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The Internationalization of Sources of Labor Law

James J. Brudney

Fordham University School of Law, jbrudney@law.fordham.edu

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THE INTERNATIONALIZATION OF SOURCES OF LABOR LAW

JAMES J. BRUDNEY*

ABSTRACT

This Article examines in depth an important but underappreciated development in international labor law: How norms promulgated by the International Labor Organization (“ILO”) have affected the development and implementation of domestic labor laws and practices since the early 1990s. The newly globalized focus of labor law – energized by substantial expansions in international trade and investment – has been recognized by scholars, practitioners, and governments, but it has not previously been explored and analyzed in this systematic way.

The Article focuses on two central regulatory areas – child labor and freedom of association – and relies on doctrinal and policy developments in these areas, as evidenced by the actions of legislatures, courts, and executive branches in more than twenty countries.

* Joseph Crowley Chair in Labor and Employment Law, Fordham Law School. An earlier version of this Article, *The Evolution and Transformation of Sources of Labor Law*, was delivered in September 2016 at the Tenth American Regional Congress of the International Society of Labor and Social Security Law (“ISLSSL”) in Panama City. The Author is grateful to Janice Bellace, Lance Compa, and Natan Elkin for suggestions during the initial drafting process; to Arturo Bronstein, Fernando Bolanos, Chris Borgen, Martin Flaherty, Harry Katz, Margaret McGuinness, Lee Swepston, Humberto Villasmil, and participants at a St. John’s Law School workshop for valuable comments on earlier drafts; and to Frank Kearn and Alison Shea for extraordinary research assistance. Fordham Law School provided generous financial support. The Author is a member of the International Labor Organization Committee of Experts (the “Committee”), but this Article is presented solely in his individual capacity as a law professor. It does not reflect the views of the Committee or the ILO.

In doing so, the Article addresses how international labor standards have influenced national labor law and practice in the Americas (excluding the United States) — directly through the soft-law route of convention ratification and ILO supervisory monitoring, and indirectly through trade agreement labor provisions that incorporate ILO norms. The resultant changes in domestic laws and practices have been evolutionary rather than transformative, and developments in law outpace those in practice, but within these parameters the changes have been substantial. The Article then places this internationalizing trend in the context of two recognized theories that seek to explain the socialization of human rights law.

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1. INTRODUCTION

Since the early 1990s, the rights and protections accorded to workers in their own countries have been increasingly influenced by international labor norms.¹ A major reason for labor law's more globalized focus has been the substantial expansion in levels of international trade and investment.² The growing attention paid to the relationship between international and domestic labor law has consequences for tens of millions of workers and also for national governments, multinational corporations, and international public bodies. This Article examines how international labor law norms—specifically those promulgated by the International Labor Organization (“ILO”)—have affected the development and implementation of national labor legislation in the past twenty-five years. The Article focuses on laws and practices in the Americas, although its descriptive and normative observations have broader reach.

A threshold question is how to characterize the impact of international labor norms in the domestic labor law arena. The title given to me for an earlier presentation on this topic referred to *The Evolution and Transformation of Sources of Labor Law*. This suggests a view that there has been *both* evolution *and* transformation in labor law sources. Yet, these two concepts—evolution and transformation—are often viewed as divergent, if not contrasting. One tends to think of a body of law as evolving or, *in the alternative*, that same body of law being transformed.

In the United States setting, for example, labor law has *evolved* over seventy years since the National Labor Relations Act of 1935 (“NLRA”) and the Labor Management Relations Act of 1947

¹ See HARRY C. KATZ ET AL., LABOR RELATIONS IN A GLOBALIZING WORLD (2015); HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS: INTERNATIONAL AND DOMESTIC PERSPECTIVES (James A. Gross & Lance Compa eds., 2009); LABOUR RIGHTS AS HUMAN RIGHTS (Philip Alston ed., 2005).

² See, e.g., Annual Session of the Parliamentary Conference on the WTO, *Back to Basics: Connecting Politics and Trade*, at 23 (Nov. 15-16, 2012) (reporting global merchandise trade in 2011 was more than five times its value in 1990); IMF, *Foreign Direct Investment Trends and Statistics* (Oct. 2003), <https://www.imf.org/external/np/sta/fdi/eng/2003/102803.pdf> [<https://perma.cc/9FFG-9F8K>] (reporting foreign direct investment increased by an average of 13% a year from 1990-97, and nearly 50% a year from 1998-2000).

("LMRA").³ It has done so essentially without legislative participation—based on a series of incremental decisions from courts and agencies, engaged in a continuing dialogue during decades of legislative gridlock.⁴ Indeed, the relative absence of legislative or constitutional change in U.S. labor law over many decades is one of its most distinctive features. If evolution in the law is considered a more gradual and incremental process, and transformation a more sudden and radical shift, the question is more aptly framed as whether there has been an evolution *or* a transformation of sources of labor law.

The time-frame explored in this Article begins more recently than enactment of the NLRA and LMRA. The Article examines changes in labor law sources over the past twenty-five to thirty years, dating from about 1990. In this shorter time period, it may be easier to characterize rapid evolution in sources of law as functionally equivalent to transformation. Nonetheless, the Article contends that sources of labor law in the Americas have not been transformed or altered in radically transformative ways. But, sources *have been* imported from outside of national contexts, and these sources have influenced and altered traditional domestic structures, in ways and at speeds I would consider quite significant—at times even rapidly incremental although not cathartically transformative.

The Article focuses on two areas of labor law: *Child Labor*, which implicates certain minimum substantive protections, and *Freedom of*

³ National Labor Relations Act, Pub. L. No. 74-198 (codified principally at 29 U.S.C. §§ 151-169 (1935)); Labor Management Relations Act, Pub. L. No. 80-101 (codified principally at 29 U.S.C. §§ 141-197 (1947)).

⁴ See James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y. J. 221 (2004-2005); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563 (1996). Judicial and agency decisions "make law" in common law countries in ways they do not in civil law settings, but the United States pattern is unique even when compared to other common law countries. In Canada, Britain, and Australia, the norm is for legislatures to play the lead role in modifying and updating statutes. Legislative activity may be part of an ongoing dialogue involving responsive court and agency decisions, or it may reflect an initiation of change for extrinsic policy reasons. Such legislative activity has been an integral part of labor law development in all major common law countries since 1950, except the United States. One might consider the seventy-year evolutionary pattern of the NLRA and LMRA to be transformative, in the sense that this essentially unmodified statute is now understood to provide dramatically less protection for workers and unions than it was thought to offer when enacted. That change, however, is due largely to external factors, notably a transformed set of economic and social conditions (e.g., automation and other technological developments, immigration, public and political hostility to unions, and globalization) rather than a transformative change in law itself.

Association, which involves basic participatory voice. Within this dual focus, it addresses the impact of four fundamental ILO Conventions,⁵ examining how ILO norms have had a pronounced evolutionary effect on domestic labor law instruments, and to a lesser extent on domestic labor law practices. This evolutionary impact has developed through two distinct institutional channels.⁶ The ILO's established mechanisms, by which member states ratify labor conventions and are then monitored for compliance in law and practice, have created soft law pressures contributing to domestic change. In addition, the proliferation of labor provisions incorporating ILO norms into bilateral and regional free trade agreements has promoted legislative adjustments as part of more traditional pressures between countries for reciprocal compliance.

This pronounced evolutionary effect is not seamlessly coherent as applied to an entire hemisphere of thirty-five countries, mainly because it encompasses two distinct fault-lines. One is the important division between changes in law and changes in practice. When labor statutes or decrees, labor provisions in constitutions, or labor decisions by domestic courts are substantially modified to take account of international norms, there remains the question of effects on the ground: How are the changes being implemented, monitored, enforced, and sanctioned? Often, the reality of changes in practice lags behind the claims or aspirations associated with changes in law. The second fault line is the existence of substantial

⁵ For treatment of Child Labor issues, see ILO Convention (No. 138) Concerning Minimum Age for Administration of Employment, June 26, 1973, 1015 U.N.T.S. 297 [hereinafter ILO Convention 138]; ILO Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S. 161 [hereinafter ILO Convention 182]. For treatment of Freedom of Association issues, see ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, July 9, 1948, 68 U.N.T.S. 17 [hereinafter ILO Convention 87]; ILO Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257 [hereinafter ILO Convention 98].

⁶ The Article does not address the role of ILO norms in other prominent international human rights covenants. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Political and Civil Rights are multilateral treaties adopted by the United Nations General Assembly in December 1966 and in force by January 1976. See International Covenant on Economic, Social, and Cultural Rights, Dec. 19, 1966, 999 U.N.T.S. 3; International Covenant on Political and Civil Rights, Dec. 19, 1966, 999 U.N.T.S. 171. The covenants are monitored by separate U.N. committees, each of which references and often defers to ILO reports and observations when reviewing how workplace-related human rights are being implemented by signatory states.

country-specific variations in legal culture and history, such that labor law sources have shifted or evolved at different paces and with differing impacts over the past quarter-century. Variations in experience among countries in the Americas are admittedly quite important. At the same time, I cannot do justice to the specific narratives for twelve countries in South America, seven countries in Central America, thirteen countries in the Caribbean region, and three countries in North America. Accordingly, my examples focus on a smaller number of countries across the region.⁷

The Article omits considering any changes in sources of law within the United States, due to the United States' self-proclaimed exceptionalism stance regarding the impact of international human rights law and norms. This exceptionalism, asserted regularly in Congress and the Supreme Court, has precluded any serious impact from transnational sources on U.S. domestic labor law.⁸ On the other hand, the United States has been a major player in leveraging

⁷ Specifically, the Article focuses on the following regions and countries: (1) in South America, Brazil, Colombia, Chile, and Peru; (2) in Central America, Guatemala, El Salvador, and Panama; and (3) in North America, Canada and Mexico.

⁸ See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (writing for the majority, Justice Scalia stated: "We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners . . . that the sentencing practices of other countries are relevant"); AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005).

Although U.S. workplace law largely comports with ILO conventions on certain subjects (e.g., nondiscrimination under ILO Convention 111), there are notable gaps between U.S. labor relations law and freedom of association and collective bargaining norms under ILO Conventions 87 and 98. For example:

- (1) U.S. employers have the right to hinder employee free choice (e.g., through captive audience speeches);
- (2) U.S. employers may exclude union organizers from employer property, *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992);
- (3) entire categories of U.S. workers are excluded from statutory coverage (e.g., agricultural workers, domestic workers, and public employees);
- (4) employers may hire permanent replacements during strikes, *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938);
- (5) minority unions lack the right to bargain when no majority exists; and
- (6) public employees do not have collective bargaining rights in many states.

See generally Lance Compa, *National and International Labor Rights*, in VOICES AT WORK: CONTINUITY AND CHANGE IN THE COMMON LAW WORLD 364, 367-68 (Alan Bogg & Tonia Novitz eds., 2014); Cesar Rosado Marzan, *Labor's Soft Means and Hard Challenges: Fundamental Discrepancies and the Promise of Non-Binding Arbitration for International Framework Agreements*, 98 MINN. L. REV. 1749, 1793-98 (2014).

the impact of free trade agreements as sources of change for the labor laws of other countries, as discussed below.

The Article proceeds as follows. Section 2 provides background on the overall direction of labor regulation in Latin America since 1980, and on the ILO's mission and basic structure. Section 3 examines the influence of ILO norms on domestic labor legislation in the Americas since 1990. It describes considerable changes in domestic *law* addressed to child labor and freedom of association. These changes reflect the influence of both soft law pressure flowing from the ILO supervisory mechanisms and incentives emanating from trade agreement labor provisions. Section 4 considers the lesser impact of these ILO norms on domestic *practice*. One factor that arguably creates headwinds for the practical application of labor laws in Latin American countries is the presence of a more conciliatory, less sanctions-oriented approach to enforcement than exists in the United States. In addition, presumptively related to competition between countries for export share, governments may dilute their intensity of commitment to international labor norms by lowering enforcement efforts rather than "walking back" changes in law itself. Section 5 situates the evolution of labor law sources in a larger international human rights law context.

2. LABOR REGULATION IN LATIN AMERICA AND BASIC ILO STRUCTURE

2.1. *Background Pattern of Ideological Change*

From 1980 onward, the overall path in the politics of labor regulation in Latin America has been toward restored or newly created labor protections.⁹ Labor relations scholars have attributed this

⁹ See Mark Anner, *Labor Law Reform and Union Decline in Latin America*, 2008 LABOR AND EMP'T RELATIONS ASS'N 149 (discussing protective labor reforms in Latin America and their limitations); Andrew Schrank & Michael Piore, *Norms, Regulations, and Labour Standards in Central America*, in ESTUDIOS Y PERSPECTIVAS (2007), http://repositorio.cepal.org/bitstream/handle/11362/5002/S0700170_en.pdf?sequence=1&isAllowed=y [<https://perma.cc/MET7-48EJ>] (evaluating the organization, nature, and prospects for labor law enforcement in Central America and the Dominican Republic); M. Victoria Murillo & Andrew Schrank, *With a Little Help from My Friends: Partisan Politics, Transnational Alliances, and Labor Rights in Latin*

trend to a confluence of several factors: the demilitarization of government structures; the democratization of political participation and power-sharing; and the emergence of more diversified economies.¹⁰ Over these decades, there has been some ebb and flow between reforms that coincide with wider democratic participation (enhancing rights and protections, both for individual workers and collectively for trade unions) and reforms that respond to free-market policies and pressures (encouraging informal employment and increased flexibilization in labor relations).¹¹

From a big-picture perspective in Latin America, governments in the 1990s often supported pro-market weakening of worker standards—through “flexibilizing” changes in law and practice—whereas, since 2000, governments have tended to be more protective of worker rights and interests.¹² Again, speaking in general terms, the weakening of protections in the 1990s via pro-market reforms that encouraged flexible and informal employment arrangements often had an adverse effect on individual rights more than collective rights. Where organized labor was sufficiently strong, the bargaining coverage and political heft of unions minimized the prospects for such weakening.¹³

America, 38 COMP. POL. STUD. 971 (2005) (explaining why Latin American governments adopted union-friendly labor reforms in 1980s and 1990s).

¹⁰ See MATTHEW E. CARNES, CONTINUITY DESPITE CHANGE: THE POLITICS OF LABOR REGULATION IN LATIN AMERICA 2–3 (2014); MARIA LORENA COOK, THE POLITICS OF LABOR REFORM IN LATIN AMERICA: BETWEEN FLEXIBILITY AND RIGHTS 14 (2013); Schrank & Piore, *supra* note 9, at 19–20.

¹¹ See CARNES, *supra* note 10, at 5–8; COOK, *supra* note 10, at 13–14; Maria Victoria Murillo et al., *Latin American Labor Reforms: Evaluating Risk and Security*, in THE OXFORD HANDBOOK OF LATIN AMERICAN ECONOMICS 790, 792–95, 801–02 (José Antonio Ocampo & Jaime Ros eds., 2011). Other factors have contributed to Latin American nations’ uneven receptivity to neoliberal economics, on the one hand, and international human rights law, on the other. See generally YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002) (examining legal and economic developments since 1960s in Argentina, Brazil, Chile, and Mexico).

¹² See, e.g., COOK, *supra* note 10, at 32–37; Salo V. Coslovsky, *Flying Under the Radar? The State and the Enforcement of Labour Laws in Brazil*, 42 OXFORD DEV. STUD. 169, 171 (2014). See also Graciela Bensusan, *Legislation and Labor Policy in Latin America: Crisis, Renovation, or Restoration?*, 34 COMP. LAB. L. & POL’Y J. 655, 664–70 (2013) (concluding that since 2000, labor protections that eroded in the 1990s have been expanded and reaffirmed in Argentina, Brazil, Chile, and Uruguay, although not in Mexico).

¹³ See CARNES, *supra* note 10, at 2–3, 5, 14; COOK, *supra* note 10, at 7, 25. See also Murillo & Schrank, *supra* note 9, at 972 (identifying growth of collective labor rights in 1990s and attributing this development in some countries to the influence of traditional labor-backed political parties, and in other countries to pressure from U.S.

Notwithstanding these general trends, the impact from the cycles of development has differed, at times substantially, among countries. Thus, for example, Argentina and Brazil tended to have strong organized labor and only moderate pro-market reforms during these years.¹⁴ By contrast, organized labor was weaker in Chile and Peru, and more extensive pro-market reforms took hold during the period.¹⁵ Moreover, the larger difference between the 1990s pro-flexibility direction and the post-2000 trend toward greater worker protections should not obscure the reality that cross-country variations in these labor market reforms have been more pronounced within each of the two periods than between them.¹⁶ One illustration of cross-country variations is in areas of non-standard employment: There is a broad range of reliance on temporary employment contracts and notable differences persist in the proportion of involuntary part-time workers.¹⁷

Still, over a period of several decades when a number of European countries, enamored of market reform, have been pursuing an agenda of softer individual employee protections and/or reduced collective labor rights,¹⁸ the Latin American picture is relatively sup-

trade unions and human rights activists). It seems relevant to recognize a missing counterfactual. It is not known whether the pro-market neoliberal pressures discussed by Carnes and Cook would have resulted in greater adverse impact on individual or collective labor rights if not for the internationalizing influences described in Sections 3 and 4 *infra*.

¹⁴ COOK, *supra* note 10, at 20–24; *see also* CARNES, *supra* note 10, at 55 (discussing Mexico's extensive and protective labor codes); Murillo & Schrank, *supra* note 9, at 975 (listing countries with union-friendly and union-averse collective labor laws enacted in 1990s). As discussed *infra* Section 4, gaps between enacted laws and actual practices are often substantial in this collective rights area.

¹⁵ COOK, *supra* note 10, at 20–24.

¹⁶ *See generally* Murillo et al., *supra* note 11, at 794–95 (listing legal reforms affecting external flexibility enacted in thirteen countries from 1985–1999 and 2000–2010).

¹⁷ *See* ILO, *Nonstandard Employment Around the World: Understanding Challenges, Shaping Prospects* 60–62, (2016), http://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_534326.pdf [<https://perma.cc/P92H-TN84>] (describing divergent evolution of temporary employment in seven Latin American countries between 2003 and 2014); *id.* at 78–80 (discussing trends in involuntary part-time work as a percentage of total part-time work in five Latin American countries from 2003 to 2013).

¹⁸ *See* David Rueda, *Social Democracy and Active Labour-Market Policies: Insiders, Outsiders and the Politics of Employment Promotion*, 36 BRITISH J. POL. SCI. 385, 392–93 (2006) (describing labor policies under Thatcher government); Andrew Glyn & Stewart Wood, *Economic Policy under New Labour: How Social Democratic is the Blair*

portive of worker protections in general terms. The question addressed in what follows is the extent to which sources of law *outside* of increasingly democratized and economically diversified national circumstances have contributed to or accounted for these developments in labor law and practice.

2.2. The ILO Structure and 'Soft Law' Pressures

The ILO is a specialized agency within the U.N. system. It was created in 1919 as an agency of the League of Nations, becoming part of the U.N. system in 1946. Unlike other U.N. specialized agencies, the ILO has a tripartite governing structure. Each of the 187 member states is represented not only by governments but also by national and international organizations of employers and of workers (i.e., social partners); their right of participation as representatives includes the right to vote.¹⁹ This tripartite structure encourages free and open exchanges among governments and social partners, which tends to result in a more pragmatic and persuasive standard-setting process than is possible for intergovernmental organizations.

The ILO's mission is to promote social justice through internationally recognized labor and human rights. It has carried out that mission by promulgating labor standards in the form of Conventions, monitoring implementation of these standards, and providing technical support and training to governments and social partners

Government?, 72 POL. Q. 50, 62–63 (2001) (describing labor policies under Blair government); Reimut Zohlnhöfer, *Partisan Politics, Party Competition and Veto Players: German Economic Policy in the Kohl Era*, 23 J. PUB. POL'Y 123, 145–46 (2003) (describing labor policies under Kohl government). See generally Thorsten Schulten & Torsten Müller, *A New European Interventionism? The Impact of the New European Economic Governance on Wages and Collective Bargaining*, in SOCIAL DEVELOPMENTS IN THE EUROPEAN UNION 181 (David Natali & Bart Vanhercke eds., 2013).

¹⁹ The standard ratio of representation is 2:1:1, or two government, one employer, and one worker. See ILO Constitution art. 3, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:62:0::NO::P62_LIST_ENTRIE_ID,P62_LANG_CODE:2453907,en [<https://perma.cc/4VFL-8VRM>]. Each of the 187 member states at the International Labor Conference has four member delegates. The Conference, which is a parliamentary-type organization, meets at least once every year – typically in June – to develop and adopt labor standards and recommendations and to approve other policies involving ILO program and budget. The ILO Governing Body meets more often during the year to set the agenda and draft a program and budget for submission to the Conference. It is composed of twenty-eight government representatives, fourteen employer representatives, and fourteen worker representatives. See *id.* art. 7.

seeking to conform their own laws and practices with the standards.²⁰ The ILO has promulgated 189 conventions through 2016.²¹ These instruments are adopted by the International Labor Conference; conventions that are then ratified by member States – at their option – essentially function as treaties for purposes of implementation.

Conventions promulgated by the ILO aim to identify certain rights and protections for individuals and to protect those individuals from transgression by their own governments.²² As such, they lack the reciprocal compliance incentives that exist for international agreements between governments, such as trade agreements or arms agreements where a violation by State A may be met with a reciprocal violation by State B. If, for example, Guatemala permits or participates in the imprisonment or murder of trade union leaders, the United States is not going to respond or retaliate by imprisoning or murdering its own labor leaders. Thus, while ILO conventions create hard-law commitments in that they are legally binding when ratified, these conventions have underlying soft-law characteristics inasmuch as they are largely unenforceable through reciprocal or other transnational means.²³ Instead, they depend on domestic law enforcement for effective implementation.

How does this domestic enforcement occur? Once a member State has ratified an ILO convention, it is required to report regularly on measures taken to implement the convention in law and practice, and to submit copies of this report to representative employer and worker organizations within the country. The ILO has developed

²⁰ ILO, *Mission and Impact of the ILO*, <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang-en/index.htm> [<https://perma.cc/B2P9-N43R>] (last visited Oct. 26, 2017).

