BACKGROUND PAPER
SOCIAL DIMENSIONS OF FREE TRADE AGREEMENTS

Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System

Jordi Agustí-Panareda, Franz Christian Ebert and Desirée LeClercq

March 2014

International Labour Office

Table of Contents

Abstract

In the past two decades, bilateral and regional trade agreements with labour provisions have proliferated rapidly. Consequently, labour standards have become more decentralized across the globe as various States use them in varying forms, and with various effects, within international trade. One of the major questions this decentralization raises is how such a structure fits with the International Labour Organization's (ILO) corpus of international labour standards. While the insertion of these provisions could provide a way to increase labour standards enforcement, the trade partners may be confronted with uncertainty in determining the implications of these standards, which threatens, among others, their uniform application and thereby the international protection they afford.

This paper explores the implications of ILO labour standards in trade agreements. It first examines the trends among various States parties as to how ILO instruments are referred to in trade agreements and then analyses the legal consequences of those references. Finally, the paper considers various options for utilising the mechanisms within the ILO's mandate that could provide guidance on the incorporation and implementation of these labour standards. Among others, the relevant trade bodies could turn to the ILO for increased capacity building and guidance to help ensure that the relevant provisions in trade agreements work in synergy with the international labour standards system.

1 Introduction*

International labour standards are becoming increasingly common in economic trade instruments. Apart from private, non-governmental systems,[1] labour standards are also being incorporated into arrangements governing the economic relations between States. The most significant and perhaps most controversial development in this regard is the insertion of labour provisions into trade agreements.[2] While previous attempts to insert labour provisions (also referred to as the "social clause") into the multilateral trade framework of the World Trade Organization (WTO) have thus far not been successful,[3] bilateral and regional trade agreements containing these labour provisions have proliferated with great speed over the past two decades. This proliferation has resulted in decentralized labour standards systems with increasing implications in the realm of international trade.[4]

These increasing implications raise a question concerning the compatibility between decentralized labour systems and the global labour system of the International Labour Organization (ILO), which seeks to implement a common set of international labour standards.[5] Critics have suggested that the proliferation of bilateral and regional trade agreements with labour provisions may be a "mixed blessing" for the ILO's international labour standards system, just as they have been for the WTO.[6] Indeed, while such agreements may provide additional leverage to enforce labour standards, they may also increase fragmentation within international labour law and subject the interpretation and application of these standards to the legal findings of trade and investment law, all of which could, in the long term, weaken the international protection of workers.[7] Thus, the impact may largely depend on mechanisms

* The authors are Senior Legal Officer, Office of the Legal Advisor, ILO; Research Fellow, Max Planck Institute for Comparative Public Law and International Law; and Legal Officer, International Labour Standards Department, ILO, respectively. The views expressed in this paper are those of the authors and do not necessarily reflect the views of the aforesaid institutions. The authors would like to thank Lance Compa, Cleopatra Doumbia-Henry, Sarah Fox, Eric Gravel, Francis Maupain, and Jeffrey Vogt for inspiration and commentary. Any remaining mistakes are of course to be attributed to the authors alone.

[1] These include notably corporate codes of conduct, see O'Rourke (2003); Posthuma (2010). Similarly, labour standards have been integrated into framework agreements between multinational companies and global union federations. See on this Papadakis (2008) (2011). This paper does not seek to address such elements as these issues deserve an independent examination.

[2] Different aspects of this phenomenon have been analysed in a number of research papers. See notably Polaski (2004); Doumbia-Henry and Gravel (2006); Bourgeois et al. (2007); Siroën et al. (2008); Bakvis and McCoy (2008); ILO (2009a); Lazo Grandi (2009); Ebert and Posthuma (2011). In addition to this, some countries have started to include labour provisions into bilateral investment agreements, see Boie (2012).

[3] See further on this see McCrudden and Davies (2005) and Kolben (2010). On the respective debate see also De Wet (1995) and Servais (2008).

[4] See Maupain (2012:199) on the general tendency of a decentralization of the global trading and wider economic framework.

[5] See especially Gravel and Delpech (2013:26).

[6] See, e.g., Maupain (2012:200).

[7] On the risk of inconsistency in the absence of a proper coordination of the different labour law regimes see already Valticos (1979:695). On fragmentation of the international protection of workers see La Hovary (2009:278-279). For an analysis of fragmentation in public international law in general see Fischer-Lescano and Teubner (2004); Simma and Pullowski (2006).

established within the decentralized system to foster consistency, promote positive synergies and avoid prejudicial interference.

Concerning potential compatibility, an increasing number of labour provisions already refer directly to – and are thus linked to – various ILO instruments such as ILO Conventions and Declarations.[8] On the one hand, superficially, this link suggests an increasing alignment between the international labour standards that have been developed under the ILO and those that are implemented under trade agreements. On the other hand, in application, this link runs the risk of implementing inconsistent practices, namely, if the States or bodies established by trade agreements use the ILO instruments, as incorporated in their provisions, under a normative or legal meaning that deviates from that previously provided by the ILO supervisory bodies.[9]

This paper explores the relationship between the two systems and, more specifically, the implications of the references in trade agreements to the ILO's instruments. First, it provides an overview of the manner in which trade agreements incorporate ILO instruments in labour provisions. Second, it analyses the legal consequences of this incorporation for the application of the labour provisions. Third, it explores a number of institutional options to foster consistency between these labour regimes, notably by promoting greater interaction between the ILO and the relevant bilateral and regional trade bodies and systems.

[8] Conventions and Recommendations are the instruments used by the International Labour Conference to set international labour standards. While Conventions become legally binding on member States upon ratification, Recommendations provide non-binding guidance. Declarations are resolutions of the International Labour Conference used to make a formal and authoritative statement and reaffirm the importance which the constituents attach to certain principles and values. Although declarations are not subject to ratification, they are intended to have a wide application and contain symbolic and political undertakings by the member States.

[9] These are notably the ILO's Committee of Experts on the Application of Conventions and Recommendations and the ILO's Committee of Freedom of Association (see below).

2 Synergy or complication? The integration of ILO instruments into trade agreements

1. The proliferation of ILO references in trade agreements

Although trade agreements with labour provisions are still a minority,[10] their number is steadily increasing. Indeed, this number has risen significantly from only four in 1995 to 21 in 2005 and 47 in 2011.[11]

These labour provisions typically commit the trade partners to comply with certain minimum labour standards and/or to enforce and maintain domestic labour laws. While some of these provisions focus on promotional activities, such as technical cooperation and dialogue, a growing number also contain a dispute settlement mechanism that may provide for, as a last resort, a form of sanctions (also known as conditional elements).[12]

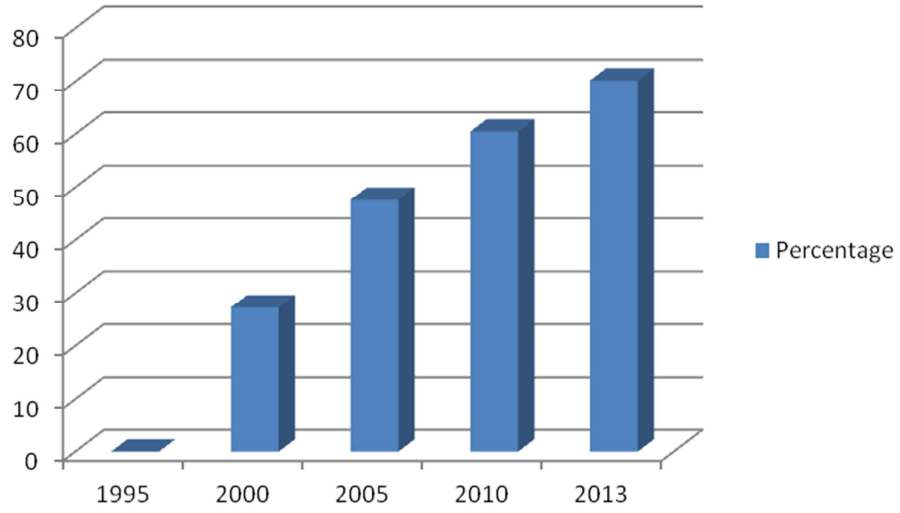
The United States (US) has negotiated trade agreements with labour provisions since the early nineties, starting with the well-known NAFTA labour side agreement in 1994, i.e., the North American Agreement on Labor Cooperation (NAALC).[13] The US labour provision model traditionally combines conditional elements with dialogue and cooperation arrangements.[14] Canada has adopted a similar approach in its trade agreements, which typically involve a dispute settlement mechanism and the possibility of inflicting sanctions. By contrast, other trade partners (notably the European Union (EU)[15] and New Zealand[16]) have mainly adopted promotional

[10] See e.g. Ebert and Posthuma (2011:5).
[11] See ILO (2012:100).
[12] See Polaski (2004:17-19); Ebert and Posthuma (2011:4-7).
[13] See NAALC, available online at http://www.naalc.org/naalc/naalc-full-text.htm.
[14] For example, the US-Peru Trade Agreements contains various labour standards-related obligations which are subject to the dispute settlement mechanism and, as a last resort, to trade sanctions in the event of non-compliance with these obligations. At the same time, the agreement provides for a "Labor Cooperation and Capacity Building Mechanism" with a view to undertaking labour-related cooperative activities. Furthermore, a "Labour Affairs Council" between cabinet level representatives and contact points at the technical level are created which is supposed to provide a forum for dialogue on labour issues of common interest. See Articles 17.2-7 and Articles 21.2 and 21.16 of the US-Peru Trade Agreement.
[15] See, for example, the EU-Republic of Korea Trade Agreement of 2011 contains commitments relating to domestic labour standards, which are linked to a civil society dialogue mechanism, which consists of annual meetings between the members of civil society of these countries, organized as domestic advisory groups. Furthermore, cooperation and dialogue activities on a number of labour issues and a review of the agreement's labour and employment effects by the parties are foreseen. In the event of a dispute, the parties may engage in consultations in the event of a dispute regarding the labour provisions, which is, however, not subject to dispute settlement. See Articles 13.4; 13.11; 13.13; 13.14; and 13.16 EU-Republic of Korea Trade Agreement. An exception in this regard is the EC-Cariforum Trade Agreement that does link labour provisions to dispute settlement and, partly, also to trade sanctions (see below).
[16] See, for example, the New Zealand-Malaysia Agreement on Labour Cooperation of 2010, which provides, alongside a number of labour standards commitments, for a number of areas of cooperation as well as for a framework for dialogue under the framework of a bilateral labour committee. This framework also allows for amiable consultations

labour provisions that focus on dialogue and cooperation rather than on elements of conditionality. A similar approach has also been adopted in a number of trade agreements among developing countries, particularly those concluded by Chile.[17]

Alongside the development of the dispute settlement link, these labour provisions have increasingly referenced ILO instruments over the last two decades.[18] While no agreement referred to ILO instruments in 1995, by 2000, about 25 per cent of the trade agreements with labour provisions made such references and, in the last decade, this number consistently rose to reach 70 per cent by 2013 (see figure 1). While trade agreements concluded by the US were the first to refer to ILO instruments, similar references have subsequently been inserted into trade agreements concluded by other countries, most frequently by Canada, the EU, and New Zealand as well as into certain South-South trade agreements, especially those concluded by Chile.

Figure 1. Share of trade agreements referring to ILO instruments (out of all trade agreements with labour provisions)[19]



Source: IILS estimates based on the WTO Regional Trade Agreements Information System.

The growing practice of trade agreements referring to ILO instruments can be tied to the adoption of the ILO Declaration on Fundamental Principles and Rights at Work, 1998 ("1998 Declaration"). Prior to its adoption, a series of debates had been held at the multilateral level[20] concerning the utility and definition of a "social clause" within the WTO trade framework.[21] It is

on matters of dispute relating to the agreement. See Articles 2-5 of the New Zealand-Malaysia Agreement on Labour Cooperation.

