

# LABOR RIGHTS AND LABOR STANDARDS IN INTERNATIONAL TRADE

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Differences in labor rights and labor standards among countries at varying levels of development are growing in importance as a factor in international trade. The North American Free Trade Agreement nearly failed passage in the United States Congress because of concerns about worker rights violations in Mexico and fears that U.S. jobs would be lost as companies moved to Mexico to take advantage of lax labor standards.<sup>1</sup> After NAFTA's passage, worker rights issues remain high on the agenda for monitoring the effects of the new trade agreement.<sup>2</sup>

The Maastricht Treaty on further integration of the European economy was jeopardized by Great Britain's refusal to accept the Social Chapter guaranteeing worker rights.<sup>3</sup> British obstinacy has led to accusations that it is attempting to lure enterprises from the Continent with promises of low labor costs and weakened unions.<sup>4</sup>

A stubborn recession in Europe has prompted calls for cutbacks in social benefits and trade union power.<sup>5</sup> Analogous to U.S. concern about job losses to Mexico, Europeans now see the newly-marketizing nations of Eastern Europe as likely prospects for "runaway shops" and attendant job losses.<sup>6</sup>

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1. The U.S. House of Representatives approved NAFTA on November 17, 1993; the Senate followed suit on November 20, 1993. See Helen Dewar, *NAFTA Wins Final Congressional Test*, WASH. POST, Nov. 21, 1993, at A1). For labor's view, see Lane Kirkland, *A Backward-Looking Deal: The Pact is Full of Safeguards for Property Rights, but None for Workers' Rights*, WASH. POST, Nov. 12, 1993, at A25; see also E.J. Dionne Jr., *The Wrong Fight, the Right Reasons: Labor Asks: At Whose Expense Will This Great Global Market Be Created?*, WASH. POST, Nov. 23, 1993, at A21.

2. See Bob Ortega and Dianne Solis, *Honeywell's Firing of Over 20 Women in Mexico May Test NAFTA, Unions Say*, WALL ST. J., Dec. 9, 1993, at A4.

3. See William E. Schmidt, *British Leader's Compromise Delays European Pact Again*, N.Y. TIMES, May 6, 1993, at A12; William Drozdiak, *EC's Executive Body Gingerly Stalls Unity Process*, WASH. POST, May 12, 1993, at A23.

4. See William Drozdiak, *French Say United Europe Promotes "Job Poaching": Shift of Plant to Scotland Sets Off Furor*, WASH. POST, Feb. 10, 1993, at A23.

5. See, e.g., Roger Cohen, *European Official Urges Cuts in Social Benefits to Add Jobs*, N.Y. TIMES, Dec. 9, 1993, at A5; Dana Milbank, *European Labor Movement Loses Ground: Recession Places Industry on New Defiant Footing*, WALL ST. J., Dec. 7, 1993, at A13; Eugene Robinson, *Spanish Socialist Defies Unions to Spur Economy*, WASH. POST, Dec. 2, 1993, at A37.

6. See Richard W. Stevenson, *East Europe's Low Wages Luring Manufacturers From West Europe*, N.Y. TIMES, May 11, 1993, at A1; Peter Gumbel, *"Exporting Labor—Western Europe Finds That It's Pricing*

Mindful of consumer sensibilities and their public images, several multinational corporations with subsidiary manufacturing operations in developing countries have begun elaborating codes of conduct on worker rights.<sup>7</sup> Even the new Euro Disney theme park outside Paris, a project hoped to bolster the big U.S. trade surplus in services and entertainment, got off to a rocky start when the Walt Disney Company sought to enforce its personal appearance code on French employees who claimed the code violated their rights.<sup>8</sup>

Disparities in labor rights and labor standards clearly affect international trade and investment choices, as these examples show. But do high standards and strong enforcement of worker rights act as a drag on trade and investment, slowing global economic development? Or do they enhance mass purchasing power and political stability, thus promoting development?

From the standpoint of international investors seeking to maximize profits, strong worker protections curb the most efficient use of labor and create disincentives to invest. Minimum wage requirements, child labor laws, occupational safety and health standards, job security rules, union organizing rights and collective bargaining obligations all interfere, to a greater or lesser degree, with pure market forces. They impose costs on companies trying to compete in the global economy. From the investor's standpoint, these costs could be minimized or avoided in countries with lower standards or less stringent enforcement of labor rights and labor standards. Such countries become tempting targets for new investment aimed at cost-saving production systems.

Fed up with "burdensome" labor standards, many companies shift operations to countries with what they feel is a more favorable investment climate—lower wages, weaker unions and less regulation of industry.<sup>9</sup> Such movements are most noticed from developed to developing countries, but they also occur from one developed country to another, and between developing countries. For example, BMW is building a large manufacturing facility in South Carolina, citing lower wages and the prospect of operating without a union, in contrast to its costly labor contract with the powerful German Metalworkers Federa-

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*Itself Out of the Job Market: Work Flees to East Europe; EC Takes a Hard Look At Employer Mandates—So Much for '1992' Euphoria*, WALL ST. J., Dec. 9, 1993, at 1.

7. Levi Strauss and Sears Roebuck are two companies that have issued labor rights codes. See Frank Swoboda, *Sears Agrees To Police Its Suppliers: Retailer Addresses Issue of Forced Labor*, WASH. POST, Mar. 31, 1992, at C1. See discussion *infra* Part II for more on voluntary codes of conduct.

8. *A Disney Dress Code Chafes in the Land of Haute Couture*, N.Y. TIMES, Dec. 25, 1992, at A1.

9. See, e.g., Eugene Robinson, *East and West, a Gloomy Economic Forecast: Europeans See an End to Long-Guaranteed Social Welfare "Rights,"* WASH. POST, Apr. 12, 1993, at A1.

tion.<sup>10</sup> South Korea is concerned about job losses to other developing countries with even lower labor costs after its own long-repressed labor movement began demanding great freedoms.<sup>11</sup>

Free market theorists would call such transfers beneficial, reflecting a comparatively advantageous use of labor. To the extent they discipline governments into easing burdensome labor regulations, such transfers may also promote more efficiency in the production process. While there may be short-term disruptions for affected workers or communities, in the long run transfers to more efficient operations make for a more dynamic, growing global economy.

Workers and unions take a different perspective. They maintain that high wages and strong social protections usually mark advanced economies with stable democracies, competent judiciaries, reliable telecommunication and transportation systems, skilled labor and a working class that enjoys middle class purchasing power. In the long run, these conditions make for greater productivity and growth in the global economy. Investors should find such conditions desirable rather than running away from them.

Attracting multinational corporations by holding down or cutting back on labor standards starts a "race to the bottom" among countries competing for investment. To encourage investment, each country wants labor costs for its workers to be lower than those of its competitors. But the only way to gain the advantage is to undercut the competition. A government that wants to raise labor standards, or even just maintain existing standards, faces the threat of companies shutting operations as a response and moving to a country with lower standards. Absent international standards that all countries must meet, each individual country is reluctant to impose new costs on employers, and is often willing to cut standards to attract or keep large employers. As this cycle accelerates, workers will not be able to buy what they produce, leading to global stagnation instead of growth.

The only solution to this dilemma is a set of strong, enforceable labor rights and international fair labor standards. This Article is written from the point of view of a trade union advocate, not an investor or free market theorist. There is, however, truth in both views. At an extreme, high wages that do not reflect high productivity, rigid social protections

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10. See Ferdinand Protzman, *BMW Details Plan to Build Cars in South Carolina*, N.Y. TIMES, June 24, 1992, at D4; Doron P. Levin, *What BMW Sees In South Carolina*, N.Y. TIMES, Apr. 11, 1993, at C5.

11. See Peter Maass, *Foreign Firms a Target in South Korea: Workers at Overseas-Owned Companies Grow Increasing Militant*, WASH. POST, May 21, 1989, at H3. See *infra* subpart I(A) for more discussion of Korean developments.

that exceed society's capacity to provide them, and arbitrary restrictions on capital mobility retard productivity and growth. Over time, they will make it impossible to maintain high labor standards.

At the other extreme, holding wages below productivity gains, failing to redistribute wealth in a society that can afford a social safety net, and permitting total capital mobility without labor protections accelerate the "race to the bottom." These policies, too, will retard productivity and growth as companies seek an advantage by "sweating" workers instead of introducing new technology, better production flows, superior materials, responsive marketing and customer service, and other innovations. The challenge for trade policymakers sensitive to worker rights is to strike the proper balance with an *upward* trend for labor standards—"upward harmonization," as the term has been used in discussions of the European Community Social Charter and proposals for an accord on labor standards in the North American Free Trade Agreement.

