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# THE RIGHT TO STRIKE: HOW THE UNITED STATES REDUCES IT TO THE FREEDOM TO STRIKE AND HOW INTERNATIONAL FRAMEWORK AGREEMENTS CAN REDEEM IT

EMILY C.M. O'NEILL\*

## I. INTRODUCTION

After months of attempting to negotiate an agreement on a new contract, employees of a textile manufacturing company in Star City, Arkansas decided to strike to improve their bargaining position.<sup>1</sup> In response to the strike, the company hired replacement workers to fill their jobs.<sup>2</sup> The company maintained production for nearly two years, keeping the replacement workers on the job permanently. Even after the workers had decided to end their strike and return to work, the company refused to reinstate them.<sup>3</sup>

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\* J.D., American University Washington College of Law; B.A. Political Science, 2005 Macalester College. I would like to thank Professor Fernanda Nicola for her indispensable guidance in the development of this article and my partner, family, and friends for their support. Additional thanks to the editors of the LABOR AND EMPLOYMENT LAW FORUM.

1. *See* Lance Compa, Human Rights Watch, Violations of Workers' Freedom of Association in the United States by European Multinational Corporations 107-09 (2010), available at <http://www.hrw.org/node/92719> (describing the circumstances preceding the strike, in which the employer's demands for the new contract would amount to effectively stripping benefits, rights, and protections built up over years of negotiations).

2. *See id.* at 109 (explaining that hiring replacement workers was the logical and legal next step after the company decided to continue operations).

3. *See id.* at 111 (indicating that management declined the striking workers' offer to negotiate a return to work once they decided to end their strike).

The company was a U.S. subsidiary of a Netherlands-based multinational corporation (“MNC”).<sup>4</sup> While the company’s hire of permanent replacements is legal in the U.S., the practice is virtually unheard of in the Netherlands, where labor rights are considered fundamental human rights.<sup>5</sup> Moreover, the Dutch MNC publicly touted its commitment to core International Labor Organization (“ILO”) Conventions on workers’ rights, under which the use of permanent strike replacements has been proscribed as incompatible with and a derogation of the fundamental right to strike.<sup>6</sup>

An increasingly global economy facilitates the ability of companies like the Dutch MNC to exploit loopholes and weak protections of workers’ rights in host countries, exacerbating the asymmetrical balance of power between businesses and workers.<sup>7</sup> When a company expands internationally, workers lose bargaining strength against that company, which can now hire abroad, where it is not necessarily held to the laws on wages, hours, and worker safety of its home country.<sup>8</sup>

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4. See *id.* at 109 (identifying Gamma Holding as the MNC, employing 65,000 workers in forty-two countries); see Robin F. Hansen, *Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill*, 26 BERKELEY J. INT’L L. 410, 414 (2008) (defining MNC as a multinational actor that coordinates its activities to generate profits on an aggregate level).

5. See Taco van Peijpe, *Employed or Self-Employed? The Role and Content of the Legal Distinction: Independent Contractors and Protected Workers in Dutch Law*, 21 COMP. LAB. L. & POL’Y J. 127, 151-52 (1999) (discussing trade union rights in the Netherlands as having their origins in international instruments such as the European Social Charter and ILO Conventions, which set out workers’ rights to collective action, including the right to strike, as fundamental).

6. See Lance Compa, Human Rights Watch, *Unfair Advantage: Workers’ Freedom of Association in the United States Under International Human Rights Standards 107-08* (2000) (providing the language of the company’s Code of Conduct on its commitment to social responsibility, in which it states its recognition of its employees’ right to organize to protect their collective and individual interests, citing ILO Conventions 87 and 98 on the freedom of association and the rights to organize and bargain collectively); cf. Int’l Lab. Org., Freedom of Ass’n Comm., *Complaint Against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)*, ¶ 92 Case No. 1543, Report No. 272 (May 1991) [hereinafter ILO Complaint Against the United States, Case No. 1543] (expressing the ILO Committee on’s position that the use of striker replacements is a violation of the right to strike, one of the essential means through which workers defend their interests).

7. See The World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All 77* (2004), available at <http://www.ilo.org/public/english/wcsdg/docs/report.pdf> (contrasting MNCs’ growing influence through economic power with the diminished influence of trade unions, which have traditionally been the counterweight to the power of business, caused by increased mobility of businesses seeking lower production costs).

8. See Verena Schmidt, *Editorial Overview, in Trade Union Responses to Globalization: A Review by the Global Union Research Network 1, 3* (Verena Schmidt ed., 2007) (pointing out that while the enhanced coordination of economic activity between countries has benefited corporate governance, it has negatively impacted labor rights by placing high value on inexpensive labor, reducing the relevance of national labor legislation in many countries).

World-wide competition results in the weakening of protections for workers. As governments compete to attract international investors through “business-friendly” labor legislation that reflects downward pressure on costs, worker protections are often sacrificed.<sup>9</sup> This “race to the bottom” underscores the need for effective international labor standards.<sup>10</sup>

The ILO is generally viewed as the principal authoritative organization charged with development and promotion of international labor standards.<sup>11</sup> While there is a consensus that the ILO’s core principles set the floor for global rules for labor in the world economy,<sup>12</sup> U.S. labor law and practice often does not even meet this minimum standard, despite its insistence that other states adopt international labor standards.<sup>13</sup> In fact, the U.S. itself has ratified only two of the ILO’s eight core labor Conventions.<sup>14</sup> This Note examines the inadequacy of U.S. labor law in safeguarding one key ILO principle: the guarantee of the right to strike.<sup>15</sup> It argues that under current U.S. labor law,

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9. See Harry Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271, 281 (2001) (describing the two models of labor policies adopted by countries in the context of globalization: the first involves a structural change to the economy to prevent wage-driven inflation from reducing profits, the second involves a failure to reform national labor law to adjust globalization’s new threats to worker protections).

10. See, e.g., Phillip R. Seckman, *Invigorating Enforcement Mechanisms of the International Labor Organization in Pursuit of U.S. Objectives*, 32 DENV. J. INT’L L. & POL’Y 675, 678–88 (2004) (illustrating the negative impact of increased mobility of capital and absence of labor law enforcement on U.S. workers’ willingness to organize for better protections for fear of an employer moving operations abroad as a race to the bottom; explaining that the ILO uses Conventions to establish a minimum for worker protections and its recommendations to promote higher standards).

11. See *id.* at 684 (explaining that while other sources for international labor law exist, the ILO’s conventions and recommendations constitute the foundational principles through which the organization carries out its mandate to improve labor standards).

12. See The World Commission on the Social Dimension of Globalization, *supra* note 7, at 91 (declaring that the consensus that ILO principles provide a minimum set of global rules for labor exists among those in the labor movement, arising out of a concern for the impact increased economic competition has on labor standards).

13. See Arthurs, *supra* note 9, at 286 (pointing out the inconsistencies in the U.S. position that countries that do not adhere to core labor standards should be denied membership in the WTO with the U.S.’s own failure to ratify ILO Conventions that establish the core standards).

14. See Int’l Trade Union Confed. [ITUC], *Internationally Recognized Core Labour Standards in the United States of America*, *Report for the WTO General Council Review of the Trade Policies of the United States of America* at 1 (Sep. 29 & Oct. 1, 2010), available at [http://www.ituc-csi.org/IMG/pdf/finalUS\\_CLS\\_2010.pdf](http://www.ituc-csi.org/IMG/pdf/finalUS_CLS_2010.pdf) (identifying the two core ILO Conventions ratified by the U.S.: the Convention on the Worst Forms of Child Labor and the Convention on the Abolition of Forced Labor).

15. The right to strike is embodied in the principles of freedom of association and the rights to organize and bargain collectively. See discussion *infra* Part I.A.2; see also Steve Charnovitz, *The ILO Convention on Freedom of Association and its Future in the United States*, 102 AM. J. INT’L L. 90, 93 (quoting the ILO 1998 Declaration on Fundamental Principles and Rights at Work, which reinforces the fundamental status of the freedom of association and right to collective bargaining and obligates member states to respect, promote, and realize the principle).

which allows employers to hire permanent replacements for striking workers the right to strike is stripped of protections and rendered a ‘freedom’ to strike.

Notwithstanding globalization’s negative impact on workers’ rights, it also presents opportunities for fostering workplace democracy and defending workers’ interests.<sup>16</sup> The proliferation of MNCs creates openings for transnational collaboration of labor organizations in confronting global employers and demanding improved working conditions.<sup>17</sup> In this context, this Note will explore the potential of International Framework Agreements (“IFAs”) to bring U.S.-based companies into compliance with international standards on the right to strike. Negotiated between global unions and MNCs, IFAs establish an ongoing relationship between the parties and ensure that the MNC respects the same standards in all the countries in which it operates.<sup>18</sup> MNCs that sign IFAs commit to adhere to the four fundamental principles and rights at work, as articulated by the ILO.<sup>19</sup> Importantly, IFAs, which are predominantly based in Europe, frequently reach beyond conduct of the signatory parent MNC, to

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16. See Schmidt, *supra* note 8, at 3 (pointing out that notwithstanding globalization’s obstacles to organizing, which has historically been done at national levels, opportunities also exist; for example lobbying international institutions and building alliances with non-governmental organizations).

17. See *id.* at 1 (acknowledging that globalization has enabled workers to negotiate transnationally through creative tactics involving broader networking and transnational alliance building with other workers and engagement with international organizations to influence their policies); cf. Lisa P. Rudikoff, Symposium, *International Framework Agreements: A Collaborative Paradigm for Labor Relations*, Global Working L. Papers, 2005, at 1-2, available at [http://www.law.nyu.edu/global/workingpapers/2005/ECM\\_DL015787](http://www.law.nyu.edu/global/workingpapers/2005/ECM_DL015787) (discussing the impact of the “race to the bottom,” characterized by under-enforcement of labor rights by states to attract investment, as the impetus for adopting new strategies and methods of organizing workers among unions).

18. See Press Release, Int’l Lab. Org., *International Framework Agreements: A Global Tool for Supporting Rights at Work* (Jan. 31, 2007), available at [http://www.ilo.org/global/about-the-ilo/press-and-media-centre/press-releases/WCMS\\_080723/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/press-and-media-centre/press-releases/WCMS_080723/lang--en/index.htm) (providing responses to an interview with Dominique Michel, Team Leader of ILO’s Multinational Enterprise Program).