[17] Examples in this regard are the Memorandum of Understanding on Labour and Social Security Cooperation and the Agreement on Labour Cooperation attached to the Chile-Panama Trade Agreement of 2008 and the Article Chile-Turkey Trade Agreement. See further on this Lazo Grandi (forthcoming).

[18] The figures below refer to the trade agreements that have entered into force and have been notified to the WTO, as contained in the WTO's Regional Trade Agreements Database, available at: http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.

[19] The data for 2013 refers to May 2013.

[20] See further on this Leary (1997:214-218); La Hovary (2009:12-14).

[21] See on this debate De Wet (1994:444) et seq.; Blackett (1999); Servais (2011:34 et seq.).

therefore not surprising that the 1998 Declaration was – despite the deadlock[22] –subsequently used as a standard of reference for the labour provisions of bilateral and regional trade agreements. Indeed, the first reference to an ILO instrument in a labour provision within the sample of trade agreements examined was included shortly after the adoption of the 1998 Declaration.[23]

The 1998 Declaration has since become the main point of reference for international labour standards in trade agreements: more than four out of five trade agreements with references to ILO instruments refer exclusively or primarily to the 1998 Declaration (see figure 2).[24] In contrast, references to other ILO instruments are rather scarce. For example, only 20 per cent of trade agreements with labour provisions refer to specific ILO Conventions. One notable exception is the EU, which refers to the ILO's Fundamental Conventions in all of its relevant trade agreements. The EU-Korea Trade Agreement goes further by committing its parties to ratifying outstanding up-to-date ILO Conventions.[25] Here, too, the influence of the Declaration is palpable, given that these labour provisions refer exclusively to the Fundamental Conventions,[26] which relate to the four principles and rights at work, i.e., the object of the 1998 Declaration.[27]

[22] The compromise reached at the Singapore Ministerial Conference of 1996 essentially referred labour standards issues to the ILO, thereby implicitly rejecting the inclusion of labour provisions into the WTO framework. See Singapore Ministerial Declaration Adopted on 13 December 1996 WT/MIN(96)/DEC, available at: http://www.wto.org/english/theWTO_e/whatis_e/tif_e/bey5_e.htm (last checked 26 September 2012).

[23] See notably Article 86(2) of the EU-South Africa Trade Agreement in force since 2000, which refers to the "[t]he pertinent standards of the ILO" relating to fundamental rights at work.

[24] Of these provisions, about half also mentioned ILO Convention No. 182 on the worst forms of child labour, although only as far as technical cooperation is concerned.

[25] Article 13.4(3) of the EU-Republic of Korea Trade Agreement. Similarly, Article 269 of the Draft EU-Colombia and Peru Trade Agreement states that each party "commits to the promotion and effective implementation in its laws and practice and in its whole territory of internationally recognised core labour standards as contained in the fundamental Conventions of the International Labour Organisation" (emph. added). Furthermore, Article 101 of the EU-Montenegro Trade Agreement provides that "Montenegro shall ensure adherence and effective implementation of ILO fundamental conventions". This can be seen to reflect a broader policy of the EU aiming to fostering ILO conventions through its third party-relations, European Commission (2001); (2006) and coincides with the approach taken in the labour provisions EU's Generalized System of Preferences which refer to the Fundamental Conventions, among other international treaties (Orbie and Tortell, 2009). The EU's Generalized System of Preferences (GSP) goes one step further from the above model in that it grants a special incentive arrangement (GSP+) for sustainable development and good governance and, in so doing, requires countries to comply with enumerated ILO Conventions set out in Annex III of the agreement. Those ILO conventions include: (i) the Minimum Age Convention, 1973 (No. 138); (ii) the Abolition of Forced Labour Convention, 1957 (No. 105); (iii) the Worst Forms of Child Labour Convention, 1999 (No. 182); (iv) the Forced Labour Convention, 1930 (No. 29); (v) the Equal Remuneration Convention, 1951 (No. 100); (vi) the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); and (vii) the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). See EC No 732/2008, Annex III. Thus, to qualify for that arrangement, a country undertakes "to maintain the ratification of the conventions and their implementing legislation and measures, and accepts regular monitoring and review of its implementation record in accordance with the implementation provisions of the conventions it has ratified." (Art. 8.1(a)).

[26] Only one recent EU trade agreement contains, in addition to references to the Fundamental Conventions, commitments to also ratify other up-to-date ILO conventions (see below). Furthermore, one labour provision refers to "international labour conventions" in general, see first recital of the Preamble of the Caricom Declaration of Labour and Industrial Relations Principles attached to Treaty Establishing the Caribbean Community.

[27] These are the Forced Labour Convention, 1930 (No. 29); the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Equal Remuneration Convention, 1951 (No. 100); the Abolition of Forced Labour Convention, 1957 (No. 105); the

Figure 2. Types of ILO instruments referred to in the labour provisions in trade agreements in 2013[28]

Source: IILS estimates based on the WTO Regional Trade Agreements Information System.

2. The increasing relevance of references to ILO instruments in labour provisions

The manner in which ILO instruments are referenced in labour provisions has evolved significantly over time and has become increasingly comprehensive. In this regard, there are two related trends concerning the substantive content as well as the increasing enforceability of such provisions.

a) The increasing legal content of ILO references

The first and most common type of substantive reference cites the State parties' reaffirmation of their general ILO obligations or political commitment to ILO principles and standards. Notably, these reaffirmations do not entail further legal obligations.[29] Most trade agreements with labour provisions contain such reaffirmations[30] and, in some agreements, this is the only ILO reference.[31]

Discrimination (Employment and Occupation) Convention, 1958 (No. 111); the Minimum Age Convention, 1973 (No. 138); and the Worst Forms of Child Labour Convention, 1999 (No. 182).

[28] The data refers to May 2013.

[29] They may, however, be relevant to the interpretation of the other labour provisions – and indeed the trade-related provisions – contained in the trade agreement.

[30] See, for example, Article 16.1(1) of CAFTA-DR; Art. 2(2) of the Memorandum of Understanding on Labour cooperation Between New Zealand and Hong Kong, China.

[31] One example is the Thailand-New Zealand Labour Side Arrangement, which states that "[t]he Participants reaffirm their obligations as members of the ILO, including their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up." See Paragraph 1.1. Arrangement on Labour between New Zealand and the Kingdom of Thailand Attached to the New Zealand-Thailand Closer Economic Partnership Agreement. This is also the case for some early EU agreements and certain agreements concluded by New Zealand. See the EU-ACP Trade Agreement and the EC-South Africa Trade Agreement; see Thailand-New Zealand (2005); China-New Zealand (2008); Hong Kong (China)- New Zealand (2011). An exception is the Taiwan, China-Nicaragua Trade Agreement which, while containing substantive labor-related obligations, does not refer to any ILO instrument.

The second type of substantive reference cites the ILO instruments to define the scope of certain labour provisions under the trade agreement. This is particularly the case for Canada's labour side agreements in relation to enforcement of domestic labour law. For example, under the Canada-Costa-Rica Labour Side Agreement, the obligation to enforce domestic labour law is subject to dispute settlement only to the extent that it falls under the 1998 Declaration.[32] Similarly, under Canada's labour side agreements with Peru and Colombia, the scope of review by the dispute settlement mechanism of the obligation not to weaken domestic labour standards is limited to the standards within the scope of the 1998 Declaration.[33]

The third – and, perhaps, the most legally interesting – type of reference commits the parties to ILO instruments by expressly incorporating ILO obligations into the trade agreement or its side arrangement.[34] By the end of 2012, about ten agreements incorporated such a provision. In this regard, two models can be distinguished.

In the first model, agreements incorporate ILO standards in the form of a "best endeavours" clause which contains certain obligatory conduct regarding labour standards. Under these provisions, the State parties "strive to ensure" that the labour principles extending from the parties' obligations as ILO members and their commitments under the 1998 Declaration "are recognized and protected by domestic law." [35] This approach is included in early US trade agreements, which sparked a trend,[36] notably in New Zealand and the South-South Agreements concluded by Chile.[37]

In the second model, and mainly more recently, agreements require the State parties to comply with certain standards as set out in the relevant ILO instruments. Such provisions have notably been included into the most recent generation of US trade agreements,[38] in which the obligations

[32] Article 15(1)(1) of the Canada-Costa Rica Agreement on Labour Cooperation.

[33] Article 13(b)(ii) of the Canada-Peru Agreement on Labour Cooperation; Article 13 (b)(ii) of the Canada-Colombia Agreement on Labour Cooperation.

[34] See, for example, Article 1 of the Agreement on Labour Cooperation between Canada and the Republic of Colombia; and Article 17.2(1) of the US-Colombia Trade Agreement. While some of these labour provisions require the State parties to comply with rights or principles contained in the relevant ILO instruments, others use references to ILO instruments to define the scope of the obligations vis-à-vis national law.

[35] See, for example, Article 6.1 of the US-Jordan Trade Agreement Article 18.1(1) of the US-Chile Trade Agreement; Article 15.1(1) of the US-Bahrain Trade Agreement; Article 16.1(1) of the US-Oman Trade Agreement.

[36] Some of these agreements even use the same wording. See Article 2(1) of the Peru-Chile Agreement on Labour Cooperation; Article 2(1) of the Panama-Chile Agreement on Labour Cooperation; Article 17.1(1) of the Chile-Colombia Trade Agreement.

[37] In this regard, three agreements, all with New Zealand's participation, do not refer to specific ILO instruments but to the parties' "international labour commitments" in general. Given the context and the structure of these labour provisions, this can, however, be interpreted to refer, at the bottom line, to the commitments under the 1998 Declaration and the ILO conventions ratified by the respective countries. See Article 2(3) of the Memorandum of Understanding on Labour Cooperation among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement; Article 2(2) of the New Zealand-Philippines Memorandum of Agreement on Labour Cooperation; Article 2(3) of the New Zealand-Malaysia Agreement on Labour Cooperation. On Chile's agreements see in particular Lazo (2009); (forthcoming).

[38] Also in terms of normative coherence, an evolution of these provisions is palpable. While the trade agreements adopted prior to the US-Peru Trade Agreements do not only refer to obligations related to ILO instruments but additionally also to "internationally recognized labour rights", the most recent US trade agreements omit this notion and focus exclusively on the ILO Declaration as a normative standard. The earlier term "internationally recognized

relating to ILO instruments require parties to implement through domestic law and practice "the […] rights, as stated in the ILO Declaration".[39] Similar provisions are included in various agreements concluded by Canada.[40] The EU-Cariforum Trade Agreement accords a particularly significant role to ILO instruments, as it both requires the parties to "provide for" labour laws and policies that are consistent with the ILO's Fundamental Conventions[41] and ensure that foreign investors operating in their territory respect the principles under the ILO's 1998 Declaration.[42]

b) The increasing enforceability of labour provisions referring to ILO instruments

Many labour provisions with ILO references are neither legally binding nor subject to non-compliance measures.[43] In contrast, other references entail tangible legal consequences that increasingly link ILO instruments to dispute settlement mechanisms. In 2005, only one trade agreement in force submitted obligations related to the compliance with ILO standards to dispute settlement;[44] by 2013, this number had risen to eight (see table 1).[45]

---

labor rights" gave rise to problems in terms of coherence given that it was defined to contain all FPRW except non-discrimination, while additionally containing rights relating to minimum working conditions such as working time, minimum wage, and occupational safety and health. Various authors have criticized this as a lack of coherence, Alston (2004:504-505).

[39] See Article 17.2(1) of the US-Peru Trade Agreement; Article 19.2(1) of the US-Republic of Korea Trade Agreement; Article 17.2(1) of the US-Colombia Trade Agreement.