An open trading system, but not "free trade" as theory would have it, is preferable to rigid protectionism. As part of an open trading policy, richer nations should recognize that developing countries have a right to take advantage of their *relatively* lower-cost labor force to attract international investment as long as it is part of a plan to *raise* living standards for their people and not a plan to extract extra profits for their elites.

The important question is, relative to what? To labor costs in neighboring countries competing for the same type of investment? To labor costs in developed countries that import the products of the developing nation? To what worker productivity would yield with a "fair" share of profits? Or to internationally recognized labor rights and fair labor standards that create a level playing field for natural trade flows, undistorted by human rights abuses, deliberate wage suppression, and exploitative labor conditions?

This Article seeks to come to grips with these issues and articulate a defense of enforceable international labor rights and labor standards as part of a trade, investment and development strategy that will benefit whole societies, not just their wealthy sectors.

Part I of this Article lays out consensus labor rights and standards drawn from various sources, with examples reflecting concrete concerns that have arisen with the new era in global trade. Part II reviews the forums in which international labor rights claims can be made, with a discussion of the different oversight or enforcement mechanisms provided in these forums. The conclusion suggests "next steps" for labor rights advocates in the various forums, and recommends a new commitment to international labor rights and fair labor standards by employers, governments and trade unions caught up in the new global economy.

## LABOR STANDARDS IN INTERNATIONAL TRADE

### I. DEFINING INTERNATIONAL LABOR RIGHTS AND STANDARDS

International and regional human rights charters are one source of international labor rights and standards. Conventions and recommendations of the International Labor Organization are another. There are also common labor laws and practices among democratic countries. Together, these sources shape a consensus on general principles, if not always on application, of basic labor rights and standards.<sup>12</sup> They include:

- the right of association, and the conjoined rights to form trade unions and bargain collectively with employers, as well as to participate in civil and political affairs of a society;
- free choice of employment, with absolute prohibitions on the use of forced or compulsory labor;
- prohibitions on child labor, and limitations on youth labor;
- non-discrimination in employment;
- adequate wages, limits on working hours, health care and other features of social security, and occupational safety and health protection.

A survey of events in the international economy over the past decade demonstrates the frequency and intensity with which labor rights issues affect trade and investment choices. These issues arise not only in connection with “runaway shops” and other forms of capital flows from developed to developing countries, but also emerge in cross-currents throughout the global economy, including among developed countries.

#### A. *Rights of Association, Organizing and Bargaining*

A fundamental right of association is enshrined in all international human rights instruments and is among the bedrock conventions of the International Labor Organization.<sup>13</sup> Patterns of union organizing and

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12. See *infra* Part II for a more detailed examination of these instruments and their oversight and enforcement regimes.

13. Some examples of these instruments are: *Universal Declaration of Human Rights*, G.A. Res. 217(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR]; *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR]; *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]; *American Convention on Human Rights: “Pact of San Jose, Costa Rica,”* OAS Official Records, OEA/Ser.A/16 (English), T.S. No. 36 (Nov. 7–22, 1969) [hereinafter ACHR]; *Banjul Charter on Human and Peoples’ Rights*, Organization of African Unity Doc. CAB/LEG/67/3/Rev.5 (Jan. 7–19, 1981) [hereinafter BCHR]; *Convention for the Protection of Human Rights and*

bargaining, and of trade union and working class participation in a country's political life and determination of economic policies, have profound effects on international trade and investment. An upsurge of organizing and strikes shook Korea in the late 1980s as workers sought a greater share of the export "miracle" so admired by economists—and so dependent, to that point, on suppression of worker rights.<sup>14</sup> The resulting wage increases cut sharply into Korean export profits and prompted movement of operations to Thailand, Malaysia, Central America, and other lower-cost export processing areas.<sup>15</sup>

Policies that restrict worker rights to organize and bargain collectively have particular effect in export processing industries that are key to many countries' development plans. The Malaysian government, for example, prohibits the formation of independent unions in its burgeoning electronics sector. Some companies there—notably U.S. multinational corporations—have threatened to move operations out of Malaysia if the policy is changed. At the same time, the United States Trade Representative has considered trade sanctions against Malaysia because of worker rights violations.<sup>16</sup>

The government of the Dominican Republic similarly restricted union organizing and bargaining rights in its *zonas francas*, or export processing zones, where dozens of U.S. companies have established branch plants employing thousands of workers. Combined pressure of the U.S. labor movement and Dominican union groups led to legal reforms in 1992 lifting the restrictions.<sup>17</sup>

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Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter ECHR]; European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89 [hereinafter ESC]; Convention Concerning Freedom of Association and Protection of the Right to Organize, ILO Convention No. 87 (1948) [hereinafter ILO Convention No. 87]; Convention Concerning the Application of the Principles of the Right to Organize and Bargain Collectively, ILO Convention No. 98 (1949) [hereinafter ILO Convention No. 98].

14. See GEORGE E. OGLE, *SOUTH KOREA: DISSENT WITHIN THE ECONOMIC MIRACLE* xiii-xv (1990).

15. See Joseph P. Manguno, *Korean Labor Confronting Future Shock*, WALL ST. J., May 1, 1989, at A11; Peter Maass, *Foreign Firms a Target in South Korea*, WASH. POST, May 21, 1989, at H3.

16. See Arne Wangel, *The ILO and Protection of Trade Union Rights: The Electronics Industry in Malaysia*, in *TRADE UNIONS AND THE NEW INDUSTRIALIZATION OF THE THIRD WORLD* 287 (Roger Southall ed., 1988); Petition Before the U.S. Trade Representative for Malaysia's Violation of the Worker Rights Provision of the Generalized System of Preferences 3 (June 1, 1990) [hereinafter *Malaysia Petition*] (describing multinational electronics firms threatening to leave Malaysia unless the Malaysian government continued to protect the electronics industry from union organizing) (on file with the International Labor Rights Education and Research Fund).

17. Department of International Affairs, AFL-CIO, *Dominican Republic: New Labor Law Challenged*, THE BULLETIN, Sept. 1992, at 6 [hereinafter *AFL-CIO BULLETIN*].

Worker rights in the United States are no less at risk than in many developing countries. Minimum wage, overtime and child labor law violations are widespread.<sup>18</sup> Thousands of workers die each year in workplace accidents and from workplace hazards.<sup>19</sup> Thousands of employees are illegally fired each year for seeking to form unions, and the National Labor Relations Board is unable to curb illegal employer tactics in union organizing campaigns and bargaining for a first contract.<sup>20</sup>

The right to strike, an integral feature of the right of association, has been eroded in the United States by the use of permanent replacements to break strikes. One case in particular carries important implications for a key export industry. In response to a United Auto Workers strike in 1992, Caterpillar Corporation threatened to bring in permanent replacements. Although this tactic was successful in breaking the strike, it stood in stark contrast to the extensive labor-management cooperation that had existed until then. The resulting bitterness now jeopardizes Caterpillar's place as a premier U.S. exporter of heavy construction equipment.<sup>21</sup>

Traditional union organizing and bargaining concerns are matched in the new global economy by worker and union efforts to shape political developments. In many developing countries, labor movements have mounted strong campaigns against austerity plans and privatization schemes imposed on their governments by the World Bank or the International Monetary Fund.<sup>22</sup>

The Solidarity labor movement in Poland set off a chain of political reforms throughout Eastern Europe that led to the demise of Communist Party dominance. In Brazil, political organizing by trade unionists and their allies in 1989 nearly launched labor leader Luis Ignacio da Silva into the presidency of that huge nation—and may yet, with the demise of the Collor presidency in a 1992 scandal and new national elections due in 1994.<sup>23</sup>

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18. See ANN. 1992 REP., U.S. DEP'T OF LABOR EMPLOYMENT STANDARDS ADMIN.

19. *Id.*

20. See ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD, 1992; Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769–70 (1983).

21. See Kevin Kelly et al., *Caterpillar's Don Fites: Why He Didn't Blink*, BUS. WK., Aug. 10, 1992, at 56, 56–57.

22. See, e.g., James Brooke, *Brazil Ignores Protests and Begins to Privatize*, N.Y. TIMES, Oct. 25, 1991, at D2; *Job Protests in Argentina*, N.Y. TIMES, Sept. 17, 1991, at D5.

23. See Stanley A. Gacek, *Brazil: Labor Fights Back*, REP. ON THE AM., Mar. 1989, at 4; *Vice and Virtue in Brazil*, N.Y. TIMES, Dec. 31, 1992, at A24.

