TO THE YUKON AND BEYOND: LOCAL LABORERS IN A GLOBAL LABOR MARKET

by
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This Article explores the possibilities for effective protection of labor rights in the emerging global labor market. It explores existing forms of transnational labor regulation, including both hard regulation, i.e., regulation by state-centered institutions, and soft regulation, i.e., regulation through private actors responding to market forces. The author finds that existing regulatory approaches are inadequate to ensure that the global marketplace will offer adequate labor standards to its global workforce. She proposes new approaches to global labor regulation, approaches that blend hard and soft law by reshaping market forces and embedding them in a regulatory framework that is protective of core labor rights.

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I. INTRODUCTION

There is a popular computer game called the Yukon Trail in which the protagonist sets out on a journey from Seattle to the Yukon Territory in search of gold. There are many hardships and dangers that lie ahead, and so the protagonist is advised at the outset to buy an outfit of gear and to find a partner. The outfit typically consists of food, a sled, warm clothing, and an axe for building a boat. The choice of partners is among a Native American who knows the terrain, a skilled carpenter who can build a boat to withstand the wild rivers ahead, or a banker who can finance the journey. On the journey the protagonist and her partner meet many people, some friendly and helpful, some treacherous, and some just plain interesting. The outcome can vary—sometimes they find gold and return enriched by their trip; other times they are left penniless with barely enough for a return passage. But the stakes are low because it is only a game.

American labor is not setting out on the Yukon Trail; nonetheless, it has embarked on an uncertain journey. The journey will take it across the border from a familiar, domestic, and comfortable regulatory regime into the lawless and risky global labor market. Workers need not leave home to make this journey—they merely need to work for a company that produces around the world. Or a company that supplies a company that produces around the world. Or a company that is supplied by producers around the world. Or a company that competes with a company that produces or has suppliers around the world.

Most American workers are already part of the expanding global labor market. The global labor market is a risky place for labor. Globalization, while an abstraction to many, threatens serious and concrete harms to workers everywhere. Unskilled workers in the Western democracies have been the first to feel globalization's bite, but others will no doubt follow. What labor needs is an outfit, a map, and a partner. This Article discusses the prospects of finding these survival necessities.

A. *The Impact of Globalization on Labor*

Globalization is the cross-border interpenetration of economic life. While we cannot see globalization directly, its imprint is evident in the spread of foreign plants across domestic landscapes; the telecommunications and computer technologies that enable firms to produce, distribute, and market all over the world; and the falling trade barriers and fading foreign exchange restrictions. National borders are becoming permeable to products made around the globe and to global capital flows.

Many trade unionists, progressive scholars, and policy-makers predict that the spread of globalization will mean the demise of hard-won labor standards and workplace rights in the Western world. They fear that globalization will marginalize or supplant national politics by virtue of its tendency to undermine the capacity of nation-states to regulate their own domestic economies.[1] Thus, some pessimists predict that globalization will lead to the demise of the Western welfare state, the decline of Western labor movements, and the deterioration of labor standards everywhere.[2]

The specific ways in which globalization threatens labor are well known, but worth restating briefly.[3] First, globalization diminishes labor's bargaining power. As capital mobility increases, businesses tend to relocate to countries with lower labor standards. Further, when firms can relocate easily, unions have less power at the bargaining table in their home countries because they are always bargaining against the threat of relocation. In practice, this means that companies will be less likely to yield to union demands and unions will not make demands for fear of triggering business flight.

Second, globalization diminishes the level of domestic labor-protective regulations. Companies prefer to produce in legal environments that offer the least protections for labor, and when feasible, they shift production to capture the resultant lower labor costs. Thus they engage in a "race to the bottom" in labor standards. The prospect of races to the bottom places organized labor in a prisoner's dilemma: labor wants

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[1] The diminished regulatory capability of the nation-state is the result of two distinct factors. First, within trading blocs, much domestic regulation is superseded by multilateral treaties and tribunals that have de facto, if not de jure, trumping power. Second, there is a practical limitation on the ability of one nation to regulate its domestic affairs when labor and capital move freely in, out, and across national borders. Increased capital mobility, it is claimed, triggers races to the bottom, prisoner's dilemmas, and regulatory competition that lower labor standards. These issues are discussed in detail in Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987 (1995).

[2] *See* DAVID TRUBEK, SOCIAL JUSTICE "AFTER" GLOBALIZATION: THE CASE OF SOCIAL EUROPE (MacArthur Consortium Research Series on International Peace and Cooperation, University of Wisconsin-Madison Global Studies Program, No. 9, Dec. 1996).

[3] Each of these issues is developed in detail in Stone, *supra* note 1, at 990-97.

domestic protective legislation to improve labor standards, but it is acutely vulnerable to the capital flight that increased labor standards can trigger. This dilemma is intensified as economic life becomes more global, rendering labor less effective as a political actor.

Third, globalization encourages regulatory competition. Regulatory competition occurs when nations compete for business by using lower labor standards. Regulatory competition leads nonlabor groups to oppose labor regulation on the ground that business flight hurts them. Thus, regulatory competition could trigger a downward spiral: nations compete with each other for lower labor standards, while labor loses its historic allies at the domestic level, rendering labor powerless to resist.

Fourth, runaway shops, races to the bottom, and regulatory competition pit labor organizations in one country against those in another. Thus, while globalization could be an impetus toward international labor solidarity and cooperation, it could also lead to organizational fragmentation and dissension. One strategy unions used in developed countries (DCs) to diminish the possibilities of domestic runaway shops and races to the bottom was advocating supranational legislation that would equalize labor standards. But unions in less developed countries (LDCs) have resisted these measures and attacked them as protectionist.[4] Another possible union strategy is to attempt to organize workers in low-wage nations and regions and bargain for parity. However, while such a strategy has succeeded at times within a single country, it is a problematic approach when corporations move beyond national boundaries. Countries have labor laws and collective bargaining systems that differ markedly from each other, even within the Western world. Thus, it is difficult for unions in one country to collaborate with unions in other countries in a way that jointly harnesses their economic weapons and furthers their joint bargaining goals.