[40] The Canada-Costa Rica Labour Side Agreement includes an obligation "to ensure that its labour law embodies and provides protection for the labour principles and rights set out in" the ILO's 1998 Declaration. See Article 2 of the Canada-Costa Rica Agreement on Labour Cooperation. It should be noted that these agreements also contain references to the ILO's Decent Work Agenda as a whole. The reference to the ILO's Decent Work Agenda concerns the labour rights protected by the labour side agreements, which do not fall within the scope of the ILO's 1998 Declaration, notably "acceptable conditions of work" regarding hours of work, minimum wage issues, and health and safety at the workplace, see, Article 1(2) of the Canada-Peru Agreement on Labour Cooperation; Article 1(2) of the Canada-Colombia Agreement on Labour Cooperation. That being said, the legal relevance of references to the Decent Work Agenda for the labour side agreement remains rather in the vague given that it only states that the rights not covered by the ILO's 1998 Declaration, such as to minimum working conditions, "more closely relate" to the Decent Work Agenda. See, Article 1(2) of the Canada-Peru Agreement on Labour Cooperation; Article 1(2) of the Canada-Colombia Agreement on Labour Cooperation. Also, the legal meaning of these references in these agreements is somewhat opaque since the rights protected in the area of FPRW by the agreements refer to the ILO Declaration only "to the extent that the[se] principles and rights [...] relate to the ILO".

[41] Article 192 in conjunction with Article 191 of the EU-Cariforum Trade Agreement.

[42] Article 72(b) of the EU-Cariforum Trade Agreement.

[43] See, e.g. Article 44 of the EU-Chile Trade Agreements which commits parties only to promote the ILO's Fundamental Conventions. Similarly, Article 2.2. of the Memorandum of Understanding on Labour Cooperation attached to the New Zealand-Hong Kong Trade Agreements merely reaffirms the parties' commitments under the ILO's 1998 Declaration.

[43] See, e.g., the US-Jordan Trade Agreement.

[44] See *ibid*.

[45] These are the US-Peru Trade Agreement; the US-Colombia Trade Agreement; the US-Republic of Korea Trade Agreement; the Canada-Peru Labour Cooperation Agreement; the Canada-Colombia Labour Cooperation Agreement; the EU-Cariforum Trade Agreement; and the Chile-Turkey Trade Agreement.

Table 1. Labour provisions requiring compliance with ILO obligations subject to dispute settlement

Name of agreement and entry into force	Reaffirmation of ILO obligations	Requirements regarding compliance with ILO obligations	Subject to dispute settlement	Reference to ILO instruments to define scope of obligations regarding domestic labour law
US Trade Agreements with Peru (2009), the Republic of Korea (2012), Colombia (2012), Panama (2013)	Obligations as ILO members	Obligation to "adopt and maintain in its statutes and regulations, and practices thereunder, the […] rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration):[46]"	Yes	Partly: The obligation to "effectively enforce its labor laws" includes, among others, those laws relating to the ILO Declaration (subject to dispute settlement)
EU-Cariforum (2008)	Standards "as defined by the relevant ILO Conventions" as well as commitments under the ILO's 1998 Declaration	Parties are required to ensure that investors comply with "core labour standards as required by the [ILO's 1998 Declaration][47]	Yes	–
		Parties are required to ensure that their laws and policies "provide for and encourage high levels of social and labour standards" in accordance with the" "core labour standards, as defined by the relevant ILO Conventions"	Yes*	
Canada's agreements with Peru (2009), Colombia (2011), and Panama (2013)	Obligations as ILO members and commitments under the 1998 Declaration	- Obligation to ensure that its law and practice "embody and provide protection" for the principles and rights listed in the ILO's 1998 Declaration as well as "acceptable conditions of work". - "To the extent that the principles and rights stated above relate to the ILO, [the provisions relating to FPRW] refer only to the ILO Declaration, whereas [the others] more closely relate to the ILO's Decent Work Agenda."	Yes, "to the extent that they refer to the ILO Declaration"	The obligation not to weaken domestic labour law is subject to dispute settlement "to the extent that [it] refer[s] to the ILO Declaration"

*Note: * Violations of these obligations may be subject to any measures under the agreement, except trade-related sanctions.*
Source: IILS estimates based on the WTO Regional Trade Agreements Information System.

[46] The obligations set out in Article 17.2, as they relate to the ILO, refer only to the ILO Declaration.
[47] The agreements states in a footnote: "These core labour standards are further elaborated, in accordance with the Declaration, in ILO Conventions concerning freedom of association, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in the work place."

This commitment is illustrated in the most recent generation of US and Canadian labour provisions. While the commitments relating to ILO instruments under most of the earlier agreements concluded by these two countries were not subject to dispute settlement,[48] more recent agreements provide for both dispute settlement and the possibility of invoking sanctions as a last resort.[49] In the case of Canada's more recent labour provisions the role given to ILO instruments is particularly relevant. The obligation to comply with certain international standards regarding labour rights is subject to dispute settlement only "to the extent that they refer to the ILO Declaration".[50]

In some cases, the enforcement arrangements for labour provisions differ from those of other provisions of the trade agreements. For example, the EU-Cariforum Agreement submits ILO-related provisions to dispute settlement but it excludes the possibility of resorting to trade sanctions for breaching the commitment to provide for domestic standards in line with the ILO Fundamental Conventions.[51] However, a breach of the State parties' obligation to ensure that companies investing in the country "act in accordance with" the standards of the ILO Declaration is subject to the full array of remedies, including trade sanctions.[52]

3. The practical implications of references to ILO instruments

The growing trend of linking international labour obligations to ILO instruments suggests that the international labour regime is becoming harmonized under a common set of norms and legal obligations, as States are seemingly undertaking the same commitments as trade partners as they are as ILO members. However, the practical consequences depend on the manner in which ILO instruments are referred to (more specifically, on whether a reference is made to the ILO Conventions or to the ILO's 1998 Declaration) and on how labour provisions in bilateral and regional trade agreements are enforced or given effect.

a) Implications of references to ILO Conventions

ILO Conventions contain relatively specific obligations that State parties must implement through national legislation and practice. Most of these Conventions are self-explanatory and set out the applicable definitions and scope. Even where certain Conventions contain more general provisions leaving elements to national discretion[53] or do not specify all of the elements of the

[48] Under the earlier US agreements, recourse to the regular dispute settlement mechanism was, in fact, excluded for most labour provisions. See e.g. the Article 16.6(5) of the US-Morocco Trade Agreement; Article 18.6(5) of the US-Australia Trade Agreement; Canada-Costa Rica Labour Cooperation Agreement.

[49] See Article 17.7(7) of the US-Peru Trade Agreement; Article 19.7(5) of the US-Republic of Korea Trade Agreement; Article 17.7(7) of the US-Colombia Trade Agreement.

[50] Article 13 (b)(ii) of the Canada-Peru Agreement on Labour Cooperation; Article 13 (b)(ii) of the Canada-Colombia Agreement on Labour Cooperation.

[51] See Article 213(2) of the EC-Cariforum Agreement.

[52] *Ibid*.

[53] See, e.g., Art. 1(2)(a) of the Chemicals Convention, 1990 (No. 170) stating that the State's competent authority "may exclude particular branches of economic activity, undertakings or products from the application of the Convention, or certain provisions thereof, when: (i) special problems of a substantial nature arise; and (ii) the overall protection afforded in pursuance of national law and practice is not inferior to that which would result from the full application of the provisions of the Convention." See, also, Art. 2 of the Prevention of Major Industrial Accidents

standard, the ILO's supervisory mechanisms[54] provide guidance.[55] In addition, given that the implementation of ratified ILO Conventions is subject to continuous supervision by the ILO supervisory mechanism, these bodies have issued and made available comprehensive and detailed comments concerning the Conventions' provisions.[56] Accordingly, among the labour provision models cited above, those that define the applicable labour standards by reference to specific ILO Conventions provide the highest degree of clarity.[57]

The legal commitment of the trade parties vis-à-vis the referenced ILO Conventions differs depending on whether or not the State party has ratified the applicable Conventions. If the country has ratified the Convention, there is typically no modification in the State's international

---

Convention, 1993 (No. 174), stating "Where special problems of a substantial nature arise so that it is not immediately possible to implement all the preventive and protective measures provided for in this Convention, a Member shall draw up plans, in consultation with the most representative organizations of employers and workers and with other interested parties who may be affected, for the progressive implementation of the said measures within a fixed time-frame." Many of the conventions also contain an optional element, in which member States can opt out of various provisions. See, e.g., the Social Security (Minimum Standards) Convention, 1952 (No. 102). Rather than ratify the Convention in its entirety, ratifying member States have the option of confining its ratification to three of the nine branches of social security, provided that at least two of the following are included: unemployment, employment injury, old age, invalidity, or survivor's benefit (Art. 2). The Convention also provides temporary exemptions for developing countries (Art. 3). Importantly, this discretion must often be exercised within the parameters of prior consultations with the most representative organizations of employers and workers concerned, thereby ensuring the continuous invocation of tripartism, also at the national level. See further Politakis (2004:464) setting out an in-depth examination of the use of flexibility in ILO instruments, noting that flexibility in this manner "may also be a misnomer for evasiveness".

[54] The ILO has several means of supervising the application of Conventions in law and practice following their adoption by the International Labour Conference and their ratification by States. Some of these are addressed in section III. For a brief introductory guide, see ILO (2009b).

[55] Attention needs to be drawn, in this respect, to the dynamic of the ILO supervisory bodies in which two Committees work together in the monitoring compliance of ILO member States with their obligations under the ILO instruments. More concretely, the respective position of its Committee of Experts on the Application of Conventions and Recommendations conceded in its 2012 General Survey, that: "as part of the regular machinery for the monitoring of the application of ratified Conventions, it is called upon to bring to the attention of the Conference Committee on the Application of Standards any national practices and standards that are not in conformity with the Conventions and the severity of certain situations (which necessarily implies an evaluation), as well as, in conformity with its working methods, to indicate cases of progress in the application of standards. This task inevitably involves a degree of interpretation, with due regard to coherence and equal treatment of States. Over the years, the evaluations used have given rise to a number of formulations of guidance in the form of opinions and recommendations, as is the case of those set out by supervisory bodies for certain conventions or treaties within the framework of the United Nations or some regional organizations. The Committee's opinions and recommendations are not binding within the ILO supervisory process and are not binding outside the ILO unless an international instrument expressly establishes them as such or the supreme Court of a country so decides of its own volition." See the 2013 General Survey concerning labour relations and collective bargaining in the public service, para. 6, available online at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_205518.pdf.

[56] See Gravel and Delpech (2013). In this article, the authors conclude that "the petitioners have made extensive use of the comments, decisions and recommendations of the ILO's supervisory bodies regarding compliance by these countries with ILO instruments".

[57] However, some implementation issues might arise from the conventions' flexibility provisions, inasmuch as they are included in the conventions with assurances of both domestic consultations with workers' and employers' groups and supervision by the ILO bodies. In trade agreements, there are no such assurances and consequently, States will not necessarily have information on whether their trade partners are invoking those flexibility provisions to opt out of costly implementing requirements to gain competitive advantage, ignoring the complaints of workers' and employers' groups, or merely to align with national circumstances. See, e.g., Singh and Zammit (2004:87): "The reasons that developing countries are unable to implement labour standards quickly is not because their governments are corrupt or perverse, but largely because of the structure of their economies and their economic circumstances."

obligations regarding that standard; rather, the agreement may simply contain an additional enforcement mechanism to the pre-existing obligation. In contrast, if the country has not ratified the Convention, the State undertakes new obligations by executing the trade agreement. Although, under international law, a State that has not ratified a multilateral instrument may agree to apply its provisions through a separate agreement (e.g., of a bilateral nature), this latter scenario has, so far, not occurred in practice concerning references to ILO Conventions in trade agreements.[58]

b) Implications of references to the principles and rights in ILO's 1998 Declaration

Rather than directly cite the applicable ILO Convention to define their labour standards, the majority of labour provisions in trade agreements reference the 1998 Declaration.[59] As noted above, there is a clear reason for such widespread reliance, as the 1998 Declaration has often been perceived as a response to the social clause debate. These references, however, differ considerably in their legal and institutional implications and, consequently, in their impact on the legal obligations of the trade partners.

