The U.S. International Labor Relations Act

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Labor rights in the United States spring from the U.S. Constitution, federal law, and international law. The First Amendment of the Constitution protects an individual's right to associate with others and the right of an association to advocate on behalf of its members. This is a right opposable to state action, but, as the Supreme Court has pointed out, "the First Amendment is not a substitute for . . . national labor relations law" in regulating the obligations of the employer.[1]

The U.S. National Labor Relations Act (NLRA)[2] was enacted by Congress in 1935 to govern relations between unions and employers in the private sector and to set the rules for the operation of the National Labor Relations Board (NLRB).[3] The NLRA declares:

> [I]t is . . . the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[4]

The NLRA was revised in 1947 and 1959, and there have been no significant amendments since then.[5]

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1. Smith v. Ark. State Highway Emps., Local 1315, 441 U.S. 463, 464 (1979).

2. Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69 (2006)).

3. Prior to the NLRA (Wagner Act), the Congress in 1914 had legislated that "[t]he labor of a human being is not a commodity or article of commerce" and had made clear that "[n]othing . . . in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations instituted for . . . mutual help. . . ." Clayton Act, Pub. L. No. 63-212, § 6, 38 Stat. 730, 731 (1914) (current version codified at 15 U.S.C. § 17 (2006)). This axiom about the nature of labor was carried forward into the Treaty of Versailles, which announced a guiding principle that "labour should not be regarded merely as a commodity or article of commerce." Treaty of Peace with Germany (Treaty of Versailles), art. 427, June 28, 1919, 2 Bevans 43; *see also* Horacio Spector, *Philosophical Foundations of Labor Law*, 33 FLA. ST. U. L. REV. 1119, 1136 (2006).

4. 29 U.S.C. § 151 (2006).

5. *See* Cynthia L. Estlund, *An American Perspective on Fundamental Labour Rights, in* SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 192, 201 (Bob Hepple ed., 2002).

The U.S. International Labor Relations Act (ILRA) is what I propose to call the international law accepted by the United States for the governance of domestic labor-management relations in the world economy. Unlike the NLRA, the ILRA is not specifically codified. Rather, it stands as an interrelated set of treaty obligations binding the United States. The ILRA began in 1934, one year earlier than the NLRA, when the United States joined the International Labour Organization (ILO).[6] U.S. officials had been among the architects of the ILO when its constitutional provisions were drafted in 1919, but membership by the United States did not come until the New Deal when Labor Secretary Frances Perkins promoted stronger international labor engagement.[7]

Besides ILO rules, the ILRA is also composed of the U.S. labor obligations carved into U.S. free trade agreements (FTAs).[8] Although the reference to the free flow of commerce in the NLRA may owe its origin to U.S. constitutional discourse, there has been a historical relationship between the regulation of international commerce and the regulation of labor conditions. Thus, the accretion to the ILRA from the labor chapters in the recent FTAs is reflective of the century-long goal of harmonizing core labor law as a precondition for attaining economic growth and social justice. Note, however, that the FTAs (or, for that matter, the ILO conventions) do not specifically address transnational labor organizing.[9]

The ILRA is interconnected with the NLRA. At the domestic level, the NLRB is judicially supervised by federal courts and is subject to indirect political supervision by the president and Congress. But the domestic level is not the only level on which the NLRB is accountable. As an entity of the United States, the NLRB and its actions are subject to legal oversight by organs of the ILO and by FTA tribunals.[10] Or, in other words, the law of the NLRB includes not only the NLRA, but also the ILRA.

This article explicates how the ILRA provides a second level of legal accountability in the United States. The article proceeds in three parts:

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6. KIRSTIN DOWNEY, THE WOMAN BEHIND THE NEW DEAL: THE LIFE OF FRANCES PERKINS, FDR'S SECRETARY OF LABOR AND HIS MORAL CONSCIENCE 195–96 (2009).

7. INT'L LAB. OFFICE [ILO], EDWARD PHELAN AND THE ILO 168–69 (2009); *id.*

8. *See* Alisa DiCaprio, *Are Labor Provisions Protectionist?: Evidence from Nine Labor-Augmented U.S. Trade Arrangements*, 26 COMP. LAB. L. & POL'Y J. 1, 1–2 (2004); Cleopatra Doumbia-Henry & Eric Gravel, *Free Trade Agreements and Labour Rights: Recent Developments*, 145 INT'L LAB. REV. 185, 189 (2006).

9. *See* James Atleson, *The Voyage of the* Neptune Jade: *Transnational Labour Solidarity and the Obstacles of Domestic Law, in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 379, 380 (Joanne Conaghan et al. eds., 2002).

10. *See* Steve Charnovitz, *The ILO Convention on Freedom of Association and Its Future in the United States*, 102 AM. J. INT'L L. 90, 92 (2008).

