Fast Track Authority and Its Implication for Labor Protection in Free Trade Agreements

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Introduction

Labor issues were a major point of contention during the recent free trade negotiations between the United States and South Korea.[1] The nation's largest labor organization, the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), joined by its allies in Congress, opposed the U.S.-South Korea Free Trade Agreement ("KORUS FTA"), due to concerns over anticipated American job losses, as well as inadequate labor protections in the agreement.[2] The United States negotiated the KORUS FTA under a procedure known as "fast track."[3] Under fast track, Congress suspends its usual legislative procedures when considering a free trade agreement ("FTA"), instead limiting debate, allowing no amendments, and requiring a simple up and down vote.[4] Although fast track controls the procedural handling of trade legislation, not the contents of the bill, the association of free trade agreements with fast track has caused pro-labor groups and their supporters in Congress to consistently oppose renewal of the President's fast track authority.[5] Labor advocates blame FTAs not only for job losses in the United States,[6] but also for encouraging a "race to the bottom" among our international trading partners.[7] They

1. *See* Aaron E. Lorenzo, Daniel Pruzin, & Amy Tsui, *Disappointment, Hope, Criticisms Mark U.S. Business Reaction to Failed Korea Talks*, Int'l Trade Rep. (BNA) (Nov. 18, 2010), http://www.bna.com/itr/arch573.htm.

2. *See* Sewell Chan, *Obama Presses to Complete Free-Trade Deal With South Korea*, N.Y. TIMES, Nov. 8, 2010, at B4. In October 2010, twenty House members sent a letter to Obama calling for stronger labor standards in the U.S.-Korea FTA, echoing concerns raised by the AFL-CIO. *Id.* In a rare exception, the United Autoworkers Union ("UAW") broke ranks with other American unions and supported the KORUS FTA. *See* John Maggs, *UAW Under Fire for Trade Deal Support,* POLITICO (Dec. 6, 2010, 4:54 PM), http://www.bilaterals.org/spip.php?article18642 (Dec. 6, 2010); *see also infra* Part V.

3. *See USTR Examining Side Letter Legal Implications For Korea FTA Changes*, WORLD TRADE ONLINE (July 23, 2010), http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-07/23/2010/ustr-examining-side-letter-legal-implications-for-korea-fta-changes/menu-id-710.html. All United States' FTAs have been negotiated under fast track, except for the Jordan FTA. *See* J. F. HORNBECK & WILLIAM H. COOPER, CONG. RESEARCH SERV., RL 33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY 11 (Nov. 4, 2010).

4. For a full enumeration of Congressional and Presidential actions under Fast Track, see HORNBECK & COOPER, *supra* note 3, at 17–18; 19 U.S.C. § 2191(d), (e)(1), (f)(1)–(2), (g)(1) –(2) (2006).

5. *See* Kara Rowland, *Obama's Free-Trade Goal Hits Roadblock*, WASH. TIMES, Aug. 18, 2010, *available at* http://www.washingtontimes.com/news/2010/aug/18/obamas-free-trade-goal-hits-roadblock/.

6. *See* Mike Hall, *Pennsylvania House Calls on Congress to Defeat Fast Track Renewal*, AFL-CIO NOW BLOG (MAY 24, 2007), http://blog.aflcio.org/2007/05/24/pennsylvania-house-calls-on-congress-to-defeat-fast-track-renewal. Since H. Ross Perot claimed during the 1991 presidential debates that the North American Free Trade Agreement (NAFTA) was causing a "giant sucking sound" of jobs leaving the U.S., FTAs have been associated with American job loss. *See* Ross Perot, *Presidential Candidate, Debating our Destiny: The Third 1992 Presidential Debate*, (Oct. 19, 1992), *available at* http://www.pbs.org/newshour/debatingourdestiny/92debates/3prez2.html.

7. *See* Charles B. Rangel, *Moving Forward: A New, Bipartisan Trade Policy That Reflects American Values*, 45 HARVARD J. ON LEGIS. 377, 394 (2008). The WTO defines the "race to the bottom" as a lowering of standards in order to gain unfair economic advantage. World Trade Organization, *Labour Standards: Consensus, Coherence and Con-*

contend that, although FTAs include some delineation of labor standards, the standards are weak and unenforceable.[8]

Fast track authority, also known as trade promotion authority ("TPA"), expired in 2007.[9] The only FTA that has been implemented since then is the Peru Trade Promotion Agreement ("Peru FTA"), which had already been completed prior to the expiration of TPA.[10] Prior to approving the Peru FTA, Congress incorporated language into the agreement that reflected its "New Trade Policy for America" ("New Trade Policy").[11] The New Trade Policy contained four enforceable labor provisions designed to protect the interests of both American and international workers.[12] Congress mandated that all future FTAs would be required to include template language from the New Trade Policy to ensure that core labor standards were administered and enforced in the signatory countries.[13] Former Speaker of the House Nancy Pelosi, in a nod to the New Trade Policy labor provisions, specifically attributed her vote in favor of the Peru FTA to the fact that the agreement included requirements for worker protections that were "a 'drastic difference' from other trade pacts."[14] With the new language providing for enforceable labor standards required in all trade agreements, labor advocates could be satisfied that they finally had the protection for both domestic and international workers, which they believed prior fast tracked agreements lacked.

The final version of the KORUS FTA included the New Trade Policy

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troversy, http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (last visited Nov. 20, 2010).

8. *See* Rangel, *supra* note 7, at 390–91.

9. HORNBECK & COOPER, *supra* note 3, at 1.

10. *See generally* United States–Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138 (2007). The FTA had been approved by the Peruvian Congress in 2006 and was awaiting U.S. congressional fast-track approval when TPA expired. M. ANGELES VILLARREAL, CONG. RESEARCH SERV., RS 22391, U.S.–PERU TRADE PROMOTION AGREEMENT 5 (Mar. 7, 2007). In addition to the Peru FTA, negotiations were completed on FTAs with Colombia, Panama, and South Korea when TPA expired. MARY JANE BOLLE, CONG. RESEARCH SERV., RS 22823, OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS 4 (Feb. 29, 2008). [hereinafter BOLLE RS 22823].

11. See *infra* Part III for a discussion of the New Trade Policy.

12. The New Trade Policy includes:

> A fully enforceable commitment that FTA countries will adopt, maintain and enforce in their laws and practice the five basic international labor standards, as stated in the 1998 International Labor Organization *Declaration on Fundamental Principles and Rights at Work*.
>
> A new, fully enforceable, binding commitment prohibiting FTA countries from lowering labor standards.
>
> New limitations on "prosecutorial" and "enforcement" discretion – FTA countries cannot defend the failure to enforce laws related to the five basic standards due to resource limitations or decisions to prioritize other enforcement issues.
>
> Same dispute settlement mechanisms/penalties as other FTA obligations.

A New Trade Policy for America, http://www.cpath.org/sitebuildercontent/sitebuilderfiles/newtradepolicyoutline5-10-07.pdf (last visited Jan. 19, 2011).

13. *See* M. ANGELES VILLARREAL & MARY JANE BOLLE, CONG. RESEARCH SERV., RS 22521, PERU TRADE PROMOTION AGREEMENT: LABOR ISSUES 5 (Oct. 23, 2006).

14. Richard Simon, *Free-Trade Deal Divides Democrats*, L.A. TIMES, Nov. 9, 2007, *available at* http://articles.latimes.com/2007/nov/09/nation/na-trade9.

template.[15] Nevertheless, as noted above, unsatisfied with its labor protections, organized labor and its congressional allies still opposed the agreement.[16] Fortunately for the Obama Administration, Congress will consider the KORUS FTA under fast track procedures because, like the Peru FTA, the original KORUS negotiations took place prior to TPA's expiration in 2007.[17] Supporters of the KORUS FTA believe the ability to use fast track will be a major factor in getting the contentious FTA passed, since labor advocates will not have the floors of Congress to reopen their objections to the agreement.[18] In fact, most trade experts maintain that without renewed fast track authority, the President will find it impossible to get any future trade agreement through Congress.[19]

This Note argues that using fast track procedures does not diminish labor protections in free trade agreements. Part I examines the evolution of fast track, detailing its legislative history and outlining fast track procedures. Part II discusses the means by which the United States enters into international agreements, examining the impact of fast track procedures on the powers of the President and Congress. Part III examines the four main methods used to insert labor protection into FTAs and examines differences in standards and enforcement mechanisms in the different models. Part IV looks at the role of the International Labor Organization ("ILO") and World Trade Organization ("WTO") in matters involving international trade and worker protections, noting the New Trade Policy's requirement for FTA conformance with the ILO's Declaration on Workers' Rights. Part V argues that fast track is not an impediment to achieving the worker protections that labor proponents seek. I advocate that fast track authority should be renewed, so that the United States can expand its export markets and create new jobs. In Part V, I also suggest that there may be more effective ways to promote labor standards than through fast tracked FTAs.

I. Fast Track Authority

A. Background

Fast track has been the means by which the United States has imple-

15. *See* WILLIAM H. COOPER & MARK E. MANYIN, CONG. RESEARCH SERV., RL 33435, THE PROPOSED SOUTH KOREA-U.S. FREE TRADE AGREEMENT (KORUS FTA) 5 (July 18, 2007).

16. *See* Chan, *supra* note 2.

17. *See* HORNBECK & COOPER, *supra* note 3, at 1. Although Congress never approved the FTA with South Korea, the U.S. originally negotiated and signed it prior to the expiration of TPA in 2007. *USTR Examining Side Letter Legal Implications For Korea FTA Changes*, *supra* note 3.

18. *See USTR Examining Side Letter Legal Implications For Korea FTA Changes*, *supra* note 3.