At the outset, the legal content of the 1998 Declaration, which is grounded on the ILO's constitutional principles, is rather broad, particularly when compared to ILO Conventions. As opposed to the concrete obligations arising out of Conventions, the 1998 Declaration mainly contains an enunciation of principles and rights. More concretely, the 1998 Declaration reaffirms the States' commitments to "the principles concerning the fundamental rights" as emanating from the members' obligations under the ILO's Constitution, "even if they have not ratified the Conventions in question".[60] Despite its full title, i.e., the ILO Declaration on Fundamental Principles *and Rights* at Work (emphasis added), the 1998 Declaration restates the ILO members' commitment to the principles concerning the rights, but, absent ratification, not to the concrete rights set out in the relevant Conventions.[61]

---

[58] In practice, the latter scenario has so far been avoided by referring only to those conventions ratified by the country. However, it is interesting to note that a proposal for a revised bill authorizing the United States Government to conclude future trade agreements referred to all eight ILO Fundamental Conventions, despite the fact that the United States have only ratified two thereof. See Section 2(2) of the Bill Introduced to the Senate of the United States June 27, 2012, 112th Congress 2nd Session.

[59] The 1998 Declaration has, indeed been identified as the "benchmark for possible trading conduct." See, e.g., European Commission (2008:17).

[60] Paragraph 2 of the 1998 Declaration. The Declaration sets out that, irrespective of the member States' decisions to ratify or refrain from ratifying conventions or implement recommendations, those States are subject to certain obligations "to respect, to promote and to realize in good faith and in accordance with the [ILO] Constitution the principles concerning the fundamental rights" regarding freedom of association, the elimination of forced labour and abolition of child labour, and the elimination of discrimination.

[61] As pointed out by the ILO legal adviser during the plenary discussions of the International Labour Conference when adopting the 1998 Declaration, the term "fundamental rights" did not mean the specific provisions of the Conventions concerned, but rather, referenced the correlative rights which would assist to further define those principles. See International Labour Conference, 86th Session (June 1998), Report of the Committee on the Declaration of Principles, Discussion in Plenary, paras. 72-74. The principles used in the 1998 Declaration are accordingly treated much the same way as the general principles of international law often play a crucial role in law

The 1998 Declaration's use of the term "principles" and its meaning has been fiercely debated, a full account of which is beyond the scope of this paper.[62] It is sufficient to note that the meaning of the term "principle" is not fully consensual and, being broader that the term "right", depends on the specific context within which this term is used.[63] Principles, unlike other rules, do not typically call for specific conduct in a situation, but instead establish objectives and values that should impact legal decisions.[64] In this sense, the term "principles" has been characterized as providing the sources for more specific norms, such as rights, [65] to be laid down in treaties or other legal instruments,[66] but principles do not appear to be as well suited as legal rules for deciding concrete cases.[67]

In the narrow ILO context, the general nature of the 1998 Declaration's principles does not pose a problem. The principles were expressly designed to be translated into specific standards by the ILO's tripartite standard-setting machinery,[68] in the form of legal instruments[69] that would then be periodically reviewed and revised to ensure the adaptability of the labour standards system.[70] However, their use may raise challenges when incorporated into labour provisions of trade

---

creation. See Kolb (2006:7-11) discussing how these principles, while appearing open-ended, are given some form of soft positive parameters "in order that the recourse to them be felt as sufficiently controlled".

[62] See further, most prominently, Alston (2004:490; 494) (arguing that the use of the term "principles" created an "extraordinarily opaque formula" and raising concerns that "the principles are statements whose normative content has been liberated or unhinged from the anchor of the ILO's painstakingly constructed jurisprudence in relation to these rights") with Maupain (2005:449-451) (arguing that "Alston indeed seems to have the story backwards. There is no danger that the principles and their content be liberated from the 'anchor' of the relevant conventions and 'painstakingly constructed jurisprudence' in relation to these rights *for the simple reason that they are the anchors*").

[63] For a concise overview in this regard see La Hovary (2009:193-194).

[64] See Petersen (2007:302) (arguing that principles "do not refer to a certain conduct, but to a specific objective. Consequently, it is not possible to describe principles with reference to specific conduct because different conduct may lead to the same objective"). See, more fundamentally, Dworkin (1978:24-26).

[65] On the different conceptions of "rights", see Sen (2000:119, 123-125) (discussing the various issues arising under the term "rights" with respect to their goals, duties and fulfilment).

[66] See, e.g., Kolb (2006:9) ("one could envision principles of law … filled with normative energy, as constituting a middle-ground category [between rules and legal ideas]: they are 'norm-sources'" ; see also Petersen (2007:287-88) "Most often the term principles is used for the more general, fundamental norms of a legal order, while concrete provisions are called rules" (and citations therein).

[67] See already Virally (1968:533), as cited in La Hovary (2009:194).

[68] This machinery consists of the Office, the Committee of Experts on the Application of Conventions and Recommendations and the International Labour Conference (primarily within the Committee on the Application of Standards). Art. 10 of the ILO Constitutions confers to the Office "the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labour…" which was later deemed to include supplying the ILO membership with complete information on the intentions of the Conference that designated the Convention. See GB, 9th Session (October 1921), Minutes, pp. 365-66. Initially, these unofficial interpretations/clarifications were published in the Official Bulletin; however, this practice seems to have ceased, as published unofficial interpretations/clarifications have not appeared in the Official Bulletin since 1984. See ILO Official Bulletin, Vol, 67(A), at 27-29 (1984). For an in-depth examination of the ILO machinery in the context of interpreting conventions, see the Office study prepared for the 256th Session (May 1993) of the Governing Body, GB.256/SC/2/2.

[69] Maupain (2005a:450). According to Maupain, the Declaration's objectives were mostly "limited to the ILO and its members." See Maupain (2005a:451).

[70] Maupain (2005b:12). Interestingly, the ILO has highlighted the need to ensure updated standards and, during its 310th Session of the Governing Body (March 2011), discussed the possible establishment and implementation of a Standards Review Mechanism (SRM) that would ensure that the ILO had in place a clear and robust body of up-to-date international labour standards that responded to the needs of the world of work, the protection of workers and promotion of sustainable enterprises.

agreements. Their incorporation into these agreements – rather than that of more specific standards – manifests general principles into legally binding and enforceable elements. As regards their enforcement, the principles of the Declaration do not expressly define the rules of conduct. Consequently, it may be more challenging to assess the compliance of conduct with legal obligations in concrete cases.[71]

Furthermore, as opposed to ILO Conventions, it will be more difficult for States to obtain clarification on the precise legal implications of these principles. As the 1998 Declaration is not subject to monitoring by the ILO's supervisory mechanisms, no specific ILO guidance on the Declaration is readily available.[72] This lack of clarity will, in turn, make it more difficult for the dispute resolution mechanism of trade agreements to uniformly apply the labour provisions referring to the 1998 Declaration. The ease with which a reference to the 1998 Declaration may reach consensus in the negotiation of a trade agreement can thus come at a cost.

These difficulties are not resolved by referring the labour provisions to the "rights" contained in the Declaration. [73] Whether making reference to the 1998 Declarations "principles" or "rights," the trade partners may be confronted with uncertainty in determining the implications of these standards, which threatens not only a uniform application but might also foster uncertainty as to whether some parties are applying less stringent labour standards than the others. Furthermore, the legal impact of these labour provisions is greatly enhanced when they subject the trade

[71] The application of these provisions is, regarding certain US agreements further complicated by the fact that the agreements specify that "[t]he obligations set out in [this Article], as they relate to the ILO, refer only to the ILO Declaration", rather than other conventions. See, e.g., footnote 1 to Article 17.2 of the US-Colombia Trade Agreement. The effects of the new footnote remain to be seen, but it continues to garner national attention and criticism. On one side of the debate, speculators have concluded that the footnote has not changed State party obligations, because even prior to this new language the United States ensured that State parties enforced national laws that were in line with the technical details of international labour standards, just without linking the agreement to the corresponding ILO conventions. In addition, given the deadlock between business' and workers' interests in Congress, any deletion of the footnote would likely have to coincide with a compromise to include more narrow language in the text clearly distinguishing State party obligations under the agreement from those under non-ratified ILO conventions. On the other side, concerns have been expressed that this footnote obliging parties to "adopt and maintain" rights will permit different dispute arbitration boards under the various trade agreements to make different interpretations, thus imposing different obligations under the same language and potentially contributing to greater incoherency within the regime. See for a critical perspective in this regard La Hovary (2009:284).

[72] While the 1998 Declaration is vested with a follow-up mechanism, this mechanism is of a promotional nature and does thus not provide guidance regarding the reach and content of the Declaration's principles. While the Committee of Freedom of Association supervises the compliance of countries with the principles emanating from the ILO Constitution regarding workers' and employers' freedom of association (see further below), it is unclear whether these principles correspond entirely to the relevant principles set out by the Declaration and cover, in any event, only one out of the four rights and principles dealt with by the Declaration.

[73] In this regard, it is interesting to note that recent US trade agreements have begun a new labour standards model which contains references to ILO instruments that appears to fall between the above spectrum of Conventions. In particular, this model now requires trade parties to respect the "rights, as stated in [the 1998 Declaration]," rather than the Declaration's principles, possibly with a view to resolving the potential challenges of the term "principles." However, a closer examination indicates that the challenges cited above are not cured. While the use of the term "rights" appears, on paper at least, to be more concrete in terms of respective legal obligations, as noted above, the "rights" contained in the Declaration are intended to define its principles. Therefore, the parties are left with the same lack of clarity when referring to the 1998 Declaration.

parties, and their conduct relating to labour standards, to dispute mechanisms; and, as noted above, these labour provisions are increasingly linked to sanction mechanisms.[74]

3 Potential ILO contributions to foster a coherent administration of labour provisions

The increasing, and non-uniform, references to ILO instruments in labour provisions of trade agreements raises issues of conformity and compliance. The question arises as to how these trade partners might obtain technical assistance to determine the meaning and obligations arising from those labour standards references, and how it can be ensured that the application of these provisions is compatible with the global labour standards system.[75] To address these questions, the following section will examine how the ILO's institutional mechanisms may be invoked to assist in the administration of labour provisions.

1. Gateways under existing trade agreements for involving the ILO

Trade agreements are not self-contained regimes. Indeed, it is now generally accepted that when interpreting the provisions of trade agreements during disputes, the WTO, as well as other trade bodies, should take into account other instruments of international law, including the jurisprudence interpreting those instruments.[76] This acknowledgment is particularly relevant with regard to those international legal instruments that are expressly referred to or otherwise incorporated into the trade agreement itself.[77]

Some trade agreements and labour side agreements have explicitly provided a role for the ILO in the administration of their labour procedures. A number of recent US and EU trade agreements, for instance, allow the agreement's institutions to request ILO assistance regarding the overall implementation of the labour provisions[78] or, in the case of certain agreements (e.g. those concluded by Canada), authorize the parties to "establish cooperative arrangements" with the ILO

[74] See Elliott (2011:429).

[75] In this regard, some authors have argued that "as a matter of principle, it would not be acceptable for a trade advantage enjoyed by an ILO Member to be withdrawn for alleged failure to observe its obligations under ratified Conventions without the ILO having had the opportunity to express its views on the matter". See Gravel et al. (2011:218) referring to ILO (2007:34). On recent discussions at the ILO on policy coherence see GB.309/WP/SDG/1, ILC 100th Session, Geneva, 2011, PR No. 32 p. 17. GB.312/HL/1 and GB.312/HL/PR. On constitutional law and practice at the ILO see generally Osieke (1985).