²¹ Convention 189, the Domestic Workers Convention, was adopted by the International Labor Conference in 2011. A complete list and description of the Conventions is available on the ILO website: <http://www.ilo.org/global/lang-en/index.htm> [<https://perma.cc/7SRF-EF82>]. In addition, the ILO has promulgated 204 Recommendations – also listed on its website – that do not have the binding force of conventions and are not subject to ratification. Recommendations may supplement conventions with additional or more detailed provisions, or they may address issues separate from particular conventions.

²² See Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588, 592 (2007) (showing common goal of international treaties is to protect rights of individuals against violations by their own governments).

²³ See *id.* at 592–93 (arguing enforcement of these treaties does not depend on other states but on actors within the state itself).

various means of supervising and monitoring convention implementation. Of particular relevance here is the work of three supervisory committees.

The Committee of Experts on the Application of Conventions and Recommendations (“CEACR”) examines the government reports,²⁴ along with responsive comments from employer and worker organizations. As the only non-tripartite supervisory committee,²⁵ the CEACR is charged with making impartial observations that address questions or concerns regarding a country’s progress toward compliance in law and practice. Committee observations on the application of ratified conventions are published in an annual report, usually prepared in December. These observations form the basis of an ongoing dialogue with member States, as governments – with continuing input from employers’ and workers’ organizations – seek to apply the conventions they have ratified.

The annual CEACR report also is examined by the Conference Committee on the Application of Standards (“CAS”) at the International Labor Conference the following June. The CAS, which is tripartite in membership, selects approximately twenty-five CEACR observations reflecting especially serious instances of noncompliance for full discussion.²⁶ The identified governments are “invited”

²⁴ See Int’l Labour Conference [ILC], Rep. of the Committee of Experts on the Application of Conventions and Recommendations [CEACR], *Application of International Labour Standards 2017 (I)*, at 7, Report III (Part 1A) (2017), http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_543646.pdf [https://perma.cc/2BJG-RUKR]. Reporting cycles vary for different types of conventions. The current cycle is three years for fundamental conventions, such as the child labor and freedom of association conventions examined in this Article, and five years for technical conventions, such as those involving safety and health or social security. In cases where serious compliance issues have arisen, the CEACR often requests interim reports in a shorter time frame.

²⁵ The CEACR, established in 1926, is composed of twenty eminent jurists appointed by the Governing Body for up to five three-year terms. The Experts, who are judges, practitioners, legal academics, and human rights specialists, come from different geographic regions, legal systems, and cultures. Their role is to provide an impartial and technical evaluation of the state of application of international labor standards. See *id.* at 10 (presenting Mandate of the Committee); *id.* at 31–34 (presenting brief biographies of current Committee members)

²⁶ The CAS also was established in 1926. See *id.* at 7. The number of serious instances of noncompliance to be selected for full discussion is agreed upon between the vice chairs for the international employers’ and international workers’ organizations. It has varied slightly in recent years, but is now set at twenty-four CEACR observations. For examples of full discussion, see ILC, Conference Committee on the Application of Standards [CAS], *Extracts from the Record of Proceedings*, Part II/5 (2017), <http://www.ilo.org/global/standards/applying->

to appear before the International Labor Conference and explain or defend their implementation efforts. Based on the information these governments provide, the CAS issues conclusions recommending that governments take specific steps to remedy a problem, or that they request ILO missions or technical assistance. The exchanges and CAS conclusions are published in the CAS annual report.

A third plank of the supervisory mechanism, the tripartite Committee on Freedom of Association (“CFA”), was established in 1951 based on recognition that the principle of freedom of association needed a further supervisory procedure to ensure compliance even in countries that had not ratified the recently promulgated Conventions 87 and 98. Unlike the CEACR and CAS, the CFA responds to outside complaints, brought against a member state by employers’ or workers’ organizations. If the CFA finds there has been a violation of freedom of association standards or principles, it issues a report through the Governing Body, makes recommendations on how the situation could be remedied, and requests a report from the government on implementation of its recommendations.²⁷

There are important additional elements of the ILO supervisory system,²⁸ but in essence, the soft law pressure comes from ongoing,

and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/WCMS_576287/lang-en/index.htm [https://perma.cc/9M8V-CYFV].

²⁷ For an overview of the CFA, see *Applying and Promoting International Labour Standards: The Committee on Freedom of Association*, ILO, <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang-en/index.htm> [https://perma.cc/L4GL-G6JV] (last visited Oct. 26, 2017). In cases where the country has ratified the relevant conventions, the CFA may refer legislative aspects of the case to the CEACR. The CFA also may propose a “direct contacts” mission to address the problem through a process of dialogue with government officials and social partners.

²⁸ Pursuant to Article 19 of the ILO Constitution—requiring Member States to report at the Governing Body’s request on their law and practice with respect to unratified as well as ratified Conventions—the CEACR publishes an in-depth annual General Survey on Member States’ national law and practice, regarding a subject chosen by the Governing Body. ILO Constitution, *supra* note 19, art. 19. These General Surveys, based on information requested from all Member States, allow the CEACR to examine the impact of conventions, to analyze the challenges identified by governments as impeding their application or ratification, and to identify possible means for overcoming the challenges. Under Article 24 of the Constitution, an employers’ organization or workers’ organization may present to the Governing Body a Representation that a Member State has failed to comply with a ratified convention. *Id.* art. 24. Under Article 26, a Member State that has ratified a convention may present to the Governing Body a Complaint against another Member State for noncompliance with the same ratified convention. *Id.* art. 26. Supervision under

participatory, and transparent review of government reports addressed to compliance efforts. With worker representatives, employer representatives, and several supervisory committees providing input, governments are strongly encouraged to be accurate about the extent to which their laws and practices conform to ratified conventions, and responsive to suggestions or urgings about how to improve those laws and practices. Since roughly 1990, ILO activities through convention ratifications, supervisory monitoring, and provision of technical support to governments have had a direct and substantial influence on the development of domestic labor laws in the Americas.

3. ILO NORMS AND DOMESTIC LABOR LAW

3.1. ILO Direct Influence on Domestic Labor Laws

3.1.1. Convention Ratification.

The first and most powerful area of influence in the post-1990 period stems from the ratification of conventions, especially although not exclusively fundamental conventions. Twenty-two countries in the Americas ratified *both* fundamental child labor conventions in the period since 1990, with the heaviest activity between 1990 and 2005.²⁹

the Representation and Complaint procedures occurs on more than an occasional basis, but not nearly with the breadth and regularity of General Surveys, or of the supervisory observations, conclusions, and decisions produced by the CEACR, CAS, and CFA.

²⁹ The twenty-two countries in the Americas that ratified both Convention 138 and Convention 182 are the following: Argentina, Barbados, Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Granada, Guatemala, Guyana, Jamaica, Mexico, Panama, Paraguay, Peru, St. Kitts & Nevis, and Trinidad & Tobago. See ILO Convention 138, *supra* note 5; ILO Convention 182, *supra* note 5. Convention 182, addressed to the worst forms of child labor, was not adopted by the ILO until 1999. Accordingly, Chart 1 focuses on countries that ratified this convention rapidly and that also approved Convention 138—adopted in 1973 and addressing the minimum age for admission to employment—during the 1990s and early 2000s. *Id.*

Ratification of Convention 138 *(Promulgated in 1973)*

	Never	Pre-1990	Ratified 1990-2005	Ratified 2006-2016
South America (12)	●	● ●	● ● ● ● ● ● ● ● ● ● ● ●	
Central America (7)		● ● ●	● ● ● ● ● ● ●	
Caribbean (13)	●	● ● ● ●	● ● ● ● ● ● ● ● ● ● ● ● ● ●	● ●
North America (3)	●			● ●

Ratification of Convention 182 *(Promulgated in 1999)*

	Not Ratified	Ratified 1999-2005	Ratified 2006-2016
South America (12)		● ● ● ● ● ● ● ● ● ● ● ●	●
Central America (7)		● ● ● ● ● ● ● ●	
Caribbean (13)		● ● ● ● ● ● ● ● ● ● ● ● ● ● ● ●	● ●
North America (3)		● ● ●	

Chart 1

This is a period in which the ILO notably intensified its commitments to child labor as an issue, buttressed by the U.N. Convention on the Rights of the Child, which came into force in 1990 and has since been ratified by every member of the U.N. except the United States.³⁰

Overall, the child labor ratification record of countries in the Americas is impressive over the past twenty-five years. The record may reflect something of a ripple effect among Latin American governments relating to child labor protections, in that widespread ratifications may reassure peer countries in the region that regulating child labor will not put them in an inferior competitive position.³¹

A number of these countries also ratified one or both fundamental freedom of association and collective bargaining conventions in

³⁰ The United States did ratify Convention 182 in 1999, ILO Convention 182, *supra* note 5; however, the United States has yet to ratify Convention 138. ILO Convention 138, *supra* note 5.

³¹ See discussion at text accompanying notes *infra* 212-15. See also Sara Kahn-Nisser, *The Ripple Effect: Peer ILO Treaty Ratification, Regional Socialization, and Collective Labor Standards*, 22 GLOBAL GOVERNANCE 513, 525 (2016) (finding a ripple effect in EU countries since the late 1990s with respect to ratification of collective labor rights conventions, notably Conventions 87 and 98).

the same recent time frame.³² Convention 87 on Freedom of Association was adopted in 1948, and Convention 98 on the Right to Organize and Collective Bargaining in 1949, and the vast majority of countries in the Americas had ratified both conventions decades prior to 1990.

Ratification of Convention 87 *(Promulgated in 1948)*

	Not Ratified	Ratified Pre-1989	Ratified 1989-2016
South America (12)	●	● ● ● ● ● ● ● ● ● ● ● ●	●
Central America (7)		● ● ● ● ● ● ●	●
Caribbean (13)		● ● ● ● ● ● ● ● ● ● ● ● ● ● ●	● ● ● ● ●
North America (3)	●	● ●	

Ratification of Convention 98 *(Promulgated in 1949)*

	Not Ratified	Ratified Pre-1989	Ratified 1989-2016
South America (12)		● ● ● ● ● ● ● ● ● ● ● ●	● ●
Central America (7)		● ● ● ● ● ● ●	●
Caribbean (13)		● ● ● ● ● ● ● ● ● ● ● ● ● ● ●	● ●
North America (3)	● ● ●		

Chart 2 (Canada very recently ratified Convention 98, but the Convention will not enter into force until June 2018.)

³² Chile, El Salvador, St. Kitts & Nevis, and St. Vincent & the Grenadines have all ratified ILO Convention 87 and ILO Convention 98 in the years since 1990. Additionally, Uruguay ratified four of the eight fundamental conventions between 1989 and 2001 – ILO Conventions 29, 100, 111, and 182 – having ratified the four others several decades earlier. ILO Convention (No. 29) Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55 [hereinafter ILO Convention 29]; ILO Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303 [hereinafter ILO Convention 100]; ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 384 U.N.T.S. 385 [hereinafter ILO Convention 111]; ILO Convention 182, *supra* note 5.

There have been many other ratifications of ILO conventions from countries in the Americas since the early 1990s, including technical conventions related to occupational safety and health and social security protections, as well as the governance conventions involving labor inspection and tripartite consultation. A substantial number of safety and health ratifications have occurred within the past ten years, and almost all have been since 1990.³³

³³ For example, Argentina ratified ILO Convention 184 in 2006 and Conventions 155 and 187 in 2014.

(1) ILO Convention (No. 184) Concerning Safety and Health in Agriculture, June 21, 2001, 2227 U.N.T.S. 241 [hereinafter Safety and Health in Agriculture Convention];

(2) ILO Convention (No. 155) Concerning Occupational Safety and Health and the Working Environment, June 21, 1981, 1331 U.N.T.S. 279 [hereinafter Occupational Health and Safety Convention];

(3) ILO Convention (No. 187) Concerning the Promotional Framework for Occupational Safety and Health, June 15, 2006, 2564 U.N.T.S. 291 [hereinafter Promotional Framework for Occupational Safety and Health Convention].

Brazil ratified ILO Conventions 167 and 176 in 2006.

(1) ILO Convention (No. 167) Concerning Safety and Health in Construction, June 20, 1988, 1592 U.N.T.S. 33 [hereinafter Safety and Health in Construction Convention];

(2) ILO Convention (No. 176) Concerning Safety and Health in Mines, June 22, 1995, 2029 U.N.T.S. 207 [hereinafter Safety and Health in Mines Convention].

Panama ratified ILO Convention 167 in 2008. Safety and Health in Construction Convention, *supra*.

Peru ratified ILO Convention 176 in 2008. Safety and Health in Mines Convention, *supra*.

Uruguay ratified ILO Conventions 167 and 184 in 2005 and ILO Convention 176 in 2014. Safety and Health in Construction Convention, *supra*; Safety and Health in Agriculture Convention, *supra*; see also Safety and Health in Mines Convention, *supra*.

With respect to governance conventions, four countries have ratified ILO Convention 81 since 1989: Brazil in 1989; El Salvador in 1995; St. Vincent & the Grenadines in 1998; and Trinidad & Tobago in 2001. ILO Convention (No. 81) Concerning Labour Inspection in Industry and Commerce, July 11, 1947, 54 U.N.T.S. 3 [hereinafter Labour Inspection Convention]. While a dozen or more countries had ratified this convention in prior decades, a number of major countries in the region have yet to ratify—including Canada, the United States, Mexico, and Chile. The importance of labor inspection for achieving compliance with ratified conventions in practice is addressed *infra* Section 4.

Ratification of Safety & Health Conventions

		Pre-1990	1990-2005	2006-2016
General OSHA 155, 161, 187	South America (12)	● ● ●	● ● ● ●	● ● ● ●
	Central America (7)	●	● ●	
	Caribbean (13)	●	● ●	● ● ●
	North America (3)	● ●		●
Asbestos and Industry S&H 162, 167, 176, 184	South America (12)		● ● ● ● ● ● ● ● ● ● ● ●	● ● ● ● ● ● ● ● ● ● ● ●
	Central America (7)	●	●	●
	Caribbean (13)		●	
	North America (3)	●	● ●	

Chart 3

Convention ratifications have frequently been accompanied by changes in domestic laws, reflecting a commitment to conform national constitutional or statutory standards to the international norms approved by governments. To cite a prominent example in child labor, Brazil brought its Constitution into alignment with Conventions 138 and 182, which it had ratified in 2000 and 2001.³⁴ Brazil’s changes in domestic law include an innovative Child and Adolescent Statute to protect the rights of children in the workplace,³⁵ a

³⁴ See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], art.7.XXXIII n.33 (Braz.) (stating the working age was raised from fourteen to sixteen with Amendment No. 20 on Dec. 16, 1998); see also CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T] art. 403 (setting the minimum working age at sixteen); Decreto No. 6.481 de 12 de Junho de 2008 (Braz.) (revising the minimum working age to eighteen); Jerome September, Children’s Rights and Child Labour: A Comparative Study of Children’s Rights and Child Labour Legislation in South Africa, Brazil and India, (Feb. 2014) (M.A. dissertation, Univ. of Cape Town) at 68, https://open.uct.ac.za/bitstream/item/9357/thesis_law_2014_september_j.pdf?sequence=1 [<https://perma.cc/TF3L-FT4D>] (outlining the progress made to reduce and eradicate the exploitation of children through the elimination of child labor).

³⁵ See Daniel Hoffman, *The Struggle for Citizenship and Human Rights, North American Congress on Latin America*, N. AM. CONG. ON LATIN AM. (1994), <http://pan->

constitutional amendment committing to a minimum age of sixteen for employment and eighteen for hazardous work,³⁶ and presidential decrees in 2000 and 2002 mandating the implementation and enforcement of both conventions.³⁷ As discussed in Section 4 below, Brazil's *practices* have for the most part successfully implemented these new legal standards, and there has been a remarkable reduction in child labor from ages five to seventeen between 1992 and 2012.³⁸

Other countries also have adopted domestic child labor laws pursuant to their recent ratification of Conventions 138 and 182. In Peru, the ratification of Convention 138 led to the increase of the minimum working age from twelve to fourteen, and to eighteen for hazardous work.³⁹ Following ratification of Convention 138, Mexico in 2012 adopted for the first time a list of dangerous jobs with restrictions for youth between ages fourteen and seventeen; in 2015, it

gaea.org/street_children/latin/statute.htm [<https://perma.cc/9A4N-Y5L4>] (describing Child and Adolescent Statute of 1990 and its role in helping Brazil advance children's human rights).

³⁶ See ILO, Int'l Programme on the Elimination of Child Labour, *Business and the Fight Against Child Labour: Experience from India, Brazil and South Africa*, at 34 (2013) [hereinafter ILO, *Business and Child Labour*], http://www.ilo.org/ipecc/Informationresources/WCMS_IPEC_PUB_23484/lang-en/index.htm [<https://perma.cc/SJH2-8NJY>] (reporting on the efforts of the Brazilian government to protect children from labor exploitation).

³⁷ See Decreto No. 3.597, de 12 de Setembro de 2000, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.09.2000 (Braz.) (mandating the implementation of ILO Convention 138); Decreto No. 4.134, de 15 de Fevereiro de 2002, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 18.02.2002 (Braz.) (mandating the implementation of ILO Convention 182).

³⁸ See *Observation (CEACR) – Adopted (2015), Published 105th ILC Session (2016): Minimum Age Convention, 1973 (No. 138)*, ILO http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3250782:NO [<https://perma.cc/9CZA-L7FJ>] (last visited Oct. 26, 2017) (commenting on Brazil's progress towards eliminating child labor); see also Patrick del Vecchio, *Child Labor in Brazil: The Government Commitment*, 10 *EJOURNAL USA* 4, 27 (2005), <http://photos.state.gov/libraries/amgov/30145/publications-english/EJ-child-labor-0505.pdf> [<https://perma.cc/8DYY-7YQW>] (discussing Brazil's efforts in combating exploitative child labor practices since the 1990s); *infra* notes 96–98 and 193–95 and accompanying text.

³⁹ See CÓDIGO DE LOS NIÑOS Y ADOLESCENTES [CHILD AND ADOLESCENT CODE] art. 51, 58 (Peru) (showing increases in minimum working age from twelve to fourteen and to eighteen for hazardous work); see also BUREAU OF INT'L LABOR AFFAIRS [ILAB], U.S. DEP'T OF LABOR, 2014 FINDINGS ON THE WORST FORMS OF CHILD LABOR: PERU 3, <https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/2014TDA/peru.pdf> [<https://perma.cc/ZUN5-HH62>] (discussing measures taken by the Peruvian government to eliminate child labor exploitation and evaluating their effectiveness).

amended its constitution raising the minimum age for employment from fourteen to fifteen.⁴⁰ Further examples include new legal requirements in Chile⁴¹ and El Salvador.⁴²

With respect to freedom of association, most western hemisphere governments have ratified both Convention 87 and Convention 98.⁴³ These ratifications have served as an impetus for improvements in collective rights laws following the demise of authoritarian rule and transitions towards a more democratic polity. Thus, for instance, Brazil and Paraguay legalized unionization in the public sector.⁴⁴ In four countries – Chile, El Salvador, Nicaragua, and Panama – legislation reduced the number of workers required to form a union.⁴⁵ In three countries – Dominican Republic, Nicaragua, and

⁴⁰ See Ley Federal del Trabajo [LFT], Diario Oficial de la Federación [DOF] 30-11-2012, reformado DOF 12-06-2015 (Mex.) (showing amended minimum age of employment as fifteen); INT'L PROGRAMME ON THE ELIMINATION OF CHILD LABOUR [IPEC] EVALUATION, STOP CHILD LABOUR IN AGRICULTURE 4 (2014), https://www.dol.gov/ilab/projects/summaries/Mexico_Agriculture_feval.pdf [<https://perma.cc/26FL-4AR4>] (showing Mexico's progress in eliminating child labor).

⁴¹ See Law No. 29539 art. 13–14, 18, Julio 31, 2002, CÓDIGO DEL TRABAJO [CÓD. TRAB.] (Chile) (raising minimum working age to fifteen and for hazardous work to eighteen); see also ILAB, U.S. DEP'T OF LABOR, 2014 FINDINGS ON THE WORST FORMS OF CHILD LABOR: CHILE 3, <https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/2014TDA/chile.pdf> [<https://perma.cc/K5JM-VX8R>] (showing that the government of Chile has enacted laws prohibiting child trafficking and the commercial sexual exploitation of children). Other Latin American countries also have laws or constitutional provisions outlawing these worst forms of child labor.

⁴² See CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR Dec. 16, 1983, art. 38 (raising the minimum age for work to fourteen); CÓDIGO DE TRABAJO, art. 105 (El Sal.). (setting the minimum age for hazardous work to eighteen); see also ILAB, U.S. DEP'T OF LABOR, 2014 FINDINGS ON THE WORST FORMS OF CHILD LABOR: EL SALVADOR 3, <https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/2014TDA/elsalvador.pdf> [<https://perma.cc/37LF-8KFJ>] (delineating measures taken by El Salvador to reduce child labor).

⁴³ Brazil has not ratified ILO Convention 87, Canada and Mexico have not ratified ILO Convention 98, and the United States has not ratified either convention.

⁴⁴ See Anner, *supra* note 9, at 150 (discussing Brazil and Paraguay's legalization of unionization in the public sector in the 1980s); MAURICIO RAND BARROS, LABOUR RELATIONS AND THE NEW UNIONISM IN CONTEMPORARY BRAZIL 69 (1999) (referring to Brazil's recognition of the right of civil servants to unionize in the 1988 Constitution); see also THE TRANSITION TO DEMOCRACY IN PARAGUAY 107–08 (Peter Lambert & Andrew Nickson eds., 1997) (referring to Paraguay's recognition in 1992 Constitution).