Part I examines the two main bodies of law in the ILRA—first, the ILO, and second, U.S. trade agreements. Part II assesses the effectiveness of the ILRA and presents some ideas for strengthening it. Part III summarizes and draws conclusions. Recognizing that our overall project honors the seventy-fifth anniversary of the NLRA, this article focuses on those aspects of labor-management relations governed by the NLRA.

I. The International Law of Labor Relations Accepted by the United States

A well-known U.S. labor law expert suggested in 2001 that "it [is] extremely unlikely that a body of international labor law governing the United States will come into existence in the foreseeable future."[11] In my view, such governing international law already exists in the form of the ILRA. Part I of this article discusses the sources of the ILRA, with Section A covering the ILO and Section B covering the free trade agreements with U.S. labor obligations.

A. The United States and the ILO

Although the "right of association for all lawful purposes" was identified as a "principle" of "special and urgent importance" in the original ILO constitution of 1919,[12] the ILO did not enact positive law to delineate that right until 1948, when the ILO finalized its new Convention Concerning Freedom of Association and Protection of the Right to Organise (C.87).[13] A year later, the ILO propounded the sister Convention Concerning the Application of the Principles of the Right to Organise and Collective Bargaining (C.98).[14] The two conventions are consistent with the provisions in the U.S.-ratified International Covenant on Civil and Political Rights affirming "the right to freedom of association with others, including the right to form and join trade unions for the protection of . . . interests."[15]

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11. Matthew W. Finkin, *International Governance and Domestic Convergence in Labor Law as Seen from the American Midwest*, 76 IND. L.J. 143, 143 (2001).

12. GERRY RODGERS ET AL., THE INTERNATIONAL LABOR ORGANIZATION AND THE QUEST FOR SOCIAL JUSTICE, 1919–2009, at 45–48 (2009).

13. *Id.* The 1948 ILO Conference was held in San Francisco. *See* ILO, Convention No. 87, Freedom of Association and Protection of the Right to Organise, June 17, 1948, *available at* http://www.ilo.org/ilolex/english/convdispl.htm (scroll down to "C87" using left-side scrollbar and click on hyperlink).

14. ILO, Convention No. 98, Right to Organise and Collective Bargaining Convention, June 8, 1949, *available at* http://www.ilo.org/ilolex/english/convdispl.htm (scroll down to "C98" using left-side scrollbar and click on hyperlink).

15. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, at art. 22 (Dec. 16, 1966); *see also* Patrick Macklem, *The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?, in* LABOUR RIGHTS AS HUMAN RIGHTS 61, 70–74 (Philip Alston ed., 2005); Justin D. Cummins, *Invigorating Labor: A Human Rights Approach in the United States*, 19 EMORY INT'L L. REV. 1, 24 (2005).

C.87 and C.98 delineate rights for workers, employers, workers' organizations, and employers' organizations, and the two conventions also impose obligations on public authorities and specifications for domestic law regarding how such organizations are regulated. Moreover, C.87 calls on ratifying member states to give effect to its provisions with appropriate domestic measures.[16] Similarly, C.98 calls for machinery to ensure respect for the right to organize.[17] C.87 was perhaps the earliest multilateral convention to recognize rights of natural persons, enterprises, and nongovernmental organizations (NGOs).

Although the U.S. government supported the consummation of both ILO conventions, the United States has not become a party to either C.87 or C.98. President Harry S. Truman sent C.87 to the U.S. Senate in 1949, but the Senate never voted on ratification.[18] C.98 has not been transmitted to the Senate for action.[19] Because the United States is not a party to those conventions, the regular ILO monitoring and compliance procedures[20] for these conventions are inapplicable to the United States.

Nevertheless, the United States is supervised by the ILO's Committee on Freedom of Association (CFA), a tripartite subsidiary organ of the ILO Governing Body.[21] The CFA does not investigate complaints against domestic or transnational enterprises.[22] Rather, the CFA inves-

16. Charnovitz, *supra* note 10, at 92.

17. ILO Convention No. 98, *supra* note 14, at art. 3.

18. Charnovitz, *supra* note 10, at 90.

19. The president's failure even to send C.98 to the Senate may have stemmed from strong opposition by business. The U.S. employer delegate to the ILO (Charles McCormick) worried that "[i]f this convention . . . [were sent] to the Senate and ratified, the conflicting sections of the Taft-Hartley law would . . . [be] nullified automatically (as would many state statutes)." EDWARD C. LORENZ, DEFINING GLOBAL JUSTICE: THE HISTORY OF U.S. INTERNATIONAL LABOR STANDARDS POLICY 171 (2001); *see also* LEONARD J. CALHOUN, THE INTERNATIONAL LABOR ORGANIZATION AND UNITED STATES DOMESTIC LAW 30 (1953) ("It is obvious that I.L.O. Treaties are generally recognized as important potential weapons in shaping our domestic legislation.").