[76] See, in particular, Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted on 20 May 1996, DSR 1996:I, p. 18.

[77] See in this regard Jansen (2012:174) who points out for the multilateral trading system that "[with WTO legal texts making reference to international standards, the latter will inevitably [come] up in disputes around the relevant agreements".

[78] Annex 16.5(2)(d) of CAFTA-DR; Article 17.5(5)(b)(iv) of the US-Peru Trade Agreement and the US-Colombia Trade Agreement, respectively; Article 195(3) of the EU-Cariforum Trade Agreement;

as well as other organizations.[79] Yet, in spite of the increasing references to ILO instruments in trade agreements, labour provisions expressly involving the ILO in the dispute settlement mechanism are rather scarce. Two recent EU agreements provide that parties may "seek advice from the ILO" on the matters of the dispute, either independently[80] or subject to the agreement of the parties.[81] These provisions are, however, limited to the consultation phase and do not apply to the phase of dispute settlements. Some labour side agreements concluded by Canada provide for procedural inputs by the ILO, for example by entrusting the ILO's Director General with the appointment of the chairperson of the review panel in the event that the parties do not come to an agreement in this regard.[82]

Thus, the most likely form of ILO assistance is that of technical and capacity building assistance. While many trade agreements do not specifically provide for ILO assistance in other contexts, such as the dispute settlement procedure, this omission does not preclude the parties from requesting such assistance. Most trade agreements that subject the standards related to ILO instruments to dispute settlement contain provisions allowing for consultations with relevant experts and entities in the course of the dispute. These provisions could also be used for consulting with the ILO.[83]

The fact that trade panels may be inclined to have recourse to other international bodies to obtain technical information is illustrated by the WTO dispute settlement practice in the area of sanitary and phytosanitary measures. Given that trade panels do not typically have the necessary expertise in order to evaluate the technical evidence,[84] the panels usually rely on specialized international institutions for identification of relevant experts in this area.[85] Presumably, trade panels could make similar requests for ILO assistance with regard to technical or legal information regarding the application of the 1998 Declaration and/or other ILO instruments referred to in trade agreements.

2. Available institutional mechanisms to foster compatibility

There are a number of different avenues in which ILO assistance might be requested to assist with the application of labour provisions in trade agreements beyond its broader involvement in the

[79] Article 25 of the Canada-Peru Labour Cooperation Agreement and the Canada-Colombia Labour Cooperation Agreement, respectively.
[80] See Article 195(4) of the EU-Cariforum Trade Agreement. This provision furthermore provides that in the event that the ILO's advice is sought, the time limit for the consultation is prolonged by three more months, *ibid*.
[81] Article 283(2) of the draft EU-Peru and Colombia Trade Agreement. The EU-Republic of Korea Trade Agreement does not specifically foresee consultation but requires parties to "ensure that the resolution reflects the activities of the ILO" with a view to fostering "greater cooperation and coherence between the work of the Parties and [this organization]". See Article 13.14(2) of the EU-Republic of Korea Trade Agreement.
[82] Annex 3(1)(c)(iii) of the Canada-Peru Labour Cooperation Agreement and the Canada-Colombia Labour Cooperation Agreement, respectively. Similarly, the earlier Canada-Chile Labour Cooperation Agreement provides that the chairperson of the Evaluation Committee of Experts, a pre-dispute settlement review organ, "shall be selected by the Council from a roster of experts developed in consultation with the International Labour Organization". Article 22(1)(b) of the Canada-Chile Labour Cooperation Agreement.
[83] The only two agreements with labour provisions subject to dispute settlement that refer to ILO instruments were the US-Jordan Trade Agreement and the US-Singapore Trade Agreement.
[84] See further on this Jackson and Jansen (2010:544-545).
[85] See Jansen (2012:174).

promotion of the standards concerned. Firstly, and perhaps most importantly, the ILO's assistance could be requested for clarifications with regard to the scope, legal content and implications of labour provisions referring to ILO instruments.[86] Secondly, the ILO could be consulted regarding the assessment of compliance with a given labour provision to the extent this provisions requires compliance with an ILO instrument. Thirdly, the ILO could assist in obtaining factual information[87] relating to the labour standards situation in specific countries where there is no confidentiality or other impediments to its disclosure.[88] Fourthly, the ILO could be asked to facilitate dispute resolution in the application of a provision, e.g., by promoting conciliation or mediation between the parties.[89] Finally, ILO assistance could be sought to facilitate implementation or address possible compliance issues raised in disputes, for example, through technical cooperation on labour standards issues.

The ILO's Social Justice Declaration of 2008 equips the ILO to provide the above forms of requested assistance, because it calls upon the Organization to adapt its institutional practices with a view to, "upon request, provid[e] assistance to Members who wish to promote strategic objectives jointly within the framework of bilateral or multilateral agreements, subject to their compatibility with ILO obligations."[90] This call, coupled with the larger Constitutional mandate of the ILO and its organs,[91] provide a broad base to assist States in giving effect to labour provisions in trade agreements which will align with ILO standards.[92]

The question arises, however, regarding the procedure for such requests for ILO assistance. Indeed, the ILO's possible contributions to the administration of labour provisions will depend on a variety of factors, including the nature of the need or request, the mechanism seized, and the decisions of the ILO's governance structure as to whether and how the Organization may contribute. The following paragraphs highlight some of the main institutional options available.

[86] This can include inputs to identify the national labour laws that fall within the scope of the agreement when these are defined in relation to an ILO instrument such as the 1998 Declaration (see above).

[87] For example, the parties to an agreement could request ILO assistance with a request to undertake a fact-finding mission to assess compliance with ILO obligations in the context of their agreement.

[88] See the International Labour Office policy on public information disclosure (Director-General's announcement IGDS Number 8, of 11 April 2008).

[89] The role of facilitator or mediator has already been played by the Organization in the past – either officially or unofficially, with the aim to being less in ascertaining compliance the labour standards but rather solving a conflict in keeping with the standards and in a way that is acceptable to the parties. See Servais (2011: 316).

[90] Section II.A(iv) of the ILO Declaration on Social Justice for a Fair Globalization adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008. The role of the ILO as a competent authority to address labour issues in the context of trade has also been acknowledged in other multilateral settings. The World Trade Organization, for example, has recognized the ILO's competence to set and deal with internationally recognized core labour standards. See the WTO Singapore Ministerial Declaration adopted on 13 December 1996, available at: http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm. For further analysis see Leary (1997).

[91] The ILO's mandate includes: promoting compliance with labour standards voluntarily adopted by its Members, furnishing technical assistance to facilitate their realization and fostering legal certainty as to their meaning and implications. See, for instance, article 10 of the ILO Constitution concerning the functions of the International Labour Office.

[92] The promotional potential of FTAs was also stressed by several governments in the context of the recent Recurrent Discussion on FPRW at the 101st International Labour Conference. See ILC, 2012 Provisional Record No. 15, e.g. paras. 163, 164, 170.

a) The International Labour Office

As the Secretariat of the Organization, the International Labour Office (the Office) discharges a broad range of functions,[93] including through technical assistance and advisory services. In addition, upon request, the Office may provide clarification concerning the meaning of ILO Conventions,[94] which, while non-authoritative,[95] can provide guidance to member States, including on compliance with such instruments.[96] In the context of a dispute regarding the labour provisions of a trade agreement, trade partners could request the Office to provide advice as to the implications of ILO instruments referred to in its labour provisions, or as to their conformity with certain legislation or practice.[97] Other contributions sought could include providing technical cooperation and advisory services in order to support the implementation of labour provisions – e.g., to give effect or to monitor specific commitments of the parties[98] – or good offices[99] in facilitating the resolution of a dispute between the trade parties, such as concerning the meaning of their adherence to FPRW.[100]

[93] These are enshrined in article 10 of the ILO Constitution, which includes all such powers and duties assigned to the Office by Conference and the Governing Body.

[94] The interpretative role of the Office was officially acknowledged in 1921, on a paper submitted to the Governing Body, as "performing a useful function by securing in as large a measure as possible that the interpretations given by the Members of the Organisation should be uniform." (Minutes of the 9th Session of the Governing Body, page 365). Subject to the above-noted caveats as to the non-authoritative nature of such interpretations, this important role of the Office has been taken up thereafter in official ILO texts – see for example Minutes of the 51st Session of the Governing Body, page 121, and GB.256/SC/2/2. These contributions are regulated in a specific Office procedure and some of them published in the ILO's Official Bulletin. The procedure is currently set out in an Office Circular. Under the circular, those opinions deemed formal or official are published in the ILO Official Bulletin – upon request or when the issue raised is likely to be of general interest, unless explicitly noted that the indications to be provided should be considered unofficial.

[95] The standard disclaimer in Office responses declares that indications are provided "on the usual understanding that the ILO Constitution confers no special competence on the Office to give an authentic interpretation of the provisions of international labour Conventions and that any decision as to conformity of national legislation and practice with a particular Convention must lie in the first instance with the Government of the country concerned, subject, in the case of a ratified Convention, to the views of the supervisory bodies of the ILO."

[96] For example, they may serve to assess the implications of ratification or the conformity of legislation with the provisions of a Convention. The value added of the Office's advice has often been noted by referring to the Office's technical means and expertise, linguistic capacity and practice in the techniques of interpretation (See GB.256/SC/2/2 par. 17). Through these indications the Office examines the meaning of Conventions and, where appropriate, their conformity with given legislation, policy or practice. A total of 147 of these formal or official opinions have been published since 1921. See, for example, ILO Memorandum of 11 August 1955, *Official Bulletin*, Vol. XXXVIII, 1955, No. 7, or ILO Memorandum of 1 June 1973, Official Bulletin, Vol. LVII, 1974, Nos. 2-4.

[97] With due deference to the autonomy of its member States and without prejudging what the interpretative and supervisory mechanisms could eventually state on the questions submitted, the Office may more expeditiously provide both information as to relevant application criteria and, relying on its expertise, a non-authoritative assessment of the question submitted, based as applicable on the previous comments of ILO supervisory bodies.

[98] For example, the ILO Sub-Regional Office for Central America, Haiti, Panama, and the Dominican Republic has carried out a project which involved the verification of certain labour standards commitments that were undertaken by the State parties in the context of the negotiation of CAFTA-DR. See at: http://www.ilo.org/sanjose/programas-y-proyectos/verificaci%C3%B3n-implementaci%C3%B3n-libro-blanco/lang--es/index.htm.

[99] The term "good offices", in its broader sense, refers to "any non-structured form of assistance given by a third party". See Lapidoth (2011, para. 1).

[100] This assistance and promotional roles may thus be of particular importance in the administration to the majority of provisions, broadly referring to the FPRW contained in the 1998 Declaration, which may be less amenable to precise clarification and assessment requests or opinions than those provisions containing concrete references to

b) The ILO supervisory bodies

Apart from the Office, the assistance of the ILO supervisory system could be sought in the administration of labour provisions.[101] In this regard, the comments of the ILO supervisory bodies can be a source of information for states and other actors seeking clarification as to the application of provisions of ILO Conventions referred to in international agreements.[102] To illustrate this and other relevant inputs, the following section examines potential contributions from two of the ILO's supervisory mechanisms, namely the tripartite Committee on Freedom of Association (CFA), and the expert-based Committee of Experts on the Application of Conventions and Recommendations (CEACR).[103]

The CEACR can serve as a source of guidance regarding the labour provisions[104] based on its comments concerning compliance with international labour standards which have been developed throughout the last eight decades.[105] While the CEACR does not currently have an explicit mandate for dispute resolution bodies or member States to request its examination of a particular compliance matter in the context of trade agreements, still the Committee's extensive comments and observations may be consulted by the bodies involved in the administration of the labour provisions and might also be relied upon by the Office when providing a response to a possible request. This contribution could be particularly relevant where the subject matter of a dispute has been the object of a previous observation by the CEACR.