19. "[E]xtensive revisions to the text may lead the other party to abandon the agreement altogether. Furthermore, a cumbersome and time-consuming process for concluding executive agreements may serve as a disincentive to enter into negotiations with the United States in the first place." Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 243 (2009).

mented trade agreements since passage of the Trade Act of 1974.[20] When Congress granted fast track authority to the President in 1974, it did so in recognition of the fact that America's trading partners would not want to engage in lengthy negotiations that could then be undone by Congress.[21] U.S. negotiating credibility had been seriously injured as a result of unauthorized agreements that the Administration made during talks on the General Agreement on Tariffs and Trade ("GATT")[22] during the 1960s Kennedy Round.[23] Congress concluded that the President had overstepped his negotiating authority in two areas of the GATT agreement, and subsequently, Congress did not pass legislation to implement those two provisions.[24] With the President's negotiating authority codified under fast track, trading partners have the security that Congress will approve what the Administration agrees to at the bargaining table, something most trade experts believe other countries expect from the negotiation process.[25]

Having fast track in place also gives Congress an added measure of control in ensuring its interests are being met during negotiations, as it prevents the President from exceeding his authority.[26] Since each piece of legislation authorizing fast track includes specific negotiating objectives, the Administration knows it must operate within certain parameters.[27] Another benefit Congress derives from fast track is the ability to sidestep its own often cumbersome procedures for bringing a bill to a vote.[28] Legislation can languish for months or even years as Congress debates not only the merits of a bill, but also procedural protocols that may have nothing to do with the substance of the legislation itself.[29] Fast track procedures also prevent trade bills from getting bogged down, or killed altogether, as special interest groups exert pressure on legislators for lengthy amendments to trade bills.[30] Labor groups, in particular, have been very vocal against free trade agreements, and they have lobbied their legislators for worker protec-

20. HORNBECK & COOPER, *supra* note 3, at 4–5; 19 U.S.C. § 2191 (2006).

21. HORNBECK & COOPER, *supra* note 3, at 5.

22. GATT largely regulated the world's trading system after World War II. GATT was later replaced by the World Trade Organization. *See* World Trade Organization, *Understanding the WTO - The Uruguay Round*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Jan. 17, 2011).

23. *See* Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 146 n.8 (1992); LENORE SEK, CONG. RESEARCH SERV., IB 10084, TRADE PROMOTION AUTHORITY (FAST-TRACK AUTHORITY FOR TRADE AGREEMENTS): BACKGROUND AND DEVELOPMENTS IN THE 107TH CONGRESS 2 (Jan. 14, 2003).

24. *See* SEK, *supra* note 23, at 2.

25. *See* ROBERT E. BALDWIN & CHRISTOPHER S. MAGEE, CONGRESSIONAL TRADE VOTES: FROM NAFTA APPROVAL TO FAST-TRACK DEFEAT 2 (Institute for International Economics 2000).

26. *See* Hathaway, *supra* note 19, at 260–62.

27. *See* HORNBECK & COOPER, *supra* note 3, at 8.

28. *See* Koh, *supra* note 23, at 148.

29. *See* Craig VanGrasstek, *U.S. Trade Promotion Authority and the Doha Round*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV. 3 (Info. Note No. 3, Feb. 2008).

30. *See id.* at 2; *see also* Koh, *supra* note 23, at 148.

tions at every opportunity.[31]

B. Fast Track Procedures

The fast track procedures enacted in the Trade Act of 1974 remained virtually intact throughout the life of fast track.[32] The procedures called for (1) enumeration of specific trade negotiating objectives for a trade agreement, (2) requirements for the President's negotiators, such as consultation with congressional and private sector committees during negotiations, (3) rules and timelines for the President to submit the agreement and draft implementing bill to Congress, and (4) commitments by Congress to follow a timeline for considering the implementing bill and bringing it to a vote.[33]

Under fast track, Congress agrees to suspend its usual legislative procedures when considering trade implementing legislation.[34] Instead of following their ordinary timelines and procedures, under fast track, the House and Senate must each complete its review of trade legislation in forty-five days.[35] Debate is subject to strict time limits of no more than twenty hours in the House or Senate, and no amendments to the legislation are allowed.[36] Passage of the bill requires a simple up or down vote.[37] In return for Congress's suspension of its usual rules, the Administration must give Congress ninety days notice of its intention to begin negotiations of a trade agreement, keep Congress advised in a specified manner as negotiations proceed, and provide notification to Congress ninety days prior to signing the completed agreement, so that Congress can provide input on the bill before the bill is finalized and brought to a vote.[38] In particular, negotiators must consult with the House Ways and Means Committee and the Senate Finance Committee, as well as the Congressional Oversight Group that was created in the Trade Act of 2002.[39]

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31. *See, e.g.*, AFL-CIO Executive Council Statement, *Fast Track or the Right Track?* (Mar. 6, 2007), *available at* http://www.aflcio.org/aboutus/thisistheaflcio/ecouncil/ec03062007c.cfm; Rowland, *supra* note 5.

32. *See* I.M. DESTLER, RENEWING FAST-TRACK LEGISLATION 7 (Institute for International Economics 1997) [hereinafter DESTLER 1997]; Trade Act of 1974, 19 U.S.C. §§ 2101–2497(b).

33. DESTLER 1997, *supra* note 32, at 7–8.

34. 19 U.S.C. § 2191(f)(1), (g)(1) (2006). Since Congress has decided that trade agreements are not "self-executing," implementing legislation is necessary to make changes to U.S. law so that it conforms with the provisions of the FTA. *See* I.M. (Mac) Destler, *American Trade Politics in 2007: Building Bipartisan Compromise*, PETERSON INST. INT'L ECON. 15 (May 2007), http://www.iie.com/publications/pb/pb07-5.pdf [hereinafter Destler 2007].

35. 19 U.S.C. § 2191(e)(1).

36. *Id.* § 2191(d), (f)(2), (g)(2).

37. Hathaway, *supra* note 19, at 264.

38. HORNBECK & COOPER, *supra* note 3, at 11, 17–18. For a full enumeration of the timeline for Administration and Presidential actions under Fast Track, see *id.*

39. *Id.* at 10.

C. Legislative History of Fast Track

Fast track authority was in effect from 1974 through 1994 and was renewed again in 2002.[40] It expired in 2007 and Congress has not extended it since.[41]

1. The Trade Act of 1974

Before the passage of the Trade Act of 1974, multilateral trade agreements over tariff reductions did not require congressional approval, although Congress did set some limits on the types of reductions permitted.[42] However, in 1974, when the President's authority was extended to negotiate non-tariff barriers as well, Congress decided to add the requirement for congressional approval of any multilateral agreements that included non-tariff issues.[43] As noted previously, during trade negotiations in the 1960s Kennedy Round, U.S. negotiators impermissibly made agreements concerning non-tariff barriers that Congress subsequently refused to approve.[44] To restore confidence in the credibility of American negotiators and to give them the power necessary to address issues beyond tariff changes in subsequent negotiations, the Nixon Administration and Congress came up with a new way of handling the passage of trade agreements, an arrangement that became known as fast track authority.[45] Fast track was enacted in the Trade Act of 1974 for a five-year period ending on January 2, 1980.[46] The Trade Agreements Act of 1979 extended fast track authority for eight more years.[47] The Tariff and Trade Act of 1984 again amended the Trade Act of 1974, this time extending the authority for negotiation of non-tariff barriers in multilateral FTAs to also include the negotiation of bilateral FTAs.[48] The U.S.-Israel and U.S.-Canada FTAs were negotiated under the 1984 Trade Act.[49]

2. The Omnibus Trade and Competitiveness Act of 1988 ("OTCA")

The OTCA extended fast track procedures for agreements entered into before June 1, 1991.[50] Congress later granted the President permission to enter into trade agreements before June 1, 1993, but the President would

40. *Id.* at 7.
41. *Id.* at 1.
42. Congress prohibited certain products from duty cuts, limited levels of duty reduction, and required that implementation of significant duty cuts be gradual. BALDWIN & MAGEE, *supra* note 25, at 11.
43. *See id.*
44. *See* SEK, *supra* note 23, at 2.
45. *See id.* at 2–3.
46. 19 U.S.C. §§ 2101–2497(b).
47. *E.g.*, CAROLYN C. SMITH, CONG. RESEARCH SERV., RS 21004, TRADE PROMOTION AUTHORITY AND FAST-TRACK NEGOTIATING AUTHORITY FOR TRADE AGREEMENTS: MAJOR VOTES 2 (July 17, 2007); Trade Agreements Act of 1979, 19 U.S.C. §§ 2501–2582 (2006).
48. HORNBECK & COOPER, *supra* note 3, at 6; Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948.
49. HORNBECK & COOPER, *supra* note 3, at 6.
50. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

have to ask for a specific extension of fast track authority for the implementing legislation to be considered under fast track.[51] NAFTA passed under the OTCA as Public Law 103-182.[52] Since the OTCA, labor standards have been included as negotiating objectives under fast track provisions.[53] Although both the Clinton Administration and Republican Congress claimed to want a renewal of fast track, they were unable to agree on how labor and environmental issues should be handled in trade agreements.[54] As a result, fast track authority was not reauthorized and expired on April 16, 1994.[55]

3. Bipartisan Trade Promotion Authority Act of 2002

Fast track authority was granted again in Title XXI of the Trade Act of 2002.[56] To avoid the negativity associated with the term "fast track," when President Bush sought renewed authority in 2001, fast track was renamed "trade promotion authority" ("TPA").[57] Although fast track was renamed TPA, the structure of the negotiating authority remained the same.[58] The TPA included labor provisions in both the principal and overall negotiating objectives, but did not require inclusion of minimal enforceable labor standards in the FTA.[59] Labor groups and many members of Congress opposed the TPA because of this lack of labor standards.[60] The TPA passed in the House by just one vote.[61] The narrow margin of support by which fast track passed in 2002 helps explain why Congress decided not to extend TPA when it expired in 2007.[62] Congress had continuing concerns over FTAs, most of which were tied to the sagging economy and globalization.[63] Democrats were particularly concerned over the loss of U.S. manufacturing jobs—something that the party's labor support base continues to attribute to the job exodus since passing NAFTA.[64]

Under the 2002 TPA, the Administration negotiated free trade agreements with Chile, Singapore, Australia, Morocco, Bahrain, Oman, and the

