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**DEVELOPING EFFECTIVE MECHANISMS  
FOR IMPLEMENTING  
LABOR RIGHTS IN THE GLOBAL ECONOMY**

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## I. Introduction.

The International Labor Rights Fund (ILRF), the Institute for Policy Studies (IPS) and the Economic Policy Institute (EPI), as part of a joint Ford Foundation project, are seeking to articulate an alternative economic vision for the global economy that will share the benefits of economic development with working people and harness global capital to serve development objectives. The ILRF contribution to the project is to examine past and current efforts to protect labor rights in the global economy and to make a proposal for more effective implementation of these rights. An assumption of the ILRF analysis is that improved labor rights recognition and enforcement in the global economy is essential to a rational policy of sustainable economic development. Better implementation of labor rights will allow workers in the global economy to improve their wages and terms and conditions of employment. More fundamentally, global mechanisms to protect labor rights are essential to create the political space necessary to allow workers to form trade unions and other civil society organizations that can act to counterbalance the virtually unchecked power of global capital. The EPI portion of the project develops the economic analysis to support this assumption and more generally examines economic policy issues that would lead to broad-based economic development. IPS examines other aspects of an overall economic policy to benefit working people, including reform of international financial institutions, such as the IMF and World Bank, and regulating private capital flows to leaven the gold rush mentality that can devastate developing economies with massive and sudden capital withdrawals when returns start to diminish.

Any proposals for enforcing worker rights globally must be made in the incredibly complicated and confused context of global politics. While there are certainly flexible positions emerging from outside the U.S. and Europe,<sup>1</sup> much of the debate over proposals to add labor rights to trade agreements is mired in an intense debate over the motives of the proponents of this idea: is there a genuine concern for workers or is it a pretext for protectionism? Those advocating some form of international labor rights regulation are often labeled protectionists, even by progressive organizations from the South,<sup>2</sup> as well as Southern governments and business interests in the North,<sup>3</sup> which oppose any social regulation that would endanger the

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<sup>1</sup> See, e.g., H. Totsuka, *Some Thoughts on "Asian Social Charter"*, **Bulletin**, Center for Transnational Labor Studies, No. 3, 27 (Nov. 1997).

<sup>2</sup> M. Khor, *Northern Trade Protectionism and Workers' Rights*, **Third World Economics**, 16-30 (April 1994). At a February 6, 1998 presentation at IPS, Khor clarified that his concern is that whatever the motives of advocates pressing for a social clause, once enacted, Northern governments could use the clause for protectionist purposes. This then presents a challenge to draft the social clause and its enforcement provisions so that this risk is eliminated or substantially minimized.

<sup>3</sup> In the recent debate over renewal of President Clinton's "fast track" negotiating authority, simply asserting that there should be open debate and a slower process resulted in vehement assertions of "protectionism" by the pro-business press. See, e.g., P. Blustein, *Free Trade vs. Social Policy*, **Washington Post**, G-1& 8 (Sept. 19, 1997)(Citing Senator Gramm who claims that advocates for labor and environmental standards in trade agreements are simply trying to keep competitive products out of the market).

current supply of cheap, exploitable labor, thus creating a very unlikely alliance of opposition to social regulation in the global economy). Fortunately, more and more trade unions and NGOs from the South are recognizing that their people are being exploited by multinational companies (MNCs) operating on a global basis, and the only solution for dealing with them is worldwide labor regulation.<sup>4</sup>

The lingering perception by opponents of a global labor regulation that North Americans and Europeans, regardless of institutional or political affiliation, are pressing in unison for a social clause to prevent job loss in their own countries by removing the comparative advantage of cheap labor in the South must be directly addressed. Based on past practice, this view is not entirely without justification. Many Northern trade unions and governments have been very clear in advocating policies designed to protect and preserve jobs. Before the recent, systematic integration of the global economy, that was a reasonable strategy for any nation to pursue. Everything has changed now, however. No country can pursue a domestic agenda in a vacuum. No union or NGO can confront effectively the global power of MNCs without global allies. **While unions and NGOs continue to have their territorial battles within and across national boundaries, the (largely North American and European) MNCs are united in their global vision to protect property and investments, and to keep wages low and profits high.** This is evidenced quite dramatically by the success of highly-competitive technology firms in cooperating for their mutual interest in securing the inclusion of very strict rules to protect intellectual property rights in the last GATT round<sup>5</sup> and in the North American Free Trade Agreement (NAFTA).<sup>6</sup> This is in sharp contrast to the failure of labor and human rights organizations to achieve inclusion of an enforceable labor or social rights clause in these trade agreements.

From the perspective of trade unions and NGOs from the North seeking to advance a new economic vision for workers in the global economy, a necessary prerequisite for successful cooperation with partners from the South then is resolution of a very basic question: If the major reason that unions and NGOs in the North would act internationally to improve conditions for workers is to protect jobs, then the workers in Bangladesh or Mexico or China or any other

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<sup>4</sup> See, for example, the discussion below at pages 15-18 of innovative proposals made by unions in South America for a Social Charter as part of Mercosur.

<sup>5</sup>Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, December 15, 1993, Annex I C.

<sup>6</sup>NAFTA, Part VI, Chapter 17.

country where MNCs have moved significant manufacturing operations should refuse to cooperate with any initiatives that could endanger their jobs. At the same time, unless unions and NGOs from the North can successfully reach out to workers in other countries to implement a strategy to enforce worker rights globally, no one will be able to address the needs of any workers in the global economy, whether from the North or South.

The major point of this paper is that workers in different countries are not adversaries and there is no actual conflict of interest between them. Broad-based economic development is a win-win proposition for workers. Workers in all countries must grasp that they are presently in a doomed competition for low wage jobs, while the MNCs are reaping the benefits of a global surplus of cheap labor. Workers everywhere must return to basics and act together to deal with the global power of MNCs. The unifying theme can be that all workers will benefit if global wages rise. The economic analysis supports this position. Workers in the North will benefit if rising wages in the South fuel consumer demand<sup>7</sup> and a growing part of this is consumption of products from the North. If in fact workers in the South can enjoy rising incomes without suffering significant job loss, this will be a substantial benefit for them. The bottom line is that the global economy can not grow if workers in the U.S. and Europe, whose high wages fuel global demand for consumer goods, are losing their jobs to workers in the Philippines or El Salvador, who earn currently bare subsistence wages.<sup>8</sup>

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<sup>7</sup> The irony is that the current economic system is based on this premise but takes no direct steps to improve wages for the working poor. Global capital accepts the theory but is, for the moment, enjoying the best of both worlds – global markets and cheap labor. Global growth obviously is not an infinite progression. There must be serious concern for sustainability. However, the overall theme of our approach is that there must be a major focus on redistribution of the benefits of global growth to support domestic demand in developing countries, rather than propping up wealthy elites. The economic analysis for our position is supported by the EPI paper, *Alternatives to the Neo-Liberal Model that Address Differences Between North and South, and Labor and the Environment*.

<sup>8</sup>The papers by EPI and IPS will explore the economic arguments underlying this assertion.

The basis for the unifying ideology is the often-repeated mantra: Trade is not an end in itself. The preamble to the original General Agreement on Trade and Tariffs (GATT), signed in 1947, stated: "Relations among countries in the field of trade and economic endeavor should be conducted with a view to raising standards of living and ensuring full employment."<sup>9</sup> This long dormant idea should be the central tenant of an international policy for worker rights. Growth in the global economy must now be fueled by rising incomes of the enormous number of workers in China, India, Mexico, Brazil and other emerging economies. If these workers can obtain a liveable wage and have some disposable income to purchase consumer items, this will increase global demand and create jobs for workers everywhere. If the MNCs, and World Bank and IMF economists don't accept this proposition, then the global trading system must be reassessed for its failure to realize the noble goal of the GATT preamble. It would be difficult for working people in any country to continue to support a system that shifts jobs from high wage to low wage countries if it doesn't offer the immediate prospect for creating new growth through rising wages for the poorest workers, and prohibiting exploitive labor practices.

In this paper, we consider two areas that offer significant prospects for using global trade as a vehicle for improving enforcement of labor rights, including the fundamental rights to associate and organize trade unions, which provide the only sustainable mechanism for ensuring that workers have a voice in the larger economic debate. First, trade agreements can be conditioned to include a substantive standard for worker rights. There is a significant consensus on what international labor rights should constitute a labor clause, which largely includes ILO Conventions ratified by or satisfied by the domestic laws of most countries in the world.<sup>10</sup> This approach requires the direct cooperation of governments and is dependent upon a significant change in direction from a well-rooted "free trade" status quo to an ideology that prioritizes issues of concern to working people and the environment. A second area is the development of "codes of conduct" and mechanisms for monitoring that, in effect, impose a private regulatory system on companies operating in the global economy, enforced by consumer choice. This approach depends upon consumer education and participation, as well as company cooperation. Both avenues offer practical mechanisms for enforcing labor laws and can be pursued on parallel fronts. No proposal for a more just economic system in the global economy can be achieved, however, unless the working people most affected agree to pursue a cooperative strategy.

## **II. Using Trade as a Lever for Improved Enforcement of Labor Rights.**

### A. The Trade-Labor Rights Linkage

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<sup>9</sup> See, e.g., Collingsworth, Goold and Harvey, *Time for a Global New Deal*, **FOREIGN AFFAIRS**, 12 (Jan. -Feb. 1994).

<sup>10</sup> See discussion at pages 25-31 *infra* for the precise parameters of the social clause.

In 1843, Edouard Ducpétiaux, a Belgian economist, issued a challenge to the future that has yet to be realized:

What argument is so often leveled against projects for industrial reform? It is the tyranny of competition . . . Man disappears in this desperate struggle; he is no longer anything more than a weapon with the aid of which blows are given or parried. . . . **Let nations unite for social reform instead of frustrating one another's efforts.** Let them summon a general congress to regulate their mutual concerns: commercial and industrial relations and the problems of workers. **All civilized nations should concur in this truly holy alliance which should open to humanity a new area of well-being and universal satisfaction.**<sup>11</sup>

Starting with Ducpétiaux, the historical and conceptual basis for linking labor rights with trade is solid. The founding of the ILO with ratification of its constitution in 1919 offered real hope of progress with its bold declaration that:

Whereas universal and lasting peace can only be established if it is based upon social justice; And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures. Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries . . . .<sup>12</sup>

The vision of the ILO's preamble remains unrealized, but the ILO has itself consistently reaffirmed the rhetoric. The ILO's Declaration of Philadelphia, ratified in 1944, stated as a basic principle that "lasting peace can be established only if it is based on social justice."<sup>13</sup> The

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<sup>11</sup> *De la condition physique et morale des jeunes ouvriers et des moyens de l'améliorer* (1843), quoted in J.W. Follows, **Antecedents of the International Labour Organization** 43 (1951)(emphasis added).

<sup>12</sup> Preamble to the Constitution of the International Labor Organization (1919).

<sup>13</sup> Declaration Concerning the Aims and Purposes of the International Labor Organization (Philadelphia Declaration), Art. II, published as an Annex to the Constitution of the International Labor Organization, 22 (May, 1989).

Declaration goes on to say that:

(c) all national and international policies and measures, *in particular those of an economic and financial character*, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective [achieving social justice].<sup>14</sup>

The previously cited language of the GATT preamble explicitly linking trade to “raising standards of living and ensuring full employment”<sup>15</sup> demonstrates that even those involved at the early stages of drafting trade rules understood that the major purpose of trade was to benefit people. Following the drafting of the GATT, there was an innovative effort to create an International Trade Organization (ITO) to implement the new trading regime. The ITO would have been charged with ensuring that trade met specific social aims, including elimination of unfair labor conditions.<sup>16</sup> This effort failed largely due to the United State’s refusal to ratify the

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<sup>14</sup> *Id* at 23 (emphasis added). The ILO is attempting to revive the spirit of its Preamble and the Philadelphia Declaration with a recent initiative to focus on “core” labor standards that will expand the scope of its present investigatory powers to include all of the core rights. It will still, however, be left without power to enforce its findings. See *Defending Values, Promoting Change, Social justice in a global economy: An ILO agenda*, Report of the Director General to the 81<sup>st</sup> Session of the International Labour Conference (1994).

<sup>15</sup> See note 8, *supra*.

<sup>16</sup> MacShane, *Human Rights and Labor Rights, A European Perspective*, in L. Compa and S. Diamond, **Human Rights, Labor Rights, and International Trade** 63-64 (1996).

ITO charter.<sup>17</sup>

In 1927, Herbert Feis' *International Labour Legislation in the Light of Economic Theory*<sup>18</sup> provided a pre-Great Depression analysis of the relationship between labor standards and international economic growth. Since then, numerous commentators and politicians have affirmed the obvious link between trade and the most essential aspect of the means of production, labor.<sup>19</sup> As former Congressman Donald J. Pease stated as his objective in authoring U.S. legislation linking labor rights to trade: "We seek to provide working people everywhere with the tools with which they can help themselves share more fully in the benefits of international trade."<sup>20</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> 15 *International Labour Review* 491 (1927).

<sup>19</sup> See, e.g., W. Greider, **One World, Ready or Not: The Manic Logic of Global Capitalism**, 33-38 (1997); Collingsworth, Goold and Harvey, *Time for a Global New Deal*, **FOREIGN AFFAIRS**, 8-13 (Jan. -Feb. 1994); Cavanagh, Compa, Ebert, Goold, Selvaggio, & Shorrock, **Trade's Hidden Costs**, 1-5 (1988); Charnowitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 126 **International Labour Review** 565 (1987); G. Hansson, **Social Clauses and International Trade: An Economic Analysis of Labour Standards in Trade Policy** (1983).

<sup>20</sup> Cavanagh, Compa, Ebert, Goold, Selvaggio, & Shorrock, **Trade's Hidden Costs**, 1 (1988).

The basic rationale for linkage is that poverty eradication and improved conditions for workers should be the focus of and primary objective of trade, not incidental, “trickle down” by-products of an exploitive system that provides lopsided benefits to a few MNCs.<sup>21</sup> The initial development goal stated in the GATT preamble and echoed in the ILO’s Constitution and the Declaration of Philadelphia has been substituted with a raw form of laissez faire capitalism that surpasses in cruel effects the last experiment in trickle down economics early in this century.<sup>22</sup> The ideology of trade policy has been captured by the MNCs, the one interest group that should be the subject of regulation, rather than the drafter of the rules.

It is essential to any understanding of the need for a new trade policy that there is no such thing as “free trade.” The final draft concluding the Uruguay Round of negotiations and creating the WTO is several hundred pages of regulations setting the rules of trade and protecting market access for MNCs.<sup>23</sup> A 32-page Annex I C deals only with protecting intellectual property rights, and the U.S. government has pursued aggressively the claims of such companies as Microsoft, which charged the Chinese government with failing to enforce its laws on copyright piracy. That this system exists, which values computer codes more than children and young people who make CDs in sweatshops, reflects the concentrated power of MNCs to impose regulations that protect their interests, and to resist regulations that might cut into their enormous profits. There is no defensible distinction for allowing regulations in a “free trade” regime to protect property but not people.<sup>24</sup> This distortion will remain until advocates for worker rights and social justice unify to counterbalance the power of MNCs in setting the rules of the global economy.

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<sup>21</sup>Economic evidence to support the assertion that trade has resulted in increasingly skewed income distribution rather than broad-based development is continuing to accumulate. See, e.g., Greider, William One World, Ready or Not: the Manic Logic of Global Capitalism; also Deyo, Frederick, Beneath the Miracle: Labor Suppression in East Asia.

<sup>22</sup> See *Time for a Global New Deal*, *supra* note 18, at 9-11.

<sup>23</sup> Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, December 15, 1993.

<sup>24</sup> *Time for a Global New Deal*, *supra* note 18, at 8-10.

## B. History of Trade-Labor Rights Linkage in U.S. Trade Law.

Labor rights advocates in the U.S. have been quite successful in legally-mandating the link between labor rights and trade on a unilateral basis in U.S. law.<sup>25</sup> A series of laws have been passed that explicitly condition certain trade benefits on compliance with labor rights:

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<sup>25</sup> See generally, Collingsworth, *American Labor Policy in the International Economy: Clarifying Policies and Interests*, 31 **Boston College Law Review** 31-100 (1989).

(1) The Generalized System of Preferences Act ("GSP"),<sup>26</sup> which grants developing countries duty free status on many exports to the U.S. conditioned on compliance with "internationally recognized worker rights," thus providing a substantial comparative advantage in U.S. markets. The worker rights conditionality was added to GSP in 1986. The idea was that the U.S. was spending billions of dollars on direct foreign assistance that was having little permanent impact on solving the underlying problems of poverty. The theme of GSP was "trade not aid," meaning that it would be a better policy to give benefits that helped economies to develop and grow so that countries could become self-sustaining and direct foreign aid could be phased out;

(2) The Caribbean Basin Economic Recovery Act (CBERA),<sup>27</sup> which is virtually identical to the GSP program but focuses on the Caribbean basin.

(3) Overseas Private Investment Corporation ("OPIC"),<sup>28</sup> which provides financing and insurance to U.S. companies investing in developing countries provided that the host country is in compliance with "internationally recognized worker rights";

(4) The Omnibus Trade and Competitiveness Act, passed in 1988, which amended section 301 of the Trade Act of 1974,<sup>29</sup> which applies to all U.S. trading partners and makes failure to comply with "internationally recognized worker rights" an unfair trading practice and subjects the offender to a wide range of sanctions. Compliance with this law ensures that a developing country will not be subject to trade sanctions;

(5) The 1992 Amendment to the Foreign Assistance Act of 1961,<sup>30</sup> which restricts funding of U.S. AID programs that contribute to the denial of "internationally recognized worker rights";

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<sup>26</sup> 19 U.S.C. §§ 2461-66 (1986).

<sup>27</sup> 19 U.S.C. §§ 2701-06 (1986).

<sup>28</sup> 22 U.S.C. § 2191 (1986).

<sup>29</sup> 19 U.S.C. § 2411 (1988).

<sup>30</sup> 22 U.S.C. § 2151 *et seq* (1992).

(6) The 1994 Amendment to the Foreign Assistance Act, which provides that “the Secretary of Treasury shall direct the United States Executive Directors of the International Financial Institutions . . . to use the voice and vote of the United States to urge the respective institution . . . to adopt policies to encourage borrowing countries to guarantee internationally recognized worker rights;”<sup>31</sup> and

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<sup>31</sup> 22 U.S.C. § 1621 (1996).

(7) The 1997 Sanders Amendment to Section 307 of the Trade Act of 1930, which clarified that the ban on importation of products made with “forced” labor applied to products made with “forced or indentured child labor.”<sup>32</sup>

All of these laws incorporate the five factor definition of “internationally recognized worker rights” from the GSP provision:

(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.<sup>33</sup>

These U.S. experiments in trade-labor rights linkage have not been very successful for a number of reasons, but they do demonstrate the conceptual premise that trade conditionality can be an effective tool for regulating worker rights. These models also offer insight into the problems that will be encountered in seeking to develop an enforceable labor rights clause as part of the rules of trade.<sup>34</sup>

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<sup>32</sup> 19 U.S.C. § 1307 (1997). Following passage of the child labor provision, the ILRF immediately filed the first petition seeking to ban the importation of hand-knotted carpets from South Asia made with child labor.

<sup>33</sup> 19 U.S.C. § 2462 (a)(4).

<sup>34</sup> See P. Harvey, *U.S. GSP Labor Rights Conditionality: Aggressive Unilateralism or a Forerunner to a Multilateral Social Clause* (1995)(Unpublished paper on file with ILRF).