The formation of militant Black unions in South Africa brought new pressures to bear on apartheid and created a new generation of political leaders, such as former mineworkers' president Cyril Ramaphosa who, in 1992, became the new general secretary of the African National Congress.<sup>24</sup> In rapidly growing Asian economies, viewed by many analysts as models of economic development, independent union organizers often challenge the authoritarian political cultures that provide the favorable investment climate sought by multinational investors.<sup>25</sup>

### B. *Child Labor*

A 1992 study by the International Labour Organization found the exploitative use of child labor to be a growing factor in world trade.<sup>26</sup> A backlash is beginning to take shape. The use of children younger than teenagers to produce hand-woven carpets in India, Pakistan and other Asian countries has prompted legislation in Congress to outlaw the importation of such goods<sup>27</sup> and several media exposes in recent years have sensitized consumers to abusive child labor conditions in various countries and forced producers to address these concerns.<sup>28</sup>

### C. *Forced Labor*

The use of prison labor in China to manufacture goods for the U.S. market has been, along with the Tiananmen Square massacre, a focal point of moves in Congress to challenge China's most-favored-nation trading status with the United States.<sup>29</sup> As with the case of child labor, dramatic media exposés with a former prisoner posing as a Chinese-American investor sparked public outrage and demands for tough sanctions against Chinese exports to the United States.<sup>30</sup>

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24. Bill Keller, *A Fitful Pas de Deux: Talks in South Africa, While Stalled, Shift from Table to the Public Arena*, N.Y. TIMES, July 10, 1992, at A8.

25. See, e.g., William Branigin, *Indonesia Booming, But Problems Loom*, WASH. POST, Dec. 30, 1992, at A13.

26. See ILO, WORLD LABOUR REPORT at 13 (1992).

27. See Child Labor Deterrence Act of 1993, S.613, 103rd Cong., 1st Sess. (1993).

28. See, e.g., Gina Kolata, *More Children Are Employed, Often Perilously*, N.Y. TIMES, June 21, 1992, at A1; Edward A. Gargan, *Bound to Looms by Poverty and Fear, Boys in India Make a Few Men Rich*, N.Y. TIMES, July 9, 1992, at A8; Lynn Kamm, *How Our Greed Keeps Kids Trapped in Foreign Sweatshops*, WASH. POST, Mar. 28, 1993, at C5.

29. See Keith Bradsher, *Prison Labor Seen in Chinese Imports*, N.Y. TIMES, Sept. 24, 1991, at A9; Daniel Southerland, *China Said to Still Use Forced Labor: Report Contends Exports Violate Pact, Threaten Favored Nation Status*, WASH. POST, May 19, 1993, at F3.

30. See also Bradsher, *supra* note 29; Daniel Southerland, *The Witness Against China: Ex-Prisoner Harry Wu Shakes Up China Debate*, WASH. POST., Sept. 29, 1991, at H1.

Allegations of forced labor by Indian peasants from the highlands of Guatemala<sup>31</sup> and by Haitian sugar cane cutters in the *bateys* of the Dominican Republic<sup>32</sup> also jeopardize those countries' exports to the United States under labor rights clauses in U.S. trade laws. Debt bondage traps millions of workers in mines, plantations and other workplaces around the world.<sup>33</sup>

#### D. Discrimination

Apartheid in South Africa has been the target of trade sanctions for years. In the United States, concern over discrimination against Black South Africans gave rise to the Sullivan Principles in the 1970s, an attempt to have U.S. companies voluntarily adopt non-discriminatory practices in their South African operations.<sup>34</sup> Later, Congress passed even broader mandatory sanctions against South Africa.<sup>35</sup>

Representatives of Palestinian workers in territories occupied by Israel have charged discrimination in labor rights and working conditions, and thousands of Palestinian oil field workers in the Middle East have been discharged from employment by Saudi and Kuwaiti companies in the wake of the 1991 Gulf War.<sup>36</sup> Conflicts between a mostly ethnic Chinese employer class and a mostly indigenous working class affect workplace relations in many East Asian countries.<sup>37</sup>

The rise of the "global assembly line"—the shifting of garment and electronic assembly operations to developing countries, while keeping management and research and development control in the developed

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31. JAMES A. GOLDSTON, *SHATTERED HOPE: GUATEMALAN WORKERS AND THE PROMISE OF DEMOCRACY* 80 (1989).

32. AMERICAS WATCH, *A TROUBLED YEAR: HAITIANS IN THE DOMINICAN REPUBLIC I* (1992).

33. ILO, *WORLD LABOUR REPORT 11*(1993). See also Molly Moore, *Casting Off the Caste System: Indian Movement Teaching Bonded Laborers to Rebel*, WASH. POST, Nov. 17, 1992, at A1; *Labor Letter: Slavery Endures in Many Parts of the World*, WALL ST. J., Mar. 9, 1993, at A1; James Brooke, *Slavery on Rise in Brazil, as Debt Chains Workers*, N.Y. TIMES, May 23, 1993, at A3.

34. For a recent discussion of the Sullivan Principles in the context of voluntary corporate codes of conduct, see Daniel H. Pink, *The Valdez Principles: Is What's Good for America Good for General Motors?*, 8 YALE L. & POL'Y REV. 180, 181-85 (1990).

35. Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001 (1988).

36. See Petition before the U.S. Trade Representative Challenging Israel's Status as a GSP Beneficiary (1989) (on file with author). In 1988, the U.S. Trade Representative announced it would accept the petition for review. GOLDSTON, *supra* note 31, at 157. No change in status resulted, on the grounds that the alleged violations occurred in an occupied territory, not in Israel (USTR Response, on file at the Office of the USTR). See also Clyde Haberman, *With Arabs Out, Israel Questions Its Own Labor*, N.Y. TIMES, April 26, 1993, at A3.

37. See, e.g., Branigin, *supra* note 25.

world—has brought widespread claims of gender-based discrimination against women workers, the bulk of the workforce in these assembly factories.<sup>38</sup> Assembly line work requires visual acuity and manual dexterity, supposedly special qualities of women. This, combined with the widespread belief that women in developing countries are deferential to authority, has made these employees who are sought-after—and often exploited. They are presumed to be unlikely to defend themselves against exploitation, whether in the form of unsafe working conditions or sexual harassment. In many cases, the physical demands and job hazards exhaust them in just a few years, their eyesight dimmed and their motor skills diminished by repetitive stress injuries.<sup>39</sup>

In the developed world, the place of guest workers from Southern Europe and Northern Africa has been high on the labor force agenda in France, Germany, and other Northern European countries for years.<sup>40</sup> Violent assaults against immigrant workers in Germany have provoked fears of a neo-Nazi resurgence. The opening of borders in Eastern Europe has caused large-scale migration of workers seeking better-paying jobs in the West, and finding painful discrimination as well. Discrimination against Hispanic workers—both undocumented immigrants and U.S. citizens—continues to undermine worker rights in the United States.<sup>41</sup>

#### E. *Minimum Wage, Hours of Work and Occupational Health and Safety*

Conflicts surrounding minimum wage requirements, limits on hours of work and occupational health and safety standards are key international trade and investment issues. News accounts of Agency for International Development (AID) financial support to Central American overtures to lure U.S. businesses focused most dramatically on competing minimum wage standards. In one particularly telling sequence, a hidden camera and microphone at an AID-sponsored trade and investment exposition recorded representatives of Honduras, El Salvador and Gua-

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38. RACHEL KAMEL, AMERICAN FRIENDS SERVICE COMMITTEE, *THE GLOBAL FACTORY* 4–5 (1990).

39. *Id.* at 11–12. See also Jean L. Pyle & Leslie Dawson, *The Impact of Multinational Technological Transfer on Female Workforces in Asia*, 25 COLUM. J. WORLD BUS. 40, 43–45 (1990).

