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Labor Law for a Global Economy: The Uneasy Case for International Labor Standards

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TABLE OF CONTENTS

I. Introduction ........................................... 716
II. The Policy Debate About International Labor Standards Today .................................... 723
III. What Should Be Done? .................................... 732
IV. The Appropriate Forum .................................... 740
V. Conclusion ............................................. 752

"Open trade is not contrary to the interest of working people. Competition and integration lead to stronger growth, more and better jobs, more widely shared gains. Renewed protectionism in any of our nations would lead to a spiral of retaliation that would diminish the standard of living for working people everywhere."2

President Bill Clinton

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1. This Article is based upon the Wayne Morse Public Lecture provided by the author when serving as the Wayne Morse Chair of Law and Politics at the University of Oregon on February 28, 2001. It has been reshaped and revised for the Lane Lecture presented at the University of Nebraska College of Law on April 8, 2002. My ideas were sharpened by virtue of seminars that I presented on the themes articulated in this Article to my colleagues at Stanford Law School in January 2002 and at a seminar organized by Professor Gary Williams, Stanford Law School '76, at Loyola Law School in Los Angeles in February 2002. The title is borrowed from Walter J. Blum & Harry Kalven, Jr., The Uneasy Case for Progressive Taxation. (1953).

2. William Jefferson Clinton, Remarks by the President to the International Labor
I. INTRODUCTION

In many respects the current debate about international labor standards is a mirror image of the tension between labor law and antitrust policies in the American domestic arena. From a labor policy perspective, a substantial portion of the dynamics relates to the attempt to improve working conditions so as to promote the dignity of labor and, in so doing, an environment of enhanced living standards. The Clayton Antitrust Act of 1914 in this country states that labor is not an article of commerce and is thus a cost of production that is genuinely unique.\(^3\) This is the direct link to the international human rights campaign which has received more prominence in the United States over the past three decades and its connection to the employment relationship.

But at the same time, unimpeded trade is designed to promote competition, which benefits the consuming public through more efficient processes and thus lower prices. The unprecedented prosperity of the past five and a half decades is undoubtedly attributable, in substantial part, to the rejection of the Smoot-Hawley Act\(^4\) sponsoring protectionism and the adoption of the Reciprocal Trade Agreement Act of 1934\(^5\) which led to the decline in average world tariffs from approximately 40 percent in 1947 to less than 5 percent at the beginning of the last decade.\(^6\)

The Organisation for Economic Co-Operation and Development (OECD) has noted that in the post-World War II period, the worldwide increase in trade between the industrialized world and low wage developing countries is generally associated with a major contribution to economic growth.\(^7\) As has been noted:

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3. 15 U.S.C. § 17 (2000) (recognizing that "[t]he labor of a human being is not a commodity or article of commerce"); see Paul O'Higgins, Labour Is Not a Commodity: An Irish Contribution to International Labour Law, 26 INDUST. L.J. 225 (1997) (describing the Irish origin of and Australian contribution to the idea that labor is not a commodity). This Article provides understanding about American Federation of Labor President Samuel Gompers' promotion of the idea both in 1914 at the time of the Clayton Antitrust Act and shortly thereafter at the Treaty of Versailles. See infra text accompanying notes 15.


While living standards in developing countries generally lag behind those of the developed world, some developing countries are catching up—namely, those that are open to trade. Indeed, the more open developing countries are to trade, the faster their standards of living converge with those of the developed world. For instance, thirty years ago, South Korea was as poor as Ghana. Today, in large part because of trade liberalization, South Korea is as wealthy as Portugal, with a per capita gross domestic product (GDP) exceeding $12,000. Countries as diverse as Nicaragua, Poland, and New Zealand have also benefited enormously from trade liberalization.8

American antitrust law has trumped labor law in the domestic arena when unions, particularly with the aid of employers who have their own concerns about product competitiveness and the product market, build walls around themselves so as to shelter themselves from competition, thus injuring the public interest.9 The ongoing conundrum lies in the fact that labor unions and thus the policies that support them proceed from the assumption that competition between workers in the same facilities, companies and industries is at odds with their collective interests. The idea of trade unionism and the collective bargaining process is thus working at cross-purposes with antitrust policy which promotes competitiveness and, historically, deemed attempts to invoke a unity of interest as collusion or unlawful restraint of trade.10

Now the debate about international labor standards has put this policy conflict into the global arena.

These competing policies are further dramatized by the fact that the labor movement's drive toward better employment conditions has its roots in both moral and economic concerns.11 The idea of dignity is what makes some of this subject matter similar to human rights issues throughout the world. And the focus is egalitarian, an attempt to distribute more fairly the balance of power between workers and employers—to "level the playing field," in modern parlance. Yet simultaneously, the attempt to improve conditions necessarily speaks in terms of comparisons and comparability and thus cuts across more

8. McGinnis & Movsesian, supra note 6, at 521-522 (footnotes omitted).
than the work station, i.e., the plant, company, and industry as a basis for raising employees up from demeaning circumstances and warring against unfair competition between workers.

The idea of international labor standards first gained momentum in early Nineteenth Century Great Britain with Robert Owen as their proponent—and it was catalyzed by the expansion of the antislavery movement. Advocacy for this idea found strength in France, Switzerland and Germany, and proponents claimed that basic human rights were involved inasmuch as the benefits had their source in morality. But then as now, an argument for uniformity across nations, which can override the nation state's sovereignty, was put forward on the grounds that nations providing improved wages and benefits would otherwise lose their competitive position. Thus, advocacy flourished, and continues to flourish, in the richer countries. Yet it is an argument that arises in the context of advanced countries competing amongst themselves when the question of comparative advantage enjoyed by developing countries, existing at a different economic state of development, is unknown.

The first of major organized meetings was organized by the Swiss government in 1881, and dealt with international legislation on factories. After a failure to attract sympathetic recruits, Switzerland tried again with a conference planned for Berne in 1889—but it was not held, though four other countries accepted invitations. In 1890, Germany organized a conference in Berlin that fourteen states attended. This conference lasted ten days, but produced no policy conclusions. Subsequent meetings were held in Brussels (the United States participated in this one along with twelve European countries), Paris, Basel, Cologne and, once again, Berne.12

Between 1904 and 1915 there were more than twenty bilateral agreements on labor issues between various European countries and in one case even the United States. Italy, France, and Germany were the most frequently involved. Most often these agreements related to issues which have clear transnational implications such as insurance compensation for accidents involving citizens of one country while working in another. Little more developed. Indeed, in the domestic arena in countries like the United States, both policy and constitutional hurdles were placed in the way of social and economic regulation of even child labor,13 though the "Brandeis Brief" produced a


Supreme Court decision upholding the constitutionality of protective legislation for women.\textsuperscript{14}

At the conclusion of World War I, President Woodrow Wilson's sponsorship of international democratic rights was seen as a way to avoid future conflicts. The Treaty of Versailles created the League of Nations as an instrument to obtain this objective but the United States did not ratify it, largely due to the urging of Senator Henry Cabot Lodge of Massachusetts. Thus the United States joined neither the League nor its new entity designed to promote international labor standards, the International Labor Organization, which was created as a part of the League in 1919.\textsuperscript{15} The League failed when Axis aggression went unremedied, but the ILO survived the League's demise.

In part this is attributable to the fact that President Franklin D. Roosevelt's Administration decided to opt for United States membership in the ILO in 1934,\textsuperscript{16} giving it a measure of support that the League never had. Moreover, the ILO was never directly tarnished by the 1930s military aggression, as was the League itself, and was thus better positioned to survive. At the end of World War II it became an agency of the United Nations.

Simultaneously, the idea that the repression of labor, most dramatically through forced labor as well as other antidemocratic policies in Germany, Italy and Japan, was a substantial factor in international discord, prompted the Allies to feature labor policy as part of the occupations of both Germany and Japan. The MacArthur Occupation in Japan creates a policy in which explicit constitutional rights for labor, unknown in the United States, were promulgated.\textsuperscript{17}

In its early years, the ILO was concerned with minimum conditions of employment such as hours of work and night work. But in the midst of World War II it promoted the Philadelphia Conference, which led to the key Conventions promoting both the right of workers to organize (Convention 87)\textsuperscript{18} and to engage in the collective bargaining

\textsuperscript{14} Muller v. Oregon, 208 U.S. 412 (1908) (upholding against a Fourteenth Amendment challenge a statute setting a limitation on the number of hours women could work in a day).


\textsuperscript{16} See ILO History, supra note 15.


\textsuperscript{18} Convention 87 delineates guarantees of freedom of association including employees' right to establish and join organizations of their own choosing, to draft the constitutions and rules of such organizations, ILO gloss grafted on by virtue of the ILO Freedom of Association Committee relating to the right to strike, and to do all of this without prior authorization. See also OECD 1996, supra note 7, at 31-32.
process (Convention 98).\textsuperscript{19} The preamble to the ILO Constitution reflects the dual objectives for international labor standards, which first emerged in the nineteenth century at the time of the agency's creation in 1919. The idea of international labor standards has always presented two faces as the result of these dual objectives.