⁴⁵ See Anner, *supra* note 9, at 150; see also CÓD. TRAB. arts. 227–28 (Chile); CÓDIGO DE TRABAJO arts. 211–12 (El Sal.); CÓDIGO DEL TRABAJO (Nicar.) art. 206;

Peru – some strike regulations have been eased; for instance, a simple majority of workers can call a strike, not the prior 60% or 75%.⁴⁶ And Argentina and Peru gave unions a right of access to employer financial information in order to facilitate collective bargaining.⁴⁷

Importantly, domestic courts have invoked these Conventions and ILO norms to expand or clarify rights of freedom of association and collective bargaining under national law. Perhaps the most dramatic recent illustration is the 2015 Canadian Supreme Court decision in *Saskatchewan Federation of Labour*, which invalidated a provincial law that severely limited the right to strike for public employees.⁴⁸ In holding that freedom of association encompasses a right to strike under the Canadian Constitution, the court relied in part on Convention 87 as construed by both the CEACR and the CFA.⁴⁹ In 2007, the Canadian Supreme Court had identified ILO norms to help justify a decision expanding collective bargaining protections for public sector workers.⁵⁰

In another very recent case, the Argentine Supreme Court invoked Convention 87 when affirming the appropriate scope of the

CÓDIGO DEL TRABAJO (Pan.) art. 244 (discussing the reduction of the number of workers required to form a union in these four countries).

⁴⁶ See Mark Anner, *Meeting the Challenges of Industrial Restructuring: Labor Reform and Enforcement in Latin America*, 50 *LATIN AM. POL. & SOC'Y* 33, 41 tbl.2 (2008) (listing the proportion of workers required to authorize a strike in Latin American countries before and after reforms). In the Dominican Republic, the required percentage of workers voting for a strike decreased from greater than 60% to greater than 51%. CÓDIGO DEL TRABAJO art. 407. In Nicaragua, the required percentage decreased from 60% to a simple majority. CÓDIGO DEL TRABAJO art. 244. In Panama, the required percentage decreased from 75% to a simple majority. LEY DE RELACIONES COLECTIVAS DE TRABAJO (Pan.) art. 73.

⁴⁷ See LEY DE RELACIONES COLECTIVAS DE TRABAJO (Peru) art. 41 (providing for access to wages, working conditions, productivity, and other issues); Law No. 25013, Feb. 9, 1998, [CVI] B.O. (Arg.) (providing for exchange of information regarding profits, wages, and financial forecasts); see also VEGA RUIZ & MARIA LUZ, *INT'L LAB. ORG., LA REFORMA LABORAL EN AMERICA LATINA: 15 AÑOS DESPUÉS* (2005).

⁴⁸ *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.R. 245 (Can.).

⁴⁹ *Id.* at 285–87.

⁵⁰ See *Health Services & Support v. British Columbia*, [2007] S.C.R. 391, 435–36 (Can.) (invoking ILO Convention 87 and its interpretations by the CEACR and CFA to support conclusion that Canadian Charter of Rights encompasses right of union members to engage in collective bargaining); see also Brian Langille, *Consistency, Consensus, or Coherence? Legal Interpretation of Fundamental Rights*, in *SOCIAL JUSTICE EXPERTISE CENTER, ENSURING COHERENCE IN FUNDAMENTAL LABOR RIGHTS CASE LAW: CHALLENGES AND OPPORTUNITIES* 60–61 (2016) (reporting Canadian Supreme Court relied extensively on ILO norms in 2007 and 2015 decisions).

right to strike under national law, relying in part on the ILO position that the internationally recognized right to strike may be reserved to authorized labor organizations rather than granted to individuals under national law.⁵¹ And the Colombian Constitutional Court in a 1999 decision ordered reinstatement of workers who had been dismissed for taking part in a strike that had been declared illegal by the Ministry of Labor.⁵² The court invoked Conventions 87 and 98 as construed by the CFA, concluding that because the strike had been declared unlawful by government administrative authority rather than by an independent body such as a court, the workers had been deprived of their right to an impartial determination.⁵³

The Colombian Constitutional Court has applied Convention 87 doctrine directly in other cases,⁵⁴ guided by the constitution's incorporation of rights of association and right to strike, and its mechanisms for their direct enforcement by the judiciary.⁵⁵ Supreme

⁵¹ See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/6/2016, "Orellano, Francisco Daniel c. Correo Oficial de la República Argentina S.A. / juicio sumarísimo," <http://www.cij.gov.ar/nota-21852-La-Corte-resolvi-que-solo-los-gremios-tienen-el-derecho-de-promover-huelgas-y-que-los-grupos-informales-de-trabajadores-no-pueden-promover-medidas-de-fuerza.html> [<https://perma.cc/ZZC-HLB8>] (establishing that only unions, not individuals, are authorized to call industrial action); see also *Supreme Court's Ruling Limits Right of Workers to Strike*, BUENOS AIRES HERALD (June 8, 2016), <http://www.buenosairesherald.com/article/215769/supreme-court%E2%80%99s-ruling-limits-right-of-workers-to-strike> [<https://perma.cc/G3UQ-3FU3>] (reporting reactions from labor leaders, political parties, and human rights organizers to the aforementioned ruling and discussing its implications on workers' right to strike).

⁵² Corte Constitucional [C.C.] [Constitutional Court], agosto 10, 1999, Sentencia T-568/99 (Colom.), *Sindicato de las Empresas Varias de Medellín v. Ministry of Labour and Social Security*, <http://compendium.itcilo.org/en/compendium-decisions/constitutional-court-of-colombia-fourth-appellate-supervisory-chamber-sindicato-de-las-empresas-varias-de-medellin-v.-ministry-of-labour-and-social-security-the-ministry-of-foreign-relations-the-municipio-of-medellin-and-empresas-varias-de-medellin-e> [<https://perma.cc/QBR9-E5DL>].

⁵³ *Id.*; see also ILO INTERNATIONAL TRAINING CENTRE, INTERNATIONAL LABOUR LAW AND DOMESTIC LAW: A TRAINING MANUAL FOR JUDGES, LAWYERS, AND LEGAL EDUCATORS 122 (Xavier Beaudonnet ed., 2010) [hereinafter Beaudonnet] (summarizing decision).

⁵⁴ See, e.g., Beaudonnet, *supra* note 53, at 117 (summarizing 2008 decision by Colombian Constitutional Court that invoked ILO Convention 87 to help justify limiting the scope of labor code registration requirements for workers' organizations so as to prohibit the government from exercising prior control over contents of trade union constitutions and rules).

⁵⁵ See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 39 (right of association); C.P. art. 56 (right to strike); C.P. arts. 83–94 (protection and application of rights).

courts in Chile and Paraguay similarly have invoked Convention 87 doctrine – to reinstate trade union representatives whose dismissal was deemed invalid, or to support a ruling that a presidential decree specifying rules for the election of trade union leaders was unconstitutional.⁵⁶

There are also examples of courts applying ILO norms in other substantive areas. These include the Paraguayan Labour Court in 2000, relying on Convention 111 (which prohibits *inter alia* sex discrimination in employment) to interpret a national law as encompassing sexual harassment;⁵⁷ and the Costa Rican Supreme Court in 1999, citing ILO norms from Conventions 107 and 169 – addressing protections for indigenous and tribal populations and peoples – to

See generally Maria Paula Saffron, *Can Constitutional Courts be Counterhegemonic Powers vis-à-vis Neoliberalism? The Case of the Colombian Constitutional Court*, 5 SEATTLE J. SOC. JUST. 533 (2007) (providing examples of the partial effectiveness of the judiciary in resisting neoliberal policies by vigorously protecting social rights, including workers' rights).

⁵⁶ *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 octubre 2000, "Stuardo, Víctor Améstida y otros c. Santa Isabel S.A.," Rol de la causa: 10.695 (Chile) (summarized in Beaudonnet, *supra* note 53, at 124); Corte Suprema de Justicia [C.S.J.] [Supreme Court], 23 septiembre 2000, "Acción de inconstitucionalidad planteada por la Central Unitaria de Trabajadores (CUT) y la Central Nacional de Trabajadores (CNT) c. el Decreto núm. 16769 dictado por el Ejecutivo," No. 35 (Para.) (summarized in Beaudonnet, *supra* note 53, at 34).

⁵⁷ *See* "Carmen Sachelaridi Knutson c/ Cooperativa Santísimo Redentor Limitada s/ cobro de guaraníes en div. conceptos," May 26, 2000 (Para.) <http://compendium.itcilo.org/en/compendium-decisions/appellate-labour-court-second-chamber-carmen-sachelaridi-knutson-v.-cooperativa-santisimo-redentor-ltda.-concerning-payment-of-guaranis-for-several-items-26-may-2000-agreement-and-decision-no.-40> [<https://perma.cc/F3TN-FYQK>] (referencing ILO Convention 111 in order to stress that sexual harassment constitutes sex discrimination); Constance Thomas et al., *The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence, and Practical Implications*, in LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR 249, 268–69 (Jean-Claude Javillier & Bernard Gernigon eds., 2013).

overturn a national law restricting the rights of indigenous peoples.⁵⁸ Indeed, there are numerous instances of Latin American domestic courts invoking Convention 169, especially concerning development-related activities.⁵⁹

Stepping back, certain ILO Conventions have been effectively incorporated into the domestic legal order for some countries in Latin America without the need for a separate statute beyond the Act that authorized ratification of the treaty.⁶⁰ Thus, for instance in Uruguay, where the constitution recognizes the right to unionize, ratification of Conventions 87 and 98 are the only legislative initiatives in the area: broad union freedoms are protected under the Conventions without any other domestic laws.⁶¹ And in Colombia, the Constitution establishes that ILO Conventions ratified by the country are part of its internal rules of law.⁶² Additionally, the direct application

⁵⁸ See Antonia Blanco Rodríguez y otros c/ el Presidente de la República, la Ministra de Gobernación y Policía, el Instituto de desarrollo Agrario y la Comisión Nacional de Asuntos Indígenas, Supreme Court of Justice, Constitutional Chamber, 11 de Agosto 1999 (Costa Rica), <http://compendium.itcilo.org/es/compendium-decisions/corte-suprema-de-justicia-sala-constitucional-antonio-blanco-rodriguez-y-otros-c-el-presidente-de-la-republica-la-ministra-de-gobernacion-y-policia-el-instituto-de-desarrollo-agrario-y-la-comision-nacional-de-asuntos-indigenas-11-de-agosto-de-1999> [<https://perma.cc/38E5-S98G>] (summarized in Thomas et al *supra* note 57, at 269-70; Beaudonnet, *supra* note 53, at 19).

⁵⁹ See Christian Courtis, *Notes on the Implementation by Latin American Countries of the ILO Convention 169 on Indigenous Peoples*, in *THE INTERRELATION BETWEEN THE RIGHT TO IDENTITY OF MINORITIES AND THEIR SOCIO-ECONOMIC PARTICIPATION* 403, 407-08 (Kristin Henard ed., 2013) (referring to judicial applications of ILO Convention 169 by courts in twelve Latin American countries: Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Peru, and Venezuela). See generally S.J. Rombouts, *The Evolution of Indigenous Peoples' Consultation Rights Under the ILO and U.N. Regimes*, 53 *STAN. J. INT'L L.* 169 (2017) (examining recent efforts in international law to give indigenous peoples rights to participate in decision-making processes affecting them); FERGUS MACKAY, *A GUIDE TO INDIGENOUS PEOPLES' RIGHTS IN THE INTERNATIONAL LABOUR ORGANIZATION* 12 (2010) (describing how the ILO Governing Body handles cases concerning indigenous rights).

⁶⁰ See David Sloss, *Domestic Application of Treaties*, in *THE OXFORD GUIDE TO TREATIES* 373-76 (Duncan B. Hollis ed., 2011) (detailing the role of domestic courts in treaty application).

⁶¹ See Graciela Mazzuchi, *Labour Relations in Uruguay, 2005-2008* 10 (ILO, Working Paper No. 6, 2009), <http://www.ilo.org/legacy/english/inwork/cb-policy-guide/uruguaylabourrelations2005to2008.pdf> [<https://perma.cc/38KX-D8QJ>].

⁶² See Francisco Rafael Ostau De Lafont de Leon & Ledy Angela Nino Charvarro, *The Binding Nature of the Recommendations of the Committee of Freedom of Association in the Colombian Legal Framework*, *REVISTA REPUBLICANA*, July-Dec. 2012, at

of ratified ILO Conventions as a primary source of law has been an increasingly potent arrow in the quiver of domestic courts – when there is no legislation addressing an issue covered by the Convention or when applicable domestic law is less detailed than the Convention's text or its application by ILO supervisory bodies.⁶³

Convention 169 is another useful illustration of the direct application aspect. The Convention has been ratified by fifteen countries in the Americas region – out of twenty-two ratifications globally. This ratification has led to enactment of implementing domestic statutes but also to the Convention being applied through court actions brought by litigants on behalf of indigenous peoples.⁶⁴

These examples are *not* meant to suggest that ratification of conventions is invariably followed by conforming changes in domestic labor laws. Despite ratification, a country may retain labor laws that are incompatible with the norms set forth in the convention itself.⁶⁵ For instance, El Salvador ratified Convention 87 in 2006, but the Supreme Court of El Salvador held in 2007 that extending the right of freedom of association to employees in the public service was contrary to an article of the national Constitution. While this article was amended in 2009 to grant public sector workers a basic right to organize, the amended provision excluded from coverage more categories of public sector workers than are recognized as legitimate to

217, 224, <http://ojs.urepublicana.edu.co/index.php/revistarepublicana/article/viewFile/214/191> [<https://perma.cc/NK4R-T7DZ>] (pointing to Articles 9, 53, and 93 of the Colombian Constitution establishing that the ILO Conventions ratified by Colombia are part of its internal rules).

⁶³ See Thomas et al., *supra* note 57, at 268 (analyzing recent court decisions relying on ILO standards as well as reports from ILO and the supervisory bodies).

⁶⁴ See Courtis, *supra* note 59, at 416–32 (discussing decisions from domestic courts in Argentina, Costa Rica, Colombia, Guatemala, and Bolivia).

⁶⁵ ILO governance does not allow for reservations to ratification by member states; however, flexibility is built into some conventions. For instance, ILO Convention 158, Termination of Employment, leaves to the ratifying state the choice between different methods of implementation in accordance with national law and practice – allowing for its provisions to be made effective by means of collective agreements, arbitration awards, or court decisions, as well as laws or regulations. ILO Convention (No. 158) Concerning Termination of Employment at the Initiative of the Employer, art. 1, June 22, 1982, 1412 U.N.T.S. 159 [hereinafter ILO Convention 158]. Similarly, in ILO Convention 182, Worst Forms of Child Labour, certain practices are defined without qualification (e.g., slavery, sale and trafficking of children, debt bondage, and child pornography), but the definition of “work which, by its nature . . . is likely to harm the health, safety or morals of children” is to be determined by national laws or regulations. ILO Convention 182, *supra* note 5, art. 4.

exclude under the ILO Convention.⁶⁶ Similarly, despite Peru's ratification of Convention 87 back in 1960, the domestic law governing contracts in the non-traditional export sectors undermines freedom of association by allowing companies to employ workers indefinitely on consecutive short-term contracts.⁶⁷

Overall, however, the positive impact of ILO convention ratification as a source for domestic labor laws has been considerable. In part, this may reflect the reality that the ILO regularly provides support and assistance in drafting these labor codes and constitutional amendments, and many if not most reforms are aimed at areas of incompatibility between domestic law and ILO conventions.⁶⁸ Moreover, when the pace of domestic law adjustment lags, the ILO supervisory mechanisms have been additionally responsive in various ways.

3.1.2. *Supervisory Mechanisms*

A second area in which ILO activity influences the evolution of domestic labor law involves the work of the supervisory committees, notably the CEACR, the CAS, and the CFA.⁶⁹ These three supervisory committees publish regular reports, responding to submissions from the member states regarding actions taken to comply with ratified conventions as a matter of law and practice. In their constructively critical responses, the three committees consider comments on government submissions received from worker and employer organizations, as well as taking account of any separate

⁶⁶ See COMMISSION OF THE EUROPEAN COMMUNITIES, INVESTIGATION PURSUANT TO ARTICLE 18(2) OF COUNCIL REGULATION (EC) No 980/2005 WITH RESPECT TO THE PROTECTION OF THE FREEDOM OF ASSOCIATION AND THE RIGHT TO ORGANISE IN EL SALVADOR 13 (2009), http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145210.pdf [<https://perma.cc/NG84-6DS2>] (“[A] limited inconsistency between the text of the revised Article 47 of the El Salvadoran Constitution and Article 2 of ILO Convention No 87 still exists.”).

⁶⁷ See ILAB, U.S. DEP'T OF LABOR, PUBLIC REPORT OF REVIEW OF U.S. SUBMISSION 2015-01 (PERU) i-ii (2016), https://www.dol.gov/ilab/reports/pdf/Public_Report_of_Review_of_US_Submission_2015-01.pdf [<https://perma.cc/2937-SMXG>] (discussing concern over the impact of Peru's short-term contract policy on freedom of association).

⁶⁸ See ARTURO BRONSTEIN, INTERNATIONAL AND COMPARATIVE LABOUR LAW: CURRENT CHALLENGES 184 (2009).

⁶⁹ For an overview discussion of these three supervisory bodies, see *supra* notes 24-27 and accompanying text.

ILO-authorized proceedings brought against member governments by employers' or workers' organizations or by other governments.⁷⁰ The ongoing attention from these supervisory bodies, reflecting concerns about compliance with ILO conventions, lacks a traditional hard-law framework of monetary or other sanctions. Nonetheless, the soft-law impact of the ILO's longstanding, transparent, and well-publicized reporting system can contribute in meaningful ways to changes in domestic laws or legal requirements.

One illustration involves complaints lodged against Canada before the CFA alleging violations of workers' freedom of association. In the three decades prior to 1982, there had been a total of sixteen complaints; between 1982 and 2002, there were sixty-two such complaints brought to the CFA.⁷¹ During this later period, the Canadian courts were not overly receptive to worker complaints alleging employer interference with organizing and bargaining rights and protections.

The labor movement turned to the ILO, where freedom of association and collective bargaining are considered fundamental human rights.⁷² When the Canadian Supreme Court substantially modified its prior restrictive interpretations of Canadian law starting in 2001, it referred to the observations of ILO supervisory bodies as interpretive sources.⁷³ Ultimately, the Canadian Supreme Court—in its groundbreaking 2007 and 2015 decisions—found that while the determinations of the CFA and CEACR were not binding, those determinations “shed light on the scope of” the Canadian Charter of Rights and Freedoms as it was intended to apply to both collective bargaining and the right to strike.⁷⁴ In this respect, domes-

⁷⁰ See ILO Constitution, *supra* note 28, art. 24 (authorizing “representations” initiated by worker or employer organizations); *id.*, art. 26 (authorizing “complaints” brought by other member states).

⁷¹ See Brian W. Burkett et al., *Canada and the ILO: Freedom of Association Since 1982*, 10 CANADIAN LAB. & EMP. L.J. 231, 232 (2003).

⁷² See *id.* at 248.

⁷³ See Judy Fudge, *Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes*, 68 CURRENT LEGAL PROBS. 267, 280 (2015) (discussing Canadian Supreme Court's reliance on international labor law in interpreting freedom of association in the labor context); Langille, *supra* note 50, at 60–61 (reporting that Canadian Supreme Court relied extensively on ILO norms in the 2007 and 2015 decisions).

⁷⁴ See Tonia Novitz, *Connecting Freedom of Association and the Right to Strike: European Dialogue with the ILO and its Potential Impact*, 15 CANADIAN LAB. & EMP. L.J. 465, 466 (2009) (quoting 2007 Health Services majority decision); Langille, *supra* note

tic constitutional courts have given ILO supervisory body observations indirect legal effect by utilizing them when interpreting fundamental rights in their own constitutional instruments.⁷⁵

The Mexican labor movement has similarly raised concerns with the ILO supervisory bodies regarding “contracts of protection.” Mexican law does not require a negotiating party to demonstrate its representativeness of the workers, and as a result these contracts are often made without workers’ support or knowledge.⁷⁶ Worker organizations have complained for many years to the ILO about the prevalence of protection contracts as violating their freedom of association rights under Convention 87, and both the CEACR and the CAS have pressured Mexico to enact the legislative reforms needed to comply with the Convention.⁷⁷ Mexico enacted several labor reforms in 2012 attempting to address these concerns (among others),

50, at 60–61 (reviewing both 2007 and 2015 decisions); *see also supra* notes 48–50 and accompanying text (discussing court’s reliance on observations from ILO supervisory bodies in 2015 Saskatchewan decision).

⁷⁵ *See* Judy Fudge, *Labour Rights as Human Rights: Turning Slogans into Legal Claims*, 37 DALHOUSIE L.J. 601, 610–11 (2014).

⁷⁶ *See* ILAB, U.S. DEP’T OF LABOR, PUBLIC REPORT OF REVIEW OF U.S. SUBMISSION 2015-04 (MEXICO) i-ii (2016) [hereinafter ILAB, PUBLIC REPORT MEXICO], <https://www.dol.gov/ilab/reports/pdf/070816-Chedraui-report.pdf> [<https://perma.cc/LEE8-FLQE>] (issued pursuant to North American Agreement on Labor Cooperation).