20. Those procedures are codified as articles 22–34 of the ILO Constitution and include supervision by the Committee of Experts on the Application of Conventions and Recommendations. *See* Francis Maupain, *Une Rolls Royce en Mal de Révision? L'efficacité du Système de Supervision de L'OIT a L'Approche de Son Centenaire*, 114 REVUE GÉNÉRALE DE DROIT INT'L PUB. 465 (2010); G.N. Barnes, *The Scope and Purpose of International Labour Legislation, in* LABOUR AS AN INTERNATIONAL PROBLEM 3, 18–19 (E. John Solano ed., 1920) (discussing the punitive measures available against defaulting states in the ILO).

21. Anne Trebilcock, *Putting the Record Straight About International Labor Standard Setting*, 31 COMP. LAB. L. & POL'Y J. 553, 554–55 (2010). Tripartism in the ILO means the participation of workers, employers, and governments. As one ILO expert explains, "[t]he structural feature of tripartism is intended to ensure that rules governing labor markets are responsive to those who live them on a daily basis." *Id.*

22. KD Ewing, *International Regulation of the Global Economy—The Role of Trade Unions, in* REGULATING LABOUR IN THE WAKE OF GLOBALISATION: NEW CHALLENGES, NEW INSTITUTIONS 205, 206–07 (Brian Bercusson & Cynthia Estlund eds., 2007) (noting that the ILO "supervises the application of standards by countries not companies").

tigates allegations that the legislation or practice of an ILO member government violates the "principles" of freedom of association or collective bargaining.[23] The complaint process is triggered by governments or by organizations of employers or workers, including international federations (typically, governments do not lodge complaints). Complaints are admissible regardless of whether a respondent government has ratified C.87 or C.98. When the CFA finds that there has been a violation of freedom of association standards or principles by a government, the Committee issues a report to the Governing Body and makes recommendations for how the implicated government can ensure the free exercise of trade union rights. The jurisprudence of the CFA maintains the vitality of C.87 and C. 98, which have not been amended since enactment.

The CFA has completed investigations of forty-three cases against the United States.[24] The vast majority of these cases were dismissed, but in eleven cases, the CFA made recommendations to raise U.S. practice up to ILO standards.[25] During the twenty-first century, there have been six cases in which the Committee found a divergence between U.S. practice and the internationally agreed minimum.[26] Unfortunately, U.S. federal and state governments have not yet taken direct action to satisfy the CFA in any of those six cases.

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23. *See, e.g.*, ILO, Report of the Committee on Freedom of Association, Complaint Against the Government of the United States Presented by the United Electrical, Radio, and Machine Workers of America, Case No. 2460, paras. 943–56, *in* 344th Report of the Committee on Freedom of Association, 90 Int'l Labor Office Bull., para. 940 (2007, Series B).

24. These calculations are based on author's tabulations from the ILO LibSynd database. *Application of International Labour Standards (LibSynd)*, INT'L LABOUR STANDARDS DEP'T, http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?Lang=EN&hdroff=1&CFID=51576571&CFTOKEN=67709822 (last visited Feb. 27, 2011). For a discussion of some of these cases, see JAMES A. GROSS, A SHAMEFUL BUSINESS: THE CASE FOR HUMAN RIGHTS IN THE AMERICAN WORKPLACE 81–82, 206–10 (2010); John C. Knapp, *The Boundaries of the ILO: A Labor Rights Argument for Institutional Cooperation*, 29 BROOK. J. INT'L L. 369, 389–91 (2003); INT'L TRADE UNION CONFEDERATION, INTERNATIONALLY RECOGNISED CORE LABOUR STANDARDS IN THE UNITED STATES OF AMERICA: REPORT FOR THE WTO GENERAL COUNCIL REVIEW OF THE TRADE POLICIES OF THE UNITED STATES OF AMERICA (2010), *available at* http://www.ituc-csi.org/IMG/pdf/final_US_CLS_2010.pdf.

25. *See Application of International Labour Standards (LibSynd), supra* note 24.

26. The cases are ILO, Report of the Committee on Freedom of Association, Complaint Against the Government of the United States Presented by the Association of Flight Attendants-Communications Workers of America, Case No. 2683, *in* 357th Report of the Committee on Freedom of Association, para. 430, U.N. Doc. GB.308/3 (2010) (regarding National Mediation Board handling of anti-union discrimination against flight attendants); ILO, Report of the Committee on Freedom of Association, Complaint Against the Government of the United States Presented by the United Automobile, Aerospace and Agricultural Implement Workers of America International Union, Case No. 2547, *in* 350th Report of the Committee on Freedom of Association, para. 732, U.N. Doc. GB.302/5 (2008) (regarding NLRB decision on the issue of university teaching and research assistants); ILO, Report of the Committee on Freedom of Association, Complaint Against the Government of the United States Presented by the American Federation of Labor

A CFA finding against a government is sometimes described as not having legal consequences at the international level.[27] At present, there is no CFA jurisprudence holding that a government cited by the CFA has a duty to bring its offending measure into compliance with the CFA's recommendations.[28] Moreover, the CFA does not issue injunctions and a state that refuses to correct its violations suffers no legal consequences in the ILO.