19. These four principles are (1) prohibition of forced labor; (2) prohibition of discrimination based on gender, race, ethnicity, and religion; (3) prohibition of child labor; and (4) freedom of association and the right to collective bargaining. See Kimberly Ann Elliott & Richard B. Freeman, *Can Labor Standards Improve Globalization?* 12 (Inst. for Int’l Econ. 2003) (generalizing that while the content of IFAs vary with regards to other various ILO standards, they all, at minimum, refer to the core ILO Core Conventions); see also Renee-Claude Drouin, *Objectionable Work: Promoting Fundamental Labor Rights Through International Framework Agreements: Practical Outcomes and Present Challenges*, 31 COMP. LAB. L. & POL’Y J. 591, 594 (2010) (maintaining that the four core standards constitute the minimum commitment required by global unions as a condition of signing an agreement).

actors along the supply chain, subsidiaries and suppliers, which are frequently based in the United States.<sup>20</sup>

This Note examines how the U.S. policy on permanent strike replacements deviates from ILO principles on the right to strike. By permitting employers to hire permanent replacements for striking workers, the United States fails to live up to its commitment as a member of the ILO to respect and promote this fundamental right. Part I will explore IFAs as a potential tool to bring U.S. companies into compliance with ILO principles on the right to strike, exceeding their obligations under domestic labor law. Part II reviews the role of the ILO in establishing international labor standards and the right to strike under such standards.<sup>21</sup> Additionally, Part II examines the right to strike in the United States and how it has been interpreted in case law.<sup>22</sup> Finally, part II discusses IFAs and their use in promoting global labor standards among MNCs.<sup>23</sup> Part III analyzes the extent to which the United States' permanent strike replacement policy contravenes international principles by stripping down the 'right' to a mere 'freedom' to strike.<sup>24</sup> Part III next explores the potential of IFAs to bring U.S.-based subsidiaries of signatory MNCs into compliance with international norms on the right to strike despite the U.S. government's failure to comply with the ILO.<sup>25</sup> Finally, Part IV recommends that the U.S. should ratify the two ILO Conventions that form the basis of the right to strike and global unions should strengthen their enforcement mechanisms to ensure that U.S. companies are adhering to the international norms of the right to strike.<sup>26</sup>

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20. As large companies are increasingly subcontracting their production processes, corporate chains of activity often stretch over huge distances, spanning vast networks of production. See Jane Wills, *Bargaining for the Space to Organize in the Global Economy: A Review of the Accor-IUF Trade Union Rights Agreement*, 9 REV. INT'L POL. ECONOMY 675, 680 (2002); see also Peter Wilke & Kim Schütze, *Background Paper on International Framework Agreements for a Meeting of the Restructuring Forum Devoted to Transnational Agreements at Company Levels* 5 (Jun. 2008), available at [http://www.anticipationofchange.eu/fileadmin/anticipation/Logos/Documents/new\\_set\\_5509/pres/Wiltke.pdf](http://www.anticipationofchange.eu/fileadmin/anticipation/Logos/Documents/new_set_5509/pres/Wiltke.pdf) (emphasizing that the enforcement of international labor laws by MNCs to subsidiaries and suppliers is one of the most important features of IFAs in that it requires employers to be more amenable and respectful to workers that wish to unionize).

21. See discussion, *infra* Part II.A (explaining the purpose and functions of the ILO, which is to establish a minimum, global standard of labor rights to protect workers from the exploitations arising out of globalized economic competition).

22. See discussion, *infra* Part II.B (discussing the National Labor Relations Act as the primary source of labor law in the United States and evaluating the right to strike it has been interpreted by the Supreme Court with regard to permanent strike replacements).

23. See discussion, *infra* Part II.C (explaining the origins of IFAs in connection with corporate social responsibility and confronting globalization's effects on workers' rights).

24. See discussion, *infra* Part III.A (analyzing how the use of permanent strike replacements results in the reduction of the 'right' to strike to the 'freedom' to strike by removing the employer duty to refrain from interference with the exercise of the right, thereby stripping protections for workers).

25. See discussion, *infra* Part III.B (arguing that IFAs bind suppliers and subsidiaries to ILO norms even when they exceed the standards of the countries in which they operate).

26. See discussion, *infra* Part IV (discussing means of strengthening the implementation of IFAs to promote MNC compliance).



## II. BACKGROUND

### *A. International Labor Standards Under the ILO*

#### *1. The ILO's Role in International Labor Law*

The ILO is the principal organization charged with promoting international norms on labor rights.<sup>27</sup> A principal motivation behind the formation of the ILO at the beginning of the twentieth century was to promote a fair and inclusive process of globalization.<sup>28</sup> The ILO sought to enhance worker protections in all member states to both reduce the competitive disadvantage faced by states with greater protections, and to prevent the exploitation of lax labor regulations at the expense of workers.<sup>29</sup> To this end, the ILO adopts and implements international labor standards such as the right to form trade unions and bargain collectively; the protection from child labor, forced labor, and discrimination; the guarantee of safe and healthy working conditions; and social security.<sup>30</sup>

Members of the United Nations automatically become members of the ILO, and states that are not United Nations members can become members of the ILO by approval of a qualified majority of the International Labor Conference.<sup>31</sup>

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27. See Lee Swepston, *Human Rights Complaint Procedures of the International Labor Organization*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 85, 85 (Hurst Hannum ed., 3d ed. 1999) (providing that the ILO was established in 1919 as the leading organization in establishing international mechanisms for the protection of labor rights).

28. See Int'l Lab. Org., *ILO History*, <http://www.ilo.org/public/english/about/history.htm> (identifying three motivations behind the formation of the ILO: (1) humanitarian, reflecting a concern for diminished conditions of exploited workers; (2) political, out of fear that workers' inability to improve their conditions might lead to unrest and even revolt; and (3) economic, to promote fair competition); see also SCHMIDT, *supra* note 8, at 8 (noting that even before globalization existed, the ILO Declaration of Philadelphia in 1944 laid the foundation for the organization's work on fair globalization by emphasizing the social injustices created by transnational business).

29. See *id.* (observing that higher costs of production stemming from greater protections for workers disadvantages competitors and creates a disincentive for countries to regulate labor conditions within their borders).

30. See Swepston, *Human Rights Complaint Procedures of the International Labor Organization*, *supra* note 27, at 86 (explaining that the ILO adopts international labor standards through conventions and recommendations that are subsequently promoted through ratification by member states, which requires them to implement them into national law).

31. See Matteo Borzaga, *Company and Labor Law: Accommodating Differences: Discrimination and Equality at Work in International Labor Law*, 30 VT. L. REV. 749, 753 (2006) (explaining that this is a departure from the ILO's original conditions of membership, which made members of the League of Nations automatic membership to the ILO).

2. *Freedom of Association and Right to Organize and Bargain Collectively as Fundamental Principles of International Labor Law*

Recognized in the preamble of the 1919 Constitution of the ILO, workers' freedom of association is a foundational principle in international labor law.<sup>32</sup> In 1948, the ILO codified freedom of association when it adopted the Convention Concerning Freedom of Association and Protection of the Right to Organize ("Convention No. 87"), declaring workers' right to establish and join trade unions.<sup>33</sup> The following year, in 1949, the ILO adopted the Convention on the Right to Organize and Collective Bargaining (Convention No. 98) as a follow-up to the previous year's session.<sup>34</sup> These two Conventions are treated integrally as one collective right of workers to organize to defend their interests.<sup>35</sup>

Convention 87 provides workers with the right to form and join organizations.<sup>36</sup> The guarantee of freedom of association is the most fundamental of rights to workers because it allows for the exercise of all other rights.<sup>37</sup> Most significantly, workers' right to organize and the right to collectively bargain flow from this basic right.<sup>38</sup>

Convention 98 allows workers to engage their employer in pursuit of their interests as one collective entity, without interference, retaliation, or

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32. See Harold Dunning, *The Origins of Convention No. 87 on Freedom of Association and the Right to Organize*, 137 INT'L LAB. REV. 149, 163 (1998) (providing that the principle would later be codified in 1944 Declaration of Philadelphia, which is contained in the Constitution, as the second of four fundamental principles on which the Organization is based; emphasizing that importantly, membership of the ILO requires formal acceptance of obligations in the Constitution, including both the Preamble and the Declaration of Philadelphia, both of which embody the principle of freedom of association).

33. Int'l Lab. Org., *Convention Concerning Freedom of Association and Protection of the Right to Organise*, 68 U.N.T.S. 17 (1948) [hereinafter ILO Convention No. 87].

34. Int'l Lab. Org., *Convention Concerning the Application of the Principles of the Right to Organise and Bargain Collectively*, 96 U.N.T.S. 257 (1949) [hereinafter ILO Convention No. 98].

35. See Dunning, *supra* note 32, at 163 (contending that the right to organize and bargain collectively, embodied in Convention 98, enlarged the principles of freedom of association to make them better suited to enactment and practice).

36. ILO Convention No. 87, *supra* note 33, art. 2 ("Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization").

37. See Compa, *Unfair Advantage*, *supra* note 6, at 13 (explaining that this freedom is the foundation upon which all other labor rights under international law rest, such as how, for example, the right of workers to organize to improve working conditions is based in their freedom of association at the workplace).

38. See *id.* (describing the right to bargain collectively as the practical implementation of the ideals represented in the rights of association and organizing).



discrimination with respect to their employment.<sup>39</sup> The purpose of this right is to give workers a unified voice to equalize the power relationship between management and gain favorable terms of employment.<sup>40</sup>

The principles embodied in the Conventions are based on the recognition that the inherently unequal employer-employee relationship undermines fair negotiation of individual worker contracts.<sup>41</sup> Collective bargaining can create a greater balance of power in the employment relationship and enable workers to negotiate dignified terms of employment.<sup>42</sup> The Conventions guarantee workers the freedom to take collective action to defend their workplace interests and promote the exercise of trade union rights by prohibiting anti-union discrimination and acts that interfere with collective action.<sup>43</sup>

The United States has not ratified either of these Conventions, but nonetheless must respect the principles as a member of the ILO.<sup>44</sup> In its 1998 Declaration on Fundamental Principles and Rights at Work (“Declaration”), the ILO stated that, of the more than 180 Conventions it has adopted, eight should be considered fundamental.<sup>45</sup> Included in the eight enumerated in the

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39. See ILO Convention No. 98, *supra* note 34, arts. 1, 2(1) (providing protection from calculated dismissals from work or other prejudice in retaliation for union activity; declaring that workers’ organizations shall be free from employer interference).

40. See COMPA, *Unfair Advantage*, *supra* note 6, at 13 (explaining workers’ choice of collective representation over individual bargaining with an employer as the basis for organizing).

41. See Bernard Gernigon, Int’l Lab. Org., *Collective Bargaining: Sixty Years After its International Recognition* 1 International Workers’ Symposium, CSAC98/2009 (Oct. 12-15, 2009), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/--actrav/documents/meetingdocument/wcms\\_114972.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/--actrav/documents/meetingdocument/wcms_114972.pdf) (identifying the basis of the ILO’s recognition of the principle of collective bargaining as an acknowledgement of the economic inequality that exists in the employment relationship); see also OTTO KAHN-FREUND & BOB HEPPLER, *Laws Against Strikes*, in INTERNATIONAL COMPARISONS AND SOCIAL POLICY 6 (1972) (arguing that the only way to address the dominant influence of accumulated capital is through the unified effort of workers).

42. See *id.* at 1 (assessing that the balance arises out of the fact that workers can be represented by trade unions that engage in discussions with an employer about terms of employment).

43. See *id.* (considering the significance of the ILO’s recognition of collective bargaining rights as giving an international dimension to an already common practice in industrialized countries).

