since it has ratified all eight. While the United States cannot be obligated to uphold the ILO conventions that it has not adopted, the ILO conventions as well as the jurisprudence developed by the ILO supervisory bodies can provide a reference point for its obligations. Part III.B proposes a more complex solution that draws on the experience of the U.S.-Cambodia Textile Agreement (UCTA):²²¹ incorporating the ILO as the fact finding and monitoring body that will provide the information used to determine compliance with the Peru Agreement. Moreover, the Peru Agreement would be read to require cooperation with and effective utilization of ILO technical assistance. These proposed solutions have the potential not only to provide an effective labor regime under the Peru Agreement, but also to supplement the ILO's soft enforcement mechanisms²²² with the hard sanctions that international organizations are unlikely to impose.

A. Interpreting the Peru Agreement to Include ILO Jurisprudence

Since the ILO has developed a rich jurisprudence elaborating the core labor rights spelled out in the ILO Declaration—through both the relevant ILO conventions²²³ and their interpretation by ILO supervisory bodies²²⁴—there is a ready source available to provide content to the Peru Agreement's obligation to uphold the ILO Declaration's principles.

Though the Peru Agreement does not explicitly provide for using these sources, this approach is nevertheless feasible. The Vienna Convention on the Law of Treaties,²²⁵ which establishes procedures for

220. For example, there can be a specific provision requiring conformance to the ILO conventions, or some other set of detailed labor standards. New trade agreements can also provide innovative regimes.

221. Note, however, that some significant differences will result, since the UCTA was implemented under unique circumstances and the Peru Agreement suggests certain differences in the focus of the arrangement.

222. See *supra* notes 131–136 and accompanying text (explaining ILO enforcement mechanisms).

223. These are the “core” or fundamental conventions. See *supra* note 148 (listing core conventions related to ILO Declaration's principles).

224. See, e.g., ILO, 2008 COE Report, *supra* note 15, at 40–425 (elaborating on content of and compliance with core conventions). For discussions of specific relevant provisions, see *id.* at 40–188 (conventions 87 and 98); *id.* at 189–260 (conventions 29 and 105); *id.* at 261–349 (conventions 138 and 182); *id.* at 350–426 (conventions 100 and 111).

225. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

the interpretation of treaties,²²⁶ states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to [its terms] in their context and in the light of its object and purpose.”²²⁷ Along with context, “[a]ny relevant rules of international law applicable in the relations between the parties,” shall be considered.²²⁸ Moreover, if dispute arbitrators find that the plain language of the obligation to uphold the ILO Declaration is ambiguous—as is the case with the Peru Agreement—the Vienna Convention instructs that “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”²²⁹

The guidance the Vienna Convention on the Law of Treaties provides suggests that the arbitral panel can interpret the Peru Agreement to include ILO jurisprudence as a source to provide content to its ambiguous obligations.²³⁰ Arbitrators can accordingly interpret the Peru Agreement to include reference to ILO jurisprudence. ILO jurispru-

226. “The interpretation of any treaty instrument must be guided by Articles 31 and 32 of the Vienna Convention on the Law of Treaties, widely regarded as part of customary international law.” William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 Va. J. Int’l L. 307, 338 (2008).

Although the United States is not a party to the Vienna Convention, domestic courts, international tribunals, and the federal government follow the treaty as customary international law and an authoritative guide to treaty interpretation. E.g., *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366, 373 n.5 (2d Cir. 2004) (“Although the United States has never ratified the Vienna Convention, we treat the Vienna Convention as an authoritative guide to the customary international law of treaties.” (internal quotation marks omitted)); *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000) (noting that “[t]he United States recognizes the Vienna Convention as a codification of customary international law” and “[t]he United States Department of State considers the Vienna Convention . . . as in large part the authoritative guide to current treaty law and practice” (internal quotation marks omitted)); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1296 n.40 (11th Cir. 1999) (“Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties.” (quoting *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 638 n.9 (5th Cir. 1994))); Beth Van Schaack, *Crimen Sine Legge: Judicial Lawmaking at the Intersection of Law and Morals*, 97 Geo. L.J. 119, 147 n.127 (2008) (“The Vienna Convention, while not universally subscribed to, is generally considered to have codified the customary international law of treaties and is treated as definitive by international and domestic tribunals.”); Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599, 677 n.347 (2008) (“Although the United States is not a party to the Vienna Convention, the treaty is widely understood to have achieved the status of customary international law in the years since it was opened for signature . . .”). The Supreme Court has cited Article 31 of the Vienna Convention to guide its interpretation of another treaty. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting).