Under U.S. law and practice, a CFA recommendation against the United States does not have any apparent domestic legal consequences. A computer search did not elicit any federal or state court cases where the court cited a CFA holding. Rather surprisingly, CFA jurisprudence is not routinely cited by the NLRB. In fact, a computer search yielded only one NLRB case where a CFA case was even mentioned, and that was in a footnote in a dissenting opinion by Chairman Wilma Liebman in 2005.[29] The absence of such citations might be explained by an observation several years ago by former NLRB Chairman William B. Gould IV, who revealed that in the 1990s "had the NLRB dared cite a decision or opinion by the ILO, it would have risked denial of appropriations and perhaps worse."[30]

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and Congress of Industrial Organizations, Case No. 2524, *in* 349th Report of the Committee on Freedom of Association, para. 794, U.N. Doc. GB.301/8 (2008) (regarding the definition of "supervisor" used by the NLRB); ILO, Report of the Committee on Freedom of Association, Case No. 2460, *supra* note 23 (regarding North Carolina's restrictions on collective bargaining by public employees); ILO, Report of the Committee on Freedom of Association, Complaint Against the Government of the United States Presented by the American Federation of Government Employees, Case No. 2292, *in* 343th Report of the Committee on Freedom of Association, para. 705, U.N. Doc. GB.297/10 (2006) (regarding rules for federal airport screeners); ILO, Report of the Committee on Freedom of Association, Complaints Against the Government of the United States Presented by the American Federation of Labor and the Congress of Industrial Organizations, Case No. 2227, *in* 332d Report of the Committee on Freedom of Association, para. 551, U.N. Doc. GB.288/7 (2003) (regarding the U.S. Supreme Court case *Hoffman Plastic Compounds v. NLRB* and its treatment of undocumented workers).

27. BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 56 (2005); Brian A. Langille, *Core Labour Rights—The True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409, 413 (2005) (referring to this and other ILO supervisory procedures as "a game of moral persuasion and, at most, public shaming. It is a decidedly soft law system.").

28. *See* Langille, *supra* note 27, at 413.

29. Firstline Transp. Sec., Inc., 344 N.L.R.B. 1007, 1008 n.11 (2005). NLRB Administrative Law Judge William G. Kocol noted in a recent decision that the applicant union had requested that the matter be referred to the ILO. Fresh & Easy Neighborhood Mkt. Inc., Case Nos. 21-CA-38882, 21-CA-39100, 2010 N.L.R.B. LEXIS 138, at *21 (NLRB Div. of Judges, June 3, 2010).

30. William B. Gould IV, *Fundamental Rights at Work and the Law of Nations: An American Lawyer's Perspective*, 23 HOFSTRA LAB. & EMP. L.J. 1, 10 (2005). Earlier, he predicted that "if an NLRB Chairman were to cite decisions of the International Labor Organization . . . he or she would be concerned with impeachment for such brazen audacity." William B. Gould IV, *Labor Law and Its Limits: Some Proposals for Reform*, 49 WAYNE L. REV. 667, 684 (2003).

The fundamental status within the ILO of union recognition and collective bargaining rights was reinforced in 1998 when the ILO adopted its Declaration on Fundamental Principles and Rights at Work.[31] The declaration states that all ILO members, even those who have not ratified the relevant conventions,

> have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution [of the ILO], the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining. . . .[32]

Under the declaration's follow-up procedures, every government that has not ratified one of the fundamental ILO conventions commits to report periodically on the status of the relevant rights in its territories.[33]

The 2010 Country Baseline published on the ILO website quotes from a new report by the U.S. government on the status of freedom of association and collective bargaining. The U.S. report admits that there are "several challenges to the full exercise of the rights of freedom of association and collective bargaining" in the United States and asserts that many of these challenges were first identified in 1999 when the United States submitted its first report under the declaration.[34] In addition, the U.S. government states that "Federal legislation and practice appear to be in general conformance with ILO Conventions 87 and 98, though the challenges identified above persist. . . ."[35] On the other hand, the U.S. report states that "it must be acknowledged that some aspects of the U.S. labor law system could be improved to more fully

31. The advent of the declaration was not universally applauded. Some analysts have criticized it for undermining the authority of ILO conventions. Philip Alston, *Facing Up to the Complexities of the ILO's Core Labour Standards Agenda*, 16 EUR. J. INT'L L. 467, 479 (2005) ("The ILO should insist that the normative content of the Declaration's principles mirrors that of the relevant conventions"); Guy Standing, *The ILO: An Agency for Globalization?*, 39 DEV. & CHANGE 355, 367 (2008) ("The Declaration further weakened the ILO by making even the core 'standards' subject only to monitoring by means that were 'strictly promotional'. . . .").

32. ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233, *available at* http://www.ilocarib.org.tt/projects/cariblex/conventions_12.shtml. The other fundamental rights subject to the Declaration concern forced labor, child labor, and employment discrimination.

33. Francis Maupain, *New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization*, 20 EUR. J. INT'L L. 823, 842 n.64 (2009).