⁷⁷ *See* CAS, *Rep. No. 354, June 2009, Case No. 2536 (Mexico)*, ¶ 153, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2910546# [<https://perma.cc/FEE7-B5ZW>] (“The Committee . . . expects that the legislation will be amended to bring it into line with Convention No. 87.”); CAS, *Interim Rep. No. 359, March 2011, Case No. 2694 (Mexico)*, ¶ 899, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2911806 [<https://perma.cc/FEE7-B5ZW>] (“The Committee wishes to point out that on previous occasions it has requested certain legislative reforms to strengthen trade union rights”); Int’l *Labour Standards 2015 (II)*, at 77–78, ILC.104/III/2 (2015) [hereinafter ILC, *Labour Standards 2015*], [http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2015-104-2\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2015-104-2).pdf) [<https://perma.cc/8HNS-YPTM>] (requesting the identification of reforms needed to bring the 2012 Labour Law into compliance with Convention No. 87); ILC, *Rep. of the CEACR, Application of International Labour Standards 2016 (I)*, at 93, ILC.105/III(1A) (2016) [hereinafter CEACR, 2016 *Rep.*], http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_448720.pdf [<https://perma.cc/XFK7-HM26>] (discussing efforts by CEACR and CAS to have Mexico revise its 2012 Labour Act). *See generally* Robin Alexander & Dan LaBotz, *Mexico’s Labor Reform: A Workers’ Defeat – For Now*, NACLA REP. ON AM., at 49, 53 (2014) (noting little hope remains for “positive change from a government that has clearly demonstrated its commitment to pursue neoliberal policies and to attract foreign capital”).

including a requirement for greater transparency in collective bargaining agreements and in the identity of negotiating unions, but these reforms have not yet had the desired effect.⁷⁸ Since then, the President of Mexico has conceded that contracts of protection are problematic and has vowed to take steps that will address the issue and also to move toward ratification of Convention 98.⁷⁹

In Colombia, the ILO supervisory committees have repeatedly criticized the government for legal shortcomings in the areas of freedom of association and the right to organize.⁸⁰ These critical reports and exchanges have been accompanied by an increasing ILO presence in the country, in the form of high-level missions and an ongoing series of contacts.⁸¹ Although a lot remains to be done, especially

⁷⁸ See ILAB, PUBLIC REPORT MEXICO, *supra* note 76, at 4–6 (noting there often are not online databases to view collective bargaining agreements in Mexico, and when there are, the databases are difficult to access).

⁷⁹ See *Mexican Senate Approves Labour Law Reforms*, INDUSTRIALL GLOBAL UNION, Oct. 24, 2016, <http://www.industrialall-union.org/mexican-senate-approves-labour-law-reforms-0> [<https://perma.cc/S2X4-33ZK>] (“[T]he Mexican Senate unanimously approved an initiative that amends Articles 107 and 123 of the Mexican Constitution, paving the way for a significant advance for workers in the country” but still has not voted on the President’s request to ratify Convention 98); Press Release to ILO’s *Convention 98 Will Strengthen Workers’ Protections in Mexico* (Dec. 3, 2015) <http://www.aflcio.org/Press-Room/Press-Releases/ILO-s-Convention-98-Will-Strengthen-Workers-Protections-in-Mexico> [<https://perma.cc/Z7KS-H6BJ>] (“The AFL-CIO welcomes the decision by the President of Mexico to bring Convention 98 of the [ILO] to the Mexican Senate for ratification.”); CAS, *Discussion: 2015, Publication: 104th ILC session, (2015)*, http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_CO_MMENT_ID:3241939 [<https://perma.cc/NDX7-5BBH>] (“The [Mexican] Government had been promising to ratify Convention No. 98 for the past three years . . .”). See generally Alexander & LaBotz, *supra* note 77, at 53.

⁸⁰ Between 1998 and 2009, Colombia appeared nine times on the CAS annual twenty-five worst-offenders list with respect to ILO Convention 87, requiring efforts by the Colombian government before the Conference to explain its extended record of serious non-compliance. See Lists of Individual Cases Before the CAS, 1998-2016 (on file with the Author and the University of Pennsylvania *Journal of International Law*).

⁸¹ See ILC, Rep. of CEACR, *General Report and Observations Concerning Particular Countries*, at 49, ILC.98/III(1A) (2008) [hereinafter CEACR, 2008 Rep.], http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_103484.pdf [<https://perma.cc/59ZU-GQPD>] (discussing establishment of Colombian Tripartite Agreement on Freedom of Association and Democracy in June 2006 and setting up of Office of ILO representation in Colombia and ILO high-level mission in November 2007); M. Angeles Villareal, *The U.S.–Colombia Free Trade Agreement: Background and Issues*, 7 CURRENT POL. & ECON. SOUTH & CENT. AM. 358 (2014) (describing Colombian Action Plan Related to Labor Rights formalized in 2011 by United States and Colombia). As discussed *infra*

in the area of practices and implementation, there have been changes in law – notably a 2011 reform of the criminal code, covering employers that undermine the right to organize and bargain collectively⁸²—and a 2012 executive decree substantially expanding collective bargaining rights for public sector employees.⁸³ And, in Costa Rica, following identification of serious noncompliance with Convention 98 over a number of years,⁸⁴ some reform of labor procedures has been reported since 2010.⁸⁵

While these illustrations all relate to Conventions 87 and 98, there also are numerous instances where governments have made substantial changes in domestic law following supervisory body pressure to comply with other fundamental conventions.⁸⁶ Yet, as the examples from Colombia and Costa Rica make clear, the monitoring of ILO supervisory bodies may yield, at best, incremental

Section 3.2.2., some of this more aggressive monitoring arose in connection with the 2007 Free Trade Agreement between the United States and Colombia. *Id.* at 357.

⁸² See Villareal, *supra* note 81, at 381.

⁸³ See ILC, Rep. of the CEACR, *Application of International Labour Standards 2014 (I)*, at 84–85, ILC.103/III(1A) (2014) [hereinafter CEACR, 2014 Rep.], http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_235054.pdf [https://perma.cc/G5A6-YZY3] (providing Observation on Colombia and ILO Convention 98).

⁸⁴ Between 1999 and 2010, Costa Rica appeared seven times on the CAS annual twenty-five worst-offenders list with respect to ILO Convention 98, requiring continuing efforts by its government before the Conference to explain its record of serious non-compliance. See Lists of Individual Cases Before the CAS, *supra* note 80.

⁸⁵ See CEACR, 2014 Rep., *supra* note 83, at 87–89 (providing Observation on Costa Rica and ILO Convention 98); Law No. 9343, 25 January 2016 (Costa Rica), <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/101727/122702/F836437510/ley%209343%20COSTA%20RICA.pdf> [https://perma.cc/Y2VA-QSMK] (amending Costa Rican Labour Code to add protections on right to strike and right to collective bargaining that respond to and better comport with ILO norms.); see also Questionnaire Reply from Costa Rica to Author Preparing for Regional Congress 3 (translated Sept. 14, 2016) (on file with Author); E-mail from Prof. Fernando Bolanos to Author (Sept. 27, 2016) (on file with Author).

⁸⁶ See, e.g., CAS, *A Dynamic and Impact Built on Decades of Dialogue and Persuasion*, at 75–81 (2011) [hereinafter CAS, *Dynamic and Impact*], http://www.google.com/url?sa=t&rcrt=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiu7dTdvKfWAh-VpIVQKHRXICzsQFggmMAA&url=http%3A%2F%2Fwww.oit.org%2Fwcmsp5%2Fgroups%2Fpublic%2F--ed_norm%2F--normes%2Fdocuments%2Fpublication%2Fwcms_154192.pdf&usg=AFQjCNELhO3_Ke_NRI3jLJOCyLXd-wSs-xQ [https://perma.cc/Q9CF-VPAD] (discussing Brazil's substantial domestic law changes from 1995 to 2010, to comply with ILO Convention 111 on Nondiscrimination).

changes in law following many years of persistent review. Indeed, such supervisory vigilance sometimes fails to result in any meaningful changes in domestic labor laws to comply with ratified conventions.

In Guatemala, for instance, ILO committees have regularly sought to persuade the government to enact legislative reforms addressing problems of nonconformity with Conventions 87 and 98.⁸⁷ Legislative issues raised by the CEACR over the years include restrictions on the freedom to establish labor organizations, limitations on the freedom to elect trade union leaders, restrictions on access to trade union rights for public sector workers, and limitations on the right to strike.⁸⁸ Although the legislature and the Ministry of Labour are now more actively considering ILO recommendations for reform, in a dialogue that includes worker and employer groups, the requested reforms have not yet been enacted.⁸⁹

Moreover, in Bolivia, a 2014 law kept the official minimum working age at fourteen—as required under Convention 138—but permitted children to work at age ten, provided they are supervised by a parent and are attending school, and to work at age twelve under contract, again subject to parental authorization and school attendance.⁹⁰ Bolivia is the only nation that approves legal employment at such young ages. Children working regularly make up as

⁸⁷ Between 1999 and 2016, Guatemala appeared on the CAS annual twenty-five-worst-offenders list, on thirteen occasions for ILO Convention 87 and on three occasions for ILO Convention 98. No other country in the Americas matches such a record of noncompliance for these two freedom-of-association-based fundamental conventions. Lists of Individual Cases Before the CAS, *supra* note 80.

⁸⁸ See, e.g., ILC, Rep. of the CEACR, *General Report and Observations Concerning Particular Countries*, at 154, ILC.99/III(1A) (2010) [hereinafter CEACR, 2010 Rep.], http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_123424.pdf [https://perma.cc/N7WJ-WRPE]; CEACR, 2014 Rep., *supra* note 83, at 115; CEACR, 2016 Rep., *supra* note 77, at 71. See Gerda van Roozendaal, *The Diffusion of Labour Standards: The Case of the U.S. and Guatemala*, 3 POL. & GOVERNANCE 18, 20, 25–26 (2015); see also Luis Linares et al., *Foreign Trade and Agricultural Employment in Guatemala*, in SHARED HARVEST: AGRICULTURE, TRADE AND EMPLOYMENT 244 (David Cheong, Marion Jansen, and Ralf Peters eds., 2013) (discussing issues involving ILO conventions on the elimination of forced labor, the abolition of child labor, and elimination of discrimination in Guatemala).

⁸⁹ CEACR, 2010 Rep., *supra* note 88, at 71; see van Roozendaal, *supra* note 88, at 26 (summarizing recent reports from U.S. Labor and State Departments and Cingranelli-Richards (“CIRI”) Human Rights Data project).

⁹⁰ Malavika Krishnan, *Advancing Backwards: Bolivia’s Child Labour Laws*, COUNS. ON HEMISPHERIC AFF. (Aug. 27, 2014), <http://www.coha.org/advancing-backwards-bolivias-child-labor-law/> [https://perma.cc/GV35-2FU9]; Aidan

much as 35% of the Bolivian workforce, and over half are under the age of fourteen, often laboring in dangerous occupations such as sugar cane harvesting and underground mining.⁹¹ In addition, about 40% of children enrolled in school are not attending, with poverty and indigenous status the most important factors accounting for their failure to attend.⁹²

Child labor laws are notoriously difficult to monitor and enforce in practice, because so much of child labor is performed in the informal economy.⁹³ The ILO continues to devote considerable attention to the challenges posed by the informal economy for the rights of workers, including the challenge of abolishing child labor.⁹⁴ Still,

McQuade, *Bolivia's Child Labour Law Shames Us All*, THE GUARDIAN (July 25, 2014), <https://www.theguardian.com/global-development/poverty-matters/2014/jul/25/bolivia-child-labour-law-exploitation-slavery> [<https://perma.cc/AL73-UR45>] (“Bolivia has become the first country to legalise child labour, reducing the minimum age of employment from 14 years old to just 10.”). In 2015, the CAS urged the government to repeal these provisions. ILC, CAS, *Extracts from the Record of Proceedings*, at 128, ILC 104 (2015), http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/publication/wcms_412826.pdf [<https://perma.cc/38WJ-F78S>].

⁹¹ See ILAB, U.S. DEP'T OF LABOR, CHILD LABOR AND FORCED LABOR REPORTS: BOLIVIA, MINIMAL ADVANCEMENT—EFFORTS MADE BUT CONTINUED LAW THAT DELAYED ADVANCEMENT (2015), <https://www.dol.gov/sites/default/files/images/ilab/child-labor/Bolivia.pdf> [<https://perma.cc/X8HZ-9LQ7>]; Krishnan, *supra* note 90.

⁹² See Francesco Grigoli & Giacomo Sbrana, *Determinant and Dynamics of Schooling and Child Labor in Bolivia* 17 (World Bank Poverty Reduction & Econ. Mgmt. Network, Working Paper No. 5534, 2011), https://www.researchgate.net/publication/228286599_Determinants_and_Dynamics_of_Schooling_and_Child_Labor_in_Bolivia [<https://perma.cc/7BL5-LLMY>].

⁹³ See Anne Trebilcock, *International Labour Standards and the Informal Economy*, in LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR. MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS 585, 608–09, http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/publication/wcms_087423.pdf [<https://perma.cc/4DE5-L6JJ>] (stating child labor is most often found in the informal economy, a fact that presents challenges to its effective abolition); ILO, *The International Programme on the Elimination of Child Labour: What it Is and What it Does*, at 7, http://www.google.com/url?sa=t&rct=j&q=&resrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKE-wifo52qu6fWAhXpy1QKHT_KB7gQFggxMAJ&url=http%3A%2F%2Fwww.ilo.org%2Fipeinfo%2Fproduct%2Fdownload.do%3Ftype%3Ddocument%26id%3D13334&usq=AFQjCNF780x7Go058Su2jH7twbOT2V5qGA [<https://perma.cc/H3JV-B57R>] (discussing agriculture, small-scale mining, and domestic labour as three prominent aspects of the child labor problem).

⁹⁴ See ILO, Recommendation No. 204, *Transition from the Informal to the Formal Economy*, arts. 11, 16 (2015); Trebilcock, *supra* note 93, at 585 (presenting international conventions targeted at eliminating child labor).

even with these practical challenges, Bolivia's 2014 statute, tolerating legal employment at ages ten to thirteen, undermines the commitment to Convention 138 as a matter of law – as distinct from practice.

3.1.3. Partnering Efforts.

A final area of direct and substantial ILO influence on the development of domestic laws is the ILO's partnering efforts with different governments to provide education, training, and technical assistance. These partnerships can facilitate the government's efforts to impose domestic protections – sometimes through actual changes in the law and often through changes in domestic legal practices.

One example of a partnership effort was in Brazil, where in 2008 the ILO began a four-year program to help end child labor in the state of Bahia.⁹⁵ The objectives of the \$4.9 million project included: expanding the knowledge base about child labor; strengthening political and institutional frameworks for the prevention of child labor; increasing the capacity of public and private actors to help eradicate child labor in Bahia; and enhancing the state social safety network to victims of child labor.⁹⁶

In addition to achieving its goal of removing or preventing 14,000 children from getting pulled into the worst forms of labor, the program was also effective in bringing together Brazil's various agencies and initiatives to address the complex problem of child labor. Examples of the collaborative practices observed in Bahia included: (1) the passage of a law restricting state funding and tax incentives for employers that do not adopt decent work practices, notably combating child labor as one of its standards; (2) the expansion of the national child labour eradication program ("PETI") through an active, house-to-house search effort conducted by a collection of social actors (e.g., education, social assistance, and health care groups) to identify children working or at risk of working; and

⁹⁵ See ILO, Evaluation Summary, *Support to National Efforts Towards a Child Labour-Free State, Bahia-Brazil* (Apr. 12, 2011) [hereinafter ILO, Evaluation Summary], http://www.ilo.org/wcmsp5/groups/public/-ed_mas/-eval/documents/publication/wcms_175461.pdf [<https://perma.cc/RC3B-FH3A>] (providing project summary and reporting that the project shows important progress both at national and state level).

⁹⁶ *Id.* at 2.

(3) the surveillance of the Labor Prosecutor's Office, in conjunction with the State Government of Bahia, to ensure the fulfillment of their obligations to combat child labor.⁹⁷

A second example is in Chile, where, despite ratification by the year 2000 of the two core child labor conventions and the U.N. Convention on the Rights of the Child, progress has been slow in both law and practice.⁹⁸ Since 2002, the Chilean Ministry of Labour and Social Welfare has partnered with the ILO on projects to assess the magnitude and characteristics of child and adolescent labor, in an effort to educate civil servants and construct policies that will eradicate child labor and assure adequate working conditions for adolescents.⁹⁹ The initial survey in 2003 and a second survey conducted in 2012 each identified over 100,000 children and adolescents working in unacceptable conditions.¹⁰⁰ These national surveys, and the dialogue they created between ILO specialists and government officials, have helped focus attention on developing a stronger enforcement process in Chile, although much work remains to be done.¹⁰¹

A further illustration of ILO partnering efforts involves Nicaragua, specifically the Better Work Nicaragua program launched in

⁹⁷ *Id.* at 4.

⁹⁸ See Jean Grugel & Enrique Peruzotti, *The Domestic Politics of International Human Rights Law: Implementing the Convention on the Rights of the Child in Ecuador, Chile, and Argentina*, 34 HUMAN RIGHTS QUARTERLY 178, 190 (2012).

⁹⁹ See, e.g., ILO ET AL., CHILD AND ADOLESCENT LABOUR IN FIGURES: SYNTHESIS OF THE FIRST NATIONAL SURVEY AND REGISTRY OF ITS WORST FORMS 6 (2004) [hereinafter ILO, CHILD LABOUR IN FIGURES], <http://www.ilo.org/ipecinfo/product/download.do?type=document&id=1219> [<https://perma.cc/6LLK-65LZ>] (presenting the magnitude and characteristics of child and adolescent labor in Chile); ILO, A CHILD IN THE WORST FORMS OF CHILD LABOUR, A STORY TO FOLLOW: THE CENTRALIZED REGISTRATION AND INTERVENTION SYSTEM (CHILE) 1 (2010), http://www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_15095/lang-en/index.htm [<https://perma.cc/M657-T68F>] (promoting the Centralized Registration and Intervention System for the Worst Forms of Child Labour, which was created in 2003 by the Chilean National Service for Minors with support from the ILO).

¹⁰⁰ See ILO, CHILD LABOUR IN FIGURES, *supra* note 99, at 10–11. “Unacceptable work” is defined as children working below age twelve; from twelve to fourteen, if the work interferes with their school attendance and studying and/or exceeds thirteen hours a week; or from fifteen to seventeen, if the work interferes with school attendance and exceeds twenty hours per week. *Id.*

¹⁰¹ See generally César F. Rosado Marzán, *Punishment and Work Compliance: Lessons from Chile*, 29 HOFSTRA LAW & EMP. L. J. 343 (2012) (calling for more participatory and cooperative regulatory processes and the use of persuasive as well as punitive enforcement orientations in order to obtain better compliance results).

2011 by the Nicaraguan government and the Nicaraguan Association of Textile Manufacturing.¹⁰² The Better Work program is a collaborative effort around the world, catalyzed by the ILO and the International Finance Corporation, to realize workers' rights in the garment industry by educating workers and influencing the laws and policies of governments and businesses. The annual reports for Nicaragua have been able to corroborate government findings of progress to root out child labor and protect freedom of association, although these reports also have uncovered instances of noncompliance with Conventions 87 and 98.¹⁰³

A final recent example of partnering efforts involves El Salvador, which in October of 2015 became part of an EU-funded ILO pilot program to strengthen the capacity of national public administrations to apply the eight fundamental ILO conventions.¹⁰⁴ This program, which is tied to EU trade preferences for the identified countries, serves as a transition to considering the role of trade agreements when promoting changes in domestic labor laws.

¹⁰² See *Nicaragua: Our Programme*, BETTERWORK, <https://betterwork.org/where-we-work/nicaragua/better-work-nicaragua/> [<https://perma.cc/JG5G-3WKG>] (last visited Oct. 26, 2017); Jennifer Bair & Gary Gereffi, *Towards Better Work in Central America: Nicaragua and the CAFTA Context*, in *TOWARDS BETTER WORK: UNDERSTANDING LABOUR IN APPAREL GLOBAL VALUE CHAINS* 251, 251-85 (Arianna Rossi, Amy Luinstra, & John Pickles eds., 2014).

¹⁰³ See ILO & Int'l Fin. Corp. [IFC], *Better Work Nicaragua: Garment Industry 2nd Compliance Synthesis Report* (Mar. 2015), <https://betterwork.org/blog/portfolio/better-work-nicaragua-2nd-compliance-synthesis-report-march-2015/> [<https://perma.cc/KZZ4-B39L>]; Bair & Gereffi, *supra* note 102. There are interesting parallels between these "public regulation" coordinated efforts, involving the ILO and national governments, and "private regulation" partnering efforts, involving consultation and technical assistance between multinational brands and their suppliers. See Richard M. Locke, *THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY* 123, 154 (Cambridge Univ. Press 2013).

¹⁰⁴ See, e.g., *Generalised Scheme of Preferences for the European Commission Directorate-General for Trade* (Aug. 1, 2017), <http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/> [<https://perma.cc/HAF6-K7JE>] (discussing GSP background materials). See also *Joint Staff Working Document on the EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') Covering the Period 2014-2015*, at 115-118, (Jan. 28, 2016), https://eeas.europa.eu/sites/eeas/files/european_commission_2016_report_on_the_generalised_scheme_of_preferences_during_the_period_2014-2015.pdf [<https://perma.cc/WS2V-FTKF>] (discussing El Salvador's ratification of eight ILO Conventions on labor standards); EU, *EU-Funded Projects Supporting GSP Beneficiary Countries*, http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155843.pdf [<https://perma.cc/3C7P-DSKZ>] (providing effective date for El Salvador's two-year pilot project).

Importantly, trade-agreement-related changes may also involve a role for the ILO. That role may be in the form of ILO technical assistance and support during the negotiation or monitoring of trade labor provisions. Additionally, it is often because the labor provisions include linkages to ILO norms.

3.2. ILO Norms and Trade Agreements

Prior to the North American Agreement on Labor Cooperation (“NAALC”), which is a side agreement to NAFTA, in the early 1990s, bilateral and regional trade agreements did not contain labor provisions. This reflected a widespread view – particularly from exporting countries – that the challenge of securing labor standards protections from a trading partner had little to do with negotiating for the reduction of trade barriers between nations.¹⁰⁵ This mindset has changed dramatically in the past two decades. On a global scale, the number of free trade agreements (“FTAs”) containing labor provisions increased from four in 1995 to seventy-six as of December 2015; nearly half of them came into existence after 2008.¹⁰⁶ In the Americas, the United States has played a pivotal role in negotiating

¹⁰⁵ Outside this negotiated context, the United States’ GSP regime requires the President to consider – when designating a country as a beneficiary – whether that country is “taking steps” to accord its workers internationally recognized workers’ rights. See William A. Douglas et al., *An Effective Confluence of Forces in Support of Workers’ Rights: ILO Standards, U.S. Trade Laws, and NGOs*, 26 HUM. RTS. Q. 273, 276 (2004). The United States’ GSP regime is a recognized exception to the WTO Most Favored Nation principles that essentially prohibits differential tariff treatment between WTO members. See Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT’L L.J. 203, 213–14 (2007). The design and inclusion of labor provisions in GSP programs is unilateral (i.e., not subject to negotiation between the United States and the implementing country) and enforcement is completely discretionary on the part of the implementing government. *Id.* at 215–16. In addition, the Office of the U.S. Trade Representative has at times been less than enthusiastic about monitoring and enforcing the GSP. See Douglas et al., *supra* at 277.