44. See Charnovitz, *supra* note 15, at 90 (providing that while the United States voted for the ILO’s adoption of Convention 98, the government’s position for not ratifying it was based on the assumption that freedom of association was already recognized in the U.S. Constitution); see also GERNIGON, *supra* note 41, at 2 (reporting that ratification of Convention 98 by region is highest in Europe (100%), Africa (98%), and the Americas (91%)). See generally discussion *infra* Parts III (discussing the U.S. commitment to respect, promote, and implement certain ILO principles as fact of membership).

45. See Melissa Torres, *Labor Rights and the ATCA: Can the ILO’s Fundamental Rights Be Supported through ATCA Litigation?*, 37 COLUM. J.L. & SOC. PROBS. 447, 455 (2004) (identifying the origins of the 1998 Declaration at the 1995 World Summit on Social Development in Copenhagen, “where the heads of state first acknowledged the existence of certain fundamental workers’ rights, including the right to organize and bargain collectively”).

Declaration are the freedom of association and the right to collective bargaining, derived from Conventions 87 and 98.<sup>46</sup> Importantly, the Declaration states that all members, irrespective of ratification of the principal Conventions in question, have an obligation to respect, promote, and realize in good faith the eight fundamental principles, which arise from the very fact of membership in the ILO.<sup>47</sup> Thus, while the United States has not ratified Conventions 87 and 98, the U.S. nonetheless has an obligation to respect the fundamental ILO principles of freedom of association and the right to organize and bargain collectively. Pursuant to this obligation, member states that have not ratified all of the Conventions relevant to the Declaration, like the United States, must submit annual reports on their progress in implementing the fundamental rights enshrined in the Declaration.<sup>48</sup> Additionally, the ILO issues a Global Report based, in part, on findings of the member states' annual follow-ups.<sup>49</sup>

### 3. *The ILO on the Right to Strike*

The right to strike has been established by the ILO as an essential tool for workers to exercise their freedom of association and right to organize.<sup>50</sup> Although the right is not explicitly stated in the ILO Constitution or expressly recognized in ILO Conventions 87 and 98, ILO supervisory bodies<sup>51</sup> have firmly established the right as an essential element of union rights for decades.<sup>52</sup> Although no amendment establishing the right was ever submitted

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46. International Labour Conference, *ILO Declaration on Fundamental Principles and Rights at Work and Annex*, Int'l Legal Materials, Jun. 18, 1998, at 1234, available at 1998 WL 778019. [hereinafter ILO Declaration on Fundamental Principles] The other three rights, also derived from previously adopted Conventions are the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.

47. *Id.* at 1237.

48. *Id.* at 1238–39 (establishing the follow-up mechanism as a review of efforts made by member states to accord with the Declaration and ultimately promote full compliance).

49. *Id.* at 1239 (providing that the Global Report is drawn up under the responsibility of the Director-General with the purpose of providing a global picture on adherence to the four fundamental principles of the Declaration, which can then be used to set priorities and plans for cooperation in the implementation of the rights).

50. See INT'L LAB. ORG., FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO ¶ 145 (5th rev. ed. 2006) [hereinafter ILO Digest of Decisions of the CFA] (declaring the right to strike a fundamental corollary of principles of Conventions 87 and 98).

51. See INT'L LAB. ORG., *Applying and Promoting Int'l Labour Standards*, <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang-en/index.htm> (discussing the ILO's supervisory bodies examining of reports on member states' implementation of ILO labor standards based on submissions by member states and observations of workers' and employers' organizations.)

52. See, e.g., INT'L LAB. ORG., FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING: THE RIGHT TO STRIKE, REPORT III Part 4B ¶136, 1994, <http://www.ilo.org/ilolex/english/surveyq.htm> [hereinafter "freedom of association"] (click "1994, Freedom of association and collective bargaining" hyperlink; then "1994, The right to strike") (explaining that strikes are often a last resort for worker organizations trying to secure their demands),

during the Conference, the right to strike appears several times in a report prepared for the first discussion of Convention 87.<sup>53</sup> Absent express provisions on the right to strike, the ILO supervisory bodies, set up to supervise the application of ILO standards, have had to interpret the meaning and scope of the right to strike from Conventions 87 and 98.<sup>54</sup> The main supervisory body, the Committee on Freedom of Association, recognizes the right as an “intrinsic corollary” to the freedom of association protected by Convention 87.<sup>55</sup> As early as its second meeting, the Committee affirmed the principle of the right to strike as an essential element of trade union rights, and one recognized by most countries as one of the essential and principal means through which workers defend their economic interests.<sup>56</sup> The ILO Committee of Experts has similarly “read in” the right to strike in Conventions 87 and 98.<sup>57</sup> Article 8 of Convention 87 declares that no national law may impair the guarantees of the Convention, including the right to strike.<sup>58</sup>

#### 4. *The ILO's Lack of Enforcement Power*

While the ILO plays a critical role in defining global labor standards, it lacks the authority to enforce such standards.<sup>59</sup> The principal mechanism for dealing with freedom of association violations is a complaint procedure, which allows workers' organizations to bring complaints to the ILO's Committee on Freedom of Association against a member state.<sup>60</sup> Unlike the ILO's other supervisory bodies which only review complaints against ratifying countries

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53. *See id.* at ¶ 142 (conceding that only one ILO Convention, on the Abolition of Forced Labour (No. 105) mentions strike action, although it appears in various resolutions, conferences, and Recommendations, but emphasizing that nonetheless the ILO is the primary source of law regarding the right to strike; speculating that the right to strike does not appear in the text of Conventions 87 and 98 because it was so basic so as to be taken for granted by the Committee).

54. *See id.* at ¶ 145 (explaining the role of supervisory bodies within the ILO, which is to examine complaints of violations of freedom of association, and identifying the Committee on Freedom of Association as the principal body).

55. *See* Freedom of Association, *supra* note 30, at ¶ 523 (reasoning that the most powerful tool workers have to demand recognition and respect for their interests).

56. *See id.* at ¶¶ 136, 520 (recognizing that strike action is both the most visible form of collective action in the event of a labor dispute, but also the last resort of workers' in pursuit of their demands); *see also* Freedom of Association and Collective Bargaining, *supra* note 55, at ¶ 146 (noting that the Committee has never departed from its position that the right to strike is an essential right grounded in the principles of Conventions 87 and 98).

57. *See* Freedom of Association, *supra* note 52, at ¶¶ 145–51 (declaring generally the right to strike as an essential means for workers to defend their interests growing out of freedom of association and right to organize and bargain collectively).

58. *See* ILO Convention No. 87, *supra* note 33, at art. 8(2) (prohibiting governments from interfering with workers' activities aimed at defending and promoting their interests).

59. *See* Torres, *supra* note 45, at 454–55 (acknowledging that the ILO's standards, embodied in Conventions and Recommendations, are non-binding instruments intended to set guidelines for national regulation).

60. *See* Swepston, *supra* note 27, at 95–96 (noting that this is a special procedure established exclusively for violations of freedom of association).

of the particular Convention, the Committee on Freedom of Association can examine complaints regardless of whether the offending state has ratified the Convention in question.<sup>61</sup> If a violation is found, the Committee will issue recommendations outlining corrective measures to bring the offending member state into conformity with ILO principles.<sup>62</sup> The ILO's weakness lies in its lack of established mechanisms to enforce compliance.<sup>63</sup> The ILO, like other international organizations, contemplates reliance on the participation of non-state entities to be effective.<sup>64</sup> As this Note demonstrates, IFAs are a promising mechanism to create a formalized space for private actors, particularly workers and unions, to play a meaningful role in promoting ILO principles in the United States. Their potential lies in their ability to (1), hold private companies operating in the U.S. to international standards where national law fails to, and (2), ultimately spur the United States to revise its labor law by systematically bringing to light its shortcomings.

### *B. Labor Law in the United States*

The National Labor Relations Act provides employees the right to strike.<sup>65</sup> Under what is known as the Mackay Doctrine, employers may hire permanent replacements for workers that strike over wages and working conditions.<sup>66</sup>

#### *1. The National Labor Relations Act as the Source of U.S. Labor Law*

The NLRA is the central instrument for protecting workers' rights to organize and bargain collectively in the United States.<sup>67</sup> The guarantee of workers' freedom of association, along with the rights to organize, bargain collectively, and strike is outlined in the heart of the Act, commonly referred to

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61. See Lee Swepston, *Human Rights Law and Freedom of Association, Development Through ILO Supervision*, 137 INT'L LAB. REV. 169, 175 (1998) (explaining that the Committee's authority is grounded in the ILO Constitution and, therefore, complaints can be filed against any member State).

62. See SWEPSTON *supra* note 27, at 97 (providing as an example that the ILO may recommend to governments that they refrain from taking certain actions or amend existing legislation).

63. See John C. Knapp, *The Boundaries of the ILO: A Labor Rights Argument for Institutional Cooperation*, 29 BROOK. J. INT'L L. 369, 380 (2003) (providing that a principal challenge to widespread implementation of ILO principles has been the ILO's inability to impose legal sanctions on noncompliant member states).

64. See Schmidt, *supra* note 8, at 9 (emphasizing the key role that civil society, particularly unions, play in the enforcement of ILO labor standards because they are in a better position to monitor compliance).

65. See National Labor Relations Act, 29 U.S.C. §§ 157–58 (2006) (providing that nothing in the Act shall be construed so as to interfere with the right to strike).

66. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–47 (1938).

67. 29 U.S.C. § 151 (2006).

as “Section 7 rights.”<sup>68</sup> The NLRA grants the National Labor Relations Board (“NLRB”) administrative authority to enforce the NLRA.<sup>69</sup> The NLRB exercises this power primarily by investigating unfair labor practice charges and providing remedial, not punitive, action when violations of the Act are found.<sup>70</sup> Section 158(a) sets forth unfair labor practices of employers, proscribed by the Act, including: interference, restraint, or coercion of employees in the exercise of their Section 7 rights; discrimination of employees that exercise their right to organize; and refusal to bargain with workers’ chosen representative.<sup>71</sup>

The United States has not ratified ILO Conventions 87 and 98 on the basis that national law already promotes the principles of freedom of association, the right to organize, and collective bargaining.<sup>72</sup> However, as previously discussed, the ILO 1998 Declaration on Fundamental Principles and Rights at Work commits member states to the proposition that membership implies an obligation to respect certain fundamental principles, including the freedom of association and the right to organize.<sup>73</sup> Nonetheless, the U.S. government has actually acknowledged to the ILO its failure to fully protect the rights to organize and bargain collectively through existing law.<sup>74</sup>

## 2. Right to Strike Under U.S. Labor Law

The right to strike is protected under the NLRA in Sections 7 and 13. Section 7 guarantees the right of workers to engage in concerted activities for the purpose of collective bargaining.<sup>75</sup> Section 13 explicitly states that nothing in the Act shall be construed so as to interfere or otherwise impede the right

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68. See 29 U.S.C. § 157 (2006) (“[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”).

69. 29 U.S.C. § 160(a) (2006).

70. 29 U.S.C. § 158 (2006).