The preamble states that, "universal and lasting peace can be established only if it is based upon social justice."\textsuperscript{20} Moreover, the preamble also states that the "failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries."\textsuperscript{21} This is the idea of unfair competition, an idea that had found a receptive audience in Europe much earlier.\textsuperscript{22} It is also reflected in portions of the National Labor Relations Act's own preamble, enacted to promote freedom of association and collective bargaining in the United States\textsuperscript{23} shortly after the United States joined the ILO. This aspect of international labor standards and the fact that the richer nations continue to sponsor them plagued the movement from its inception through the turn of this new century. It figures substantially in the debate known as the "race to the bottom" which, some contend, emerged because of the absence of some kind of international regulation.\textsuperscript{24}

A final factor in the equation relates to global poverty—a theme addressed by the first portion of the ILO preamble. There has been a

\begin{itemize}
  \item \textsuperscript{19} By guaranteeing employees' right to engage in collective bargaining, Convention 98 gives teeth to Convention 87. See id. at 32. Convention 98 guarantees the right to collective bargaining by requiring that workers be protected against anti-union discrimination and that the law provide "adequate protection against acts of interference between workers and employers organizations." \textit{Id.}
  \item \textsuperscript{20} ILO CONS., at \url{http://www.ilo.org/public/english/abouttiloconst.htm#pre}.
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} OECD 1996, \textit{supra} note 7, at 11.
  \item \textsuperscript{23} See 29 U.S.C. § 151 (2000). Interestingly, in enacting the NLRA, Congress announced that a primary purpose of this policy was to remove the downward pressure on wages that a failure to protect collective bargaining rights produces. Congress stated,

  The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by . . . causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

  \textit{Id.} Congress also noted, "The inequality of bargaining power between employees . . . and employers . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners . . . and by preventing the stabilization of competitive wage rates and working conditions within and between industries." \textit{Id.}
  \item \textsuperscript{24} \textit{See, e.g.,} \textsc{organisation for economic co-operation and development, international trade and core labour standards} 39 (2000) [hereinafter OECD 2000] (reviewing the "race to the bottom" literature).
\end{itemize}
dramatic decline in foreign assistance provided by the industrialized nations to the developing countries. Whatever the virtues of free trade—and they are obviously considerable—their spread and application have been uneven, leaving African and Muslim countries disproportionally beyond their beneficence.\textsuperscript{25} Even the Bush Administration, its proposals hobbled with inadequacy,\textsuperscript{26} appears to have accepted the maxim that global poverty can be diminished only with aid and trade operating in tandem.

Despite being the wealthiest nation in the world, the United States has done surprisingly little to help developing countries. The decline is particularly dramatic in the United States when one realizes that 3.21 percent of GDP was provided in foreign aid in 1949.\textsuperscript{27} Admittedly, this statistic is somewhat distorted because the United States was providing so much to war-torn Europe through the Marshall Plan so as to get that continent on its feet. Yet, even in the 1960s foreign assistance fell below one percent of GDP. Now the United States expends 0.08 percent on foreign assistance\textsuperscript{28} and has balked at the United Nations’ target of 0.7 percent, established to halve world poverty by 2015.

The United States not only failed to keep up with its own past performance in the foreign aid arena—it is also currently failing to keep


\textsuperscript{27} Security over Succor, 32 NAT'L. J. 1824 (2000).

up with the international community. Although foreign aid expenditures dropped nearly across the board in the 1990s, the United States has led this race to the bottom. In the late 1980s, Japan de-throned the U.S. as the world’s number one provider of foreign aid. Today the U.S. ranks dead last among Western developed nations in percentage of GDP devoted to foreign aid. Scandinavian countries have consistently met the UN’s foreign aid expenditure goal of 0.7 percent of GDP. Other Western industrialized countries’ expenditures have also dwarfed the US’ in recent years. Denmark is currently setting the pace, spending a full one percent of its GDP on foreign aid. France has managed to devote 0.6 percent of its GDP to foreign aid, and the EU average stands at about 0.3 percent. The OCED average is also 0.3 percent, almost four times that of the U.S. Italy and Greece are the only Western countries that devote 0.2 percent of their GDP to aid. At the other end of the continuum is Denmark with 1.06 percent, the Netherlands 0.84%, and Sweden at 0.8%. Moreover, in responding to the United Nations’ initiative the United States was “careful to avoid any language that could have weakened the mandate of the [International Monetary Fund and World Bank] or . . . increased the say of the UN General Assembly, where every country holds an equal vote.” The 2002 Bush Administration proposals for foreign aid increases leave the United States lagging behind European generosity and good policy. The Bush

35. Id.
36. Unfortunately, the poorest developing nations receive surprisingly little of the foreign aid provided by industrialized countries. According to the UN Development Programme, ten nations that contain two-thirds of the world’s poorest people receive only one-third of the world’s foreign aid. *The Kindness of Strangers*, ECONOMIST, May 7, 1994, at 19. The rest of the aid is directed toward countries that are, by comparison, rather wealthy. For example, between 1982 and 1991, Israel and Egypt received the lion’s share of US aid. During that period, Israel received $29.9 billion and Egypt received $23.2 billion from the United States. *Foreign Aid; Kind Words, Closed Wallet*, ECONOMIST, Mar. 27, 1993, at 26. By way of comparison, Turkey ranked third on the United States’ list for that time period, receiving only $6.9 billion. *Id.* Since that time, the pattern has continued. Israel receives the most aid per capita, with about $400 of aid going to Israel for every citizen. *See Emerging Market Indicators: Official Aid*, ECONOMIST, Feb. 14, 1998, at 104.
Administration appears to continue to denigrate the significance of foreign aid to the well-being of developing countries and, notwithstanding the fact that country to country aid is provided in the Middle East, for instance, without scrutiny of the reforms undertaken by the recipient countries, it insists that that the 80 percent success rate of the World Bank and IMF is “not enough” for today’s occupants of the White House. As John Cassidy has noted:

> Between 1970 and 1993, developing countries with good economic policies but low aid payments grew at an annual rate of 2.2 per cent per capita, whereas developing countries with good economic policies and high aid payments grew almost twice as fast, at an annual rate of 3.7 per cent.

My judgment is that these two issues, aid and trade, are deeply connected. The lowering of tariff barriers in the rich countries is important for the poor nations. Moreover, the issue of aid directly affects the implementation feasibility of some of the international labor standards, most particularly child labor which requires financial aid to families will lose income as the result of effective child labor prohibitions. Finally, it seems clear that the threat posed to the West by those whom globalization has overlooked has been made dramatically manifest by the events of September 11, 2001. Global poverty and discontent are best challenged through practical standards, domestic policies which are designed to address the concerns of workers dislocated as the result of free trade, and dramatically increased foreign assistance to the developing countries of the world.

II. THE POLICY DEBATE ABOUT INTERNATIONAL LABOR STANDARDS TODAY

The idea of international human rights, of course, has gained momentum through other post-World War II instruments such as the Universal Declaration of Human Rights, the International Covenant

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39. Cassidy, supra note 37, at 66.
40. Id. at 63.
41. But opening up markets makes little difference if countries lack the capability to produce for them—if, for instance, they do not have the transport to bring their goods to market. By the same token, the mantra that countries should turn to the private sector is misleading. Foreign investment is important, but it goes to relatively few countries and in relatively few sectors. Foreign direct investment misses out on rural roads, on health and education—all important to developing countries.


42. Alan Beattie, Raw Deal for Poor Nations Limits Backing for Free Trade, Fin. Times (London), Apr. 12, 2002, at 3.

on Civil and Political Rights (ICCPR)\textsuperscript{44} and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).\textsuperscript{45} All of these agreements label the right to freedom of association as a fundamental right. In this country, these policies began to flourish in the 1970s through the Carter Administration's adoption of an international human rights program.\textsuperscript{46}

And the past decade has witnessed the emergence of Yugoslavian and Rwandan war crimes tribunals as well as the threatened criminal prosecution of General Augusto Pinochet in Great Britain, and thus, for the first time since the Nuremberg trials, attempted to apply criminal prosecutions internationally. The European Court of Human Rights has focused attention on principles which transcend and supersede national law of the Member States of the Council of Europe.\textsuperscript{47}

But the more recent debate about international labor standards has found its focus in two phenomena. The first is the growing income and wage inequality in the United States\textsuperscript{48} and, in some measure, Great Britain. It is contended this trend has its roots in unprece-

\begin{itemize}
\item \textsuperscript{47} The European Court of Human Rights has jurisdiction over forty-three member-states both within and outside the European Union. The court, amongst its duties, resolves disputes involving the interpretation of and adherence to Article 11 of the Convention which protects the right to join unions. For a discussion of the comparable law in the European Union, see generally Brian Bercosson, \textit{European Labour Law} 58-63 (1996); P. L. Davies, \textit{The Emergence of European Labour Law, in Legal Intervention in Industrial Relations: Gains and Losses} 313, 318-342 (William McCarthy ed., 1992).
\item \textsuperscript{48} See generally Derek Bok, \textit{The Cost of Talent: How Executives and Professionals Are Paid and How It Affects America} (1993); James K. Galbraith, \textit{Created Unequal: The Crisis in American Pay} (1998). Increases in wealth inequality are further evidence of the increasing inequality in America. For instance, between 1983 and 1998, the bottom 40\% of Americans' share of national wealth dropped from 0.9\% to 0.2\%. \textit{Facts and Figures}, at http://www.inequality.org/factsfr.html (last visited Mar. 13, 2002) (citing Edward N. Wolff, \textit{Recent Trends in Wealth Ownership, 1983-1998}, (Apr. 2000)). During the same time period, the middle 20\% of Americans' share dropped from 5.2\% to 4.5\%. \textit{Id}. The extent of inequality growth is better illustrated by the following figure: between 1983 and 1998, the bottom 40\% of Americans experienced a 76.3\% decrease in household net worth, while the top 1\% of Americans enjoyed a 42.2\% gain. \textit{Id}. 
\end{itemize}
dented globalization and unfair trade by countries that undercut the labor standards in the industrialized world.