227. Vienna Convention, *supra* note 225, art. 31(1), 1155 U.N.T.S. at 340.

228. *Id.* art. 31(3)(c), 1155 U.N.T.S. at 340.

229. *Id.* art. 32, 1155 U.N.T.S. at 340.

230. Noting the likelihood that dispute panels would look to ILO jurisprudence to define the Peru FTA’s labor standards, Senator Orrin Hatch said:

dence that the parties have adopted—including, as discussed below, all the ILO core conventions in Peru’s case, and the jurisprudence of the ILO’s Committee on Freedom of Association (CFA) and ILO Declaration follow-up reports in the case of both states—appears to fall within The Vienna Convention Article 31’s reference to international law.

1. *Core Conventions.* — It is clear that Peru’s obligation to uphold the ILO Declaration’s principles does not translate into a direct obligation to uphold the corresponding ILO core conventions²³¹—particularly in light of the footnote to Article 17.2, which explicitly limits the obligation to the ILO Declaration.²³² Yet Peru’s ratification of all eight of the ILO conventions²³³ supports an interpretation of its obligations under the Peru Agreement with reference to the corresponding ILO conventions.²³⁴ Peru’s ratification of the ILO conventions entails the obligation to conform to the ILO conventions’ specific provisions.²³⁵ Accordingly, a finding by the ILO Committee of Experts that Peru has violated a particular ILO convention would then provide a basis for finding a violation under Article 17.2 of the Peru Agreement.

While Peru is already obliged under the ILO Constitution to uphold the provisions of ratified ILO conventions, this obligation is made subject

The Peru FTA does not provide any definition of these fundamental rights, leaving the interpretation of what constitutes “freedom of association” or “collective bargaining” to a dispute settlement panel appointed by the U.S. and Peruvian Governments. Given the agreement’s reference to the ILO declaration, it is widely expected that such a dispute settlement panel would in fact look at and rely at least partially on the standards of the relevant ILO core conventions associated with these rights, much as the ILO does each year in its followup reports required by the ILO declaration.

53 Cong. Rec. S14,723 (daily ed. Dec. 4, 2007).

231. See *supra* Part II.C.1.

232. *Supra* notes 177–178 and accompanying text (discussing footnote to Art. 17.2 and its implications).

233. See Int’l Labour Org., ILOLEX, Ratifications by Country, at <http://www.ilo.org/ilolex/english/newratframeE.htm> (last visited Dec. 23, 2008) (on file with the *Columbia Law Review*) [hereinafter Ratifications] (listing conventions that countries, including Peru, have ratified).

234. Edward Potter, the U.S. employer representative to the ILO, while making clear that the ILO Declaration’s principles are “divorced” from the specific legal provisions in the conventions, suggested that when a nation has ratified the relevant convention, that convention provides the content of the corresponding principle for that nation. He stated that “the principle concerning equal remuneration under the Declaration”—which “is incorporated within the elimination of discrimination principle”—“is not the definition under [the] Convention . . . *except in those . . . countries that have ratified the Convention.*” Int’l Labour Org., Provisional Record 14, International Labour Conference, 91st Sess., at 14/2 (2003), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/pr-14.pdf> (on file with the *Columbia Law Review*) [hereinafter ILC, Provisional Record] (emphasis added).

235. Amended ILO Constitution, *supra* note 30, art. 19(5)(d), 62 Stat. at 3522, 15 U.N.T.S. at 72 (providing that after member state ratifies a convention it “will take such action as may be necessary to make effective the provisions of such Convention”).

to hard sanctions when imported into the Peru Agreement.²³⁶ Additionally, labor organizations can file complaints—or “representations”—under the ILO system,²³⁷ and accordingly initiate the Peru Agreement’s enforcement mechanism and the finding of violations. Basing violations of the Peru Agreement on reports regarding compliance with the ILO conventions would open up an important channel for public complaints.