71. *Id.*

72. *Cf.* Charnovitz, *supra* note 15, at 91 (discussing that, while the United States voted for the ILO’s adoption of Convention No. 98, the government’s position for not ratifying it was based on the assumption that freedom of association was already recognized in the U.S. Constitution).

73. See ILO Declaration on Fundamental Principles, *supra* note 46, at 1233 (reaffirming the principles articulated in Conventions 87 and 98 as one of four fundamental rights, and stating that all member States have an obligation to respect, promote, and realize such principles, regardless of ratification, on the basis of membership).

74. See Charnovitz, *supra* note 15, at 104 (referring to a 2000 report by the U.S. government to the ILO on the status of Convention 87 in the United States in which it admitted shortcomings in its legislation preventing it from complying with the Convention).

75. See 29 U.S.C. § 157 (2006) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .”).

to strike.<sup>76</sup> Read together with the Section 158(a)'s proscriptions of employer conduct, these provisions protect workers from retaliation for exercising the right to strike.<sup>77</sup>

U.S. law, however, permits an employer to hire permanent replacements for employees engaged in an economic strike.<sup>78</sup> The law was established by the Supreme Court in 1938 in *NLRB v. Mackay Radio and Telegraph Company* and has subsequently become known as the Mackay doctrine.<sup>79</sup> The Court reasoned that just because workers have the right to strike to secure an advantageous bargaining position, employers do not lose their right to replace the strikers to carry on with business.<sup>80</sup> Under the Mackay doctrine, an employer is free to fill vacancies left open by economic strikers with replacement workers, and is not obligated to discharge the hired replacements to create space for workers wishing to return at the end of the strike.<sup>81</sup> As this Note will demonstrate, the permanent-replacement doctrine significantly weakens the strike as an economic weapon for workers to enforce their collective bargaining rights, to the point of rendering it a mere privilege, not a right.<sup>82</sup>

### *C. IFAs as a Tool for Promoting MNC Compliance with International Labor Principles*

IFAs open the door to collective bargaining by creating a space that alters the traditionally antagonistic employer-employee engagement and is more

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76. See § 163 (“Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”).

77. See § 158 (declaring interference with workers’ exercise of rights an unfair labor practice).

78. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–56 (1938) (distinguishing between “economic strikers” and “unfair labor practice strikers” and ruling, in part, that an employer is not bound to discharge workers hired to fill the places of strikers in order to create places for the strikers upon their subsequent election to return to work). *But cf.* *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1368 (1968) (holding that an employer whose workers strike over the employer’s unfair labor practice must reinstate the striking employees to their former positions, discharging replacements hired during the strike if necessary).

79. See *Mackay Radio*, 304 U.S. 333 at 345 (holding that an employer reserves the right to hire permanent replacements for employees on strike while noting that such employees retain employment status and, upon an unconditional offer to return, are eligible for reinstatement in the event the replacement worker leaves and a position becomes open).

80. See *id.* (elaborating that an employer is not obligated to discharge those workers he hires to fill spots left open by striking employees).

81. See *id.* at 345–46 (maintaining, without explanation, that such action does not constitute an unfair labor practice under Section 13 of the NLRA).

82. See discussion, *infra* Part III. B. (clarifying that the significance of the difference between a right and a privilege is greater than mere semantics; unlike a right, which is protected by a corresponding duty restricting interference with the exercise of the right, a privilege is a mere freedom to act and imposes no duty upon another party).



hospitable to the organizing process.<sup>83</sup> MNC commitment to respect the core ILO principles of freedom of association and the rights to organize and collectively bargain through IFAs are instrumental to realizing that purpose.<sup>84</sup>

### *1. The Creation and Proliferation of International Framework Agreements*

An IFA is an agreement negotiated between an MNC and typically<sup>85</sup> a global union<sup>86</sup> to establish an ongoing relationship between the signatories and ensure adherence to uniform labor standards by the MNC in all countries in which it operates.<sup>87</sup> IFAs are the first and only formally-negotiated instruments between unions and corporations at the global level and a significant development in labor relations.<sup>88</sup> Since the signing of the first IFA in 1988, they have spread at a steadily increasing rate.<sup>89</sup> Their proliferation since 2000 has been especially dramatic—with the number of IFAs signed in 2003-2006 nearly doubling the number signed in the first fifteen years.<sup>90</sup> By 2008, approximately sixty-five

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83. See Rudikoff, *supra* note 17, at 8 (emphasizing that IFAs stimulate unionization by ensuring that employers refrain from interfering with workers in the collective bargaining process).

84. See Elliott & Freeman, *supra* note 19, at 12 (explaining that the freedom of association is the most controversial core standard because it increases the power of workers by creating a mechanism for raising and negotiating solutions to workplace issues).

85. See Nikolaus Hammer, *International Framework Agreements: Global Industrial Relations Between Rights and Bargaining*, 11 TRANSFER EUR. REV. LAB. & RES. 511, 523 (2005), available at <http://trs.sagepub.com/content/11/4/511.full.pdf> (acknowledging that not all IFAs include a global union as a signatory).

86. See Rudikoff, *supra* note 17, at 3 n.9 (defining global unions as international representatives of national unions that organize in specific sectors).

87. See ARTURO BRONSTEIN, INTERNATIONAL AND COMPARATIVE LABOUR LAW: CURRENT CHALLENGES 115 (Palgrave Macmillan, Int'l Labour Office 2009) (suggesting that IFAs are one of the developments of industrial relations in the age of globalization).

88. See Dimitris Stevis & Terry Boswell, *International Framework Agreements, Opportunities and Challenges for Global Unionism*, in GLOBAL UNIONS: CHALLENGING TRANSNATIONAL CAPITAL THROUGH CROSS-BORDER CAMPAIGNS 174, 180 (Kate Brofenbrenner ed., 2007) (noting that transnational companies refused to negotiate with unions until the late 1990s); see also Dimitris Stevis, *International Framework Agreements and Global Social Dialogue*, INT'L LAB. ORG., EMP'T SECTOR, Working Paper No. 47 at 5 (2010) (identifying employer recognition of a global entity that represents workers interlocutors as both the key characteristic and breakthrough of IFAs).

89. See Hammer, *supra* note 85, at 515 (identifying the social dialogue between Danone, a French dairy products company, and the International Union of Food Workers (IUF), a world-wide federation of workers, as the first that resulted in an IFA).

90. See KONSTANTINOS PAPADAKIS, INTRODUCTION TO CROSS-BORDER SOCIAL DIALOGUE AND AGREEMENTS: AN EMERGING GLOBAL INDUSTRIAL RELATIONS FRAMEWORK? 1, 2-3 (Konstantinos Papadakis ed., 2008) (documenting that twenty-three IFAs were signed from 1988-2002 versus thirty-three signed from 2003-2006).

agreements had been concluded.<sup>91</sup> At the end of 2010, that number had jumped to seventy-six.<sup>92</sup>

## 2. Context of Framework Agreements: Corporate Social Responsibility

While both corporate codes of conduct and IFAs can be traced to a consumer-driven push for corporate social responsibility, a key difference separates the two: credibility. In the late 1980's, MNCs in the United States began to respond to campaigns by non-governmental organizations accusing MNCs of international human rights abuses by elaborating internal codes of conduct.<sup>93</sup> These codes, unilaterally written and implemented, tend to be vague and provide for no enforcement mechanism.<sup>94</sup> The voluntary, self-enforcing nature of these commitments has led critics to conclude that they are mere marketing ploys lacking in credibility or having any real social impact.<sup>95</sup>

IFAs were developed, in part, as an alternative to corporate codes of conduct to raise labor standards.<sup>96</sup> Unlike unilateral codes, IFAs are negotiated between the two principal actors—employers and workers—in the employment relationship.<sup>97</sup> Involvement of the very party the agreement is meant to protect attaches greater meaning and significance to the instrument.<sup>98</sup>

The purpose of IFAs is to promote fundamental labor rights by regulating corporate conduct on a global level.<sup>99</sup> This brings us to another key distinction between corporate codes of conduct and IFAs: their concrete normative content.

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91. See Drouin, *supra* note 19, at 596 (listing high profile companies like Danone, IKEA, Volkswagen, and H&M as examples of companies that have signed IFAs).

92. See Michael Fichter & Markus Helfen, *Regulating Labor Relations in Global Production Networks: Insights on International Framework Agreements 4* (April, 2011) (unpublished manuscript) (on file with author).

93. See Bronstein, *supra* note 87, at 114 (suggesting that MNCs were motivated by the fear of international campaigns that would tarnish their brand names).

94. See Owen Herrstadt, *Are International Framework Agreements a Path to Corporate Social Responsibility?*, 10 U. PA. J. BUS. & EMP. L. 187, 187-88 (2007) (noting that in addition to lacking real substance, most codes are initiated and finalized at the highest level of the business enterprise with virtually no input from the workers they supposedly are intended to benefit).

95. See *id.* at 189 (suggesting that codes were adopted in response to negative publicity related to exploitative labor practices, not altruism).

96. See *id.* at 187 (speculating that the development of IFAs was organized labor's response to multinationals' "empty gestures," codes).

97. See Drouin, *supra* note 19, at 593 (explaining that workers are involved in the negotiations through their union representatives).

98. See *id.* at 593-94 (contrasting IFAs to the paternalistic character of corporate codes of conduct in that they involve workers in the negotiations, as opposed to being unilateral instruments).

99. See Stevis & Boswell, *supra* note 88, at 175 (explaining that while not actually collective bargaining agreements, IFAs establish certain rules aimed at corporate labor practices).

### 3. Core ILO Principles as the Substantive Content of IFAs

Whereas codes tend to be vague in their commitments, MNCs commit themselves to concrete international labor norms through framework agreements. The key areas of IFAs are the acceptance of the four core labor standards, as articulated in the 1998 ILO Declaration.<sup>100</sup> The Declaration itself is typically not mentioned, but rather the four rights are referred to in IFAs by their convention numbers.<sup>101</sup> Thus, apart from a very few exceptions, IFAs refer explicitly to ILO Conventions 87 and 98 on freedom of association and the right to organize and collective bargaining, respectively.<sup>102</sup>

As previously discussed, ILO standards are the principal source of international labor norms.<sup>103</sup> ILO Conventions 87 and 98 are perhaps the most important of ILO principles since the right to organize and bargain collectively is essential to the defense of working conditions like wages, hours, and health and safety through the collective bargaining process.<sup>104</sup>

### 4. Scope of IFAs, MNCs and Supply Chains

One of the most important features of IFAs is their goal of addressing behavior not only within the signatory MNC, but along their supply chains as well.<sup>105</sup> According to one study, of the IFAs in existence as of 2008, eighty-eight percent explicitly indicated that the norms of the agreements applied to their subsidiaries and seventy-three percent contained provisions defining their application to suppliers and subcontractors.<sup>106</sup> These provisions contain

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100. See International Labour Conference, *supra* note 46 (enumerating the four fundamental labor rights: freedom of association and the right to collective bargaining (Conventions No. 87 and No. 98); the elimination of forced and compulsory labor (Conventions No. 29 and No. 105); the abolition of child labor (Convention No. 138); and the elimination of discrimination in the workplace (Conventions No. 100 and No. 111)); see also Drouin, *supra* note 19, at 594 (pointing out that GUFs generally consider the four rights the minimal content of an agreement without which they will refuse to sign).