The CFA, a tripartite body composed of Governing Body members, is mandated to assist in assessing compliance with the principles of freedom of association by a State party to a trade

---

Conventions. The Office has, in the past, held a conciliatory and mediatory role in disputes among States concerning giving effect to ILO instruments (see, for example, Servais (2011: 316-317)), a role that could be all the more important to facilitate the resolution of conflicts between trade parties when these refer to labour clauses alluding to ILO texts.

[101] On the ILO supervisory system see, for example, Valticos and Potobsky (1995) and Maupain (1999) and (2010).

[102] See Gravel and Delpech 2013:25-26. Moreover, an analogy can also be drawn as to how national and regional adjudicators already both need at times to assess the application ILO instruments and, in doing so, may rely on the comments and principles of ILO supervisory bodies. On recent developments as to international labour standards and ILO supervisory mechanisms in national supervisory systems see Beaudonnet (2005), Gravel and Delpech (2008). On the practice of regional human rights courts in terms of referring to ILO instruments and supervisory body reports see Novitz (2010) and Ebert and Oelz (2012).

[103] On the important and adaptive role of these two mechanisms see, for example, Maupain (2010: 470-468).

[104] The comments of the Committee of Experts concerning the fulfilment by member States of their standards-related obligations take the form of either direct requests to Government or observations. Observations contain comments on issues raised by the application of a particular Convention by a member State and are reproduced in the Committee's annual report, submitted to the Conference every year. In accordance with the mandate given by the Governing Body, the Committee is called upon to examine the annual reports under article 22 of the Constitution on the measures taken by member States to give effect to the provisions of the Conventions to which they are parties; the information and reports concerning Conventions and Recommendations communicated by member States in accordance with article 19 of the Constitution; and information and reports on the measures taken by member States in accordance with article 35 of the Constitution. See the revised Terms of reference of the Committee of Experts, Minutes of the 103rd Session of the Governing Body (1947), Appendix XII, para. 37.

[105] The Committee was established in 1926 to assist the Conference in handling the reports submitted by member States on the measures taken to give effect to ratified Conventions. See Report of the Committee on the Application of Standards, Provisional Records, 8th Session of ILC, 1926, Vol I, Appendix VII, pp. 429.A1. On the evolution of the committee and its contribution to the ILO' supervisory machinery see, for example, Cornil (1979), Valticos (1987) and Maupain (2010).

agreement.[106] While limited to questions concerning freedom of association and collective bargaining, and although unable to adjudicate on authoritative interpretations of ILO instruments, representations may be brought before it against all ILO member States, whether or not they have ratified the pertinent Conventions (Nos. 87 and 98).[107] Since Governments, as well as employers and workers organizations, can lodge complaints, member States could consider resorting to the CFA system to handle their disagreements as trade partners on the implications of freedom of association, either prior to or during a trade dispute. While the procedure before the Committee is not designed to bindingly adjudicate such disputes, it can provide useful elements to the parties, and promote a coherent understanding and application of freedom of association references in trade agreements.[108]

c) Authoritative interpretation mechanisms

The ILO Constitution provides for two possible adjudication mechanisms for questions or disputes relating to the interpretation of the ILO Constitution and ILO Conventions: (1) referral to the International Court of Justice (ICJ) (article 37.1) and (2) appointment of a specialized tribunal (article 37.2).[109] These mechanisms, focusing solely on interpretation,[110] may have limited relevance in giving effect to a majority of labour provisions, and may not be able to effectively clarify the most prevalent references in labour provisions, i.e. the 1998 Declaration.[111] Moreover, regarding the ICJ, proceedings can be lengthy and require considerable involvement. Notably, article 37.1 has only been used once to interpret Conventions,[112] and, as to the article 37.2 tribunal, the ILO's tripartite constituents have yet to agree on its establishment.[113]

---

[106] The CFA examines whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions. This definition of its mandate has been stated by the Committee on several occasions – see, for example, 310th Report, Case No. 1931 para. 494 or 337th Report, Case No. 2258, para. 836 . Concerning the evolution of this mechanism, from a preliminary system of review of a complaint to a Fact Finding and Conciliation procedure, into a full-fledged examination of the substance of complaints see Maupain 1999, Gravel, Duplessis and Gernigon 2001 and, the creative genius behind its inception, Jenks (1957).

[107] See Jenks (1957); Valticos and Von Potobsky (1995: 295-296).

[108] Trade partners, for example, could bilaterally determine in the agreement or thereafter (through and MOU or for a particular dispute) to submit disagreements over Freedom of Association to the CFA.

[109] Article 37.2 provides that "the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention". On article 37.2 of the ILO Constitution see Governing Body document GB.256/SC/2/2. For an analysis on the creation of an interpretative tribunal pursuant to said article see Maupain (1999) and more recently Fraterman (2011).

[110] An authoritative interpretation alone, however, could provide an important contribution to a coherent application of ILO instruments, of great value not only to parties to a trade dispute concerning a labour clause or an outside tribunal in charge of its adjudication, but also to other ILO members and constituents. See, in this regard and as to an article 37.2 Tribunal, Fratermann (2011).

[111] Unless, concerning the ICJ, it was submitted as a question concerning the interpretation of the ILO Constitution.

[112] Even on that occasion the request came from the Council of the League of Nations, not from a State. In 1932 a question of interpretation concerning the Night Work (Women) Convention, 1919 (No. 4), was referred to the Permanent Court of International Justice (PCIJ), predecessor to the ICJ. On the nature and procedure of the article 37.1 mechanism, including as to the possibility of participation by social partners, see the Office study submitted to the Governing Body in 1993 (GB. 256/SC/2/2).

[113] Discussions as to the possible appointment of an Article 37.2 tribunal have taken place on several occasions since the mechanism was added to the Constitution through its 1946 amendment. See, in particular, the 1993 Office

However, these interpretative mechanisms could still be relevant for legal disputes of labour provisions, particularly as they have the potential to authoritatively define the meaning of an ILO Convention referred to by these provisions. This is particularly true for the ICJ, which is the ultimate forum for the settlement of disputes,[114] which could be of relevance in the context of trade agreements and which may be used by either ILO member States or by the ILO itself.[115] Moreover, if a specialized tribunal was appointed pursuant to article 37.2, it could provide an expeditious means for authoritative interpretation. As the Governing Body would prepare the tribunal's rules for the Conference's approval, it could consider whether to expressly address the possibility of submitting questions concerning the interpretation of agreements referring to Conventions, and of access to the tribunal through referrals and preliminary rulings (*renvoi prejudiciel*) – e.g., by dispute resolution bodies in charge of handling disputes pursuant to a trade or other international agreements, as well as by other international courts or tribunals.[116]

d) Additional mechanisms and ad hoc means

In addition to the potential assistance that could be requested through the ILO's institutional means outlined above, there are additional mechanisms in place that could be invoked. These mechanisms include: other supervisory system procedures, such as representations before a tripartite committee and complaints to be examined by a commission of inquiry, research studies and training mechanisms already used in other contexts, including the training of national adjudicators.[117] In addition, parties may request ILO fact-finding, direct-contacts or conciliation missions to tackle issues stemming out of the application of ILO standards through bilateral or multilateral agreements.

---

document and Governing Body discussion (GB.256/SC/2/2, GB .256/11/22 and VI/3-4, and ILC 80th Session 1993 PR No. 25 p. 4-5). The debate has been reopened recently and been the object of a series of consultations (see, for example, GB.307/10/2 (Rev.) and GB.307/PV para. 219).

[114] Article 37.2 acknowledges its prevalence over an ad hoc tribunal noting that "Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph".

[115] Pursuant to article 37.1, the ILO can also seek an interpretative ruling of the ICJ under the Court's advisory jurisdiction (see Article IVX of the ILO-UN Agreement of 1946, Article 96 of the UN Charter and Article 65 of the Statute of the ICJ).

[116] This possibility could even be made mandatory by the agreements themselves, as to questions involving the interpretation of an ILO Convention. Also a crucial aspect to be addressed in setting out such rules would be the binding nature of the resulting awards. In this vein, it should be noted that the intent of the drafters was that awards should possess a binding character, not only to those States which had submitted the case because their interpretations were divergent, but to all States Members, as uniformity of interpretation was deemed essential – see First Session of the Conference Delegation on Constitutional Questions (London, 21 Jannary-15 February 1946) ILO Official Bulletin 15 December 1946 XXVII, No. 3 p. 770). If so binding, the opportunity to participate by any member State would need to be addressed.

[117] The ILO's International Training Centre organizes specific courses for national judges under whose competence falls the national application of labour standards. Tapping on the existing informal networks of arbitrators, which tend to be repeat players in the handling of inter-State disputes (e.g. see Vagts (1996)) the ILO could consider proposing a training or manual for these professionals, concerning the nature and implications of labour clauses in international agreements, including the means to ensure coherence with ILO instruments and obligations.

In particular, within its existing constitutional framework, the ILO may establish ad hoc mechanisms to handle requests made to the Organization concerning bilateral or multilateral relationships between States.[118] The Conference's above-mentioned call under the Social Justice Declaration may be channelled in a variety of ways, including the Governing Body's authority to create or appoint bodies, such as a committee or a working party, to consider any matters which may require examination.[119] The ILO could consider the creation of a specific body or procedure, tripartite or expert based, to address outside questions or referrals on the application of labour standards, including in the context of labour provisions in inter-State agreements. Moreover, with the growth of international texts referring to labour standards and ILO instruments, and the related need to promote compatibility by offering inputs to a variety of contexts, the ILO could also assess whether to develop a coordinated procedure to ensure the delivery of consistent external contributions to other institutions.

3. Assessing the implications of ILO involvement: opportunities and considerations

The implications and effects of contributions provided in the administration of labour provisions for the parties to the international agreement will partly depend on the mechanism seized. For example, while a submission to the ICJ's contentious jurisdiction as a dispute under article 37.1 of the Constitution would lead to a binding input,[120] a non-authoritative opinion by the Office may be treated as guidance. On the other hand, the nature and impact of contributions by ILO mechanisms will also largely depend on what the parties decide and set out in their agreement, or its ulterior development, as noted above. Moreover, the different potential implications of ILO contributions will have to be borne in mind by competent bodies when determining whether to accept contribution requests, and through which mechanisms and procedures these should be handled.[121] One of the questions to be addressed will be the extent to which the ILO contribution procedure would be formalized.

Accordingly, ILO involvement in the administration of labour provisions gives rise to both opportunities and questions to consider. Concerns have, in particular, been raised as to the extent to which compatibility between different legal systems is an achievable goal, given the challenges of incorporating the norms, values and logic of one system (e.g., bilateral and regional trade law) into another (e.g. global labour law) while retaining their original meaning, purpose and integrity. While the dispute settlement bodies involved in a case would have full autonomy over the form of ILO assistance requested, from the ILO's vista, the relative lack of ownership of its contributions,

[118] An example of a specific ad hoc mechanism created by the Governing Body to address external requests is provided by the Procedure for the examination of disputes concerning the application of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy by means of interpretation of its provisions, adopted by the Governing Body at its 232nd Session (see Official Bulletin 1986, Vol. LXIX, Series A, No.3, pp. 196-197).

[119] See section 4.2.1 of the Governing Body Standing Orders.

[120] Conversely, the ICJ's jurisdiction would be advisory in relation to questions relating to the interpretation of a Convention or of the Constitution, as submitted by the Conference or the Governing Body (under Conference authorization).