The same argument is put forward, perhaps with slightly less intensity, with regard to developments in Europe. There, an inefficient and inflexible labor market has at least been partially responsible for double-digit unemployment. However, in Europe this unemployment exists amidst a strong social safety net—a stark difference from the American scene,49 where there are now prospects for an even further weakened welfare system.50 In short, the difficulty in America is poverty and inequality and in Europe, unemployment and lack of jobs51 and the contention by some is that globalization has produced these phenomena.52

Is a “race to the bottom” fueled by free trade policies responsible for these difficulties? The issue is dramatized not only by the increasing third world imports in certain labor intensive industries where the work has been done here by unskilled workers, but also (as the most favored nations legislative debate in the United States in 2000 testifies)53 by China's emergence as a major player on the international scene. Its accession to the World Trade Organization demonstrates this problem vividly.

How can the United States and the industrialized world, it is said, possibly compete when countries like China with lower labor standards and miniscule wages are in competition for the same markets? The difficulty here is that there is not much evidence to support the proposition that there is a “race to the bottom” with nations in competition with one another across national boundaries.54 Thus “there is

49. The weakness of our social safety net is evidenced by the fact that the United States has the highest percentage of children in poverty (20.5%) of any industrialized nation. See SYLVI A N N HEWLETT & CORNEL WEST, THE WAR AGAINST PARENTS 43 (1998).
52. See generally John Cassidy, Who Killed the Middle Class?, New Yorker, Oct. 16, 1995.
53. For a sample of the debate surrounding the decision to grant normal trade relations treatment to China, see Providing for Further Consideration of H.R. 4444, Authorizing Extension of Nondiscriminatory Treatment (Normal Trade Relations Treatment) to People's Republic of China, 146 Cong. Rec. H3652 (2000); Authorizing Extension of Nondiscriminatory Treatment (Normal Trade Relations Treatment) to People's Republic of China, 146 Cong. Rec. H3662 (2000).
54. A similar argument has led to national legislation on the doctrine of preemption in connection therewith in American labor law. See generally Archibald Cox, Federalism in the Law of Labor Relations, 67 HARN. L. REV. 1297 (1954). National labor legislation is also warranted in many instances by the need to prevent competition based upon differences in state law. . . . Today enterprises located in states where unionization is fought by the
little empirical support for a link between increased world trade and a
decline in labor conditions.\textsuperscript{55} One of the features of this phenomenon
is a comparative disadvantage in technological innovation and labor
productivity in nations which have a comparative advantage in wages
and other benefits.

Professor Robert Flanagan of the Stanford Graduate School of Busi-
ness cites the example of Kenya and the United States in the early
1980s when American wages were 183 times as high as those of Ke-
nya. Ironically, the productivity of an American worker was exactly
183 times greater.\textsuperscript{56} As nations and companies become more pros-
perous, productivity gains through technological innovations allow work-
ers to become richer.

For instance, in less than a decade, Korean wages rose from one-
tenth of American wages to two-fifths. As Professor Gary Fields has
noted:

In the early stages of Korean economic growth, labor market conditions
improved via reduction in unemployment with real wages holding essentially
constant. . . . Labor earnings and per capita growth proceeded apace of one
another thereafter.

These gains led to marked improvements in standards of living, leading
Korea to a place at or near the top of middle-income countries in such dimen-
sions as life expectancy, infant mortality, access to safe water, adult literacy,
and school enrollment rates. The growing richness of the Korean economy
permitted the country to introduce new social programs while improving and
expanding existing ones. Minimum wages were introduced, employment in-
surance systems instituted, and social protections systems created.

At the same time, not every aspect of Korea's social situation was rosy.
Labor unions were suppressed openly in Korea until 1987; the labor move-
ment has only recently won some but not all of the battles in the struggle for
free collective bargaining and freedom of association at the enterprise and fed-
eration levels. Wages were repressed, because of worries that increases in
wages would undercut comparative advantage and threaten economic growth.
(In my view, these worries were misplaced, as indeed is borne out by the con-
tinuation of very rapid economic growth in Korea throughout the 1980s and
most of the 1990s.) The gap in earnings and job opportunities between men
and women remains large, with discrimination against women playing an im-
portant role.

whole business community and where there are repressive laws against
strikes and picketing frequently enjoy advantages which influence the
location of new industries and even the migration of established
concerns.

\textit{Id.} at 1303. See also William B. Gould IV, \textit{The Garmon Case: Decline and
Threshold of Litigating Elucidation}, 39 U. Der. L.J. 539 (1962). The same do-
crine affects state legislation in the international labor policy arena. See Crosby,
Sec'y of Admin. and Fin. of Massachusetts v. Nat'l Foreign Trade Council, 530

\textsuperscript{55} McGinnis & Movsesian, \textit{supra} note 6 (footnotes omitted).

\textsuperscript{56} Robert J. Flanagan, \textit{Labor Standards and International Competitive Advantage}
(paper presented at the International Labor Standards Conference, Stanford Law
School, May 20, 2002).
Notwithstanding these problems, Korea succeeded in dramatically improving the material well-being of working people. Real wages (adjusted for inflation) grew in Korea at the same rate that per capita Gross National Product did. This was achieved not by being forced under international pressure to adhere to externally-set labor standards and not by setting an ambitious domestic labor code with which companies had to comply. Nor were their successes brought about by cracking down on unions, placing limits on wages, or disempowering women in the labor market. The lives of working people in Korea were improved by economic growth, which tightened the labor market to the point where full employment was achieved and maintained and wages and working conditions were pulled up by the rapidly-growing demand for labor. Employers raised wages not because the government told them to, but because the market told them to . . . .

Korea's labor market success story is one that has been duplicated in kind in the other rapidly-growing economies of East and Southeast Asia. . . . The achievement of full employment, rapidly-rising real wages, improvements in the types of jobs that people are in, falling rates of poverty—all of these have happened because of the success of the East Asian types of growth models.57

The tendency for wages and income to increase alongside of productivity makes it less likely that the natural tendency of the developing countries to catch up with technological innovations from the industrialized world will destroy the economic balance between the two worlds of countries. States one writer:

The great fear of the race-to-the-bottom crowd—that U.S. multinationals will locate production facilities in developing countries, exploit local resources, and reexport back to the United States—has not materialized. In fact, that type of activity characterizes less than 4 percent of total U.S. investment abroad. The oft-cited cases of garment facilities based in poor nations and geared to consumers in advanced economies are the exception, not the rule. This exception is largely due to the low capital investment and importance of labor costs in the textiles sector.58

The same writer notes that similar patterns have emerged with regard to environmental standards. "Mexico has enhanced its environmental protection efforts while trying to attract investment. The result? Foreign direct investment around Mexico has exploded, while the air quality has actually improved."59

Two important studies by the OECD issued in 1996 and 2000 are instructive. These reports publicize a series of findings that are closely related to the race to the bottom argument. For if in fact there is a race to the bottom through which the developing countries will enjoy a comparative advantage, just as the more affluent countries

59. Id. However, the shantytowns and worker dislocation in that country represent another more somber side of the Mexican picture. See, e.g., Joel Millman, Mexican Border Workers Suffer as Plants Relocate South, WALL ST. J., Mar. 26, 2002, at A20; Tim Weiner, Monterrey's Poor Sinking in Rising Economic Tide, N.Y. TIMES, Mar. 21, 2002, at A6.
will advocate international labor standards, the developing countries will resist them because of a feared impact upon their own ability to compete in world markets.

The OECD has examined the question of whether the adherence to basic labor standards interferes with their development and places them at a competitive disadvantage. As the studies indicate, the very first question that must be answered preliminarily is how one defines international labor standards at issue. There is a consensus about the identity of a small set of “core” standards, though there is some dispute about this at the margin.