51. *Id.*
52. NAFTA became effective on January 1, 1994. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-82, 107 Stat. 785.
53. *See* MARY JANE BOLLE, CONG. RESEARCH SERV., RL 33864, Trade Promotion Authority (TPA) Renewal: Core Labor Standards Issues 9–10 (June 13, 2007) [hereinafter BOLLE RL 33864].
54. *See id.* at 6 (discussing bipartisan efforts in trade agreements and legislation).
55. *See id.*
56. Trade Act of 2002, 19 U.S.C. §§ 3801–3813 (2010).
57. HORNBECK & COOPER, *supra* note 3, at 7.
58. *Id.*
59. *See id.*; Robert A. Rogowsky & Eric Chyn, *U.S. Trade Law and FTAs: A Survey of Labor Requirements*, U.S. INT'L TRADE COMM'N J. INT'L COM. & ECON. 1, 7–8 (2007), *available at* http://www.usitc.gov/publications/332/journals/trade_law_ftas.pdf.
60. HORNBECK & COOPER, *supra* note 3, at 7.
61. *See* Rangel, *supra* note 7, at 381 n.31.
62. *See id.* at 387.
63. *See* HORNBECK & COOPER, *supra* note 3, at 15.
64. *See* Andrew C. Schneider, *Democrats Threaten NAFTA, but Pact Is Here to Stay*, KIPLINGER, Apr. 3, 2008, http://www.kiplinger.com/businessresource/forecast/archive/nafta_and_political_candidates_080403.html.

Dominican Republic–Central American Free Trade Agreement, all of which passed through Congress under fast track procedures.[65] Prior to expiration of TPA on July 1, 2007, the U.S. signed free trade agreements with Colombia, Peru, Panama, and South Korea, but Congress has only approved implementing legislation for the U.S.-Peru FTA.[66]

II. U.S. Procedure for International Agreements

The President does not require fast track authority to negotiate a free trade agreement.[67] As discussed in Part I, fast track is simply an expedited procedure that provides assurance to America's trading partners that a negotiated agreement will make it through Congress expeditiously and without change.[68] There are several other ways that the President can enter into international trade agreements, including Article II treaties, sole executive agreements, and congressional-executive agreements.[69]

A. Presidential Role in International Agreements

Article II, Section 2, of the United States Constitution grants the President the power to make an international treaty, but the Senate must then approve the agreement by a two-thirds supermajority vote.[70] An exception arises in cases where a treaty itself authorizes subsequent agreements, allowing the President to unilaterally make those agreements without further approval from the Senate.[71] There are also "sole executive agreements" that the President makes based on his inherent constitutional authority, including his power as Commander-in-Chief of the military.[72] Most agreements take the form of "ex ante congressional-executive agreements" where Congress, through a simple majority vote in both Houses, authorizes the President to negotiate international agreements.[73] Once negotiated, these ex ante congressional-executive agreements are not subject to further congressional approval.[74] There are also "ex post congressional-executive agreements" that the President negotiates and then submits to both houses of Congress for an up or down vote.[75]

B. Presidential Authority to Negotiate FTAs

U.S. trade agreements such as NAFTA and KORUS have been treated

65. *E.g.*, JEANNE J. GRIMMETT, CONG. RESEARCH SERV., 97-896, WHY CERTAIN TRADE AGREEMENTS ARE APPROVED AS CONGRESSIONAL-EXECUTIVE AGREEMENTS RATHER THAN AS TREATIES 4 (Sept. 8, 2010).
66. HORNBECK & COOPER, *supra* note 3, at 7.
67. BALDWIN & MAGEE, *supra* note 25, at 2.
68. *See supra* Part I; *see also* BALDWIN & MAGEE, *supra* note 25, at 2.
69. *See* Hathaway, *supra* note 19, at 148–49.
70. U.S. CONST. art. II, § 2.
71. *See* SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 208 (Thomson/West 2006). This is known as a "treaty-based executive agreement." *Id.*
72. Hathaway, *supra* note 19, at 149, 154.
73. *Id.* at 149.
74. *Id.*
75. *Id.* at 148–49.

as congressional-executive agreements rather than as treaties.[76] Since the "Constitution grants Congress primary jurisdiction over 'commerce with foreign nations[,]'" some have questioned whether giving the President the right to negotiate free trade agreements under fast track gives the executive branch more power than that which the law entitles it.[77] On the one hand, the President has Article II authority to negotiate treaties and international agreements and to conduct foreign affairs.[78] On the other hand, Congress has the express power to impose duties and tariffs and to regulate foreign commerce.[79] However, even though Congress has express power in tariff matters, it can still delegate this authority to the President.[80] In a judicial challenge to NAFTA, it was alleged that the President's failure to use the treaty process rendered NAFTA and its implementing legislation unconstitutional.[81] However, in *Made in the USA Foundation v. United States*,[82] a federal appeals court held that whether international commercial agreements could be passed via an executive agreement, as opposed to a treaty, was a non-justiciable political question.[83] Consequently, free trade agreements continue to be handled as congressional-executive agreements.[84]

C. Congressional Role in Free Trade Agreements

Professor Oona A. Hathaway of Yale Law School argues that fast track (ex post congressional-executive) agreements are actually "more democratically legitimate" than others, since Article II treaties remove the House of Representatives from the lawmaking process and, with ex ante agreements, Congress hands over its power in advance—giving Congress little involvement in the final product.[85] By contrast, fast track agreements require the President to consult with Congress and to consider Congress's agenda during the entire negotiation process, since Congress has the ultimate power to vote the completed agreement up or down.[86] Congress can exert its authority over trade negotiations through several means, such as deciding which types of negotiations go forward, establishing what statutory guidelines should be used for negotiations, and consulting with the executive branch during the negotiating process to ensure that the implementing bill

76. *See* GRIMMETT, *supra* note 65, at 1 n.1.

77. DESTLER 1997, *supra* note 32, at 33–34. *See generally* Hathaway, *supra* note 19, for a discussion of the proper roles of the President and Congress in making international agreements.

78. *See* GRIMMETT, *supra* note 65, at 1 n.1 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 319 (1936)).

79. *See id.* (citing U.S. CONST. art. I, § 8, cls. 1, 3).

80. *See id.* at 2 n.2.

81. *See id.* at 5.

82. *See* 242 F.3d 1300 (11th Cir. 2001).

83. *See* GRIMMETT, *supra* note 65, at 6. Under the "political question" doctrine, a court will not make a ruling regarding political matters which are best left to the executive and legislative branches. *See id.*

84. *See id.* at 1.

85. Hathaway, *supra* note 19, at 261.

86. *See id.* at 261–62.

will reflect Congress's interests.[87]

Perhaps the most important tool that Congress has for controlling the contents of trade agreements negotiated under fast track authority is its ability to set negotiating objectives within the TPA legislation.[88] Although the Executive Branch has some discretion over how it implements the objectives that Congress sets, the objectives are considered "definitive statements of U.S. trade policy" and the Administration is expected to abide by them if it wants to use fast track procedures.[89]

There are different categories of negotiating objectives. "Overall objectives" provide the general direction that trade negotiations are expected to take, such as improving the American economy.[90] "Principal objectives" provide more detailed goals that Congress wants to accomplish in trade negotiations, such as reducing specific trade barriers or promoting labor rights.[91] Using the Trade Act of 2002 as an example, in its overall trade negotiating objectives, the Act expressed several goals pertaining to labor, such as raising living standards, promoting full employment in the United States, promoting respect for worker rights, and having signatory parties "strive to ensure" that they do not reduce labor protection to encourage trade.[92] In its principal negotiating objectives for labor, the Trade Act of 2002 specified the inclusion of provisions to ensure that a party does not fail to "effectively" enforce its labor laws and to strengthen the capacity of U.S. trading partners to respect core labor standards.[93]

Because the language written into a free trade agreement so closely resembles the objectives set forth in the actual fast track legislation, Congress's choice of specific words in the TPA to describe the negotiating objectives has often been extremely contentious and is blamed, in part, for the controversy over renewal of the TPA in 2002.[94] The congressional vote on whether to renew fast track authority is among the most critical trade votes that Congress makes, and it is also one of the most political, which explains why TPA legislation has not only passed so narrowly, but has also done so along partisan lines.[95] In 2002, for example, reauthorization of fast track authority passed the House by a margin of a single vote, with only seven Democrats voting in favor of the bill.[96]

III. Labor Protection in Free Trade Agreements

Labor provisions were not included in the first two fast track FTAs

87. *See* DESTLER 1997, *supra* note 32, at 34.
88. *See* HORNBECK & COOPER, *supra* note 3, at 8.
89. *Id.*
90. *Id.*
91. *Id.*
92. 19 U.S.C. § 3802(a)(4), (6), (7) (2002).
93. *Id.* § 3802(b)(11)(A), (C).
94. *See* HORNBECK & COOPER, *supra* note 3, at 8–9.
95. *See id.*; Rangel, *supra* note 7, at 381–82.
96. 19 U.S.C. §§ 3801–3813 (2002); Rangel, *supra* note 7, at 381 n.31.

with Israel and Canada.[97] However, starting with NAFTA, all FTAs have contained labor standards, as the United States has entered into negotiations with lesser-developed countries, and labor and trade policies have been increasingly linked.[98] Those seeking to include enforceable labor standards in FTAs have mixed goals.[99] On one hand, labor advocates have economic interests, and they want to protect American jobs by ensuring that American workers are not at a disadvantage when competing with workers overseas.[100] Developing countries competing for market share may impose low wages and poor working conditions in order to produce low-priced goods for export.[101] Other proponents of labor standards have a more humanitarian objective, however, and seek to promote improved working conditions for laborers around the world by ensuring that U.S. trading partners enforce minimum labor standards.[102]

The United States has implemented ten FTAs since 1993, including NAFTA, Jordan, Chile, Singapore, Australia, Morocco, Bahrain, Oman, CAFTA-DR,[103] and Peru.[104] These FTAs have used four main methods to provide labor protections.[105] NAFTA, negotiated under fast track authority, utilized a side agreement on labor.[106] For the Jordan FTA, which was not subject to fast track, a number of labor requirements were written into the body of the agreement.[107] The FTAs negotiated under the Trade Act of 2002's fast track authority included a single enforceable labor provision within the agreement.[108] Finally, the Peru FTA, which was negotiated under fast track but implemented after its expiration, incorporated enforceable labor concepts derived from the New Trade Policy for America.[109] This Part will examine the differences in protections and enforcement mechanisms in the four models.