Finally, globalization can lead to the deterioration of labor's political power. National labor movements operate in the context of a particular regulatory environment. Labor's political power is undermined when the focus of labor regulation moves from a national to an international

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[4] *See* Louise D. Williams, *Trade, Labor, Law and Development: Opportunities and Challenges for Mexican Labor Arising from the North American Free Trade Agreement*, 22 BROOK. J. INT'L L. 361, 377 (1996) (arguing that developed and developing countries' unions have opposing interests because LDC unions benefit from the influx of jobs); *see also* Karen Vassler Champion, *Who Pays for Free Trade? The Dilemma of Free Trade and International Labor Standards*, 22 N.C. J. INT'L L. & COM. REG. 181, 215-16 (1996) (discussing how "[s]ome [commentators] argue that so-called 'international' labor standards are actually Western labor standards and that imposing these standards on developing nations is both unrealistic and unwarranted protectionism."). Also, LDC governments view international labor standards as efforts to destroy their comparative advantage in labor. *See* Frederick M. Abbott, *Introductory Comments, International Trade and Social Welfare: The New Agenda*, 17 COMP. LAB. L.J. 338, 344-45 (1996) (introducing the January 7, 1995 meeting of the Section of International Law of the American Association of Law Schools).

arena. Further, if labor ceases to be a voice in national politics, then the democratic nature of government is undermined. Unions function not merely as economic, workplace-based organizations, but also as political lobbying groups and electoral blocs. Collectively, labor unions articulate the interests and public policy concerns of a large segment of the population. Without labor unions' continued presence in national politics, this segment of the population would be silenced.

Some economists, arguing that firms make location choices on the basis of factors other than labor costs, challenge the claim that globalization will necessarily and undoubtedly lead to races to the bottom and regulatory competition.[5] For example, some firms require a high level of skill or education in their workforce and need to locate where those skills are found. Some require locations close to particular markets, resources, or related firms, in order to get the benefit of synergies and agglomeration effects. And some place a great value on political stability. While these factors are no doubt present in the decision-making calculus of some firms, few economists would deny that when firms have a choice about where to produce, they tend to choose locations with lower labor costs for the labor-intensive aspects of their production. This means, when all else is equal, firms tend to prefer locations with low wages, poor safety provisions, weak protections for unions, and other low labor standards. Indeed, firms sometimes rearrange their production processes so as to locate those operations that do not require high skills in low-wage, low-labor-standard countries, and locate those operations that require highly educated labor in developed areas. The recent hollowing out of San Diego, where low-skilled production jobs have moved to Mexico and executive jobs have remained in San Diego, is one example of this trend.[6]

Firms that need to be in a high-wage area to attract a highly educated workforce or to take advantage of production or distributional agglomeration effects will continue to do so. However, firms that can move to low-wage areas will tend to race to the bottom. Further, history gives many examples of firms that initially required a highly skilled workforce, but later found ways to restructure their production so as to split off the low-skilled components and relocate those aspects of the workforce when a

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[5] *See* NICOLAS VALTICOS & GERALDO W. VON POTOBSKY, INTERNATIONAL LABOR LAW 21 (2d ed. 1995) (explaining that economists discount the race to the bottom theory because it ignores other factors, such as the price of raw materials, available resources and capital, competence of labor and management, productivity, tax systems, available markets, and tariff and custom issues).

[6] *See* Michael Riley, *NAFTAs Payoff, San Diego Gains, Not El Paso*, WASH. TIMES, Nov. 15, 1998, at A1 (describing how firms' management is located in San Diego in order to take advantage of skills, while production is across the border to take advantage of low labor costs); *see also* Don Lee, *State's Job Gains Highest in 15 Years*, L.A. TIMES, Feb. 27, 1999, at A1 (explaining that despite state's low unemployment rate, there has been an exodus of production jobs to Mexico).

low-cost location became available.[7] And firms that relocate for the purpose of low labor standards are capable of relocating again and again, thereby depressing the labor standard of each country in which they alight. For this reason, developing countries have as much to fear as developed countries from races to the bottom in labor standards. One union leader in the Philippines was recently quoted in the *Los Angeles Times* as saying, "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."[8]

There is now considerable data that indicates that firms tend to move production to the countries that offer lower labor costs, as well as lower levels of unionization. For example, William Cooke analyzed data on foreign direct investment by U.S. multinational firms within the nineteen Organization for Economic Co-operation and Development (OECD) countries between 1982 and 1993. He found that the most important factors in locational decisions within the developed world were that investment was positively correlated with levels of education of the work force and negatively correlated with levels of unionization and protective labor legislation.[9] In a similar vein, Richard Freeman and Ana Revanga found that increased trade between the United States and LDCs from 1970 and 1992 led to significant reductions both in employment levels and wages for low-skilled workers in the United States.[10] Further, Laura Tyson and Bill Cline have concluded that trade is responsible for somewhere between twenty to fifty-three percent of the increase in income inequality in the United States.[11] These findings are powerful evidence that companies are moving low-skilled jobs to low-wage, low-union-density countries, thereby depressing wages and increasing unemployment in their wake.

B. This Article

This Article explores the possibilities for effective regulation to protect labor rights in the global labor market. It addresses the questions: Is it *inevitable* for globalization to weaken labor organizations and under-

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[7] *See* Charles B. Craver, *Why Labor Unions Must (and Can) Survive*, 1 U. PA. J. LAB. & EMPLOYMENT 15, 17-18 (1998).

[8] Pharis J. Harvey et al., Developing Effective Mechanisms for Implementing Labor Rights in the Global Economy 28 (1998) (unpublished manuscript, International Labor Rights Fund Discussion Draft, on file with author) (quoting Walter Russell Mead, *Labor's New Power in Asia*, L.A. TIMES, Feb. 22, 1998, at M1).