¹⁰⁶ See ILO, STUDIES ON GROWTH WITH EQUITY: ASSESSMENT OF LABOUR PROVISIONS IN TRADE AND INVESTMENT ARRANGEMENTS 1 (Jonas Aissi et al., eds., 2016) [hereinafter ILO, ASSESSMENT OF LABOUR PROVISIONS], http://www.ilo.org/wcmsp5/groups/public/-/dgreports/-/inst/documents/publication/wcms_498944.pdf [<https://perma.cc/L3TC-6DBB>]; International Institute for Labour Studies, ILO, *Social Dimensions of Free Trade Agreements 1* (Nov. 6, 2013) [hereinafter ILO, *Social Dimensions of FTAs*], <http://www.ilo.org/wcmsp5/groups/public/-/dgreports/-/inst/documents/publication/wcms228965.pdf> [<https://perma.cc/8D5T-CFGS>].

these provisions—in regional trade agreements like the Central American Free Trade Agreement (“CAFTA”)¹⁰⁷ and the controversial proposed Trans-Pacific Partnership (“TPP”)¹⁰⁸ as well as bilateral agreements with Chile (2003), Peru (2006), Colombia (2012), and Panama (2012).

3.2.1. Positive Elements of Linkage to ILO Norms.

As a party to most FTAs in the Americas,¹⁰⁹ the United States is persistent about including a commitment to international standards on labor rights. This persistence is primarily the result of legislative branch pressure. Congress has been generally uninterested in ratifying ILO standards for domestic application,¹¹⁰ but since the Trade Act of 2002, Congress has required that U.S. trade agreements aim

¹⁰⁷ This 2005 agreement covers trade relations involving the United States and Guatemala, El Salvador, Honduras, Costa Rica, and Nicaragua. See Office of the U.S. Trade Representative, CAFTA Policy Brief (July 2005) https://ustr.gov/archive/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file58_7878.pdf [<https://perma.cc/T8SM-LR4Q>] (praising “tough, effective enforcement provisions” from U.S. perspective).

¹⁰⁸ This 2015 agreement covers twelve countries—including the United States, Canada, Chile, Mexico, and Peru in the Americas. President Obama was influential in negotiating the TPP, but in January 2017, President Trump declared that the United States would not join the agreement. Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama’s Signature Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?r=0> [<https://perma.cc/U4DN-8VT6>].

¹⁰⁹ Canada has separate bilateral agreements with some countries, e.g., Canadian Agreement on Labour Cooperation with Peru (2009) and Colombia (2012). See ILO, *Social Dimensions of FTAs*, *supra* note 106, at 33.

¹¹⁰ Congress’s opposition to such influence in its own legal system is an aspect of American exceptionalism, discussed in the Introduction. See *supra* note 8 and accompanying text. The United States has ratified fourteen conventions, twelve of which are in force. This includes two of the eight fundamental conventions each ratified since 1990: ILO Convention 182, *supra* note 5; and ILO Convention (No. 105) Concerning the Abolition of Forced Labour, Jan. 17, 1959, 320 U.N.T.S. 291 [hereinafter ILO Convention 105]. For other conventions ratified since 1990, see ILO Convention (No. 150) Concerning Labour Administration: Role, Functions and Organisation, June 26, 1978, 1201 U.N.T.S. 179; ILO Convention (No. 160) Concerning Labour Statistics, June 25, 1985, 1505 U.N.T.S. 39, and ILO Convention 176, *supra* note 33.

“to strengthen the capacity of United States trading partners to promote respect for core labor standards,”¹¹¹ and has defined core labor standards to track fundamental ILO norms.¹¹² Labor provisions of U.S. trade agreements now regularly feature linkages to ILO norms. Thus, for instance, the Central American Free Trade Agreement (CAFTA, 2004) and the agreement with Chile (2003) specify that the parties shall “strive to ensure” that labor principles internationally recognized under the ILO 1998 Declaration on Fundamental Principles and Rights at Work (Declaration) are protected by their domestic laws.¹¹³ Labor provisions in more recent U.S. trade agreements with Colombia (2012), Panama (2012), and Peru (2006) go somewhat further, providing that each party shall “adopt and maintain in its statutes and regulations, and practices thereunder,” the rights “as stated in the ILO Declaration.”¹¹⁴

These linkages have encouraged countries to push domestic labor law reform toward compliance with international standards, often as a condition of having the agreements ratified in the United States.¹¹⁵ Accordingly, changes in national labor laws have occurred

¹¹¹ Trade Act of 2002, Pub. L. No. 107-210, § 2102(b)(11)(C), 16 Stat. 994 (2002); *see also* § 2102(c)(2) (requiring the President to establish consultative mechanisms among parties to trade agreements in order to accomplish this objective).

¹¹² *See id.* at § 2113(6) (defining core labor standards to include protection for freedom of association and collective bargaining, prohibition of forced labor and child labor, and acceptable working conditions regarding wages, hours, and safety and health).

¹¹³ Central American Free Trade Agreement, art. 16.1, U.S.-Costa Rica-Dom., Rep.-El. Sal.-Guat.-Hond.-Nicar., Jan. 28, 2004, 43 I.L.M. 514 [hereinafter CAFTA], <http://ustr.gov/TradeAgreements/Bilateral/CAFTA/CAFTA-DRFinalTexts/SectionIndex.html> [<https://perma.cc/67N7-PPSW>]; Free Trade Agreement, U.S.-Chile., art. 18.1, June 6, 2003, 42 I.L.M. 1026 [hereinafter U.S.-Chile Agreement], https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file853_4012.pdf [<https://perma.cc/G5B2-C243>].

¹¹⁴ Trade Promotion Agreement, U.S.-Colom., art. 17.2, May 15, 2012 [hereinafter U.S.-Colom. Agreement], https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file993_10146.pdf [<https://perma.cc/FV4U-WKSX>]; Trade Promotion Agreement, U.S.-Pan., art. 16.2, Oct. 31, 2012 [hereinafter U.S.-Pan. Agreement], https://ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file403_10354.pdf [<https://perma.cc/UV2K-T2JF>]; Free Trade Agreement, U.S.-Peru, art. 17.2, Apr. 12, 2006 [hereinafter U.S.-Peru Agreement], https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file73_9496.pdf [<https://perma.cc/VW8N-F3KK>].

¹¹⁵ *See* ILO, ASSESSMENT OF LABOUR PROVISIONS, *supra* note 106, at 3 (discussing effective enforcement of labor rights and reforms through pre-treaty and post treaty ratification requirements).

in response to concerns raised pursuant to these agreements by the U.S. Congress, the U.S. Trade Representative, or the U.S. Labor Advisory Committee. In Peru, apart from the previously described changes to the laws regulating strikes, presidential decrees and existing law have addressed the use of temporary employment and outsourcing arrangements and protection against anti-union activities.¹¹⁶ In Panama, executive decrees and new labor laws created a specific bureau to combat child labor and protect young workers, and also to remove restrictions on collective bargaining rights and the right to strike in the country's export processing zones.¹¹⁷ And in Colombia, a national labor rights Action Plan was announced in 2011, dealing especially with preventing anti-union violence, limiting the evasion of national laws, and enabling stronger enforcement.¹¹⁸ By 2014 there had been meaningful progress under the Action Plan, including the enactment of laws that strengthen workers' rights protections and the hiring of hundreds of new labor inspectors, although problems of implementation remain.¹¹⁹

As noted above, the labor provisions in these trade agreements refer not to particular ILO Conventions but to the 1998 ILO Declaration. This is not the place to revisit the debate among legal scholars as to whether the Declaration's emphasis on a limited number of conventions,¹²⁰ or its focus on "promot[ing] and realiz[ing] the principles concerning the fundamental rights" in those conventions,

¹¹⁶ ILO, *Social Dimensions of FTAs*, *supra* note 106, at 38 (citing Inside U.S. Trade, *United States, Peru Reach Labor Deal, Administration Vows to Fight for All FTAs* (Aug. 10, 2007), <https://insidetrade.com> [<https://perma.cc/L7M7-VSKP>]).

¹¹⁷ *Id.* at 39; see MARK P. SULLIVAN, CONG. RESEARCH SERV., RL30981, PANAMA: POLITICAL AND ECONOMIC CONDITIONS AND U.S. RELATIONS 19-21 (2012).

¹¹⁸ See ILO, *Social Dimensions of FTAs*, *supra* note 106, at 39.

¹¹⁹ U.S. DEP'T OF LABOR, EXEC. OFFICE OF PRESIDENT, UPDATE: THE COLOMBIAN LABOR ACTION PLAN, THREE YEARS LATER 1 (2014), <https://ustr.gov/sites/default/files/Colombia%20Labor%20Action%20Plan%20update%20final-April2014.pdf> [<https://perma.cc/5TER-ERJX>].

¹²⁰ The Declaration focuses on eight conventions deemed "fundamental": ILO Convention 29, *supra* note 32 (addressing forced labor); ILO Convention 105, *supra* note 110 (same); ILO Convention 138, *supra* note 5 (addressing child labor); ILO Convention 182, *supra* note 5 (same); ILO Convention 87, *supra* note 5 (addressing freedom of association and collective bargaining); ILO Convention 98, *supra* note 5 (same); ILO Convention 100, *supra* note 32 (addressing equal remuneration for women); ILO Convention 111, *supra* note 32 (addressing nondiscrimination in employment).

have damaged the efficacy of the traditional ILO supervisory system.¹²¹ For present purposes, it is enough to describe briefly why the Declaration's central role in trade agreement labor provisions has contributed constructively to the development of domestic labor laws in Latin America.

First, the promotional focus of the Declaration includes a pragmatic recognition that the ILO has an obligation to help member states achieve compliance with these fundamental principles – by offering technical assistance and advice and by assisting members' efforts to secure enhanced economic and social development.¹²² This pragmatic approach has encouraged countries to re-elaborate their laws and practices as they seek to conform to the fundamental principles, and relatedly to secure outside financial and technical assistance in support of their efforts.¹²³

Second, the Declaration, through its treatment of economic growth and social justice as closely interrelated, in effect identifies

¹²¹ Compare Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?*, 36 NYU J. INT'L L. & POL. 221, 256–63 (2004) (stating that the Declaration has had detrimental effects on the ILO's supervising and monitoring mechanisms), with Francis Maupin, *Revitalization Not Retreat: The Real Potential of the 1998 Declaration for the Universal Protection of Workers' Rights*, 16 EUR. J. INTL L. 439, 443–44 (2005) [hereinafter Maupin, *Revitalization Not Retreat*] (contending that the Declaration has helped overcome limitations in the existing supervisory mechanisms), and Brian Langille, *Core Labour Rights – The True Story (Reply to Alston)*, 16 EUR. J. INTL L. 409, 420–27 (2005) [hereinafter Langille, *Core Labour Rights*] (questioning the validity of the assertion that the Declaration has had mainly negative effects on the supervisory system).

¹²² ILC, *ILO Declaration on Fundamental Principles and Rights at Work*, art.3, 37 I.L.M. 1237, (June 18, 1998) [hereinafter *ILO Declaration*], <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm> [<https://perma.cc/2YVS-EXDN>]; ILO, *Independent Evaluation of the ILO's Strategies on Fundamental Principles and Rights at Work*, at ix, (ILO ed., 2015) [hereinafter *ILO Strategies*], http://www.ilo.org/wcmsp5/groups/public/-ed_mas/-eval/documents/publication/wcms_314442.pdf [<https://perma.cc/M3H4-6S9G>]; Ana Virginia Moreira Gomes, *The Effect of ILO's Declaration on Fundamental Principles and Rights at Work on the Evolution of Legal Policy in Brazil: An Analysis of Freedom of Association 88-99* (2009) (unpublished M.S.L. thesis, University of Toronto) (on file with the Author).

¹²³ See Maupin, *Revitalization Not Retreat*, *supra* note 121, at 446 (discussing ILO's obligation to assist member countries in respecting and realizing the fundamental principles and rights through technical cooperation and advisory services); *ILO Strategies*, *supra* note 122, at 12–28; Jean-Marc Siroën, *Labour Provisions in Preferential Trade Agreements: Current Practice and Outlook*, 152 INT'L LAB. REV. 85, 88–89 (2013) (chronicling the Cambodian government's leverage of quotas to assist ILO monitoring).

the fundamental or core labor rights as human rights.¹²⁴ This has helped make the fundamental principles an essential element of the dialogue involving trade and investment arrangements between governments. In addressing how “to ensure that trade liberalization upholds or improves labor standards, rather than put[ting] them at risk,”¹²⁵ national leaders contemplating trade agreements have come to appreciate that respect for the Declaration should be part of their efforts, and to worry that they may be disadvantaged if they fail to take sufficient action in this area.¹²⁶

Finally, and relatedly, ILO adoption of the Declaration has been followed by a torrent of new ratifications for these eight fundamental conventions. Historically, ILO member States have ratified the eight conventions at a combined level over 90%, and 30% of those ratifications occurred between 1999 and 2006.¹²⁷ The enormous increase in ratifications presumably reflects a combination of strong encouragement and removal of obstacles, due to trade agreement factors; the Declaration’s requirement that States report every year on why they have not ratified and their consideration of the ILO’s

¹²⁴ ILO Declaration, *supra* note 122, at pmbl. 5. See Langille, *Core Labour Rights*, *supra* note 121, at 419 (discussing the centrality of social justice as the goal and precondition to the creation of durable economies and societies); Janice R. Bellace, *The ILO Declaration of Fundamental Principles and Rights at Work*, 17 INT’L J. COMP. LAB. L. & INDUS. REL. 269, 269–70 (2001) (attributing ILO’s implementation of the ‘Declaration on Fundamental Principles and Rights at Work’ to the concerted effort to focus on those conventions that protect fundamental human rights).

¹²⁵ ILO, *Social Dimensions of FTAs*, *supra* note 106, at 6.

¹²⁶ ILO Strategies, *supra* note 122, at 42–43; MARY JANE BOLLE, CONG. RESEARCH SERV., RS22823, OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS 3–4 (2016); Eric Gravel & Quentin Delpuch, ILO, *The Comments of the ILO’s Supervisory Bodies: Usefulness in the Context of the Sanction-Based Dimension of Labour Provisions in U.S. Free Trade Agreements* 7–12, 26–27, (2013), http://ilo.org/wcmsp5/groups/public/-dgreports/-inst/documents/publication/wcms_207860.pdf [<https://perma.cc/3UTQ-N2FJ>].

¹²⁷ The 187 member states could ratify up to 1496 times for the eight fundamental conventions. Author calculations based on ILO website data indicate a combined 1365 ratifications for the fundamental conventions; 408 of these occurred between 1999 and 2006. See also Kahn-Nisser, *supra* note 31, at 525 (reporting on the impact of the Declaration in forty-five studied European countries: thirty-nine of forty-five had ratified seven or eight of the fundamental conventions by 2002, compared with seventeen countries in 1998, twenty-four in 1999, thirty in 2000, and thirty-six in 2001).

offer of technical and financial assistance;¹²⁸ and perhaps even a concern that the ILO might begin to supervise the Declaration.¹²⁹

3.2.2. *Limitations on the Linkage to ILO Norms.*

Notwithstanding this elevation of ILO norms in the labor provisions of trade agreements, the impact on domestic labor laws from such trade agreement provisions may be somewhat limited. One important factor is that trade agreement labor provisions are usually drafted to avoid a specific commitment to compliance with ILO conventions. Over 70% of trade-related labor provisions make reference to ILO instruments, but as noted above, the vast majority of these incorporations are made explicitly and exclusively to the 1998 Declaration, not to particular Conventions.¹³⁰ The labor provisions language in recent U.S. trade agreements involving the Americas — including the now-shelved TPP — includes a footnote stating unequivocally that the parties' obligations to adopt and maintain practices consistent with ILO norms "refer only to the ILO Declaration."¹³¹ The language creating linkage to ILO norms has been strengthened from "strive to ensure" to "adopt and maintain,"¹³² but the reference point remains the Declaration rather than the underlying Conventions.

Although inclusion of the Declaration has been beneficial in certain broad ways previously described, its use as a reference point is problematic from the standpoint of domestic labor law reform. For a start, the exact scope and meaning of the Declaration are unclear.

¹²⁸ See *ILO Declaration*, *supra* note 122, art.3, annex II.B.1.-3. (providing assistance to member countries through operational and budgetary resources to attain objectives of the convention).

¹²⁹ See *id.*, annex II.-III. (stipulating annual follow-up with member countries that have not ratified all the fundamental conventions).

¹³⁰ ILO, ASSESSMENT OF LABOUR PROVISIONS, *supra* note 106, at 2; ILO, *Social Dimensions of FTAs*, *supra* note 106, at 107 (reporting that only 15% of all agreements with labor provisions refer specifically to ILO fundamental conventions).

¹³¹ U.S.-Colom. Agreement, *supra* note 114, art.17.2 n.1; U.S.-Pan. Agreement, *supra* 114, art.16.2 n.1; U.S.-Peru Agreement, *supra* 114, art. 17.2 n.2; Trans-Pacific Partnership Agreement, *opened for signature*, Austl.- Brunei-Can.-Chile-Japan-Malay.-Mex.-N.Z.-Peru-Sing.-Viet., art.19.3.1 n.3, Feb. 4, 2016 [hereinafter TPP Agreement], <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour.pdf> [<https://perma.cc/MFP2-LU7M>]

¹³² See *supra* notes 113-14 and accompanying texts.

The drafting history indicates that a number of governments as well as the ILO legal advisor described the Declaration as “refer[ring] to adherence to principles and values and not to specific Conventions,”¹³³ a distinction that invites questions as to its precise or definitive content.¹³⁴ Further, a commitment to principles appears less binding than a commitment to adhere to Conventions that a state has ratified. Because the Declaration applies universally to all member states as an aspect of ILO membership, including member states that have not ratified some or many of the fundamental conventions, it cannot obligate members to uphold all the standards in these eight Conventions.¹³⁵

A related consideration is that the 1998 Declaration is not subject to monitoring by the ILO supervisory bodies in the way that Conventions are. The absence of close and continuing interpretive guidance from these supervisory bodies means that it is more difficult to achieve consistency of meaning for the principles set forth in the Declaration. This, in turn, invites and may even demand more decentralized interpretations of the international norms, perhaps effectively diminishing their strength as legal standards, or “law.”¹³⁶

I do not mean to suggest that ILO supervisory positions construing the meaning or scope of Conventions are consistently followed by all national courts. Some conventions, perhaps especially those drafted and promulgated as relatively general texts, have given rise to good faith differences in interpretation at the national level.¹³⁷

¹³³ Michael A. Cabin, Note, *Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?* 109 COLUM. L. REV. 1047, 1076 (2009) (reporting on remarks by government representatives from United States, Chile, Sweden, France, and Brazil); see also *id.* (describing similar remarks by ILO legal advisor).

¹³⁴ *Id.* at 1047, 1049, 1074–1076; ILO, *Social Dimensions of FTAs*, *supra* note 106, at 107.

¹³⁵ Cabin, *supra* note 133, at 1074–75.

¹³⁶ See Jordi Agustí-Panareda, Franz Christian Ebert & Desirée LeClercq, *ILO Labour Standards and Trade Agreements: A Case for Consistency*, 36 COMP. LAB. L. & POL'Y J. 347, 363–67 (2015) (discussing the uncertainty of the scope and interpretation of ILO Declaration's principles upon independent application by different trade bodies).

¹³⁷ *Compare* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/6/2016, “Orellano Francisco Daniel c. Correo Oficial de la República Argentina / juicio sumarísimo,” *La Ley* [L.L.] (2016-49-55) (Arg.), <http://www.sajj.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-orellano-francisco-daniel-correo-oficial-republica-argentina-sa-juicio-sumarismo-fa16000089-2016-06-07/123456789-980-0006-1ots-eupmocsollaf> [<https://perma.cc/TK6L-D4GD>] (stating that based on the interpretation of ILO

Further, the increased use of fundamental ILO Conventions by private actors as well as governments may make it more difficult to maintain a coherent interpretive practice regarding these conventions.¹³⁸ And the recent questions raised by the ILO Employers Group regarding the right to strike indicate that prevailing CEACR and CFA interpretations are susceptible to challenge from inside the tripartite governing structure.¹³⁹

Nonetheless, the current levels of difference or disagreement about how the textual language of Conventions should be applied

Convention 87, the right to strike belongs to the organization and not the individual), with Corte Suprema de Justicia [C.S.J.] [Supreme Court], 8 marzo 2016, "Actionline Chile c. Claudio Yutronic Rojas y Rodrigo Carmona Millanao," Rol de la causa: 28919-2015 (Chile) (on file with Author) (rejecting the position taken by employer parties in reliance on ILO Convention 87, that the right to strike belongs only to organizations). With respect to the right to strike, the ILO supervisory bodies' interpretations of ILO Convention 87 on this issue may be capacious enough to support national laws that point in either direction — laws protecting the collective right to industrial action through trade unions or workers' organizations as well as laws recognizing that strikes by individual workers may be part of freedom of association rights under the Convention. See generally ILO, FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO ¶¶ 520, 524 (5th ed. 2006).