However, the degree to which ILO jurisprudence can be imported into the Peru Agreement’s obligations differs with regard to Peru and the United States. While Peru has ratified all eight of the ILO core conventions, the United States has ratified only two.²³⁸ Under the ILO Constitution, the United States is not bound to uphold those ILO conventions that it has not ratified.²³⁹ Although the provisions of the unratified ILO conventions are not legally binding on the United States, they, along with ILO supervisory reports in other areas of the ILO scheme, can nevertheless provide an important source for interpreting the United States’s obligations under the Peru Agreement.²⁴⁰

Basing the United States’s obligations under the Peru Agreement on the standards in ILO core conventions, absent explicit statutory instruction, would not be without precedent. U.S. legislation, including the Generalized System of Preferences, the Trade Act of 1988, and the African Growth and Opportunity Act of 2000, all refer to internationally recognized labor rights.²⁴¹ Where the United States’ obligations incorpo-

236. Interpreting the Peru Agreement to obligate Peru to uphold the core conventions brings to mind Alston’s criticism regarding the United States’s motive in endorsing the ILO Declaration—namely, that it allows the United States to use hard sanctions to promote core labor standards while deflecting criticism that it has failed to ratify all but two of the core conventions. See *supra* note 197 (explaining Alston’s criticism). However lamentable this situation may be, backing up Peru’s obligation under the ILO Constitution with hard sanctions could provide an important incentive to improve its labor standards to conform to the conventions. The fact that Peru’s President offered to incorporate ILO labor rights into the Peru Agreement—though the United States refused—also suggests that Peru does not perceive the situation as unfair. *Supra* note 210 and accompanying text.

237. See Amended ILO Constitution, *supra* note 30, arts. 24–25, 62 Stat. at 3534, 15 U.N.T.S. at 84 (providing “representation” complaint mechanism).

238. The United States has ratified Convention 105, the “Abolition of Forced Labor Convention,” and 182, the “Worst Forms of Child Labor Convention.” Ratifications, *supra* note 233 (listing ILO conventions that United States has ratified).

239. Amended ILO Constitution, *supra* note 30, art. 19(5)(e), 62 Stat. at 3522–24, 15 U.N.T.S. at 72 (providing that state has no obligations under unratified ILO convention besides periodic reporting regarding compliance when ILO Governing Body so requests).

240. Supporting the notion that the ILO conventions should be used to interpret the nature of obligations under the ILO Declaration, Edward Potter argued during debates regarding obligations under the ILO Declaration’s nondiscrimination principle that “priority needs to be given to those classifications specifically enumerated in Convention No. 111 [concerning discrimination].” ILC, Provisional Record, *supra* note 234, at 14/2.

241. Though “[n]one of these statutes define these worker rights[,] . . . the legislative history . . . make[s] clear that ILO standards are intended to be the applicable benchmarks.” Potter, Pragmatic Assessment, *supra* note 201, at 127; see also Lance Compa, *Workers’ Freedom of Association in the United States: The Gap Between Ideals*

rate the ILO conventions, dispute panels determining whether the United States is in violation can refer to reports regarding compliance with unratified conventions.²⁴² The panel would have to consider that the United States is not obliged to comply with every specific provision of unratified conventions, and allow for divergence from convention provisions that directly conflict with domestic legislation.²⁴³

2. *The Jurisprudence of the ILO's Committee on Freedom of Association.* — Along with the conventions and the supervisory reports regarding compliance, the jurisprudence of the CFA²⁴⁴ should be used as a source for interpreting the U.S.'s and Peru's obligations under the ILO Declaration's principles of freedom of association and collective bargaining.²⁴⁵ Though the United States has not ratified the conventions on

and Practice, *in Workers' Rights*, supra note 182, at 23, 30–31 (“Since passage of the 1984 GSP labor rights amendment, the U.S. State Department’s annual *Country Reports on Human Rights Practices* refer to ILO Convention 87 as the basis of U.S. policy on workers’ freedom of association.” (citing U.S. Dep’t. of State, *Country Reports on Human Rights Practices for 1999 app. B (2000)*)); Potter, *Labor Standards*, supra note 28, at 250 (noting that “[b]eginning in the 1980s, the U.S. Congress began to link trade preferences, political risk insurance and other benefits of trade legislation with ‘internationally recognized worker rights’ which are based on ILO standards”).