[9] William N. Cooke, *The Influence of Industrial Relations Factors on U.S. Foreign Direct Investment Abroad*, 51 INDUS. & LAB. REL. REV. 3 (1997).

[10] Richard Freeman & Ana Revanga, How Much Has LDC Trade Affected Western Job Markets? (unpublished manuscript presented at the Conference on International Trade and Employment, Nov. 12, 1995).

[11] These studies are summarized in Robert Scott, Alternatives to the Neo-Liberal Model that Address Differences Between North and South 3-4 (1998) (unpublished manuscript, on file with the Economic Policy Institute).

mine labor protective regulations, or instead are there policy alternatives that could change the trajectory? What are the prospects for transnational labor regulation that can replicate the existing regulatory schemes in the North? Are there possible non-state-centered modes of regulation that could provide effective protection for labor rights in the emerging worldwide labor market? In short, is there a possibility of "social justice after globalization"?[12]

Part II discusses the prospects for "hard law" transnational labor regulation at the international, regional, and domestic levels to provide a means to achieve international labor rights. It concludes that there are serious political obstacles to effective hard law regulation at every level, so this is not a promising approach to labor protection in the global marketplace.

Part II then addresses the prospects for transnational "soft law" regulation, i.e., regulation that operates not through nation-states or public officials, but through private sector actors responding to market forces.[13] Several different types of soft law mechanisms are examined, including the legal pluralistic approach and the campaigns by nongovernmental organizations (NGOs) in the labor rights field to create corporate codes of conduct and social labeling campaigns. This Part finds that the legal pluralist view, while impressive in theory, lacks an empirical basis, and that the efforts by NGOs, while impressive in particularized cases, are episodic in their success and devoid of accountability. Thus, neither the hard nor soft law approach is an adequate mechanism to ensure protection for labor standards in the face of globalizational trends in the world economy.

Part III proposes some new approaches to global regulation that attempt to blend soft law concepts with hard law institutions. These approaches attempt to reshape market forces by embedding them in a regulatory framework that is protective of core labor rights. They represent efforts to use existing soft law experiences to construct a new type of regulatory regime, one that sees regulation as providing a framework for market actors rather than a set of mandatory commands. It is hoped that the suggestions located between hard and soft will help carve out a space in the global marketplace where labor rights might reside.

C. Moving Beyond the Rhetoric of Free Trade

Before describing the differing approaches to global regulation, it is necessary to better characterize globalization and to identify the social actors that are available as labor's partners in resisting the ill effects of

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[12] *See* TRUBEK, *supra* note 2, at 3 (posing question of how to ensure labor rights in the global economy).

[13] On "hard law" and "soft law" in international regulation, see Steven R. Ratner, *International Law: The Trials of Global Norms*, FOREIGN POL'Y, Spring 1998, at 65 (discussing the role of soft versus hard law in the development of global norms).

globalization. Globalization must not be confused with free trade. In present debates the term *free trade* is highly charged. It is a phrase that is intensely normative and highly privileged, a phrase that acts as a trump card in discussions of economic, legal, or social policy, providing justification for some policies and silencing consideration of others.[14] In the realm of public policy, we all appear to be Ricardians—we all believe that the freer the trade, the better off we all will be.

There might be some truth to the Ricardian theory of comparative advantage and free trade—that is, trade based on comparative advantage may well be a magic wand that produces untold wealth, from a few sheep in Lancaster traded for a few bottles of Spanish port—what Ethan Kapstein refers to as the one great free lunch in the economists' universe.[15] However, we must remember that globalization is *not* the same as free trade. In the past twenty years, we have not seen the development of free trade at all. Rather, the rules of trade have changed dramatically. One salient change is that trade has been reorganized into trading blocs. The trading bloc system means that there is one set of trading rules for nations inside a bloc and another set of rules to govern relations between nations in the bloc and the rest of the world. Thus, in the last twenty years, as trading blocs have been formed or fortified, the nations involved have changed their relationship to those other nations within the same bloc from relations governed by diplomacy and by unilaterally promulgated trading rules to relations governed by bureaucratic and quasi-democratic devices of representation and administration. Trading blocs are not free trade; they are instead a new map of the boundaries and entities of trade, a new definition of insiders and outsiders, new decision-making bodies, and new rules of trade.

The other significant change in the rules of economic life is the World Trade Organization (WTO), which now governs relations between trading blocs and the rest of the world. It also provides a new set of rules to regulate relations between economic actors and between states. And here too, quasi-legitimate multilateral bodies and bureaucratic agencies replace unilateral action and diplomacy by nation-states.

The new rules governing international trade have not come from an abstract invisible hand. While they often were created in transnational settings by representatives of national governments, they are the product of national governments acting under pressures from various domestic interest groups, including business, labor, and the like. That is, domestic politics produced the trading blocs in the first place and framed their rules. Also, domestic politics produced different trading blocs, with different rules, in different places. For example, the European Union (EU)

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[14] *See, e.g.*, Scherck v. Alberto-Culver, 417 U.S. 506 (1974) (adopting expansive interpretation of Federal Arbitration Act as applied to an international contract because doing so will further free trade).