These standards, in substantial part, are procedural and do not directly affect the substance of the employment relationship. They include freedom of association, the right to organize and bargain collectively, non-discrimination in employment, the prohibition of forced labor. The issue of child labor and its elimination is usually considered amongst the so-called core principles, though such policies carry special problems with them.

These standards, notes the OECD, are the most important because they “embody basic human rights,” in contrast to standards relating to working time arrangements and minimum wage laws. In this and related economic areas, different states of development of nation-states and, equally important, the views of democratic institutions in those countries about this matter, will be harmed by uniformity. And, a view that these standards are procedural in nature leads to the idea that they establish a framework for other labor standards that may be either voluntarily negotiated by labor and management or devised through government policy.

The OECD emphasizes its concern about uniformity by its distinction between core labor standards and other labor standards. The

60. OECD 2000, supra note 24, at 14 (arguing that because core and non-core labor standards differ in the economic outcomes they produce, studies based on labor standards generally cannot be easily compared to studies based on core labor standards).
62. See id. at 18, 20 (listing the fundamental principles and rights at work).
63. See id. (including eliminating child labor among the fundamental principles and rights at work); see also OECD 1996, supra note 6, at 13. But, as we shall see, the child labor issue carries with it special problems that bump up against economic issues directly.
64. See OECD 2000, supra note 24, at 17.
OECD finds this distinction to be "crucial" inasmuch as working time and minimum wages can affect "patterns of comparative advantage, e.g., higher minimum wages are likely to affect trade performance negatively. But core labor standards, unlike minimum wages, will not necessarily affect comparative advantage negatively, and indeed may have a positive effect."65

Finally, the Declaration on Fundamental Principles and Rights at Work unanimously adopted by the ILO in 1998, which expresses support on behalf of all members for the core standards, is acknowledgement of the fact they are viewed to be of a fundamental nature and at the center of a democratic society.66 The same holds true of the ILO Declaration of Philadelphia of 1944, which established special support for the principles of freedom of association and collective bargaining.67

The OECD found that there was no empirical evidence that low core standards could be correlated with low real wage growth or that raising core standards would imply a pattern of higher real wage growth.68 In some countries where there is little or no freedom of association there is no indication that real wages have grown faster than productivity.69 Thus there appears to be no gain for developing countries that attempt to repress workers' rights in any of these areas and thus involve such countries in an attempt to facilitate a "race to the bottom."

Moreover, the 1996 OECD report found that a country's amount of total country exports was not altered by improvement in the freedom of association area.70 Moreover, a U.S. International Trade Commission report cited by the OECD supported the view that exporting sectors in the developing countries have higher labor standards than non-exporting sectors.71 Nonetheless, in five countries—Bangladesh, Jamaica, Sri Lanka, Pakistan, and Turkey—workers' rights have

65. See id. at 33. But see J. BHAGWATI, FREE TRADE TODAY 71 (2002) (decrying the selective use of core standards so as to disadvantage developing countries).


67. See DECLARATION CONCERNING THE AIMS AND PURPOSES OF THE INTERNATIONAL LABOUR ORGANIZATION, Art. III(e) (1944), at http://www.ilo.org/public/english/about/ilconst.htm#annex (committing the ILO to "further world programmes which will achieve ... the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures").

68. OECD 1996, supra note 7, at 37.

69. But see id. supra note 7, at 37.

70. Id. at 41.

been repressed in exporting zones in a way that was not the case of the country generally.\textsuperscript{72}

Of course, all that is reflected in the OECD report is a tendency—a tendency which, while constituting the preponderance of evidence, is by no means uniform. Nonetheless, the 1996 OECD report contains this conclusion:

The "race to the bottom" view which argues that low standard countries will enjoy gains in export market shares to the detriment of high standards countries appears to lack solid empirical support. Countries can only succeed in repressing real wages and working conditions for a limited period of time. Thereafter, market forces will be such that wages will catch-up, thus wiping out previous competitive gains. More generally, there is evidence that, as expected, low per capita income countries have recorded significant improvements in export market shares, suggesting market forces work in the aggregate.\textsuperscript{73}

What about foreign direct investment in developing countries? Will it not go to countries in which labor standards are inferior and thus promote a "race to the bottom" in a less dramatic and more drawn out fashion? Here again, the OECD is of the view that there is no support for low core standards as a factor in trade and investment decisions.\textsuperscript{74} This is because there is no evidence that low core standards are associated with low labor costs that are, in fact, principal considerations in trade and investment. And, there is no evidence that the ability to attract investment or even stimulate exports in areas where labor standards are low means that the long-term growth of the country will be promoted. In essence, the OECD is of the view that the enforcement of core standards may strengthen the economic performance of developing countries.\textsuperscript{75}

Other findings of the OECD relate to the interplay between trade liberalization and labor and the development of labor standards, particularly core standards. No single pattern of sequencing in terms of trade liberalization and better compliance with Conventions 87 and 98 is demonstrated through OECD examination. That is to say, there is no single pattern that determines whether free trade is likely to produce core labor standards or whether core labor standards as part of a democratic system induce free trade.

But the OECD notes that freedom of association rights tended to improve at least three years after the start of trade reforms in fifteen countries and that in nine countries such rates preceded trade reforms by at least three years.\textsuperscript{76} In eight countries the two processes begin at

\begin{itemize}
  \item \textsuperscript{72} Id. at 43.
  \item \textsuperscript{73} Id. at 45.
  \item \textsuperscript{74} Id.
  \item \textsuperscript{75} Id. at 46 (arguing that "the enforcement of core standards is likely to strengthen the long-term economic performance of all countries").
  \item \textsuperscript{76} Id. at 49.
\end{itemize}
the same time and in six countries there has been no improvement in association rights.\textsuperscript{77} Thus, the OECD concludes that, on balance, there is a “positive two-way relationship between these processes. Indeed, a comprehensive policy and institutional reforms have been implemented simultaneously in most of the liberalizing countries.”\textsuperscript{78}

Again, these conclusions do not seem to be consistent with the race to the bottom idea. In no case was a worsening of freedom of association rights found where trade reforms were instituted. And in no case did the promotion of freedom of association and bargaining rights impede trade liberalization.

Finally, in its 2000 report the OECD concluded that there was no “robust evidence” that firms were directing investment to “no standards” countries.\textsuperscript{79} The OECD was of the view that countries in which core labor standards were not respected received a very small share of global investment. However, it was careful to note that there was a “significant exception” to this conclusion in China.\textsuperscript{80}

It is still too early to say whether China’s accession to the WTO will alter this picture. China’s proudly proclaimed resistance to the development of independent unions in that country\textsuperscript{81} as well as its forced labor violations induce us to approach that country’s experience and potential for altering what has been described above with some caution. That, in itself, is an argument—or a portion of an argument—for some form of regulation.

Second, it is unclear what impact globalization has on health and safety issues. It is interesting to note that neither the OECD nor the ILO includes health and safety matters within the so-called “core” principles. In a sense, this absence is justifiable because of the difficulties invariably involved with defining the content. Yet the importance of health and safety and its ability to be understood across national boundaries means that it ought to get some kind of international regulatory attention.\textsuperscript{82} Moreover, “[m]orality \textit{sans} borders”

\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} OECD 2000, supra note 24, at 34.
\textsuperscript{80} Id.
cannot avert its gaze from admittedly complex and vexatious issues like child labor about which there appears to be considerable consensus. The Woodrow Wilson–Jimmy Carter approach to international human rights provides much of the justification for international regulation. The fact that some matters are difficult to resolve does not argue against international regulation.

Third, the burden of competition appears to fall disproportionately upon the unionized sector of the industrially advanced economies. The difficulties in the United States in terms of both low wages as well as unemployment have disproportionately affected the bastions of union strength like manufacturing and textiles. The causes are far more complex than globalization. Yet the decline of trade unionism is a worrisome phenomenon that a democratic pluralistic society can ill afford. Again, this erosion of the important elements of the democratic state argues for international regulation of some kind.

III. WHAT SHOULD BE DONE?

Of course, many argue that the answer to this question is absolutely nothing. Professor Jagdish Bhagwati and others champion this view—at least when it comes to linkage between trade and labor. Their first argument lies in their contentions that there is no causal link between globalization and inequality and unemployment. Their view is that if imports were undercutting the unionized sector, we would see a resulting decrease in prices of such goods. Yet this phenomenon has not occurred. The response put forward by, for instance, Adrian Wood is that the decimation of entire industries like textiles has emerged and that, in any event, technology—the other major culprit in this story—is in part promoted by trade. Technology, it is argued, is a response to trade and is often introduced through foreign competition itself, Japan being a vivid illustration.