242. States are required to report on compliance with unratified treaties when the ILO Governing Body so requests under Article 19(5)(e) of the ILO Constitution. On the basis of Article 19(5)(e), the Committee of Experts issues surveys that compile and report on the submissions from governments and employer and labor organizations regarding compliance with unratified ILO conventions. See Int’l Labour Org., *Applying Conventions when Countries Have Not Ratified Them*, at http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/Applyingconventions (last visited Feb. 8, 2009) (on file with the *Columbia Law Review*) (explaining ILO procedures for assessing compliance with unratified treaties).

243. For a discussion of conflicts between U.S. law concerning freedom of association and collective bargaining and ILO Conventions 87 and 98, see generally Edward E. Potter, *Freedom of Association, the Right to Organize and Collective Bargaining—The Impact on U.S. Law and Practice of Ratification of ILO Conventions No. 87 and No. 98* (1984).

244. Describing the development and function of the CFA, the ILO webpage notes: [I]n 1951 the ILO set up the . . . [CFA] for the purpose of examining complaints about violations of freedom of association, whether or not the country concerned had ratified the relevant conventions. Complaints may be brought against a member state by employers’ and workers’ organizations. The CFA is a Governing Body committee, and is composed of an independent chairperson and three representatives each of governments, employers, and workers. If it decides to receive the case, it establishes the facts in dialogue with the government concerned. If it finds that there has been a violation of freedom of association standards or principles, it issues a report through the Governing Body and makes recommendations on how the situation could be remedied. Governments are subsequently requested to report on the implementation of its recommendations.

Int’l Labour Org., *Committee on Freedom of Association*, at http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/CFA (last visited Feb. 8, 2009) (on file with the *Columbia Law Review*). The jurisprudence developed by the CFA is compiled in a digest of decisions and principles. See ILO, *CFA Digest*, supra note 15 (summarizing CFA decisions and principles).

245. The CFA, “[o]ver decades of painstaking treatment of allegations of violations of workers’ rights . . . has elaborated authoritative guidelines for implementation of the right

freedom of association (Conventions 87 and 98), it has submitted to the CFA's jurisdiction and review of complaints filed pursuant to these conventions.²⁴⁶ While the CFA's recommendations are not legally binding on the United States, they provide an available and credible source of content for the U.S. obligations under the Peru Agreement, particularly in reference to the ILO Declaration's freedom of association and collective bargaining principles.

3. *Annual Review and Global Reports.* — The final sources of ILO jurisprudence that can be used to give content to the obligations under the Peru Agreement are the annual reviews and global reports of the ILO Governing Body and the independent expert made pursuant to the ILO Declaration's follow-up procedure.²⁴⁷ The annual reviews consist of government reports describing efforts made to respect the principles and rights relating to all unratified core ILO conventions, as well as comments regarding these efforts from employers' and workers' organizations.²⁴⁸ The Global Reports focus on one of the core principles each year, providing a general description of the status of that principle across all ILO member states and assessing the success of ILO technical assistance.²⁴⁹ These reports provide an important elaboration of the core principles with substantial insight into their scope and nature.²⁵⁰ Dispute panels can use the reports to glean a more concrete sense of the principles and the obligations they create under the Peru Agreement.

to organize, the right to bargain collectively, and the right to strike." Compa, *supra* note 241, at 26.

246. *Id.* at 28.

247. See Int'l Labour Org., *The Declaration*, available at <http://www.ilo.org/declaration/thedeclaration/lang-en/index.htm> (last visited Feb. 8, 2009) (on file with the *Columbia Law Review*) [hereinafter ILO, *Explanation of the Declaration*] (describing reporting procedures under ILO Declaration).

248. *Id.* A database of the annual reviews, beginning with the first in 2000, can be found at <http://www.ilo.org/declaration/follow-up/annualreview/annualreports/lang-en/index.htm> (last visited Feb. 8, 2009) (on file with the *Columbia Law Review*).