40. See, e.g., Craig R. Whitney, *German Labor Police Round Up Illegal Workers*, N.Y. TIMES, Apr. 2, 1993, at A3.

41. See, e.g., Immigration Committee, Los Angeles County Federation of Labor, AFL-CIO, *The Impact of the Immigration Reform and Control Act on Organized Labor in Los Angeles* 18–19 (March 3, 1992) (on file with author); AMERICAN FRIENDS SERVICE COMMITTEE, *SEALING OUR BORDERS: THE HUMAN TOLL* (1992).

temala underbidding each other with wage quotes—90 cents an hour, 80 cents, 70 cents, 57 cents.<sup>42</sup> The ensuing public uproar became a significant factor in the 1992 presidential campaign, helping to fuel Bill Clinton's attacks on President Bush's economic policies.<sup>43</sup>

For decades, the government of Korea resisted enacting minimum wage laws in what workers' advocates charged was a deliberate policy to boost investments, profits and exports by suppressing wages below levels justified by worker productivity. Korea's minimum wage policy—or lack of a policy—was a significant factor causing workers' patience to snap in a fury of strikes and union organizing campaigns in the late 1980s that ultimately raised wages, cut profits, and shrunk exports.<sup>44</sup>

Unlimited working hours are a consistent feature of "global assembly line" operations throughout the developing world. Twelve and fourteen-hour days, double shifts, special overnight work to meet rush orders, and other extended workdays are common.<sup>45</sup> Conflicts over working hours, however, are not limited to developing countries. In France, for example, an electronics exporting firm had established, with the agreement of its workers, a twenty-four hour, three-shift operation that allowed women to work at night. French authorities prosecuted the firm and labor officials argued that such night work was illegal under French labor law prohibiting night work by women. The company succeeded in having the case moved from domestic courts to the European Court of Justice, which declared that the French ban on night work by women violated a European Council directive on non-discrimination in the workplace, and permitted the company's production schedule to remain unchanged.<sup>46</sup>

Safe and healthful working conditions are another international labor concern that affects trade and investment. Regulations of the U.S. Occupational Safety and Health Administration and the Environmental Protection Agency, alongside the comparatively lax job safety and environmental regulations in Mexico, are cited as important factors in the

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42. See *60 Minutes: Hiring Rosa Martinez* (CBS television broadcast, Sept. 27, 1992); *Nightline: Paying to Lose Our Jobs* (ABC television broadcast, Sept. 29–30, 1992).

43. See, e.g., Clinton Remarks, *infra* note 77.

44. See OGLE, *supra* note 14, at 115–53.

45. See, e.g., Denis MacShane, *Dreaming of the Forty-Hour Week*, THE NATION, May 15, 1989, at 658.

46. *European Community Cannot Ban Night Work For Women, Court Rules*, 9 Empl. Rel. Wkly. (BNA) 856 (Aug. 5, 1991). The ECJ found that certain prohibitions on night work by women could be allowed for legitimate protective purposes, but that the facts of this case did not warrant such protections. *Id.*

cross-border movement of manufacturing operations.<sup>47</sup> Just as the Korean “miracle” depended on suppressing wages, it also depended in part on deliberately ignoring worker safety conditions, contributing to the turmoil of the late 1980s that so affected investment patterns throughout Asia.<sup>48</sup> A 1993 fire in a Thailand export factory that lacked even basic safeguards shocked the world with the highest death toll of any recorded factory fire in history.<sup>49</sup>

## II. SOURCES OF LABOR RIGHTS CLAIMS AND THEIR ENFORCEMENT REGIMES

International labor rights claims will emerge in many arenas, bringing with them challenging problems in human rights, trade policy and development strategy. Myriad rules, standards, codes, guidelines, and practices create sources of “law” that may be invoked by aggrieved parties—workers, trade unions, employers, communities, governments, non-governmental organizations and others—making rights claims and seeking enforcement in a forum competent to hear their complaints. This section reviews various sources of labor rights claims and arenas where they can be raised, with oversight and enforcement mechanisms.

### A. *Multilateral Human Rights Instruments*

The starting point in reviewing sources of international labor rights is the International Bill of Rights, which includes the United Nations’ Universal Declaration of Human Rights<sup>50</sup> and the two international covenants that flow from it—one on Economic, Social and Cultural Rights<sup>51</sup>, and the other on Civil and Political Rights.<sup>52</sup> The Bill of Rights contains declarations of rights of association and trade union organizing and bargaining,<sup>53</sup> just and favorable wages and working conditions,<sup>54</sup>

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47. See Peter Behr, *Environmental Groups Urge Tougher Free-Trade Agreement*, WASH. POST, Mar. 6, 1993, at D1.

48. See Peter Maass, *South Korea’s Economic Miracle Taking Toll Among Workers: Job Safety Continues to be Low Priority*, WASH. POST, Apr. 25, 1989, at E1; OGLE, *supra* note 14, at 77.

49. See Mary Kay Magistad, *Hundreds Die in Thai Factory Fire*, WASH. POST, May 12, 1993, at A25. The Hong Kong-based company that held a major stake in the factory had ignored warnings to improve safety features. *Id.*

50. UDHR, *supra* note 13.

51. ICESCR, *supra* note 13.

52. ICCPR, *supra* note 13.

53. UDHR, *supra* note 13, art. 20; ICESCR, *supra* note 13, art. 8; ICCPR, *supra* note 13, art. 22.

54. UDHR, *supra* note 13, arts. 23–25; ICESCR, *supra* note 13, art. 7

and prohibitions or limitations on forced labor,<sup>55</sup> discrimination,<sup>56</sup> and child labor.<sup>57</sup>

Regional human rights instruments of the Organization of American States, Organization of African Unity, and the European Community contain equivalent labor protection clauses.<sup>58</sup> The United Nations and these regional organizations all have human rights commissions and courts to which aggrieved workers or trade unions can turn with claims of labor rights violations.<sup>59</sup> However, these courts have jurisdiction over claims of general human rights violations. Instead, specific labor rights claims are usually directed to the International Labour Organization (ILO).

### B. *ILO Conventions and Recommendations*

A second principal source of international fair labor standards is the International Labour Organization, whose 174 Conventions and 178 Recommendations together comprise the International Labor Code.<sup>60</sup> The ILO was founded in 1919 after fitful efforts to shape pan-European labor standards.<sup>61</sup> Some international agreements had already been achieved on particular products or in particular sectors such as a ban on the use of deadly white phosphorus in the manufacture of matches and prohibitions on night work by women in industry.<sup>62</sup> As with the tandem

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55. UDHR, *supra* note 13, art. 4; ICCPR, *supra* note 13, art. 8.

56. UDHR, *supra* note 13, arts. 2, 7; ICESCR, *supra* note 13, arts. 2, 3; ICCPR, *supra* note 13, arts. 2, 3.

57. ICESCR, *supra* note 13, art. 10.

58. See ACHR, *supra* note 13; BCHR, *supra* note 13; ECHR, *supra* note 13. For an extended discussion of the Banjul Charter, see Fatsah Ouguergouz, *La Charte Africaine Des Droits de L'Homme et Des Peuples: Historique, Portée Juridique et Contribution à la Protection des Droits de l'Homme en Afrique* (1991) (Ph.D thesis no. 476, University of Geneva, Institut Universitaire de Hautes Etudes Internationales) (on file with author).

59. ICESCR, *supra* note 13, art. 19 (referring to the Commission on Human Rights); ICCPR, *supra* note 13, art. 28 (establishing the Human Rights Committee); ACHR, *supra* note 13, ch. 11, §§ 1, 2 (establishing the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights); BCHR, *supra* note 13, pt. II (establishing the African Commission on Human and People's Rights); ECHR, *supra* note 13, §§ 2, 3 (establishing the European Commission of Human Rights and the European Court of Human Rights).

60. ECONOMIC POLICY COUNCIL, *THE INTERNATIONAL LABOR ORGANIZATION AND THE GLOBAL ECONOMY: NEW OPTIONS FOR THE UNITED STATES IN THE 1990S* 21–22 (1991). See also ILO, *INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS: 1919–1991* (1992). For a standard reference work on the ILO, see NICOLAS VALTICOS, *DROIT INTERNATIONAL DU TRAVAIL* (1983).

61. See DAVID A. MORSE, *THE ORIGIN AND EVOLUTION OF THE I.L.O. AND ITS ROLE IN THE WORLD COMMUNITY* 4–8 (1969).

62. See *id.* at 6–8.

creation of the League of Nations, government officials, labor leaders and employer groups, appalled by the slaughter of World War I, hoped that international fair labor standards would reduce conflict among member states.<sup>63</sup>

The ILO survived the demise of the League of Nations and began the process of articulating consensus fair labor standards, called Conventions, along with advisory Recommendations. Suspended for a time during World War II, ILO ideals were reaffirmed in the Philadelphia Declaration of 1944, when the war's end was in sight and the governments, employers and workers of the anti-Axis alliance hoped that a renewed commitment to fair labor standards would help avoid yet another international disaster.<sup>64</sup>

Today, the ILO is a specialized United Nations agency based in Geneva with universally acknowledged expertise and competence in labor matters.<sup>65</sup> Representation and decision-making power is shared among governmental, trade union and employer delegates to ILO Conferences.<sup>66</sup>

Among its many instruments, the ILO gives primacy to certain core human rights conventions.<sup>67</sup> Most often cited are Convention 87, guaranteeing workers and employers the right to establish and join organizations of their own choosing and to conduct their legitimate affairs without interference from the state,<sup>68</sup> and Convention 98, protecting the right to organize and bargain collectively.<sup>69</sup>

Other key ILO Conventions addressing basic worker rights include No. 105, calling for the "complete abolition" of forced labor; No. 111, prohibiting discrimination in employment, and No. 138, limiting child labor. Outside this human rights core, more than 160 other Conventions, and as many Recommendations seek to regulate working hours, basic benefits, health and safety protection and other conditions of employment.