In any event, the argument of Bhagwati and others is that the idea of international labor standards is essentially protectionist and thus akin to other straightforward protectionist arguments proffered on behalf of industries that are harmed by foreign competition and globalization. This argument will gain strength in the wake of the Bush Administration’s tariff increases in the steel industry which, rather

83. BHAGWATI, supra note 65, at 68.
85. BHAGWATI, supra note 65, at 79-80.
86. Since 1997, the United States has lost 180,000 jobs in textiles. Last year 116 plants closed. Free Trade Tangled up in Textiles, ECONOMIST, Mar. 30, 2002 at 25.
than protect the most vulnerable workers, are designed to diminish peril for uncompetitive industry.88 Even before the steel debacle the same Administration sacrificed free trade at the altar of the textile industry in order to get the Trade Promotion Act—supposedly a free trade measure—through the House of Representatives.89

From this analogy, the Bhagwati group concludes that international labor standards with teeth must be rejected. If, runs the argument, the industrialized countries were truly concerned about the plight of foreign workers and seeking to have them benefit through the development of such standards, they would provide more adequate foreign assistance. Yet, as we have seen, foreign assistance has diminished, particularly in the United States, reflecting a lack of genuine concern for foreign workers.

Second, it is argued that the fact that immigrant workers are routinely denied visas is another example of protectionism. If the U.S. truly desires to benefit foreign workers, the argument goes, then why not allow them entry to the United States so that they can enjoy the labor standards of this country? The large influx of illegal or undocumented workers is indicative of both the employers' demand for labor and the employees' demand for jobs. The exploitation of undocumented workers is unremedied by labor law coverage90—a point dramatized by the Supreme Court's 5–4 decision to deny undocumented workers back pay remedies under the NLRA.91 This ruling which creates an incentive for American employers to employ workers to whom labor law protection is denied constitutes a compelling argument in favor of the proposition that the West, and particularly the United States, is not concerned with the plight of vulnerable immigrant workers who hail from the poor nations but rather the interests of entrepreneurs within our own borders.92

88. See supra note 11 for articles dealing with the increased tariffs in the steel industry.
Third, opponents of international labor standards note that the United States has not ratified any of the core conventions except for the Worst Forms of Child Labor Convention of 1999 as well as Convention 105 on the Abolition of Forced Labor, ratified belatedly in 1991.\textsuperscript{93} Even the fundamental Conventions providing the principles and standards of freedom of association and collective bargaining have not been ratified by the United States in part, because of the argument that is a federalist country where our national government would have difficulty committing itself to such standards.\textsuperscript{94} At the same time, it can be argued that this policy constitutes indifference to all workers by American governments, Americans as well as foreigners, and that therefore job protectionism is not present.\textsuperscript{95}

And fourth, the opponents of standards note that the United States has done a poor job of protecting the oppressed within its own borders. For instance, agricultural workers are beyond the protections of the National Labor Relations Act.\textsuperscript{96} This policy is the mirror image of American treatment of undocumented workers. Thus in many instances protection is not afforded to the most vulnerable among us here. The United States has been resistant to the idea that international human rights-labor standards ought to be used to raise up workers who are oppressed in the United States.\textsuperscript{97} Again, however, the evidence thus far seems to support policies which are indifferent to workers both in the United States and abroad.

What policies should be pursued within our own borders to address and assuage the concerns and difficulties of American workers and, in

\textsuperscript{93}OECD 2000, supra note 24, at 22-23.

\textsuperscript{94}Yet there is something more involved in this story since federalist countries other than the United States have a demonstrably superior record in ratifying ILO Conventions. \textit{Id.} at 21 (noting that nations with federal forms of government, such as the United States and Switzerland, may be limited in their abilities to bind their states as a result of the decentralization of political authority). Although this “federalism prevents passage of fundamental standards” argument makes sense, comparing the performance of different federalist nations demonstrates that some other factors must be at work. Canada has ratified four of the ILO’s seven fundamental conventions; Australia has ratified six; and Switzerland has ratified all seven. \textit{Id.} at 25. If it were the case that federalism were the determinant factor, then one would expect these nations’ totals to be closer to the United States’ measly total of two.

\textsuperscript{95}I am indebted to Professor Brian Bercusson for making this point to me.


so doing, to diminish protectionist instincts such as those which have emerged in the steel industry in 2002? Little attention has been given to this problem.

The fact of the matter is that trade is a game of winners and losers and the United States has done little to help the losers. In 2000, Senator Bill Bradley advocated protection for workers displaced by trade agreements through a new earnings insurance program that would give them time to learn new skills and develop new careers. Such a program would allow employees to take a job at a lower salary and the government would reimburse half the lost wages for the next three years. This would not extend or constitute unemployment compensation but would provide workers with time to develop new skills that would allow them to advance their new job and new career.98 Senator Bradley was not elected and the legislation was not enacted. It seems clear that at this point there is no political will to provide substantial tax money for this important policy objective. Even more modest Democratic Party attempts to expand adjustment assistance to workers secondarily affected by trade has met with Bush White House resistance.99

The 2002 steel industry debate resulted in increased tariffs—but not governmental assistance to protect workers’ pensions and health care which are threatened by dislocation. National labor policy must focus upon protecting workers in transition who are in industries that lack a comparative advantage and who will lose income, health benefits, and pensions—not industries that cannot compete in world market. Thus I enthusiastically concur with the following view:

[With] the wealth generated by free trade, society can provide transfers to people with less income, including those for whom trade provides no advantage or even a net disadvantage. For example, instead of pressuring the Japanese automobile industry to adopt voluntary export restraints in the 1980s, the United States could have paid cash compensation to American autoworkers. This strategy would have cost far less than the $3 billion that American consumers ultimately spent in higher car prices.100

Since the consumers win from free trade, it is appropriate that part of their winnings go to the free trade losers. Additionally, there will be ongoing debate about whether the trade adjustment assistance program, which has promoted assistance including benefits, relocation

100. McGinnis & Movsesian, supra note 6, at 525 (footnotes omitted).
expenses and training—should be strengthened so as to facilitate eligibility for benefits.\textsuperscript{101}

In any event, that debate about legislation relates to a law that provides benefits alone and not, as advocated by Senator Bradley, benefits alongside of new jobs. A central element of the industrialized world's policies must be to provide income assistance along with jobs. As the London\textit{ Economist} has noted in criticizing the steel tariff:

\textit{[T]he principle should be 'protect the worker, not the industry.' The government should improve its assistance programmes for workers who lose their health-care benefits and pensions when firms fail, and it should look at new and more generous ways of helping workers find new jobs. These policies cost money, of course—but so does shutting out imports, and far more so, the only other difference being that the effect is disguised.}\textsuperscript{102}

Beyond this approach, former Secretary of Labor Robert Reich has advocated reforming the National Labor Relations Act as a way to move toward the acceptance of trade and a form of labor standards in our own country.\textsuperscript{103} The idea is that unions which have a fair shot of organizing new employees in industries that grow as a result of free trade will find less to resist in globalization itself. But even before the intensified debate about international labor standards, it was clear that enactment of any revisions of the National Labor Relations Act had no chance whatsoever, even with a Democratic Congress (let alone with a Republican-controlled House, which has been the case since 1994).

Even if the needy rich have laid first claim on the United States Treasury and thus the realization of proposals propounded by Senator Bradley and labor law reform are not even remotely possible, the question still arises as to whether some the problems at which an international framework is aimed could be remedied by existing national labor law in a sovereign state like the United States. Solidarity between unions across bargaining units and other arbitrary boundary lines is unusual—particularly in the form of secondary boycotts—and the law allowing for international secondary activity in the United States is murky.\textsuperscript{104} Similarly, the duty to bargain with unions about corporate relocations across boundaries affords little basis for American unions to ascertain the actual grounds on which management's

\begin{itemize}
\item \textsuperscript{102} \textit{Tariffs on Steel: George Bush, Protectionist—The President's Decision to Place High Tariffs on Imports of Steel Is Disgraceful}, \textit{Economist}, Mar. 9, 2002, at 13.
\item \textsuperscript{103} See, e.g., Thomas Friedman, \textit{Foreign Affairs; America's Labor Pains}, N.Y. Times, May 9, 2000, at A25.
\end{itemize}
decision has been taken.105 Employer decisions to relocate because of union activity are unlawful, but the applicability of this proposition is limited by the need to prove actual anti-union animus106 or to get the Board to use expedited procedures available under Section 10(j) of Act.107

As the Court of Appeals for the Second Circuit in Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.108 has made clear, it will be difficult for American courts to exercise jurisdiction over labor disputes beyond our borders.109 My dissenting opinion in International Longshoreman’s Association110 would have expanded jurisdiction under the National Labor Relations Act, but at this point it is just that—a dissent! If answers to the question of whether and what international labor standards should be promoted are to be found, one must look beyond national labor law in the United States and, in all probability, throughout the industrialized world.

What then should or needs to be done beyond efforts to cushion the blows of trade for domestic workers inside America’s borders? The fact that there are outlier countries in which the “race to the bottom” does take place and that there is so little known about what will constitute China’s response to free trade, that the race may well affect aspects of health and safety, along with the intrinsic value of international labor standards or rights as a matter of both decency and dignity and as an important factor in democracy and world peace, all could argue for some form of protection which is not protectionism.