34. ILO, COUNTRY BASELINES UNDER THE ILO DECLARATION ANNUAL REVIEW 2000–2010: UNITED STATES 206, 212 (2010) [hereinafter COUNTRY BASELINES], *available at* http://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-declaration/documents/publication/wcms_091262.pdf.

35. *Id.* at 215.

protect the rights to organize and bargain collectively of all employees in all circumstances."[36] The U.S. report indicates that President Barack Obama has expressed support for the Employee Free Choice Act,[37] which, the report claims, would address many of the concerns noted above.[38] The report does not explain how this proposed act would respond to the ILO's criticisms about U.S. practices.

The U.S. baseline also includes comments by the ILO Declaration Expert-Advisers. They state that "restrictions on the rights of certain categories of workers in United States, such as workers in the public service and agricultural workers, to organize, were not compatible with realization of this principle and right."[39] The Expert-Advisers also note that they are concerned that the absence of U.S. ratification of C.87 and C.98 "leaves many millions of workers and employers without the protection offered by these instruments in international law. . . ."[40]

In summary, although the United States has declined to ratify the fundamental ILO conventions on labor relations, the United States is nevertheless obliged, by virtue of its ILO membership, to comply with the principles of freedom of association and collective bargaining as broadly articulated in C.87 and 98. Over fifty cases have been brought against the United States in the CFA and, in recent years, there has been a substantial record developed of a failure by the United States in specific instances to respect international principles.[41] The U.S. administration's most recent report to the ILO does not present any timetable for remedying the U.S. deficiencies identified by the CFA. Nor does the administration commit to seeking U.S. Senate approval of C.87 and C.98. Ironically, the one proposition that unites the U.S. labor and employer organizations that participate in the ILO is that U.S. law fails to comply with C.87 and C.98. As this article goes to press, the U.S. compliance gap seems to be widening with respect to the treatment of public sector unions.[42]

B. The Labor Law Commitments in U.S. FTAs

The U.S.-Peru Trade Promotion Agreement of 2006 is the most recent of the implemented U.S. FTAs.[43] Moreover, this agreement is

36. *Id.* at 214.

37. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

38. COUNTRY BASELINES, *supra* note 34, at 212.

39. *Id.* at 215.

40. *Id.*

41. *See ILOLEX: Conventions*, INT'L LABOUR ORG. (Jan. 11, 2011), http://www.ilo.org/ilolex/english/index.htm (click on hyperlinked term "specific country," then on "United States" in the left-hand scroll bar, and then on "Freedom of Association cases").

42. Kris Maher & Ilan Brat, *Wisconsin Curbs Unions*, WALL ST. J., Mar. 11, 2011, at A3.

43. United States–Peru Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006 [hereinafter U.S.-Peru FTA], *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text; *see also* Michael A. Cabin, *Labor Rights in the*

the most advanced FTA in force with respect to fundamental labor rights. The Peru FTA enhances the legalization of the ILO declaration by explicitly committing both parties to adhere to it and by backing that up with trade sanctions or monetary fines. Compared to the ILO Declaration, the FTA evinces greater authority and intention to control governmental behavior. The FTA requires each party to "adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up* (1998) (ILO Declaration): (a) freedom of association; (b) the effective recognition of the right to collective bargaining;. . . ."[44] In addition, the FTA declares that "[n]either party shall waive or otherwise derogate from . . . its statutes or regulations" relating to the above principles and rights "in a manner affecting trade or investment between the Parties."[45]

Because the U.S. government has contracted with Peru to adopt and maintain the rights of freedom of association and collective bargaining and to provide effective recognition of collective bargaining, these provisions form part of the ILRA. Unlike the ILO where legal commitments are made multilaterally and to the ILO itself, these FTA legal commitments are made solely to one treaty partner, Peru. Of course, given the indivisible nature of FTA labor commitments, if the United States fulfills its legal obligations to Peru, those benefits will also flow to other countries.

The U.S.-Peru FTA contains two other major labor obligations: First, the FTA forbids each government from failing to enforce effectively domestic labor laws "through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties."[46] Second, the FTA requires that persons with a legally recognized interest have appropriate access to domestic tribunals for the enforcement of labor laws.[47] Proceedings under such administrative or judicial tribunals must not entail unreasonable charges or unwarranted delays; moreover, final decisions shall be made available without undue delay to the parties.

Peru Agreement: Can Vague Principles Yield Concrete Change?, 109 COLUM. L. REV. 1047 (2009).

44. U.S.-Peru FTA, *supra* note 43, art. 17.2(1) (footnote omitted). The footnote explains that the obligations, as they relate to the ILO, refer only to the ILO Declaration. The Bush administration negotiated three additional FTAs, with South Korea, Panama, and Colombia, that have similar labor commitments, but the Obama administration has not sought congressional approval of any of those labor-friendly FTAs.

45. *Id.* art. 17.2(2).

46. *Id.* art. 17.3(1)(a).