101. See Drouin, *supra* note 19 at 595 (explaining that many agreements increase their legitimacy by going beyond merely referencing the four core labor standards to also include references to working condition obligations under the Universal Declaration of Human Rights and the UN Global Compact).

102. See *id.* (noting that this provision is typically accompanied by a reference to the specific relevant ILO core convention).

103. See Compa, *supra* note 1, at 7 n.8 (noting that other sources include the United Nations declarations, covenants, and resolutions; the Organization for Economic Cooperation and Development's Guidelines; and European human rights instruments).

104. See Wills, *supra* note 20, at 677, 682 (explaining that organized workers are in a better position to negotiate favorable terms of employment than single employees).

105. See Reynald Bourque, *International Framework Agreements and the Future of Collective Bargaining in Multinational Companies*, 12 JUST LAB.: A CANADIAN J. OF WORK & SOC'Y 30, 37 (2008) (emphasizing that companies commit to at least inform or encourage subcontractors and suppliers to adhere to the principles and ILO conventions in the agreement in a large majority of IFAs).

106. See WILKE & SCHÜTZE, *supra* note 20, at 9–10 (suggesting that commitment to hold supply chain actors to IFA provisions depends on the degree of power an MNC has over them).

varying degrees of commitment on behalf of the signatory MNC. Some MNCs agree to place very concrete obligations on supply chain parties, going so far as to detail sanctions to be imposed upon non-compliant suppliers.<sup>107</sup> Others contain provisions that are less mandatory, limiting the MNC's obligation to informing or encouraging its suppliers and subsidiaries to respect the principles of the agreement. For instance, the PSA Peugeot Citroen IFA was amended in 2010, changing its once relatively firm language by which suppliers are "required" to make similar commitments to a much weaker provision in which the MNC agrees to "request" that its suppliers a similar commitment in respect of their own suppliers and sub-contractors.<sup>108</sup>

### III. ANALYSIS

The principal weapon workers have to leverage their bargaining power is the strike.<sup>109</sup> The permanent strike replacement policy renders this weapon almost meaningless by subjecting workers that employ it to a risk of job loss. This practice deviates from international norms on freedom of association, the right to organize, and bargain collectively, as enunciated in Conventions 87 and 98, and reaffirmed in the ILO 1998 Declaration to the point of rendering the right to strike a mere freedom to strike.<sup>110</sup> Fortunately, IFAs have the potential to bring many U.S. operating companies into compliance with international standards on the right to strike, which prohibits the use of permanent replacements.

This Section first addresses the effect of the permanent replacement doctrine on the right to strike in the United States. It next argues that as a member of the ILO, the U.S. is obligated to amend this policy to guarantee workers protection in their right to strike. Finally, it argues that even if the U.S. permits permanent strike replacements, certain U.S. companies are bound to IFAs that prohibit them from taking advantage of the policy.

#### *A. Interference with the Right to Strike is an Abridgement of ILO Principles*

Collective bargaining is the mechanism through which workers present their demands to an employer and, through negotiations, determine the

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107. For example, in certain cases, suppliers and subcontractors not respecting the IFA principles may face termination of contract. *See id.* at 10 (identifying the IKEA IFA as an example).

108. International Framework Agreement on PSA Peugeot Citroën's Social Responsibility chapt. 4, 2006, rev'd 2010, *available at* [http://www.imfmetal.org/files/10052511431579/PSAIFAEnglish\\_revisedJune2010.pdf](http://www.imfmetal.org/files/10052511431579/PSAIFAEnglish_revisedJune2010.pdf) (last visited Jan. 21, 2011).

109. *See* Bess Nkabinde, *The Right to Strike, an Essential Component of Workplace Democracy: Its Scope and Global Economy*, 24 MD. J. INT'L L. 270, 279 (2009) (emphasizing that strike action is an external source of bargaining power that is essential to providing employers with an incentive to respond to workers' concerns by exerting pressure on management).

110. *See* discussion, *supra* Part III.A (analyzing how the Mackay doctrine is inconsistent with Conventions 87 and 98 because it does not sufficiently protect workers on strike, which prevents the strike action from being meaningfully considered a right).

working conditions and terms of employment.<sup>111</sup> The right to strike arises most often in the context of collective bargaining, though as a weapon of last resort.<sup>112</sup> The employment relationship is an economic one—with most workers' demands encompassing improved pay or other working conditions.<sup>113</sup> To bring balance to the employment relationship at the bargaining table, one of the primary weapons available to workers in defending their interests is the threat of withholding labor to inflict costs upon the employer.<sup>114</sup> The principle of the strike as a legitimate means of action taken by workers' organizations is widely recognized in countries throughout the world, almost to the point of universal recognition.<sup>115</sup> The ILO Committee on Freedom of Association holds the position that the right to strike is a basic consequence of the right to organize.<sup>116</sup>

Interference or impairment of the right to strike is inconsistent with Articles 3, 8, and 10 of Convention 87 guaranteeing workers freedom of association and the right to take concerted actions to further their interests. Article 3 recognizes the right of workers' organizations to organize their activities and to formulate

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111. See Bernard Gernigon, et al., *ILO Principles Concerning Collective Bargaining*, 139 INT'L LAB. REV. 33, 35 (2000) (providing the ILO's definition of collective bargaining: all negotiations which take place between an employer, a group of employers, or one or more employers' organizations, on the one hand, and one or more workers' organizations, on the other for: (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organizations and a workers' organization or workers' organizations).

112. See Bernard Gernigon et al., *ILO Principles Concerning the Right to Strike*, 137 INT'L LAB. REV. 441, 445 (1998) (providing that the Committee on Freedom of Association deems strikes that occur long before negotiations even take place as falling beyond the scope of the principles of freedom of association); see also Nkabinde, *supra* note 112, at 276 (discussing the imbalance in bargaining power between an employer and employee, and suggesting that in the absence of a right to strike, collective bargaining would amount to "collective begging").

113. See Gernigon, *supra* note 112, at 137 (providing that the ILO Committee on Freedom of Association has linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers, thereby placing purely politically-natured strikes beyond the purview of the Organization's scope).

114. See INT'L LAB. ORG., ILO GENERAL SURVEY ON THE FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING, ¶ 150, available at: [http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1994-81-4B\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1994-81-4B).pdf) (conceding that the conditions and restrictions of the right varies from country to country, however an examination of national legislation around the globe reflects a wide recognition of the right to some degree).

115. See Gernigon *supra* note 112, at 447–48 (emphasizing that this is the case notwithstanding the relative frequency of national restrictions on the right, for instance, impositions of penal sanctions for organizing or participating in unlawful strikes, requirements of an excessively large majority of votes to be able to call a strike, bans on strikes by public servants, and bans on strikes in certain non-essential services).

116. See INT'L LAB. ORG., ILO GENERAL SURVEY ON THE FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING, ¶ 194, available at: [http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1994-81-4B\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1994-81-4B).pdf) (referring to the right to strike as an intrinsic corollary of the principles of freedom of association due to its effectiveness in helping workers realize their collective demands).

their programs.<sup>117</sup> Article 10 states that the term “organization” means any organization for furthering and defending the interests of workers.<sup>118</sup> When read together with Article 10, Article 3 protects activities and actions that are designed to further and defend the interests of workers. Recall that strikes are recognized as an essential means through which workers further and defend their interests.<sup>119</sup> Article 8 declares that no national law may impair the guarantees of the Convention.<sup>120</sup> Because strike action falls under the activities protected by Article 3, which are aimed at furthering and defending workers’ interests, limitations on the right to strike may contravene Conventions 87 and 98.<sup>121</sup> This subsection addresses the lawful practice of hiring of permanent replacements for striking workers in the United States as it relates to ILO principles.

*1. The Use of Permanent Strike Replacements Reduces the ‘Right’ to Strike to the Unprotected ‘Freedom’ to Strike*

In refraining from ratifying ILO Conventions 87 and 98, the United States government has insisted that U.S. law sufficiently guarantees workers protections of the principles of freedom of association, the rights to organize, and bargain collectively.<sup>122</sup> While Section 13 of the NLRA addresses the right to strike,<sup>123</sup> in reality, enforcement of the NLRA falls short of its goals and departs from international norms, which afford the right to strike fundamental status.<sup>124</sup>

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117. See ILO Convention No. 87, *supra* note 33, art. 3(1) (“Workers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes”).

118. *Id.* art. 10.

119. See discussion, *supra* II.B.2 (discussing the ILO’s consideration of the right to strike as an intrinsic corollary of freedom of association and the rights to organize and bargain collectively, which reflects the general recognition of the right to strike as a means of furthering workers’ interests throughout the world).

120. See ILO Convention No. 87, *supra* note 33, art. 8(2) (“The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.”).

121. See generally Michael Bendel, *The International Protection of Trade Union Rights: A Canadian Case Study*, 13 OTTAWA L. REV. 182, 183-91 (insisting that a reasonable interpretation of Convention No. 87 could identify an implicit recognition of the right to strike in Convention No. 87 along with customary international law).

122. See Charnovitz, *supra* note 15, at 90 (providing documentary evidence of the Senate’s response to President Harry S. Truman’s 1949 submission for advice and consent regarding ratification of Convention No. 87: that revision of Federal law would be unnecessary to effect compliance with the terms of the Convention).

123. See 29 U.S.C. 163 (2006) (“Nothing in this Act . . . shall be construed so as either to interfere with or impede in any way the right to strike.”).

124. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Overview and Critical Assessment*, 43 B.C. L. REV. 351, 441 (2002) (insisting that in most other countries, an employee that engages in a lawful strike retains a right to reclaim her former position at the end of a strike).



The Mackay doctrine, permitting permanent replacement of strikers renders the right a mere privilege, or freedom, because it removes meaningful protection of the right by stripping employers of a duty to refrain from interference with striking.<sup>125</sup> Wesley Hohfeld's famous account of legal rights provides a useful analytical framework for distinguishing between the colloquial uses of the "rights" and their implications.<sup>126</sup> Under this framework, rights are distinguished from what he calls privileges, or freedoms, by the existence or inexistence of a corresponding duty. All rights have a corresponding duty, or a legal obligation to respect the legal interest of the right-holder and refrain from interfering with it.<sup>127</sup> In the example of the right to strike, the correlative is the employer's duty to not interfere with the employees' right.<sup>128</sup> On the other hand, a 'freedom' is the liberty to act, but without the imposition of a duty upon others.<sup>129</sup> When one has the freedom to act, others simply do not have a right to prevent her from acting.<sup>130</sup> In the strike context, if employees enjoy the freedom to strike, an employer does not have the right to stop the employees from striking, but does not have a duty to not interfere with the act of striking.<sup>131</sup>

In establishing the Mackay permanent strike replacement Doctrine, the Supreme Court reasoned that the 'right' to strike does not destroy an

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125. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (giving birth to the Mackay doctrine that allows employers to replace their economic strikers permanently).