Freedom of association and collective bargaining are the bedrock of international labor standards as human rights. Beyond the concerns expressed previously relating to trade, these rights are part of the so-called public goods which workers are unlikely to obtain on an individual basis but can do so collectively through trade union representation.111 Second, it seems apparent that unions are part of the

democratic pluralist society in which workers are able to voice their views alongside of business interests. True, the United States and, to a lesser extent, the West is sometimes inconsistent in its promotion of such policies within the industrialized world. But they must be pursued throughout the world.

Third, anti-discrimination principles, particularly where the question of equal pay for equally valued work is skirted—it remains a thorny problem in the United States itself— is the second obvious candidate. Just as they do with substantive conditions of employment like minimum wage and overtime, developing countries may maintain that freedom of association and collective bargaining are inappropriate to them at their stage of economic development. Is it possible to make the same claim in connection with discrimination on the basis of, for instance, sex or race or some other arbitrary consideration? My sense is that a broad consensus cutting across national boundaries answers this question in the negative.

But beyond freedom of association, collective bargaining and anti-discrimination, the list becomes more complicated. Forced labor is surely the next obvious candidate. The forced labor prohibitions are very much akin to antislavery policies. It is difficult to quarrel with the idea that these kinds of standards, whether the race to the bottom is involved or not, can be tolerated in civilized societies in the twenty-first century.

Yet problems arise in United States in connection with prison labor. Some states in this country allow prison work to be subcontracted to private companies. That practice appears to run


113. Thus I am skeptical about the Bhagwati argument that gender discrimination will not be fast-tracked as a core standard. BHAGWATI, supra note 65, at 71.


afoul of the relevant ILO convention and makes consensus more difficult.116

But the most troublesome of all of the core labor standards and that which appears to be most heinous and attracts consequent unfavorable publicity for American and other Western multinationals is child labor itself. As the OECD has said with regard to the law and child labor:

[It is unlikely that the low legal provisions are the main factor behind child labour. Instead, it is the lack of enforcement of the existing provisions (however low) which poses the major problem. Enforcement is typically weak in the informal sector. In several countries, the under-provision of schools makes enforcement of child labour laws problematic. This is especially the case in rural areas of Brazil, India and Turkey. More generally, in the face of very low living standards, child labour provides an important source of income to their families.117

This means that attempts to remedy child labor and the way in which it stunts educational growth and opportunity lie in more assistance to affected people rather than in flat prohibitions. Income decline visited upon impoverished families place them in desperate circumstances.118 They must be recompensed for the loss involved. The institution reviewing child labor disputes must be able to order or effectively promote assistance as a necessary complement to any prohibition.

Again, the richest countries will be required to provide the assistance. The imposition of child labor requirements without assistance will simply push children away from export industries for instance, and into the area of pornography and sexual exploitation.

In 1999 the ILO members unanimously adopted the Worst Forms of Child Labor Convention, Convention 182. Even the United States ratified this one. Convention 182 specifically bans all forms of slavery or practices akin to slavery, forced or compulsory labor, sexual exploitation, illicit activities and other forms of work relating to children that will harm their health, safety and morals. It would be a mistake for anyone to believe that this broadly accepted convention addresses the more fundamental problem of child labor—nor does the ILO Con-
vention which prohibits the employment of minors below a particular age. Again, the broader problem can be addressed only with financial assistance that compensates families which are on the edge of economic devastation.

IV. THE APPROPRIATE FORUM

But if there are standards that should exist internationally, the question is how to bring about adherence or enforcement. As noted above, the International Labor Organization has been the principal forum historically. The ILO utilizes a variety of means to monitor application or observance of its conventions. The first is the regular system of supervision based on the ratification of conventions by ILO member countries. The ILO, tripartite in organization, allows for any employer or workers' organization to seek an examination of a government's alleged failure to apply a convention that it has ratified. Governments may also bring complaints or concerns against other governments and special machinery is established to address freedom of association complaints from workers' organizations or employers against governments which have not ratified Conventions 87 and 98 relating to freedom of association, the right to organize, and collective bargaining. And special machinery may be established for reporting purposes relating to labor standards issues—a good illustration of this is the special machinery established to report on apartheid in South Africa. Attempts to extend the freedom of association machinery to other core conventions such as forced labor and non-discrimination have been rejected because those conventions are not embedded in the ILO Constitution as is true of Conventions 87 and 98. The problem here is to assure applicability of the machinery to non-ratifying countries.

As noted above, the ILO Declaration on Fundamental Principles and Rights at Work, promulgated in 1998, attempts to promote observance of the core standards for countries which are members of the organization whether the convention has been ratified by the country.

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119. Convention 138, passed in 1973, requires each member nation to establish a minimum age for workers. That age should be at "a level consistent with the fullest physical and mental development of young persons," ILO Convention No. 138, art. I, at http://ilolex.ilo.ch:1567/scripts/convde.pl?C138, and no lower than fifteen, id. at art. II., § 3. The Convention further establishes that the minimum age in jobs "likely to jeopardise the health, safety or morals of young persons" should be eighteen. Id. at art. III, § 1. These provisions notwithstanding, Convention No. 138 states that member nations may permit children between the ages of thirteen and fifteen to perform work that is "not likely to be harmful to their health or development" and "not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received." Id. at art. VII, § 1.
in question or not.120 Yet, despite the potential of a resort to the International Court of Justice in Hague pursuant to in ILO Article 33, the fact of the matter is that it has not been tried even in the more notorious cases of South Africa, when apartheid prevailed, or Myanmar, where there were numerous problems with forced labor violations. Although it is an exaggeration to characterize the ILO as a debating society, it has at its disposal no meaningful remedies and sanctions beyond the potential for the offending country to be castigated and chastised in the court of international public opinion.121

Nonetheless Professor Bhagwati, and much of the business community, believe that the ILO is the best agency. States Bhagwati:

So the common argument that ILO has no teeth, that is, no trade sanctions, is wrong. I would argue that God gave us just not teeth but also a tongue; and a good tongue-lashing, based on evaluations that are credible, impartial and unbiased, can push a country into better policies through shame, guilt and the activities of NGOs that act on such findings.122

This view appears to be predicated upon two general considerations. The first is that the ILO possesses the expertise and has more staff than comparable organizations like the World Trade Organization which possesses trade sanctions remedies. The ILO is the appropriate agency though its “staff and structure need improvement.”123 Bhagwati points out that only 5 percent of the output produced by children enters foreign markets and notes that a broad prohibition against child labor could push children into prostitution. But it is unclear why the ILO or any other agency which possessed effective remedies could not address these issues. Similarly, his point that the United States is not itself in compliance with the fundamental core standards does not seem to undercut the idea firm remedies should be applied against both industrialized and developing countries.

Admittedly, Bhagwati’s point about the ILO possessing the expertise and experience is well taken. But this begs the issue of whether any agency should have strong sanctions or remedies. The attractiveness of the ILO appears to lie in the fact that it not only possesses expertise but also a tongue rather than a tooth.

The ILO has experience with the promotion of anti-child labor policies coupled with financial assistance to affected families.124 Its re-

122. *Bhagwati*, *supra* note 65, at 79.
123. *Id.* at 73.
124. The connection between effective child labor policies and cash assistance is clear from the ILO experience itself. See, e.g., Christian von Mitzlaff, *ILO Technical Paper 1: Monitoring and Verification Systems in Garment Factories and the Placement of Child Workers in Education Programmes* (presented at ILO/Japan
structuring must give it the authority of a world tribunal\(^1\) with meaningful remedies including the potential for sanctions as a last resort.\(^2\)

A second potential forum for this issue is the World Trade Organization whose 1999 meeting in Seattle prompted protests by various groups and organizations. The WTO's dispute resolution machinery can culminate in sanctions for violations of GATT. But, generally speaking, its jurisdiction does not attach to labor matters. Only where prison labor is involved does any provision of GATT become applicable to the WTO and its jurisdiction.\(^3\)

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126. My assistant Sarah Preston points out to me that trade sanctions could operate unevenly and harm the interests of developing countries which do not have resources or economic power comparable to the industrialized world. Assuming arguendo the accuracy of this point, this strengthens support for other remedies such as fines which can transcend national boundaries.

127. Article XX(e) of GATT provides,

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

\(\ldots\)

(e) relating to products of prison labor.

As the Seattle fracas demonstrated, when President Clinton spoke of labor standards or workers rights in the context of trade sanctions and the United States renewed proposals for an ILO-WTO working party on the subject, there is rigid resistance to bringing this matter within the WTO's jurisdiction on the part of the developing countries. Those who hold this view frequently note that the ILO is the expert agency in the area of core standards and other labor issues. But, as noted, the conundrum is that the ILO has no sanctions and that, while the WTO does, there is no consensus supporting the view that the WTO should move in a direction which applies its mechanisms to unfair labor practices or trade practices which involve labor components. Indeed, in Seattle the idea of establishing working groups involving the ILO and the WTO or other international agencies reviewing the relationship between labor standards and a trading system was rejected. In Doha in 2001 the labor issue was not even on the table at the most recent WTO meeting.