A. NAFTA Side Agreement

The NAFTA agreement itself did not include labor provisions, but a side agreement, the North American Agreement on Labor Cooperation ("NAALC") addressed labor provisions.[110] As stated in Article I of the NAALC, the objectives of the Agreement are to:

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97. BOLLE RS 22823, *supra* note 10, at 2.
98. *See id.*
99. *See*, *e.g.*, BOLLE RL 33864, *supra* note 53, at 3.
100. *See id.*
101. *See* Edward Gresser, *Labor and Environment in Trade Since NAFTA: Activists Have Achieved Less, and More, Than They Realize*, 45 WAKE FOREST L. REV. 491, 515 (2010).
102. *See* BOLLE RL 33864, *supra* note 53, at 3.
103. Similar to NAFTA, CAFTA-DR is a regional agreement. It includes the Dominican Republic, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.
104. *E.g.*, BOLLE RS 22823, *supra* note 10, at 3.
105. *See id.* at 3–4.
106. *See id.* at 3.
107. *See* Rogowsky & Chyn, *supra* note 59, at 8.
108. BOLLE RS 22823, *supra* note 10, at 3.
109. *See* Gresser, *supra* note 101, at 497.
110. BOLLE RS 22823, *supra* note 10, at 3.

(a) improve working conditions and living standards in each Party's territory;
(b) promote, to the maximum extent possible, the labor principles set out in Annex 1;
(c) encourage cooperation to promote innovation and rising levels of productivity and quality;
(d) encourage publication and exchange of information, data development and coordination, and joint studies to enhance mutually beneficial understanding of the laws and institutions governing labor in each Party's territory;
(e) pursue cooperative labor-related activities on the basis of mutual benefit;
(f) promote compliance with, and effective enforcement by each Party of, its labor law; and
(g) foster transparency in the administration of labor law.[111]

Annex 1 to the NAALC further listed "guiding principles" for workers that the three signatory countries committed themselves to upholding.[112] While each country agreed to promote the labor principles listed in the Annex, "subject to each [p]arty's domestic law," the NAALC specified that the principles "did not establish common minimum standards for their domestic law."[113] Each nation maintained sovereignty over its own labor laws.[114]

The labor principles delineated in Annex 1 are listed below:
1. Freedom of association and protection of the right to organize.
2. The right to bargain collectively.
3. The right to strike.
4. Prohibition of forced labor.
5. Labor protections for children and young persons.
6. Minimum employment standards.
7. Elimination of employment discrimination.
8. Equal pay for women and men.
9. Prevention of occupational injuries and illnesses.
10. Compensation in cases of occupational injuries and illnesses.
11. Protection of migrant workers.[115]

Only three of these principles were made enforceable by sanctions: labor protections for children, occupational safety and health standards, and minimum wage employment standards.[116] There were no sanctions specified for a country's failure to enforce its own laws relating to organizing and collective bargaining, both of which labor advocates consider

111. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., art. 1, ¶ 1, Sept.14, 1993, 32 I.L.M. 1499 [hereinafter NAALC], *available at* http://actrav.itcilo.org/actrav-english/telearn/global/ilo/blokit/naalc1.htm.
112. *Id.* at Annex 1: LABOR PRINCIPLES, *available at* http://new.naalc.org/index.cfm?page=219.
113. *Id.*
114. *See id.*
115. *Id.*; North American Free Trade Agreement, Sept. 13, 1993, 19 U.S.C. §§ 3301–3473.
116. *See* Rogowsky & Chyn, *supra* note 59, at 7; *see also* NAALC, *supra* note 111, art. 29.

"basic core labor rights."[117] In contrast, NAFTA itself made all of the provisions relating to commercial issues fully enforceable.[118] Further, the NAALC places maximum limits on monetary enforcement assessments, while NAFTA places no cap on penalties for commercial compliance violations.[119]

If one of the signatories to the NAALC believes another is "demonstrating a persistent pattern of failure" to enforce the enumerated labor principles, a dispute resolution process is available.[120] Only governments have authority in the dispute resolution process, as NAALC procedures require private organizations and other non-governmental entities to pursue labor complaints through the government of one of the signatory nations.[121] Because governments are unlikely to take punitive action against another government for fear of retaliation, labor champions consider the NAALC mechanism for enforcement to be very ineffective.[122] NAALC's lack of enforcement teeth is evidenced by the fact that no government has ever brought a claim against another government under the NAALC.[123]

B. Jordan Free Trade Agreement

The Jordan FTA, signed on October 24, 2000, was the first free trade agreement to incorporate labor provisions within the actual body of the FTA.[124] The Jordan FTA was not negotiated under fast track procedures, as the authority had expired.[125] Article 6 of the Jordan FTA was devoted to labor issues.[126] In this Article, both countries reaffirmed their obligations as members of the International Labor Organization ("ILO")[127] and agreed not to promote trade by diminishing domestic labor laws.[128] In addition, Jordan and the U.S. recognized that each nation had the right to establish its own domestic labor standards.[129] Enforcement was specifically addressed in Article 6, Subpart 4, as follows:

Article 6: Labor

117. BOLLE RS 22823, *supra* note 10, at 5.
118. *Id.*
119. *Id.*
120. U.S. NATIONAL ADMINISTRATIVE OFFICE, BUREAU OF INTERNATIONAL LABOR AFFAIRS, NORTH AMERICAN AGREEMENT ON LABOR COOPERATION: A GUIDE (U.S. Dept. of Labor 2005), *available at* http://www.dol.gov/ilab/media/reports/nao/naalcgd.htm#Dispute Resolution.
121. *See* Frank H. Bieszczat, *Labor Provisions in Trade Agreements: From the NAALC to Now*, 83 CHI-KENT L. REV. 1387, 1394 (2008).
122. *See id.* at 1395.
123. *See id.*
124. Rogowsky & Chyn, *supra* note 59, at 8.
125. *Id.*
126. *See generally* Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, *available at* http://www.ustraderep.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf [hereinafter U.S.-Jordan FTA].
127. *See infra* Part IV for a discussion of the ILO.
128. U.S.-Jordan FTA. art. 6 §§ 1-2.
129. *Id.* § 3.

> 4. (a) A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.
>
> (b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.[130]

Although labor advocates hailed the Jordan FTA for including enforcement provisions directly in the agreement, requiring a country to "effectively enforce its labor laws" was not a particularly strong mandate, especially when a country could deem that other matters had a higher priority than labor, without suffering any penalty.[131]

Similarly, while the labor community praised the Jordan FTA for providing dispute resolution procedures and sanctions that equally applied to both the labor and commercial provisions of the agreement, these mechanisms also proved ineffective.[132] Initially, labor advocates believed that the equivalent procedures would make the enforcement of labor standards stronger than in prior FTAs.[133] However, in reality, the Jordan agreement turned out to have the same "soft obligations" as previous FTAs.[134] Although the agreement spelled out the dispute resolution procedure, before the FTA was presented to Congress, United States Trade Representative ("USTR") Robert Zoellick and Jordanian Ambassador Marwan Muasher exchanged letters stating that their governments would resolve any potential disputes without resorting to trade sanctions.[135] The letters reportedly stated the countries "would not expect or intend to apply the Agreement's dispute settlement enforcement procedures to secure its rights under the Agreement in a manner that results in blocking trade."[136] The Jordan FTA provided comparable treatment for labor and commercial disputes, but enforcement efforts were clearly designed to be limited, much to the dismay of labor proponents.[137]

C. Trade Agreements under the Trade Act of 2002

Under the fast track authority granted in the Trade Act of 2002, the United States implemented FTAs with Singapore, Chile, Australia, Morocco, the six CAFTA-DR countries (Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua), Bahrain, and

130. *Id.* art. 6.
131. *See id.* § 4.
132. *See id.* art. 17; Rangel, *supra* note 7, at 392.
133. *See* Rangel, *supra* note 7, at 392.
134. *See id.*
135. BOLLE RS 22823, *supra* note 10, at 3-4.
136. BOLLE RS 22823, *supra* note 10, at 4 n.5 (citing *Jordan Free Trade Agreement Approved by Finance and Ways and Means*, INSIDE U.S. TRADE, July 27, 2001).
137. *See id.* at 3-4.