47. *Id.* art. 17.4(1). For the United States, "labor laws" refers only to the U.S. Constitution and federal statutes or regulations promulgated pursuant to acts of Congress. *Id.* art. 17.8.

The labor rules in the U.S-Peru FTA are subject to a state-to-state dispute settlement system. The multiple steps required to get a tribunal are (1) engaging in cooperative labor consultations between the governments; (2) convening the Labor Affairs Council consisting of cabinet-level representatives, who may consult outside experts; (3) requesting intergovernmental consultations; and (4) requesting an arbitral panel of three members pursuant to the FTA Model Rules of Procedure.[48] The final report from the panel is due within 150 days.[49] If the panel determines that the defendant has not complied with its FTA obligations, the preferred resolution is for that party to eliminate the nonconformity.[50] If after forty-five days the parties cannot agree upon a resolution, they are to enter into consultations for compensation, and if that is not agreed upon, the complaining party may suspend trade benefits of equivalent effect.[51] Such trade sanctions may begin after thirty days unless the defendant agrees to pay an annual monetary assessment.[52] So far, these dispute procedures have not been used.

As of February 2011, the United States has made labor commitments in eight other FTAs currently in force as well as in a side agreement to the North American Free Trade Agreement (Canada and Mexico).[53] The labor commitments in these FTAs are less extensive than in the U.S.-Peru FTA and do not contain its core obligation to adopt and maintain in statutes and regulations the international rights of association and collective bargaining. For example, in the Dominican Republic, Central America, and U.S. FTA, the parties agreed that they "shall strive to ensure" that labor principles and internationally recognized labor rights are recognized and protected by domestic law.[54] Whether the "strive to ensure" rule is explicit enough for arbitral enforcement has yet to be tested as there have been no labor disputes brought under this FTA. Indeed, no U.S. trading partner has ever lodged an FTA labor dispute against the United States and, perhaps in reciprocity, the United States has not lodged an FTA labor dispute against another country.[55]

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48. *Id.* arts. 21.4–.10.

49. *Id.* arts. 21.13–.14.

50. *Id.* art. 21.15(2).

51. *Id.* art. 21.16.

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

53. The eight FTAs are with Australia, Bahrain, Central America (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic, Chile, Jordan, Morocco, Oman, and Singapore. *See Free Trade Agreements*, OFFICE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements (last visited Mar. 20, 2011).

54. Dominican Republic–Central America–United States Free Trade Agreement, art. 16.1, Aug. 5, 2004, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta.

55. *But see* Len Bracken, *U.S. Will File First-Ever FTA Labor Case Against Guatemala, USTR Chief Kirk Says*, BNA Daily Rep. for Executives, Aug. 2, 2010, at A-17.

II. Assessing and Strengthening the ILRA

To assess the ILRA, one needs to start with an understanding of its purpose. International labor law would seem to have two main aims. First, ILO standards can provide the rules of the road for the world economy and labor markets.[56] Second, the international labor regime can enhance the accountability of domestic labor agencies and prevent regulatory failure.

As to the purpose of incorporating labor obligations into U.S. FTAs, two explanations seem most cogent. First, the U.S. government is locking in its labor law via a legal commitment to other countries. Second, the U.S. government is using the U.S. commitment instrumentally to seek matching policies in other countries. In that regard, the U.S. government could be motivated by altruistic reasons (e.g., to promote social justice and democracy in other countries), by pragmatic reasons because "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,"[57] or by commercial reasons to prevent unfair competition. Alleged unfair competition has been a longtime preoccupation of U.S. labor policymakers. In 1919, for example, the War Labor Policies Board reported that "[a]s a natural consequence of unequal international standards, nations with higher labor standards are handicapped in competition with nations having lower standards."[58]

Although this article looks only at the U.S. ILRA, it is interesting to note parallel developments in other countries. For example, the Canada–Peru FTA of 2008 cross-references a bilateral Labour Cooperation Agreement that contains substantive labor obligations similar to those in the U.S.–Peru FTA.[59] On the other hand, many FTAs lack any provisions regarding labor other than on the temporary entry of professionals.

The rationale for using both labor and trade treaties to lift employment standards has been questioned. Some argue that treaty makers should avoid duplication. Nevertheless, there are benefits in utilizing

56. For further discussion of the rationale for international labor standards, see Steve Charnovitz, *The International Labour Organization in Its Second Century*, 4 MAX PLANCK Y.B. UNITED NATIONS L. 147, 165–68 (2000).

57. ILO CONST. pmbl. (1919); *see also* C.J. Ratzlaff, *The International Labor Organization of the League of Nations: Its Significance to the United States*, 22 AM. ECON. REV. 447, 450 (1932) (noting that because of economic internationalization, the regulation of industry and labor can be brought about by the ILO easier than one nation at a time).