[15] Ethan Kapstein, *Workers and the World Economy*, FOREIGN AFF., May/June 1966, at 16.

attempts to create a free internal market in capital, goods, and labor, whereas the North American Free Trade Agreement (NAFTA) attempts to create a free internal market in capital and goods, but not in labor. This difference in approach has had great significance for the operation of the trading rules and for labor rights in each regional bloc.[16]

Once it is understood that domestic actors have created the rules of trade and can shape their future, the policy question shifts from a technical question of how to promote freer trade to a normative question of whether any particular set of trading rules is desirable or not. One important factor to know is who are the winners and who are the losers under the new rules of trade. There is considerable evidence that employers in DCs are winners and lower skilled workers in the DCs are losers under the new rules of trade.[17] It is less clear whether employers and workers in the LDCs are winners or losers. It is possible that both are winners because the new rules shift much economic activity from the North to the South. Yet it is possible too that some groups of workers in the South are also losers. A study by Massachusetts Institute of Technology (MIT) economist Alice Amsden and International Labour Organisation (ILO) economist Rolph Van Der Hoeven found that in the 1980s, most developed countries experienced stagnation or decline in their manufacturing sectors, while most developing countries experienced declines in their real wages. From the data they conclude that the 1980s, "a decade *par excellence* of free market economics," was also a decade of worldwide redistribution of income from labor to capital.[18]

Within the United States and the EU, there are many proposals for policy changes that would change the line up of winners and losers and protect workers in the DCs against some of the negative effects of globalization. These include measures such as providing meaningful adjustment assistance and retraining to workers who lose their jobs because of trade; enacting enforceable minimal global labor standards in the areas of minimum wages and child labor; enacting on a global scale enforceable rights to organize and strike; providing a robust social safety net; creating state and regional industrial policy to promote industrial districts of specialized production niches; enacting a social clause in the WTO; and giving heightened enforcement powers to NAFTA or the ILO. Any consideration of these or other proposals must address several questions: Who is going to advocate such policies and who has the political clout to

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[16] *See generally* Stone, *supra* note 1, at 1007-08.

[17] *See* Craver, *supra* note 7, at 18.

[18] Alice H. Amsden & Rolph Van Der Hoeven, *Manufacturing Output, Employment and Real Wages in the 1980s: Labour's Loss Until the Century's End*, 32 J. DEV. STUD. 506, 522 (1996). There may be other tangible, but less quantifiable, harms to workers in LDCs from direct foreign investment. For example, while child labor by multinational firms in Southeast Asia might help feed families that would otherwise starve, multinational production may undermine the viability of traditional agricultural life and family structure, thereby forcing women and children into bonded labor or sexual slavery. These types of issues need further study.

achieve them? Is there a constituency that exists and has the power to revise the rules of trade? What groups are available to promote and protect labor rights in the global economy? In short, can labor find a partner to help promote protections in the global marketplace?

D. Labor's Potential Partners

The most obvious candidate for revising the rules of trade is organized labor in the Western world. However, the union movements in the Western countries have been severely weakened in recent years. Organized labor has declined both numerically and in political influence throughout the countries of the West, so that today labor has little political power in most Western countries.[19] Even in Great Britain, where there is a recently elected Labour government, the unions are desperately trying to retain the vestiges of the postwar welfare state. It is ironic, but perhaps not accidental, that as union strength is declining at the national level, national unions are making more efforts than ever to develop international ties and cross-border bargaining strategies. This new form of labor internationalism is refocusing unions on collaborative bargaining efforts rather than on political power. While such strategies may be effective to change the policies of some firms, it is too soon to say whether such a strategy can lead to the rewriting of the rules of international trade and economic life.

Another obvious partner to assist the Western union movement in promoting international labor standards is the union movement in the LDCs. Workers in the LDCs are the most directly affected by substandard conditions and thus are the ones with the most incentive to press for improvements. Unfortunately, however, the unions in the LDCs generally oppose international imposition of minimum labor standards because they believe that their countries' low labor standards give them jobs. They understand that foreign firms are producing in their countries precisely to take advantage of the comparatively low labor standards they offer. Thus, to press for improvements would be to push out their jobs. Furthermore, while the multinational corporations (MNCs) offer working conditions in LDCs that are low by the DCs' standards, they are often higher than the alternatives available in the LDCs. Workers for the Nike or Banana Republic corporations in Southeast Asia often earn more than twice as much as their counterparts who work in domestic production. Hence the workers do not necessarily perceive their working conditions to be substandard.

Another potential partner for Western labor unions is the human rights community. To date, human rights groups often have been more effective than traditional labor groups in calling public attention to the problems of bonded labor, forced labor, child labor, and torture in the

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[19] *See generally* HARRY KATZ & OWEN DARBISHIRE, CONVERGING DIVERGENCES: WORLDWIDE CHANGES IN EMPLOYMENT SYSTEMS (forthcoming fall 1999).

production of goods in LDCs. Human rights groups have spearheaded commissions of inquiry, exposed reprehensible labor practices by multinational firms, and devised innovative techniques to try to eliminate such practices. These groups by now have a proven track record in policing and enforcing labor rights violations and thus have earned a role in any transnational labor rights regime. However, amongst these groups there is a problem of legitimacy. Lacking a labor constituency, human rights NGOs are vulnerable to the accusation that they are officious intermeddlers, taking the glory when they are successful, but bearing none of the risks when they fail.[20]

Another group that has an interest and potential role in enforcing labor rights is consumers. Consumers provide the market for the products made overseas, and they can use their spending power to vote against those products made with substandard conditions. However, consumers are a scattered and disorganized group. Consumers are not organized around the issues of labor standards, nor is that issue high among their priorities. Indeed, many consumers believe they benefit from low labor standards because they receive lower prices than they would otherwise pay. Thus, it is difficult to rely on consumers to be a constituency that will champion the cause of international labor standards. Recently, some human rights and labor activists have been able to harness this consumer power by effectuating product boycotts to punish extreme labor standard violators.[21] But these incidents are rare and have not yet made consumers a powerful or sustained voice in the public debates over trade.

Enlightened corporations also have an interest in seeing their competitors adhere to standards of decency in their labor practices. Managers who do not want to employ child labor or pay subsistence wages welcome regulations that keep their competitors from bidding down the price and conditions of labor. But here too, enlightened managers are not likely to wield great power within their firms. If they permit their social consciences to compromise their firms' profits, they risk seeing their own personal labor conditions deteriorate to the point of a pink slip.