The most significant problem in realizing the objective of improved labor rights enforcement is that a combination of conservative U.S. governments and powerful lobbying by the MNCs has prevented any real enforcement of the laws. The administrations of Presidents Reagan, Bush and Clinton have consistently used their discretionary authority to decline to enforce the worker rights provisions of the various laws. The concerned bureaucracies at the U.S. Trade Representative and the Departments of State, Commerce, Labor, and Treasury<sup>35</sup> opposed rigorous enforcement of the worker rights provisions, ultimately resulting in litigation brought by the ILRF to challenge the non-enforcement of the law.<sup>36</sup> Likewise, the ILRF is currently pressuring the Treasury Department to comply with its obligation to require respect for worker rights as a condition to U.S. support for international financial institutions.<sup>37</sup> To date, the Clinton Administration has been hostile to pursuing worker rights at the IMF or the World Bank. This experience demonstrates that any future solution requires a mandatory and transparent process, not easily undermined by bureaucratic hostility or inertia. Most recently, efforts by ILRF to require the U.S. Customs Service and the Department of Treasury to enforce the child labor provision of section 307 of the Trade Act of 1930 have met with extreme bureaucratic resistance.<sup>38</sup>

For outside observers of this process, it is crucial to understand that there is not any homogenous “U.S. view.” Advocates for workers pushed for legislation that provided tools to work to improve enforcement of internationally recognized worker rights. The U.S. government and corporate interests disagreed with the policy and have worked to undermine it. That advocates for workers want stronger language and a multilateral mechanism does not change this fundamental dynamic.

The U.S. approach of linking trade to worker rights, while never enforced adequately, drew considerable criticism for being unilateral.<sup>39</sup> This reflects a basic suspicion in the South, and in Europe for that matter, of anything that is perceived as U.S.-initiated action.<sup>40</sup> However, the critics have failed to understand that the U.S. government, as represented by the Executive branch, never wanted the laws, never enforced the laws, and resisted any effort to introduce

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<sup>35</sup> These agencies comprise the Trade Policy Committee, which attempts to coordinate U.S. trade policy.

<sup>36</sup> For a complete discussion of the litigation, see Collingsworth, *International Worker Rights Enforcement: Proposals Following a Test Case*, in L. Compa and S. Diamond, **Human Rights, Labor Rights, and International Trade** 227-250 (1996).

<sup>37</sup> Correspondence between the ILRF and Treasury Secretary Rubin is on file at the ILRF.

<sup>38</sup> Correspondence between the U.S. Customs service and the ILRF regarding the non-enforcement of section 307 is on file with the ILRF.

<sup>39</sup> See, e.g., Alston, *Labor Rights Provisions in U.S. Trade Law: “Aggressive Unilateralism”?*, in L. Compa and S. Diamond, **Human Rights, Labor Rights, and International Trade** 71-95 (1996).

<sup>40</sup> Interestingly, there has been virtually no vocal criticism of the EU for adopting a GSP program very similar to the U.S. program.

social policy into trade policy. **The entire process was an effort by labor rights advocates, with allies in the U.S. Congress, to force the U.S. government to treat labor rights as a priority in its trading relations.** These advocates also pressed Congress to pass a law that required the U.S. government to push for inclusion of a social clause in the GATT.<sup>41</sup>

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<sup>41</sup> 19 U.S.C. § 213 (a)(4)(1980).

The preferred solution remains a multilateral provision that firmly links labor rights to the trading regime. However, the combination of lackluster U.S. advocacy for the policy, and the absence of any strong allies in the multilateral discussions,<sup>42</sup> resulted in the ratification of the Uruguay Round document without any social clause. At the first World Trade Organization (WTO) Ministerial, the WTO managed to sidestep a renewed call for a social clause by refusing to discuss the addition of a social clause and renewing a commitment to observe the Conventions of the ILO, an alternative all concerned knew meant there was no prospect of any enforcement threat since the ILO has no power to impose any penalty for non-compliance.<sup>43</sup> Thus, U.S. advocates for labor rights are left in a bind: they are criticized for pursuing unilateral measures, but got little support in efforts to persuade other governments to join the U.S. in pushing for a social clause at the WTO. Again, any ultimate solution requires a unified effort by labor rights advocates on a global basis. This requires recognition that labor rights advocates in the U.S. are struggling to force the U.S. government to incorporate worker rights into its global trading agenda; the U.S. government is largely a hostile and unwilling partner in this effort, or, at its best, a divided and ambivalent ally.

### C. Regional Trade Agreements: Experiments With Multilateral Labor Rights-Trade Linkage

A firm labor rights-trade linkage with an enforcement mechanism has not been established at a multilateral level. With more than 100 member countries each, the two principal multilateral institutions, the WTO and the ILO, each possess one-half of an enforcement mechanism. The WTO allows economic sanctions against countries that violate GATT rules, but has so far refused to adopt rules on labor rights, insisting that labor issues belong in the ILO.<sup>44</sup> For its part, the ILO can investigate and determine violations of international labor standards, but has no sanctioning power. Another multilateral institution, the 29-member OECD, has

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<sup>42</sup> See *infra* pages 34-36 and the accompanying text for a discussion of the effort to include a “social clause” to the WTO at the December 13, 1996 Singapore Ministerial.

<sup>43</sup> Singapore Ministerial Declaration, ¶ 4 (December 13, 1996).

<sup>44</sup> See text at notes 133-138 *infra* for a discussion of the WTO’s refusal to deal with worker rights.

“guidelines” for multinational corporations in their dealings with unions,<sup>45</sup> and a forum for consultation on alleged violations. However, the OECD does not contemplate sanctions as a remedy.<sup>46</sup>

Regional labor rights regimes are starting to fashion a stronger link between labor rights and trade. Each of the three main regional groupings -- the European Union (EU), the Common Market of the South (Mercosur), and the North American Free Trade Agreement (NAFTA) -- has created institutions and mechanisms to treat issues of workers’ rights in connection with economic integration. A review of these three efforts to create labor rights regimes offers valuable lessons for developing new, effective means of enforcing labor rights in trade on a global basis.

## 1. European Union

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<sup>45</sup> See OECD, Declaration on International Investment and Multinational Enterprises (1976, revised 1979).

<sup>46</sup> See B. Glade and E. Potter, *Targeting the Labor Practices of Multinational Companies, Focus on Issues* (U.S. Council for International Business, July, 1989); D. Campbell and R. Rowen, **Multinational Enterprises and the OECD Industrial Relations Guidelines** (1983); J. Robinson, **Multinationals and Political Control**.

Since its founding by the Treaty of Rome in 1957, the EU has developed an elaborate institutional framework for both economic integration and for coordination of military, political, and monetary policy. This includes a plan for a single currency beginning in 1999, although the plan has run into resistance from workers and citizens concerned about cuts in labor standards and welfare benefits considered “acquired rights” after decades of social progress.<sup>47</sup>

Europe has seen a series of “social charters” of varying scope and effectiveness before the current *Community Charter of Basic Social Rights for Workers* was adopted in 1989:

1) Social provisions of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms included several labor rights provisions drawn from the UN’s Universal Declaration of Human Rights. The European Convention and a series of protocols that followed have given rise to many cases involving labor rights and labor standards brought before the European Court of Human Rights, which remains independent from the EU structure.

2) The 1957 Treaty of Rome contained a brief statement of social rights, but with no accompanying mechanism for oversight or enforcement.

3) A 1961 European Social Charter was adopted by the Council of Europe (not an EU institution), applicable to all the countries of Europe.

4) A 1987 Protocol to the 1961 European Social Charter added clauses on social rights affecting workplace equality between men and women, rights to information and consultation in the workplace, and worker participation in setting working conditions.

5) A 1989 Social Charter was approved as part of the formation of the European Free Trade Area (EFTA), which included the members of the EU plus the Scandinavian states and the historically neutral states, along with Eastern European countries that have gradually been joining the EFTA and have now begun to join the EU.

The 1986 enlargement of the EU to include a “South” of Portugal, Spain and Greece prompted a reshaping of these many “social charters” into a new, detailed *Community Charter of Basic Social Rights for Workers* in 1989. The Charter was followed by the “Social Protocol and Agreement” to the Maastricht Treaty on European Union in 1992, which set conditions for

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<sup>47</sup>See Nicholas Bray, “European Labor Scorns Single Currency: Unions Say Required Budget Cost Too Many Jobs,” *Wall Street Journal*, October 10, 1996, at A13; “Insecure or Jobless, Europeans Renew Protests: Social safety nets are worn at a time leaders feel they must limit deficits,” *New York Times*, March 25, 1997, at D4; Alan Friedman, “European Workers Angry: Downsizing, Spending Cuts Sparking Street Protests,” *Washington Post*, March 25, 1997, at C3.

adopting binding, Europe-wide legislation on labor rights.

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.

In the EU system, “Directives” proposed by the European Commission and adopted by the Council of Ministers require member countries to conform their laws to a European standard. On labor rights, the EU has adopted several Directives on such matters as health and safety, equal treatment of men and women, and consultation with workers. A recent Works Council Directive requires European companies — defined as firms with 1,000 or more employees in two or more countries — to consult annually with worker representatives on future employment plans.

The European Commission and the Council of Ministers are the predominant operative bodies in the EU structure. The Commission proposes and the Council, which represents the executive authority of each member country, adopts Directives, the only true “legislation” in the EU system. However, a popularly elected European Parliament is growing in importance, from its beginnings as a merely advisory body to one that is now more assertive. Although it still does not have any power to enact legislation, a power reserved to the Council, the European Parliament does have a role in initiating or blocking Commission proposals.

The Maastricht Treaty of 1992 revised EU decision making powers to permit Directives on certain topics to be adopted by qualified system of majority vote through a weighted voting system meant to balance interests of large and small members. This revision ended the power of a single country to veto a Directive, and binds countries that vote against a Directive that passes with a qualified majority.

The Maastricht social protocol creates a 3-tier system of issues subject to possible Europe-wide legislation in the form of Directives. The EU can adopt Directives by qualified majority voting in matters of health and safety, working conditions, information and consultation of workers, equality between women and men, and persons excluded from the labor market. Unanimity is required for Directives that deal with social security, job security, worker

participation, employment of 3<sup>rd</sup>-country nationals, and job creation. However, Maastricht prohibits any Directives on union organizing, collective bargaining, or the right to strike. Considered so integral to national character and so dependent on national history, these matters are reserved to the domestic polity.<sup>48</sup> This is a salient “tiering” of labor rights into different categories with different levels of enforcement, a phenomenon also found in the NAFTA labor rights structure.<sup>49</sup>

A country’s failure to implement an EU Directive in its domestic law can be challenged in the European Court of Justice after exhausting all domestic tribunals. However, the ECJ does not have the power to order economic sanctions or to send out a European police (no such police exists) to enforce its judgments when violations are found. The “enforcement” power in the European Union comes down to willingness of countries to abide by ECJ rulings out of a sense of responsibility to each other, based on the notion that if countries began to spurn ECJ decisions, the entire fabric of European integration could start to unravel.

For example, British laws were found by the ECJ to violate EU Directives requiring worker consultation in a plant closing.<sup>50</sup> France amended laws limiting night work by women after an ECJ ruling found the laws in violation of EU Directive on equal treatment of men and women.<sup>51</sup> German laws providing affirmative action for women workers were recently struck down by the court on similar grounds.<sup>52</sup> The German affirmative action ruling suggests that controversies over “reverse discrimination” are not limited to the United States. It also demonstrates that a supranational labor rights authority is not certain to hand down decisions always to the liking of progressives.

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<sup>48</sup> See Maastricht Treaty on European Union, Protocol and Agreement on Social Policy, Art. 118 (1)-(6), Feb. 7, 1992, 31 I.L.M. 247, 357.

<sup>49</sup> See discussion at pages 21-22, *infra*.

<sup>50</sup> See Robert Rice and David Goodhart, “Britain ruled in breach of EU employment laws,” *Financial Times*, June 9, 1994, at 1.

<sup>51</sup> See “European Community Cannot Ban Night work For Women,” 9 *Employee Relations Weekly* 856, Bureau of National Affairs (August 5, 1991).

<sup>52</sup> See “Setback for German Labor Law,” World Wire, *Wall Street Journal*, May 16, 1997, at A15.

There is a general impression outside Europe that the EU labor rights regime is a model to be emulated in NAFTA or in other mechanisms to implement workers' rights in trade.<sup>53</sup> Interestingly, however, European trade unionists and labor rights advocates are highly critical of the EU scheme. A recent proposal to revise the European labor rights system has been submitted by over 100 labor law experts, with the support of European trade unions. They call the current EU labor rights instruments "inadequate" and say that they have "fallen far short of an effective protection of fundamental rights."<sup>54</sup>

The Community Charter of Fundamental Social Rights of Workers is a "side agreement," not an integral part of the Treaty of European Union. It remains an aspirational instrument, not real norms with which countries must comply. Where binding Directives have been enacted, they tend to be in relatively uncontroversial areas like health and safety or worker consultation. As noted above, European Directives can be used to strike down affirmative action laws.

No directives can be adopted on union organizing, collective bargaining, or the right to strike. European employers are pressing for deregulation of the employment relationship and cuts in social benefits, and the European Commission has pulled back from promoting the "Action Programme" for implementing the Community Charter in favor of deregulating measures.<sup>55</sup> The movement to "flexibilize" European labor relations has accelerated in recent years as unemployment has risen and manufacturing shops have "run away" to lower cost EU members, to non-EU European countries, and to the United States.<sup>56</sup>

There is no true Europe-wide collective bargaining. Trade unions are still embedded in their national frameworks, with intermittent cross-border communication and collaboration, despite the presence of Europe-wide labor bodies and efforts to coordinate action under the Works Council Directive. Indeed, some employers are embracing the Works Council Directive

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<sup>53</sup> See, e.g., J. Brecher and T. Costello, **Global Village or Global Pillage** (1994).

<sup>54</sup> See, e.g., Blanpain et. al., *Fundamental Social Rights: Proposals for the European Union* (1996).

<sup>55</sup> See R. Taylor, "EU bows to employers over rights of workers," *Financial Times*, April 12, 1995, at 1.

<sup>56</sup> See, e.g., Helen Lachs Ginsburg, "Fall from grace: Entrance in the EU has increased pressure on Sweden to dismantle its welfare state," *In These Times*, December 23, 1996, at 21.

as a device to bypass unions and deal with employee representatives drawn from white collar and lower management ranks.<sup>57</sup> Cross-border collaboration between trade unions through the Works Council process (when a union is the representative for the Works Council) offers great unrealized potential.

## **2. Mercosur**

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<sup>57</sup>See Robert Taylor, "Unilever switch on works council," *Financial Times*, April 12, 1995, at 3.

The Common Market of the South--known as Mercosur in Spanish--was the outgrowth of political and economic ties between Argentina and Brazil following the return to democratic rule in both countries in the mid-1980s.<sup>58</sup> The growing bilateral ties evolved into the idea of Mercosur when Uruguay and Paraguay joined the two countries with the signing of the Treaty of Asuncion in 1991. (Chile and Bolivia have since become associate members). As the most ambitious attempt yet toward regional integration in Latin America, the ultimate goal of Mercosur is the creation of a "common market," allowing for the free mobility of investment, labor and services, as well as trade in goods, among the members. As an interim step toward that goal, as of January 1995, Mercosur organized itself as a customs union in which the member countries have a common external tariff covering imports from third countries, with largely tariff-free trade among the four members.

Mercosur countries have focused their attention on the intricacies of economic integration, and did not initially take up labor rights as part of their agenda. Unions from the four countries organized a coalition, the Southern Cone Central Labor Coordination (CCSCS in its Spanish/Portuguese acronym) and fought to have the Mercosur discussions opened up to workers and social organizations. As a result of this pressure, in 1992 a tripartite Mercosur Working Group on Labor Relations, Employment, and Social Security was set up, with the initial mandate of harmonizing labor laws and benefits in the region.<sup>59</sup> Government, employer, and trade union representatives made up the Working Group and created subcommittees on the following topics:

- individual labor relations
- collective labor relations
- employment
- training
- health and safety
- social security
- sectoral matters (specifically in transportation and agricultural labor)
- review of ILO Conventions and draft of a Social Charter

Among other accomplishments, the labor Working Group called for member countries to each ratify 34 Conventions of the ILO deemed relevant and necessary for fair labor standards in the Southern Cone market. Among these, the Working Group noted that 11 Conventions had already been adopted by all four countries:

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<sup>58</sup> See generally, **Mercosur 1997**, Orbis Publications, Washington DC, 1997.

<sup>59</sup> INFOSUR - Informacion Sindical Sobre el Mercosur, No. 2, Coordinadora de Centrales Sindicales del Cono Sur, 1996.

- No. 11 on unionization in agriculture
- No. 14 on weekly days of rest
- No. 26 on minimum wages
- No. 81 on labor inspectors
- No. 95 on salary protection
- No. 98 on freedom of association and the right to bargain collectively
- No. 100 on equal pay
- No. 105 on the abolition of forced labor
- No. 111 on non-discrimination in employment
- No. 115 on protection against radiation poisoning
- No. 159 on retraining

The Working Group characterized these universally-adopted ILO Conventions as substantive labor rights norms for Mercosur, setting a stage for consideration of further measures. The CCSCS went further and drafted a complete Social Charter for consideration in the Working Group, incorporating relevant clauses from international human rights instruments and from other ILO Conventions.

As described by the Brazilian Confederation Unica de Trabajo (CUT), the Charter "was conceived as a way to improve social and living conditions, strengthen democracy and protect those sections of the population most vulnerable to the effects of economic integration. It is inspired by a concept of human rights that extends beyond labor rights, encompassing the basic individual rights of all citizens in the Mercosur--life, liberty, health, education, nutrition, a safe and healthy working environment, and a social safety net--as well as collective rights, such as freedom of organization, collective bargaining, the right to strike, and freedom of information."<sup>60</sup>

To date, the governments have not officially responded to the Charter proposal, effectively blocking its adoption.

The unions have further proposed that issues related to the Charter of Fundamental Rights be dealt with by two additional institutions: the Mercosur Commission for Social Rights and the Committee of Specialists. The Commission for Social Rights would be made up of two representatives from each country's government and one from each country's professional sectors. Its functions would be "to ensure compliance with the rights and obligations stipulated in the Charter; to issue directives to increase the effectiveness of the Charter; and to propose to the Council of the Mercosur economic measures, such as fines or tariffs, as penalties against countries that fail to comply with the Commission's resolutions."<sup>61</sup>

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<sup>60</sup> *Social Charters: Perspectives from the Americas*, Latin American Working Group, Toronto, 1996, p. 35.

<sup>61</sup> *Id* at 36.

The 1994 Protocol of Ouro Preto established a permanent institutional structure for Mercosur. However, the countries rejected new trade union demands for a Social Charter with enforceable labor rights. Instead, Ouro Preto created an Economic and Social Consultative Forum (FCES in its Spanish/Portuguese acronym) in which business, labor, and other social sectors can make non-binding recommendations to the governments on labor rights and labor standards. Ouro Preto also created a Joint Parliamentary Commission (CPC) for selected lawmakers of member countries to consult with each other and to serve as a bridge to their respective legislatures for Mercosur matters. Meanwhile, Working Group 10, the formal tripartite Mercosur body on labor relations, employment, and social security, continues to deal with labor issues, although control by government and employer representatives makes a breakthrough on labor rights unlikely in the near term.

As with the FCES, the CPC has no power to adopt a “charter” or any form of Mercosur-wide legislation. Both bodies have an inherent weakness of a purely recommendatory function. Both governments and employer organizations have resisted an elaboration of region-wide labor rights and labor standards, insisting that these issues remain in the domestic lawmaking sphere. However, trade unions and popular organizations have recognized the potential of the FCES and the CJC, as well as of Working Group 10, as arenas for promoting progressive labor policies to accompany regional economic integration.

Within these limits of the Mercosur framework -- the labor Working Group controlled by governments and employer groups that continue to block a Social Charter, and an FCES and CJC with solely recommendatory or advisory functions -- the CCSCS and allied human rights, community, and other popular organizations continue demanding a Social Charter with region-wide labor standards.

It remains to be seen whether a common market can be built without a complex institutional structure that can act as one of the driving forces of the integration process. Without independent supranational institutions, it is unlikely that Mercosur will be able to make much progress toward a common market, and thus development of common labor and environmental standards may be a very slow process. This is illustrated by the EU process, where the countries have a much higher level of economic development but are still struggling with the economic aspects of integration. The Southern Cone trade unionists generally concede that they will not be able to achieve their goals in the current context, and are actively pursuing other strategies. One alternative is demanding the inclusion of a formally constituted Labor Forum, equivalent in status to the already existing Business Forum, in connection with the creation of the Free Trade Area of the Americas (FTAA).