126. Wesley Hohfeld, a notable jurist of the early twentieth century, authored the influential *SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS*, which is central to modern-day understandings of legal concepts, including the precise meanings of "right" and "duty" and their impact on legal relations. The concept of the reciprocal relationship between right and duty is central to Hohfeld's analysis that challenges the generic treatment and misuses of the word "right." His conception of correlating rights and duties, that is that the creation of a right in one person imposes a correlative duty on another, provides a practical test to measure the existence of a recognized right. See DAVID KENNEDY, *THE CANON OF AMERICAN LEGAL THOUGHT* 47 (David Kennedy & William W. Fisher III eds., 2006).

127. See Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 31 (1913) (advancing that 'duty' and 'right' are correlative terms such that a right only exists when another person has a duty and, when a right is invaded, a duty is violated).

128. Cf. KENNEDY, *supra* note 126, at 48 (applying the Hohfeldian analysis of rights and privileges, or freedoms, to property rights: if one has a right to exclude others from her property, others will have a correlative duty not to trespass).

129. See HOHFELD, *supra* note 127, at 33 (emphasizing that the fundamental and important difference between a right and a privilege is the absence of a correlative duty of the latter. Instead, the correlative of privilege is an absence of a right of another to prevent the privilege-holder from acting).

130. See Jon Finelli, Comment, *In Re Costas: The Misapplication of Section 548(a) to Disclaimer Law*, 14 *AM. BANKR. INST. L. REV.* 567, 585 n. 113 (2006) (articulating that the 'absence of right,' or a no-right, is the correlative of privilege).

131. See HOHFELD, *supra* note 127, at 37 (asserting that it is incorrect to conflate right with freedom since the existence of a freedom imparts no duty on another to refrain from interfering. In order to transform a freedom into a right, a duty to not interfere must be established).

employer's right to protect and continue business by filling the vacancies of the strikers.<sup>132</sup> In so holding, the Court actually transformed the 'right' to strike it into the 'freedom' to strike by removing a corresponding affirmative duty not to interfere with the exercise of the right from the employer.<sup>133</sup> The hire of permanent replacements interferes with strike action by inflicting substantial repercussions upon the employees that undertake the action, loss of employment opportunities.<sup>134</sup>

The Mackay doctrine forces an employee to choose to strike—at the risk of losing the very job that is the object of the gains and benefits sought—rendering the act virtually useless.<sup>135</sup> The threat of being permanently replaced has, in fact, discouraged workers from exercising their 'right' to strike.<sup>136</sup>

Application of the Mackay doctrine produces results that are inconsistent with the NLRA's provisions regarding protected activity, making the diminution of protection for striking employees even more apparent. In recognizing an employer right to hire permanent replacements, the Mackay Court created a loophole for employers who otherwise are prohibited from firing striking employees under the Section 8(a)(3) of the NLRA, which proscribes retaliation against employees that engage in protected union activity.<sup>137</sup> While the act of permanently replacing strikers is lawful, firing strikers is unlawful, although both acts produce the same result: loss of a job as a consequence of striking.<sup>138</sup> The result renders the NLRA's protections for striking workers a dead letter. Although employers have a duty to refrain from retaliation against workers

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132. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938) ("Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although section 13 of the [NLRA] provides, 'Nothing in this Act . . . shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer . . . has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the place of strikers, upon the election of the latter to resume their employment, in order to create places for them.").

133. Cf. HOHFELD, *supra* note 127, at 31 (reiterating that a right cannot exist without a corresponding duty on others to refrain from interference).

134. It is important to note that it is unlawful for an employer to terminate an employee who chooses to strike; such an employee retains employment status and is eligible for reinstatement as hired strike replacements leave and create openings. However, the effect of the permanent strike replacement doctrine may be that the employee faces an indefinite period waiting for a vacancy in order to resume work. See *Mackay Radio*, 304 U.S. at 345–56 (upholding that employees exercising their right to strike remain employees notwithstanding that an employer is not obligated to reinstate them upon termination of the strike).

135. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1538 (2002) (likening the effect of the permanent replacement doctrine to employee "suicide").

136. See Befort, *supra* note 124, at 440–41 (presenting data from a study that reveals a sharp decline in strike activity accompanying a significant increase in the use of permanent strike replacements in the eighties).

137. See 29 U.S.C. § 158(a)(3) (2006) (prohibiting employers from firing employees on the basis of union or otherwise concerted activity).

138. See James Gray Pope, *How Americans Lost Their Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 529 (2004) (pointing out that the effect creates a disincentive for employees to engage in "protected" concerted activity).

engaged in union activity in the form of firing, employers do not have a duty to refrain from reaching the same result through a different tactic—permanent replacement.<sup>139</sup> Thus, this removal of a duty to refrain from interference renders the ‘right’ to strike, an unprotected ‘freedom’ to strike that yields to an employer’s corresponding freedom to replace strikers.<sup>140</sup> In other words, the Mackay doctrine preserves the NLRA Section 13 reference to strike action as a lawful recourse for workers, but not one afforded the status of a protected right.

*2. The U.S. Fails to Live up to its Commitment as Member of the ILO in Promulgating its Labor Policy Allowing for the Use of Permanent Strike Replacements*

In sanctioning the permanent strike replacement, the United States fails to uphold its commitment as a member of the ILO to guarantee the right to strike. Although the United States has not ratified ILO Conventions 87 and 98, which are the basis for the right to strike, as a member of the ILO it has certain duties related to the principles set therein. The 1998 Declaration obligates member states to respect, to promote, and to realize, in good faith and in accordance with the ILO Constitution, the core principles concerning fundamental rights, which include freedom of association and the right to organize.<sup>141</sup> This obligation arises out of the fact of membership, without regard to ratification of the underlying Conventions.<sup>142</sup> In other words, the obligation exists for all members, independently of specific obligations ratifying governments are subject to.

While the commitment to respect principles does not rise to the level of a legal obligation, it remains significant.<sup>143</sup> The Declaration established a new monitoring procedure to review government and private sector conduct,

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139. See *id.* at 527 (viewing an employer’s right to hire permanent replacements, which the Mackay Court considered a constitutional property right, as trumping employees’ rights under Section 7 of the NLRA).

140. As the Mackay Court mistakenly referred to the ‘right’ to strike, so too did it mislabel an employer’s ‘right’ to continue operations as a ‘right’ since employees do not have a corresponding duty not to interfere with this right, for strikes invariably interfere with business operations. See KENNEDY, *supra* note 126, at 50 (citing Wesley Hohfeld’s assessment of an employer’s right to earn a living as a privilege, or freedom, since a union has no duty not to interfere with the employer’s contractual relations).

141. See Francis Maupain, *Revitalization not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights*, 16 EUR. J. INT’L L. 439, 445, 448 (2005) (explaining the relationship between the ILO Constitution and the 1998 Declaration, whereby the latter expanded and made concrete specific principles and attached special significance to them by establishing practical consequences to them).

142. See Laurence R. Helfer, *The Law and Politics of International Delegation: Monitoring Compliance with Unratified Treaties: The ILO Experience*, 71 LAW & CONTEMP. PROBS. 193, 204 (2008) (comparing the 1998 Declaration to the WTO, which conditions membership to the organization on acceptance of certain commitments).

143. See Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1155 U.N.T.S. 331 (establishing the foundational rule of the international legal system: a treaty does not create obligations or rights for a state without its consent).

providing for an increased level of scrutiny regarding fundamental rights.<sup>144</sup> Under its “follow-up” mechanism, members that have not ratified one or more of the fundamental conventions are subject to annual review of the status of the relevant rights and principles within their borders.<sup>145</sup> This review is based on annual reports filed by the government with optional comments from employers and workers’ organizations.<sup>146</sup> Additionally, member states accept jurisdiction and review by the ILO Committee on Freedom of Association of complaints filed against them under the underlying conventions.<sup>147</sup>

The Committee on Freedom of Association has had opportunity to review the United States’ policy on permitting the hire of permanent replacements for workers that exercise their right to strike through the complaint process.<sup>148</sup> The Committee reaffirmed the basic right to strike as an essential means through which workers defend their interests and found that the U.S. permanent strike replacement policy contravenes freedom of association principles. The Committee concluded that the right to strike is not truly guaranteed when a worker who exercises it runs the risk of permanently losing her job to another worker.<sup>149</sup> In light of its findings, the Committee issued a recommendation advising the government to consider the practice’s derogation from the right to strike.<sup>150</sup> Nonetheless, despite this formal recognition of the law’s detrimental effect on workers’ rights, an employer may still hire permanent replacement

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144. See Christopher R. Coxson, Comment, *The 1998 ILO Declaration on Fundamental Principles and Rights at Work: Promoting Labor Law Reforms Through the ILO as an Alternative to Imposing Coercive Trade Sanctions*, 17 DICK. J. INT’L L. 469, 470 (1999) (indicating that the follow-up procedure was intended to encourage governments to adopt standards consistent with the fundamental principles identified in the Declaration).

145. See ILO Principles on Fundamental Rights, *supra* note 46, annex, (establishing the follow-up mechanism as a review of efforts made by member states to comply with the Declaration so as to ultimately promote full compliance).

146. See Maupain, *supra* note 141, at 446 (acknowledging that the follow-up system was, in part, established out of a recognition of a mutual obligation of the organization to assist members in the fulfillment of their obligation under the Declaration and that it reveals the obstacles preventing the realization of principles and rights and determines what assistance governments require to overcome them).

147. See Compa, *supra* note 6, at 46 (describing the United States’ support behind the adoption of the 1998 Declaration, and noting U.S. Labor Secretary Alexis Herman’s response to the adoption: “‘ILO members have accepted the need to be accountable, and with this action there will now be a process within the ILO to demonstrate that accountability.’”)

148. See generally Freedom of Association, *supra* note 6 (presenting its findings based on the investigation of a complaint submitted to the Committee by the AFL-CIO against the United States charging that the Mackay doctrine violates principles of freedom of association and the rights to organize and bargain collectively).

149. See *id.* ¶ 92 (determining that forcing an employee to choose between striking and retaining her position renders the right meaningless).

150. See *id.* ¶ 93 (informing the Governing Body that the use of non-union labour during a time of strike may affect the free exercise of trade union rights).

workers during a strike.<sup>151</sup> Twenty years later, this has been cause for continued scrutiny by the Committee on Freedom of Association.<sup>152</sup>

Having been alerted to the detrimental effect of the Mackay Doctrine, continued inaction to guarantee the right to strike evidences a lack of respect and implementation of the principle. The object of the monitoring powers is to promote ratification of the conventions through gradual implementation of recommendations.<sup>153</sup> Because the U.S. is not legally bound to implement such recommendations does not remove its normative obligations as a member.