Oman.[138] The provisions of these agreements all followed the framework and objectives established by Congress under the 2002 Act.[139] As discussed in Part II, Congress established both overall and principal objectives for promoting labor rights in the Trade Act of 2002.[140] One of the principal objectives for the United States with respect to labor was for the signatory countries to "strive to ensure" that they do not weaken or reduce labor protections to encourage trade.[141] However, principal negotiating objective 11(B), in a nod to principles of national sovereignty, essentially left the enforcement of labor standards in the hands of each country based on the country's discretion and assessment of national priorities, with a promise of no retaliation for "reasonable" decisions.[142] The labor provisions in the 2002 TPA followed the same general format and shared much of the same language as those set forth in the Jordan FTA.[143]

The Singapore FTA, which was the first negotiated under the 2002 fast track authority, included labor provisions that reflected the growing attention to labor in American trade policy.[144] The chapter on labor was three and a half pages long as compared to the half dozen paragraphs on labor contained in the Jordan FTA.[145] However, the extra space devoted to discussion of labor principles did not in any way enhance the enforcement provisions set out as objectives in the Trade Act of 2002.[146] Article 17.2 of the Singapore FTA, mirroring the 2002 TPA, simply required that each party "not fail to effectively enforce its labor laws," and again allowed "that each [p]arty retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities."[147] As former House Committee on Ways and Means Chairman Charles Rangel noted, "[E]ach party is merely required to 'effectively enforce' its own labor laws, whatever they may be."[148]

Rangel consistently has maintained that the FTAs negotiated under the 2002 fast track authority "did little more than pay lip service to labor rights."[149] Besides questionable enforcement standards, the FTAs made limited remedies available for labor violations, capped at $15 million, while there were no monetary limits on penalties for violations of other provisions of the agreements.[150] Additionally, while violations that were not

138. *E.g.*, Rogowsky & Chyn, *supra* note 59, at 8.
139. *Id.* at 7.
140. *See supra* Part II; 19 U.S.C. §§ 3801–3813 (2002).
141. *Id.* § 3802(a)(7).
142. *See id.* § 3802(b)(11)(B).
143. *See* Gresser, *supra* note 101, at 496.
144. *See* Rogowsky & Chyn, *supra* note 59, at 9.
145. *See id.*
146. *See id.* at 10.
147. United States–Singapore Free Trade Agreement art. 17.2, May 6, 2003, *available at* http://www.sice.oas.org/trade/usa-singapore/text_e.asp#CHAPTER%2017.
148. Rangel, *supra* note 7, at 391.
149. *Id.*
150. *See id;* BOLLE RS 22823, *supra* note 10, at 5.

related to labor could result in suspension of a trading partner's benefits under the FTA, labor violations were not subject to the same treatment.[151]

D. New Trade Policy for America

The New Trade Policy for America, agreed upon on May 10, 2007, included four enforceable labor provisions.[152] These requirements were (1) parties to FTAs would adopt and maintain in their laws and practices the labor standards in the ILO *Declaration on Fundamental Principles and Rights at Work* ("ILO Declaration"), (2) FTA countries would not lower their labor standards, (3) discretion on "prosecutorial" and "enforcement" priority would have limitations, and (4) the same dispute settlement mechanisms and penalties would be available for labor as for other FTA obligations (such as commercial interests).[153] The New Trade Policy terms were designed to be inserted into free trade agreements as "template language."[154] Much in the way that the language of negotiating objectives was agreed upon for fast track authority and inserted into the relevant FTAs, the language eventually used as the New Trade Policy template was agreed upon by the Bush White House and congressional leadership, and then added into newly negotiated FTAs.[155]

There were four pending FTAs at the time the New Trade Policy was adopted—with Peru, Colombia, Panama and South Korea.[156] Congress has only voted to implement the Peru FTA, and it insisted the New Trade Policy be added to the agreement before its passage.[157] The Peru FTA's labor chapter requires that each party "adopt and maintain in its statutes and regulations, and practices" the rights "as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)*."[158] However, there is a footnote to this requirement that notes, "The obligations set out in Article 17.2, as they relate to the ILO, refer only to the ILO Declaration."[159] Not requiring compliance with the ILO's follow-up procedures means that annual reports, which would document efforts to implement ILO core conventions, do not have to be filed with the ILO.[160] As Part IV will discuss further, this is an important provision for the United States because the U.S. has not ratified most ILO conventions due to incompatibility with U.S. labor law.[161]

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151. *See* Rangel, *supra* note 7, at 391.
152. BOLLE RS 22823, *supra* note 10, at 4.
153. *A New Trade Policy for America*, *supra* note 12.
154. BOLLE RS 22823, *supra* note 10, at 4.
155. *See id.*
156. *E.g.*, *id.*
157. *See* Gresser, *supra* note 101, at 497; United States–Peru Trade Promotion Agreement ch. 17, Apr. 12, 2006, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file73_9496.pdf.
158. United States–Peru Trade Promotion Agreement, *supra* note 157, art. 17.2. *See infra* Part IV for discussion of ILO.
159. United States–Peru Trade Promotion Agreement, *supra* note 157, art. 17.2(1) n.2.
160. See *infra* Part IV discussing U.S. and ILO conventions.
161. *See* Gresser, *supra* note 101, at 497–98.

The labor provisions in FTAs negotiated in compliance with the New Trade Policy are fully enforceable through the same dispute settlement mechanisms and penalties as any other obligations in the agreement.[162] As with all FTAs, dispute resolution for labor violations under the New Trade Policy resides with the Office of the United States Trade Representative ("USTR").[163] To date, no labor dispute has reached the USTR level under any FTA.[164]

IV. The ILO and WTO as Forums for Addressing Worker Protections

Any discussion of the impact that fast track procedures have on worker protections in free trade agreements necessitates an examination of what the appropriate forum is for addressing workers' rights. The New Trade Policy for America, for instance, in its attempt to protect labor, requires signatory parties to FTAs to comply with the labor requirements set forth in the ILO Declaration.[165] The International Labor Organization and the World Trade Organization have both been suggested as proper venues for dealing with workers' rights, rather than having labor standards written into individual FTAs. This Part examines the role of the ILO and WTO in setting international trade policies on worker protection.

A. The ILO

Currently, the ILO is the international body recognized as having authority over global labor matters.[166] The ILO is an agency of the United Nations that is made up of government officials, employers, and workers, all of whom have an equal voice in labor matters.[167] As of February 2010, 183 countries belonged to the ILO.[168] The ILO states that its mission is "promot[ing] opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity."[169] In order to accomplish these goals, the ILO develops international labor standards addressing the full range of issues related to

162. *See A New Trade Policy for America, supra* note 12.

163. BOLLE RS 22823, *supra* note 10, at 6.

164. *Id.*

165. *A New Trade Policy for America*, *supra* note 12. See *infra* Part IV.A.2 for a discussion of the ILO Declaration.

166. *See About the ILO*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/global/About_the_ILO/lang—en/index.htm (last visited Nov. 20, 2010).

167. *See International Labor Organization (ILO)*, *Bureau of International Labor Affairs,* UNITED STATES DEPARTMENT OF LABOR, http://www.dol.gov/ilab/programs/oir/ilo.htm (last visited Nov. 20, 2010).

168. *See Alphabetical List of ILO Member Countries (183 countries)*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/public/english/standards/relm/country.htm (last visited Nov. 20, 2010).

169. *See Mission and Objectives*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/global/About_the_ILO/Mission_and_objectives/lang—en/index.htm (last visited Nov. 20, 2010).

workers and their employment conditions.[170] These standards can take the form of a "convention," which is a legally binding international treaty that requires ratification by member countries, or "recommendations," which serve as non-binding guidelines for ILO members.[171] ILO representatives can propose conventions and recommendations at the ILO's annual International Labor Conference ("ILC").[172] Once the ILC adopts a labor standard, the ILO Constitution requires member nations to submit the standard to their government for consideration, or in the case of a convention, for ratification.[173]

1. ILO Conventions

The ILO has identified eight conventions as "fundamental."[174]

1. Forced Labour Convention (No. 29)
2. Freedom of Association and Protection of the Right to Organise Convention (No. 87)
3. Right to Organise and Collective Bargaining Convention (No. 98)
4. Equal Remuneration Convention (No. 100)
5. Abolition of Forced Labour Convention (No. 105)
6. Discrimination (Employment and Occupation) Convention (No. 111)
7. Minimum Age Convention (No. 138)
8. Worst Forms of Child Labour Convention (No. 182)

The United States has ratified only two of the ILO's eight core conventions—number 105 covering forced labor and number 182 relating to child labor.[175] In addition, the United States is considering Convention 111 on employment discrimination.[176] The United States has not ratified several conventions because its own labor laws are incompatible with the ILO conventions.[177] Five of the ILO's eight core conventions, numbers 29, 87, 98, 100, and 138, are in direct conflict with U.S. law and practice.[178] For instance, ratification of numbers 87 and 98, which relate to organizing and collective bargaining, would require "extensive revisions of longstanding principles of U.S. labor law."[179] American laws allow broader exclusions

170. *Id.* The ILO considers minimum standards of basic labor rights to include freedom of association, the right to organize, collective bargaining, abolition of forced labor, and equality of opportunity and treatment. *Id.*

171. *See Conventions and Recommendations*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/global/What_we_do/InternationalLabourStandards/Introduction/ConventionsandRecommendations/lang—en/index.htm (last visited Nov. 20, 2010).

172. *Id.*

173. *Id.*

174. *Id.*

175. Adam Greene, *U.S. Ratification of ILO Core Labor Standards*, U.S. COUNCIL INT'L BUS. 2 (Apr. 2007), *available at* http://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf.

176. *Id.*

177. *See* K.D. Raju, *Social Clause in WTO and Core ILO Labour Standards: Concerns of India and Other Developing Countries* 11 (Aug. 1, 2008) (unpublished), *available at* http://ssrn.com/abstract=1195305.

178. *See* Greene, *supra* note 175, at 3.

179. *Id. See also* C87 Freedom of Association and Protection of the Right to Organise Convention, 1948, http://www.ilo.org/public/libdoc/ilo/1948/48B09_45_engl.pdf (last

of collective bargaining rights and the right to strike, and several American states allow the hiring of replacement workers, a practice that is incompatible with the ILO's convention on the right to strike without interference.[180] While critics ask how the U.S. can insist its trading partners abide by ILO conventions that America itself has not ratified, the United States can point to the fact that although it has not ratified all of the ILO core conventions, American laws and practices meet or exceed virtually every ILO convention.[181]

Enforcement of ILO conventions is generally weak.[182] In most cases, countries do not ratify a convention until such time as their laws have already been made consistent with the convention, which does at least make it more likely that labor standards are actually being practiced.[183] Nevertheless, after a member nation has ratified an ILO convention, ensuring that the convention is actually followed is not only difficult to verify, but the ILO has "resisted the notion" of enforcing its conventions.[184] The ILO is not inclined to pursue a strict enforcement policy because it does not want to drive countries out of the organization simply because these nations want to avoid expending the resources necessary to come into full compliance with the conventions.[185] Another driving force behind the ILO's lax enforcement is the fact that, even in cases where violations are discovered, the ILO has little recourse against member nations, since the ILO has no real powers or mechanisms for enforcement.[186]

2. *ILO Declaration on Fundamental Principles and Rights at Work*

Since the United States has not ratified all of the ILO conventions, it is not legally obliged to comply with them.[187] However, as a member of the ILO, the U.S. is bound to observe the ILO Declaration, which was adopted in 1998.[188] The ILO Declaration commits all member nations "to respect and promote principles and rights" in four areas covering workers' rights,

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visited Jan. 18, 2011); C98 Right to Organise and Collective Bargaining Convention, 1949, http://www.ilo.org/public/libdoc/ilo/1949/49B09_88_engl.pdf (last visited Jan. 18, 2011).