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63. See VALTICOS, *supra* note 60; MORSE, *supra* note 61, at 4-10. For a recent discussion of the ILO and its work from a U.S. perspective, see Stephen I. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 COMP. LABOR L.J. 48 (1989).

64. See MORSE, *supra* note 61, at 24-34; C. Wilfred Jencks, *Human Rights, Social Justice and Peace: The Broader Significance of the I.L.O. Experience*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 227, 230-37 (Asbjorn Eide et al. eds., 1968).

65. MORSE, *supra* note 61, at 31-32; ECONOMIC POLICY COUNCIL, *supra* note 60, at ii.

66. ECONOMIC POLICY COUNCIL, *supra* note 60, at ii.

67. See *supra* note 13 and accompanying text. See also ILO, HUMAN RIGHTS—A COMMON RESPONSIBILITY: REPORT OF THE DIRECTOR GENERAL (1988).

68. ILO Convention No. 87, *supra* note 13.

69. ILO Convention No. 98, *supra* note 13.

## LABOR STANDARDS IN INTERNATIONAL TRADE

The ILO does not have firm enforcement powers: it cannot compel conduct by a member country, nor can it impose sanctions on violators of labor standards.<sup>70</sup> Rather, the ILO's strength in treating labor rights issues among member states arises from its extensive oversight function. Whether or not a country has ratified an ILO Convention, states are required to submit Conventions to competent national authorities and to report progress toward adoption—or lack of progress—back to the ILO. Countries must regularly report on their observance of ILO standards and respond to complaints of violation. A Committee of Experts and a Commission of Inquiry can launch investigations and issue reports on charges of serious violations of ILO standards, especially regarding rights of association, organizing and bargaining, and forced labor allegations. Thus, the moral force of the ILO in the world community can bring reforms through public embarrassment of a violator.<sup>71</sup>

### C. *Bilateral and Multilateral Trade Agreements*

International trade arrangements often include clauses with varying degrees of specificity and enforceability regarding worker rights and labor standards. Trade pacts historically provide forums to advance worker rights. For example, an accord between France and Italy in the early 20th century regulated pay and pension fund transfers from one country to another for workers who crossed the border for employment. The agreement compelled Italy to establish retirement benefits and governmental administration of pensions under standards equal to those of France.<sup>72</sup>

The twelve-member European Community (EC) has the most highly developed multinational regime of labor rights enforcement. Aggrieved parties have recourse to the European Commission in Brussels, and from there to the European Court of Justice at Luxembourg. Alternatively, workers can invoke the European Convention on Human Rights and appeal to the European Court of Human Rights.<sup>73</sup>

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70. For example, the United States has ratified only 11 ILO conventions, and only Convention 105 among the core human rights conventions, which the U.S. Senate approved in May 1991. See Schlossberg, *supra* note 63, at 49; ECONOMIC POLICY COUNCIL, *supra* note 60, at 38–40.

71. For a summary explanation of ILO oversight activities, see Francis Wolf, *Human Rights and the International Labour Organization*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 273 (Theodor Meron ed., 1984).

72. See VALTICOS, *supra* note 60, at 167.

73. For an extended treatment of European labor standards, see ROGER BLANPAIN, *LABOUR LAW AND INDUSTRIAL RELATIONS OF THE EUROPEAN COMMUNITY* (1991).

In connection with the plan for European economic integration, the EC proposed a detailed “social charter” covering a broad field of labor rights and labor standards.<sup>74</sup> Although U.K. rejection prevented the unanimity required to include the charter in the body of the Maastricht Treaty, it did not prevent the other eleven EC members from adopting the charter as a Protocol and Agreement annexed to the treaty.<sup>75</sup>

The example of the European Social Charter was pointed to by advocates of a labor rights clause in the proposed North American Free Trade Agreement (NAFTA).<sup>76</sup> NAFTA negotiators under the Bush administration insisted they were negotiating a trade agreement, not a social pact, and resisted including labor rights provisions in NAFTA. The Clinton Administration, however, moved to re-open negotiations on labor and environmental “side agreements” to NAFTA.<sup>77</sup> The labor side agreement ultimately failed to win most trade union advocates to a pro-NAFTA view, especially because of its failure to adopt tri-national standards, and its exemption of rights of association, organizing and bargaining from its enforcement mechanism.<sup>78</sup>

Labor rights and labor standards are not solely the concerns of developed countries. For example, a series of accords meant to protect Haitian sugar cane cutters working in the Dominican Republic were

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74. The Community Charter of Basic Social Rights for Workers covers these subjects: the right to freedom of movement; employment and remuneration; the improvement of living and working conditions—the right to social protection; the right to freedom of association and collective bargaining; the right to vocational training; the right of men and women to equal treatment; the right to information, consultation and participation; the right to health and safety in the workplace; the protection of children and adolescents in employment; the protection of elderly persons; protection of persons with disabilities. See ESC, *supra* note 13. Maastricht Treaty on European Union, Protocol and Agreement on Social Policy, Feb. 7, 1992, 31 I.L.M. 247, 357.

75. *Id.* Without unanimity, however, the social charter lacks treaty status, and thus carries a lesser degree of enforceability than the treaty as a whole.

76. See, e.g., Michael Barr, et al., *Labor and Environmental Rights in the Proposed Mexico-United States Free Trade Agreement*, 14 HOUS. J. INT'L L. 1, 44–63 (1991); IAN ROBINSON, NORTH AMERICAN TRADE AS IF DEMOCRACY MATTERED: WHAT'S WRONG WITH NAFTA AND WHAT ARE THE ALTERNATIVES? Canadian Center for Policy Alternatives, International Labor Rights Education and Research Fund (1993) 29–31.

77. President Clinton first outlined this position in a campaign speech given in October 1992. Governor Bill Clinton, Remarks at North Carolina State University (Oct. 4, 1992) [hereinafter Clinton Remarks]. An environmental side agreement was also held out as a condition of NAFTA approval. See Peter Behr, *Fears of Job Exodus Emerge as Chief Hurdle for Free Trade Pact*, WASH. POST, Mar. 18, 1993, at C15.

78. For a critique of the Labor Side Agreement, see JEROME I. LEVINSON, ECONOMIC POLICY INSTITUTE, THE LABOR SIDE ACCORD TO THE NORTH AMERICAN FREE TRADE AGREEMENT: AN ENDORSEMENT OF ABUSE OF WORKER RIGHTS IN MEXICO (1993).

found to be ill-enforced,<sup>79</sup> giving rise to human rights complaints before both the United Nations human rights commissions and the United States Trade Representative.<sup>80</sup>

A linkage of labor rights and labor standards to international trade rules has been proposed in various rounds of negotiations in the General Agreement on Tariffs and Trade (GATT).<sup>81</sup> Founders of the GATT in 1948 had originally included a labor rights clause in the charter of the International Trade Organization (ITO), which was supposed to supersede the General Agreement.<sup>82</sup> However, U.S. congressional refusal to approve membership aborted the ITO, leaving the GATT without a labor rights link. In recent years, the United States and Scandinavian countries have proposed reviving a labor rights clause in the GATT, but developing countries consider this a protectionist measure and have resisted, thus blocking full consideration.<sup>83</sup>

#### D. *Unilateral United States Action*

In the past decade, the United States has taken several unilateral measures to promote labor rights in international trade. First, the United States has enacted worker rights conditionality clauses in statutes providing preferential trade status with the U.S. Under these amendments, countries exporting to the United States must respect internationally recognized worker rights as a condition of beneficial status in trade programs.<sup>84</sup>

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79. See AMERICAS WATCH, *supra* note 32.

80. See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, *A CHILDHOOD ABDUCTED: CHILDREN CUTTING SUGAR CANE IN THE DOMINICAN REPUBLIC* 34-65 (1991).

81. For an overview of this issue, see GOTE HANSSON, *SOCIAL CLAUSES AND INTERNATIONAL TRADE: AN ECONOMIC ANALYSIS OF LABOUR STANDARDS IN TRADE POLICY* (1983).

82. See U.S. DEP'T OF STATE, PUB. NO. 3206, *HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION* (1948); see also Steve Charnovitz, "The Influence of International Labour Standards on the World Trading Regime: A Historical Overview" 126 INT'L LABOR REV. 5 (Sept.-Oct. 1987), 565-581.