Despite the significant political obstacles to establishing enforceable social clauses within the Mercosur structure, the experience of creating the Charter of Fundamental Rights and working jointly for worker representation in the Mercosur negotiations has created the conditions necessary for the unions and social organizations to exercise mutual solidarity in the countries of the region, and has generated innovative proposals for implementing a social clause.

### 3. NAFTA

The labor side agreement to the North American Free Trade Agreement (NAFTA), the North American Agreement on Labor Cooperation (NAALC), is the first labor agreement explicitly related to a regional trade pact containing potential economic sanctions for labor rights violations following an arbitration process. NAALC has, however, been consistently criticized for being primarily cosmetic because these sanctions apply only to a narrow category of rights. With respect to the most important labor rights, particularly the right to associate, there are no meaningful enforcement mechanisms.<sup>62</sup>

The agreement stresses cooperation on labor issues among the three NAALC countries, Canada, Mexico and the U.S. At the same time, however, the NAALC creates procedures for critical reviews by each country's labor department, and by independent, non-governmental experts, of another country's performance in enforcing domestic labor laws. The governments that negotiated the NAALC are in the midst of a 4-year review required by the Agreement. Unions, human rights organizations, employers, and other non-governmental actors have varying views of the NAALC, as do labor law and industrial relations experts that have been analyzing it.<sup>63</sup>

The core of the NAALC is found in 11 *Labor Principles* which, while not formally constituting a social charter, lay a foundation for common continental norms. The NAALC Labor Principles include:

- 1) freedom of association and protection of the right to organize;
- 2) the right to bargain collectively;
- 3) the right to strike;

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<sup>62</sup> See, e.g., *The Failed Experiment: NAFTA at Three Years*, a joint study by The Economic Policy Institute, the Institute for Policy Studies, the International Labor Rights Fund, Public Citizen's Global Trade Watch, the Sierra Club, and the U.S. Business and Industrial Council Educational Foundation (June 26, 1997)(Copy on file at ILRF).

<sup>63</sup> In a January 30, 1998 letter to the National Administrative Office as part of the NAALC review, the ILRF was strongly critical of the NAALC and urged reforms to provide improved enforcement powers. (Copy on file with ILRF).

- 4) prohibition of forced labor;
- 5) labor protections for children and young persons;
- 6) minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements;
- 7) elimination of employment discrimination on the basis of such grounds as race, religion, age, sex, or other grounds as determined by each Party's domestic laws;
- 8) equal pay for men and women;
- 9) prevention of occupational injuries and illnesses;
- 10) compensation in cases of occupational injuries and illnesses;
- 11) protection of migrant workers.<sup>64</sup>

The NAALC expressly states that these Labor Principles “do not establish common minimum standards,” but the countries are “committed to promote” them in their domestic law.<sup>65</sup> Indeed, despite the recognition in the NAALC preamble that there should be an effort to “protect, enhance and enforce basic workers’ rights,”<sup>66</sup> the countries generally assume that their domestic laws already conform to the Labor Principles — an assumption that has been challenged in early cases alleging violations of the NAALC.

Connected to the NAALC Labor Principles are six Obligations spelled out in the Agreement.<sup>67</sup> The first is a “general duty” obligation to provide “high labor standards.”<sup>68</sup> Other obligations are to effectively enforce domestic labor laws,<sup>69</sup> to provide for private right of action giving legal recourse to aggrieved workers under domestic labor law,<sup>70</sup> to provide for due process, transparency, and other procedural rights in the domestic labor law system,<sup>71</sup> to publish

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<sup>64</sup> NAALC, Annex 1.

<sup>65</sup> *Id.*

<sup>66</sup> NAFTA Preamble, p. 1.

<sup>67</sup> NAALC, Part II, Arts. 2-7.

<sup>68</sup> NAALC, Art. 2.

<sup>69</sup> NAALC, Art. 3.

<sup>70</sup> NAALC, Art. 4.

<sup>71</sup> NAALC, Art. 5.

and provide public access to the labor laws,<sup>72</sup> and to promote public awareness of workers' rights.<sup>73</sup>

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<sup>72</sup> NAALC, Art. 6.

<sup>73</sup> NAALC, Art. 7.

The NAALC stresses sovereignty in each country's internal labor affairs, recognizing "the right of each Party to establish its own domestic labor standards."<sup>74</sup> It does not create a new labor rights enforcement agency to supplant the domestic authorities of each country. NAALC negotiators took pains to declare that "Nothing in this Agreement shall be construed to empower a Party's authorities to undertake law enforcement activities in the territory of another Party."<sup>75</sup>

The NAALC also does not create a supranational tribunal to take evidence and decide the guilt or innocence of employers involved in labor disputes, or to order remedies against violators. This is left to domestic authorities. Instead, the NAALC countries created a system for mutual review of labor matters and labor law enforcement in defined areas of labor law. These reviews are conducted first by agencies in each others' labor departments and then, depending on the subject area, by independent, non-governmental evaluation committees or arbitral panels.

One core obligation assumed by each of the NAALC parties is to "effectively enforce its labor law."<sup>76</sup> While the countries have not yielded sovereignty on the content of their laws or the authorities and procedures for enforcing them, they have broken with traditional notions of sovereignty by opening themselves to critical international and independent reviews, evaluations and even arbitrations over their performance in enforcing labor laws. In three key areas -- minimum wage, child labor, and occupational safety and health -- the countries created a prospect of fines or loss of NAFTA trade benefits for a persistent pattern of failure to effectively enforce domestic law.<sup>77</sup>

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<sup>74</sup> NAALC, Art. 2.

<sup>75</sup> NAALC, Art. 42.

<sup>76</sup> NAALC, Art. 1(e).

<sup>77</sup> NAALC, Arts. 29 and 41.

Despite the availability of the NAALC to provide wide-ranging scrutiny of labor law enforcement in member countries, fewer than 10 complaints have been filed in the four years since the Agreement went into effect. The lack of concrete remedies to benefit workers whose rights have been denied discourages participation by organizations lacking resources to participate in a process that will most likely result only in a “Ministerial Consultation.”<sup>78</sup> No employer has ever bothered to appear and present testimony in defense of allegations of labor rights violations since there is absolutely no provision in NAALC allowing a remedy against a private employer.<sup>79</sup> One complaint of discrimination against pregnant women workers in the *maquiladora* factory zone along the U.S.-Mexico border was the first case with the potential to go beyond ministerial consultation.<sup>80</sup> In the hearing on the Han Young case,<sup>81</sup> substantial evidence was presented on health and safety violations, raising for the first time the prospect of a case going to the arbitration procedures of NAALC. There still has not been a case filed raising squarely matters of minimum wage or child labor, other issues that can be subjects of arbitration under the NAALC.

Most complaints have been aimed at events in Mexico. In the one case involving the United States, a plant closing by the Sprint Corporation came under intense scrutiny through a NAALC review and led to a broad study of anti-union plant closings in the three NAALC countries.<sup>82</sup> However, a U.S. court of appeals ultimately overruled a decision by the NLRB that the plant closing was an unfair labor practice.<sup>83</sup> The court’s final ruling found in favor of the corporation, declaring that the plant closing was motivated by economic factors, not by anti-unionism. U.S. unionists have asserted that this case exposes the fundamental flaw of NAALC: if domestic law fails to adequately protect worker rights, NAALC is powerless to improve the substantive standard for worker rights.

There is no question that NAALC was designed to be a cooperative process that did not interfere with domestic labor law standards. Advocates for worker rights have consistently identified three fundamental weaknesses preventing NAALC from serving as a process for

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<sup>78</sup> NAALC, Art. 22. All but one of the cases filed involved the first of the 11 Labor Principles, Freedom of Association, which most worker rights advocates agree is the most important of the rights. However, under NAALC, the maximum relief for violation is review and a ministerial consultation. These cases cannot go farther to independent evaluation or arbitration.

<sup>79</sup> The Mexican government did appear in the Fisheries Case (No. 9601) both as the government and the employer.

<sup>80</sup> The NAO issued its report in Case No. 9701 on January 12, 1998 and requested a Ministerial Consultation. If the result of the consultation is not satisfactory, the NAO can request that an Evaluation Committee of Experts (ECE) be created under Art. 23. This process is still pending.

<sup>81</sup> No. 9702.

<sup>82</sup> Commission for Labor Cooperation, **Plant Closings and Labor Rights** (1997).

<sup>83</sup> *LCF Inc., D/B/A La Conexion Familiar v. NLRB*, 129 F. 3d 1276 (D.C. Cir. 1997).

improving worker rights enforcement:

- the lack of harmonized international labor standards, based on ILO Conventions or other agreed sources, that compel countries to improve their labor laws,
- the inability of the NAALC to achieve specific remedies when workers' rights are violated, and
- a division of the Labor Principles into 3 "tiers" by which only three of the 11 Principles (minimum wage, child labor, and health and safety standards) can be subject to arbitration and possible use of trade sanctions as a remedy, and the three key Principles for trade unions — those on organizing, collective bargaining, and the right to strike — can only be subject to review and ministerial consultation, and not to independent evaluation or arbitration.

In sharp contrast, NAFTA sets strong, common international standards on Intellectual Property Rights (IPR) that forced changes in Mexican laws and provide for swift, sure remedies for violations. NAFTA carefully defines intellectual property rights and protections for such things as patents, copyrights, trademarks, service marks, plant breeders' rights, industrial designs, trade secrets, semiconductor chips, computer programs and databases.<sup>84</sup> These careful definitions of protected rights are followed by tough enforcement mechanisms. Violators of intellectual property rights face punitive damages, injunctive relief, sanctions against due process violations, IPR inspection and seizure at the border, and other strong and rapid means of halting violations.

Despite its weaknesses, the hybrid approach of the NAALC — preserving each country's sovereignty over labor laws and their enforcement, but submitting to reviews by each other and by independent, non-governmental bodies -- is probably as far as the three parties to the accord countries were willing to go in fashioning the first labor accord connected to an international trade agreement. This is especially true where the United States dominates the economic relationship among the three NAFTA countries, and both Mexico and Canada see their own labor laws as more protective of workers than those of the United States. The smaller economies resist any move toward harmonization that would be influenced by the gravitational pull of U.S. economic power. Indeed, there is already a fear among labor rights advocates in Mexico and Canada that the U.S. deregulatory model of labor relations is making inroads in their countries.<sup>85</sup>

The NAALC contains several features that might be encouraged in further development of a global clause linking labor rights and trade. For one, the 11 Labor Principles range far

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<sup>84</sup> See generally, NAFTA, Part VI, Arts. 1701-21 for provisions relating to protection of intellectual property rights.

<sup>85</sup> See, e.g., Manuel Fuentes Muñiz, *The NAFTA Labor Accord in Mexico and Its Repercussions for Workers*, 10 *Connecticut Journal of International Law* 379-401 (1995), and debates surrounding proposed "right-to-work" legislation in Alberta.

beyond the 3 or 4 “core” labor standards often advocated as the basis of a labor rights regime.<sup>86</sup> For another, NAALC is a good model for access to the process and transparency. There is ample opportunity for the involvement of trade unions and NGOs to use the NAALC, both in filing complaints and in participating in public hearings and other events. Finally, procedures for review, evaluation, and arbitration force governments to be called to account for their domestic labor law enforcement in a public international forum. This provides much greater scrutiny than behind-the-scenes ILO investigations, or other forms of diplomacy.

Other benefits stemming from NAALC relate to the unprecedented increase in exchange, communication and collaboration among trade unionists, labor rights advocates and labor researchers at the tri-national level. Under the Agreement's procedures, complaints about violations in one country must be initiated in another country. Thus, trade unionists and their allies are compelled to collaborate across North American borders to use the NAALC. Labor solidarity is growing and will hopefully gain strength to allow worker groups to have the political power to insist upon an improved mechanism for enforcing labor rights. Workers in the three NAALC countries are cooperating and demonstrating that they have much to gain by acting in unity against violators of their rights. Trade unionists and allied groups in the three NAALC countries now regularly send delegates to each others' conventions, conferences and other activities. They are trading bargaining information, translating papers and studies and finding new ways to link their movements. In some instances, union organizers have crossed borders to assist in organizing campaigns in another country. While it is not only the labor side agreement driving these actions, the NAALC creates a framework for concrete work nourishing long-term gains in labor solidarity.

#### **4. APEC.**

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<sup>86</sup> See pages 25-31 *infra* for a discussion of labor provisions generally included in proposals for a social clause.

Concrete steps have been taken to discuss integration of the economies of Asia through a loose association called Asia Pacific Economic Cooperation (APEC).<sup>87</sup> Despite the lack of any binding agreements on integration and the early stage of the discussions, trade unions and NGOs have used the APEC forums to gather to express solidarity, and to make clear at a very early stage of the discussions that any economic integration must include provisions to protect workers and the environment. Following the Manila People's Forum in November, 1996, those assembled issued a Plan of Action that included a demand to the governments of APEC countries to honor their existing international commitments, including ILO Conventions ratified, and to "respect, enforce and improve national laws protecting human and labor rights, and where these laws do not meet international standards, to amend them and bring them into compliance."<sup>88</sup> Addressing a particular concern in Asia, the Plan requires that "informal sector workers, migrants, farm workers and free trade zone workers must be included within labor laws and governments must inform migrant workers of their legal rights."<sup>89</sup> The challenges of integrating the extremely diverse economies and cultures of the Pacific basin are enormous. The APEC process must also be viewed as a crucial challenge for advocates for social justice to use the lever of trade to improve labor rights enforcement in countries of Asia that represent some of the most repressive regimes in the global economy.

## 5. Concluding Summary of Regional Trade Agreements.

A review of regional labor rights regimes reveals a rich variety of mechanisms for implementing labor rights in trade. The European Union has elaborated an extensive social charter, including free movement of workers, and has a mechanism for enacting Europe-wide legislation through Directives in selected labor rights areas. A European Parliament provides a democratic political voice for EU citizens, even though its functions are basically advisory rather than legislative.

The European Court of Justice takes up labor rights cases, and has succeeded in changing some domestic laws that conflict with EU Directives. The Works Council Directive promotes Europe-wide consultation between employers and workers, which might contain seed of Europe-wide collective bargaining.

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<sup>87</sup> See generally, **APEC: Four Adjectives in Search of a Noun**, (1996)(Copy on file with ILRF).

<sup>88</sup> *Plan of Action, Manila People's Forum on APEC* at p. 4 (November 21-23 (1996)(Copy on file with ILRF).

<sup>89</sup> *Id.*

Mercosur has not adopted either a social charter of the European type, or a statement of principles like that of the NAALC. However, Southern Cone unions have drafted and promoted a complete Social Charter, and the Southern Cone countries have established an innovative mechanism for the participation of trade unions and other social groups in the Economic and Social Consultative Forum, and in Working Group 10 on Labor Relations, Employment, and Social Security. Mercosur also established a Joint Parliamentary Commission giving a voice (non-binding) to elected representatives in the region. The Mercosur unions are also taking the lead in demanding a Labor Forum equivalent in status to the Business Forum in negotiations on a hemispheric free trade agreement.

The NAALC provides an extensive set of Labor Principles that prepare the ground for a social charter even while domestic sovereignty over labor law matters is preserved. It provides for a broad, flexible program of international reviews, consultations, evaluations, and possible arbitrations on questions of domestic labor law enforcement, with many opportunities for participation by trade unions and allied groups.

All the regional systems have critical weaknesses, too. The Social Charter has not halted the drive toward U.S.-style “flexibility” in employment relations. The EU continues to preclude rights of organizing, collective bargaining, and strikes from treatment by Europe-wide Directives.. The NAALC precludes the same subjects from independent evaluation or arbitration, and avoids setting common international standards and specific remedies for labor rights violations. The Mercosur labor rights framework is limited to consultation and recommendations with no binding effect. In all three regimes, the focus is on the actions of governments rather than on actions of the multinational corporations that violate workers’ rights.

The European Union has taken more than 40 years to reach its current, still-flawed social charter. NAFTA and Mercosur countries have just begun experimenting with new instruments addressing the labor rights-trade linkage. The strengths and weaknesses of various regional labor rights regimes provide a rich field for analysis and dialogue among labor rights advocates along North-South, North-North, and South-South axes. Such a dialogue can move us beyond generalized demands for high labor standards toward a concrete, practical agenda to implement labor rights in trade. If labor rights advocates see the EU, Mercosur, and NAFTA labor rights regimes as “first drafts” of a worker rights-trade link, then we can begin developing a long-range strategy to improve them in future “drafts,” conscious that there is no finality — there is only continuing struggle — in the movement for labor rights in international trade. We now have sufficient experience, however, to move towards agreement on a universal model for a social clause so that advocates can work in solidarity towards the same objective. Emerging regional trading blocs, such as FTAA and APEC, present immediate opportunities to improve upon existing models.

#### D. The Substance of a “Labor Clause.”

There is an emerging consistency on the substance of the “labor clause” to trade agreements. The debate really begins with how such a clause would be enforced internationally,

the topic of the next section.

The most widely-accepted version of the labor clause has been proposed by the International Confederation of Free Trade Unions (ICFTU), the international body of national trade union federations. The ICFTU's proposal is to define the social clause based on key Conventions of the ILO, which have been ratified by most countries of the world. These are:

- the right to associate (ILO Convention No. 87);
- the right to organize and bargain collectively (ILO Convention No. 98);
- equal employment opportunity and non-discrimination (ILO Convention Nos. 100 and 111);
- Prohibition of Forced Labor (ILO Convention Nos. 29 and 105); and
- Prohibition of Child Labor (ILO Convention No.138).<sup>90</sup>

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<sup>90</sup> See, e.g., **Social Charter for Democratic Development**, ICFTU-APRO (1994).

This version of the labor clause is endorsed by most of the International Trade Secretariats, which are international groupings of trade unions on a sectorial basis. Two of the largest and most influential, the International Textile, Garment & Leather Workers Federation (ITGLWF), and the International Metalworkers Federation (IMF), have produced booklets to promote and explain this version of the social clause to their affiliates.<sup>91</sup>

Perhaps most significant, the Organization for Economic Cooperation and Development (OECD) has specifically endorsed a version of the labor clause nearly identical to that proposed by the ICFTU. In a recent publication, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*,<sup>92</sup> the OECD advocates for inclusion of "core" labor rights, which are identified as freedom of association and the right of collective bargaining, prohibition of forced labor, prohibition of discrimination in employment, and prohibition of exploitative forms of child labor.<sup>93</sup> The OECD characterizes these worker rights as part of "international jurisprudence concerning human rights."<sup>94</sup> Except for a refusal to endorse the ILO's child labor convention (No. 138), the OECD Report expressly accepts the same ILO Conventions as the ICFTU in giving substance to the core labor standards.<sup>95</sup> Regarding child labor, the OECD took issue with the ILO's focus in Convention No. 138 with the age of the child

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<sup>91</sup> Enabling Workers to Share the Benefits of World Trade (ITGLWF) and Trade and Workers' Rights – Time for a Link (IMF) (Both are on file at the ILRF).

<sup>92</sup> Published by the OECD in 1996 (Hereinafter OECD Report)(Copy on file at the ILRF). For a thorough and balanced critique of the OECD's report, see Charnowitz, *Trade Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 **Temple International and Comparative Law Journal** 131 (1997).

<sup>93</sup> OECD Report, supra note 32, at 26-27.

<sup>94</sup> *Id.* at 27.

<sup>95</sup> *Id.* at 33-36.

rather than the conditions under which children worked.<sup>96</sup> The ILO now has a new Convention No. 187 on child labor that will focus on the most “intolerable” forms of child labor.<sup>97</sup> Perhaps this will merge the ILO and OECD views. At this point, it is significant to note that the OECD has, for all practical purposes, proposed a social clause that is virtually identical to that proposed by the ICFTU.

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<sup>96</sup> *Id.* at 35-38.

<sup>97</sup> ILO, **Child Labour, Targeting the Intolerable**, International Labour Conference, 86<sup>th</sup> Session (1998).