The purpose of the ILO Declaration was to attach greater significance to certain principles the ILO deemed to be fundamental labor rights.<sup>154</sup> As discussed in the preceding subsection, the Mackay Doctrine in the United States has diminished the status of strike action from a right to a freedom.<sup>155</sup> The rationale behind the U.S. policy on strike replacements is that workers' interests must be balanced against an employer's interest in protecting its business.<sup>156</sup> This balancing test is evidence that the right to strike does not rise to the level of a fundamental right in the United States. To illustrate this point, consider U.S. policy regarding the constitutionally-guaranteed freedom of religion in the employment context.<sup>157</sup> Employers in the United States are required to accommodate employees' religious observances.<sup>158</sup> For instance, a hospital may not terminate and replace a nurse due to her refusal to perform a certain procedure on the basis of moral objections based on her religious

151. In 1994, democratic senator Howard Metzenbaum introduced a bill that would prohibit the hiring of permanent strike replacements, the "Striker Replacement Bill," but opponents successfully filibustered the bill, blocking floor consideration. See U.S. Senate: Legislation & Records Home, U.S. Senate Role Call Votes, 103d Congress, 2d Session, available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=103&session=2&vote=00189](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=2&vote=00189).

152. See, e.g., Int'l Lab. Org., *Country Baseline Under the ILO Declaration Annual Review (2000-2010): United States* 214 (2010) available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_091265.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_091265.pdf) (highlighting the law embodied in the Mackay doctrine as a continued challenge in the realization of the fundamental rights of freedom of association and meaningful collective bargaining and the United State's failure to produce evidence of progress).

153. See Helfer, *supra* note 142, at 201 (discussing how monitoring allows government to submit documentation on their progress of implementation and permits the ILO to make recommendations for improvement).

154. See Charnovitz, *supra* note 15, at 92 (explaining that the greater significance attaches by committing member states to the proposition that ILO membership implies an obligation to respect certain principles by virtue of membership alone).

155. See discussion, *supra* III.A.1 (discussing the lack of adequate protections of the striking workers as evidence that the 'right' to strike is in fact only the 'freedom' to strike).

156. See *Mackay Radio*, 304 U.S. at 345 (identifying the Fifth Amendment property rights as the source of an the employer's right to protect and continue business).

157. See U.S. CONST. AMEND. I ("Congress shall make no law respecting an establishment of religion . . .").

158. See 42 U.S.C. § 2000(e)(j) (2006) (declaring unlawful discrimination of employees based on religion).



beliefs.<sup>159</sup> This example illustrates how, unlike the right to strike, rights deemed fundamental are sufficient to overcome employer interests to operate a business.

The Committee on Freedom of Association has taken the position that national legislation should provide for genuine protection of the right to strike to prevent derogation of its meaning.<sup>160</sup> Governments must not take any action that infringes on the right to strike.<sup>161</sup> Governments must also act affirmatively to prevent private actors from interfering with the exercise of the right.<sup>162</sup> In this way, employers' hire of permanent strike replacements requires that government intervene to prevent such action.<sup>163</sup> In neglecting to amend its policy on permanent strike replacements to guarantee protections of striking workers, the U.S. government fails to attach the status fundamental right to strike action, and thereby fails to live up to its commitment to respect fundamental ILO principles.

### *3. IFAs Bind Certain U.S. Companies to ILO Principles that are Violated by the Use of Permanent Strike Replacements*

Although IFAs are not legally enforceable instruments, they nonetheless offer a promising tool to hold private actors in the United States to ILO standards even when national labor laws fail to hold MNCs accountable.<sup>164</sup> The United States' apparent reluctance to conform its strike law with ILO standards does not preclude unions from bringing complaints to an IFA signatory MNC whose U.S. based subsidiaries and suppliers take advantage of the Mackay Doctrine and hire replacements for striking workers.

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159. See, e.g., *Swanson v. St. John's Lutheran Hosp.*, 597 P.2d 702, 709–10 (Mont. 1979) (finding that no hardship resulted to the hospital when a nurse refused to participate in a sterilization procedure on account of her religion and holding that her dismissal was unlawful).

160. See INT'L LAB. ORG., ILO GENERAL SURVEY ON THE FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING, ¶ 139, available at: [http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1994-81-4B\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1994-81-4B).pdf) (discussing the maintenance of the employment relationship as fundamental to the right to strike and providing examples of various ways nations leave the right devoid of content by effectively allowing termination of the employment relationship, as in when employers replace strikers with new recruits or when strikers are targeted for disciplinary actions like transfers, dismissals, or demotions).

161. See *id.* (identifying the right to strike as conceptually a negative right in that workers theoretically are free to exercise their right to strike if just left alone by the state).

162. . See *id.* (discussing that in some instances, workers need protections from the state in order to freely exercise this right and, in this way, the right is also a positive right).

163. . *Accord id.* at 284 (arguing that a government is not meeting its international human rights obligations if it permits private actors to violate workers' rights with impunity).

164. See Drouin, *supra* note 19, at 612 (emphasizing that the absence of the threat of legal sanctions does not render IFAs meaningless since compliance largely depends on a company's motivations for signing an IFA in the first place and in most cases will provide an incentive to remain faithful to obligations for fear of brand tarnishing).



Subsidiaries and suppliers are bound to signatory MNCs through express provisions in IFAs in which the MNC commits to promote implementation of the IFA along its supply chain.<sup>165</sup> While actual terms of IFAs vary, many provide for mechanisms that monitor compliance of supply chain actors and sanctions for noncompliance. For example, H&M's IFA with Union Network International contains a provision for unannounced audits of suppliers' factories and termination of business relations upon continued non-compliance.<sup>166</sup>

The enforceability of IFAs upon suppliers and subsidiaries operating in the United States and elsewhere lies not in the threat of legal sanctions for noncompliance, but in "shame sanctions."<sup>167</sup> As discussed earlier, MNCs typically sign IFAs in part to enhance their reputation as socially responsible actors.<sup>168</sup> In this way, IFAs give MNCs an incentive to ensure compliance with business partners whose noncompliant conduct can be linked to the MNC subjecting the MNC to the risk of unfavorable publicity.

U.S. operating subsidiaries and suppliers charged with accusations of noncompliance with an operating IFA frequently argue that the company's conduct conforms with national law and practice and thereby fulfills any obligations it has pursuant to the IFA.<sup>169</sup> This raises the question: when national law appears to overlap with international norms with regard to IFA provisions, which standard governs compliance?<sup>170</sup> U.S. labor law's failure to reflect international standards, as illustrated with its laws governing the right to strike, underscores the importance of resolving this issue. A careful examination of the typical IFA which includes European-style protection of the right to strike, indicate that IFAs bind suppliers and subsidiaries to ILO principles regarding the right to strike.

In determining which set of standards signatory MNCs, which, for the most part are based in Europe, intend to bind supply chain actors to—ILO principles or national law—an examination of the norms of their home countries is informative. Unlike in the United States, the right to strike is constitutionally

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165. See *id* at 624 (conceding that although the majority of IFAs contain provisions regarding expectations that suppliers and subsidiaries respect the principles contained in the IFA, in practice, MNCs still frequently fail to ensure that supply chain actors, are adequately informed of the existence of an agreement or monitored for compliance with the terms contained in the IFA).

166. See Hammer, *supra* note 85, at 526 (providing provisional language).

167. See Molly Beutz Land, *International Law and Democratic Considerations: Peer Producing Human Rights*, 46 ALBERTA L. REV. 1115, 1118 (2009) (describing the "name and shame" process of publicizing an actor's record with regard to human rights in an effort to pressure the actor into changing its conduct).

168. See Drouin, *supra* note 19, at 607 (identifying other motivations; including a desire to avoid government or regulatory intervention, profit anticipation, the desire to promote a positive public image and altruism).

169. See Herrnstadt, *supra* note 94, at 199 (providing a U.S. based subsidiary's response to complaint alleging breach of the IFA signed by its European parent company: ". . . The [company] adheres to the principles and values stipulated by the [IFA]. It believes . . . that such application must be carried out while observing legal regulations, practices, and cultures within the countries welcoming our presence.").

170. See *id.* (arguing that vague language in IFAs leave this open for debate).

protected in many European countries.<sup>171</sup> In fact, labor laws in the United States are not grounded in fundamental rights at all: Congress derived its authority to enact labor legislation on its constitutional power to regulate interstate business under the commerce clause.<sup>172</sup> The purpose behind the NLRA was to avoid the disruptions of commerce arising from industrial strife that the adversarial and unequal employment relationship inevitably creates.<sup>173</sup> The result is that in the United States workers' mere statutorily-created rights frequently yield to employer rights and economic interests.<sup>174</sup>

In contrast, workers' rights are treated as fundamental in Europe and receive broad protections. For instance, Article 28 of the Charter of the Fundamental Rights of the European Union includes the right of workers to take strike action to defend their interests.<sup>175</sup> In a landmark case, the European Court of Justice was confronted with the task of striking a balance between economic freedoms and fundamental social rights, namely, the right to take collective action, including the right to strike. In *The International Transport Workers' Federation v. Viking Line ABP (Viking)*, a Finnish trade union implemented a strike to prevent a ferry boat operator from moving its operations to Estonia to benefit from lower wage levels.<sup>176</sup> In an opinion that came as a surprise to the international labor community, the Court emphasized the importance of freedom of movement in business undertakings to the point that in some

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171. For example, France, Italy, and Spain recognize a constitutional right to strike. Moreover, the right encompasses broader action than in the United States, for instance, sympathy strikes, which are unlawful in the U.S. See James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFFALO L. REV. 85, 166 (2004).

172. See Lance Compa, *The ILO Core Standards Declaration: Changing the Climate for Changing the Law*, Perspectives on Work 24 (2003) <http://digitalcommons.ilr.cornell.edu/articles/179/> (arguing that if Congress had grounded the NLRA and labor rights in fundamental rights provisions of the Constitution, such a foundation would have made application of international human rights standards to domestic labor law easier).

173. See 29 U.S.C. § 151 (2006) (declaring the NLRA's policy to eliminate obstructions to the free flow of commerce through promotion of collective bargaining, based on findings that the right of workers to organize and bargain collectively safeguards the flow of commerce by restoring the balance of power between employers and employees, enabling peaceful resolution of disputes).

174. For example, that employers are legally permitted to mount aggressive anti-union campaigns that often contain factual misrepresentations about unions is justified by employers' First Amendment free speech rights. See James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 EMPL. RTS. & EMPLOY. POL'Y J. 65, 89 (1999).

175. See Charter of Fundamental Rights of the European Union, art. 17, Dec. 7, 2000 O.J. (C 364) ("Workers and employers, or their respective organizations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.").

176. See Case C-438/05, *Int'l Transport Workers' Fed'n v. Viking Line ABP*, 2007 ECJ (Dec. 11, 2007) ("the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures").

instances, collective action may yield to it.<sup>177</sup> Nevertheless, the Court held that the right to strike was so fundamental to the protection of workers that the strike in this case was justified.<sup>178</sup> The outcome of that case is indicative of the European Union's commitment to the protection of the fundamental right to strike. Since the majority of IFAs are signed by European MNCs, it is a safe presumption that they envisioned protection of the right to strike under European standards, which reflect the ILO's norms.