Thus, there are some constituencies that are potential partners to defend international labor rights, but each one's incentives and abilities are limited. In addition, there is a problem of paralysis. The rhetorical

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[20] An example of failure is the campaign by the National Labor Committee (NLC) against the Disney contractors in Haiti. Once the NLC threatened to mount a publicity campaign about the poor labor conditions of the Disney workers, the company simply closed up shop in Haiti. Mark S. Anner, Local and Transnational Campaigns to End Sweatshop Practices 18-19 (1998) (unpublished manuscript presented at the 1998 Conference of the Latin American Studies Association, on file with author).

[21] *See, e.g.*, Bill Richards, *Nike to Increase Minimum Age in Asia for New Hirings, Improve Air Quality*, WALL ST. J., May 13, 1998, at B10 (discussing Nike's attempts to end product boycotts over labor abuses); *Some U.S. Firms in Myanmar to Face Boycotts: Human Rights Groups*, Agence France-Presse, Nov. 19, 1998, *available in* 1998 WL 16642289.

power of the appeal to "free trade" conveys to many a sense of inevitability. The issues of what to do and who will do it are intricately related. Below, I discuss several approaches for protecting labor rights, each of which calls upon different social actors to take a leading role.

II. CURRENT EFFORTS TO PROVIDE TRANSNATIONAL REGULATION TO PROTECT LABOR STANDARDS

Attempts at transnational labor regulation can be divided into hard law regulation and soft law regulation. Hard regulation is regulation by means of laws and treaties enacted by states and official multilateral agencies. The creation and persistence of hard regulation requires organized and sustained political pressure from interest groups operating within state structures. Soft regulation, on the other hand, is regulation by non-state actors who promulgate norms that come to take on prescriptive status. Soft regulations require different types of actors and different fora for their activism. Below, I discuss some of the prospects for each type of regulation with an effort to integrate the who and the what of transnational labor regulation.

A. Hard Regulation

Proponents of hard regulation advocate the construction of a transnational regime that is comparable to the existing forms of European or American regimes of labor regulation. Global optimists believe that one need not fear the demise of labor standards in the global labor market because protective labor regulation can simply be transposed to an international level. These optimists envision the replacement of a national labor regulatory regime with an international regulatory regime. They envision regulation of labor relations by state-like agencies, comparable to legislatures, executive agencies, and courts, which set and enforce standards. They posit that transnational labor standards will emerge, along with transnational labor movements to implement them and multilateral tribunals to enforce them, which will recreate at the international level the protections that labor currently enjoys domestically.

At present there is no transnational agency that can even approximate this type of hard labor regulation, but there are some candidates for doing so. At the international level, some have proposed that either the WTO or the ILO play that role. At the regional level, various trading blocs, such as the European Union, the North American Free Trade Association, Mercosur, and the Asian Pacific Economic Cooperation (APEC), have attempted to enact enforceable transnational labor standards.[22] The limited successes and outright failures of each of these efforts are instructive, as they argue for finding another approach to the problem of protecting global labor standards in the twenty-first century.

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[22] Harvey, *supra* note 8, at 11-24.

1. The International Arena

In the 1990s several international organizations have achieved a consensus about what core labor rights are.[23] The International Confederation of Free Trade Unions (ICFTU), the ILO, the OECD, and some other international organizations have each articulated their own set of core labor rights that they deem fundamental to any just international regime. While each group articulates its standards somewhat differently, there is a remarkable degree of consensus on what the core standards should be. They are (1) freedom of association, collective bargaining, and the right to strike; (2) prohibition of forced labor; (3) prohibition of discrimination in employment; and (4) prohibition of child labor.[24] There is some disagreement between organizations about the exact content of these rights and about whether to characterize them as "rights" or as "standards,"[25] but the notion that these four areas are "core" is widely shared.[26]

In anticipation of the WTO Ministerial Conference in Singapore in 1996, there was a great deal of optimism about the prospect of the WTO's enacting a social clause to protect these core labor rights. The ICFTU, the World Confederation of Labour, and the European Trade Union Confederation proposed that the WTO adopt a social clause in the hope that it would provide the beginning of a framework for protecting certain designated core labor rights within the emerging world trading regime.[27] At the Singapore meeting, the United States, together with the European

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[23] *Id.* at 34.

[24] *See, e.g.*, ILO Declaration on Fundamental Labor Rights, June 1998; ORGANIZATION FOR ECON. CO-OPERATION & DEV. (OECD), TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKER'S RIGHTS AND INTERNATIONAL TRADE (1996) [hereinafter OECD STUDY] (listing core labor standards; describing the extent to which selected countries observe core labor standards; analyzing the relationships between core labor standards and trade, investment, and employment; and suggesting mechanisms to promote core labor standards). The core labor rights can also be found in some of the primary human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess. (1966) and the Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess. (1948). *See generally*, Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNAT'L L. 659, 660-64 (1998) (examining core labor standards and their sources).

[25] Cappuyns, *supra* note 24, at 661-64.

[26] For example, the OECD takes issue with the ILO on its formulation of the core standard on child labor. The OECD maintains that the core standard should prohibit not work by children, but "exploitation" of children. *See* OECD STUDY, *supra* note 24, at 35-36; *see generally*, Steve Charnovitz, *Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 TEMP. INT'L & COMP. L.J. 131, 133-36 (1997) (book review).

[27] *See* Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws), in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 177, 200-01 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); Christopher Candland, How Do International Norms Evolve? 8 (1997) (unpublished manuscript presented at the Debate and Action on International Labor Standards,

Union, Norway, and Canada, urged the WTO to adopt the core rights and establish some mechanism to enforce them.[28] However, the proponents of a social clause did not foresee the strength of the opposition. Representatives of the developing countries viewed the U.S. and European efforts to obtain a social clause as protectionism and maintained that such measures would deny them their rightful comparative advantage in low labor costs. They were joined in opposition by the multinational firms and other business groups from the developed countries who claimed that such measures were anti-trade.[29] As a result of this ad hoc alliance, the WTO refused to incorporate a social clause and instead issued a ministerial declaration stating that the ILO is the appropriate agency to deal with labor standards. The Declaration contained a direct rebuff to the U.S., Canadian, and European position, stating: "We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question."[30] After the conference the WTO conference chairman clarified whatever ambiguity that remained by stating, "Some delegations had expressed the concern that this text may lead the WTO to acquire a competence to undertake further work in the relationship between trade and core labour standards. I want to assure these delegations that this text will not permit such a development."[31] Thus the WTO ministers' action in Singapore took the issue of a social clause off the WTO agenda.