Other proposed versions of a labor clause include minimum standards for health and safety and an acceptable minimum wage, based on the level of economic development of a particular country.<sup>98</sup> This approach is consistent with the definition of “internationally recognized worker rights” contained in the provisions of U.S. law that link worker rights with various trade benefits,<sup>99</sup> which includes “acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.”<sup>100</sup> Likewise, the 11 Labor Principles of NAALC<sup>101</sup> go well beyond the “core” labor standards and include issues of wages, health and safety, and migrant worker protections.

There is some disagreement over the merit of including a working conditions provision in the social clause. Some argue that it fuels the “protectionist” objection to the social clause and reinforces the accusation that those in the North simply want to drive up wages in the South to protect Northern jobs. The response to this is that the proposal to include a minimum wage, for example, has always been stated firmly by worker rights advocates to be intended to set wages in the context of the level of economic development of the subject country, which would certainly allow for an extremely broad range of wages and would permit low wage countries to retain a significant comparative advantage. In the Bangladesh garment sector, for example, the monthly minimum wage set by law for an unskilled worker is 930 taka per month, approximately \$23.<sup>102</sup> Virtually none of the workers in the garment sector received the minimum wage, and were instead paid 500 taka per month or less.

### **The greatest danger for a developing country trying to improve wages and develop a**

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<sup>98</sup> See, e.g., Brown, Goold, and Cavanagh, *Making Trade Fair*, *World Policy Journal* 325-26 (Spring, 1992).

<sup>99</sup> See discussion at pages 7-10, *supra*.

<sup>100</sup> 19 U.S.C. § 2462 (a)(4).

<sup>101</sup> NAALC, Annex 1. See discussion of the 11 Labor Principles at pages 18-19, *supra*.

<sup>102</sup> Collingsworth, *Justice for Workers: A Manual for Enforcing the Labour Laws of Bangladesh* 16-17 (1995) (Published by the Bangladesh Independent Garment Workers Union, Dhaka, Bangladesh, and on file at the ILRF).

**domestic economy is that a close competitor would try to undercut its labor costs to steal business, not that U.S. or European workers, who earn more than 50-100 times what workers in the least developed country earn, will successfully lure jobs back following a modest increase in the minimum wage.** Thus, if Bangladesh wanted to raise its wage rates in the garment sector to \$80 a month, but China, not bound to any social clause at this point, keeps its wages at \$40, Bangladesh would no doubt lose business to China. Bangladesh's decision to increase its minimum wage to \$80 per month would certainly not cause a company to return its manufacturing to New York City, where even workers making the minimum wage earn at least \$1000 a month. This reality was emphasized last year in Indonesia, when shoe manufacturers stated that if the country's minimum wage continued to rise, they would shift operations to countries with lower wages.

MNCs also use countries' desires to maintain their "competitive advantage" to undermine trade union rights. A union leader in the Philippines recently expressed his difficulty in organizing unions: "Our biggest problem here in the Philippines is job flight . . . As soon as we start to organize a union, the company threatens to move to Vietnam."<sup>103</sup> For this reason, it is crucial to include language protecting workers' rights to associate in any social clause.

It is thus in the interest of Bangladesh, or the Philippines, or any other country seeking to raise the standard of living of its people, to support a social clause with minimum standards to ensure that no country is able to win the race to offer the cheapest, most exploited labor in the world. Without a binding social clause to set a floor under which no country could go, the world's poorest workers remain pawns in a "beggar thy neighbour" economy that only the MNCs are truly happy with.<sup>104</sup>

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<sup>103</sup> Walter Russell Mead, *Labor's New Power in Asia*, **Los Angeles Times**, Opinion Section, M1 (February 22, 1998).

<sup>104</sup> Greider, *supra* note 18, at 101.

Assertions that exploitative working conditions and extremely low wages are a natural step of economic development are misplaced.<sup>105</sup> Early in this century when new industrial companies were struggling to develop, sweatshops were the norm. What has changed is that highly developed companies, like Motorola and Wal-Mart, are taking advantage of the undeveloped state of countries in the South to exploit workers until the countries do develop, and then they move on to another place and exploit a different group of workers. The only economic law at work here is that companies are looking for the lowest possible wages and the most docile workforce, not to survive a struggle to get a foothold in the market, but to maximize already impressive profits. Based on our research in Bangladesh, India, Indonesia, Thailand, and other evolving economies, there is little question that for most workers the minimum wage is the prevailing wage rate. Until trade unions are able to secure collective bargaining agreements for these workers that improve upon the minimum wage, it is important to emphasize just how crucial the wage issue is to most workers. We encourage an international process to develop a formula for determining a liveable wage, based on local economic conditions, and to incorporate this in the labor clause.<sup>106</sup>

Whether to ultimately include a provision in a social clause setting minimum wages and conditions remains an economic, political and strategic decision that should follow careful discussion between the organizations participating in an alliance to promote the social clause. Likewise, whether to add environmental or other social provisions is a strategic question based on what can reasonably be accomplished. It should be noted, however, that at a people's forum parallel to a governmental gathering in Brazil in May, 1997 to discuss the creation of a Free Trade Area of the Americas (FTAA), there was an extraordinary showing of unity between unions and NGOs resulting in a broad declaration stating:

There should be no FTAA agreement if it is to be created along the lines of other existing agreements, such as NAFTA. We need an agreement that promotes genuine development for all of the peoples of the hemisphere, one that recognizes and attempts to reduce the

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<sup>105</sup> See, e.g., Myerson, **New York Times**, Section 4, page 5, Column 1 ( June 22, 1997) (describes the positions of Jeffery Sachs and Paul Krugman calling for more sweatshops as the answer to the "backbreaking poverty" of Africa).

<sup>106</sup> Richard Rothstein has prepared an excellent paper discussing the process for setting minimum wages based on local economic realities, *Developing Reasonable Standards for Judging Whether Minimum Wage Levels are Acceptable* (1996)(Copy on file with ILRF).

differences in levels of development, one that allows for integration of our economies based on democratically determined national development models, and one that is based on consensus. . . We are proposing an agreement designed for sustainable development rather than for trade liberalization. Any trade agreement should not be an end in itself, but rather a means towards combatting poverty and social exclusion and for achieving just and sustainable development.<sup>107</sup>

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<sup>107</sup> Declaration: Building a Hemispheric Social Alliance to Confront Free Trade, ¶ 1 (May 15, 1997)(copy on file at the ILRF).

The Declaration goes on to demand democratic participation in negotiating any FTAA,<sup>108</sup> and to require a social clause that includes protection for labor rights<sup>109</sup> and the environment,<sup>110</sup> as well as provisions aimed at regulating capital flows,<sup>111</sup> negotiating debt reduction,<sup>112</sup> and resolving disputes over non-tariff barriers.<sup>113</sup> The declaration was ultimately signed by the ICFTU's Inter-American Regional Organization of Workers, the Alliance for Responsible Trade, which includes the ILRF and IPS, a number of significant NGOs, including the Mexican Action Network on Free Trade (RMALC), Common Frontiers (Canada), the Brazilian Association of NGOs (ABONG), the National Indigenous Council of Mexico, and the Canadian Association of Labor Lawyers.

There are a number of other very compelling models for a social clause.<sup>114</sup> As a function

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<sup>108</sup> *Id* at ¶ 2.

<sup>109</sup> *Id* at ¶ 3.

<sup>110</sup> *Id* at ¶ 4.

<sup>111</sup> *Id* at ¶ 5.

<sup>112</sup> *Id*.

<sup>113</sup> *Id* at ¶ 6.

<sup>114</sup> See, e.g., the *Philippines Declaration* signed by NGOs in the APEC countries, which calls for a social clause that incorporates labor rights and a broad range of social issues (On file at ILRF).

of proposals made during the NAFTA debate, several organizations produced a document, *A Just and Sustainable Trade and Development Initiative for the Western Hemisphere*,<sup>115</sup> which suggests five basic principles that should govern any trade agreement: respect for human rights, environmental and social sustainability, reduction of inequalities, democracy and open participation, and nonpreemption of government protections.<sup>116</sup> Ultimately, a detailed plan for a social clause embracing worker rights, environmental protection, land reform, debt reduction, protection for rights of women and indigenous people, and democratic processes is proposed.<sup>117</sup>

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<sup>115</sup> Produced by the Alliance for Responsible Trade, Citizen Trade Campaign, and the Mexican Action Network on Free Trade (July, 19, 1994)(Copy on file at the ILRF).

<sup>116</sup> *Id* at 2-5.

<sup>117</sup> *Id* at 9-13. *See also*, **Social Charters, Perspectives From the Americas**, produced by Common Frontiers and the Latin American Working Group (1996)(Copy on file at the ILRF), which summarizes proposals for a social clause from various organizations in the Americas.

Again, inclusion of issues beyond the core labor standards must be resolved in the context of deciding which form of the clause has the best chance of becoming a reality. If, however, environmental and/or social NGOs are to be added to a “social clause” coalition, some provision to address their specific concerns will need to be included in the social clause that may require financial incentives to offset compliance.<sup>118</sup> **Perhaps the most fruitful approach would be to first agree on the components of the social clause and then engage in a prioritization process to phase in the list of rights across several years. As part of this discussion, development aid and debt reduction could be used to offset the costs incurred by a developing country as it phases in the rights of the social clause.** The EU used a phase in approach with its GSP system, first activating prohibitions on forced or child labor, and then gradually phasing in other core labor rights.

The issue of development aid targeted to compliance with labor standards is an extremely important component of any effort to secure agreement internationally with a social clause.<sup>119</sup> To take one example, India, with at least 50 million child workers, could never sign on to a labor clause that included a prohibition on child labor. Regardless of whether India could afford to solve its own child labor problem by reprioritizing available resources, India has no incentive to force its own compliance by supporting a labor clause. To overcome present noncompliance, countries like India will require significant development assistance.

To conclude on this issue, we refer to the negotiation process that occurred at Belo Horizonte in drafting the declaration. The ILRF and IPS participated in the discussion. There was remarkably little disagreement over what issues to cover in the labor clause. Generally, the organizations represented understood that any of the options would be an amazing victory if it could be included in the FTAA or other trade agreements. Virtually everyone accepted the reality that the proposal for a social clause must be “reasonable” to have any chance of being enacted. The issue that few had thought about carefully, but most acknowledged was the key question, was how the social clause would be enforced. This alone would determine whether the goals expressed in the substance of the clause would be realized. This would also determine the force of resistance from the MNCs and hostile governments. If there was little or no threat of enforcement, such as with the ILO Conventions, then those in opposition would not be overly concerned. If, however, the labor clause is designed with real teeth, then the opposition would be fierce. Also, to gain support of unions and NGOs in the South, these enforcement provisions must be carefully designed to ensure that the teeth are not used for protectionist purposes.<sup>120</sup> The major challenge remains to have an enforceable mechanism that will allow workers to realize

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<sup>118</sup> It is beyond the scope of this article to develop the details of an environmental social clause. For an introduction to the issues, see H. French, *Reconciling Trade and the Environment*, in L. Brown et al, **State of the World** (Worldwatch Institute 1993).

<sup>119</sup> At an October, 1999 International Forum supported by the Ford Foundation to discuss this paper and the related papers by EPI and IPS, the need for targeted development assistance was emphasized by labor rights activists from the South as the key barrier to gathering support for the labor clause in their countries.

<sup>120</sup> See note 2 *supra* for concerns expressed by Martin Khor about protectionist uses of the social clause.

their rights.

## E. A Proposal to Enforce the Terms of a Labor Clause.

### **1. Background Introduction.**

A labor clause, whatever the specific terms ultimately are, will make a concrete improvement in the lives of working people in the global economy only if there is an effective enforcement mechanism. This assertion is best illustrated by considering that the ILO, which will celebrate its 80<sup>th</sup> anniversary in 1999, has developed nearly universal labor standards, but has not played a significant role in alleviating worker exploitation in the modern global economy because it lacks enforcement power.<sup>121</sup> Likewise, the Labor Principles provided in the NAALC,<sup>122</sup> while comprehensive, have not been significantly advanced by the NAALC due to extremely weak enforcement provisions.<sup>123</sup>

The labor clause, by its nature, raises issues of individual harm suffered by workers and their families as a result of the failure of employers to comply with labor laws set in domestic law and by international standards. Further, there is almost always an issue of a government failing to act to enforce properly the labor laws. A labor clause is thus designed to give voice and authority to workers, often against the combined power of governments and employers. This will only be realized if there is a democratic process to finalize the terms of any trade agreements to not only include a labor clause, but to ensure that the other provisions of the trade agreement support social and environmental sustainability. In other words, **an enforceable social clause is not a panacea; trade agreements themselves should reflect a primary concern with improving the lives of people and protecting the environment.**<sup>124</sup> If, instead, a trade agreement permits widespread exploitation of workers and the environment, and it has some mechanism for seeking redress for harm that has already occurred, this is not a sensible path to sustainable development. This highlights why it is not advisable, therefore, simply to advocate using mechanisms that protect intellectual property in the WTO, for example, to protect the rights of workers. The WTO, as it is presently constituted, can not be trusted to protect the rights of workers because the government and MNC powers that created the WTO are the powers that workers need to be protected from.<sup>125</sup>

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<sup>121</sup> See, e.g. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 **Yale Journal of International Law** 361, 382 (1995).

<sup>122</sup> NAALC, Annex 1(1993).

<sup>123</sup> See, e.g., ILRF's January 30, 1998 letter to the U.S. National Administrative Office, as part of the NAALC review process. (On file with the ILRF).

<sup>124</sup> *A Just and Sustainable Trade and Development Initiative for the Western Hemisphere*, Alliance for Responsible Trade, Citizen Trade Campaign, and the Mexican Action Network on Free Trade (July, 19, 1994)(Copy on file at the ILRF).

<sup>125</sup> See Charnovitz, *Trade Employment and Labour Standards: The OECD Study and Recent Developments*

It is our hope that by the process for developing an effective enforcement mechanism for the labor clause, we will also stimulate debate in other areas, including among advocates for the environment and indigenous people, to ensure that we speak with one voice. Any future trade agreements must be negotiated using a democratic process with the aim of creating a new trading regime that deals with social issues as the primary objective of trade, rather than as a remedial afterthought, if at all. This was certainly the sentiment expressed by the assembled labor, human rights and environmental NGOs in drafting the Belo Horizonte Declaration.<sup>126</sup>

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*in the Trade and Labor Standards Debate*, 11 **Temple International and Comparative Law Journal** at 160 (1997)(noting that the WTO “is never going to be a good forum for pursuing the goal of higher labor standards”).

<sup>126</sup> See text at notes pages 29-30, *supra*.

As worker rights advocates managed to do in denying President Clinton “fast track” negotiating authority, one aspect of eventually achieving the goal of a labor clause is to block efforts to expand free trade agreements unless they reflect acceptance of the idea that trade should benefit people and protect the environment. The major task for proponents of a labor clause is to devise a politically-realistic enforcement model so that we can promote a positive agenda, rather than serve only in a reactive role. Further, it bears repeating what many argued during the original NAFTA debates: obviously increased global trade and economic integration are occurring at a rapid pace even if there are no new trade agreements.<sup>127</sup> Doing nothing, or serving only a blocking role, will not halt global integration. We need to advance a clear alternative agenda. Each new trade agreement presents an opportunity to promote an alternative view of the trading system.

Many organizations have implicitly or explicitly assumed that the ultimate goal is creation of a supranational enforcement body that oversees protection and enforcement of labor rights in the global economy by issuing binding remedial orders against offending governments and/or MNCs.<sup>128</sup> The processes of this body would be democratic and transparent, and individual workers could file complaints to have their rights fairly adjudicated. While this may be a possible goal, it is not likely to happen in the near future. It is hard to imagine the major powers in the global economy, especially the U.S. and China, ceding significant national sovereignty to enforce worker rights to a supranational body.<sup>129</sup>

There is room for a concrete series of steps to achieve an ultimate and more ideal result, **but careful thought should be given to devising intermediate steps that are worth accomplishing in themselves.** The discussion in this section will first provide an introduction to and context for the idea of an enforcement mechanism for the labor clause. We will then provide a recommended proposal which includes the key elements for effective enforcement. In the proposal we will identify areas where strategic choices need to be made between specific options. It is our goal to facilitate the development of agreement on a uniform enforcement mechanism that can be applied to virtually any trade agreement. Like the substance of the labor

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<sup>127</sup> Rothstein, *Continental Drift: NAFTA and its Aftershocks*, *The American Prospect* 68, 69-70 (Winter 1993).

<sup>128</sup> This was evident in discussions at the Belo Horizonte meetings with trade unions and NGOs in May, 1997 leading to the Belo Horizonte Declaration. See discussion in text at notes at pages 29-30, *supra*.

<sup>129</sup> See the discussion in the next session indicating the failure of efforts to include a social clause in the WTO. This is a strong indication of the long-term nature of any plans for global enforcement of worker rights.

clause itself, it is essential to develop consensus around a proposal for enforcement.

## 2. Context for Seeking Enforcement of a Labor Clause in Trade Agreements.

Until the WTO held its first Ministerial Conference and issued the Singapore Ministerial Declaration on December 13, 1996,<sup>130</sup> most of the discussion for enforcing a social clause centered on inclusion of a social clause in the WTO.<sup>131</sup> The ICFTU's proposal for enforcement was to add a provision to the WTO Charter:

The contracting parties agree to take steps to ensure the observance of the minimum labour standards specified by an advisory committee to be established by the WTO and the ILO, and including those on freedom of association and the right to collective bargaining, the minimum age for employment, discrimination, equal remuneration and forced labour.<sup>132</sup>

This proposal would have tied the enforcement mechanism to the WTO, while giving the ILO responsibility for determining whether a country was in compliance with the labor standards. This was designed to capitalize on the strength and credibility of the ILO in identifying violations of its conventions, but keeping enforcement power at the WTO. This position was solidly endorsed by commentators as the best way to proceed.<sup>133</sup>

The national trade WTO, however, soundly rejected the idea of a social clause and issued the following language relating to worker rights:

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<sup>130</sup> WTO, Singapore Ministerial Declaration, Doc. No. 96-5315 (December 13, 1996).

<sup>131</sup> See generally, Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 **Yale Journal of International Law** 361 (1995); Edren, *Fair Labour Standards and Trade Liberalization*, 118 **International Labour Review** 523 (1979).

<sup>132</sup> ICFTU Circular No. 38 at 3 (June 29, 1995)(Copy on file with ILRF).

<sup>133</sup> See, e.g., Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 **Yale Journal of International Law** at 403-414 (1995).

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in supporting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must be in no way put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.<sup>134</sup>

The statement leaves no room for optimism that a labor clause will soon be a reality at the WTO. In a thorough assessment of the implications of the WTO's position, Steve Charnovitz reports that subsequent statements by WTO officials restricted even further the WTO position.<sup>135</sup> For example, the former WTO Director General, Renato Ruggiero, clarified that the cooperation with the ILO would be limited to information exchange, such as whether ILO programs ran afoul of international trade rules.<sup>136</sup> There should be no doubt then that the WTO is hostile to the idea of a social clause, there was virtually no support for the social clause at the Singapore Ministerial,<sup>137</sup> and, as we noted before, it is our belief that even the well-publicized U.S. support was based on legislation requiring the U.S. to press for the social clause,<sup>138</sup> but U.S. support was *pro forma*.<sup>139</sup> The now famous "Battle in Seattle", the Second Ministerial held in November, 1999, confirmed the WTO's indifference to social issues, but, more important, demonstrated the widespread dissatisfaction with the current regime for managing the global economy.

The 1999 WTO Ministerial in Seattle also highlighted the need for stronger North/South dialogues. While the U.S. trade negotiating team did agree to raise the idea of a working group on labor within the WTO, in exchange for AFL-CIO support for the overall negotiating agenda, the trade negotiators did little to ensure support for the idea from any developing nation. Indeed, the U.S. team's disregard for developing-nation input in the Seattle meetings led to a threatened walkout by sub-Saharan African delegates, furious at being excluded from key negotiations. This, perhaps to an even greater extent than actions in Seattle's streets, led to a breakdown in the

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<sup>134</sup> WTO, Singapore Ministerial Declaration, Doc. No. 96-5315, ¶ 4 (December 13, 1996).

<sup>135</sup> Charnovitz, *Trade Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 **Temple International and Comparative Law Journal** at 156-58 (1997).