180. *See* Raju, *supra* note 177, at 11. For a full discussion of how fast-track contributes to the erosion of federal and states rights, see generally William J. Kovatch, Jr., *Left out of the Game: Fast-Track, Non-Tariff Barriers, and the Erosion of Federalism*, 5 ILSA J. INT'L & COMP. L. 71, 71–91 (1998).

181. *See* International Labor Organization (ILO), *supra* note 167.

182. *See, e.g.*, Raju, *supra* note 177, at 11.

183. *See id.*

184. *See id.*

185. *See id.*

186. "[T]he ILO has no police force or labour inspectorate empowered to order a workplace to be made safer[.]" Anne Trebilcock, *ILO Conventions–Enforcement Procedures*, INTERNATIONAL LABOUR ORGANIZATION http://www.ilo.org/safework_bookshelf/english?content&nd=857170272 (last visited Nov. 20, 2010).

187. *See* Greene, *supra* note 175, at 2.

188. Int'l Labour Org. [ILO], *Declaration on Fundamental Principles and Rights at Work* (June 18, 1998), *available at* http://www.ilo.org/declaration/thedeclaration/lang–en/index.htm.

"whether or not [countries] have ratified the relevant Conventions."[189] These four areas are freedom of association and recognition of the right to collective bargaining, elimination of forced labor, abolition of child labor, and elimination of discrimination in respect of employment and occupation.[190] The commitment to the ILO Declaration includes adherence to a follow-up procedure, whereby member nations that have not ratified one or more of the core conventions are asked to make annual reports on "the status of the relevant rights and principles within their borders."[191] These reports are reviewed by a committee of independent expert advisers who then submit their comments to the ILO's Governing Body for consideration.[192]

Enforcement of the ILO Declaration, as with the ILO conventions, is limited. The Declaration provides for a "follow-up" whose aim is "to encourage the efforts made by the Members of the Organization to promote the fundamental principles and rights enshrined in the Constitution of the ILO . . ."[193] The ILO will provide assistance to member nations that require help to implement these fundamental principles and rights, such as offering "technical cooperation and advisory services" as well as "operational and budgetary resources" that will help promote the ratification and implementation of the ILO's conventions.[194] The goal of the ILO is to help bring nations into compliance with ILO conventions, rather than to punish them for their inadequacies in enforcing labor standards.[195]

B. The World Trade Organization

The World Trade Organization serves as an international forum for multilateral trade negotiations.[196] Once negotiations are completed and ratified by member nations, the WTO also administers the agreements and settles any disputes that arise over compliance with their provisions.[197] The WTO states that its main mission is "to help trade flow smoothly, freely, fairly and predictably."[198] The organization "has nearly 150 members, accounting for over 97% of world trade."[199]

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189. *Id.*

190. *Id.* The New Trade Policy for America requires that FTA countries practice the labor standards stated in the ILO Declaration. *A New Trade Policy for America, supra* note 12.

191. The ILO Declaration, *supra* note 188. The New Trade Policy has carved out the follow-up requirement. *See supra* Part III.

192. The ILO Declaration, *supra* note 188.

193. Int'l Labour Org. [ILO], *Annex 1. ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, art. I(1) (June 18, 1998), *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb277/pdf/d1-annex.pdf.

194. *Id.* art. 3.

195. *See id.* Annex 1., art. I.

196. World Trade Org. [WTO], *The WTO in Brief: Part 2: The Organization*, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm (last visited Jan. 18, 2011).

197. *Id.*

198. World Trade Organization [WTO], *The Organization* 7, *available at* http://www.wto.org/english/res_e/doload_e/inbr_e.pdf.

199. *Id.*

There is a lack of consensus among WTO members on whether the WTO, rather than the ILO, is the proper place to establish and enforce rules on labor.[200] Currently, labor standards are not subject to WTO rules and sanctions.[201] In fact, at the WTO's 1996 Ministerial meeting in Singapore, it specifically identified the ILO as the proper organization to deal with labor issues.[202] The Singapore Ministerial Declaration stated, "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them."[203] The WTO Ministers also promised that the WTO and ILO Secretariats would continue their "existing collaboration."[204] Although WTO trade agreements have not heretofore dealt with labor standards, the WTO readily acknowledges the controversy surrounding the linkage of labor standards and trade.[205]

Several developed countries, including the United States, have suggested that the World Trade Organization is the proper place for establishing a linkage between labor standards and trade.[206] The WTO not only has an elaborate system in place to investigate complaints and settle disputes, but it also permits retaliation for violations of its rules.[207] Further, the WTO wields substantial influence and power over international trade matters through its multilateral agreements, far surpassing the limited range of impact of the ILO standards referenced in the FTAs.[208]

As much as many developed countries want labor issues brought into the WTO, developing countries do not, out of concern that higher labor standards will affect the competitive edge they now enjoy with their lower wage workers.[209] Many developing countries also argue that labor standards proposed by developed countries are too difficult for them to meet at their current stage of economic development.[210] Finally, developing nations have charged that inserting labor requirements into trade negotia-

200. *See* DESTLER 1997, *supra* note 32, at 44.

201. World Trade Organization [WTO], *Trade and Labour Standards,* http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm (last visited Jan. 19, 2011).

202. *Singapore Ministerial Declaration* (Dec. 13, 1996), http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (last visited Jan. 19, 2011); *DOHA WTO Ministerial 2001: Ministerial Declaration* (Nov. 20, 2001), http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (reaffirming ILO's role in labor affairs). In 1999, the Seattle Ministerial Conference reached no agreement on the subject. *Labour Standards: Consensus, Coherence and Controversy*, *supra* note 7.

203. *Singapore Ministerial Declaration*, *supra* note 202.

204. *Id.*

205. *See Labour Standards: Consensus, Coherence and Controversy*, *supra* note 7.

206. *See, e.g.*, *Trade and Labour Standards*, *supra* note 201.

207. *See* Gary Burtless, *Workers' Rights: Labor standards and Global Trade*, 19 BROOKINGS INST. (Fall 2001), http://www.brookings.edu/articles/2001/fall_globaleconomics_burtless.aspx (last visited Jan. 19, 2011).

208. *See* Gresser, *supra* note 101, at 502.

209. *See Labour Standards: Consensus, Coherence and Controversy*, *supra* note 7.

210. *See id.*

tions is "little more than a smokescreen for protectionism."[211] The Singapore Ministerial Declaration stated, "We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question."[212] Notwithstanding this statement, developing countries fear that they would be pressured to comply with labor standards in the name of "international coherence," making them hesitant to bring labor issues into the WTO's regulatory sphere.[213]

The developing nations have succeeded so far, and labor standards have not been included in the WTO's latest round of "Doha"[214] negotiations.[215] However, as will be discussed in Part V, not only are developed nations increasingly pushing for a labor and trade linkage, so are non-government organizations and multinational corporations whose customers want higher labor standards imposed upon nations producing American imports.[216]

V. Protecting Labor's Interests

Although fast track is not required to negotiate a free trade agreement, fast track procedures vastly increase the chance that an agreement will make its way successfully through Congress.[217] However, labor advocates have long condemned the fast track mechanism, equating it with the contents of the FTAs that have been implemented under fast track.[218] They object to the labor provisions in the FTAs, considering them weak and unenforceable.[219] Yet, the multilateral trade agreements negotiated in the WTO, covering the vast majority of world trade, contain no labor provisions whatsoever, and the WTO has made the conscious decision that there will be no linkage between labor standards and trade.[220] From this perspective, America's bilateral free trade agreements, which do contain labor provisions, should be viewed as a real win for pro-labor interests, and getting the outstanding FTAs through Congress expeditiously should be the labor community's goal.

In this Part, I argue that labor proponents should not oppose fast track since, contrary to their insistence, it does provide a viable means for put-

211. *Id.*
212. *Singapore Ministerial Declaration*, *supra* note 202.
213. The WTO describes "international coherence" as "the phrase used to describe efforts to ensure policies move in the same direction." *Labour Standards: Consensus, Coherence and Controversy*, *supra* note 7.
214. The latest multilateral WTO negotiations began in Nov. 2001 in Doha, Qatar and are commonly referred to as the "Doha Round." *See* World Trade Organization [WTO], *Doha Development Agenda: Negotiations, Implementation and Development*, http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Jan. 19, 2011).
215. *See* Ctr. Int'l Dev. Harvard Univ., GLOBAL TRADE NEGOTIATIONS HOME PAGE, http://www.cid.harvard.edu/cidtrade/issues/labor.html (last visited Jan. 19, 2011).
216. *See id.*
217. BALDWIN & MAGEE, *supra* note 25, at 2.
218. *See, e.g.*, Rowland, *supra* note 5.
219. *See* Rangel, *supra* note 7, at 390–391.
220. For a discussion of the WTO, see *supra* Part IV.

ting forth a labor agenda. I advocate that Congress should reauthorize fast track authority, as it is an important tool for ensuring the United States maintains a prominent role in international trade and has a market for its exports—a market that can potentially create new American jobs. Finally, I suggest there are more effective means available than FTAs for labor champions to ensure that all workers have the protections they need.