83. See *infra* note 112; see also Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253 (1988).

84. See Perez-Lopez, *supra* note 83, at 259. For analyses critical of the unilateral nature of these U.S. measures, see Philip Alston, *Labor Rights Provisions in U.S. Trade Law: "Aggressive Unilateralism"?*, 15 HUM. RTS. Q. 1 (1993); Theresa A. Amato, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79 (1990); Harlan Mandel, *In Pursuit of the Missing Link: International Worker Rights and International Trade?*, 27 COLUM. J. TRANSNAT'L L. 443 (1989). For a defense of such measures, see JOHN CAVANAGH ET AL., *INTERNATIONAL LABOR RIGHTS EDUCATION AND RESEARCH FUND, TRADE'S HIDDEN COSTS: WORKER RIGHTS IN A CHANGING WORLD ECONOMY* (1988); Terry Collingsworth, *American Labor Policy and the International Economy: Clarifying Policies and Interests*, 31 B.C. L. REV. 31 (1989).

Labor rights amendments have been added to various statutes: the Generalized System of Preferences in 1984,<sup>85</sup> the Overseas Private Investment Corporation in 1986,<sup>86</sup> the Caribbean Basin Economic Recovery Act in 1986,<sup>87</sup> Section 301 of the Trade Act of 1988,<sup>88</sup> and the Agency for International Development (AID) funding for economic development grants overseas in 1992.<sup>89</sup> The labor rights specified in these amendments include the right of association, the right to organize and bargain, prohibitions on forced labor, limitations on child labor, and acceptable conditions regarding minimum wage laws, hours of work and occupational health and safety.<sup>90</sup> Each of these measures would unilaterally apply trade sanctions against countries that violate these basic worker rights.<sup>91</sup>

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85. 19 U.S.C. §§ 2461–66 (1988). The GSP program permits a developing country to export goods to the United States on a preferential, duty-free basis as long as it meets the conditions for eligibility in the program. The labor rights provision, § 2462(a)(4), was added in 1984.

86. 22 U.S.C. §§ 2191–200 (1988). OPIC provides insurance for overseas investments by U.S. corporations against losses due to war, revolution, expropriation, or other factors related to political turmoil, so long as the country receiving the investment meets conditions for eligibility under OPIC insurance. One of the conditions for eligibility is the adherence to labor rights standards.

87. 19 U.S.C. §§ 2701–06 (1988). CBERA is designed to stimulate economies in the Caribbean Basin by granting duty-free status to exports into the United States from Caribbean Basin countries on a more extensive basis than under GSP provisions. A labor rights amendment, added in 1990, expanded the original workers' rights clause to comport with GSP and OPIC formulations. 19 U.S.C. § 2702 (1988).

88. 19 U.S.C. §§ 2411–20 (1988). Section 301 defines various unfair trade practices, including worker rights violations. Under section 301, a country that trades with the United States can be subject to retaliatory action for violations.

89. Amendment to the Foreign Assistance Act, 22 U.S.C. § 2151 et seq. (Supp. IV 1992). The AID labor rights clause was passed by Congress following the "60 Minutes" and "Nightline" exposes of AID funds used to lure U.S. businesses offshore. *See supra* note 42 and accompanying text.

90. Significantly, however, the fundamental right of freedom from discrimination in employment has been omitted from the U.S. statutory scheme. For a discussion of this feature, *see* Karen F. Travis, *Women in Global Production and Worker Rights Provisions in U.S. Trade Laws*, 17 YALE J. INT'L L. 173 (1992).

91. Examples of violations and the resultant sanctions include the following: South Korea was removed from OPIC beneficiary status for worker rights violations in 1991; Chile and Paraguay under their previous military dictatorships, and Romania under the former communist government, were the first countries suspended from GSP beneficiary status under the labor rights amendment; Haiti, Guatemala, the Dominican Republic, Burma, and Indonesia have been suspended or placed on a review status after allegations of worker rights violations. *See International Labor Rights Educ. and Research Fund v. Bush*, 954 F.2d 745 (D.C. Cir. 1992) (worker rights advocates' unsuccessful suit against the Bush Administration for alleged failure to fully enforce the GSP labor rights clause).

E. *Voluntary Codes of Conduct*

Codes of conduct detailing labor rights and labor standards in international trade have emerged in several settings. Some are promoted by non-governmental organizations seeking to influence the behavior of multinational corporations.<sup>92</sup> Some are initiated by industry associations,<sup>93</sup> and some by individual companies.<sup>94</sup>

A detailed voluntary code of conduct governing labor rights has also been issued by the Organization for Economic Cooperation and Development (OECD), the coordinating body of the advanced industrial countries.<sup>95</sup> The code provides for the right to organize and bargain collectively and requires employers to furnish facilities and information to worker representatives needed for meaningful negotiations. In addition, it requires employers to supply corporate information to employee representatives, allowing them to “obtain a true and fair view” of

92. The best-known examples are the Sullivan Principles, which were issued by a prominent African-American clergyman and corporate director to encourage non-discrimination by U.S. companies operating in South Africa. See Pink, *supra* note 34, at 181–85. Although later events and tougher U.S. statutory sanctions superseded their applicability, their basic features—an appeal to companies to subscribe to the code of conduct, reporting and oversight mechanisms, and a threat of adverse publicity with economic consequences for refusal to subscribe or for violations of the code—inhere in current voluntary code initiatives. *Id.* See also Interfaith Center on Corporate Responsibility, *Las Normas de Conducta Para Las Maquiladora* (1992) (setting standards of conduct that seek to promote a safe environment and improved working conditions in the maquiladora factory zones along the U.S.-Mexico border).

93. A number of private sector commodity agreements contain labor rights provisions. In particular, the principal accords among tin, sugar, cocoa, and rubber producers require fair labor standards. Ulrich Kullmann, “Fair Labour Standards” in *International Commodity Agreements*, 14 J. WORLD TRADE L. 527, 527–31 (1981). Critics charge, however, that such standards have been used by more advanced producers to limit entry into the business rather than to advance worker rights. *Id.* For a view defending such standards and discussing their inefficacy, see Philip Alston, *Commodity Agreements—As Though People Don’t Matter*, 15 J. OF WORLD TRADE L. 455 (1981) (reply to Kullmann).

94. Levi Strauss, Sears Roebuck and other companies issued labor rights codes following press accounts of abusive labor conditions in factories, mostly in Asia, supplying goods to those retailers. See Swoboda, *supra* note 7. The Levi Strauss code, for example, states that the company “will only do business with partners whose workers are in all cases present voluntarily, not put at risk of physical harm, fairly compensated, allowed the right of free association and not exploited in any way.” LEVI STRAUSS & CO., BUSINESS PARTNER TERMS OF ENGAGEMENT (1992).

95. See OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES (1976) [hereinafter OECD GUIDELINES]. The OECD coordinates policies among the governments of the United States, Japan, Australia, Canada, New Zealand, and the developed nations of Europe. The guidelines took shape after revelations of misconduct by multinational corporations in the 1960s and 1970s, particularly in undermining the elected socialist government of Salvador Allende in Chile. See *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 381–86 (1975).

company performance. It also bans discrimination in employment, calls for advance notice of layoffs and cooperation with unions to mitigate the effects of layoffs, and instructs management not to use threats to close or transfer operations, to unfairly influence negotiations, or to interfere with the right to organize.<sup>96</sup>

The ILO also has adopted a code of conduct on the activities of multinational corporations.<sup>97</sup> Like the OECD Guidelines, the ILO declaration is a voluntary code whose enforcement is more a matter of private consultation or public embarrassment than one of strict sanctions. But the ILO code has a broader range, extending to such areas as job creation, subcontracting and investment in the local economy. It also provides for a precise complaint procedure under a Standing Committee on Multinational Enterprises, with authority to investigate and make specific findings of violations of the code by companies.<sup>98</sup>

#### F. *Litigation Strategies*

Advocates of fair labor standards in international trade have also turned to U.S. courts to vindicate labor rights claims. Results have been mixed, as some courts are reluctant to break new ground in cases with complex international economic, political and cultural connotations. But such cases are sure to increase, with new theories taking shape, as worker rights are caught up in the growing web of global trade.

In one case, a Korean labor union sued a New York-based multinational company in U.S. federal court for violating its labor agreement and inflicting tortious damage on workers when it abruptly shut opera-

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96. See OECD GUIDELINES, *supra* note 95. The OECD guidelines include a de facto complaint procedure, although the body avoids making specific findings of misconduct by individual companies. Instead, it holds an "exchange of views" on the "experience gained" under the guidelines, and issues "clarifications" of the guidelines as they apply to specific labor-management conflicts. Notwithstanding this elliptical enforcement regime, several international labor disputes have been resolved under OECD guidelines. See JOHN ROBINSON, MULTINATIONALS AND POLITICAL CONTROL 7-12 (1983); BRADLEY C. KARKKAINEN, THE OECD GUIDELINES: LABOR'S SEARCH FOR CONSTRAINTS ON MULTINATIONAL CORPORATIONS (1992) (on file with author).