¹³⁸ Niklas Bruun, *Understanding Fundamental Labor Rights: Achieving Social Justice Through Interpretation*, in ENSURING COHERENCE IN FUNDAMENTAL LABOR RIGHTS CASE LAW: CHALLENGES AND OPPORTUNITIES 40, 46 (Social Justice Expertise Center ed., 2016), <http://www.thehagueinstituteforglobaljustice.org/wp-content/uploads/2016/09/SJEC-Conference-booklet-Final-15-September.pdf> [<https://perma.cc/UTB7-PMQQ>]. See James J. Brudney, *Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisyphus?* 33 COMP. LAB. L. & POL'Y J. 555, 559-60 (2012) (describing how multinational corporations use varied formulations to invoke ILO conventions and principles in their corporate codes). In addition to corporate codes, the International Finance Corporation's Sustainability Framework requires its clients to apply certain performance standards "to manage . . . social risks and impacts so that development opportunities are enhanced." IFC, *IFC Sustainability Framework: Policy and Performance Standards on Environmental and Social Sustainability, Access to Information Policy*, at 14 (Jan. 1, 2012), https://www.ifc.org/wps/wcm/connect/b9dacb004a73e7a8a273fff998895a12/IFC_Sustainability_Framework.pdf?MOD=AJPERES [<https://perma.cc/HN6A-ZTB3>]. The performance standard devoted to labor and working conditions includes requirements that are guided in important respects by the ILO's eight fundamental conventions. See Craig Moss, et al., IFC & Soc. Accountability Int'l [SAI], *Measure and Improve Your Labor Standards Performance: Performance Standard 2 Handbook for Labor and Working Conditions*, at 15 (2012) https://www.ifc.org/wps/wcm/connect/177c370048865808b3def36a6515bb18/SAI_IFC_LaborHandbook.pdf?MOD=AJPERES [<https://perma.cc/ML6S-LBZ5>].

¹³⁹ Bruun, *supra* note 138, at 45-46; Claire La Hovary, *Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike*, 42 INDUS. L.J. 338 (2013).

can be understood as fairly characteristic of rule-of-law regimes at both national and international levels.¹⁴⁰ In this regard, the debates and controversies about Convention interpretations that have been developed over decades by ILO supervisory bodies are occurring against a background of stability and legitimacy emanating from the ILO supervisory structure, which includes the CAS as well as the CEACR and CFA. Such a background is unlikely to be comparably established with respect to the scope and meaning of the Declaration.

3.2.3. *Limitations Due to the Architecture of Trade Agreement Labor Provisions.*

Apart from the challenge of requiring commitment to ILO principles (as distinct from ILO Conventions), certain structural aspects of the labor provisions have impeded efforts to incorporate international norms into domestic labor law. First, these trade agreements follow the state-focused “enforce your own labor laws” model, established under the North American Agreement on Labor Cooperation (“NAALC”) that was part of NAFTA. Standard labor provision language provides that a party “shall not fail to effectively enforce its labor laws . . . through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties”¹⁴¹ But the parties also retain the right to exercise reasonable discretion regarding regulatory and resource-allocation matters, including options for enforcement among the fundamental labor rights articulated earlier.¹⁴² This approach is at one level understandable given considerations of sovereignty and the unequal

¹⁴⁰ See Claire La Hovary, *The ILO and the Interpretation of Fundamental Rights at Work: A Closer Look at Establishing a Tribunal Under Article 37(2)*, in ENSURING COHERENCE IN FUNDAMENTAL LABOR RIGHTS CASE LAW: CHALLENGES AND OPPORTUNITIES 49, 58 (Social Justice Expertise Center ed., 2016), <http://www.thehagueinstituteforglobaljustice.org/wp-content/uploads/2016/09/SJEC-Conference-booklet-Final-15-September.pdf> [<https://perma.cc/5M7L-A8L3>] (“For the Employers’ Group, it seems that it is not the process of interpretation by the supervisory bodies as such that is the problem, so much as the outcomes of that process.”).

¹⁴¹ U.S.-Peru Agreement, *supra* note 114, art. 17.3.1(a); CAFTA, *supra* note 113, art. 16.2.1(a).

¹⁴² U.S.-Peru Agreement, *supra* note 114, art. 17.3.1(b); CAFTA, *supra* note 113, art. 16.2.1(b).

resources available across states for enactment, enforcement, and dispute-settlement purposes. Nonetheless, the internalized state-action, state-sanctions model means that labor rights provisions in trade agreements do not benefit from serious transnational oversight.¹⁴³ Thus, for instance, the United States may draw attention to the prevalence of children working on farms in Peru, in violation of national laws and Convention 138.¹⁴⁴ However, the United States has not ratified Convention 138, and laws in the United States allow children to work on family-owned farms, or on small farms regardless of the hazards involved.¹⁴⁵

In addition, violations require a showing that the failure to adopt or maintain ILO fundamental principles has been done “in a manner affecting trade or investment between the parties.”¹⁴⁶ This language appears to subordinate labor law protections to mercantile law and transnational mercantile interests. Even willful violations of statutory or constitutional provisions that protect freedom of association or prohibit child labor do not warrant intervention under the trade agreement unless it is proven that the violation is directly impacting free trade.

¹⁴³ See Kolben, *supra* note 105, at 221–22 (discussing criticisms of bilateral and regional trade agreements due to “weakness of the enforce-your-own-labor-law standard”); Siroën, *supra* note 123, at 88–90 (contrasting U.S. bilateral agreements that focus on enforcement of one’s own labor legislation, and Canadian bilateral agreements that give precedence to compliance with domestic legislation over ratification of ILO conventions, with 1999 bilateral textile agreement between United States and Cambodia, which expired in 2005, where ILO was assigned to carry out workplace inspections).

¹⁴⁴ See ILAB, U.S. DEP’T OF LABOR, FINDINGS ON THE WORST FORMS OF CHILD LABOR: PERU, at 1 (2014), <https://www.dol.gov/sites/default/files/images/ilab/child-labor/Peru2016.pdf> [<https://perma.cc/7ASV-5A9M>] [hereinafter ILAB 2014 FINDINGS] (reporting 68% of child laborers under the legal working age of fourteen work in rural areas, principally on farms).

¹⁴⁵ See Fair Labor Standards Act, 29 U.S.C. § 213(1)(A)(iii) (exempting children of any age working on their family-owned farm); OCCUPATIONAL SAFETY & HEALTH ADMIN. [OSHA], U.S. DEP’T. OF LABOR, POLICY CLARIFICATION ON OSHA’S ENFORCEMENT AUTHORITY ON SMALL FARMS (2014), https://www.osha.gov/dep/enforcement/policy_clarification_small_farms.html [<https://perma.cc/BG85-9DKX>] (exempting small farms with ten or fewer non-family employees from enforcement activities). To be sure, United States or international trade unions could comment to CEACR with respect to hazardous work covered under ILO Convention 182, which the United States has ratified. But any follow up would be between the United States and the ILO, not within a bilateral or regional trade agreement.

¹⁴⁶ U.S.-Colom. Agreement, *supra* note 114, art. 17.2 n.2; U.S.-Pan. Agreement, *supra* note 114, art.16.2 n.2; U.S.-Peru Agreement, *supra* note 114, art.17.2 n.1; TPP Agreement, *supra* note 131, art. 19.3 n.4.

Finally, trade agreement labor provisions typically provide for a three-stage process of enforcement: complaints addressed through *consultations between governments*; followed by an intermediate stage of *non-binding recommendations* that may involve an independent experts' panel; and ultimately a final stage of *arbitration and possible sanctions*.¹⁴⁷ Disputes involving labor provisions almost never get past the initial stage of consultation between governments.¹⁴⁸ Perhaps as a result of the lengthy and inconclusive resolution process, complaints filed under the NAALC declined significantly after 1998,¹⁴⁹ and there have been relatively few complaints filed under the other trade agreements.¹⁵⁰ Complaints that have been filed primarily involve freedom of association—including violence against trade unionists, state interference in internal union affairs, and the failure to enforce domestic labor laws involving freedom of association and collective bargaining.¹⁵¹ There have also been complaints alleging violations of child labor laws.¹⁵²

A recurring problem with the dispute resolution mechanisms in these agreements is that while trade unions and their supporters can file complaints and denounce failures to act on alleged interference with fundamental labor rights, what happens to the complaint—how hard to push a case forward or whether to push at all—is completely under government control.¹⁵³ Governments generally would prefer to negotiate diplomatic solutions with their trading partners behind closed doors, rather than allow a more public airing of possibly serious violations of domestic laws that are intended to em-

¹⁴⁷ See, e.g., North American Agreement on Labor Cooperation, art. 27-41, 1, September 13, 1993, 32 I.L.M. 1499 (stating the mechanism for dispute resolution); CAFTA, *supra* note 113, art.16.6 (stating the mechanism for cooperative labor consultations between parties); U.S.-Chile Agreement, *supra* note 113, art.18.6 (stating the mechanism for cooperative consultations between parties); U.S.-Colom. Agreement, *supra* note 114, art.17.7; U.S.-Peru Agreement, *supra* note 114, art.17.7 (providing the mechanism for cooperative labor consultation between parties).

¹⁴⁸ ILO, *Social Dimensions of the FTAs*, *supra* note 106, at 42-47, 50-51.

¹⁴⁹ *Id.* at 44.

¹⁵⁰ *Id.* at 50-51.

¹⁵¹ See *id.* at 51-52 (discussing complaints filed against Guatemala (2008); Costa Rica (2010); Peru (2010); and Honduras (2012)).

¹⁵² See *id.* at 51-52 (discussing complaints against Dominican Republic (2011) and Honduras (2012)).

¹⁵³ See Lance Compa, *La 'clausola sociale' commercio-lavoro a 20 anni dal NAFTA: il punto*, 66 RIVISTA GIUDIRICA DEL LAVORO 763 (2015) (It.) (unpublished English version on file with Author).

brace international norms. In more than twenty years of trade agreement labor provisions in the Americas, only a single case has reached the final dispute resolution stage. Nine years after a complaint was filed against the Guatemalan government, an arbitral decision was recently issued—finding a violation of domestic labor laws but no persuasive proof of trade impact.¹⁵⁴

Sanctions are not a panacea for protecting fundamental labor rights enshrined in international norms. A trade agreement penalty clause for violation of child labor laws would similarly require establishing a causal link between violation of the national law and economic injury experienced by an industry in the receiving country.¹⁵⁵ Moreover, once establishing the link, any penalty substantial enough to have a deterrent effect, such as either withdrawing trade benefits or a severe fine, could well cause more immediate harm to workers in the affected country (e.g., through lost jobs) than to the offending government or the perpetrating employers.¹⁵⁶ One could argue that trade sanctions should not target the country as a whole

¹⁵⁴ A complaint filed in 2008 under CAFTA by six Guatemalan unions and the AFL-CIO alleged serious and repeated failures by the Guatemalan government to enforce its labor laws, primarily related to freedom of association. The United States called for an arbitral panel in 2011, which was put on hold following an agreement in 2013 on an “action plan,” but the United States again requested a panel in 2015. In June 2017, the panel ruled against the United States. Andrew Wallender, *United States Labor Dispute Failure Prompts Calls for NAFTA Changes*, BLOOMBERG BNA: DAILY LABOR REPORT (June 29, 2016, 6:01PM), <https://convergenceapi.bna.com/ui/content/articleStandalone/247183204000000001/388272?itemGuid=dc067db2-20c6-49d2-bb5e-7e2852289bca> [<https://perma.cc/JZ5C-K6WM>]. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, IN THE MATTER OF GUATEMALA – ISSUES RELATING TO OBLIGATIONS UNDER ARTICLE 16.2.1(A) OF THE CAFTA-DR, ¶ 594 (2017), [http://trade.gov/industry/tas/Guatemala%20%20E2%80%9320Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf](http://trade.gov/industry/tas/Guatemala%20%20E2%80%9320Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf) [<https://perma.cc/8MnQ-FH6A>] (“The United States has proven that at eight worksites and with respect to [seventy-four] workers Guatemala failed to effectively enforce its labor laws by failing to secure compliance with court orders, but not that these instances constitute a course of inaction that was in a manner affecting trade. The United States has not proven sufficient failures to adequately conduct labor inspections to constitute a course of action or inaction.”).

¹⁵⁵ See *supra* note 146 and accompanying text.

¹⁵⁶ See Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 U.C. DAVIS J. INT’L L. & POL’Y 13, 20–21 (2003).

or an entire industry, but only the offending company or companies.¹⁵⁷ And in some national settings, a combination of positive incentives and more accurate information about working conditions might yield better results than the threat of negative consequences for noncompliance.¹⁵⁸

But whether incentives for compliance are positive or negative, if complaining parties (e.g., labor unions and employers) could continue to participate in and influence the process, one result might be a more sustained interest in the capacity of trade agreements to promote adherence to international labor norms. Importantly, the successes of the ILO supervisory system are illustrative in this regard. Although they lack authority to impose monetary or other sanctions, ILO supervisory mechanisms feature a more transparent, ongoing, and participatory process. This process—devoted to reporting and monitoring and supplemented by the provision of technical assistance—engages social partners as well as governments in the effort to achieve compliance with labor norms.

Further, the primary focus of the implementation process is compliance with ratified international law, rather than a government's capacity or willingness to follow its already existing domestic laws. In this setting, conforming changes in national labor law can flow from the public dialogue involving a country that feels obliged to respond to compliance concerns raised by the CEACR or CFA, or to address in person other governments—along with worker and employer members—before the CAS when those supervisory actors are searchingly critical of the country's violations of a ratified convention.¹⁵⁹

4. ILO NORMS AND DOMESTIC LABOR PRACTICES

As discussed in Section 3, ILO norms have had a meaningful impact on the development of domestic labor laws in the Americas

¹⁵⁷ See Siroën, *supra* note 123, at 98.

¹⁵⁸ See Polaski, *supra* note 156, at 21–22.

¹⁵⁹ For discussion on some of the twenty-five worst cases, see generally ILC, *Committee on the Application of Standards at the Conference: Extracts from the Record of Proceedings*, at 56–62, ILC104 (2015) (El Salvador); *id.* at 62–68 (Guatemala); *id.* at 71–78 (Mexico); *id.* at 84–94 (Venezuela); *id.* at 124–28 (Bolivia).

since the early 1990s. Legislatures and courts have adjusted or expanded workplace rights relating to child labor and freedom of association, relying on a diverse set of interactions with those ILO norms: (1) ratification of Conventions; (2) response to the supervisory mechanisms; (3) support gleaned from training and technical assistance; and (4) commitments undertaken through trade agreements. Progress has been uneven as between countries, and the relative contribution from trade agreement commitments may be more debatable, but the cumulative changes have been quite substantial over three decades.

It remains true, of course, that evolutionary changes in labor laws do not always translate to the same degree into progress on the ground. One labor scholar has recently observed that a decade after pro-worker reforms in many Latin American countries, labor unions continue to lose members, and their strength is shrinking.¹⁶⁰ Some of this dissonance between law and practice is due to extrinsic factors such as those mentioned in the United States context—global competition, the pace of technology, and political opposition to unions.¹⁶¹

But an important factor limiting the impact of labor law reform is the lack of adequate enforcement. Labor laws in the Americas are increasingly influenced by international norms. However, such laws cannot function effectively as part of a rule-of-law regime without an adequate means to detect violations, a system of meaningful punishments, and a commitment to apply both the detection and sanctions aspects with some degree of rigor. Section 4.1. addresses certain challenges relating to the implementation process for laws sourced increasingly from international norms, and Section 4.2. briefly discusses some serious instances of failure to comply with child labor and freedom of association laws that are on the books.

4.1. Dueling Frameworks and Resources for Enforcement

Scholars have observed important differences between labor inspection approaches undertaken in the United States versus in most

¹⁶⁰ See Anner, *supra* note 9, at 150.

¹⁶¹ See *supra* note 4.

Latin American countries.¹⁶² In the U.S. legal system, inspection is specialized in that different regulations are administered by different agencies or divisions within an agency.¹⁶³ Moreover, the command-and-control enforcement approach is geared to sanctions for noncompliance, especially civil damages or fines, and sometimes criminal penalties as well.¹⁶⁴ By contrast, labor inspection systems in Latin America, which are derived from Franco-Iberian roots, are more unified. The entire labor code is, in principle, administered by a single agency, and the inspector's remit covers every aspect of the establishment being examined.¹⁶⁵ The Latin American approach is also more conciliatory in that the inspector's role is to initiate and oversee a process that can bring about reasonable compliance with the law — through advice and consultations perhaps more than fines and penalties.¹⁶⁶

¹⁶² See Schrank & Piore, *supra* note 9, at 10 (contrasting specialized agency inspections and use of penal sanctions in U.S. system of labor market regulation with a more unified and conciliatory approach to inspection in Latin America); see also Andrew Schrank, *Rewarding Regulation in Latin America*, 41 POL. & SOC'Y 487, 489 (2013) (“[H]ighlighting the prospects for *rewarding regulation*—i.e., regulation that redounds to the benefit of the regulated as well as society as a whole—in a number of Latin American countries and issue areas.”).

¹⁶³ For instance, the Department of Labor is charged with enforcing numerous statutes that have distinct enforcement schemes administered separately within the Department, including: Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2008); Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2006); Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (1979); Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (1970); and Mine Safety and Health Act, 30 U.S.C. §§ 801–966 (1977). The Occupational Safety and Health Act (“OSHA”) and the Mine Safety Health Act (“MSHA”) have separate cadres of inspectors, trained under those statutes. In addition to the Department of Labor, other agencies are authorized to enforce their own workplace statutes. Thus, the NLRB enforces the National Labor Relations Act, 29 U.S.C. §§ 151–169 (1935), which is addressed to labor management relations, and the Equal Employment Opportunity Commission enforces several antidiscrimination laws: Title VII, Civil Rights Act, 42 U.S.C. §§1981–2000h-6 (1964); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1967); and Americans With Disabilities Act, 42 U.S.C. §§ 12101–12213 (1990).

¹⁶⁴ See, e.g., 29 U.S.C. § 216(b) (providing civil penalties for back pay and liquidated damages for minimum wage and overtime work violations); § 216(e) (providing civil fines for child labor violations); § 216(a) (providing criminal fines or imprisonment for specified willful violations of § 215). 29 U.S.C. § 666(a)–(d) (providing civil penalties up to \$70,000 per violation); § 666(e)–(g) (providing criminal penalties for violations). 42 U.S.C. §1981a(b)(1)–(2) (providing compensatory and punitive damages for intentional discrimination violating Title VII or ADA).

¹⁶⁵ See Schrank & Piore, *supra* note 9, at 10.

¹⁶⁶ See Coslovsky, *supra* note 12, at 172–173 (discussing alternative labor inspection methods used by Brazilian inspectors to ensure compliance); Michael J. Piore & Andrew M. Schrank, *Transnational Integration and Labor Market Regulation*

Some observers contend that the Latin American approach is appropriate for its time and place: Generalist inspectors are in a position to establish realistic priorities, negotiate deals with those priorities in mind, and produce acceptable levels of compliance while operating within constrained budgets.¹⁶⁷ The underlying rationale is that lack of compliance with labor laws is in large part a function of *inability* to comply or *ignorance* of how to manage competitively with better labor standards, and addressing these deficiencies of resources and knowledge requires a more collaborative approach to enforcement.¹⁶⁸

On the other hand, it may well be that many employers do not comply because they are *unwilling* to do so: Their competitive advantage stems in important respects from exploiting the realities of low labor standards. Under such circumstances, a vigorously watchful labor inspection system becomes more of a priority. And unfortunately, there is ample evidence of instances where labor inspectorates in Latin America lack sufficient training and expertise, experience large-scale inefficiencies, or are prone to corruption.¹⁶⁹

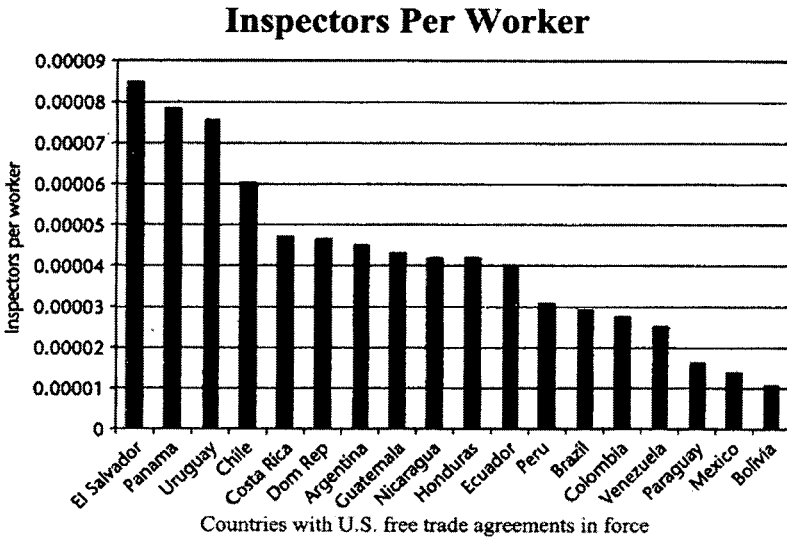
in Mexico and Beyond, in *LEVELING THE PLAYING FIELD: TRANSNATIONAL REGULATORY INTEGRATION AND DEVELOPMENT* 80, 94, 99 (Laszlo Bruszt & Gerald A. McDermott eds., 2014) ("Labor inspectors in the Latin world can not only tailor their enforcement efforts to the distinct need of particular firms and workers but can take the viability of the enterprise and the value of the jobs it generates into account when making their enforcement decisions—all the while looking for ways to reconcile compliance with competitiveness.").

¹⁶⁷ See Schrank & Piore, *supra* note 9, at 10–11; Coslovsky, *supra* note 12, at 173, 189–90.

¹⁶⁸ See Schrank & Piore, *supra* note 9, at 14–15 ("While Anglo-American inspectors treat non-compliance as a product of individual cost-benefit calculations, and therefore try to deter future transgressions by making examples out of current offenders, their Franco-Iberian counterparts treat non-compliance as a product of ignorance and inefficiency—and realize that sanctions alone may aggravate, rather than solve, the problem.").