A. TPA Provides the Opportunity to Promote Labor's Interests

Labor advocates need not fear that fast track will bring about reduced attention to labor issues in free trade negotiations, as prior trade acts authorizing TPA have laid out U.S. negotiating objectives that specifically included labor requirements.[221] In addition, any future TPA that Congress might authorize would undoubtedly require adherence to the New Trade Policy, as it was already retroactively added to both the Peru FTA and KORUS FTA.[222] Since the New Trade Policy requires observance of the ILO Declaration's core standards, and obligates governments to effectively enforce these standards, pro-labor groups have additional assurance that U.S. trade negotiating objectives will include labor protection.

Opponents of fast track often gloss over the fact that while TPA procedures limit debate and amendments once an implementing bill has reached Congress, the procedures do not prevent lobbyists, politicians, and even labor unions from providing input to FTAs during other stages of the process.[223] For example, the United Auto Workers Union ("UAW") reversed its original position opposing the KORUS FTA after the union received the opportunity to discuss the problems it had with certain terms of the agreement.[224] In explaining the UAW's reasons for ultimately supporting KORUS, even though it meant breaking ranks with virtually all of America's organized labor, the UAW's president noted, "[T]he UAW was consulted and played a meaningful role in the negotiations and was able to successfully influence the process and secure significant improvements to the automotive provisions in the trade agreement."[225] Fast track did not prevent the UAW from expressing its concerns about the KORUS FTA before the implementing legislation reached Congress for approval—it only dictated the timing and forum for the union's input.

Admittedly, the opportunity extended to the UAW for making comments is not altogether commonplace in American trade negotiations. In announcing the Obama Administration's 2010 Trade Policy Agenda, USTR Ron Kirk frankly acknowledged that the Administration has not adequately addressed the concerns of all its constituencies when negotiating

221. *See* BOLLE RL 33864, *supra* note 53, at 5.

222. *See* BOLLE RS 22823, *supra* note 10, at 3.

223. *See* HORNBECK & COOPER, *supra* note 3, at 9–10; VanGrasstek, *supra* note 29, at 4.

224. *See* United Auto Workers Union [UAW], *More on 2010 KORUS Trade Deal* (Dec. 15, 2010), http://www.uaw.org/articles/more-2010-korus-trade-deal.

225. *Id.*; Maggs, *supra* note 2.

past trade agreements.[226] However, in reiterating the importance of FTAs to the United States, Kirk asserted that in the future, the USTR's Office would consult more often with both Congress and the general public, in an effort to incorporate what stakeholders want included in a particular FTA.[227] Kirk noted,

> The Administration continues to believe that proper resolution and implementation of Free Trade Agreements with Panama, Colombia and Korea can bring significant economic and strategic benefits. However, there have been serious questions in America about some aspects of these pending pacts. Rather than brush these questions aside, we conducted extensive consultations with Congress, stakeholders, and the public on the pending Agreements, including a *Federal Register* Notice on Colombia and Korea to more precisely identify issues.[228]

Since the Obama Administration has stated that it is interested in hearing the positions of all the stakeholders in FTAs, the political climate today seems perfect for addressing a new authorization of TPA. With the willingness to entertain all viewpoints that the Obama Administration has expressed, members of Congress would have ample opportunity to make their wishes known concerning what they want to be included in a new TPA legislation's negotiating objectives. Congressional representatives are very aware of the need to satisfy their constituents, and labor has always been a powerful political force. However, satisfying labor's agenda in a trade bill is not an impossible task, given Congress's ability to frame the precise language of trade negotiating objectives.[229] If strong labor standards are written directly into a new trade bill to reauthorize fast track, Congress would have the opportunity to show its labor base that it is still very sensitive to labor's best interests. The time for Congress to reject objectionable aspects of fast track authority is when the Trade Act authorizing TPA is being put together, not when an individual FTA is up for a vote. This is the only way that the negative association between fast track and FTAs will ever be broken.

Labor advocates must rethink their position on fast track and support renewal of TPA as a means of expanding the U.S. export market. If crafted with due deliberation, TPA legislation can ensure there is labor protection for both American workers and those workers employed by our trading partners, thereby meeting the dual economic and humanitarian goals of the labor community.[230] As will be discussed in the next section, absent TPA, the U.S. is currently not undertaking any new free trade agreement negotiations. As a result, the U.S. is already falling behind other nations in international trade, a trend that economists believe will ultimately cost the

226. *See* RON KIRK, OFFICE U.S. TRADE REPRESENTATIVE, THE PRESIDENT'S 2010 TRADE POLICY AGENDA 10 (2010), *available at* http://www.ustr.gov/webfm_send/1673.

227. *See id.*

228. *See id.*

229. *See supra* Part II (discussing the congressional role in FTA creation).

230. *See supra* Part III (discussing goals of labor protection).

U.S. a significant number of jobs.[231]

B. TPA Renewal Can Improve U.S. Export Capacity and Stem American Job Losses

Based on historical experience, the President needs TPA to ensure passage of the pending FTAs with South Korea, Panama, and Colombia, as well as any other trade deals the U.S. wants to negotiate, including the Doha Round.[232] Leading economists such as Jagdish Bhagwati, a professor at Columbia University and a member of the Council on Foreign Relations, believe that TPA is "a prerequisite" for trade negotiations, and without it, the United States will be "losers in the world trade system."[233]

There is already evidence that world trade has started to pass the U.S. by, as other more trade-friendly nations enter into their own FTAs.[234] For example, Canada has entered into FTAs with both Colombia and Panama, causing U.S. wheat exporters great concern as they anticipate American market share will "decline precipitously" in South America as a result.[235] The European Union has similarly entered into FTAs with Colombia, Peru, Panama, and other Central American countries.[236] Although there are approximately 100 trade agreements currently under negotiation around the world, the U.S. is only party to one.[237] Considering that the U.S. has always been a leader in world trade, having international trade negotiations virtually at a standstill is a sign that something needs to change. I submit that the change needed is immediate reauthorization of the President's fast track authority, so that FTA negotiations with potential new trading partners can begin.

According to the U.S. Chamber of Commerce, "overseas markets represent 73% of the world's purchasing power, 87% of its economic growth, and 95% of its consumers."[238] The U.S. needs access to these overseas markets in order to stimulate the economy by generating more jobs. In his January 2010 State of the Union address, President Obama set a goal of doubling American exports over the next five years, which he

231. *See* GABRIEL H. SAHLGREN, COMPETITIVE ENTER. INST., THE UNITED STATES-SOUTH KOREA FREE TRADE AGREEMENT 6 (2007), *available at* http://cei.org/pdf/6189.pdf.

232. *See* Hathaway, *supra* note 19, at 243; VanGrasstek, *supra* note 29, at 1.

233. *See* SAHLGREN, *supra* note 231, at 4–5. Other countries will be reluctant to negotiate if Congress can amend an FTA. *See id.*

234. Rowland, *supra* note 5 (statement of Christopher Wenk, senior director of international policy at the U.S. Chamber of Commerce) ("Everybody is moving forward except for us right now[.]") (noting that unlike the U.S., the European Union is entering into new FTAs).

235. *See* U.S. WHEAT ASSOCS., U.S. WHEAT INDUSTRY 2010 POLICY PRIORITIES FOR THE ADMINISTRATION OF PRESIDENT BARACK OBAMA 2–3, *available at* http://www.uswheat.org/whatWeDo/tradePolicy/doc/C16D244A2D11AFBB852578300070EB99/$File/USW%20Policy%20Priorities%202010.pdf; JOHN MURPHY, UNIV. MIAMI CTR. HEMISPHERIC POL'Y, LOCKED OUT AND LEFT BEHIND: THE CONSEQUENCES OF U.S. INACTION ON TRADE 3 (2010), *available at* https://www6.miami.edu/hemispheric-policy/Murphy_PerspectivesPaper_Locked_Out_Left_Behind.pdf.

236. *E.g.*, MURPHY, *supra* note 235, at 3.

237. *E.g.*, *id.*

238. *Id.* at 1.

claimed could potentially result in two million jobs.[239] To capitalize on the export market, however, the U.S. must improve its tariff exposure with other nations. The World Economic Forum ranks the United States 114 out of 121 economies in terms of the tariffs U.S. exporters face when shipping their goods overseas.[240] FTAs are a proven way to lower or eliminate tariffs and therefore make foreign markets riper for American products. Yet without fast track, the prospects of new free trade agreements being passed are very slim.

Labor and its allies must reverse their longstanding position against FTAs and support the fast track legislation the President needs to get America's economy going again. In a May 2010 Chamber of Commerce study that looked at how FTAs with 14 countries benefited U.S. workers and companies over the past 25 years, researchers found that 17.7 million American jobs depended on trade with these partner countries.[241] The study also found that in the ten years from 1998 to 2008, U.S. exports to FTA trading partners increased almost three times faster than did U.S. exports to non-partners.[242] These findings show that American labor does not lose footing when the U.S. engages in free trade, despite rhetoric to the contrary.[243]

Blocking fast track will not improve the lot of workers. It will simply delay the passage of FTAs that, in the long run, could benefit workers by creating jobs. Another reality that organized labor and its backers must recognize is that, given how few FTAs there are, and how few of America's trading partners they encompass, free trade agreements may not be a particularly effective means for bringing about widespread international labor reform.[244] Although the U.S. government has traditionally used free trade agreements to create a linkage between labor and trade, as will be discussed, private industry has succeeded in finding other effective means for imposing labor standards on the nations with which America trades. The energy that organized labor expends campaigning against passage of a new TPA should instead be used to support the industry-initiated labor protection programs described below.

C. Proponents Have Better Means than FTAs to Promote Labor Standards

Linking trade and worker protections reflects what the public wants both in the U.S. and abroad. Americans want countries that take part in

239. *See* Helene Cooper, *Obama Sets Ambitious Export Goal*, N.Y. TIMES, Jan. 29, 2010, at B1; Rowland, *supra* note 5.

240. *E.g.*, MURPHY, *supra* note 235, at 2.

241. MURPHY, *supra* note 235, at 3 (citing U.S. CHAMBER COMMERCE, OPENING MARKETS, CREATING JOBS: ESTIMATED U.S. EMPLOYMENT EFFECTS OF TRADE WITH FTA PARTNERS 10 (2010), available at http://www.uschamber.com/sites/default/files/reports/100514_ftajobs_full_0.pdf.