97. ILO, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (1977).

98. ILO code enforcement helped resolve disputes between U.S. unions and the Belgian-based Carrefour international supermarket chain in a Pennsylvania operation, and the Italian ENI energy company that owned an Enoxy Co. coal mine in West Virginia. See David Wallace, *Carrefour, Union Reach Truce in Two-Year Dispute*, PHILADELPHIA BUS. J., Feb. 19, 1990, at 1; INDUSTRIAL UNION DEPARTMENT, AFL-CIO, MAKING THE INTERNATIONAL CONNECTION WORK (1990). A management-side account of these and other disputes brought by unions to the ILO and to the OECD is contained in B. GLADE & E. POTTER, U.S. COUNCIL FOR INTERNATIONAL BUSINESS, FOCUS ON ISSUES: TARGETING THE LABOR PRACTICES OF MULTINATIONAL COMPANIES (1989).

tions in 1989 and moved to Taiwan.<sup>99</sup> Three hundred workers, mostly women, lost their jobs in the shutdown. Not only did they not receive the advance notice and severance pay called for in their union contract, they were not paid for their final weeks of actual work performed.<sup>100</sup>

In another case, Costa Rican farmworkers brought multimillion dollar tort claims against Dow Chemical Corp. and Shell Oil Co. in Texas state courts.<sup>101</sup> The workers alleged they were rendered impotent or sterile by pesticides banned in the United States under environmental and worker safety laws. Those companies manufactured dibromochloropropane (DBCP) in the United States and exported it to Costa Rica for use on banana plantations there. Workers spread the chemical with no warning of its hazards and without protective equipment furnished by the plantation owners or by Dow or Shell.<sup>102</sup> The case was settled in August 1992 with millions of dollars in payments to affected workers.<sup>103</sup>

In another case, the mere prospect of a lawsuit spurred changes in the

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99. *Labor Union of Pico Korea v. Pico Prod., Inc.* 968 F.2d 191 (2d Cir. 1992).

100. Having transferred its assets outside Korea, the company could not be reached for damages in courts there. The union sued in the federal district court at the parent company's headquarters location in upstate New York. The union prevailed against jurisdiction, standing, and *forum non conveniens* defenses, and the case went to trial in 1990. *Id.* at 192. The employer made a settlement offer that amounted to nearly all the monetary damages the workers could hope to obtain in winning the case. Their U.S. attorneys from the Center for Constitutional Rights recommended accepting the settlement, but the workers refused, asserting that the satisfaction of a judicial determination of guilt was more important to them than the money to be gained in a settlement with a non-admission of wrongdoing. *Id.* Their risky move ended in failure when the courts would not apply U.S. law extraterritorially to worker rights violations in Korea—even though the courts found all the facts favorable to the workers. *Id.* at 195–96.

101. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990).

102. *Id.* at 675.

103. The U.S. companies defended, as did Pico Products, on *forum non conveniens* grounds, arguing that the case should be heard in Costa Rican courts, not in Texas. Under Costa Rican law, however, each worker would have been limited to a recovery equivalent to \$1500. The Texas Supreme Court ruled for the workers and ordered the case to trial, saying

the [*forum non conveniens*] doctrine . . . has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad . . . . The doctrine of *forum non conveniens* is obsolete in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet . . . . In the absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without adequate regard for the human and environmental costs of their actions.

*Id.* at 680–89 (concurring opinion). For a discussion, see Winton D. Woods, *Suits by Foreign Plaintiffs: Keeping the Doors of American Courts Open*, 8 ARIZ. J. INT'L & COMP. L. 75 (1991).

labor policies of a U.S.-owned apparel exporting firm in Guatemala. The company had fired union leaders and dozens of workers in 1989 after they formed a union and requested bargaining. The workers won a judgment in Guatemalan labor courts in 1990 ordering reinstatement and back pay. However, that country's military-dominated government failed to enforce the courts' ruling.

U.S. labor rights advocates traced the owner's operations and found a distribution company located in Miami, Florida and major customers in New York City. They prepared to bring suit in Florida state courts, or alternatively in New York, to enforce the judgment of the Guatemalan courts under basic principles of comity in international commercial law, using assets of the distribution company or accounts of the customers to satisfy at least the money judgment for the workers.

Reinstatement could not be obtained in U.S. courts, but the prospect of a money judgment against the company's U.S. assets or accounts payable revived negotiations among the union, the company and the Guatemalan labor ministry to resolve the dispute. In July 1992 the move bore fruit: the fired workers were reinstated to their jobs with back pay, the union was recognized, and collective bargaining commenced.<sup>104</sup>

Extraterritorial application of U.S. labor laws is growing in significance as an issue in the global economy. The *Pico* case is one example, as is the case of a U.S. citizen claiming race discrimination by a U.S. company that employed him overseas. The U.S. Supreme Court ruled in 1990 that Title VII of the Civil Rights Act did not have extraterritorial application to protect a U.S. citizen working overseas; Congress reversed this interpretation in the Civil Rights Act of 1991.<sup>105</sup>

In contrast to *Pico*, where U.S. labor law was found not to apply extraterritorially to assist workers, the National Labor Relations Board ruled that U.S. labor law *does* apply extraterritorially in a decision that favored a U.S. employer.<sup>106</sup> A Florida-based shipping company secured an injunction against a U.S. dockworkers union that asked Japanese unionists not to handle goods shipped using non-union labor.<sup>107</sup> Such international labor solidarity appeals are common among unions in the same industry, so the Board decision holds ominous implications for future support efforts. Labor rights advocates could turn to Congress for

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104. Memoranda and draft pleadings in this case are on file with the International Labor Rights Education and Research Fund, Washington, D.C.

105. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), *superseded by* Section 109(a) of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

106. *International Longshoremen's Ass'n*, 313 N.L.R.B. 53 (1993).

107. *Id.* at 781.

a legislative remedy, just as civil rights advocates succeeded in having the *Aramco* Title VII decision reversed.

It will take many years for a new, court-fashioned international labor law to take shape from cases like these. But the impact on labor rights and labor standards from shifting patterns of international trade and investment is sure to give rise to new cases, requiring a judicial elaboration of rules to balance the rights of workers and investors. Alongside international human rights forums, the ILO, multilateral and bilateral trade agreements, and corporate, government, and NGO voluntary codes of conduct, the courts also will be fashioning rules to address worker rights in the global economy.

### III. CONCLUSION

Distinguishing between unconditional rights, such as the right of association and freedom from forced labor, and rights that are necessarily conditioned on a country's level of development, such as a minimum working age, minimum wage levels, limits on working hours and decent standards of working conditions, poses thorny problems for labor rights advocates. The former, which can be seen as absolute, provide solid ground for rights advocacy and criticism of country practices. The latter "rights" can be viewed as dependent on a country's level of development. Advocacy over these issues gives rise to charges of "back-door protectionism"—that is, that the labor rights argument is just a cover for blocking exports from developing countries, since advocates know those countries cannot afford to increase labor costs.

The same considerations constrain the arguments of export-led development advocates. Certain practices cannot be openly articulated as part of a business or development strategy. For example, a country cannot say it will have a mild form of slavery to boost development or will use forced labor to boost profits. But they often do say they cannot afford to improve minimum wages, standard working hours, or occupational health and safety protections, and call demands that they do a disguised form of protectionism promoted by labor rights advocates.<sup>108</sup>

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108. For example, delegates from Colombia, Nigeria, Korea, and Hong Kong to the General Agreement on Tariffs and Trade responded to U.S. proposals to create a GATT working group on labor standards by arguing that such proposals are "an attempt to cancel out any comparative advantage which developing countries might enjoy" and that "lower labor costs in some developing countries were due to the economic situation, not necessarily to 'enslavement of labor.'" Telegram from U.S. Mission Geneva to Secretary of State, Regarding Worker Rights Discussion in the GATT Preparatory Committee (July 1986) (on file with the International Labor Rights Education and Research Fund).

International labor rights advocates must first solidify their definitions of basic fair labor standards. At this stage in the development of an emerging international labor rights analysis, it is important for advocates to avoid *idees fixes* about the sole or the best forum for treatment. Each of the arenas discussed in Part II is ripe for further development. This Article can only sketch the steps needed to reach a minimum consensus.

Proponents of international fair labor standards can first test the worker rights clauses of human rights instruments and procedures of the United Nations and the principal regional charter organizations, pushing them to come to grips with labor issues. Carefully selected cases that clearly meet the definitions in the instruments should be brought to the commissions and courts of these multilateral bodies.