Language of typical IFAs provide concrete evidence that subsidiaries and suppliers of signatory MNCs are bound to ILO principles concerning the fundamental right to strike. Express reference to ILO Conventions 87 and 98, confirm the signatories' objectives to promote adherence to ILO standards when they exceed national standards.<sup>179</sup> For instance, the Swedish construction MNC, Skanska, which has operations in the United States, commits to comply with national legislation and all ILO Conventions and Recommendations in its IFA.<sup>180</sup> The company further commits to apply the IFA to its subsidiaries, explicitly referring to ILO Conventions 87 and 98 regarding their employees' right to organize.<sup>181</sup> Thus the IFA clearly articulates the ILO principles as the applicable standard with regard to the right to strike, which constitutes an intrinsic corollary of the Conventions referred to in the IFA. Another MNC, IKEA, indicates in its IFA the company's intention to establish its suppliers' compliance with minimum labor standards through contracts based on requirements stated in its Code of Conduct, found in the annex of the IFA.<sup>182</sup> The Code of Conduct identifies specific ILO Conventions as primary principles guiding minimum conduct.<sup>183</sup>

Moreover, IFAs were developed in response to national laws that unions viewed as inadequate in meeting international standards.<sup>184</sup> As discussed previously, IFAs, unlike voluntary codes of conduct, are agreements reflecting

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177. *See id.* (recognizing the exercise of the right to strike may be subject to certain restrictions).

178. *See id.* (holding the right to strike is to be protected in accordance with Community law, national law and national practices).

179. *See Wilke & Schütze, supra* note 20, at 7 (finding that more than half of IFAs expressly refer to these Conventions by number).

180. *See Skanska, International Framework Agreement Between Skanska and IFBWW 1* (2001), <http://www.bwint.org/default.asp?index=43> (last visited October 29, 2011) (explaining that compliance must be practiced by "all units and subsidiaries of the Skanska Group").

181. *See id.* (indicating that the company and its representatives are obliged to respect its workers' union activities).

182. *See IKEA, International Framework Agreement Between IKEA and IFBWW, BUILDING AND WOOD WORKER'S INTERNATIONAL* (Dec. 19, 2001), <http://www.bwint.org/default.asp?index=46&Language=EN> (indicating that IKEA has formed a compliance organisation to support and monitor compliance with these contracts).

183. *See id.* (referring to the ILO's Declaration on Fundamental Principles and Rights at Work).

184. *See Herrnstadt, supra* note 94, at 190 (explaining that unions sought to compel companies to exceed their obligations under international laws).

negotiations between global unions and MNCs.<sup>185</sup> Global unions would have little incentive to negotiate an IFA that merely holds suppliers and subsidiaries to national law that they are already required to follow, making the conclusion that suppliers and subsidiaries are bound to ILO principles, not national principles reasonable.

Under ILO norms, the right to strike has been interpreted as an essential element of freedom of association.<sup>186</sup> As discussed earlier, the Mackay Doctrine is incompatible with Conventions 87 and 98 because it fails to provide adequate protections for workers on strike, thereby stripping the strike action of its status as a right.<sup>187</sup> Thus, a U.S. subsidiary or supplier of an MNC that is party to an IFA availing itself of its right to hire permanent replacements for striking workers can be held accountable to its parent MNC and the signatory global union for noncompliance with the IFA, even though its conduct fully comports with U.S. law.

#### IV. RECOMMENDATIONS

The United States should ratify ILO Conventions 87 and 98 to give full effect to the guarantee of the right to strike. This will create pressure for lawmakers to amend domestic law to bring it into compliance with international standards, under which the right to strike is so fundamental as to prohibit employer interference in the form of hiring strike replacements. However, short of this, IFAs should be strengthened, both in language and implementation to compel U.S. companies to abstain from availing themselves of the Mackay doctrine.

*A. Congress Should Ratify ILO Conventions 87 and 98 and Reverse the Mackay Permanent Replacement Doctrine to Bring the Right to Strike into Compliance with International Standards that Make it a Fundamental Right*

Congress should ratify ILO Conventions 87 and 98 as a demonstration of its commitment to fundamental labor rights.<sup>188</sup> These Conventions provide analogous, albeit stronger, protections to many of those already afforded under U.S. law, and ratification would not require drastic changes to the law,

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185. See discussion, *supra* II.C.1 (discussing IFAs as a response to codes of conduct that fail to hold MNCs accountable).

186. See INT'L LAB. ORG., ILO GENERAL SURVEY ON THE FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING, ¶ 149, available at: [http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1994-81-4B\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1994-81-4B).pdf) (declaring strike action as an activity of workers' organizations as intrinsic to freedom of association and the right to organize and bargain collectively because it is the principal means through which workers' defend their interests).

187. *Accord id.* ¶¶ 144–50 (expressing that the ILO Committee on the Freedom of Association considers this right essential to the other guarantees of Conventions 87 and 98, which would otherwise remain a dead letter).

188. *But cf.* Charnovitz, *supra* note 15, at 103 (lamenting that the U.S. Labor Department's position is that the U.S. will not ratify any ILO convention until U.S. law and practice is in full conformity with its provisions).

especially regarding the right to strike.<sup>189</sup> However, ratification of Conventions 87 and 98 would pressure U.S. lawmakers to amend the Mackay Doctrine to bring the right to strike into compliance with ILO standards, which condemns the use of permanent strike replacements.

Congress should enact legislation that prohibits the hiring of permanent replacements for workers that exercise their right to strike, to give full effect to the right that exists under ILO standards.<sup>190</sup> The use of permanent strike replacements bears little difference from the dismissal of workers that strike, which is unlawful and therefore, should also be prohibited. Instead, employers should have to dismiss any temporary replacements it hires once the strike ceases and employees elect to return to their former positions.<sup>191</sup>

*B. IFAs Implementation Should be Enhanced to Provide for Greater Monitoring and Enforcement all Along Supply Chains Through Involvement of National Unions and Stronger Language*

Global unions should ensure that national unions from countries in which signatory MNCs have operations are included in the negotiation process of IFAs.<sup>192</sup> As instruments that lack legal enforceability, IFAs depend on local trade unions for effective implementation, which requires widespread awareness about IFAs.<sup>193</sup> Comprehensive enforcement requires the participation and communication of all relevant actors at the inception of the process to ensure

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189. See Seckman, *supra* note 10, at 695 (insisting that U.S. law frequently extends equal or greater protections to U.S. workers than many ILO conventions, for instance, the ILO calls for protection of fewer classes than U.S. law does under the Age Discrimination in Employment Act and the Americans with Disability Act).

190. See Julius Getman, *The National Labor Relations Act: What Went Wrong: Can We Fix it?*, 45 B.C. L. REV. 125, 139 (2003) (arguing that the Mackay Doctrine weakens the strike weapon to the extent of destroying collective bargaining, which makes unionization meaningless).

191. This is the existing policy for workers that go on strike to protest an employer's unfair labor practices, Congress' repeal of the Mackay doctrine should not pose a significant problem, since it only involves removing the distinction separating economic strikes from unfair labor strikes. See *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1368 (1986) (holding that an employer whose workers strike over the employer's unfair labor practice must reinstate the striking employees to their former positions, discharging replacements hired during the strike if necessary).

192. Cf. Stevis & Boswell, *supra* note 88, at 185 (reporting that until now, most national unions that have been involved in the signing of agreements are those that are from the same country as the signatory MNC, and very few national unions from host countries of MNCs' have been involved); see *Hammer*, *supra* note 88, at 525 (maintaining that the strength of IFAs depends on union involvement with implementation at the local level).

193. Cf. *id.* at 186 (attributing low participation of unions outside of Europe in the implementation of IFAs to lack of knowledge of their existence).

monitoring at all stages of the supply chain.<sup>194</sup> Global unions should provide trainings for national union leaders around the world to gather information about MNC operations in their countries and provide information about IFAs as a tool for organizing.<sup>195</sup> To promote enforcement, national unions should inform employees of subsidiaries and suppliers that are bound to IFAs about the existence of IFAs, and provide trainings on identifying and reporting violations of the terms of the IFA.

Violations of IFAs must be systematically reported. Reported violations should be publicized and widely disseminated throughout countries where the signatory MNC has operations to pressure it into compelling its supply chain business partners into compliance.<sup>196</sup> Additionally, violations that are inconsistent with core ILO labor standards and reveal a member state's failure to enforce such standards, like the Mackay Doctrine in the U.S., should be submitted as a report to the ILO Committee on Freedom of Association, which can then be used as negative publicity.<sup>197</sup>

For IFAs to live up to their potential as private agreements that compel MNCs into compliance with international norms in every country in which they operate, global unions must insist on precise, firm language that explicitly makes clear subsidiary and supplier obligations to comply with its provisions, including the right to strike.<sup>198</sup> Vague references to measures informing subsidiaries and suppliers of the IFA should be replaced with firm and explicit commitment to require implementation of agreement at the supply chain level, under threat of express sanctions. IFAs should include a clause that provides that whenever a provision is a subject of both national and international regulation, international standards prevail.<sup>199</sup> Lastly, IFAs must include provisions of specific plan aimed at implementation the IFA along the supply chain level,

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194. See, e.g. Wills, *supra* note 20, at 691–94 (describing events that took place during an unsuccessful organizing drive of a French-owned hotel in New York that went on for ten years until local organizers learned of the existence of the IFA the company had signed with a global union in Europe which spurred transnational cooperation that promptly pressured the hotel to recognize the union and negotiate a first contract).

195. See Wills, *supra* note 20, at 685 (clarifying that IFAs are not a substitute for local or national collective bargaining, rather, IFAs facilitate the organizing and collective bargaining process by committing companies to respect workers' freedom to organize).

196. Cf. Drouin, *supra* note 19, at 607 (discussing that MNC's desire to promote public image is an incentive that drives them to sign IFAs).

197. See ILO Complaint Against the United States, Case No. 1543, *supra* note 6, ¶ 93 (issuing a recommendation to the U.S. on the Mackay doctrine's deviation from international labor standards in the form of a report).

198. Cf. Drouin, *supra* note 19, at 621 (pointing out that weak provisions found in many IFAs, including commitments to 'encourage' suppliers and subsidiaries to comply with the IFA had led to stipulations regarding the extent to which those actors are truly obligated to adhere to the IFA terms).

199. See Herrstadt, *supra* note 94, at 189 (raising the fundamental question, whether IFAs bind parties to national law or international standards, arising out of vague language leading MNCs to argue that compliance with national standards is sufficient to effectuate compliance).



for example, providing for a monitoring mechanism, informational programs and trainings of workers, and reporting mechanisms.<sup>200</sup>

#### IV. CONCLUSION

By permitting employers to hire permanent replacements for striking workers, the United States fails to give full guarantee of the internationally-recognized right to strike despite its commitment as a member of the ILO. IFAs can be an effective tool to raise standards among employers compelling them to comply with international standards in labor law even when it exceeds the protections provided by national law. Enforcing this standard would prevent employers from permanently replacing workers that strike, thereby guaranteeing full protections of the right to strike.

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200. *Cf. id.* at 201 (arguing that proper enforcement of IFA provisions requires a monitoring system).