With little prospect for a WTO social clause in the foreseeable future, some labor groups turned to the ILO to implement international labor standards. The ILO has until now relied on the power of monitoring, publicity, and behind-the-scenes pressure to induce countries to comply voluntarily with its 177 conventions.[32] On several occasions unions and other international organizations have urged the ILO to abandon its historic policy of promoting voluntary compliance and instead to utilize some sort of compulsion.[33] For example, in 1979 several organizations of trade unions urged the ILO to stop giving technical assistance to and eliminate its contacts with countries that were egregious violators of the freedom of association convention. Governments and

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Annual Meeting of American Political Science Associations, Aug. 1997, on file with author).

[28] *See* Charnovitz, *supra* note 26, at 154 n.223.

[29] *Id.*

[30] *Id.* at 155-56.

[31] *Id.* at 157 (quoting Concluding Remarks by Mr. Yeo Cheow Tong, Chairman of the Singapore Ministerial Conference).

[32] For a description of the ILO's compliance powers, see Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights, in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 22, 41-42 (Lance A. Compa & Stephen F. Diamond eds., 1996).

[33] Leary, *supra* note 27, at 196-97.

employer groups within the ILO resisted this suggestion, so the ILO refused.[34]

In the wake of the Singapore meeting, labor and human rights groups renewed their pressure on the ILO to use sanctions against labor rights violators and to assume more enforcement powers for the core labor conventions. These efforts led the ILO Director-General to accept the WTO's invitation to assume leadership in the establishment and protection of core labor rights. In the 1997 report *The ILO, Standard Setting and Globalization*, the ILO Director-General suggested that the ILO adopt a Declaration of Fundamental Rights and explore the idea of social labeling.[35] While the social labeling proposal was quickly squelched, the idea of a Declaration ripened in June 1998 into a full-blown promulgation entitled the ILO Declaration on Fundamental Principles and Rights at Work.[36] The Declaration states that all members of the ILO have an obligation

> to respect, to promote and to realize . . . the principles concerning the fundamental rights which are the subject of those Conventions, namely:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining;
>
> (b) the elimination of all forms of forced or compulsory labour;
>
> (c) the effective abolition of child labour; and
>
> (d) the elimination of discrimination in respect of employment and occupation.[37]

The Declaration applies to all ILO members, whether they have ratified the relevant conventions or not. Thus, the Declaration appears to move the organization in the direction of imposing minimal labor standards on all its members. However, the Declaration contains no enforcement mechanism and merely alludes to a "promotional follow-up" that will contain suggestions for studying and reporting on the progressive adoptions of the relevant conventions. Further, as if compelled to equivocate, the ILO Declaration ends with a paragraph that tracks the WTO's statement rejecting international labor standards, stating that:

> [L]abour standards should not be used for protectionist trade purposes, and . . . nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the com-

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[34] *Id.*

[35] International Labour Office, *Report of the Director-General, International Labour Conference, 85th Sess. 1997* (visited May 4, 1999) <http://www.ilo.org/public/english/10ilc/ilc85/dg-rep.htm>.

[36] The genesis of the declaration and the fate of the social labeling proposal are discussed in Brian A. Langille, The ILO and the New Economy: Recent Developments (Nov. 6, 1998) (unpublished manuscript, on file with author).

[37] ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1238 (1998).

> parative advantage of any country should in no way be called into question by this Declaration and its follow-up.[38]

Thus, the ILO's post-Singapore initiatives reflect, at least in part, a failure to gain consensus within its own ranks on the desirability of international labor standards.[39]

Several commentators have proposed a regime for labor rights enforcement built upon a combination of the ILO and the WTO. For example, some have suggested that the ILO determine persistent labor rights violations and the WTO determine what sanctions to impose.[40] However, to date, both the ILO and the WTO have refused to adopt any form of mandatory enforceability for labor rights violations. Thus, while multilateral hard regulation of labor standards would be desirable, at present the prospects look dim.

2. *Regional Trading Blocs*

While there is little prospect for hard regulation to provide international labor standards on the horizon, there have been some successful efforts by regional trading blocs to articulate labor standards and construct mechanisms for their enforcement. The most successful efforts of transnational labor regulation are found in the EU and NAFTA, described below.[41]

a. The EU's Approach to Transnational Labor Regulation

The EU has developed a two-tiered approach to transnational labor regulation. First, the provisions of the European Economic Community Treaty (EEC Treaty) and the regulations issued by the EU Council of Ministers pursuant to the EEC Treaty are directly applicable to citizens of the member states. These regulations set uniform rules for certain labor rights and have priority over conflicting national legislation. To date, the EC has promulgated only a few regulations on labor matters, in the areas of immigrant workers, gender equality, and occupational safety and health.

The other form of labor regulation is harmonization by means of EC directives. Directives are rules promulgated by the Council of Ministers to which the member states are required to conform. Member states have discretion as to how to bring their separate labor laws into conformity, and they have time to do so. Harmonization is a strategy of regulation

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[38] *Id.*

[39] Charnovitz, *supra* note 26, at 137; Langille, *supra* note 36.

[40] *See* Daniel S. Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 32, at 163, 165-75. *See also* Leary, *supra* note 27, at 201-02 (discussing 1995 proposal under consideration at ILO for linking ILO labor standards with the WTO).