¹⁶⁹ See Schrank & Piore *supra* note 9, at 21 (describing existing literature's conclusions that "enforcement remains problematic" and non-enforcement is "egregious, systematic, and, in some cases, largely attributable to a lack of political will"); CEACR, 2016 *Rep.*, *supra* note 77, at 371, 376–77 (discussing non-compliance with ILO Convention 81, Labor Inspection by Bolivia and Costa Rica); ILC, *Rep. of the CEACR, Application of International Labour Standards 2015 (I)*, at 326–28, 333–35, 354–56, ILC 104/III(1A) (2015) [hereinafter CEACR, 2015 *Rep.*], [http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2015-104-1A\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2015-104-1A).pdf) [<https://perma.cc/F6XL-TUKE>] (discussing non-compliance with ILO Convention 81, Labor Inspection by Guatemala, Honduras, and Peru); CEACR, 2014 *Rep.*, *supra* note 83, at 360–62, 388–89, 416–19 (discussing non-compliance with ILO Convention 81, Labor Inspection by Colombia, Paraguay, and Venezuela). In addition to CEACR Observations for countries that have ratified ILO Convention 81, but failed

Disagreement over the optimal framing approach to labor inspection is paralleled by difficulties in interpreting the available evidence on changes in enforcement resources. When examining available data that compares labor inspection activities across Latin American countries, there is a broad correlation between increased inspector resources in recent years and the existence of a trade agreement with the United States.



Graph source: Piore and Schrank 2010-11 calculations extrapolated from 13 different sources

Figure 1

Most Latin American countries ranking above average in the ratio of inspectors to workers have signed trade agreements with the United States. El Salvador, Panama, Chile, Costa Rica, and the Dominican Republic are five of the six top ranked nations among eighteen Latin American countries surveyed in 2010-11.¹⁷⁰ Four of these

to comply with the provisions, ILO Convention 81 has not been ratified by Canada, Mexico, Chile, Nicaragua, St. Kitts & Nevis, St. Lucia, and the United States. Labour Inspection Convention, *supra* note 33.

¹⁷⁰ See Piore & Schrank, *supra* note 166, at 90 (illustrating graphically labor law enforcement resources in Latin America). El Salvador, Costa Rica, and the Dominican Republic are members of CAFTA, while Chile and Panama have bilateral agreements. See *supra* notes 107-08 and accompanying text. The sixth country is Uruguay, which does not have a trade agreement with the United States.

five, along with trade agreement signatories Peru and Colombia, experienced an enormous increase in their enforcement resources between the late 1980s and 2009.¹⁷¹ These improvements reflect, in part, the impact of cooperative activities with the U.S. Labor Department to build capacity pursuant to the trade agreements.¹⁷²

At the same time, this interesting data can be somewhat misleading. Several countries that rank high in terms of inspectors-per-worker—El Salvador, Chile, and Guatemala—are also known for failures to comply with ratified ILO conventions and their own domestic laws.¹⁷³ Brazil, which ranks comparatively lower in terms of inspectors-per-worker, has a substantially better track record for implementation.¹⁷⁴ Additionally, two countries ranking with or below Brazil in terms of inspectors-per-worker—Peru and Colombia—also have trade agreements with the United States. Further, the data on inspectors-per-worker do not adequately capture the depth or rigor with which inspections take place. For instance, among five Central American countries with roughly an equal number of inspectors-per-worker, the number of annual inspection actions per inspector

¹⁷¹ See Murillo et al., *supra* note 11, at 806 tbl.31.3 (displaying increase in enforcement resources as the following: Chile 185%, El Salvador 175%, Dominican Republic 100%, Panama 80%, Colombia 100%, and Peru 135%). The authors measured changes in the ratio of labor inspectors to the economically active population. *Id.*

¹⁷² See ILO, ASSESSMENT OF LABOUR PROVISIONS, *supra* note 106, at 3, 41, 65-66, 74 (describing examples of United States using trade agreement provisions to help build capacity in Cambodia, Jordan, Colombia, and Honduras).

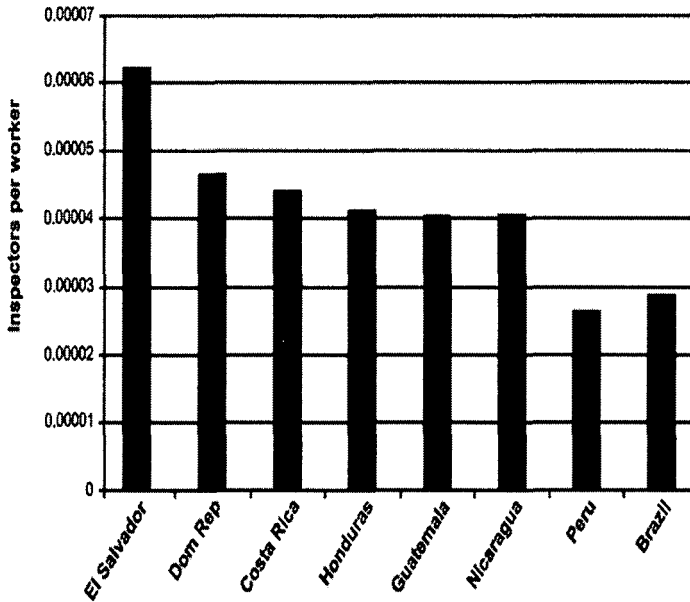
¹⁷³ See *supra* notes 98-101 and accompanying text (discussing Chile's failure to comply with ILO conventions and national laws on child labor). CEACR, 2015 Rep., *supra* note 169, at 72-73, 225-26 (discussing El Salvador's failure to comply with ILO Conventions and national laws on freedom of association and worst forms of child labor). CEACR, 2016 Rep., *supra* note 77, at 70-72, 188-89 (discussing Guatemala's failure to comply with ILO Conventions and national laws on freedom of association and forced labor).

¹⁷⁴ See, e.g., CEACR, 2016 Rep., *supra* note 77, at 227-28 (welcoming government information from national household surveys indicating 59% decrease in child labor from 1992 to 2012); ILO, *Business and Child Labour*, *supra* note 36, at 33-59 (discussing wide range of business initiatives to end child labor in Brazil); CAS, *Dynamic and Impact*, *supra* note 86, at 75-81 (discussing Brazil's substantial changes in law and practice from 1995 to 2010 to comply with ILO Convention 111 on nondiscrimination).

ranges from 427 to 55, a difference of almost 8 to 1.

Inspectors Per Worker

2009	El Salvador	Dom Rep	Costa Rica	Honduras	Guatemala	Nicaragua	Peru	Brazil
Inspectors	159	203	93	120	238	96	411	2,949
Inspection Actions	29,728	86,816	14,385	15,277	13,131	6,861	84,095	334,625
Actions per Inspector	186.97	427.67	154.68	127.31	55.17	71.47	204.61	113.47
Total Workforce	2,546,699	4,339,454	2,100,269	2,899,155	5,852,758	2,356,120	15,457,246	101,850,665



Source: ILO data compiled for 2009

Figure 2

From a broader perspective, it is possible that the increased exposure to international trade in Latin America since the 1980s has subtly encouraged governments to walk back the rigorosity of their labor standards.¹⁷⁵ This hypothesis of weakened implementation may reflect that governments faced with global or regional competition for export share yield to pressure to engage in some form of

¹⁷⁵ See Lucas Ronconi, *Globalization, Domestic Institutions, and Enforcement of Labor Law: Evidence from Latin America*, 51 *INDUS. REL.* 89, 96 (2012) (advancing this hypothesis after reporting a substantial increase in exports to, and imports from, outside the region from 1985 to 2008).

a race to the bottom regarding labor standards. For reasons of political visibility to the electorate, governments contemplating such a walking-back may be more likely to weaken labor standards by lowering enforcement (“turning a blind eye to noncompliance”) than by ratcheting down existing labor legislation.¹⁷⁶

Even presuming some validity to this hypothesis, regional trends in enforcement during the period since 1990 are difficult to decipher; the results seem decidedly mixed by country. One study reported that enforcement resources increased in nine Latin American countries and decreased in eight others between 1985 and 2009.¹⁷⁷ Another study showed similarly divergent results, reporting an increase in enforcement resources between the 1990s and 2000s for six countries and a reduction for seven others.¹⁷⁸ One way to reach beyond the uncertain empirical record on inspection resources is to consider country-specific instances of noncompliance with ratified Conventions or enacted domestic laws.

4.2. *Examples of Gaps between Law and Practice*

This section does not purport to be comprehensive; rather, it examines several instances of noncompliance for illustrative purposes. In this regard, it may be somewhat easier to measure progress on child labor legislation and practice (or an absence thereof), given that national data on children in the workforce are collected with some regularity and precision. By contrast, measuring progress on freedom of association laws and practices tends to involve analyses that are less quantitative, and perhaps somewhat more subjective.¹⁷⁹

¹⁷⁶ *Id.* Ronconi adds that empirical studies do not find that more openness to international trade results in a greater likelihood of labor law deregulation, but that comparable empirical data is lacking regarding the impact of increased trade on labor law enforcement. *See id.*

¹⁷⁷ *See* Murillo et al., *supra* note 11, at 806 (indicating that the largest proportional increases disclosed by the compiled data are in Chile, El Salvador, and Peru; the largest proportional decreases are in Bolivia, Ecuador, and Mexico).

¹⁷⁸ *See* Ronconi, *supra* note 175, at 95 (reporting an increase in enforcement resources for Argentina, Uruguay, Colombia, Guatemala, Panama, and Peru; and a reduction for Bolivia, Brazil, Costa Rica, Ecuador, Honduras, Mexico, and Paraguay). These results are generally consistent with those from Murillo et al. — perhaps not surprising given that Ronconi, a co-author on the Murillo study, uses a dataset that updates the earlier version. *See id.* at 91.

¹⁷⁹ *See* Stephanie Barrientos, Gary Gereffi, & Arianna Rossi, *Economic and Social Upgrading in Global Production Networks: A New Paradigm for a Changing World*, 150

In El Salvador, reports indicate that the Ministry of Labor has not been effective in enforcing the child labor laws that are in place.¹⁸⁰ The government's focus is almost exclusively on the formal economy although child labor is a far bigger issue in agriculture (especially coffee and sugarcane) and throughout the informal economy. Assessed penalties are insufficient to act as a deterrent, and the number of child workers in the country in 2014 appears at least as large as the number identified in 2001.¹⁸¹

The gap between law and practice with respect to freedom of association is also substantial. Both United States and leading NGOs report a range of unlawful employer practices including dismissals for participating in legal strikes or for other attempts to unionize, blacklisting of workers who are former union members, and declaring strikes illegal when they appear to follow domestic law.¹⁸² The

INT'L LAB. REV. 319, 324–25 (2011) (illustrating that social upgrading includes measurable standards such as wage levels and working hours and less easily quantified standards such as freedom of association and right to collectively bargain); Kevin Kolben, *Dialogic Labor Regulation in the Global Supply Chain*, 36 MICH. J. INT'L L. 425, 438 (2015) (differentiating between technical standards, such as wages and health and safety, and “process rights” such as freedom of association).

¹⁸⁰ See U.S. DEP'T OF STATE, EL SALVADOR 2015 HUMAN RIGHTS REPORT 27–28 (2015), <https://www.state.gov/documents/organization/253225.pdf> [<https://perma.cc/C2EC-JLD4>]; Matthew E Johnson, *CAFTA and International Human Rights in El Salvador: Is the United States Acquiescing to Widespread Workers' Human Rights Violations?*, 4 NW. UNIV. J. INT'L HUM. RTS. 162, 170 (2005).

¹⁸¹ Compare Johnson, *supra* note 180, at 170 (reporting 2001 State Department data that 75,000 children between ages 5 and 13 were working; 147,000 working between ages 14 and 17), with U.S. DEP'T OF LABOR, 2014 FINDINGS ON WORST FORMS OF CHILD LABOR: EL SALVADOR 1 (2014), <https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/2014TDA/elsalvador.pdf> [<https://perma.cc/EDA9-N5N>] (reporting that approximately 165,000 children ages 7 to 14 were either working or combining work and school). See generally U.S. DEP'T OF STATE, 2015 HUMAN RIGHTS REPORT, *supra* note 180, at 27–28 (reporting that child labor “remained a serious and widespread problem” with “limited effectiveness” of enforcement efforts).

¹⁸² See U.S. DEP'T OF STATE, 2015 HUMAN RIGHTS REPORT, *supra* note 180, at 26–27 (reporting that the government is ineffective in enforcing right to association and collective bargaining rights, and that the government lacks resources to conduct inspections); Johnson, *supra* note 180, at 169 (describing reports of the government violating the right to association by dismissing, blacklisting, and threatening workers); CENTER FOR GLOBAL WORKERS' RIGHTS & WORKER RIGHTS CONSORTIUM, UNHOLY ALLIANCES: HOW EMPLOYERS IN EL SALVADOR'S GARMENT INDUSTRY COLLUDE WITH A CORRUPT LABOR FEDERATION, COMPANY UNIONS AND VIOLENT GANGS TO SUPPRESS WORKERS' RIGHTS 8 (2015) [hereinafter UNHOLY ALLIANCES], http://lser.la.psu.edu/gwr/documents/UnholyAlliances_January2015.pdf [<https://perma.cc/ST37-TKP7>] (concluding that the Salvadoran government is not

Salvadoran government is reported to contribute to such practices, through legal recognition of employer-controlled unions, support for corrupt labor organizations, and weak enforcement of existing labor laws which in any event include less than adequate penalties for employers who retaliate, as well as labor inspectors who are prone to corruption and bribery.¹⁸³

Guatemala is another country with a solid record of ILO ratifications and relatively strong protections in its labor code, but a sizable gap between law and practice. The country has a history of employers and governmental authorities engaging in violence against trade unions and workers, including death threats, abduction, torture and murders.¹⁸⁴ Perhaps unsurprisingly, it has the lowest rate of unionization among seventeen Latin American countries.¹⁸⁵ Even for workers who are unionized, government policies

effective in enforcing labor law, and that it encourages corrupt labor organizations and employer-controlled unions).

¹⁸³ See U.S. DEP'T OF STATE, 2015 HUMAN RIGHTS REPORT, *supra* note 180, at 26 (arguing that the \$114 maximum penalty for employers who interfere with the right to strike was not sufficient to deter violations); Johnson, *supra* note 180, at 169 (quoting from State Department's 2001 Report stating that government inspectors were prone to bribery); UNHOLY ALLIANCES, *supra* note 182 at 8-10 (describing history of ILO raising serious noncompliance concerns with the government through the years).

¹⁸⁴ See, e.g., van Roozendaal, *supra* note 88, at 18, 20 (describing reports of the Guatemalan government engaging in violent oppression of trade unionists and workers such as killings, threats, and torture); ILC, Rep. of the CEACR, *Application of Int'l Labour Standards 2011 (I)*, at 83-87, ILC 100/III/1A (2016) [hereinafter CEACR, 2011 Rep.], [http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2011-100-1A\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2011-100-1A).pdf) [<https://perma.cc/2WMV-GX7T>] (describing repeated efforts by CEACR, CAS, and Committee on Freedom of Association to have the Government address acts of violence that continually go unpunished); ILC, Rep. of the CEACR, *General Report and Observations Concerning Particular Countries*, at 110-12, ILC.102/III(1A) (2013) [hereinafter CEACR, 2013 Rep.], [http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2013-102-1A\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2013-102-1A).pdf) [<https://perma.cc/7P9V-T6MY>] (detailing the reported murders of trade unionists from 2007 to 2012); CEACR, 2015 Rep., *supra* note 169, at 88 ("The Committee notes with *deep concern* that, according to the information provided . . . [sixteen] trade unionists were murdered between 2 January 2013 and 20 August 2014.").

¹⁸⁵ See Mark Anner, *Meeting the Challenges of Industrial Restructuring: Labor Reform and Enforcement in Latin America*, 50 LATIN AM. POL. & SOC'Y 33, 37 (2008) (reporting unionization rate below 2%, compared to rates over 20% in Argentina, Brazil, Mexico, Nicaragua; between 11% and 20% in Bolivia, Chile, Costa Rica, Ecuador, Honduras, Panama, Venezuela; and between 5% and 10% in Colombia, Dominican Republic, El Salvador, and Peru).

establish registration and support requirements that seriously impede collective bargaining and the right to strike.¹⁸⁶ Further, child labor is widespread for ages seven to fourteen, mainly in rural areas, and legal protections are difficult to enforce because some three-fourths of the workforce is employed in the informal economy.¹⁸⁷

In Mexico, extensive legal protections for freedom of association are in place, reflective of international and domestic legal principles,¹⁸⁸ but they are far from fully realized in practice. The pervasive control exercised by “official” unions, through contracts of protection and other “sweetheart” arrangements, has undermined the exercise of rights to organize and bargain for independent, democratic workers’ organizations.¹⁸⁹

¹⁸⁶ See FREEDOM HOUSE, COUNTRIES AT THE CROSSROADS 2012: GUATEMALA 8 (2012), https://freedomhouse.org/sites/default/files/Guatemala%20-%20FINAL_0.pdf (“Anti-union policies include a 25 percent union registration requirement for collective bargaining within a company; a stipulation that strikes need to be supported by 51 percent of the workforce, as well as a broad definition of the ‘essential services’ sectors within which strikes are barred.”); CEACR, 2015 Rep., *supra* note 169 (asking the Guatemalan government to amend requirements such as requiring strikes to be called by a majority of the workers instead of a majority of those casting ballots).

¹⁸⁷ See COUNTRIES AT THE CROSSROADS, *supra* note 186, at 8–9 (reporting on serious shortcomings in administering the rule of law); U.S. DEP’T OF LABOR, 2014 FINDINGS ON WORST FORMS OF CHILD LABOR: GUATEMALA 1, <https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/2014TDA/guatemala.pdf> (reporting that one-third of children age 7 to 14 were either working (e.g., 19.2%) or combining work and school (e.g., 14.6%)); UNDERSTANDING CHILDREN’S WORK IN GUATEMALA 2–4 (ILO, UNICEF, & World Bank eds., 2003) (describing prevalence and characteristics of children’s work).

¹⁸⁸ See CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [C.P.] *as amended*, DIARIO OFICIAL DE LA FEDERACIÓN [DO], 5 de Febrero de 1917, Title VI, art.123 (Mex.); Maria Teresa Guerra & Anna L. Torriente, *The NAALC and the Labor Laws of Mexico and the United States*, 14 ARIZ. J. INT’L & COMP. L. 503, 514–16 (1997) (noting the rights Article 123 of the Mexican Constitution establishes such as a maximum working day of eight hours, paid day of rest, vacation and equal pay for equal work).

¹⁸⁹ See Guerra & Torriente, *supra* note 188, at 524–25 (contending that the right to collectively bargain has been adversely affected by corrupt union bosses in concert with management); OFF. OF TRADE & LAB. AFF., U.S. DEP’T OF LABOR, PUBLIC REPORT OF REVIEW OF U.S. SUBMISSION 2015-04 (MEXICO) PURSUANT TO NAALC 3–7 (2016), <https://www.dol.gov/ilab/reports/pdf/070816-Chedraui-report.pdf> [<https://perma.cc/J9VR-J453>] (detailing how protection contracts undermine workers’ rights); Graciela Bensusan, *Organizing Workers in Argentina, Brazil, Chile, and Mexico: The Authoritarian-Corporatist Legacy and Old Institutional Designs in a New Context*, 17 THEORETICAL INQ. L. 131, 144, 154–55, 158 (2015) (arguing that union representation has an inverse meaning in that unions defend the interest of the employers and the government instead of the workers).

Finally, in Peru, despite laws prohibiting child labor, nearly 20 percent of children age six to fourteen are working and not in school.¹⁹⁰ This very high proportion of noncompliance – three times higher than in Argentina or Colombia and five times higher than in Brazil¹⁹¹ – may reflect the challenges of child labor enforcement in rural areas and across the informal economy. Yet it seems that other Latin American countries faced with comparable challenges are achieving substantially better results.¹⁹²

These examples of sizable gaps between law and practice should not be taken to mean that such gaps are uniformly present or even broadly prevalent. In Brazil, the combined efforts of the national government, the ILO, NGOs, and local businesses have reduced the number of children at work by more than 50 percent since the early 1990s – a removal of nearly five million children from the labor force.¹⁹³ Key elements of the country's implementation effort were

¹⁹⁰ See U.S. DEP'T OF LABOR, 2014 FINDINGS ON WORST FORMS OF CHILD LABOR: PERU 1 (2014), <https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/2014TDA/peru.pdf> [https://perma.cc/7Q2M-8UMV] (showing that 19.4%, over 1 million children, are working and not in school).

¹⁹¹ See U.S. DEP'T OF LABOR, 2014 FINDINGS ON WORST FORMS OF CHILD LABOR: ARGENTINA 1 (2014), <https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/2014TDA/argentina.pdf> [https://perma.cc/UR5F-GY7M] (showing that 6.5% of children are work); U.S. DEP'T OF LABOR, 2014 FINDINGS ON WORST FORMS OF CHILD LABOR: COLOMBIA 1 (2014), <https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/2014TDA/colombia.pdf> [https://perma.cc/QX3C-3FU2] (showing that 5.9% of children work); U.S. DEP'T OF LABOR, 2014 FINDINGS ON WORST FORMS OF CHILD LABOR: BRAZIL 1 (2014), <https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/2014TDA/brazil.pdf> [https://perma.cc/9NE8-LWLF] (showing that 3.5% of children work).

¹⁹² Based on Department of Labor data, Guatemala, with 19.2% of children working, not in school, is close to Peru's results. For discussion of the extent of informality in labor markets across Latin America, see ILO, NONSTANDARD EMPLOYMENT AROUND THE WORLD: UNDERSTANDING CHALLENGES, SHAPING PROSPECTS 60-62, 104 (2016). The South American country closest to Peru in terms of exhibiting a high level of temporary employment contracts as well as informal economy jobs is Ecuador. See *id.* Yet in 2014, only 2.7% of children age 5 to 14 (75,689) in Ecuador were working and not in school – a proportion less than one-sixth that in Peru. U.S. DEP'T OF LABOR, 2014 FINDINGS ON WORST FORMS OF CHILD LABOR: ECUADOR 1 (2014), <https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/2014TDA/ecuador.pdf> [https://perma.cc/69F7-C6UK].