Are there other more suitable fora for resolving such matters? This is the most fruitful arena for the establishment and promotion of international labor standards. At the front line of activity are regional agreements or treaties, unilateral government actions and litigation about such as well as corporate codes of conduct.

Regional treaties have seen a great deal of activity and it may be that this is where most of the developments will take place. As has been noted:

> Because the citizens of nations in a particular region are more likely to have similar preferences, resources, political values, and economic systems, it may be easier for them to reach effective and enforceable regional agreements. After nations have already formed such smaller compacts, it may be easier for them to move to a global agreement.

These more limited first steps may make it possible to take into account the idiosyncratic expectations of different nation-states. Notwithstanding the fact that such instruments create trade barriers for non-signatories, they may constitute the first step toward interna-
tional labor standards contained in legal agreements. At least in the short run full blown international instruments relating to labor are perhaps excessively ambitious.

The most widely discussed regional agreement is the North American Free Trade Agreement (NAFTA) which promotes enforcement of existing labor laws between the three member countries, the United States, Canada and Mexico. The problem with NAFTA is that only existing standards are protected and then, in the case of core standards, no remedy beyond Ministerial consultations exists.

This first effort in this arena was enacted in 1993, effective January 1, 1994. President Clinton had campaigned in 1992 against the NAFTA proposed by the Bush Administration on the grounds that it did not include a labor accord or labor provisions which would take into account worker rights. The NAFTA which became effective contained the first ever labor side agreement attached to a trade agreement.132

The NAFTA creates three categories of worker rights, one category that is enforceable through the dispute resolution mechanism, culminating in sanctions, and the others not.133 The provisions that are ultimately enforceable by sanctions are those that prohibit child labor, establish minimum employment standards pertaining to minimum wages and promote the prevention of occupational injuries and illnesses. Core standards are remitted to a different mechanism. In the case of freedom of association, the right to organize and bargain collectively, and the right to strike, all such matters are heard by National Administrative Offices established in each country and, the final step in the process is Ministerial discussion between the United States' Secretary of Labor and the Ministers of Labor in Canada and Mexico.

Other core standards like the prohibition of forced labor, the elimination of employment discrimination, and equal pay for men and women are handled by an Evaluation Committee of Experts, and as is the case with the other core standards, no sanctions apply.

The NAFTA obliges all three signatory nations to enforce their own domestic laws. But, as the American experience itself demonstrates,134 domestic law is frequently inadequate or lacking in promoting the broad principles which are set forth in the NAFTA itself. And

132. For discussion of a wide variety of instruments containing labor clauses, see Brian Bercusson, Labour Regulation in a Transnational Economy, 6 MAASSTRICHT J. OF EUR. AND COMP. L. 244.


even where the National Labor Relations Board finds violations of the Act, a court of appeals may reverse the finding through its own interpretation of both fact and law. This happened in the celebrated Sprint case\textsuperscript{135} in which complaints were filed by the Mexican government.\textsuperscript{136} Moreover, the NAFTA procedures themselves have been convoluted and, as noted, there are no sanctions at the end of the road.\textsuperscript{137}

Nonetheless, a number of accomplishments are associated with the NAFTA. First, as noted above, it is the first trade agreement to provide for labor rights. Just as the National Labor Relations Act contains a bill of rights for workers which has existed ever since 1935, an important principle has been established, notwithstanding the ineffectiveness of remedies.

Second, it seems clear that Mexico has become more democratic since the NAFTA has been in existence. Indeed the Supreme Court of Mexico has held Mexican labor law, which reserves representation in a firm to one union, to be unconstitutional in that country. New and more democratic unions seem to have been set in place as the result of this process.

Third, the dispute resolution procedures of the NAFTA are open and, in contrast to the WTO, the sunshine seems to have enhanced reforms. All three countries seem to have become more aware of their respective labor laws as the result of the NAFTA.

But the most important feature of the NAFTA was that its labor accord, notwithstanding its imperfection, might serve as a basis for a better mechanism in the future. Already the dialogue has progressed substantially beyond that which transpired in the early '90s at the time of the major NAFTA debate.

Now the debate about whether labor should be part of the trade equation has emerged dramatically within the context of legislation designed to extend or revive the president's authority to negotiate such treaties on a so-called "fast-track" basis. This authority expired with the expiration of the Ominbus Trade and Competitiveness Act of 1988. The theory has been that the United States would be at a disadvantage in negotiating foreign trade agreements with other countries if those countries believed that Congress could later interfere with a negotiated agreement. The result would be either no deal at all or a


deal which would more likely reflect something short of the other country's final or best offer.

Both the 104th and the 105th Congresses considered, but failed to enact, renewed fast-track authority for the president which would prohibit congressional amendments of a negotiated trade agreement and provide for limited debate. The fall of 1997 was to see this issue at impasse with the Congressional Democrats unwilling to support President Clinton's sought after fast-track authority, though a substantial number of Republicans were perfectly delighted to harm the Clinton presidency.

Thomas Friedman summed up the debate well when he said that a kind of four party system had emerged on this matter. It could be said that integrationists promoting globalization, noted Friedman, were on one side of an east-west line and that separatists who believed that neither free trade nor technological integration was good or inevitable were on the other side. But, Friedman noted that another line from north to south was relevant to the globalization debate. This was the so-called "distribution line" which was concerned with cushioning workers from social, economic and environmental impacts of globalization. Some like the "Integrationist-Social-Safety-Netters" were concerned with assisting the know-nots and have-nots who lacked the skills to take advantage of the new economy and were unemployed and driven into poor jobs as a result. At the other end of this distribution line were the "Let-Them-Eat-Cakers" or those who like Speaker Newt Gingrich and the Republican right wing in the Congress believed in a "winner-take-all, loser-take-care-of-yourself" economy. Said Friedman:

You have to build a real politics of Integrationist-Social-Safety-Nettism—a politics that show people the power and potential of global integration, while taking seriously their needs for safety nets to protect them along the way.

Build it and they will come.

Notwithstanding the expiration of fast-track authority and President Clinton's inability to obtain approval from the Republican Congresses with which fate consigned him to deal, the Administration negotiated a U.S.-Jordan Free Trade Agreement. This agreement, rather than simply constituting an accord or side agreement as was

the case with the NAFTA, contained labor provisions in the body of the agreement itself, occupying one page of the text. Moreover, the labor laws which were to be respected were not only each countries' own—enforcement being required through a dispute resolution mechanism—but also "internationally recognized worker rights" and "core labor standards" as defined by the International Labor Organization. This time, in contrast to the NAFTA, the dispute resolution procedures obliged parties to take "appropriate and commensurate" measures at the processes culmination. The Jordan Agreement provided a kind of backdrop for debate about the renewal of fast-track or, as it came to be called during the Bush Administration in 2001 and 2002, trade promotion authority.

Now the debate has become more complex. The Bush Administration proposed a so-called "toolbox" of actions, which could be taken in trade negotiations, one of which would relate to the protection of children and adherence to core labor standards in connection with international trade.

Some of the New Democrats, led by Congressman Cal Dooley of California, lauded Bush but expressed a concern that no appropriate mechanisms for the enforcement of trade agreements were provided by the Bush proposals. The overwhelming number of Old and New Democrats opposed the Bush initiative. In a widely discussed and heralded vote in late '01, the House of Representatives passed a Republican bill supported by a handful of Democrats such as Dooley, Jefferson, and Tanner by a vote of 215 to 214. Yet the major defect in this bill, HR 3005, relates to the vagueness of the content of future trade agreements as they relate to labor issues. The president is directed to further "certain priorities" most of which are related to labor and environmental objectives. All that the bill does is to direct the President to seek greater cooperation between the World Trade Organization and the International Labor Organization.

At the other end of the continuum is HR 3019 sponsored by Congressman Charles Rangel of New York and Sander Levin of Michigan which gives more direction to negotiators to achieve labor and environmental goals. Specific objectives for agreements must be undertaken. Congressional trade advisors are provided for by statute and the bill would allow withdrawal from any fast-track procedure before the start of negotiations, during the negotiations, and before the President enters into an agreement if Congressional advisors do not concur with the President on the issue of whether the agreement "substantially achieves the principal negotiating objectives."  

141. Lenore Sek, Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107th Congress, CRS Issue Brief IB10084, Jan. 18, 2002 at 6.
142. Id. at 10.
Meanwhile, the Senate has passed its own 2002 trade bill, taking up the Bradley idea and providing both wage insurance and health insurance to displaced workers.\textsuperscript{143} Much of 2002 has been consumed with impasse between the Democratic Senate and Republican House on this subject.\textsuperscript{144}

In August 2002 the congress enacted and President Bush signed the Trade Bill with most Republicans supporting it, House Democrats opposed, the Senate Democrats divided.\textsuperscript{145} The new law makes labor and environmental goals “principal negotiating objectives”—but adherence to no particular standards is required. Senator Max Baucus has emphasized the assistance provided by the law to dislocated workers:\textsuperscript{146} (1) coverage of so-called “secondary” workers who are eligible for benefits and workers “affected” by shifts in production if the company moves to a nation with which the United States has a free trade agreement or preferential trade agreement—and where no such agreement exists, benefits ought to be proved if imports are “likely to increase” as the result of the shift; (2) such older workers provided wage insurance to supplement lower paying jobs as well as health insurance; (3) income support for workers undergoing training extended from 52 to 78 weeks; (4) 65 percent health insurance reimbursement through tax credits.