58. WAR LABOR POLICIES BD., REPORT ON INTERNATIONAL LABOR STANDARDS 7 (1919), *available at* http://www.archive.org/details/cu31924001900897. This report was commissioned by the U.S. negotiators for the 1919 Paris Peace Conference. Felix Frankfurter oversaw the preparation of the report.

59. Canada-Peru Free Trade Agreement, art. 1603, Can.-Peru, May 29, 2008, *available at* http://www.sice.oas.org/Trade/CAN_PER/CAN_PER_e/CAN_PER_index_e.asp.

both founts of treaty making.[60] First, by using two treaties, governments and civil society get the benefits of two different compliance systems. Second, bilateral trade agreements offer two parties the opportunity to add to the multilateral law operating between them.

An assessment of the effectiveness of the ILO declaration is complex and cannot be fully addressed here.[61] Briefly, the declaration has been successful in several ways. It has generated periodic reports from ILO governments on the domestic status of freedom of association and collective bargaining.[62] It has succeeded in boosting ratifications of C.87 and C.98.[63] The declaration has also succeeded in gaining sufficient legitimacy that it can be readily transplanted into FTAs. In return, the FTAs harden the enforcement of the declaration.

Today may be too early to evaluate the effectiveness of the FTA labor chapters. As there have been no disputes, we do not know how panels will interpret FTA obligations and whether the threatened trade sanctions will promote compliance with panel directives. This author is not aware of any detailed study of FTA institutional labor cooperation, but my impression is that there has been little, if any, technical assistance provided to the United States on labor-management relations.

The U.S. government should take several steps to upgrade its engagement with the ILO. First, as I recommended in 1995,[64] the United States should appoint an ambassador (or permanent representative) to the ILO to better advance U.S. interests. (The United States has a permanent representative to other international organizations, such as the Organization for Economic Co-operation and Development (OECD);[65] the United Nations Educational, Scientific and Cultural Organization (UNESCO);[66] and the United Nations Environment

60. Alan Hyde, *A Game Theory Account and Defence of Transnational Labour Standards—A Preliminary Look at the Problem, in* GLOBALIZATION AND THE FUTURE OF LABOUR LAW 143, 153–54 (John D. R. Craig & S. Michael Lynk eds., 2006).

61. *See* ILO, FREEDOM OF ASSOCIATION IN PRACTICE: LESSONS LEARNED (2008), *available at* http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_096122.pdf.

62. Of course, even before the Declaration, a nonparty to an ILO convention was required to report on its law and practice and the difficulties preventing ratification. ILO CONST. art. 19.5(e) (1919).

63. Ratifications of C.87 have risen from 121 to 150; ratifications of C.98 have risen from 137 to 160. ILO, REVIEW OF THE FOLLOW-UP TO THE 1998 ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK, at para. 24 (2010), *available at* http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_141677.pdf.

64. Steve Charnovitz, *Promoting Higher Labor Standards*, WASH. Q., Summer 1995, at 167, 179.

65. *See Members and Partners*, OECD, http://www.oecd.org/pages/ 0,3417,en_36734052_36761800_1_1_1_1_1,00.html (last visited Mar. 6, 2011).

66. *See Member States*, UNESCO, http://erc.unesco.org/portal/UNESCOMemberStates.asp? language=en (last visited Mar. 6, 2011).

Program (UNEP).)[67] Second, the president's Committee on the ILO (PCILO), which had not met for ten years when it was convened in May 2010, should convene regularly and should set up a website to achieve greater transparency.[68] Third, the PCILO should develop a strategy for achieving Senate approval of C.87, which is the longest-pending treaty before the Senate.[69] Fourth, the PCILO should put on its agenda all cases in which the CFA rules against the United States; the PCILO should make recommendations on whether the United States should come into compliance. Fifth, the appropriate congressional committees should convene a hearing whenever the CFA rules against the United States.

The United States also needs to strengthen the rule of law domestically. Congress should consider amending the NLRA using as a model the post-judgment implementation procedures of U.S. trade law. Under section 129 of the Uruguay Round Agreements Act, the U.S. Trade Representative (USTR) can request the U.S. International Trade Commission to take action following a WTO decision that a ruling by the Commission was not in accord with the WTO obligations of the United States.[70] Specifically, the USTR may request the Commission to consider whether its statutory authority would permit it to render its ruling not inconsistent with WTO findings. If the Commission advises that it has such authority, then the USTR may request the Commission to change its ruling.

An analogous procedure could be established for the NLRB following an adverse decision by the CFA on an NLRB case. Under such a new procedure, the secretary of state could be given the triggering role to ask the NLRB to consider whether it has authority to render its ruling not inconsistent with the findings of the CFA. Should the NLRB find that it has that authority, then, after weighing foreign policy interests, the secretary of state could ask the NLRB to reverse its prior ruling.

Note that the section 129 trade process does not help the United States when a change in federal law is needed to bring the United States into compliance with WTO rules. The same disability would exist with a labor law equivalent of section 129. That is, if compliance

67. *See List of Members of the Governing Council for 2010–2013*, UNEP, http://unep.org/gc/Secretariat/GCmember2008-2011-alpha.pdf (last visited Mar. 6, 2011).