249. ILO, *Explanation of the Declaration*, *supra* note 247. A database of the Global Reports, beginning with the first in 2000, can be found at <http://www.ilo.org/declaration/follow-up/globalreports/lang-en/index.htm> (last visited Feb. 8, 2009) (on file with the *Columbia Law Review*).

250. As Francis Maupain noted, the Governing Body's assessment of compliance with the ILO Declaration in follow-up reports is an important tool for ensuring consistency in the interpretation of the ILO Declaration's principles. See Maupain, *Revitalization*, *supra* note 190, at 450 ("While it may be that indicators could usefully be developed to assist in monitoring progress towards 'principles' consistent with the relevant instruments, the key guarantee for such consistency ultimately rests with the role and responsibilities vested in the tripartite constituency."). Incorporating these reports as a source for determining obligations under the Peru Agreement can, therefore, serve to mitigate the risk of divergent interpretations by politically motivated governments. See *supra* note 197 (describing risks of ILO Declaration's open-ended principles).

B. *Incorporating the ILO as the Fact Finding and Monitoring Body Under the Peru Agreement*

The ILO Declaration's focus on providing technical support for states implementing the ILO Declaration's principles²⁵¹ provides a conceptual basis—in addition to the conceptual basis derived from the Peru Agreement's importation of ILO jurisprudence through its incorporation of the ILO Declaration—for remedying the ambiguity of the obligations under the Peru Agreement. The Peru Agreement's inclusion of the ILO Declaration provides the foundation for innovative implementation of the ILO's supervisory and technical assistance programs,²⁵² such as establishing a cooperative program with the ILO in which the ILO would monitor compliance.

Furthermore, the Peru Agreement's explicit contemplation of the ILO's assistance provides another textual basis for a hybrid regime.²⁵³ Such a program would take advantage of the ILO's neutrality²⁵⁴ and competence,²⁵⁵ along with the ability of the national sovereigns to impose

251. Paragraph 3 of the ILO Declaration provides that the ILO has an obligation to assist its Members . . . in . . . [attaining the ILO Declaration's] objectives by making full use of its constitutional, operational and budgetary resources, including by the mobilization of external resources and support . . . to support these efforts: (a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions; (b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of those Conventions; and (c) by helping the Members in their efforts to create a climate for economic and social development.

ILO Declaration, *supra* note 147, para. 3, 37 I.L.M. at 1238.

252. The ability of FTAs to provide new opportunities for the ILO's supervisory and monitoring processes was the subject of debate between Maupain and Alston. Maupain argued that “[t]he FTAs, through the co-operation mechanisms and monitoring systems built into them, may provide a ‘window of opportunity’ for strengthening ILO’s own supervisory work and related advisory services.” Maupain, *Revitalization*, *supra* note 190, at 451 n.56. Alston calls this “a bold claim . . . given . . . [that r]ecent free trade agreements negotiated by the United States do not contain an enforceable commitment to respect core ILO labor standards Instead, these FTAs contain only one enforceable labor commitment: to enforce domestic labor laws.” Alston, *Facing Up*, *supra* note 197, at 471 (internal quotation marks omitted). Alston’s doubts rest primarily on the absence in these trade agreements of an enforceable obligation to uphold the core rights. As the Peru Agreement is the first to contain such an obligation, it appears to provide an opportunity to realize Maupain’s vision.

253. See U.S.-Peru TPA, *supra* note 6, art. 17.5(5)(b)(iv) (authorizing parties to “seek support . . . from international organizations such as the ILO”).

254. Michael Hecker, *A Lesson from the East: International Labor Rights and the U.S.-Cambodia Agreement of 1999*, 26 *Buff. Pub. Int. L.J.* 39, 48 (2008) (“The ILO offered something most regulatory schemes cannot, and something deemed to be crucial to the success of the [Cambodia] program: a neutral, non-profit third party who could enforce regulations without tainting results.”).