The ILO, the European Community and many countries have extensively developed jurisprudence on the right of association, the right to organize and bargain, the right to strike, and other features of trade union activity.<sup>109</sup> Labor rights advocates must consolidate these doctrines and determine which are universal, permitting no derogation by a country in the name of economic development or local labor traditions.<sup>110</sup>

Perhaps the greatest challenge here is to define those rights specific to trade union activity that can be asserted as fundamental. Just as there is no debate as to the universality of certain civil and political rights in society at large, like the right to be free of torture or arbitrary arrest and freedom of conscience, workers' right of association and the rights that flow from it—organizing, bargaining and collective action—ought to be unassailable.

In the spectrum from unarguably universal human rights (the right of association, freedom from torture, freedom from slavery, etc.) to arguably "mere" economic benefits (minimum wages, paid leaves, etc.),

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109. See VALTICOS, *supra* note 60; BLANPAIN, *supra* note 73. For a discussion on the right to strike, see RUTH BEN-ISRAEL, *INTERNATIONAL LABOUR STANDARDS: THE CASE OF FREEDOM TO STRIKE* (1988).

110. Two examples of contrasting traditions in democratic countries are immediately apparent. First, union shop clauses that compel dues payments to labor organizations are permitted in Great Britain and the United States, where the freedom of unions and employers to contract such arrangements as part of a bargaining agreement is recognized. Such clauses are not permitted in several continental European democracies and in most of South America, however, which view them as violating the individual right of association. In turn, U.S. and British labor laws do not permit unions that represent only a minority of workers to compel bargaining with employers; in most of continental Europe and South America, on the other hand, minority unions do have bargaining rights. The right of association and the right to organize and bargain are implicated here, but with conflicting results. It will not be possible to soon reach uniformity in national treatment of the union shop and minority bargaining rights issues.

worker rights to form and join trade unions and to participate in union activity (bargaining, striking, engaging in political and legislative action, etc.) are often placed on the economic and social side of the ledger rather than on the universally-recognized rights side. Seen in this light, organizing, bargaining, striking and other union actions are simply methods of making economic demands that a country or an employer may not be in a position to meet. Their refusal to recognize these union-related rights, therefore, are not human rights violations. The state may impose conditions to channel worker action toward outcomes dictated by development strategy and economic policymaking (attracting foreign investment, underselling foreign competitors or nurturing nascent industries)—or simply by the ability (or inability) to pay for improved salaries and benefits.

The flaw in this view is that rights cannot exist as abstractions. The classic rights of the individual, in fact, cannot be guaranteed in practice unless basic economic, social and cultural needs are fulfilled. Otherwise, desperate action by impoverished people will provoke repression by governments in a permanent cycle of human rights abuse.

Redistributive action by government is usually counseled as the solution to this problem by proponents of expanded definitions of human rights. What labor rights advocates can bring to the debate is a defense of self-help by workers turning to trade unionism as an expression of a human right. Organizing, bargaining, strikes, peaceful picketing, political activity and other trade union actions must be treated as basic rights, not variable benefits.

Several steps can be taken to advance consideration of international fair labor standards in the interdependent global economy. In the United States, labor rights supporters should demand ratification of the human rights Conventions of the ILO and the UN International Covenant on Economic, Social and Cultural Rights.<sup>111</sup> The failure of the United States to adopt these international instruments severely undermines the use of unilateral trade measures to address worker rights violations, like those of the Generalized System of Preferences and other U.S. trade programs.

Perhaps the most promising immediate arena for promoting worker

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111. Any ratification movement will have to contend with stubborn U.S. employer resistance. For example, the U.S. Council on International Business, the principal voice of U.S.-based multinational corporations, argues that ratification of ILO Conventions 87 and 98 would conflict with the U.S. Constitution. See EDWARD E. POTTER, *FREEDOM OF ASSOCIATION, THE RIGHT TO ORGANIZE AND COLLECTIVE BARGAINING—THE IMPACT ON U.S. LAW AND PRACTICE OF RATIFICATION OF ILO CONVENTIONS NO. 87 & NO. 98* (1984) at iii-v and 91-94.

rights in international trade is that of bilateral and multinational trade agreements. NAFTA took a half-step in that direction with its labor side agreement, which establishes an enforcement regime for alleged violations of minimum wage, child labor or occupational health and safety laws, and an oversight and evaluation mechanism (without enforcement powers, however), for other labor issues (but *not* rights of association, organizing and bargaining.<sup>112</sup> As the U.S. and Mexican economies continue to intertwine, setting trading arrangements on a foundation of gradually rising labor standards rather than downward pressure on U.S. wages and greater exploitation of Mexican workers will continue to be pressed by labor rights supporters.<sup>113</sup>

The GATT could return to the principles of the Havana Charter that launched the organization, with new consideration of fair labor standards as a condition of liberalized trade. In Europe, Great Britain could sign on to the Social Charter, elevating it to treaty status and creating an example for upward harmonization efforts in other trade agreements.

Unions, churches, human rights groups, consumer organizations and allies should demand expanded accountability of multinational corporations for labor practices in their operations around the world. The adoption of new voluntary labor rights codes by Sears, Levi Strauss, and others can serve to inspire other companies to take like steps. Beyond that, companies can be pressed to enforce their new codes with extensive reporting requirements, labor “ombudspersons,” and other innovative measures.

In general, multilateral consensus on labor rights and labor standards is preferable to unilateral action. The United States is especially vulnerable when it takes action against a developing country on labor rights grounds, both on charges of hypocrisy (not having ratified key human rights instruments and ILO Conventions) and “big power arrogance” (using its economic might to dictate policy to smaller countries). On the other hand, these considerations should not freeze the United States into inaction. As long as a multilateral consensus is lacking, the United

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112. See Keith Bradsher, *Side Agreements to Trade Accord Vary in Ambition*, N.Y. TIMES, September 19, 1993, at 1.

113. It is generally conceded that Mexico’s labor laws are, on paper, superior to those of the United States. Furthermore, Mexico has ratified more than 70 conventions of the ILO, while the U.S. has ratified fewer than a dozen. Critics point to weak enforcement of Mexican labor law, however, and virtual control of the labor movement by the ruling party. U.S. labor law contains several severe constraints on union activity, such as prohibitions on secondary boycotts (or solidarity, as unions would have it), but enforcement is surer, if not swifter. On Mexico, see DAN LA BOTZ, *MASK OF DEMOCRACY: LABOR SUPPRESSION IN MEXICO TODAY* (1992).

States can push others toward a consensus by being willing to act on its own to defend worker rights as an important factor in international trade. Thus, labor rights advocates should expand the reach of labor rights clauses throughout trade statutes, much as intellectual property rights have become a cornerstone of U.S. policy.<sup>114</sup>

Workers, unions and labor rights advocates at home and abroad should also develop innovative litigation strategies to buttress statutory initiatives, voluntary codes of conduct, trade negotiations, and human rights appeals. It may be possible, for example, to bring a *Filartiga*-type lawsuit alleging labor rights abuse as a violation of the law of nations.<sup>115</sup> A forced labor claim would probably be strongest, but with a case with compelling facts, a claim implicating organizing and bargaining rights could be developed as well. Common law remedies might also be available in U.S. courts for labor rights violations. For example, labor rights advocates are currently considering bringing a wrongful death action against a U.S. corporation whose local management, in a developing country subsidiary, was implicated in the shooting death of a trade union activist.<sup>116</sup>

Enforceable international fair labor standards are still in their developing stage, needing to catch up with rapid changes in the global economy and an enormous head start by multinational corporations. Defining basic rights and elaborating standards are a complex enterprise, crossing lines of human rights, international trade and labor law and policy. But it has to be done. In years to come, human rights advocates and theorists, trade and development policy analysts, and labor lawyers, including practitioners and scholars, will have much to contribute to a new international law of worker rights in the global economy.

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114. For example, the North American Free Trade Agreement contains an entire chapter devoted to defining intellectual property rights and elaborating an extensive enforcement regime, including requirements that Mexico enact criminal sanctions against IPR violators. NORTH AMERICA FREE TRADE AGREEMENT FINAL TEXT [Special Report No. 39, Extra Edition], Free Trade L. Rep. (CCH International) (Dec. 17, 1992), ch. 17. Worker rights in NAFTA are addressed in only one sentence in the preamble.

115. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The court permitted a wrongful death claim in tort to proceed against a foreign police official, resident in the United States, who had tortured and murdered a member of the plaintiff's family, in violation of international law. The court took jurisdiction and granted judgment, citing the universality of strictures against torture.

116. Because such an action has not yet been filed, the author has determined that more detailed information should not be made public at this time.