68. The PCILO is the primary institution fulfilling U.S. responsibilities under the ILO Tripartite Consultation Convention No. 144, which entered into force for the United States in 1988.

69. The treaty was sent to the Senate for advice and consent on August 27, 1949. *See Treaties Pending in the Senate*, U.S. DEP'T OF STATE (Mar. 16, 2009), http://www.state.gov/s/l/treaty/pending/.

70. 19 U.S.C. § 3538(a) (2006).

with the CFA decision requires an amendment to the NLRA or to another U.S. labor law, it would be up to Congress to act. In considering whether to reform U.S. law, the Congress would be wise to recall Federalist No. 63, wherein Madison counseled: "An attention to the judgment of other nations is important to every government for two reasons," the second being that "in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed."[71]

The NLRB also needs to expand its legal space in respect of international labor law. In perusing the NLRB website,[72] one gets the sense that ILO decisions are not part of the toolbox of NLRB practice. The NLRB website appears to say nothing about the international labor law binding the United States and does not advise worker or employer organizations of their right to complain to the CFA about a Board decision that transgresses the principles of international labor law. As far as I know, there is no ongoing program of dialogue between members of the NLRB (and administrative law judges) and members of the ILO's quasi-judicial bodies. All of these omissions can be rectified without new legislation, and should be.

While I would not go monist in contending that the entire jurisprudence of the CFA should be a rule of decision in U.S. federal and state courts, I do argue that U.S. courts should give respectful consideration to CFA interpretations of the international rights of freedom of association and collective bargaining.[73] Adjudications in the ILO are obviously not foreign law; they are reflective of international law that is part of U.S. law. Too often, American courts are embarrassingly parochial when it comes to applying international law.[74] By contrast, national courts in other countries, such as Argentina and Canada, have struck down laws based, at least in part, on the holdings of ILO supervisory bodies.[75]

Let me now turn to how the labor chapters of the FTAs can be improved. Looking back at the experience since 1994 when the first U.S.

71. THE FEDERALIST NO. 63 (James Madison).

72. *See NLRB*, NAT'L LAB. REL. BD., http://www.nlrb.gov (last visited Feb. 27, 2010).

73. *See* Breard v. Greene, 523 U.S. 371, 375 (1998) (holding that the U.S. Supreme Court should give "respectful consideration" to treaty interpretation rendered by an international court with jurisdiction to interpret it).

74. *See, e.g.*, Steve Charnovitz, *Revitalizing the U.S. Compliance Power*, 102 AM. J. INT'L L. 551 (2008) (discussing the *Medellin* decision of the U.S. Supreme Court).

75. Arturo Bronstein, *Labour Law in Latin America: Some Recent (and Not So Recent) Trends*, 26 INT'L J. COMP. LAB. L. & INDUS. REL. 17, 21 (2010); Eric Gravel & Quentin Delpech, *International Labour Standards: Recent Developments in Complementarity Between the International and National Supervisory Systems*, 147 INT'L LAB. REV. 403, 410–14 (2008).

FTA labor commitments went into force, the evidence shows that we cannot depend upon other governments to bring labor cases against the United States. No such cases have been brought, and none are likely to be. Two reasons can explain this: first, governments are loathe to bring labor cases against each other; and second, the asymmetry of power between the United States and each of its FTA partners means that a country lodging a complaint against the United States risks U.S. retaliation. In addition, no international legal aid program exists to help small countries litigate labor cases against the United States.

The flaw in the FTA labor chapters is that there is no private right of action to bring cases as there is in the FTA investment chapters where an investor can bring a case against a foreign government. The ILO CFA complaint process has been effective because injured private actors may lodge cases. This same technique of individual empowerment should be utilized in the FTA labor chapter (even if cases can only be brought against a *foreign* government).

III. Conclusions

All countries have an international and a national legal framework for labor relations, but the content of this legislative dyad differs from country to country. The ILO principles on freedom of association define a minimum level for every country, and that is supplemented in many countries by additional labor commitment in other treaties. The distinctive interplay between international acts and national praxis in each country should receive more attention in the field of comparative labor law.

In the United States, the interplay between the "International" and "National" tilts away from the "International." The domestic labor tribunals are unchaperoned by international tribunals and there is remarkably little real-world synergy between the ILRA and the NLRA. The U.S. Congress regularly fails to learn from the experience of other countries that could help achieve the full exercise by workers of freedom of association. Too often, labor law practitioners are not well versed in international labor law.[76]

Looking to the future, we should use the ILRA to make the NLRA more effective.

76. *See* Donald C. Dowling Jr., *The Practice of International Labor & Employment Law: Escort Your Labor/Employment Clients into the Global Millennium*, 17 LAB. LAW. 1, 2 (2001) ("Before December 1999, international labor law was an obscure topic that interested almost nobody outside Geneva, Switzerland—the seat of the International Labour Organization (ILO).").