255. The 1996 WTO Ministerial declared the ILO to be “the competent body to set and deal with [core labor] standards.” World Trade Org., *Ministerial Declaration of 13 December 1996* para. 4, WT/MIN(96)/DEC/18, 36 I.L.M. 218, 221 (1997). The 2001

hard sanctions under the Peru Agreement.²⁵⁶ This program would draw on ILO and U.S. experience with hybrid programs, such as the arrangement developed under the U.S.-Cambodia Bilateral Textile Trade Agreement (UCTA). The program would learn from the experience under the UCTA, implementing certain aspects while differing from others.²⁵⁷

The UCTA, signed on January 20, 1999, embodies an innovative labor regime that combines ILO factory-level monitoring—which focuses on the adequacy of actual factory conditions instead of the domestic laws regulating labor practices—with U.S. trade incentives in the form of increased textile quotas for compliance with ILO and domestic labor law.²⁵⁸ Other than this use of “carrots”²⁵⁹ to incentivize improved labor standards—as opposed to “sticks” in the form of sanctions or threats to terminate existing trade privileges—the UCTA’s major innovation is its novel use of the ILO to monitor and report information regarding labor conditions in Cambodian garment factories.²⁶⁰ Under the UCTA, the United States increases Cambodia’s textile quota each year if garment factories “substantially compli[ed]” with Cambodian and international labor standards in the previous year.²⁶¹ While the UCTA does not define the terms “substantially comply,” the United States determines satisfac-

WTO Ministerial reaffirmed this declaration. World Trade Organization, Ministerial Declaration of 14 November 2001 para. 8, WT/MIN(01)/DEC/1, 41 I.L.M 746, 747 (2002).

256. U.S.-Peru TPA, *supra* note 6, arts. 17.7(6), 21.15–17 (authorizing complaining party to suspend equivalent benefits accruing to party complained against if dispute settlement process fails to resolve dispute within specified period of time).

257. For example, it would differ from the UCTA’s use of “carrots” versus “sticks” and its focus on factory monitoring in a specific industry. See Kevin Kolben, Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia’s Garment Factories, 7 *Yale Hum. Rts. & Dev. L.J.* 79, 80–81 (2004) (noting that UCTA is novel because it combined “trade related incentives to enforce workers’ rights” and “factory level monitoring of labor rights compliance”). These divergences are the result of differences in the trade agreements and other external circumstances.

258. For detailed descriptions and analyses of the UCTA, see generally *id.*; Don Wells, “Best Practice” in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement, 27 *Comp. Lab. L. & Pol’y J.* 357 (2006); Sandra Polaski, Cambodia Blazes a New Path to Economic Growth and Job Creation (Carnegie Endowment for Int’l Peace, Carnegie Paper No. 51, 2004), available at <http://www.carnegieendowment.org/files/cp51polaskifinal2.pdf> (on file with the *Columbia Law Review*) [hereinafter Polaski, Cambodia].

259. See Kolben, *supra* note 257, at 80 (noting that UCTA uses “trade related incentives to enforce workers’ rights”).

260. See Polaski, Cambodia, *supra* note 258, at 5 (referring to UCTA’s “inauguration of a new role in international governance for an international agency” as “key innovation” and describing ILO’s monitoring role under UCTA).

261. Cambodia Bilateral Textile Agreement, U.S.-Cambodia, art. 10(D), Jan. 20, 1999, available at http://cambodia.usembassy.gov/uploads/images/M9rzdrzMKGi6Ajf0SIuJRA/uskh_textile.pdf (on file with the *Columbia Law Review*) [hereinafter UCTA].

tion based on reports from ILO monitors.²⁶² These monitors visit participating garment factories²⁶³ and report on labor conditions using checklists containing 156 items based on ILO fundamental labor standards and Cambodian labor law.²⁶⁴

The credibility and transparency of the ILO's reports are critical to the program's success. The reports serve not only to provide the United States with detailed information to make its determination under the UCTA, but also provide information to private firms contracting with Cambodian factories.²⁶⁵ These private firms, responding to public pressure induced by the ILO's reports and increasing media coverage of labor violations, would refrain from using factories with poor records.²⁶⁶ While scholars and commentators have critiqued certain aspects of the program, they generally consider it successful.²⁶⁷