242. *Id.*

243. For a description of some of this "rhetoric to the contrary," see Hall, *supra* note 6.

244. *See* Gresser, *supra* note 101, at 502, 515.

international trade agreements to maintain minimum standards for workers.[245] Polls in other nations, such as China, Mexico, and India, reveal the same support for including labor standards in trade agreements.[246] However, trade agreements are not the only way to bring about improved labor conditions for workers. As a result of the public's increased attention to labor issues, many multinational companies have established voluntary business codes and factory inspection protocols that offer workers far more protection than they receive through the labor provisions of FTAs.[247] Two decades ago, when FTAs such as NAFTA were first signed, most businesses viewed labor standards as a government issue.[248] Today, however, it has become commonplace for companies to establish codes of conduct and labor standards for their international suppliers.[249] Levi Strauss, Reebok, Starbucks, Sears, JCPenney, and Home Depot are among the many companies that require their overseas producers to meet company labor standards, regardless of local labor laws.[250]

The provisions of corporate conduct codes are quite similar to the labor stipulations of U.S. FTAs.[251] Similar to the labor provisions in FTAs, the codes also serve dual purposes. In most cases, corporations that establish voluntary business codes do so for humanitarian reasons, but they also do so for "self-interested reasons."[252] Brand name and company image are important commodities, and support for labor rights helps a company avoid offending socially conscious consumers.[253] A compelling illustration of what can happen when consumers become aware of labor abuses in overseas factories is the successful campaign that took place against apparel bearing the Kathie Lee Gifford logo, hurting the company's bottom line and tarnishing Kathie Lee Gifford's name.[254] Similar campaigns have taken place against Nike, Gap, Wal-Mart, and Disney, as consumer watchdog groups publicized reports of abusive labor conditions in these companies' manufacturing facilities overseas.[255]

A further indication that the marketplace, rather than trade agreements, may be a better place to forge labor protections can be found in the example of the apparel industry's corporate codes.[256] The apparel codes

245. *See, e.g.*, Destler 2007, *supra* note 34, at 7.

246. Support for labor standards was 84% in China, 67% in Mexico and 56% in India. *Id.*

247. *See* Gresser, *supra* note 101, at 520.

248. *See* Gresser, *supra* note 101, at 520–521.

249. *See* Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 675 (1995).

250. *See id.* at 686; Gresser, *supra* note 101, at 521.

251. *See* Gresser, *supra* note 101, at 524.

252. *See* Compa & Hinchliffe-Darricarrère, *supra* note 249, at 669; Gresser, *supra* note 101, at 515.

253. *See* Compa & Hinchliffe-Darricarrère, *supra* note 249, at 687, 689.

254. *See* Lance Compa, *Trade Unions, NGOs, and Corporate Codes of Conduct*, DEV. PRAC. 210, 211 (2004).

255. *See id.*

256. *See* Gresser, *supra* note 101, at 521.

provide more extensive coverage than FTAs, as they contain wage and safety measures, require adherence to the ILO Declaration, and call for factory inspections that are more comprehensive than those required by the ILO or the U.S. government.[257] There are similar codes of conduct governing workers' rights in other industries as well, including toys, cosmetics, and food.[258] Estimates are that business expenditures to ensure compliance with labor codes internationally actually exceed the amount spent by the U.S. Department of Labor and closely approach the annual budget of the ILO.[259]

Private sector codes have some definite advantages over government imposed standards. For one thing, the codes apply to all countries where a company does business, not just those who are formal American trading partners through a free trade agreement.[260] Additionally, by using private codes, labor violations are generally detected sooner, since companies perform regular factory inspections.[261] Enforcement is also more immediate and pronounced, as a company can quickly withdraw orders as a sanction for labor violations.[262]

Another advantage of private codes is that governments are not the only parties able to take action for labor violations, making it much more likely that infractions will be reported.[263] As noted in the earlier discussion of the weak enforcement mechanism of the NAALC, and the Jordan FTA's side letter that essentially nullified the agreement's trade sanctions, governments do not want to take actions against other governments, rendering most of the labor provisions in FTAs useless.[264] Leaving governments out of the enforcement process allows for flexibility in the terms of the codes that might otherwise be unavailable. The United States, as a member of the ILO and WTO, has certain trade obligations that constrain its free trade policies.[265] As a result, the U.S. can only go so far in its FTA negotiations without running afoul of other international rules.[266] Negotiations over aspects of FTAs, including labor enforcement, can suffer due to WTO limitations in terms of what the U.S. can demand of its trading partners.[267] Corporate codes, on the other hand, because they are established between private entities, have no such constraints, allowing companies a free hand in deciding on sanctions and penalties for labor violations.

Some of the seeming advantages of corporate codes also present corresponding disadvantages, however. For one thing, because corporate codes

257. *See id.* at 521–522.
258. *See* Compa, *supra* note 254, at 211.
259. Gresser, *supra* note 101, at 523. The U.S. Department of Labor spent $81 million in 2008 for international labor affairs. The ILO's budget for 2009 was $320 million. *Id.*
260. *See id.* at 524.
261. *See id.*
262. *See id.*
263. *See* Bieszczat, *supra* note 121, at 1395.
264. *See supra* Part III.
265. *See* Gresser, *supra* note 101, at 509.
266. WTO rules prevent the US from imposing certain penalties in FTAs. *Id.* at 515.
267. *See id.* at 510.

are private and voluntary, they do not have the same legal standing as labor provisions agreed upon between governments in FTAs.[268] Labor standards enumerated in a free trade agreement bind all of a country's industries equally. Studies have found that codes of conduct and inspection protocols work far better in certain sectors, such as apparel and footwear manufacturing, than they do in other industries, such as agriculture or those involving natural resources.[269] Without local government regulation or standards imposed by the labor provisions of trade agreements, protection for workers in some industries could remain weak or non-existent. However, since there are so many human rights groups, religious organizations, and members of the labor community advocating for increased implementation of corporate codes, it should only be a matter of time before the codes become more effective across all industries.[270]

Another potential problem with corporate codes that bears consideration is that self-monitoring allows a company to control the level of enforcement to which it subjects its suppliers, much the same way that labor provisions in FTAs allow American trading partners to determine the extent to which they will enforce their own labor laws. Although companies may establish a public image of responsibility to meet the expectations of their customers and shareholders, what really goes on behind factory doors is still a private matter.

There are enough companies that have taken concrete action out of genuine concern for their workers that voluntary corporate codes must be viewed as a better alternative to the labor standards established through free trade agreements. As noted above, business codes are more flexible than FTA provisions and cover more issues. Corporations can move swiftly to impose sanctions when there are labor violations, unencumbered by the political and regulatory constraints governments face. Finally, and most importantly, corporate codes have proven themselves effective in bringing about better wages and working conditions, as companies endeavor to ensure their labor practices do not offend consumers and hurt their bottom line. Successful consumer boycotts have made multinational corporations all too aware of what can happen if they do not enforce an appropriate level of labor standards in their factories. In contrast, not a single labor infraction under the provisions of any U.S. FTA has ever been reported to the Office of the USTR for resolution, bearing out the labor community's claims of the weaknesses in FTA enforcement capabilities.[271]

Congress should reauthorize fast track as a means of trade expansion and job creation, and it should include labor requirements in the TPA legislation's negotiating objectives. However, labor proponents should look beyond FTA labor provisions to business codes of conduct for better assur-

268. *See id.* at 525.

269. *See id.* at 524.

270. *See generally* Compa, *supra* note 254 (discussing the roles of various stakeholders in enforcing corporate codes).

271. Dispute resolution of all FTA provisions, including labor violations, rests with the USTR. BOLLE RS 22823, *supra* note 10, at 6.

ance that workers will be protected both in the United States and in our trading partners.

Conclusion

For more than three decades, fast track procedures have been used to negotiate free trade agreements. Yet the labor community and its friends in Congress still object to fast track, equating it with the FTAs fast track has helped to pass. Labor advocates contend that FTAs have led to job losses in the United States and degradation of labor standards in our international trading partners. While FTAs do include some iteration of labor standards, labor champions argue that the standards are not only ineffective, but they are not even enforced.

Fast track is not required to negotiate a free trade agreement, but its strict rules on congressional debate and amendments vastly improve the chance that an agreement will be passed. It is these very requirements, however, that have caused much of the criticism over fast track procedures. Labor advocates believe that they have not been given a meaningful opportunity to voice their opinion on the contents of trade agreements, which they believe has led to inadequate protections for both American workers and the laborers of our trading partners. The Obama Administration's announcement that it will consider the views of all stakeholders when negotiating future FTAs, and its recent consideration of the United Auto Workers' comments on the KORUS FTA, may finally put an end to concerns that there is no vehicle for labor's input into FTAs.

Labor proponents deserve credit for trying to establish working standards that all Americans can be proud of. However, they need not fear that reauthorizing fast track will weaken labor protections in FTAs. Previous versions of TPA have included negotiating objectives favorable to labor, and there is no reason why future TPAs would not similarly do so. Nevertheless, with such strong misgivings over the effectiveness of FTA labor enforcement, labor groups must consider that FTA provisions may no longer be the best means for achieving worker protections. Times have changed since the inception of fast track in 1974. Today, many multinational corporations have established voluntary codes of conduct that have proven far more effective in raising labor standards than have FTAs. Labor's cause might be better served if it joined with industry groups to further develop corporate conduct codes.

The President's fast track authority expired in 2007 and has not been renewed. Most trade experts believe the President needs TPA, since other nations will not want to negotiate trade agreements with the U.S. if they have no assurance that what they agree to at the negotiating table will make it through Congress unchanged. The U.S. has commenced no new FTA negotiations since fast track expired, although many other nations have done so, putting into jeopardy America's prominence in world trade. FTAs have the potential to open up world markets and generate new jobs, both in America and overseas. At this juncture, opposing a reauthorization of TPA would not be in labor's best interests.