[121] For example, a need for binding input on a specific matter could lead the ILO to appoint a Tribunal under article 37.2 of its Constitution – see footnote [28] above [on the binding effects of the decisions of an ad hoc tribunal].

once provided and hence externalized from the ILO context, would have to be considered. In order to address this and other related challenges, the ILO would need to assess whether and how its assistance could be provided so as to ensure, to the extent possible, compatibility with the ILO's labour standards and mandate. This may favour, for example, precise opinions on a specific question or availability and ongoing engagement in giving effect to a provision, rather than general dissemination of rules and application criteria on a broader area, which may risk inconsistent application by the receiving institution or having them recast under an incompatible logic.

Furthermore, as the ILO will presumably elect to contribute to the administration of labour provisions in a way that meets the needs and expectations of its member States, other technical and institutional considerations arise.[122] For example, the representation and complaint mechanisms under articles 24 and 26 of the ILO Constitution may not be an appropriate means if the parties are seeking a swift clarification or objective assessment from an independent third party. In these circumstances, the assistance of the Office, even if merely providing summaries of the comments made by the supervisory bodies, and with the usual caveat that its comments are not authoritative, may be more suited to the needs of trade partners. Similarly, pursuant the call for institutional adaptation in the Social Justice Declaration, the ILO, through its tripartite constituency, could consider whether to adjust the mandate of existing supervisory bodies to address the members' needs. For example, the mandate of the CFA could be expanded to address queries on freedom of association from trade partners, which may not necessarily stem from contentious situations; or whether a dispute resolution body (e.g. handling a bilateral trade dispute between two States, or established tribunals such as the WTO's Appellate Body) could directly seize the CFA for an advisory opinion or preliminary ruling concerning compliance with the principles of freedom of association and collective bargaining. At the same time, though, where the supervisory mechanisms have long been diagnosed as overburdened,[123] it may have to be carefully assessed whether these bodies may take extra work, without first considering the allocation of specific resources or, where mere resources may not be enough, an institutional redesign to enable efficient ILO contributions to external fora.[124]

4 Conclusions

This paper has discussed the proliferation of trade agreements with labour provisions that incorporate the ILO's labour standard system in various manners, and it has outlined some of the implications of these agreements. It has explained that a growing number of trade agreements refer to ILO instruments and increasingly make their content a binding part of the agreement, subject to dispute settlement and trade sanctions. However, it has become clear that this

[122] Moreover, there are number of other broader technical challenges in giving effect to labour clauses in international agreements, in particular whether the clauses can or should be supplemented with effective sanctions to penalize violations, see for example Servais (2011: 37-43). On earlier debates concerning the implementation of social clauses see de Wet (1995).
[123] See Gravel (2008).
[124] See Maupain (2010).

development, while leading to a greater potential coherency with the ILO's labour standards system, is not free from challenges. This is notably due to the fact that the majority of these references do not relate to the ILO's Conventions but rather to the ILO's 1998 Declaration, whose content is less specific than the relevant Conventions. This results in a risk of legal uncertainty and, even worse, an application of these labour provisions that is inconsistent with the application by the ILO supervisory machinery, especially where the compliance of a party with such a labour provision is challenged before a dispute settlement body that could lead to economic sanctions.

In order to ensure consistency between the bilateral and regional trade agreements and the ILO's global labour system, a number of options have been identified above. The decision concerning the most appropriate avenue will depend on multiple variables that would have to be assessed on a case-by-case basis. These include (but are not limited to) the parties' respective obligations under the terms of the agreement, or subsequent instrument, the parties' respective obligations as ILO members (e.g., ratified Conventions), the parties' requested ILO contribution and how it is formulated and processed.[125] For the ILO's part, its participation in external international institutional settings is not new; it has been participating with public international organizations, such as the United Nations, as well as other international bodies and networks, such as the International Organization for Standardization, for many years.[126]

It is clear, therefore, that trade partners have a number of options to ensure consistency between the application of their labour provisions and the referenced ILO instruments and that they can expressly set out such options in their agreements. What is less clear, however, is whether the inclusion of any of these options will be considered by the parties, and whether and how the relevant dispute resolution bodies will reach out to the ILO for guidance. While references to ILO standards in labour provisions can entail a first step toward consistency, the trade partners may wish to consider providing for the possibility of ILO assistance if they aim to ensure that their trade agreements work in synergy with the international labour standards system.

[125] Similarly relevant would be the definition of the process to be followed (e.g. if it would entail adversarial participation of the parties or even of other actors).
[126] For a recent example see Bakvis and McCoy (2008:2).

Annex.

Overview of ILO references in bilateral and regional trade agreements

Table 1. References to ILO instruments in the United States' trade agreements

Name of agreement and entry into force	ILO obligations	Labour provisions requiring compliance with ILO obligations	Subject to dispute settlement	Reference to ILO instruments to define scope of obligations regarding domestic labour law
NAALC (1994)	No	–	No	–
US-Jordan (2001)	Obligations as ILO members and commitments under the 1998 Declaration	State parties "shall strive to ensure" that the "labor principles" following from obligations as ILO members and commitments under the 1998 Declaration "are recognized and protected by domestic law."	Yes	No
US Trade Agreements with Chile (2004), Singapore (2004), Australia (2005), Morocco (2006), Bahrain (2006), Central America - Dominican Republic (CAFTA-DR) (2006), Oman (2009)	Obligations as ILO members and commitments under the 1998 Declaration	Obligation to "strive to ensure" that the "labor principles" following from obligations as ILO members and commitments under the 1998 Declaration "are recognized and protected by domestic law."	No	No
US Trade Agreements with Peru (2009), the Republic of Korea (2012), Colombia (2012), Panama (2013)	Obligations as ILO members	Obligation to "adopt and maintain in its statutes and regulations, and practices thereunder, the […] rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration):[127]"	Yes	Partly: The obligation to "effectively enforce its labor laws" includes, among others, those laws relating to the ILO Declaration (subject to dispute settlement)

Source: IILS estimates based on the WTO Regional Trade Agreements Information System.

[127] The obligations set out in Article 17.2, as they relate to the ILO, refer only to the ILO Declaration.

Table 2. References to ILO instruments in Canada's trade agreements

Name of agreement and entry into force	ILO obligations	Labour provisions requiring compliance with ILO obligations	Subject to dispute settlement	Reference to ILO instruments to define the effect of obligations regarding domestic labour law
Canada-Chile (1997)	No	No	–	No
Canada-Costa Rica (2002)	Obligations as ILO members and commitments under the 1998 Declaration	Obligation to "ensure that its labour law embodies and provides protection for the labour principles and rights set out in" the ILO's 1998 Declaration	No	Yes: The obligation to "effectively enforce its labor laws" is subject to dispute settlement only if the issues concerns the rights and principles under the ILO Declaration
Canada's agreements with Peru (2009), Colombia (2011), and Panama (2013)	Obligations as ILO members and commitments under the 1998 Declaration	- Obligation to ensure that its law and practice "embody and provide protection" for the principles and rights listed in the ILO's 1998 Declaration as well as "acceptable conditions of work". - "To the extent that the principles and rights stated above relate to the ILO, [the provisions relating to FPRW] refer only to the ILO Declaration, whereas [the others] more closely relate to the ILO's Decent Work Agenda."	Yes, "to the extent that they refer to the ILO Declaration"	The obligation not to weaken domestic labour law is subject to dispute settlement "to the extent that [it] refer[s] to the ILO Declaration"

Source: IILS estimates based on the WTO Regional Trade Agreements Information System.

Table 3. References to ILO instruments in the EU's trade agreements

Name of agreement	ILO obligations	Labour provisions requiring compliance with ILO obligations	Subject to dispute settlement	Others
EU-South Africa (2000); EU-ACP (2003)	FPRW in accordance with ILO standards*	–	–	
EU-Chile (2003)	–	–	–	In the social development cooperation, parties commit to "giv[ing] priority to the creation of employment and respect for fundamental social rights, notably by promoting the [fundamental] conventions of the International Labour Organisation".
EU-Cariforum (2008)	Standards "as defined by the relevant ILO Conventions" as well as commitments under the ILO's 1998 Declaration	Parties are required to ensure that investors comply with "core labour standards as required by the [ILO's 1998 Declaration][128]	Yes	–
		Parties are required to ensure that their laws and policies "provide for and encourage high levels of social and labour standards" in accordance with the" "core labour standards, as defined by the relevant ILO Conventions"	Yes**	
EU-Republic of Korea (2011)	Effective implementation of ratified ILO Conventions	Parties "commit to respecting, promoting and realising [...]the principles concerning the fundamental rights" "in accordance with the obligations deriving from membership of the ILO and the ILO Declaration"	No	Parties commit to making "continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO."
EU-Peru, Colombia (2012)	–	"Parties commits to the promotion and effective implementation in its laws and practice and in its whole territory of internationally recognised core labour standards as contained in the fundamental Conventions of the International Labour Organisation"	No	Parties commit to "exchang[ing] information on their respective situation and advancements as regards the ratification of priority ILO Conventions as well as other conventions that are classified as up-to-date by the ILO."

*Note: * The EU-ACP Agreement specifically refers to the ILO Fundamental Conventions.*
*** Violations of these obligations may be subject to any measures under the agreement, except trade-related sanctions.*

[128] The agreements states in a footnote: "These core labour standards are further elaborated, in accordance with the Declaration, in ILO Conventions concerning freedom of association, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in the work place."

Source: IILS estimates based on the WTO Regional Trade Agreements Information System.

Table 4. References to ILO instruments in trade agreements concluded by Asian, Pacific, and Latin American countries

Name of agreement	ILO obligations	Labour provisions requiring compliance with ILO obligations	Subject to dispute settlement	Others
Thailand-New Zealand (2005)*; China-New Zealand (2008)*; Hong Kong (China)- New Zealand (2011)*	Obligations as ILO members and commitments under the 1998 Declaration	–	–	–
Transpacific Strategic Economic Partnership Agreement (P4) (2006)*; New Zealand-Malaysia (2010)*; New Zealand-Philippines (2010)*	Commitments as ILO members and under the 1998 Declaration	Obligation to "work [...]to ensure" conformity of national law and practice with the parties' "international labour commitments"	No	States as an objective to "promote better understanding and observance" of the ILO 1998 Declaration's principles**
Chile-Panama*; Chile–Colombia (2009); Chile-Peru (2009)*	Obligations as ILO members and commitments under the 1998 Declaration	State parties "shall strive to ensure" that the "labor principles" following from obligations as ILO members and commitments under the 1998 Declaration "are recognized and protected by domestic law."	No	–
Chile–Turkey (2011)			Yes	

*Note: * The labour provisions of this trade agreement are embodied in a side agreement or memorandum of understanding.*
*** The New-Zealand-Philippines Memorandum of Agreement on Labour Cooperation extends this object to "other instruments on labour and employment to which they are party".*
Source: IILS estimates based on the WTO Regional Trade Agreements Information System.

References

Alston, P. 2004. "Core Labour Standards' and the Transformation of the International Labour Rights Regime", in *European Journal of International Law*, Vol. 15, No 3, pp. 457-521.

Bakvis, P.; McCoy, M. 2008. *Core labour standards and international organizations: What inroads has labour made?*, Briefing Papers No. 6 (Geneva, Friedrich-Ebert-Stiftung). Available at: http://library.fes.de/pdf-files/iez/05431.pdf.

Beaudonnet, X. 2005. "L'utilisation des sources universelles du droit international du travail par les juridictions internes", in *Bulletin de droit comparé du travail et de la sécurité sociale* (Bordeaux), pp. 43–84.

Blackett, A. 1999. "Whither social clause? Human rights, trade theory and treaty interpretation", in *Columbia Human Rights Law Review*, Vol. 31, No. 1, pp. 1-80.