A similar hybrid program under the Peru Agreement that incorporates ILO monitoring could provide an important source of information and analysis for compliance with the ILO Declaration. Parties can use this information to institute enforcement proceedings or as evidence for dispute panels deciding whether a violation has occurred. Though the arrangement cannot replicate the UCTA's use of prospective incentives,

262. See Kolben, *supra* note 257, at 103 & n.134 (noting that there is no definition of "substantial compliance" and Committee for the Implementation of Textile Agreements, consisting of U.S. Departments of State, Labor, Commerce, and Treasury, and the United States Trade Representative, determine whether requirement is satisfied); see also UCTA, *supra* note 261, art. 10(D) (noting that U.S. government will make determination based on consultations with Cambodian government "and other information regarding the implementation of this program and its results").

263. Though factory participation was voluntary, the Cambodian government passed a regulation that permitted only participating factories to benefit from increased quota allotments. Polaski, *Cambodia*, *supra* note 258, at 7–8.

264. Monitors are to report on issues including child labor, forced labor, sexual harassment, hours of work, minimum wages, and freedom of association. Kolben, *supra* note 257, at 101–02; Wells, *supra* note 258, at 360.

265. See Kolben, *supra* note 257, at 105–06 (noting that buyer pressure resulted in companies such as Gap and Nike obtaining ILO compliance reports regarding their factories).

266. See Polaski, *Cambodia*, *supra* note 258, at 11–12 (describing effect of ILO reports on Nike's patronage of Cambodian factories).

267. Compare Kolben, *supra* note 257, at 103–05 (critiquing aspects of UCTA program including its lack of mechanism to require factory participation, inability of workers to access compliance reports, and insufficient responsiveness to workers' complaints), with Wells, *supra* note 258, at 367–73 (concluding that "the UCTA with its ILO plant monitoring led to significant improvement[s]" including "increased employment, higher wages, and improvements in key labor standards"), and Polaski, *Cambodia*, *supra* note 258, at 11–16 (describing UCTA's benefits and concluding that "[t]he impact of the quota bonus and monitoring program has been positive for employment and working conditions in Cambodia's apparel sector, by all available measures").

since the Peru Agreement only provides for sanctions, it would draw on the ILO's monitoring experience under the UCTA program.²⁶⁸

Additionally, unlike the UCTA's focus on the garment industry, the Peru Agreement program would reach further than one particular industry and monitor beyond the factory level. ILO monitors would report on workplace conditions, union activity, and government regulation chains. While the broader focus might be more difficult and costly to implement, it would provide a better assessment of deficiencies in the domestic labor regimes that go beyond poor factory conditions.

Furthermore, the broader focus will be coupled with a metric that is more informal and less specific, thus providing more time to focus on the core rights.²⁶⁹ As opposed to the detailed and rigid checklists that monitors under the UCTA program used, which focused on specific labor standards in numerous areas,²⁷⁰ the monitors under the Peru Agreement would report on conditions relating to the ILO Declaration's core labor principles that focus on impediments to their realization. The reports would reveal areas that the ILO can help to improve, as well as provide evidence that governments and dispute panels could use to determine violations.²⁷¹ Since the analysis regarding compliance with the ILO Declaration would come from the ILO monitors or from a second level compilation of the reports by ILO supervisors,²⁷² the ILO Declaration's

268. As Polaski notes, the tools gained by the ILO from its experience under the UCTA can serve as the basis of innovative mechanisms for future ILO-FTA arrangements: The experience [with the UCTA program] has . . . built a strong new capacity within the ILO that is highly relevant to the needs of its constituencies elsewhere. As countries struggle to balance economic and social policies—and to advance trade while promoting acceptable levels of labor standards—the ILO could be called on to use its newly developed skills to monitor and provide credible information in a wide range of situations. Such an invitation could come from governments, and it is likely that the ILO would act only if the governments involved explicitly requested its participation.

Polaski, Cambodia, *supra* note 258, at 18.

269. As Kolben notes, shifting the monitors' focus to the ILO Declaration's core principles and impediments to their implementation would remedy the problem that resulted from the UCTA monitors' focus on detailed and numerous labor standards—namely, that “less time [could] be spent developing the cores of sustainable monitoring—effective enforcement of freedom of association and creation of space for legitimate unions to organize.” Kolben, *supra* note 257, at 105.