<sup>136</sup> *Id* at 157-58.

<sup>137</sup> *Id* at 154. Charnovitz reports that the European Commission, Canada and Norway joined the U.S. in proposing a social clause.

<sup>138</sup> See text at note 39, *supra*.

<sup>139</sup> See pages 9-11, *supra*, for a discussion of the U.S. government's unwillingness to enforce U.S. laws linking trade with worker rights.

meetings. In such a context, the U.S. government cannot be relied upon to raise even the working group idea, let alone that of a social clause, in a manner that will gain widespread acceptance. The push will have to come from somewhere else, and still requires much groundwork.

Commentators continue to urge that the labor clause be implemented by a WTO/ILO collaboration,<sup>140</sup> but this must now be viewed realistically as a long term goal that can only follow implementation on a regional level of trade agreements with a social clause. As Charnovitz put it, “[t]he stonewalling at Singapore should force a re-examination of strategy.”<sup>141</sup> Continuing to press member states for inclusion of the social clause in the WTO, as well as including democratic reforms to allow for meaningful participation by workers in the process, should remain a top priority. In the near term, we first need to develop a universally-accepted enforcement mechanism that can be used in both regional trade agreements and, ultimately, at the WTO. There should be clear agreement on what interested organizations mean when they press for enforcement of a labor clause so that strategic energies can be spent working to gain acceptance for the idea, rather than continuing to debate internally what it is they want, allowing divisiveness to delay concrete action.

### **3. Key Elements of an Effective Enforcement Mechanism for the Social Clause.**

The elements described below represent the key aspects of a mechanism designed to enforce the labor clause. It is our initial assumption, based on the discussion in the preceding section, that the immediate prospects for major change at the WTO are not good, and that an alternative should be to work immediately to ensure that any new regional trade agreements include an enforceable labor clause. Probably the most promising initial opportunity is in the

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<sup>140</sup> See, e.g., Wachtel, *Labor's Stake in the WTO*, **The American Prospect** 34-38 (March-April 1998).

<sup>141</sup> Charnovitz, *supra* note 69, at 158-63. Charnovitz advocates giving the ILO enforcement powers, which could be provided consistent with its present charter. *Id.* at 160. However, the tripartite character of the ILO would certainly make agreement to this within the ILO problematic. The very same nations that voted overwhelmingly to defeat a social clause at the WTO are unlikely to agree to give the ILO enforcement powers over the same issues. The resistance is not due to a belief that the WTO is the inappropriate forum, but to the idea of an enforceable labor clause. Certainly the employer representatives at the ILO would work to defeat an effort to give the ILO enforcement powers.

context of the FTAA, particularly given that trade unions and NGOs have already signed the Belo Horizonte Declaration.<sup>142</sup> However, the approach here is to develop an enforcement mechanism that can be integrated with the labor clause into any trade agreement with minor modifications. Achieving enforcement of the labor clause through a series of regional trade agreements is a realistic goal, and one that offers the prospect of multiple experiments. As more and more major trading partners are covered by a labor clause, those countries already committed to the labor clause would have some incentive to support changes to allow for inclusion at the WTO level, along with democratic changes.

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<sup>142</sup> See pages 29-30, *supra* for a discussion of the Belo Horizonte Declaration.

Our recommendation for an enforcement mechanism does not require any radical changes for the countries involved. **The most fundamental concept that must always be at the forefront of efforts to gain acceptance of an enforceable labor clause is that virtually every country in the world has domestic labor laws and has ratified international instruments, including ILO Conventions, that already require compliance with all of the terms of the labor clause.**<sup>143</sup> What's lacking is enforcement, and the effort is to provide for labor laws what already exists for property rights in the global economy: a mechanism to ensure adequate enforcement. We believe, as was discussed earlier,<sup>144</sup> that the major barrier to enforcement of labor laws in the global economy is that individual countries fear that if they require MNCs to comply with the law, the companies will flee to another country that will offer greater freedom from regulation. A major objective of the labor clause is ultimately to provide a worldwide floor for labor standards so that there can be no place that a company could flee to in order to avoid compliance. Thus, the provisions proposed below are designed to achieve what most countries are already legally bound to do: compliance with the terms of the labor clause. **The powerful dynamic for enforcement will be to provide incentives for each country to cooperate in obtaining compliance by MNCs with the labor clause and corresponding domestic laws.**

We believe that all of the elements discussed below are essential, but there are several options for achieving the objective of a given element. Those choices must be resolved as part of an overall political strategy, and are highlighted here to facilitate debate and resolution among advocates for a social clause. Sample language is offered in discussing some elements in order to better illustrate the concept. Our intention is to facilitate discussion towards agreement on an enforcement mechanism that can become part of a universal effort by unions and NGOs to speak with one voice in pressing for an enforceable social clause.

**a. Compliance with the labor clause as a condition to participation in the trade agreement.** Regardless of whether we are talking about admission to the WTO or to a new regional agreement, such as the FTAA, a firm principle must be that all countries seeking to participate in the trade agreement must be in compliance with the clause as a condition to membership. Each country would participate in an extensive review of its law and practice to determine compliance with the standard. If a country is found not to be in complete compliance, it could have probationary membership, provided it agrees to implement specific reforms within two years, for example, subject to ongoing monitoring. The necessary revisions to law and practice could be identified as part of participation in the harmonization process discussed in the next section. If at the end of the two-year period it fails to be in complete compliance, then its membership in the trading group would be terminated with the right to reapply only when there

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<sup>143</sup> The Southern Cone trade unions made this a primary argument for uniform labor standards and documented the ILO Conventions that had been ratified by all of the participating countries. See discussion at pages 15-17, *supra*. China and Vietnam are notable and significant exceptions. Neither have ratified the key Conventions, nor do their domestic labor laws adequately protect the core labor rights. For a list of ILO Convention ratifications by country, see ILO, **Lists of Ratifications by Convention and by country**, Report III (Part 5)(1995)

<sup>144</sup> See page 28, *supra*.

is complete compliance with the labor clause.

Issues to Be Resolved:

i. Who determines compliance with the labor clause? Ideally, this would be something the ILO could do. Certainly, in the context of an agreed format by the participating nations, the ILO is well-suited to assessing whether any given country is in compliance with core ILO Conventions. Indeed, the ILO already performs this function to a certain degree through its annual review of members' compliance with ratified conventions.<sup>145</sup> Further, when there are persistent problems with a particular country's compliance with one or more conventions, there is a procedure to create a Commission of Inquiry to investigate fully.<sup>146</sup> The ILO thus has the experience and mandate to perform this function.<sup>147</sup> If, however, the ILO declines to participate, or the process for getting its cooperation is too cumbersome, or, as some assert, the ILO is too lethargic to play a constructive role in international worker rights enforcement, then the subject trade agreement could assemble its own panel of experts to make these determinations.<sup>148</sup> The

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<sup>145</sup> Art. 22, Constitution of the ILO.

<sup>146</sup> *Id.* at Art. 26.

<sup>147</sup> Charnovitz, *Trade Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 **Temple International and Comparative Law Journal** at 160-63 (1997)(discussing the ILO's unique qualification to assess compliance with its Conventions).

<sup>148</sup> Further concerns are whether the ILO could in fact perform all of the functions required in enforcing the social clause and whether giving the ILO enforcement powers would cause employer and government representatives to take concerted action to dilute the standards set by the Conventions, which to date have been more viewed as of academic interest since there is no threat of enforcement.

committee could be drawn from a balance of labor ministry staff from the participating countries and outside experts, or, as was agreed to in the NAALC, could be made up entirely of credible, outside experts.<sup>149</sup> Likewise, trade unions participating in Mercosur have proposed using a “Committee of Specialists” to evaluate compliance with social standards.<sup>150</sup> **Whatever its composition, for the remainder of this discussion, the body will be referred to as the “Panel of Experts.”**<sup>151</sup>

ii. Can a country not in compliance participate in the trade agreement on a probationary basis while implementing a plan to get into compliance? We recommend that there be a probationary period and suggest two years as a reasonable period to make significant progress. The reason for the recommendation is simply to acknowledge the reality that most countries will not be in complete compliance, and allowing a probationary period will provide some incentive to participate in making progress. This also reflects our view that trade agreements represent an opportunity to make progress on worker rights. If the standard for participation is too high, then the result will be that there will not be any trade agreements and no opportunities to make progress. Assuming this approach is accepted, the idea then is to have the Panel of Experts draft a very specific work plan to bring the country into compliance with the social clause, including specific recommendations for reform of labor laws and improving enforcement mechanisms. A major part of the plan should be evaluation of what development assistance is necessary to secure compliance. It should be very clear that the failure of a country to comply with implementation of the plan within the two year probation period will result in automatic expulsion with the option of reapplying only when there is complete compliance. No country will take its obligation seriously if there is a regular pattern of extending time.

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<sup>149</sup> NAALC Arts. 23-24. In limited cases, the NAALC allows for the formation of an “Evaluation Committee of Experts.”

<sup>150</sup> See pages 16-17, *supra*.

<sup>151</sup> If the labor clause evolves into a broader social clause that includes environmental standards, then the Panel of Experts would need to include experts in this field as well.

**b. Participation in a process to harmonize laws upwardly to be consistent with the social clause .** The premise of the social clause is that one or more of the countries participating in the trade agreement either does not have adequate laws or is not enforcing its laws. Otherwise, a social clause would not be necessary. In order to emphasize that the individual countries maintain primary responsibility for ensuring the conditions of the social clause, to allow for unique national solutions, and to avoid creating new multilateral institutions that exist in perpetuity, a process of upward harmonization is recommended. More fundamentally, this will reduce concerns of loss of national sovereignty by emphasizing that the primary intent is to encourage countries to rapidly improve their own enforcement processes to assume responsibility for upholding the law. This will, if taken seriously, require each country to adjust its laws and enforcement mechanisms upwards and to assume direct responsibility for enforcement of the provisions of the social clause. This is one of the major strategies for achieving implementation of the European Economic Community Treaty<sup>152</sup> and was also advanced as a key aspect for the social charter proposed for Mercosur<sup>153</sup> and by trade union advocates at the APEC People's Summit.<sup>154</sup> This is in sharp contrast with NAFTA, which, in the NAALC, precluded review of or changes to the domestic labor law of the signatories.<sup>155</sup>

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<sup>152</sup> See, e.g., Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 *Michigan Journal of International Law* 987, 997-1004 (1995).

<sup>153</sup> See discussion at pages 15-17, *supra*.

<sup>154</sup> See discussion at pages 23-24, *supra*.

<sup>155</sup> See NAALC, Art. 3 (1) requiring that “[e]ach Party shall promote compliance with and enforce its own labor law . . .” The Labor Principles of Annex 1 specifically “do not establish common minimum standards for [the parties’] domestic law.”

Achieving harmony among the relatively similar economies of the European Community is significantly different from attempting to unite the Americas with the extremely diverse levels of economic development, but harmonization should be accepted initially as the ultimate goal. It is important to add, however, that with respect to the issue of minimum wages, or other issues that are based on relative economic condition, we are not suggesting that standards be harmonized to be identical.<sup>156</sup> The issue would be whether there is a minimum wage, for example, that meets the standard in the given country. As noted earlier,<sup>157</sup> in many developing countries, the minimum wage is the prevailing wage, so for most workers having the minimum wage also be a liveable wage, based on local economic conditions, is the most immediate concern that they have. This should be a key concern of the harmonization debate. Another issue that must be specifically addressed is whether the laws of a given country provide for sufficient remedies and penalties to encourage compliance by employers.

**A further principle of harmonization is that countries that lack resources and capacity to improve the enforcement of labor laws must be provided with direct assistance to support these activities and offset the costs of compliance.** This need goes well beyond compliance with law. For example, a country with a serious child labor problem could need targeted assistance to remove children from the workforce and place them in schools. This is a form of development aid that could actually lead to concrete and sustainable development benefits for working people.

Issues to Be Resolved:

i. Who participates in the harmonization planning process? Certainly, representatives of the member countries should be participants, but there should also be direct participation from concerned organizations, as well as from acknowledged experts. Perhaps the Panel of Experts could provide staff resources for the harmonization process, since the inspections will reveal the precise issues to be addressed with harmonization. There should also be participation from labor unions, NGOs, and employers.

ii. How long should the harmonization process take? The ultimate decision on this issue depends upon which group of countries is involved. If the entire world is participating through a reformed WTO process, for example, that would obviously require a much longer period than adding another country to NAFTA. It is essential however, to have a clear time frame with specific steps beginning with assessing the laws that need to be improved, amending the laws, and then fully enforcing the new laws. If the subject countries have already agreed to be bound by the social clause, then amending and implementing changes to domestic law to be in compliance with the social clause should not require any major changes in the way things are done and therefore should not require an overly lengthy period of time. This is particularly true since most countries already have adequate laws to satisfy the labor clause and the adjustments

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<sup>156</sup> See pages 27-29, *supra* for a discussion of inclusion of a minimum wage in the social clause.

<sup>157</sup> *Id.*

will only need to be made to secure enforcement.

**c. Participation in an information audit by companies operating in more than one country of the trade area.** There must be a firm recognition that employers, not governments,<sup>158</sup> initially deny workers their rights, and then the role of government is to enforce the law. A major goal for effective enforcement of a social clause is to develop a way to regulate the employment practices of companies operating in the countries bound by the social clause. Most of the problems relating to a denial of the rights created in the social clause would be solved if companies respected the law.

In order to have a basis for monitoring the activities of companies, more information is needed. This process can be initiated by requiring as part of the enforcement mechanism for a social clause that all participating countries must cooperate in developing an annual Labor Information Audit of businesses operating in two or more of the trade agreement countries. The audit would be conducted by independent monitors, and would be required of any company that seeks to export or import within the area covered by the trade agreement. The companies would be required to report information pertaining to all of their operations, whether under their own corporate form or through subsidiaries, joint ventures, contractors, or other business forms. The information would include: a) location, b) total number of employees, categorized by job classification and pay grade, c) wages paid for each job classification and/or pay grade specified by form of payment (i.e., hourly, daily, weekly, monthly etc. or average wages for piecework), d) total benefits provided to all individual or group of employees, present unionization status of any employees specifying the name of the union, number of represented employees, status of, and a copy of the most recent, collective bargaining agreement, affiliation of union with any central labor body or confederation, e) health and safety records, and f) some record of employment practices that might violate the law in one or more trade area countries. The information would be publicly available to inform governments and organizations seeking to enforce domestic laws or the provisions of the social clause.

#### Issues to Be Resolved:

i. Who would conduct the audits? To ensure credibility, the audits must be done by “independent” auditors.<sup>159</sup> Whether this includes representatives from the respective governments is optional, but it would be desirable to improve the enforcement capacity of government inspectors. The Panel of Experts could certainly be recruited to survey the companies as well, but if the ILO is ultimately selected to serve as the Panel of Experts, it would not necessarily be the ideal group to survey employers. Perhaps a body of independent experts within each country could be appointed to focus exclusively on performing the annual labor audit. The ILO could play an important role in providing uniform information and/or training to these national bodies, to facilitate standardization of reviews.

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<sup>158</sup> Of course governments, when acting as employers, can and do violate their own labor laws.

<sup>159</sup> See discussion in section III(C)(2) below of the need to have independent monitors for implementing Codes of Conduct.

ii. How to require company compliance. There will have to be some commitment by the governments to mandate company compliance as part of the trade agreement. This should include a thorough audit of each country's labor laws to clarify employer obligations under the law.

iii. What is the result if a company is found in the audit to be violating either the labor laws or the social clause? Any violation of the labor laws discovered in the audit should be reported to the country where the violation occurred. There should be a process for monitoring to ensure that the country took action to enforce the law. Violations of the social clause by companies are dealt with in the next two provisions.

**d. Require that companies operating in more than one country of the trade area must comply with the terms of the social clause.** The audit described in part c, above, is designed to develop information to promote better compliance with labor standards. However, in order to ensure that companies comply with the law, they should be required to abide by the terms of the social clause, in addition to the labor laws in the countries where they operate. This is not a radical proposition. The OECD<sup>160</sup> and the ILO<sup>161</sup> have both called for developing codes of conduct for MNCs that incorporate similar substantive standards as the proposed social clause. Binding the companies to the social clause would provide an alternative, albeit more mandatory, mechanism for ensuring company compliance. This provision is essential to clarify the responsibility of MNCs in participating in efforts to improve respect for labor laws. Once harmonization occurs following completion of part b above, compliance with the provisions of the social clause would be redundant with compliance with the labor laws.

Issues to Be Resolved:

i. What is the relationship between obligations created by the social clause and any effort to develop a binding code of conduct?<sup>162</sup> It is important not to create conflicting obligations for the companies. The best course would be to view Codes of Conduct as offering a private regulatory system to further ensure compliance with the social clause.

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<sup>160</sup> OECD, *Guidelines for Multinational Enterprises* (1996).

<sup>161</sup> ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1996).

<sup>162</sup> See section III below for a complete discussion of codes of conduct.

ii. What is the scope of coverage for a company's responsibility? Should it extend to the subcontractor level? Since an increasing percentage of global production is done by subcontractors, it would seem essential to hold the buyer-company responsible for the conditions of production for products it sells. This issue is also central to the debate on codes of conduct.<sup>163</sup>

ii. What happens if a company refuses to agree to be bound by the social clause? There could be a discussion about a grace period for companies that cannot comply immediately due to the need to make comprehensive changes in the way they operate. That could be a legitimate issue. However, for companies that simply refuse to cooperate, the penalty should be the same as for companies that are found to have violated the social clause, discussed in part e below.

**e. Remedies following a violation of the social clause by a member country and/or a company operating within a member country.** This, of course, is ultimately the issue that will cause resistance to participation by governments. Whether it is the U.S. or Haiti, no government wants another authority to have enforcement power over it. This provision will necessarily be more complex. To facilitate discussion, suggested language will be offered to accomplish the key points.

Notice of Violation. To leaven the perception that the social clause will override national authority we must constantly emphasize that any penalty imposed against a participating government would flow from a voluntary trade agreement that all member states have agreed to abide by that imposes substantive standards in the labor clause that each country is already bound to through domestic labor law, or international instruments, including ILO Conventions. The power to avoid penalties rests with the member states' ability to avoid violations. To emphasize strongly this point, the first clause of the remedy provision should require notice and opportunity to correct:

*Prior to any investigation or hearing of any sort under this or any other provision, any complaint submitted to the Panel of Experts that a party has violated any provision of the social clause must be provided to the appropriate authority of that party in writing with any documentation. No action may be taken by the Panel of Experts, nor any penalty imposed, nor will the allegation be considered a violation for purposes of cumulating violations, if the party that is the subject of the allegation addresses the allegations to the satisfaction of the complaining party within 30 days of the provision of notice.*

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<sup>163</sup> See discussion at page 54, *supra*.

Penalties for Failure to Correct Violations of the Social Clause. If a country fails to remedy a violation of the social clause, which would normally mean it refuses to enforce its laws, there must be a system of penalties to encourage compliance. There should be a clear recognition that normally the government doesn't violate the rights protected directly, but is charged with enforcing the law with respect to companies operating within its territory. Given that each country will have, by necessity, passed an assessment of compliance with the social clause as per part a, above, to qualify for participation in the trade agreement, there should not be too many issues of inadequate law. **Penalties directed at companies, with the cooperation of the host government, will resolve most problems.** The penalties therefore should be designed to encourage enforcement. Again, this leaves solving the problem within the firm control of the individual governments and allows them to act to prevent any protectionist use of the social clause.<sup>164</sup> If a country ultimately refuses to enforce its own laws as per the commitment made in accepting the social clause, then the remedy must be exclusion from the trade agreement and the corresponding benefits. The following provision is an effort to accomplish these objectives:

*Any products found by the Panel of Experts to be made in violation of any of the provisions of the social clause shall be deemed to be tainted products that may not be shipped within the trade area. Following such a finding, all member countries have the right to ban immediately the importation of that product from the country that was the subject of the finding. Alternatively, the countries could impose a tariff on the product to reflect the unfair cost advantage of producing the product in violation of the social clause. If it is not practical to identify within a class of products which items were made in violation of the social clause, all products within the class are subject to the ban unless the producer can demonstrate with satisfactory evidence that his or her products were not made in violation of the social clause.*

*Any party to the trade agreement, or any person or organization adversely affected by a violation of the social clause, may bring a formal complaint to the Panel of Experts within one year of the occurrence of the last act constituting a violation. In order for a country that is a party to the agreement to bring a complaint to the Panel of Experts, that country must itself be in full compliance with the social clause. The Panel of Experts, which shall develop its own rules of procedure to be submitted for approval to the parties to the trade agreement, must hold a public hearing on all complaints and must resolve all complaints with a written opinion within 180 days of the filing date.*

*Following a finding by the Panel of Experts that there was a violation of the social clause, the country where the violation occurred shall immediately institute proceedings to enforce the law with respect to the company or entity identified as denying the rights of the social clause. The country shall file with the Panel of Experts monthly reports, available for public inspection, indicating steps being taken to enforce the law. In no case shall the enforcement process at the first level of adjudication*

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<sup>164</sup> This will hopefully address concerns that the social clause could be misused for protectionist purposes. See note 2, *supra*.