Boie, B. 2012. *Labour related Provisions in International Investment Agreements*, Employment Working Paper No. 126 (Geneva, ILO). Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_191245.pdf.

Bourgeois, J. et al. 2007. *A comparative analysis of selected provisions in free trade agreements* (Brussels, European Commission). Available at: http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc_138103.pdf.

Cornil, P. 1970. "Le rôle de la Commission d'experts de l'O.I.T. dans le contrôle de l'application des conventions internationales du travail", in *Revue Belge de Droit International*, No. 1, pp. 265-277.

De Wet, E. 1995. "Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/ World Trade Organization", in *Human Rights Quarterly*, Vol. 17, No. 3, pp. 443-462.

Delpech, Q.; Gravel, E. 2008. "International labour standards: Recent developments in complementarity between the international and national supervisory systems", in I*nternational Labour Review*, Vol. 147, No. 4, pp. 403-415.

Doumbia-Henry, C.; Gravel, E. 2006. "Free trade agreements and labour rights: Recent developments", in *International Labour Review*, Vol. 145, No. 3, pp. 185–206.

Dworkin, R. 1978. *Taking Rights Seriously* (London, Duckworth).

Ebert, F.C.; Oelz, M. 2012. *Bridging the Gap between Labour Rights and Human Rights: The Role of ILO Law in Regional Human Rights Courts*, Discussion Paper No. 212 (Geneva, ILO/IILS). Available at: http://www.ilo.org/public/english/bureau/inst/download/dp212_2012.pdf.

–; Posthuma, A. 2011. *Labour Provisions in Trade Arrangements: Current Trends and Perspectives*, Discussion Paper No. 205, (Geneva, ILO/IILS). Available at: http://www.ilo.org/public/libdoc/ilo/2010/465391.pdf.

Elliott, K.A. 2011. "Labour Rights", in J.P. Chauffour and J.C. Maur (eds): *Preferential Trade Agreements for Policies, a handbook* (Washington, D.C., The International Bank for Reconstruction and Development/The World Bank), pp. 427-441.

European Commission. 2001. *Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation*, Communication from the Commission, COM (2001) 416 final (Brussels, European Union).

–. 2006. *Promoting decent work for all. The EU contribution to the implementation of the decent work agenda in the world*, Communication from the Commission, COM (2006) 249 final (Brussels, European Union).

–. 2008. *The Use, Scope and Effectiveness of Labour and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements*, Final Report, Contract VC/2007/0638.

Fischer-Lescano, A.; Teubner, G. 2004. "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", in *Michigan Journal of International Law*, Vol. 25, No. 4 pp. 999-1046.

Fraterman, J.A. 2011. "Article 37(2) of the ILO Constitution: Can an ILO Interpretive Tribunal End the Hegemony of International Trade Law?", in *Georgetown Journal of International Law*, Vol. 42, No. 3, pp. 879-922.

Gravel, E. 2008. "Is the appropriation of international labour standards by new actors replacing or complementing the ILO's standards –related work?" in *Governance, international law and corporate social responsibility*, Research Series No. 116 (Geneva, ILO/International Institute for Labour Studies).

–; Delpech, Q. 2013. *The comments of the ILO's Supervisory bodies: Usefulness in the context of the sanction-based dimension of labour provisions in US free trade agreements*, Research Paper No. 4 (Geneva, ILO). Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_207860.pdf.

–; Duplessis, I.; Gernigon, B. 2001. *The Committee on Freedom of Association: Its impact Over 50 Years*, (Geneva, ILO).

–; Kohiyama, T.; Tsotroudi, K. 2011. "The role of International Labour Standards in rebalancing globalization: A legal perspective", in *The Global Crisis, causes, responses and challenges* (Geneva, ILO), pp. 209-221.

International Labour Office (ILO). 1998. *The Declaration of Principles*, Discussion in Plenary Report of the Committee, International Labour Conference, 86th Session, Geneva, 1998 (Geneva). Available at: http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-decl.htm.

–; 2007. *Strengthening the ILO's capacity to assist its Members' efforts to reach its objectives in the context of globalization*, Report V, International Labour Conference, 96th Session, Geneva, 2007 (Geneva).

–. 2009a. "Rebalancing globalization: The role of labour provisions in existing international trade arrangements and development finance policies", in *World of Work Report 2009: The global jobs crisis and beyond* (Geneva, International Institute for Labour Studies), pp. 63-95. Available at: http://www.ilo.org/public/english/bureau/inst/download/wow_09.pdf.

–. 2009b. *Rules of the Game: a brief introduction to International Labour Standards* (Geneva, ILO).

–. 2012. *Fundamental principles and rights at work: From commitment to action*, Report VI, International Labour Conference, 101st Session, Geneva, 2012, (Geneva).

Jackson, L. A. and Jansen, M. 2010. "Risk assessment in the international food safety policy arena. Can the multilateral institutions encourage unbiased outcomes?", in *Food Policy*, Vol. 35, No.6, pp. 538-547.

Jansen, M. 2012. "Defining the Borders of the WTO Agenda", in M. Daunton and R.M. Stern (eds.): *The Oxford Handbook on the World Trade Organization* (Oxford, Oxford University Press), pp. 161-183.

Jenks, C.W. 1957. *The international protection of trade union freedom*, (London, Stevens).

Kolb, R. 2006. “Principles as Sources of International Law (With Special Reference to Good Faith)”, in *Netherlands International Law Review*, Vol. 53, No. 1, pp. 1-36.

Kolben K. 2010. “The WTO Distraction”, in *Stanford Law and Policy Review*, Vol. 21, No. 3, pp. 461-492.

La Hovary, C. 2009. *Les droits fondamentaux au travail. Origines, statut et impact en droit international*, (Paris, Presses Universitaires de France).

Lapidoth, R. 2011. “Good Offices”, in Wolfrum, R. (ed.): Max Planck Encyclopaedia of Public International Law (Oxford, OUP). Available at: http://opil.ouplaw.com/home/EPIL.

Lazo Grandi, P. 2009. *Trade Agreements and their Relation to Labour Standards: The Current Situation*, Issue Paper No. 3 (Geneva, International Centre for Trade and Sustainable Development). Available at: http://www.iadb.org/intal/intalcdi/PE/2009/04460.pdf.

–. Forthcoming. *Disposiciones Laborales en los Acuerdos de Libre Comercio: La Experiencia de Chile* (Geneva, ILO).

Leary, V.A. 1997. “The WTO and the Social Clause: Post-Singapore”, in *European Journal of International Law*, Vol. 8, No. 1, pp. 118-122.

Maupain, F. 1999. “The settlement of disputes within the ILO”, in *Journal of International Economic Law*, Vol.2, No.2, June, pp. 273-293.

–. 2005a. “Revitalization not Retreat. The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights”, in *European Journal of International Law*, Vol. 16, No.3, pp. 439-465.

–. 2005b. “La « valeur ajoutee » de la Declaration relative aux principes et droits fondamentaux au travail pour la coherence et l’efficacite de l’action normative de l’OIT”, in I. Daugareilh (ed) : *Mondialisation, Travail et Droits Fondamentaux* (Paris/ Bruxelles, LGDJ/ Bruylant) pp. 1-56.

–. 2010. “Une Rolls Royce en mal de révision. L'efficacité du système de supervision de l'OIT à l'approche de son centenaire”, in *Revue Générale de Droit International Public*, Vol. 114, No. 3, pp. 465-499.

–. 2012. *Réguler sans contraindre: quel avenir pour l’OIT face aux déséquilibres persistants de la mondialisation fin*ancière, (Geneva, ILO/IILS).

McCrudden, C.; Davies, A. 2005. "International Trade Law and Labour Rights", in M.W. Gehring and M-C. Cordonier Segger (eds): *Sustainable Development in World Trade Law*, Global Trade and Finance Series No. 9 (The Hague, Kluwer Law International), pp. 107-127.

Novitz, T. 2010. “Protection of Workers under Regional Human Rights Systems: An Assessment of Evolving and Divergent Practices”, in C. Fenwick and T. Novitz, (eds.): *Human Rights at Work. Perspectives on Law and Regulation.* (Oxford/Portland, Hart), pp. 409-438.

O’Rourke, D. 2003. “Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring”, in *The Policy Studies Journal*, Vol. 31, No. 1, pp. 1-30.

Orbie, J.; Tortell, L. 2009. “The New GSP-Plus Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?”, in *European Foreign Affairs Review*, Vol. 14, No. 5, pp. 663–681.

Osieke, E. 1985. *Constitutional law and practice in the International Labour Organisation* (Dordrecht and Boston, M. Nijhoff Publishers).

Papadakis, K. (ed.) 2008. *Cross-Border Social Dialogue and Agreements: An emerging global industrial relations framework?* (Hampshire/Geneva, Palgrave/ILO).

–. 2011. *Shaping Global Industrial Relations: The Impact of International Framework Agreements*, (Londres, Palgrave Macmillan).

Petersen, N. 2007. "Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation", in *American University International Law Review*, Vol. 23, No. 2. pp. 275-310.

Polaski, S. 2004. "Protecting labor rights through trade agreements: An analytical guide", in *Journal of International Law and Policy*, Vol.10, No. 13, pp. 13–25.

Politakis, G. 2004. "Deconstructing flexibility in international labour Conventions" in *Les normes internationales du travail: un patrimoine pour l'avenir : mélanges en l'honneur de Nicolas Valticos*, (Geneva, ILO).

Posthuma, A. 2010. "Beyond 'Regulatory Enclaves': Challenges and Opportunities to Promote Decent Work in Global Production Networks", in A. Posthuma, and D. Nathan, (eds.): *Labour in Global Production Networks in India* (Oxford, Oxford University Press), pp. 57-80.

Sen, A. 2000. "Work and rights", in *International Labour Review*, Vol. 139, No. 2 (Geneva, ILO). Available at: http://www.ilo.org/public/english/revue/download/pdf/sen2000-2.pdf.

Servais, J.-M. 2008. "International Labour Law", in Blanpain R. (ed.): *International encyclopaedia of Law: Labour Law and Industrial Relations*, (Deventer, Kluwer Law International).

–. 2011. *International Labour Law*, 3rd ed., (Alphen aan den Rijn, Wolters Kluwer).

Simma, B. and Pulkowski, D. 2006. "Of Planets and the Universe: Self-contained Regimes in International Law", in *European Journal of International Law*, Vol. 17, No. 3, pp. 483-529.

Singh, A.; Zammit, A. 2004. *Labour Standards and the "Race to the Bottom": Rethinking Globalization and Workers' Rights from Developmental and Solidaristic Purposes*, Working Paper No. 279, March, (University of Cambridge, Centre for Business Research). Available at: http://www.cbr.cam.ac.uk/pdf/wp279.pdf.

Siroën, J.-M. et al. 2008. *The Use, Scope and Effectiveness of Labour and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements*, Final Report, (Brussels, European Commission). Available at: http://ec.europa.eu/social/BlobServlet?docId=2112&langId=en.

Vagts, D.F. 1996. "The International Legal Profession: A Need for More Governance?" in *The American Journal of International Law*, Vol. 90, No. 2, pp. 250-261.

Valticos, N. 1979. "The Future Prospects for International Labour Standards" in *International Labour Review*, Vol. 118, No. 6, pp. 679-697.

–. 1987. "L'évolution du système de contrôle de l'Organisation internationale du Travail", in *Mélanges Roberto Ago*, Vol. II (Milano, Dott. A. Giuffre Editore), pp. 505-521.

–; Von Potobsky, G. 1995. *International Labour Law*, (Deventer-Boston, Kluwer Law and Taxation Publishers).

Virally, M. 1968. "Le rôle des 'principes' dans le développement du droit international", in *Recueil des études de droit international en hommage à Paul Guggenheim*, Vol. 1, (Geneva, Imprimerie de la Tribune de Genève), pp. 531-554.