[41] *See* Stone, *supra* note 1, at 998-1028 (describing and comparing transnational labor regulation within EU and NAFTA).

that is based on the short-term acceptance of differences in regulatory regimes, and it embodies the assumption that, over time, differences will fade and there will emerge one set of norms, rules, and procedures.

There are presently EC Directives in effect in several areas of labor regulation. In 1975 the EC lawmakers adopted a directive on collective redundancies, also known as dismissals for economic reasons. In 1977 a directive was adopted to protect workers faced with takeovers and other changes in the ownership of their firms. It called for protection of the workers' pre-existing contractual rights and imposed these contractual obligations on the new entity.[42] In 1980 a directive was adopted on insolvencies that requires firms to guarantee payment of workers' outstanding wage claims and benefits prior to the commencement of insolvency proceedings.[43] There have also been directives addressing workplace safety and health[44] and equal treatment for women and men.[45]

In 1992 at Maastricht, eleven of the twelve EU member states concluded an Agreement on Social Policy,[46] which set out a series of issues on which the EU could legislate by majority vote, rather than unanimity, as had previously been required.[47] These areas include health and safety protection, working conditions, workers' information and consultation rights, and equality between men and women. It expressly does not include most collective labor rights, such as pay, the right of association, the right to strike, or the right to impose lockouts, for which unanimous voting was retained.[48]

The 1992 Social Protocol also provided that directives could be implemented through collective bargaining as well as through legislation or administrative regulation. Thus, the actual application of the directives

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[42] Council Directive 77/187, 1977 O.J. (L 61) 26. *See* Case 324/86 Foreningen AF Arbejdsledere v. Daddy's Dance Hall, (1988) E.C.R 739 (holding that employees' rights under acquired rights directive cannot be waived).

[43] Council Directive 80/987, 1980 O.J. (L 283) 23.

[44] *See, e.g.,* Council Directive 92/29, 1992 O.J. (L 113) 19 (addressing minimum safety and health requirements on board vessels); Council Directive 83/447, 1991 O.J. (L 206) 16 (addressing protections for workers from risks associated with asbestos exposure); *see generally* John T. Addison & Stanley Siebert, *Recent Developments in Social Policy in the New European Union*, 48 INDUS. & LAB. REL. REV. 5, 8-13 (1994) (charting out various directives that have passed or whose passage was imminent).

[45] Council Directive 76/207, 1976 O.J. (L39) 40; Council Directive 86/378, 1986 O.J. (L 225) 40.

[46] Treaty on European Union - Agreement on Social Policy, European Social Policy, 1992 O.J. (C191) 91. The United Kingdom refused to accept the agreement. Because amending the EEC Treaty requires unanimity, the Agreement did not amend the Treaty and is not binding on the U.K. Brian Bercusson, *Maastricht: A Fundamental Change in European Labor Law*, 23 INDUS. REL. J. 177, 178 (1992). The Agreement thus constitutes a separate agreement that binds only the 11 member states that subscribed to it. Antonio Lo Faro, *EC Social Policy and 1993: The Dark Side of European Integration?*, 14 COMP. LAB. L.J. 1, 28 (1992).

[47] Bercusson, *supra* note 46.

[48] ROGER BLANPAIN, LABOUR LAW AND INDUSTRIAL RELATIONS OF THE EUROPEAN UNION: MAASTRICHT AND BEYOND 39-40 (1992).

can vary greatly from state to state. In 1991 the European Court of Justice ruled that a member country could be held liable to an individual worker if the country failed to implement a labor protective directive.[49] This decision could lead to a more uniform application and enforcement of directives.

In September 1994 the first directive was issued under the new Social Agreement. It provided for the establishment of European Works Councils or other consultative procedures by all European multinational enterprises.[50] These are workplace-based organizations established for the purpose of consultation and information-sharing, not for the purpose of providing worker representation. A number of multinational corporations have set up transnational works councils whose worker-members communicate about issues of company-wide policy.[51]

The EU's efforts at securing labor rights for workers in the member countries are impressive at first glance, but ultimately quite limited. To date the European Council has not utilized its legislative power to set labor standards on more than a few issues, and it has not attempted to set any uniform rules governing collective bargaining, strikes, and other forms of collective action. One explanation is that EC regulations and directives require multilateral action, and it is difficult to gain the necessary consensus to actually set labor standards. Thus, while the EC's approach could theoretically help equalize labor standards and establish a floor of labor rights, it is not likely to do so in the near future.

There is yet another problem with the EC approach to transnational labor regulation. One of the most important goals of transnational labor regulation is to preserve a role for labor in political life and to protect labor's political clout. The enactment of EC regulations is a process that diminishes the role of labor unions in politics because it takes issues of labor relations out of the reach of the national political processes and places them in multilateral agencies.[52] By definition it moves labor legislation out of the national political arena and into a multilateral arena. At present unions exist in nation-specific environments; they are not major players in transnational decision-making bodies. In the EC Council, votes are cast by country, not by political party or constituency-based group. Yet national unions rarely are powerful enough in their home countries to be empowered to speak for the national interest in an international policy-making setting. And in most countries within the EU, unions' strength at

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[49] Joined Cases C-6/90 and C-9/90, Francovich v. Italian Republic, 1991 E.C.R. I-5357, [1991] 67 C.M.L.R. 66 (1993).

[50] Council Directive 94/45, 1994 O.J. (L254) 64.

[51] Robert Taylor, *Entering into a New Direction*, FIN. TIMES, Apr. 10, 1995, at 11.