*available in the country take more than six months to complete.*

*In any case in which a single company, and for purposes of the social clause a single company includes all subsidiaries or other entities under its direction or control, is the subject of more than two findings by the Panel of Experts of a violation of the same provision of the social clause within a one year period, whether or not the violation occurred in the same country of the trade area, the third violation will be deemed a systematic failure to comply with the law. The company will be suspended from the benefits of the trade agreement for a period of one year, and all products produced by the company within the trade area must be subject to tariff treatment by all member countries as if they were produced outside the trade area and may be subject to any other trade sanctions any country within the trade area wishes to impose. Appropriate steps must be taken by member countries to prevent transshipments of products through a non-sanctioned company. After a one year period, the company may apply to have the suspension lifted and must then participate in a new audit as per part (c) above to determine whether the company is in complete compliance with the social clause.*

*In any case in which a member country is the subject of more than two findings by the Panel of Experts of failing to enforce the same provision of the social clause within a one year period, whether or not the violation concerns the same company or entity, the third violation will be deemed a systematic failure to enforce the law and the country will be suspended from the benefits of the trade agreement, allowing all other countries to adjust tariffs or otherwise impose sanctions as if the subject country was not a party to the trade agreement. This penalty will also apply in any case in which a country fails to comply with any of the affirmative requirements of this enforcement provision to provide information to the Panel of Experts or otherwise cooperate in obtaining enforcement of the social clause. If the violations are specific to a particular sector of the economy, the Panel of Experts may opt to impose the penalty only with respect to that sector. After a one year period, the country may reapply for membership through the provisions of part (a) above.*

Issues to Be Resolved:

All of the issues addressed in the recommended language should be thoroughly debated to identify the best options. Some general explanation may be helpful in focusing the discussion. The emphasis is on respecting national sovereignty by acknowledging that countries must have the primary responsibility for enforcing laws within their territory, and the social clause serves as a backup device, as well as a monitoring instrument. There are significant opportunities for countries to avoid penalties, first by requiring notice and an opportunity to correct, then by permitting up to two violations before permitting penalties for systematic violations, assuming the country otherwise cooperates in resolving the first two violations. Whether this standard should be higher or lower is certainly something that should be thoroughly debated. Further, we recommend penalties focused on removal of trade benefits with the possibility of banning the tainted products from trade. The permissible remedies should be the focus of special attention in discussions. There certainly are other options, including monetary fines. We have tried to propose a reasonable mechanism that would not be viewed as too onerous by countries. It seems fair that the trade agreement provides specific benefits for countries that comply with the provisions, including the social clause, and that countries will lose these benefits if they violate the provisions. Likewise, with respect to companies, penalties are designed to achieve compliance and provide an incentive to cooperate to avoid suffering loss of market access.

### **III. Developing Codes of Conduct with Independent Monitoring Systems to Improve Labor Rights Enforcement.**

#### A. Introduction and Background.

As noted earlier in this paper, a number of private enforcement initiatives directed at corporations, rather than governments, have been proposed in recent years as alternatives or complements to bilateral labor rights clauses in trade agreements and regional social charters. These initiatives attempt to address directly the problem of employer violations of labor rights worldwide.

Corporate codes of conduct and mechanisms to enforce them provide a means to identify and address worker rights violations using consumer pressure, without directly relying on either individual government or international legal enforcement mechanisms. However we recognize that approach is limited to certain consumer-oriented MNCs with high profile brand names. Ultimately, therefore, the approach cannot be a substitute for the broader project of enhancing international labor standards and their enforcement.

In response to a flurry of exposes about inhumane conditions in the production of big-name consumer items – especially garments, footwear, and toys – a number of MNCs which have significant elements of their corporate value tied up in name identification have turned to the strategy of adopting and publicizing corporate codes of conduct.<sup>165</sup> Typically, such codes

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<sup>165</sup>Campaigns to influence corporate behavior have employed various strategies, from shareholder resolutions to lawsuits. Promoting codes of conduct are only one among these strategies. For a discussion of the

stress the company's commitment to good environmental practices, to prohibiting forced labor and child labor, to fair and safe working conditions for employees, variously defined, and to non-discrimination for reasons of gender, race, or other factors not relevant to the performance of work. A few of these corporate codes go further, attesting to the company's commitment to recognize their employees' right to form trade unions and to bargain collectively.<sup>166</sup>

Nevertheless, codes of conduct and independent monitoring initiatives can play an important role in breaking new ground on labor rights enforcement, and thus paving the way for proposed mechanisms outlined in the previous section. In particular, they have played a useful role in mobilizing large numbers of consumers and workers to fight for better implementation of international labor standards.

## **History**

Efforts to promote codes of conduct began in the 1970s. Revelations of the involvement of ITT and other U.S. corporations in the bloody coup against the Allende government in Chile in 1973, and of huge bribes paid by the Lockheed Corporation to Japanese political figures to gain military contracts in 1975, led to a movement by NGOs and governments of developing countries to demand greater corporate accountability. In 1975, the United Nations created a Commission on Transnational Corporations which set out to negotiate a UN Code of Conduct on Transnational Corporations. However, during the 1980s, the UN Commission found it impossible to develop any mechanisms to make this code relevant, or even to research the level of compliance by companies or countries with the terms of the codes. By the end of the decade, the Commission itself was virtually without funds and unable to carry out even a modicum of its original mandate. Under strong pressure from the US government, it was dismantled in the early 1990s.

In 1976, the Organization of Economic Cooperation and Development (OECD) passed guidelines on MNCs that recognize the rights of workers to organize and to bargain collectively. However, this document only affects OECD countries, most of which already have strong trade union movements and relatively consistent enforcement of labor laws. Furthermore it is voluntary and thus cannot be enforced.

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corporate accountability movement, see Broad and Cavanagh, "The Corporate Accountability Movement: Lessons and Opportunities," paper prepared for the World Wildlife Fund Project on International Financial Flows and the Environment, on file at IPS and ILRF.

<sup>166</sup>For a sampling of these codes, see Appendix A.

In 1977, the ILO adopted a Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, a code which encompasses a broad range of rights and principles, and which furthermore includes a detailed complaint procedure which allows for an ILO Standing Committee on Multinational Enterprises to investigate a company's practices. However, this code has no sanctions or other enforcement mechanisms, and the Standing Committee has been unable even to launch investigations. In 1993 the committee received a request to review labor practices at a Pepsico bottling facility in Guatemala following severe harassment and intimidation of trade union members there.<sup>167</sup> The employer representatives on the ILO Standing Committee blocked the request. According to the committee report, the Employer Vice-Chairman stated "that the Employers did not perceive respect for human rights as a precondition for investment. If that were the case, she argued, employers would not have accepted the Tripartite Declaration."<sup>168</sup>

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<sup>167</sup>Correspondence from the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations to the International Labor Rights Fund, on file at ILRF.

<sup>168</sup>"Report of the Committee on Multinational Enterprises," International Labour Office, Geneva March 1-4, 1993.

Despite the failure of these attempts, pressure to create codes to regulate employer behavior worldwide grew. During the 1980s, however, several academics and grassroots activists investigated and publicized reports of environmental, labor and land rights abuses by MNCs expanding into developing countries.<sup>169</sup> By the early 1990s these investigations had led to public exposes of practices by several U.S.-based companies. In 1991 jeans maker Levi-Strauss was revealed to be using a contractor in the Northern Marianas, where young women from China and Thailand were being shipped in to work in factories under near-bonded conditions and denied any access to labor law protection. Dismayed by the negative publicity, Levi-Strauss set out to implement a code of conduct both for its own operations and for those of its suppliers and contractors. This was the first known example of a company code of conduct adopted as a means to combat both bad conditions and bad publicity.<sup>170</sup> Shoemakers Nike International and Reebok International were the subjects of a series of reports starting in the early 1990s and continuing to the present day about labor rights abuses in shoe production facilities in China and Southeast Asia.<sup>171</sup> Reebok responded by adopting the first code of conduct to contain language protecting the rights to associate freely and bargain collectively.<sup>172</sup> Walmart was the subject of a television expose that revealed that garments it retailed carrying a “Made in USA” label were actually produced with child labor in Bangladesh. The National Labor Committee, a U.S. based NGO, found and publicized the fact that the “Kathy Lee” label, owned by TV personality Kathy Lee Gifford, was being produced in factories in Honduras employing 13 year-old girls.

These incidents were given further poignancy by the discovery in 1995 in El Monte, California of a factory producing garments for a number of name-brand U.S. companies that had kept 76 women workers from Thailand in a state of complete captivity for as much as seven

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<sup>169</sup>e.g., Mies, Maria, The Lace Makers of Narsapur: Indian Housewives Produce for the World Market, London: Zed Press 1982 ; Nash, June, We Eat the Mines and the Mines Eat Us, New York: Columbia University Press, 1979; Ong, Aihwa, Spirits of Resistance and Capitalist Discipline: Factory Women in Malaysia, Albany: State University of New York Press, 1987.

<sup>170</sup>See Forcese, Craig, Commerce with Conscience? Human Rights and Corporate Codes of Conduct, Quebec: International Centre for Human Rights and Democratic Development, 1997.

<sup>171</sup>See The Sweatshop Quandary, Washington: Investor Responsibility Research Center, 1998.

<sup>172</sup>See Appendix A.

years. The realization that “globalization” had brought the worst possible Third World conditions home to the U.S. provided stark evidence of the need to challenge corporate behavior.

**“No Sweat” Campaign.** Consequently, U.S. Labor Secretary Robert Reich reached out to the apparel industry, to trade unions and to non-governmental organizations to conceptualize answers to a growing dilemma: how to monitor and control corporate behavior in a situation in which governments, including the U.S. Government, have rapidly declining resources to inspect factories and punish violators, and where competitive pressures are narrowing margins of profit at the labor-intensive end of production. The Department of Labor attempted to use publicity, both positive and negative, to induce reforms within the domestic industry. Consistent violators of U.S. labor laws, particularly wage and hour regulations, were targeted in a quarterly list of violators. On the other hand, the department established a “Trendsetter List”, highlighting for special commendation companies that were making particularly strong efforts to weed out labor abuses in their domestic facilities. This effort, while useful in a transition to serious enforcement of standards, also demonstrated its weakness when several “Trendsetter” companies were found to have serious violations in some of their subsidiary operations. Also, as was pointed out by critics, the “Trendsetter List” only targeted domestic producers; the worst human rights violations in the garment industry still take place, despite the revelations about El Monte, in developing countries with weak labor regimes. An international approach to codes of conduct and monitoring was clearly needed. The outcome of the “No Sweat” Campaign was the creation of the Apparel Industry Partnership Fair Labor Association, to be described in the following section.

#### B. Model Initiatives.

The biggest issue facing advocates for a code of conduct approach today is that of implementation. How can it be ensured that companies or industries are obeying their own codes? What kinds of sanctions can be applied for failure to implement? Below are a few examples of specific initiatives to address the implementation issue. While each of the examples below has its own unique history and problems, overall they may provide a basis for development of a broader implementation strategy.

**Rugmark.** Reports of bonded child labor amounting to virtual slavery in the carpet industries of India and Pakistan were displayed in shocking detail on European television in the mid-1980s. This news caused an immediate and potentially disastrous loss of sales of carpets from India in Europe, especially in Germany, the largest market for oriental carpets in the world. Alarmed at the prospects of losing an important source of foreign exchange, Indian non-governmental organizations, together with export promotion agencies linking Germany to India, began to discuss appropriate means to market good corporate behavior in the making of rugs. A number of labeling programs grew out of these discussions, including the Rugmark program. The program was later implemented in Nepal, as well.

Rugmark is a private, voluntary certification program founded in September, 1994.<sup>173</sup> It

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<sup>173</sup>This program is described in great detail in the report, “*By the Sweat and Toil of Children Vol. IV: Consumer Labels and Child Labor*,” US Department of Labor, Bureau of International Labor Affairs, 1997. See also, P. Harvey, “**Rugmark: After One Year**” (October, 1996)(Copy on file at ILRF).

is administered as a foundation. The program aims to reduce the use of child labor in the industry and thereby avoid consumer boycotts. It also seeks to improve the long-term prospects of children who are removed from jobs in the industry. The program administers two systems of licensing, one for manufacturers and exporters and the other for importers and retailers in consuming countries. Licensed parties are required to pay a licensing fee, which is used to cover inspections and monitoring, administrative costs, issuance of Rugmark labels and to provide funds to establish educational programs for children removed from carpet work.

Inspections are carried out by professional Rugmark inspectors, and representatives of local NGOs are permitted to accompany inspectors at any time. When child labor is detected, licensees are given one warning before they are sanctioned. Once carpets are completed and ready for export, a carpet identification number is issued on a label affixed to the carpet, which allows the carpet to be traced back to the actual loom on which it was produced.

As of December 1999, the Rugmark program had succeeded in licensing more than 180 manufacturers and exporters in India, and had certified the export of one and a half million carpets from India and several thousand from Nepal. Most of these were shipped to Germany, with smaller numbers reaching the United States, U.K, Italy, Spain, Switzerland, France, the Netherlands and Japan. The Rugmark program had also succeeded in establishing seven schools in Nepal and India to rehabilitate former child workers. A Rugmark Pakistan program has recently become operational.

**FIFA Code of Conduct/ILO Sialkot Monitoring Program.** The soccer ball industry, centered around the city of Sialkot in Pakistan,<sup>174</sup> has come under fire in recent years for employing child workers. Public attention to this issue led to the model Code of Labor Practice adopted in September, 1996 by the International Federation of Football Associations (FIFA), the world regulatory agency for soccer.

FIFA already had a program of quality control in place to certify and label all balls used in international tournament play. The organization collaborated with three trade union bodies: the International Confederation of Free Trade Unions (ICFTU), the International Textile, Garment and Leather Workers Federation (ITGLWF), and the International Federation of Commercial, Clerical, and Technical Employees (FIET) to develop a code of conduct to be added to the quality control criteria for all goods bearing its logo. The code that was adopted is perhaps the most comprehensive code of conduct among the many that have been proposed or developed. This is due, in part, to the fact that no industry representatives were involved in its formulation. Negotiated by labor unions and a regulatory agency with power to impose it on producers, this code could establish maximum standards without the need to compromise in order to gain adherence.

Unsurprisingly, this code attracted considerable anxiety and animosity from the World

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<sup>174</sup>Approximately 75 percent of all the world=s soccer balls are produced in the Sialkot area.

Federation of Sporting Goods Industries (WFSGI) when it was announced, leading to the formulation of a WFSGI Code, announced in early 1998, and to an effort to limit damage to the industry by a program to eliminate child labor from the making of soccer balls in Sialkot. This program was negotiated between the ILO, UNICEF, Save The Children UK, and the Sialkot Chamber of Commerce, representing soccer factories. Soccer ball manufacturers agreed to participate in a monitoring program sponsored by the ILO. The program had the stated goal of eliminating child labor from the soccer ball industry in Pakistan within 18 months. The program intended to provide former child workers with educational opportunities, so that they were not simply forced to work in another industry.

In early 1999, a year into the program, independent researchers discovered that child labor still existed in the Sialkot soccer ball industry.<sup>175</sup> Moreover, even according to the ILO's own assessment of the program, the program was beset with a number of problems. These included:

- § Many manufacturers who signed onto the program had not paid dues or provided any details about their stitching centers.
- § Even participating employers were still using children in their stitching centers, and in home-based employment; the ILO is not empowered to apply any sanctions to these employers.
- § Soccer ball production may be shifting from Sialkot to nearby, unregulated regions of Pakistan, and some children may be moving from production of soccer balls to production of surgical instruments.
- § Schools established for soccer-stitching children may instead be serving other children, while former soccer stitchers are employed in other work.

Despite these problems, the ILO indicated it was planning to expand the program to the soccer ball industry in India and initiate a similar program in the carpet industry in Pakistan.

A major flaw in the ILO program is that it contains no sanctions for offending employers, nor any reward for good behavior. The program has explicitly been designed, as per the

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<sup>175</sup>In late 1998, the Association of Network for Community Empowerment (ANCE), based in Lahore, Pakistan, conducted an independent investigation into the effectiveness of the ILO program. A research team visited 23 villages in the Sialkot region to determine whether or not children continued to work on soccer ball production either within village stitching centers or at home, and whether new educational opportunities had been offered to these children through the ILO program. The ANCE report is on file at ILRF.

desires of industry representatives to the process, so that it did not contain any social labelling component. The ILO itself was reluctant to take on a labelling or certification role, although it has been willing to lend its affiliation, and the approval that affiliation implies, to the participating manufacturers and retailers. Without a label or other means to identify to consumers manufacturers and retailers that comply with the program, there is little incentive to comply, and a serious problem, noted by the ILO's own assessment, of a significant level of free riders to the program.

For the program to work, it may be necessary to revisit the Partners' Agreement, and to strengthen it to include sanctions against manufacturers within the program who fail to comply with its commitments to cease employing children.

**SA8000.** Another response to the welter of demands for greater corporate accountability has been the Center for Economic Priorities' development of a code and monitoring system based on the ISO series of quality standards. Called SA8000, this code to measure Social Accountability is an effort to provide standards that can be monitored by professional accounting firms to declare individual factories or work sites socially accountable, so that multinational firms can contract with them in the assurance that they have been declared acceptable. The terms of the code are similar to others, and in some instances superior. For example, the code calls clearly for payment of a living wage and for reparations or rehabilitation funds to be paid to children who are laid off by companies in order to comply with the standards.

A detailed analysis of the program by Janneke van Eijk of the European Clean Clothes Campaign noted several of the program's flaws.<sup>176</sup> Among issues raised were the fact that monitoring cannot simply be conducted on a periodic spot check basis, but must involve the establishment of reliable, permanent mechanisms through which workers can report problems and grievances; such mechanisms are lacking in the SA8000 plan.

Another problem noted by van Eijk is the program's focus on individual factories, rather than on retailers. A participating MNC can apply for certification of a single factory, or handful of factories, and receive such certification even if the vast majority of its facilities or suppliers remain uninspected. A company might thus choose to spotlight a model facility under the program, and receive the public benefit of such inspection, even when the vast majority of its production takes place under unregulated conditions. While the program's spokespeople have responded by noting that they provide certification only to factories, not to retailers, the overall report card approach of the Center for Economic Priorities may nevertheless convey to consumers the suggestion that a company has received, as a whole, a clean bill of health.

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<sup>176</sup>VanEijk, Janneke, Comments on the Guidance Document for Social Accountability 8000, Clean Clothes Network, December 1997.

A final flaw of the program is that monitors must pay a fee to receive accreditation from the program, a process that many local NGOs may find prohibitive. Although the program is in theory open to any sort of organization that may wish to be accredited as a monitor, to date monitoring has been carried out by a small handful of MNCs with expertise in financial auditing or the area of customs inspection, principally *Societe Generale de Surveillance*.

The SA8000 scheme is likely to win some support among MNCs as being a consistent and relatively easily implementable approach. However, treating labor rights as a quality control issue similar to other ISO standards is unlikely to appease critics of corporate behavior from the trade union and NGO communities. Unlike verification of the quality of a product, independent monitoring of codes requires the establishment of relationships of trust between monitors and workers, as shall be described in the Issues section below.