The significance of health insurance may be to revive the call for comprehensive health insurance reform promoted by both President Harry Truman and President Bill Clinton. As the Washington Post has noted:

Among the new benefits such workers will receive is a federal tax credit to help cover the cost of health insurance. Since almost no one argues that work-

\textsuperscript{143} The compromise to grant Mr. Bush so-called trade promotion authority won the support of the Senate Democratic leadership only after weeks of partisan haggling. It would triple the money spent on aid for displaced workers to $1.2 billion annually. The government would also begin paying 70 percent of the health insurance costs for people whose jobs disappear because of imports.


ers who lose their jobs to foreign competition deserve better treatment than those who become unemployed for other reasons, some believe the bill could create impetus for extending similar benefits to millions more of the unemployed than it already covers. That hope, in fact, has been one of the Senate Democrats' main—albeit unspoken—motives.\textsuperscript{147}

Lurking in the background of these debates regarding international labor standards are the strengths and deficiencies of the ILO and the WTO, two institutions with contrasting traditions, attitudes and authority. We have already noted the problems with the ILO mechanisms for enforcement and how they contrast with WTO sanctions. One central problem with the WTO relates to its confidentiality provisions which apply, understandably to conciliation and mediation\textsuperscript{148} in dispute resolution,\textsuperscript{149} but also to adjudication itself which would appear to be appropriately public. There is a lack of transparency and secrecy in the WTO procedures.\textsuperscript{150} Though the WTO appears not to have provided any justification for this aspect of its

\begin{quote}
There seems to be little prospect of governments in developing countries enforcing their own national—workplace laws—if it means losing factories, employment and taxes, let alone conforming to the conventions of the ILO. And private monitoring is too often a public relations sham—with little incentive for companies to effectively police their own violations of basic workplace protections. The multinational corporations are increasingly sensitive, however, to the power the consumer market and other organizations may impose, and willing under pressure, for the short term at least, to provide the accommodation that will perpetuate sales to the protesting markets. That measure of persuasion more than enforcement may be effective. The institutionalization through the ILO of a mediating facility might be a way of bringing compliance when international political will is now lacking. The NGOs, the consumers, the unions and many responsible retailers are increasingly alert to the deprivations of workplace protections, and yet they are largely ineffective in enforcing employers to live up to their international workplace obligations.
\end{quote}


\textsuperscript{147} Paul Blustein, Trade Bill to Help Laid-Off Workers; Victims of Imports Win Added Benefits, WASH. POST, Aug. 3, 2002, at E1.

\textsuperscript{148} Arnold Zack has proposed a mediation unit in conjunction with the ILO which would promote compliance with international labor standards:

\begin{quote}
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\end{quote}


\textsuperscript{149} A confidentiality demarcation line between conciliation and adjudication was drawn by the NLRB during my Chairmanship. The rule prohibits disclosure of discussions, representations and positions taken in conciliation but requires disclosure in adjudication. See John T. Delaney & Lamont E. Stallworth, An Evaluation of the NLRB's Settlement Judge Program (2001) (unpublished, on file with the author).

procedures, unceasing criticism has moved them towards the consideration of reforms in this area.\textsuperscript{151}

Yet the difficulties in obtaining consensus which is a prerequisite for WTO action and the resistance of developing countries to the use of trade sanctions would seem to make even the use of fines rather than trade sanctions unacceptable through such a mechanism in the short run.\textsuperscript{152} The ILO is the best forum—but a stronger ILO with remedies at its disposal.

In the near future, therefore, it seems that most of the action, while borrowing from the institutional resources and standards of both the ILO and the WTO, will constitute new institutions or dispute resolutions procedures established through country to country or regional treaties. Perhaps the one with the most fruitful potential is that designed by Congressman Sander Levin as part of the 2000 China trade bill. The Levin amendment creates a Congressional Executive Commission on China\textsuperscript{153} which holds hearings (probably not in China) and produces an annual report on the rule of law and human rights. Its jurisdiction includes labor and, if does its job, it will surely clash with the trade union system in China. Hearings are scheduled in 2002.

Another area in which international labor standards can flourish are domestic trade laws such as the Generalized System of Preferences (GSP) which was established by the 1974 Trade Act,\textsuperscript{154} and then amended in 1984. This initiative, and others\textsuperscript{155} such as the Caribbean Basin Initiative,\textsuperscript{156} provide for sanctions. But they contain a number of problems. The first is that changing political winds will alter the willingness of the Executive branch to enforce the laws. But the second is that they exist at the level of the nation-state and smack of unilaterism, a tendency with which this Bush Administration has come to be frequently associated. Even the United States-Cambodia textile agreement undertaken outside of the WTO mechanism which established a direct linkage between imports and adherence to labor

\textsuperscript{151} Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1 Paragraph 10 (Nov. 20, 2001).


\textsuperscript{156} 19 U.S.C. § 2702(c)(8) (2000) (requiring consideration of whether a country "has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights" in extending duty free status to 27 Caribbean nations).
standards allows for unilateral determinations which may be fundamentally protectionist.\textsuperscript{158}

Professor Sarah Cleveland has advocated the use of the Alien Tort Claims Act as a vehicle for enforcing international labor standards through labor litigation.\textsuperscript{159} As she points out, other theories pursued by private litigants have thus far been remarkably unsuccessful.\textsuperscript{160}

Finally, there is the world of corporate codes of conduct. Again, the OECD has provided the most substantial inventory of these voluntary initiatives undertaken by multinational companies operating away their home base.\textsuperscript{161}

These codes may look to laws both local and internationally recognized instruments—although international standards such as ILO Conventions or UN Declarations are explicitly cited in only 18 percent of the codes. In the critical area of enforcement, it is important to note that a majority of the codes rely exclusively on internal monitoring. It would seem that codes are most effective where they provide for some kind of outside review, preferably with the use of qualified local people who possess not only the ability and the language but knowledge about the community and local work practices. Moreover, one other feature of the monitoring process should allow for unannounced visits and on-site reviews of the employment relationship. This is critical because, while many codes address such matters as the level of wages and the amount of overtime which can be addressed through reviewing the records of corporations and can be performed by accounting firms, questions relating to freedom of association, non-discrimination and particularly allegations of sexual harassment can only be resolved

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\item[159.] Cleveland, supra note 155.
\end{itemize}
through observation of the workplace and direct interviews and contact of some form with the parties involved.

A central concern of many of the codes address are relationships with subcontractors since most of the disputes about adherence to labor standards arise in connection with work done by different corporate entities, i.e. subcontractors, for major firms in the United States. Illustrative of these firms are Nike, Levi Strauss, the GAP, Sears, JCPenny and Wal-Mart.

Concern about labor problems which could be characterized as sweatshop conditions in industries such clothing and footwear produced the Apparel Industry Partnership Agreement in the Clinton Administration. The overriding objective is to produce a labeling system as the result of monitoring which could determine which countries abide by fair labor practices. The objective here is to create sufficient transparency and competition between firms which are concerned about loss of business as the result of changes in consumer practices that working conditions could be improved worldwide.162

V. CONCLUSION

Whatever the validity of the argument about a “race to the bottom” within a country’s own borders163—and it must be said that the fact that relatively successful Canadian labor law is provincial and not national creates a measure of skepticism about this—there is no general evidence that the same phenomenon exists internationally. To repeat, there is no evidence of a “race to the bottom” internationally in the labor arena. Indeed, the OECD evidence is that countries adopting the so called “core” standards of the ILO have not been harmed and they may well have benefited economically as their trade performance has been enhanced.

But there are substantial arguments for international regulation. The moral high ground for human rights properly includes labor rights. The idea associated with such human rights has moved beyond national borders. And the outlier countries coupled with China make it possible that the “race to the bottom” phenomenon could yet become a pressing one.

Yet the child labor issue demonstrates the care and selectivity which must be exercised in this area. The absence of cash payments—a matter which must be addressed through a substantial expansion of foreign assistance beyond present policies and proposals—seriously erodes advancement for the families which the child labor policies are

163. Cox, supra note 54.
presumably designed to protect. International labor regulation can only move forward in tandem with major revisions and expansion of foreign assistance from the rich countries—particularly the United States.

The world has long recognized that labor rights are an important part of the idea of democracy accepted throughout the world. The United States must be an important part of the world and take responsibility for international regulation. Whatever the success of private initiatives, the argument for international regulation, initially at the regional trade level, is important. As noted, it must be undertaken with care and caution. It will not diminish as this century's globalization process moves forward. But the necessary confluence of labor and the financial assistance demonstrates how uneasy the case is for this admittedly vital objective.