¹⁹³ See CEACR, 2016 Rep., *supra* note 77, at 227-28 ("The Committee welcomes the Government's information that the results of the national household surveys from 1992 to 2012 indicated a drastic reduction in child labour from 8.4 million children (between the ages of 5-17 years) in 1992 to 3.51 million children in 2012,

the establishment of a specific inspection scheme within the Child Labor Eradication Program, and the registration of hundreds of thousands of families with child labor participants for social and monitoring services.¹⁹⁴ In Mexico, efforts undertaken since 2000 have resulted in a 40% decrease in the number of twelve- to fourteen-year-olds working.¹⁹⁵ In addition to the commitment of public and private actors in the labor law arena, the success stories in these two countries result from more active policies in the area of education as well as a transformation of the economy away from the agricultural sector.¹⁹⁶

Further, child labor experience in Canada illustrates that even within a single country, variations in local government practices can be substantial—some essentially consistent with international norms while others depart from those norms.¹⁹⁷ And the experience

indicating a reduction of 4.9 million [59%] during this period.”); del Vecchio, *supra* note 38, at 27 (detailing Brazil’s concerted effort to eradicate child labor since the 1990s through school stipends, labor inspections, special task forces, and the National Forum for the Prevention of Child Labor).

¹⁹⁴ See CEACR, 2016 Rep., *supra* note 77, at 228 (“[T]he fight against child labour in Brazil, through regular inspections and specific programmes for the eradication of child labour, comprises both the formal and informal sectors, including family enterprises.”); ILO, Evaluation Summary, *supra* note 95, at 2 (“The project has contributed with methodologies for the process of identification and registration of working boys, girls and adolescents and their families, as well as with the creation of monitoring instruments . . .”).

¹⁹⁵ UNDERSTANDING CHILDREN’S WORK (UCW) PROGRAMME, THE MEXICAN EXPERIENCE IN REDUCING CHILD LABOUR: EMPIRICAL EVIDENCE AND POLICY LESSONS 22–23 (2012), http://www.ucw-project.org/attachment/Report_Child_Labour_trends20130308_111116.pdf [<https://perma.cc/2BQC-4VX5>].

¹⁹⁶ See *id.* at 32–33, 45 (discussing factors in Mexico); ILO, *Business and Child Labour*, *supra* note 36, at 34 (emphasizing importance of Brazil’s increased access to educational opportunities including free mandatory education for all children between ages four and seventeen).

¹⁹⁷ See BC CHILD AND YOUTH ADVOCACY COALITION, CHILD LABOUR IS NO ACCIDENT: THE EXPERIENCE OF BC’S WORKING CHILDREN 26–28 (2013), <http://firstcallbc.org/wordpress/wp-content/uploads/2015/08/Child-Labour-Is-No-Accident-FirstCall-2013-05.pdf> [<https://perma.cc/8YEZ-DJS7>] (reporting on child labor practices in British Columbia and Alberta that follow lowering of the work-start age to twelve—with parental permission—in those two provinces; the work-start age is fourteen or sixteen in Ontario and Saskatchewan, and several other provinces allow children to work under age fourteen only with detailed restrictions beyond parental permission); Lynette Schultz & Alison Taylor, *Children at Work in Alberta*, 32 CAN. PUB. POL’Y 431, 432–433 (2006) (criticizing lowering the working age in Alberta as contravening principles of international labour agreements). Canada recently ratified ILO Convention 138 in June 2016, and there may be pressure for a more nationally imposed set of requirements and practices going forward.

of implementing Convention 169 concerning Indigenous and Tribal Peoples reflects variation among ratifying countries regarding perceived implementation costs—in one very recent instance, costs associated with prior consultations on energy and infrastructure investment projects.¹⁹⁸

Overall, the magnitude of gaps between law and practice can be seen at least in part as a function of country-specific factors involving distinctive economic organization, political dynamics, and background cultural elements.¹⁹⁹ Accordingly, a satisfactory account of national variations may need to dwell on the saliency of these economic, political, and cultural factors, as well as on larger evolutionary developments across continents or regions.

5. INTERNATIONALIZED LABOR LAW SOURCES IN A BROADER SETTING

Having identified and analyzed an evolution toward reliance on international sources for domestic labor law and, to a lesser extent, labor practices in the Americas, I close by suggesting ways in which this evolution may be understood as consistent with larger patterns in the development of international labor and human rights law.

5.1. Sourcing of International Law by National Governments

Halton Cheadle has concisely noted certain significant obstacles to the direct importation of international labor law into domestic law.²⁰⁰ International labor law tends to be general and flexible in its obligations and focuses on government conduct, whereas domestic

¹⁹⁸ See ILO Bureau for Employer's Activities Launches a Report on Convention 169 and its Implementation in Four Latin American Countries, (Aug. 4, 2016), http://www.ilo.org/americas/sala-de-prensa/WCMS_507952/lang-en/index.htm [<https://perma.cc/9G78-PQJ8>] (analyzing implementation of Convention 169 in Chile, Colombia, Costa Rica, and Guatemala based on studies conducted in 2013 and 2014); COURTIS, *supra* note 59.

¹⁹⁹ These factors are manifested in a lack of resources devoted to enforcement, a lack of will—attributable to politics and/or corruption—or some combination of the two.

²⁰⁰ See Halton Cheadle, *Reception of International Labour Standards in Common-Law Legal Systems*, 2012 ACTA JURIDICA 348, 351.

laws and regulations are usually more detailed and reticulated and they centrally regulate the conduct of private actors.²⁰¹ In addition, approval of labor conventions at the national level may be perceived as a threat to values of federalism, based on the division of authority between national and provincial or local governments in many countries.²⁰² Finally, the possible adoption of international labor norms through domestic court decisions before those norms have been legislatively approved, or perhaps even debated, raises concerns about the outsized role of a national judiciary, especially in common law countries.²⁰³

However, as Cheadle also observes, these genuine obstacles hardly operate as absolute barriers to application of international norms in suitable domestic circumstances.²⁰⁴ Harold Koh has written about the complex processes by which countries come to adopt and comply with international law, including human rights law.²⁰⁵ In addition to well-recognized motivations stemming from national self-interest and national identity,²⁰⁶ Koh emphasizes the importance of three distinct procedural elements: "*interaction* within the transnational legal process, *interpretation* of international norms, and domestic *internalization* of those norms as determinants of why nations obey."²⁰⁷ Each of these elements is importantly present in the international labor law context I have examined.

There is multidimensional *interaction* with a transnational legal process. Countries are regularly engaged with ILO governance and supervisory mechanisms—through review and ratification of conventions, through exchanges with the CEACR, CAS, and CFA, and

²⁰¹ *Id.* at 351.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 351–62 (discussing various channels through which international law has been adopted in domestic settings—legislation, self-executing provisions, customary international law, and judicial interpretation).

²⁰⁵ See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997) [hereinafter Koh, *International Law*]; Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 Ind. L.J. 1396 (1999) [hereinafter Koh, *Human Rights Law*].

²⁰⁶ See generally Koh, *Human Rights Law*, *supra* note 205, at 1407 (discussing obedience related to economic incentives such as trade benefits, and conformity related to a desirable political identity in the global community of nations).

²⁰⁷ Koh, *International Law*, *supra* note 205, at 2634; see also Koh, *Human Rights Law*, *supra* note 205, at 1399–1400 (identifying the same three-phase process and noting its evolutionary quality).

through partnering efforts involving ILO staff and advisors. This interaction is deepened through countries' participation in the proliferating number of bilateral and regional trade agreements, almost all of which invoke ILO principles if not ILO standards as attainable goals.

The *interpretation* of international norms has been conveyed on a provisional basis,²⁰⁸ initially and continuously through the ILO supervisory bodies – the CEACR, CAS, and CFA – as well as through ILO leadership and staff. Interpretations also have been conveyed on occasion through transnational tribunals, including the European Court of Human Rights, the European Court of Justice, and the Inter-American Court of Human Rights.²⁰⁹ And the *internalization* of those norms has been accomplished through the efforts of national law-making entities. This has taken place across all three branches of government: statutes embody or assimilate the norms; executive decrees or regulations provide for their implementation; and judicial decisions apply and extend them in the context of national facts and circumstances.

Koh's approach is not the only explanatory theory that seeks to account for the internalization of international human rights law. Ryan Goodman and Derek Jinks contend that international law may change state behavior through a process they refer to as "acculturation,"²¹⁰ and which they distinguish from two recognized social

²⁰⁸ Under Article 37 of the ILO Constitution, authoritative interpretations of Conventions occur through referral to the International Court of Justice or appointment of a special tribunal. In the absence of such referral or appointment, the CEACR, as part of its "impartial and technical analysis of how the Conventions are applied in law and practice by member States . . . must determine the legal scope, content and meaning of the provisions of the Conventions, [through] opinions and recommendations [that] are non-binding, being intended to guide the actions of national authorities." CEACR, *2016 Rep.*, *supra* note 77, at 9.

²⁰⁹ See, e.g., *Demir and Baykara v. Turkey*, Eur. Ct.H.R. 1345 (2008) (invoking ILO Convention 87), <http://www.bailii.org/eu/cases/ECHR/2008/1345.html> [<https://perma.cc/N7U8-5AJF>]; *Case C-438/05, Int'l Transport Workers' Federation and Finish Seamen's Union v. Viking Line ABP*, 2007 E.C.R I-10779, C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* and others, 2007, E.C.R I-11767 (invoking and limiting scope of ILO Convention 87); *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R., No. 127, 130, 136 (June 17, 2005) (construing ILO Convention 169).

²¹⁰ See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and Int'l Human Rights Law*, 54 DUKE L.J. 621, 626 (2004) ("By acculturation, we mean the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture. This mechanism induces behavioral changes through pressures to assimilate—some imposed by other actors and some imposed by the self.").

mechanisms for influencing states' behavior—persuasion and coercion.²¹¹ According to Goodman and Jinks, a state may adopt the behavioral norms and policies of a surrounding culture, influenced by social expectations and the perceived conduct of important reference groups. These conformity-induced adjustments in norms are not tantamount to full acceptance of the persuasiveness or legitimacy of a given norm, nor are they based on a calculation of material costs and benefits.²¹²

One might understand the considerable internalization of international labor law in the Americas to be a function of acculturation as distinct from persuasion or coercion. The ripple effect resulting from Convention ratifications across the region is likely to have contributed to a socialized acceptance of ILO norms on child labor and freedom of association.²¹³ At the same time, increasing conformity with ILO norms in law, with a meaningful lag in practice, reflects that states may be less than fully persuaded of the norms' intrinsic merits or legitimacy. And conformity to those norms is not a function of material cost-benefit assessment. Despite the presence of labor provisions in trade agreements, the costs of noncompliance with ILO norms are likely to be shaming and shunning rather than loss of favorable trade or investment status.

Stepping back, international labor and human rights law is not typically enforced through interstate action. In contrast to agreements focused on commercial trade or arms limitations that have an important element of self-enforcement between states, the direct beneficiaries in ILO conventions are not the governments but third parties.²¹⁴ For this reason among others, the internalization of international labor law at the domestic level seems incompletely realized when compared to certain other forms of international law. Unlike nations' willingness to endorse and comply with international treaties governing security and self-defense, or commercial transactions,

²¹¹ See *id.* at 633–38 (describing coercion and persuasion).

²¹² See *id.* at 638–55 (describing how acculturation differs from both persuasion and coercion as mechanisms of social influence over States).

²¹³ See Kahn-Nisser, *supra* note 31.

²¹⁴ See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 119–27 (2005). As stated *supra* in notes 22–23 and accompanying text, in a bilateral commercial trade or arms limitation agreement, violation of a provision by one state effectively invites a violation by the other. The same dynamic does not apply when one state violates child labor norms or unlawfully restricts trade union activities.

transnational labor standards have not often been embraced in the same comprehensive or nuanced ways by national governments.

Still, the liberalization of trade and investment—while hardly free from controversy—is perceived by almost all governments to be in their national self-interest. This liberalization has been accompanied in the Americas and elsewhere by a substantially expanded role for ILO norms and ILO supervision, as governments have come to understand that public support for trade and investment requires a fairer distribution of its benefits across entire populations. In recognizing the essential nature of this social dimension, the World Trade Organization, the World Bank, and other transnational bodies dedicated to economic growth have accepted the ILO regime as the primary means to promote decent working conditions and minimize exploitation or abuse of workers. Consequently, more countries view efforts to impose labor protections of their own, through adoption of and compliance with international labor standards, as one of the keys to admission into full-partner nation status. Again, trade agreements play a role in these developments: They attract the appetite and interest of governments and they often lead to increased consciousness about the links between domestic labor laws and international labor standards.

And yet, there remains a meaningful distance between acceptance in law and compliance in practice. The gaps are evident with respect to implementation of both ratified ILO conventions and negotiated labor provisions in trade agreements. That declared commitments to monitoring and enforcement have been incompletely realized indicates that internalization of these norms remains a work in progress.

5.2. Sourcing of International Law by Transnational Corporations

The internalization of international labor law norms reflects contributions from transnational private actors as well as governments, although such contributions are not the focus of this article. In addition to convention ratifications and trade agreements, there are norms of corporate social responsibility (CSR) promulgated in

scores of voluntary codes and ostensibly promoted and implemented by transnational corporations.²¹⁵ These codes can be an important reputational asset with consumers and investors, including institutional consumers such as universities and local governments, and institutional investors like public pension funds and socially conscious mutual funds.²¹⁶

CSR codes often embrace the eight fundamental ILO conventions, and they have become more explicit about doing so in recent years.²¹⁷ At their strongest, these corporate codes may declare that management “adhere[s] to the eight fundamental conventions of the ILO,” including identifying by name and number Conventions addressed to freedom of association and child labor, and may further state that “where our own principles and regulations are stricter than local legislation, the higher standard applies.”²¹⁸ At the same time, transnational corporations often have separate codes for their suppliers, which tend to accord greater protection to supplier employees than their own workers.²¹⁹

²¹⁵ See Rhys Jenkins, *The Political Economy of Codes of Conduct*, in CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY 13, 13–22 (2002); Robert H. Montgomery & Gregory F. Maggio, *Fostering Labor Rights in Developing Countries: An Investors' Approach to Managing Labor Issues*, 87 BUS. ETHICS 199 (2008).

²¹⁶ See DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF SOCIAL RESPONSIBILITY* 35–45, 61–66 (2005).

²¹⁷ See Brudney, *supra* note 138, at 559–67 (reporting on codes of conduct for twenty-seven multinational corporations, including their invocation of ILO Conventions and Principles and their propensity to adopt distinct approaches for suppliers as contrasted with their own employees).

²¹⁸ Chairman and Chief Executive Officer of Nestec, Ltd., *Human Rights and Labour Practices*, in NESTLE CORPORATE BUSINESS PRINCIPLES 3, 9 (2010), http://www.nestle.com/asset-library/documents/library/documents/corporate_governance/corporate-business-principles-en.pdf [<https://perma.cc/KR5D-S6PE>].

²¹⁹ See Brudney, *supra* note 138, at 563–64 (describing greater protection for freedom of association offered by six transnational corporations to supplier employees than to their own workers). Nestle is an outlier in this respect: It holds suppliers to a less rigorous standard than it demands of itself. Compare *supra* note 218 and accompanying text with NESTEC, LTD., *THE NESTLE SUPPLIER CODE 2* (2013), <https://www.nestle.com/asset-library/documents/library/documents/suppliers/supplier-code-english.pdf> [<https://perma.cc/43N2-UTB6>] (“[Supplier] should grant its employees the right to Freedom of Association and Collective Bargaining in accordance with all applicable laws and regulations.”).

There has been ample criticism of these codes as ineffective or little more than window-dressing.²²⁰ But it is worth noting the parallels between development of the corporate codes, often featuring ILO norms, and the evolution of domestic law sources discussed in Sections 3 and 4 above. Since these codes were launched in the 1990s, their language has become stronger and their scope wider, and they have achieved some modest practical successes.²²¹

Part of this strengthening involves attention to ways in which transnational brands can utilize corporate codes to bring pressure on their global supply chains – acting either on their own or pursuant to the recently promulgated United Nations Principles on Business and Human Rights.²²² Further, the codes can be important complements to efforts at the national regulatory level. Private auditors operating in particular sectors of the economy, such as export-processing zones, may mollify (if not liberate) government regulators who must allocate their limited resources among delinquent actors throughout the country.²²³ Private and public regulators also can work together – including with ILO involvement – assisting governments that lack the willpower to impose or otherwise effectuate compliance on their own.²²⁴

²²⁰ See, e.g., Axel Marx & Jan Wouters, *Redesigning Enforcement in Private Regulations: The Case of International Labour Governance* 1, 5–8 (Leuven Ctr. for Glob. Governance Studies, Working Paper No. 126, 2013), https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp121-130/wp127-marx-wouters.pdf [<https://perma.cc/K6AM-WEU6>] (discussing problems with internal audits and putatively independent monitoring of code compliance); JILL ESBENSHADE, *MONITORING SWEATSHOPS: WORKERS, CONSUMERS, AND THE GLOBAL APPAREL INDUSTRY* 110–11 (Temple Univ. Press, 2004) (discussing expense involved in corrective action and subsequent audits to monitor ongoing compliance); Frederick Mayer & John Pickles, *Re-embedding the Market: Global Apparel Value Chains, Governance, and Decent Work*, in *TOWARDS BETTER WORK* 17, 28–29 (Arianna Rossi et al., eds., 2014) (summarizing multiple limitations to this private governance approach).

²²¹ See CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 93–97 (2010); Lance Compa, *Corporate Social Responsibility and Workers' Rights*, 30 *COMP. LAB. L. & POL'Y J.* 1, 1–2 (2008).

²²² See JOHN RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* (2013); Anne Trebilcock, *Due Diligence on Labour Issues: Opportunities and Limits of the U.N. Guiding Principles on Business and Human Rights*, in *RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW* 93, 93–107 (2015).

²²³ See Coslovsky, *supra* note 12, at 172. See also Locke, *supra* note 103, at 164, 170 (discussing successful efforts in several countries at private enforcement of norms contained in national labor regulations and ILO standards).

²²⁴ See, e.g., Mayer & Pickles, *supra* note 220, at 34–35 (describing Better Work Cambodia program, in which Cambodian export apparel industry operates since

One might well conclude that the codes are largely ineffective when standing alone, because not adequately monitored or rigorously enforced. This gap between promulgation and compliance echoes in certain respects the distinction between law and practice that is evident when governments have subscribed to international public law norms. At the same time, the endorsement of international labor standards protections by transnational brands raises possibilities for monitoring corporate compliance with those standards through certain types of contractual relationships. These possible relationships notably include agreements between brands and workers that cross national boundaries.²²⁵ In short, the private law codes suggest possibilities for a more horizontal form of internationalized sourcing of labor standards, one that supplements the more vertical country-by-country developments analyzed in Sections 3 and 4.

6. CONCLUSION

There has been a substantial infusion of ILO norms as sources for change in domestic labor law over the past twenty-five years. I have focused on the Americas in this article, but there is ample reason to believe that the trend exists in other parts of the world as well.²²⁶ Change has taken place through the more direct route of

2006 under combination of private self-regulation and national and international public interventions, notably ILO, combining independent monitoring with programs of training and technical assistance); Michael Posner & Justine Nolan, *Can Codes of Conduct Play a Role in Promoting Workers' Rights?*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 207, 222–23 (Robert J. Flanagan & William B. Gould eds., 2003) (describing ILO role in monitoring the 1999 U.S.-Cambodia Textile Quota Agreement, specifically implementation of program to improve working conditions in apparel industry in compliance with international labor standards as well as domestic law); Locke, *supra* note 107, at 166–68 (describing complementary private and public regulation to improve conditions of electronics contract workers in Czech Republic).

²²⁵ See James J. Brudney, *Decent Labour Standards in Corporate Supply Chains: The Immokalee Workers Model*, in TEMPORARY LABOUR MIGRATION IN THE GLOBAL ERA: THE REGULATORY CHANGES 351, 351–76, (Joanna Howe & Rosemary Owens eds., 2016); Felix Hadwiger, *Global Framework Agreements: Achieving Decent Work in Global Supply Chains?*, 7 INT'L J. LAB. RES. 75 (2015).

²²⁶ See Kahn-Nisser, *supra* note 31, at 525 (reporting that between 1998 and 2002, thirty-nine of the forty-five European countries studied had ratified seven or eight of the eight fundamental ILO conventions, compared with seventeen coun-

ILO convention ratification followed by legislative adjustment, and through the less direct route of trade agreement labor provisions. The convention ratification route is classic soft law but with a continuous and participatory implementation and “shaming” focus. The trade agreement route implicates reciprocal compliance pressures, although these provisions have not yet proven to be enforceable in traditionally meaningful ways.

I have argued that the internationalization of labor law sources is aptly characterized as evolution rather than transformation, and it has been more successful at the level of laws than practices. Progress has been incremental and there have been setbacks as well as advances. Sources for both labor law and labor practice will continue to change in evolutionary ways. At least in the near-term, we can expect the process to continue to be steadier and less erratic at the level of law than of practice.

tries in 1998). Similarly, the eight Asian countries heavily involved in garment production have fifty ratifications—out of a possible sixty-four—for these eight fundamental conventions; thirty-two of the fifty occurred since the early 1990s. For a list of ratifications by Convention and date ratified for each country, see *Ratifications of ILO Conventions By Country*, ILO, <http://www.ilo.org/dyn/normlex/en/f?p=1000:11001:::NO:::> [<https://perma.cc/7PXB-CGQX>] (last visited Oct. 26, 2017). For discussion of the eight Asian countries and the number of ratifications by each, see Brudney, *supra* note 225, at 354–55. See also Beaudonnet, *supra* note 53 (discussing substantial numbers of domestic court decisions in Europe, Africa, and Asia as well as the Americas that have invoked ILO norms as of 2010).

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