**Apparel Industry Partnership/Fair Labor Association.** In August, 1996, President Clinton threw his support behind an effort which, building on the No Sweat initiative, began to develop a cooperative code of conduct for apparel and footwear companies for both their domestic operations and their subsidiaries and suppliers all around the world. This initiative is the White House Apparel Industry Partnership (AIP). Initially composed of 10 major apparel and footwear companies, two unions and four civic groups (human rights, labor rights, religious and consumer organizations), the AIP presented its proposed code of workplace practices to President Clinton in April, 1997. In addition to a code of conduct and a set of monitoring principles applicable both to internal company monitors and to external independent monitors (defined below), the report called for the creation of an organization which is to have responsibility for accrediting monitors, overseeing monitoring, educating the consumer public, and researching the causes of poor labor practices. The charter document for this new Fair Labor Association (FLA) was unveiled in November, 1998, and the association itself was incorporated as a nonprofit organization in 1999.

The AIP represents an effort by concerned businesses and worker advocates to work together to develop labor standards for worldwide operations, and to implement these standards. However, following the announcement of the FLA Charter in late 1998, the participating unions, the Union of Needletrades, Industrial and Textile Employees (UNITE) and the Retail, Sales and Department Store Workers' Union (RSDWU) pulled out of the partnership, as did the single representative from the ethical investment community, the Interfaith Center for Corporate Responsibility (ICCR).<sup>177</sup> Not only these groups, but others in the US sweatshop activist community criticized the agreement reached in the charter document. Primary criticisms focused on the level of monitoring<sup>178</sup>, on the fact that companies may select their preferred monitors from a roster of groups accredited by the FLA, and on what was considered to be inadequate language

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<sup>177</sup>The representative from RSDWU, the union's president emeritus Lenore Miller, later rejoined the FLA as a member to its NGO advisory council.

<sup>178</sup>Companies would be required to monitor 100 percent of their own facilities, and 30 percent of the facilities worldwide would be subject to independent monitoring.

on wages.<sup>179</sup>

Despite these criticisms, the FLA became fully operational in 2000 with the hiring of an Executive Director, and the development of accreditation protocols for independent monitors. The next steps were to accept applications from organizations that wish to be accredited as monitors, and to develop full guidance for independent monitoring reporting. In the meanwhile, two of the FLA partners have already experimented with NGO monitoring (described below in the section on single-company initiatives). Another strength of the program is that it provides for the creation of a channel for third-party complaints to be filed against employers/retailers whose facilities are believed to be in violation of the code of conduct.

The initiative still suffers from a number of weaknesses<sup>180</sup>, as well as some important open questions. After three years, program participants had not yet reached agreement on the benchmarks for determining compliance on issues not fully defined by the code of conduct, or by international standards, such as definitions of sexual harassment, or the extent of benchmarks on occupational safety and health matters. Also, the channel for third party complaints had not yet been established. The decisions reached on these matters, as well as the initial implementation of independent monitoring under the program, will be the real tests of its success.

### **Ethical Trading Initiative**

In early 1998, U.K.- based retailers and representatives of NGOs and trade unions came together to create the Ethical Trading Initiative. The participants negotiated a model code of conduct, and began a series of pilot projects in Asia and Africa to determine how best to verify implementation of this code. The approach differs significantly from the AIP in two regards. First, it is not restricted to a single industry; company participants include clothing retailers, food and beverage producers, a cosmetics company and others.<sup>181</sup>

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<sup>179</sup>The AIP/FLA code of conduct mandates employers to pay either minimum or prevailing wages in the country of operation, whichever is higher. Although the document references the need for wages to meet workers' basic needs, some groups, including ICCR, felt that companies should be made to commit to paying such wages, even when higher than minimum wage.

<sup>180</sup>An assessment of the Charter Document's strengths and weaknesses can be found on the ILRF website, at [www.laborrights.org](http://www.laborrights.org).

<sup>181</sup>A full list of ETI participants is available on the ETI website, [www.ethicaltrade.org/participants](http://www.ethicaltrade.org/participants).

In 1999, ETI consolidated its organizational structure and entered discussions with NGO partners in developing countries regarding the implementation of pilot programs to test ways to verify the ETI code, in different settings and industries. The pilots were focused on apparel production in China, tea plantations in Zimbabwe, and beverage production in South Africa. An interim review of these projects was completed in November, 1999.

The ETI approach, focusing as it has on small-scale experiments rather than ambitious plans to create monitoring and verification systems with worldwide applicability, has some notable advantages over the AIP. First, because the initiative has been focused on promoting dialogue rather than prescriptions, it has avoided the tensions and political problems faced by AIP members. Second, the pilot approach has integrated important real-world learning, based in some part on integration of views from the global South, into the discussion on monitoring and verification. That said, the initiative has moved forward extremely slowly, and it remains to be seen whether it will ultimately contribute to the larger debate on worldwide labor regulation. Moreover, at least one of the pilot projects has had difficulty going forward; the sensitive issue of monitoring in China, a country with no independent NGOs or trade unions, has not yet been overcome.

### **Fair Trade Charter**

In 1994, a model code of conduct called the Fair Trade Charter for Garments was developed by the Netherlands-based Clean Clothes Campaign, the Dutch trade union federation FNV, and the overseas development organization NOVIB.<sup>182</sup> In 1996, Dutch garment manufacturers and retailers= associations agreed to participate in a working group to discuss the possible creation of a foundation to oversee implementation and monitoring of the Charter. The working group has reached agreement on a number of issues, such as composition of the Board, governance functions of the foundation, and some principles regarding monitoring, but there remain a number of outstanding issues to be resolved before the initiative will be ready to undertake monitoring and verification activities.

### **Canadian Partnership for Ethical Trading**

Labor and NGO allies in Canada came together in early 1999 to form the Canadian Partnership for Ethical Trading, a taskforce convened by the Canadian government at the behest of sweatshop activist groups. Participating organizations include the Canadian Labor Congress, the Union of Needletrades, Industrial and Textile Employees (UNITE), and the Maquila Solidarity Network, which houses a working group related to the initiative, the Ethical Trading Action Group. The group proposed a base code of conduct in November, 1999 but that code continues to be the subject of negotiation with Canadian retailers.

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<sup>182</sup>Atlin, Joan, Jeffcott, Bob, Ladd, Deena, and Lynda Yanz, APolicy Options to Improve Standards for Women Garment Workers in Canada and Internationally,@ report by Maquila Solidarity Network, October 15, 1998 (draft), p. 65-66.

## Worldwide Responsible Apparel Production (WRAP)

Also in 1999, the American Apparel Manufacturers Association (AAMA) launched its own code of conduct and monitoring initiative, known as the Worldwide Responsible Apparel Production (WRAP) Certification Program. The WRAP program requires participants to undergo self-assessments of compliance with the WRAP principles, and calls for some independent verification of these self-assessments.

The Canada-based Maquila Solidarity Network (MSN) has conducted a thorough and detailed critique of the WRAP program.<sup>183</sup> The critique points out that the independence of the initiative cannot yet be addressed, as the program's governing Board has not yet been named. Moreover, MSN points out two serious flaws in the program's code of conduct and planned operation. First, the code fails to protect workers' rights to organize and to bargain collectively.

The assessment states,

On the key issue of freedom of association, WRAP only requires that manufacturers respect that right where it is legally recognized (Apparel manufacturers will recognize and respect the right of employees to exercise their lawful rights of free association, including joining or not joining any association). The last part of that clause or not joining any association is consistent with a right to work legislation, subverting collective bargaining. WRAP's Production Facility Self-Assessment Handbook forbids discrimination against employees who choose not to join any association. Collective bargaining is another ILO convention (#98) is not recognized as a right by WRAP.

The second serious flaw is that the program in no way provides for any level of public disclosure of factory monitoring reports, or any other information that would allow outside bodies or consumers to independently evaluate the effectiveness of the program. In short, the program lacks transparency and provides no ways in which outside consumer or other pressure might be effectively used to improve the program or to generate change among employers in violation of the WRAP principles.

### Single-Company Initiatives

**a. Independent Monitoring Group of El Salvador.** In 1995, the National Labor Committee, a US-based NGO that had been active in supporting human rights in Central America for a decade, documented abusive labor conditions in El Salvador, including the firing of several hundred workers who tried to organize a union in a factory called Mandarin. Mandarin produced clothing

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<sup>183</sup>A Critique of the Worldwide Responsible Apparel Production (WRAP) Program, Maquila Solidarity Network, April 2000 (available on the MSN's website at [www.web.net/~msn/5codes5.htm](http://www.web.net/~msn/5codes5.htm)).

for Liz Claiborne, The Gap and other American companies. Liz Claiborne chose to avoid negative publicity by ceasing all orders to the factory. The Gap also tried to sever its ties to the company, but under the pressure of public criticism, instead developed a code of conduct and, by the spring of 1996, accepted the services of a monitoring group in El Salvador comprised of local human rights and labor research organizations, the Independent Monitoring Group of El Salvador (GMIES). This group maintained communication with a committee based in New York in which several North American labor and human rights groups participated. These committees negotiated with The Gap a process to respect workers rights and to reinstate the workers who had been fired.

This dual structure established a model monitoring operation that included a number of innovations: NGO monitors were allowed free access to the factory on a regular and frequent basis; monitors were given financial data to determine when production had reached a level sufficient to enlarge the work force by rehiring retrenched unionists, and a regular reporting system was established between the monitors on the ground and the advisory committee in New York. By 1997, this scheme had resulted in the rehiring of six fired trade union leaders and several dozen workers who had been laid off during the labor conflict, and a marked improvement in working conditions within the Mandarin plant.<sup>184</sup>

While a recent survey revealed that the overwhelming majority of workers in the plant felt that conditions had improved since the introduction of the monitoring group, the project has had its problems. The issue of who will fund the project has not been resolved. In the first year, the monitoring group received matching funds from the National Labor Committee and The Gap. In the second year, The Gap discontinued funding and it is not clear who will fund the group in future.<sup>185</sup> Another issue concerns the relationship between the monitoring group and the trade union it was established to assist. Since that time the company has established its own union within the plant, which has all but destroyed support for the original union. The monitoring group has been unable to intervene in this problem. The limitations of the monitoring project vis a vis the Mandarin's two trade unions will be taken up below in the Issues section of this paper.

It should also be noted that despite the success of this program, the Gap has not initiated independent monitoring of any other supplier factories anywhere in the world, despite pressure from investors and campaign groups<sup>186</sup>, and its promises to do so.

## **b. Commission to Verify Codes of Conduct (COVERCO)**

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<sup>184</sup>Anner, Mark, *ALa Maquila y El Monitoreo Independiente en El Salvador*, paper presented at the Encounter on Independent Monitoring, San Salvador, January 13 1998 (on file at ILRF).

<sup>185</sup>A new ILRF initiative, funded by a consortium of US universities, may allow ILRF to assist GMIES to develop and expand its monitoring work.

<sup>186</sup>Principally, the ethical investment organization, Interfaith Center on Corporate Responsibility, and the NGO Global Exchange.

In October, 1999 a Guatemala-based consortium of human rights and labor activists, the Commission to Verify Codes of Conduct (COVERCO), completed an independent assessment of labor issues at a garment factory producing apparel for Liz Claiborne, Inc. The problems identified included forced overtime, hazardous safety and health conditions, and improper record-keeping. The investigation was conducted with the full knowledge and support of Liz Claiborne, Inc.

The COVERCO investigation marked the first time that a US-based retailer contracted directly with human rights groups in a producer country both to investigate and report publicly on problems in its supplier factories, and to provide ongoing monitoring of those factories to ensure that problems are corrected. The report, issued on October 15, represented the conclusion of the initial investigation. The retailer agreed to take remedial action in problem areas identified by the initial investigation, and COVERCO will continue ongoing monitoring work of the facility to ensure that recommendations are implemented.

Other single-company initiatives include a 1999 audit of Mattel Corporation's toy facilities in China and Southeast Asia by an independent monitoring body convened expressly for this purpose (the Mattel Independent Monitoring Council, or MIMCO), and a report by an Indonesian team of researchers, commissioned by Reebok corporation, of two Reebok sport shoe factories in Indonesia (the Peduli HAK report).

## **Monitors for Hire**

During the past two years a number of companies have developed labor auditing services, provided to companies on a for-profit basis. These companies include accounting firms Ernst and Young and Price Waterhouse Coopers. The problems with for-profit auditing initiatives are discussed in the next section. An independent non-profit organization, Verite, has also been established to provide labor auditing services to companies on a paid, contractual basis.

## **Issues to be Resolved**

Initiatives to promote codes of conduct and independent monitoring and verification systems have made great strides in recent years. While these initiatives have garnered far more widespread attention and support from employers, consumers and trade unions than any previous such efforts, and have achieved notable success in pushing the discussion on corporate responsibility forward, nevertheless there remain several outstanding issues under debate. Below we review the most significant of these questions and outline our position on each.

### **1. Do Codes Undermine Collective Bargaining?**

Although unions and union federations have been prominent participants in the

promotion of, and creation of bodies to monitor, codes of conduct<sup>187</sup>, nevertheless many activists in the trade union movement both in the United States and elsewhere have expressed fears that codes of conduct, if implemented, may obviate the need for trade unions to negotiate collective bargaining agreements on behalf of an enterprise's workforce. They fear that monitors will most likely be appointed from the NGO community, and, in handling grievances, take over the function of democratically-elected union leadership, thus removing the democratic right of workers to have a direct say in their own wages and working conditions.

The experience of the Independent Monitoring Group of El Salvador highlights the relevance of such fears. GMIES emerged as a response to a particular situation, that of the mass dismissal of independent trade union activists at the Mandarin plant. It succeeded in its original goal to compel the company to re-hire the fired activists. However, subsequently the group was saddled with the larger responsibility of monitoring overall company compliance with The Gap's code of conduct, a task for which it was unprepared, and which it undertook in a vacuum of coordinated guidance or oversight.

GMIES' role shifted away from one of supporting the independent union, and toward one of investigating and handling complaints of company non-compliance with labor standards in its code. By early 1998, the group had adopted a "neutral" stance vis a vis the conflict between the original, independent union and the company union. Superior resources and friendly relationships with management had allowed the company union to win widespread support among workers, whereas the independent union had dwindled to a small handful of supporters.

While the GMIES experiment did not lead to the establishment of a vibrant, independent trade union in the factory, it did serve to neutralize some of the factors that had previously made union organizing impossible, and to assist fired trade unionists to regain employment. This may reflect more broadly an important role for NGO monitors: they may serve as a check on employer behavior to prevent workers from exercising their right to associate. While this role is a limited one, given the severe restrictions on workers' right to associate today, particularly in the garment and other light manufacturing industries, monitoring may play a very useful role in strengthening nascent trade union activity.

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<sup>187</sup>i.e., the Union of Needletrades, Industrial and Textile Employees (UNITE) and Retail, Sales and Department Store Workers= Union (RSDWU) participated in the creation of the AIP code of conduct; the British Trades Union Council is a member of the ETI; the Dutch union federation FNV is part of the Fair Trade Foundation; the International Textile, Garment and Leather Workers= Federation (ITGLWF) Secretary-General Neil Kearney is a board member of the Council on Economic Priorities' new SA 8000 program.

We note that in most developing countries, employers are free to employ a wide variety of union-busting techniques at the slightest sign of independent organizing activity. The International Confederation of Free Trade Unions (ICFTU) has estimated that between 300 to 500 workers are killed *each year* for their organizing activities. Thousands more are arrested, beaten or intimidated. There are between 65,000 and 75,000 cases of union leaders reported to be fired for their activities each year. Many thousands more cases go unreported.<sup>188</sup> Those who suggest that independent monitors will prevent independent unions from forming are to some extent ignoring the far more significant impediments that exist to independent union formation, such as employers' ability to enlist the support of police or other local authorities to arrest or intimidate workers, and the near-impossibility of resolving unfair terminations in a timely manner through local judicial systems.

One of the most important roles a monitoring group can play, particularly in closed polities such as China, where information flow on labor issues is carefully restricted, will be to collect information about such terminations and to pressure employers to act immediately to rehire these workers. This is an area in which immediate pressure from Western consumers and advocacy groups is far more likely to be effective than recourse to local judicial processes. The practice is also likely to act as a deterrent to any future such firings, thus removing a significant obstacle to union organizing.

Where independent unions exist, monitors within the workplace should be delegates of the union itself. In many if not most light manufacturing enterprises in developing countries, however, independent unions have not been able to form. In such a context, monitors may also serve a useful role in simply providing information to workers about their rights under a company's code. In this way, non-union monitors can and should become allies to union activists, not replacements for them.

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<sup>188</sup>ICFTU Annual Report 1997.

*Codes may help promote development of trade unions, provided they contain protections for workers' rights to associate and form unions, and to bargain collectively.* By and large, the protections listed in codes of conduct do not vary significantly from protections contained in most countries' labor laws. Abuses occur because governments fail to enforce these laws. One area in which the problem is not enforcement, but weak legislation itself, is that of trade union activity. Many developing countries have consciously adopted a strategy of suppressing or heavily regulating all trade union activity.<sup>189</sup> The links between such strategies and governments' desires to attract foreign investment, particularly in the manufacturing sector, are exemplified by the additional restrictions placed on labor organizing in export processing zones.<sup>190</sup> In short, the race to the bottom has been as much a race to weaken trade union and bargaining rights as it has been a race to provide cheap wages. Codes of conduct have the potential to play a critical role in the promotion of free trade unions in such places, provided they contain language protecting workers' rights to associate and form unions and to bargain collectively. By pressuring MNCs not only to adopt but to honor such language, worker advocates may be able to create a context within which free trade unions can develop even under restrictive legal frameworks.

## 2. Who Should Monitor Companies' Compliance with their Codes?

Companies have experimented with three types of monitoring of codes: internal, external and independent. These definitions are taken from the report, *The Apparel Industry and Codes of Conduct: A Solution to the International Child Labor Problem?* produced by the US Department of Labor's Bureau of International Affairs in 1996. The definitions themselves are the subject of debate. Some feel that external monitoring is, in fact, independent monitoring while others feel it more closely resembles internal monitoring. This paper retains the DOL definitions in order to distinguish between monitoring performed on contract to the company and that which is not. For the purposes of the discussion below, internal monitoring is that conducted by representatives of the company (either the MNC or the supplier) itself. External monitoring is conducted by a third party, a *monitor-for-hire*, under contract to the company on a for-profit basis. Independent monitoring (also referred to as independent verification) is that which is performed by a group which does not have a direct or exclusive relationship with the company; usually some level of public reporting is a part of independent monitoring.

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<sup>189</sup>For a case study of government strategies of labor repression in Asia, see Deyo, Frederick, [Beneath the Miracle: Labor Suppression in East Asia](#).

<sup>190</sup>For example, Pakistan, Bangladesh and Malaysia all allow trade unions to function elsewhere but not in EPZs; see ILRF petition on Pakistan's GSP privileges. Sri Lanka placed severe restrictions on labor in EPZs until a GSP petition brought about improvement.

## Internal Monitoring

Internal monitoring is that conducted by employees or representatives of the retailer itself or of its supplier. Its advantages are that monitors may be allowed free access to all information relevant to the production process without risk of jeopardizing any privileged information, such as trade secrets. The basic problem with internal monitoring is that it relies on the good faith of the company itself. The premise of consumer pressure is removed because even those companies with the best of intentions will have no incentive to reveal their own bad practices to the public. Where the company has a genuine desire to be a good corporate citizen, or to improve its labor practices for reasons of improved efficiency, stability, or to avoid negative publicity, individuals entrusted with monitoring may be able to enforce real compliance with standards. Where, however, the monitoring is being done merely to placate a hostile consumer audience, efforts to monitor may be restricted to a mere exercise in public relations. Under such circumstances, information presented by the company to the public cannot be relied upon.