270. *Id.* at 101–02 (describing 156-item checklist and its development).

271. The First ILO synthesis reports on compliance with the UCTA, and links to the second through eleventh reports, can be found at Int'l Labour Org., First Synthesis Report on the Working Conditions Situation in Cambodia's Garment Sector (2001), available at <http://www.ilo.org/public/english/dialogue/ifpdial/publ/cambodia.htm> (on file with the *Columbia Law Review*). The twelfth report can be found at Int'l Labour Org., Twelfth Synthesis Report on the Working Conditions in Cambodia's Garment Sector (2005), available at [http://www.betterfactories.org/content/documents/1/12th%20Synthesis%20Report%20\(En\).pdf](http://www.betterfactories.org/content/documents/1/12th%20Synthesis%20Report%20(En).pdf) (on file with the *Columbia Law Review*) [hereinafter Twelfth Synthesis Report].

272. See Kolben, *supra* note 257, at 102–03 (noting that under UCTA, ILO Chief Technical Advisor publishes “synthesis reports” on monitoring results).

principles would be less susceptible to weak and divergent interpretations by domestic governments or dispute panels.

Finally, and perhaps most importantly, the reports would be transparent and available to the public.²⁷³ If ILO reports indicate severe non-compliance, they could induce public and political pressure to institute enforcement proceedings under the Peru Agreement.²⁷⁴ This pressure could provide the necessary motivation to overcome an administration reluctant²⁷⁵ to enforce labor provisions in FTAs. The program could therefore mitigate the threat of the ILO Declaration's vague principles and create real pressure to enforce the Peru Agreement's labor provisions.

The feasibility of implementing such a program depends on political will to establish supplementary arrangements among the United States, Peru, and the ILO. The Peru Agreement provides the foundation for the program, but the parties and the ILO would have to work out its practicalities. With such a program in place, the improvements to the Peru Agreement that resulted from the bipartisan deal could embody an actual breakthrough in U.S. efforts to link labor and trade.

CONCLUSION

This Note has argued that effectively linking labor and trade in U.S. FTAs requires more than vague commitments to uphold abstract principles reflecting the lowest common denominator of internationally accepted labor rights. It has shown that, as a result of political constraints, the necessity of universality, and the nature of the ILO Declaration's project within the ILO regime, the ILO Declaration consists of ambiguous labor principles that provide little guidance regarding their implementation or content. While the ILO Declaration's vagueness may be unavoidable in the context of the ILO, the Peru Agreement provides the opportunity to endow the principles with more specific labor standards and thus overcome the limitations of the ILO Declaration in order to protect workers and help create more effective domestic labor regimes. The Peru Agreement can live up to its potential by incorporating the ILO into its labor regime—either through reference to its jurisprudence or through more active participation as factfinder and monitor.

273. See Twelfth Synthesis Report, *supra* note 271, at 4 (noting that “synthesis reports” are posted on the ILO website); Polaski, Cambodia, *supra* note 258, at 8 (observing that ILO would provide “full transparency of monitoring results”).

274. See, e.g., Polaski, Cambodia, *supra* note 258, at 8 (noting that under UCTA “the private incentive for firms to improve their labor standards to attract reputation-conscious buyers was very significant” and supporting statement with statistics indicating “that buyers were attracted to place orders with factories that were seen as compliant with labor norms”).

275. See *supra* notes 166–167 and accompanying text (discussing legislators' statements expressing concern that Bush Administration would be reluctant to enforce Peru Agreement's labor provisions).

As the United States moves forward with regional economic integration, the necessity for effective labor protections becomes increasingly salient. While the ILO serves an important function in the international sphere, augmentation through programs such as those proposed under the Peru Agreement can mitigate its practical constraints. There is no need for such programs to start from scratch given the ILO's substantial experience in developing and promoting labor rights and its international credibility and acceptance. Both ILO and national efforts to promote labor rights can gain from innovative hybrid projects that combine their institutional strengths to work around impediments each would face on its own. By beginning to experiment with new programs under the Peru Agreement, the United States can substantiate its commitment to promote and protect labor standards and lead the way in an increasingly globalized economy.