An example of such an exercise in good faith was the advertising campaign launched by Guess Inc. in December, 1997. In previous years, Guess had been the target of consumer campaigns to publicize the company's labor abuses. In December, the company took out full-page ads in the New York Times and other regional newspapers advertising its jeans as sweat free and stating that the company had been given a clean bill of health by the US Department of Labor. In fact the Department of Labor had cited Guess suppliers in the United States for labor violations earlier in the year, and insisted that the company remove the claim from its advertisements. The Guess strategy illustrates the problems consumers might face if their only source of information were companies themselves.

## External Monitoring

External monitoring is monitoring contracted out by the company itself to a third party. Nike International provides an example of a company using external monitoring. For the past few years the corporation has hired the accounting firm Ernst and Young to provide labor audits of its plants in Southeast Asia. In 1997, Nike also contracted Goodworks International, a non-profit led by former US Ambassador Andrew Young, to inspect its plants in China and Southeast Asia.

External monitoring carries an information flow problem similar to that of internal monitoring. Since the external monitor is on contract to the company, the monitor is not free to disseminate information publicly. Instead, a confidential report is issued to the company which the company itself may or may not disseminate. This was a problem which arose in the Nike/Ernst and Young example. The company discovered serious health and safety hazards at Nike producing facilities in Vietnam, but was precluded from publicizing this information. Despite its findings, Ernst and Young nonetheless certified that Nike was in compliance with its code. Nike chose not to correct the violations, and continued to assert publicly that the audits were assisting suppliers to improve their labor conditions. An independent NGO representative discovered and

publicized the violations uncovered by Ernst and Young, to the company=s embarrassment.<sup>191</sup>

Another criticism leveled against external for-profit monitors is that they may not have the expertise or sensitivity necessary to conduct accurate interviews with workers. This criticism operates on two levels. First is the suggestion that an accounting firm or otherwise inexperienced group may simply not know what questions to ask. This problem can be overcome by a system to train and accredit monitors, a subject to be discussed in the following section. Second is the suggestion that workers may be afraid to provide external monitors, whom they perceive as company representatives, with accurate information. This was the criticism leveled against Andrew Young, who conducted his tour of Nike factories accompanied by factory management and made no attempts to interview workers in a confidential setting.

### Independent Monitoring/Verification

Independent monitoring is that conducted by a third party not on exclusive contract to the company itself. Independent monitoring may use Amonitors-for-hire@ or may use local organizations, including labor, religious, human rights or other community-based groups, to conduct labor investigations in zones where such groups are located. This approach is exemplified by the Independent Monitoring Group of El Salvador, described earlier in this section. In theory monitoring by a firm such as Ernst and Young may be considered independent if the monitor is not acting as an agent of the company it is monitoring, or is not subject to a conflict of interest caused by the fact it may have or seek other commercial relationships with the company. For example in the Nike/Ernst and Young case, Ernst and Young could not be considered independent, even if their labor audits were paid for by a source other than Nike, because they have a separate commercial relationship with Nike to conduct the company=s financial audits and a consequent disincentive to be overly, or even appropriately, critical of labor pactices, since the other financial interest outweighed the social auditing program incentive.

*Monitoring cannot work without a reliable, confidential reporting procedure.* Workers in most developing countries know that they are vulnerable to being fired without cause, and that legal redress, if it is available at all, may take years in process. Rather than lose their jobs, most individual workers will exercise caution in criticizing their employer or airing their grievances publicly, or even confidentially. The most trustworthy interviewers will inevitably be those who arise from the ranks of the workers themselves, or from their communities. Local organizations are also best equipped to deal with language and other locale-specific barriers, since they possess the cultural knowledge necessary both to frame questions appropriately and to interpret answers

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<sup>191</sup>ASmoke from a Hired Gun,@ report by Dara O=Rourke, Transnational Research and Action Center (TRAC), November, 1997. This report is on file at ILRF and also available at TRAC=s Corporate Watch website ([www.corpwatch.org](http://www.corpwatch.org)).

accurately.

*Independent trade unions, led by representatives elected directly by an enterprise's workers, are the organizations best equipped to set up a monitoring and reporting process within a factory.* Independent trade unions may already have in place the grievance-handling procedures necessary to obtain reliable ongoing information from workers. As self-funding organizations, trade unions are also the most cost-effective monitors. Unfortunately, in many of the countries to which production of consumer goods has fled, authoritarian regimes prohibit or control labor organizing and unions, if they exist at all, are neither independent nor representative of workers' interests. Indonesia under Suharto provides a prominent example of such practices. Even where laws protecting unions are adequate, lax enforcement often means that in practice workers' bargaining power is weak. In such countries, community based organizations often take an active role in promoting workers' welfare. Staff of such organizations may spend a considerable amount of time getting to know workers and their families, and may have sufficient trust and status within the area to be able to probe for sensitive information.

In cases where trade unions do not exist or are not free to play a key role in this process, NGOs provide a viable alternative. There are some drawbacks to the NGO approach; most notably, because it is localized, start-up of a monitoring effort is extremely time- and labor-intensive. Another problem with the NGO approach is that, again because it is localized, it may suffer from consistency between regions or countries. It may be that *A levels* of monitoring are needed, where one level, that of direct worker interviews, is conducted by local groups and other levels (such as measuring levels of hazardous substances, or verifying adequate ventilation and fire precautions) is conducted in a more generalized or standardized fashion.

### 3. How Should Monitoring be Regulated?

Whether independent monitoring is conducted by international or by local groups, there is a need to regulate the monitors themselves in order to ensure that information to be provided to consumers is consistent and accurate. Initially, monitors should be accredited by a body that is recognizable and trusted by consumers. After accreditation, groups should be provided with guidance as to the types of information they are expected to provide. If the strategy of using local organizations is adopted, companies and worker advocates in consuming countries may wish to develop a training program to teach such organizations how to gather the relevant information and how to present it in a standard format that can be used easily by companies and consumer advocates. An essential function of an accreditation body would be to revoke accreditation from monitors who are found to be unreliable or otherwise substandard.

A regulatory body serves the additional role of middleman between the company and the monitor. As noted above, independent monitoring precludes that contracted directly by the company, except under carefully regulated circumstances. In order to preserve the independence of monitoring groups, whether they be business firms or NGOs, an independent regulatory body must evaluate information, ensure that it meets standards of the accreditation program, and

ensure transparency of the process in such a way as to preclude any inappropriate relationships between the monitors and companies. The Rugmark program has such a body. The Fair Labor Association and Fair Trade Foundation represent other examples of regulatory intermediaries between companies and monitors.

The ILO may be able to play a useful role in the area of standardization of monitoring and reporting, by sharing through training or informational programs its own measures or benchmarks for compliance with ILO conventions. Such an exchange might also facilitate convergence of different private initiative toward a globally applicable labor rights monitoring framework.

#### 4. Who Should Pay for Monitoring?

The possible sources of funding are, in essence, corporations, governments and worker/consumer advocates (trade unions and other civic organizations). Various mixes of funding from these entities may provide for monitoring to take place and to remain independent. The critical issue here is not who provides the funding, but what steps are taken to ensure that monitors may retain their independence from any single party and are not biased by the source of funding. Direct financial relationships between the monitor and company are not precluded, as long as the public interest is protected by measures that include transparency of monitoring contracts, some form of public access to results of audits, and protections against side payments or other improper transactions between the contracting parties.

The Rugmark example provides one workable funding scenario: companies wishing to utilize the services of monitors pay a licensing fee to an independent overseer (in this case, the Rugmark Foundation) and that overseer in turn provides inspection services. Since inspectors are not paid directly by their clients they are able to maintain their objectivity. The Rugmark program also institutes other safeguards to ensure that inspectors are not vulnerable to bribery or other possible compromises of their integrity.

The Independent Monitoring Group of El Salvador in its first year used another model of funding, one in which the company itself and a worker advocate, the National Labor Committee, contributed equally to its upkeep. The group=s independence from each funder was thus assured. However, The Gap=s failure to provide a second year of funding is indicative of problems with this approach that might best be addressed if funding were to be channeled through a neutral body with ongoing oversight responsibility.

#### 5. Do Codes Undermine Efforts to Strengthen National and International Labor Standards?

Some have expressed concern that by functioning independently of any country's legal system, codes of conduct and independent monitoring may palliate local desire to improve legal standards. In fact we feel codes and independent monitoring provide an important, complementary mechanism to augment enforcement of existing legal systems, and may foster greater desire to improve those systems. By adopting a code, a corporation also acknowledges

its responsibility to abide by local labor laws. In most cases, local labor laws even in developing countries offer adequate protections for workers, conforming with at least minimum international standards on subjects such as working hours, overtime compensation, forced labor and child labor.<sup>192</sup> However, abuses occur because governments lack adequate enforcement budgets, or are offered multiple incentives to protect the interests of elites and capital rather than enforcing these laws. For example, in both China and Indonesia, partnerships between top military officials and investors have been documented.<sup>193</sup> Such alliances give the military in both countries every incentive to safeguard their investments by participating in labor repression.

If monitored, codes may improve enforcement of local labor laws. The codes approach recognizes that in many developing countries, workers may be unaware of existing legal protections. Even where they have information about such laws, workers may hesitate to involve corrupt or unsympathetic labor officials in their grievances. Through monitors, workers may gain access to information not only about a company's code of conduct but also about local labor laws and legal protections. Furthermore, if effective monitoring mechanisms can be established, it may be easier and less intimidating for a worker to use such mechanisms than to bring problems to the attention of local officials or courts. The development of such alternate dispute resolution mechanisms for MNCs with codes of conduct may provide officials in developing countries with incentives to better enforce existing labor laws, in order to preserve their own jurisdiction. At very least such an approach provides some workers with another option to seek redress for grievances. This approach may ultimately have a spillover effect from MNCs that adopt and comply with codes to local employers, as workers share information between enterprises. Workers in local enterprises are ultimately unlikely to tolerate dual systems of enforcement.

The codes approach may also create incentives for some MNCs to become allies in the movement for harmonized labor standards and consistent enforcement of those standards. By initially creating an environment of greater accountability for MNCs with codes, it puts them at a competitive disadvantage to MNCs in the same industry without codes producing in the same countries. The approach may therefore convince Agood@ companies that in order to compete effectively, they too have an interest in advocating for uniform adoption and implementation of labor legislation.

## 6. Should Codes Define a Living Wage?

The basic content of most codes of conduct does not vary significantly from the internationally-recognized worker rights called for in debates for a social clause in international

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<sup>192</sup>An exception to this generalization are local laws regulating trade union activity, discussed below.

<sup>193</sup>See Simbolon, Johannes, AABRI, from War Machine to Big Business Bureaucrats, @ in *Jakarta Post*, October 1, 1995; also AChina=s People=s Liberation Army: Where to Find PLA Companies in America, What Products the PLA Sells in America and Who are the PLA=s Customers, @ report issued by Food and Allied Service Trades Department, AFL-CIO.

trade agreements. Insofar as this is true, the standards represent a broad international consensus on fundamental worker rights which has been generated by advocates in both developed and developing countries. The list of generally agreed-upon standards includes elimination of forced labor, elimination of child labor, decent wages and working conditions, decent health and safety standards, non-discrimination, the right to organize and bargain collectively. Most industry and company codes incorporate all of these standards. One issue that remains unresolved is the debate on wages. The AIP and ETI codes call for employers to pay either minimum or prevailing wages in the countries where they produce, and to recognize the need for those wages to meet workers' basic needs. Critics of this provision note that in most developing countries, the minimum or prevailing wages are insufficient to provide a basic market basket of goods to most workers. These critics call for the establishment of criteria to define what a living wage would be in each country, and call on companies to agree to pay this amount rather than minimum wage.

The debate on living wages has been a contentious one, in no small part because, unlike other rights covered by corporate codes, the definition of a living wage has yet to be clearly established by any international convention.<sup>194</sup> Nor do economists or other social scientists agree on a cross-country definition of a standard market basket of goods. Since international consensus on this issue is lacking, consumer country advocates for a living wage clause have been particularly susceptible to the argument that they are acting out of protectionist rather than humanitarian motivations.

It is our position that the living wage issue cannot be resolved without (a) substantial further research and the development of a reasonable and widely acceptable cross-cultural index to measure basic needs; and (b) substantial effort by developed country advocates of a living wage to engage in open dialogue on this issue with trade unions and NGOs in developing countries. We note that to date, such dialogue has consisted principally of Northern NGOs asking Southern partners to make assessments of economic indicators in their particular countries, rather than engaging in participation as full partners in the issue of standard-setting. As noted in this paper's earlier discussion on the development and promotion of a social clause, the wage issue is an extremely important one, but it is unlikely that it can be promoted by US or other consumer-country advocates in a manner that adequately addresses developing-country fears of protectionism.

International dialogue, perhaps oriented toward a re-examination of ILO language on wage-fixing machinery, is a vital first step to further discussion and definition of the living wage.

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<sup>194</sup>The UN's Universal Declaration of Human Rights notes the right of workers to earn a living wage. The ILO's Tripartite Declaration also affirms the responsibility of MNCs to provide a wage at least adequate to satisfy the basic needs of workers and their families. @ However neither of these international fora have been able to resolve the question of how minimum wages or basic needs should be measured or set. See Rothstein, Richard, *Developing Reasonable Standards for Judging Whether Minimum Wage Levels in Developing Countries are Acceptable*, @ Bureau of International Labor Affairs, US Department of Labor, June 1996; see also Athreya, Bama and Natacha Thys, *Empowering Workers Toward a Living Wage: A Position Paper*, @ International Labor Rights Fund, Fall 1999.

Without such dialogue, advocates in the North run the risk of undermining gains made by NGOs and trade unions in the South. In the meanwhile, it is our position that codes of conduct should not set wages, but rather should provide an absolute floor for wages. Promotion and vigilant monitoring of workers= right to bargain collectively is the ultimate way to ensure that workers receive wages adequate to meet their basic needs.

This view, however, does not lessen the moral and pragmatic imperatives to provide workers with wages adequate to allow them to live decently.<sup>195</sup> Trade unions and other worker advocates should bring the living wage discussion into the broader context of the debate for a social clause, and should, through continued consumer pressure, support and bolster efforts by trade unions and NGOs in the South to negotiate appropriate wages.

## **Conclusion**

The codes of conduct approach offers a valuable means to create and foster dialogues between developed world and developing world advocates for labor and consumer rights. The strategy is, in effect, an extension of an older, proven strategy to mobilize consumer support for workers: the boycott. Threats of boycott action have helped turn the tide in labor/management battles in the United States and other developed countries on numerous occasions. Codes of conduct help to extend consumer awareness of labor's problems and battles in less-developed parts of the world. Exposés of labor rights abuses, whether child labor in the soccer ball industry or trade union harassment in El Salvador, were made possible by the creation of alliances between developed world and developing world advocates.

Consumers in the US and other developed countries have become increasingly aware that many of the goods they consume are produced under inhumane or substandard conditions in locales such as Pakistan and Guatemala. As this awareness increases, so to does the awareness of citizens of developed countries that they live in a global economy, and that trade relations between countries do affect their day to day lives. This awareness has in recent months led to the mobilization of the North American and European consumer publics around issues such as the meetings of the WTO in Seattle in 1999, the World Bank and International Monetary Fund meetings in Washington, DC in April, 2000, and even the relatively obscure Multilateral Agreement on Investment. In short, raised awareness about conditions in garment and toy factories has helped introduce and foster broader debates on trade and human rights issues.

The area of activism is, moreover, one that has given rise to significant, far-ranging and quickly progressing new efforts at global regulation over the past few years. In addition to the initiatives detailed in this paper, UN Secretary General Kofi Annan has led the United Nations into new initiatives in the area of voluntary codes of conduct and corporate accountability. Despite the fears of some advocates that such efforts will undermine more stringent attempts to

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<sup>195</sup>See Athreya and Thys, *Empowering Workers Toward a Living Wage: A Position Paper*.@

promote global governance, a natural convergence of the strategies has occurred in at least two areas: that of internationally binding legislation, and that of cross-border contract negotiations.

As early as 1991, the US Congress attempted to legislate a code of conduct for US corporations doing business in China. The code would have required an annual review of the practices of all corporations in China, and would have provided for some sanction to those companies that failed to implement the code. The initiative has been revived a number of times over the past decade, and at different moments was passed by both the House of Representatives and the US Senate. A new version has recently been circulated, and in the wake of debates over China's entry into the WTO, may well find support in both legislative houses, creating a precedent for binding corporations to a code of conduct, allowing for public review of corporate behavior, and sanctioning non-compliant corporations. A parallel initiative was taken by the European Parliament last year, which passed a resolution calling for EU-based corporations to abide by a set of human rights principles in their operations worldwide. However, while the European Parliament may be empowered to review corporate behavior, it is unable to impose sanctions on violators.

Another notable initiative is that undertaken by the International Federation of Building and Wood Workers (IFBWW), which in recent years has negotiated an internationally-applicable code of conduct with furniture manufacturer Ikea Corporation. Ikea has agreed to accept the code as binding on its relationships with all IFBWW member unions, in all countries of operation, setting an important precedent for contract negotiations at the worldwide level.

## **IV. Conclusion -- Strategies for Cooperation to Improve Labor Rights Enforcement.**

The discussion of using trade as a mechanism for regulating social issues confirms both that there is a growing consensus on what to do and a significant increase in cross-border solidarity and cooperation. The success of U.S. activists in denying in the U.S. Congress President Clinton's request for "fast track" authority to expand NAFTA, and the diversity of opposition to the WTO as evidenced by events both inside and outside the 1999 Ministerial meetings in Seattle, demonstrate that now is the time to build on the momentum of opposition to "free trade" and work to develop an alternative model of economic integration that respects people and the environment. This success should not be overstated, however. There was a significant block of votes in opposition to fast track that would not support any effort to include a social clause in future trade agreements. We should likewise be encouraged that trade unions of the Mercosur countries have agreed among themselves to the terms of a social charter and they have managed to get a seat at the table in discussing the process of economic integration. They have not yet, however, managed to overcome the united effort of employers and governments to block inclusion of the social charter in the Mercosur agreement.

In no single country does the labor movement, with supporting NGOs, have the political clout to have its agenda enacted into law. Considering the resounding defeat of the first effort to gain inclusion of the labor clause at the WTO, ultimate success may be a very long term goal. There is much to do, but generally we know what needs to be done. First and foremost, we must cooperate globally with trade unions, human rights and environmental NGOs, church groups, academics, and progressive members of the business and government communities to agree on a final version of a social clause and get to work on a political strategy to press for its adoption in all trade agreements. We must develop allies in key countries to pressure their governments to support the labor clause in all future trade agreements and support its inclusion in the WTO. We must act as educators at every event we can attend to inform people about the need for a social clause, how it would work, and why it is essential to an overall strategy of achieving sustainable economic development. We must work in our own countries to defeat efforts to expand the existing corporatist trade agenda and work to convert our governments to become advocates for the labor clause at multilateral gatherings.

There is also much to do on a company-specific basis. We must share information about MNCs and cooperate in targeted consumer boycotts. Perhaps we can agree with allies to select each year a company to be named the worst labor violator in the world, and have that company be the focus of global boycott activities for a year. We have seen the power of cross-border cooperation in several NAALC cases. In one case involving independent union organizing in the Han Young factory, a Hyundai affiliate in Tijuana, the NAALC complaint provided a forum for international action including demonstrations at Hyundai dealerships in the United States.

Pressure from the AFL-CIO and its affiliates caused President Clinton to raise the issue with President Zedillo, and the Mexican government took immediate action to enforce the law and protect the rights of the individuals who had sought to form an independent union. One way to get support from the business community for a labor clause is to create enough grassroots-driven boycott activity that resistant companies will want to have stable rules to govern the situation.

Immediate first steps should center around building upon the momentum of the 1999 Seattle events; a promising follow-up was made at meetings of the World Bank and IMF in Washington, DC in early 2000 although more work is needed to ensure that messages from developed and developing-world advocates can be reconciled. The grassroots agreement to oppose present policies on trade and investment must blossom into an alternative vision, and specific alternative proposals.

Ultimately, advocates for worker rights must trust each other. We need to move beyond nationalistic suspicions and judge by actions that have achieved positive results. MNCs and governments are allied on a global level. The WTO is the best example of their power of unity. Workers have the advantage of numbers, voting power, and a belief in their cause. In unity, we can overcome the obstacles and earn justice for workers in the global economy.