[52] This has been called the "democratic deficit" in the European Community. *See, e.g.*, Stephen Gill, *The Emerging World Order and European Change: The Political Economy of European Union*, *in* SOCIALIST REGISTER 1992, at 157, 166 (Ralph Miliband & Leo Pantich eds., 1992).

the national level is in marked decline.[53] Therefore, within the EU there is a danger that the influence of national unions will become diluted and highly mediated.[54]

b. The North American Free Trade Agreement (NAFTA)

NAFTA provides an alternative approach to transnational labor regulation within a trading bloc. NAFTA was signed by the heads of state of Mexico, Canada, and the United States in 1992. In August 1993, before NAFTA was submitted to the U.S. Congress for approval, President Clinton negotiated the Side Accord on Labor Cooperation, known as the North American Agreement on Labor Cooperation (NAALC).[55] He did this in an effort to address concerns about NAFTA raised by organized labor, particularly concerns that NAFTA would cause massive job losses.[56]

Annex 1 of the NAALC contains a detailed list of "guiding principles that the Parties are committed to promote."[57] These principles include a statement of labor rights, including freedom of association, the right to bargain collectively and to strike, prohibition of forced labor, protection for child labor, minimum wages and other employment standards, elimination of discrimination in employment, equal pay for men and women, protection for occupational safety and health, compensation for occupational injuries, and protection of migrant workers.[58] The guiding principles express the aspirations of the drafters of the NAALC that labor rights be protected under NAFTA. However, in contrast to the EU, the NAALC seeks neither to equalize labor standards nor to establish a minimum floor of labor standards or labor rights.[59] Rather, it says that the guiding principles "indicate broad areas of concern where the Parties have devel-

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[53] KATZ & DARBISHIRE, *supra* note 19; Richard Locke & Tom Kochan, *Conclusion: The Transformation of Industrial Relations? A Cross-National Review of the Evidence, in* EMPLOYMENT RELATIONS IN A CHANGING WORLD ECONOMY (Richard Locke et al. eds., 1995).

[54] It has been argued that harmonization directives, unlike EU regulations, are mechanisms that preserve a significant role for labor in national politics. This is because harmonization requires that legislation be enacted at the domestic level to implement directives, and thus it presumes that labor regulations will be adopted, implemented, and interpreted at the level of the nation-state. Consequently, harmonization will enable, indeed require, unions to continue their efforts to influence lawmakers and other decision-makers at the national level. *See* Stone, *supra* note 1, at 1024.

[55] North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499 (1993) [hereinafter NAALC].

[56] For a detailed chronology and analysis of organized labor's opposition to NAFTA, see JEFFERSON COWIE, THE SEARCH FOR A TRANSNATIONAL LABOR DISCOURSE FOR A NORTH AMERICAN ECONOMY: A CRITICAL REVIEW OF U.S. LABOR'S CAMPAIGN AGAINST NAFTA (Duke University Program in Latin American Studies Working Paper No. 13, 1994).

[57] NAALC, *supra* note 55, annex 1, 32 I.L.M. at 1515.

[58] *Id.*, 32 I.L.M. at 1515-16.

[59] *See* Stone, *supra* note 1 (comparing EC labor regulation with NAFTA on basis that the former sets "base-line norms" for labor regulation and the latter does not).

oped, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces."[60]

The NAALC establishes a transnational agency, the Commission for Labor Cooperation, together with a ministerial council and a secretariat, to oversee implementation of the NAALC's provisions. However, in further contrast to the power of the EC institutions, the agencies established by the NAALC have no authority over the actual labor standards of the member countries. The Agreement explicitly says that no country is required to alter its labor standards in any way.[61] Rather, it merely addresses the enforcement of each country's existing labor laws.

The NAALC does provide procedures to ensure that the countries enforce some of their labor laws, culminating in arbitration and the possibility of sanctions. However, not all labor laws have their enforcement safeguarded. Arbitration and sanctions are available only for nonenforcement of a country's laws pertaining to occupational health and safety, child labor, and minimum wages. And even within these three limited areas, the enforcement procedures are drawn-out, cumbersome, and riddled with qualifiers and exceptions. For example, the enforcement procedure calls for sanctions when there is a finding that a party has engaged in a "*persistent* pattern of failure . . . to *effectively* enforce its occupational safety and health, child labor or minimum wage technical labor standards . . . ."[62] In addition, Article 49 carves out an enormous exception to the cross-border enforcement procedure. Article 49 says that a party does not fail to effectively enforce its labor laws if the action or inaction either

> (a) reflects a reasonable exercise of the agency's or the official's discretion with respect to investigatory, prosecutorial, regulatory or compliance matters; or
> (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other labor matters determined to have higher priorities.[63]

There is almost no instance, at least under U.S. labor law, in which government failure to enforce a labor law cannot be said to fall within one of these exceptions.

Thus, the NAALC holds little prospect of equalizing labor standards within North America. Nor is it likely to harmonize or otherwise bring consistency to the vastly different collective bargaining systems that exist within North America. At best it might lead to more vigorous enforcement of each country's own pre-existing labor laws in some limited areas. Yet even in that area, those who have attempted to utilize the NAALC procedures report little but disappointment and frustration.[64]

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[60] NAALC, *supra* note 55, annex 1, 32 I.L.M. at 1515.
[61] *Id.* art. 2, 32 I.L.M. at 1503.
[62] *Id.* art. 36(2)(b), 32 I.L.M. at 1511 (emphasis supplied).
[63] *Id.* art. 49, 32 I.L.M. at 1513.
[64] Clyde Summers, *NAFTA's Labor Side Agreement and International Labor Standards*, 3 J. SMALL & EMERGING BUS. L. 173 (1999).

c. Mercosur

Mercosur, the name for the Common Market of the South, is a trade bloc composed of Argentina, Brazil, Uruguay, and Paraguay, with Chile and Bolivia as associate members. Mercosur began as a customs consortium wherein member states agreed to reduce or eliminate tariffs among themselves and to set common tariffs to the outside world. Its ultimate goal is to create a common market in capital, goods, and labor in Latin America. Unlike the EU, Mercosur does not have independent transnational institutions that legislate and resolve disputes over economic integration. The labor unions in the Mercosur countries have formed a coalition, the Southern Cone Central Labor Coordination (CCSCS), which has attempted to include labor protections in the Mercosur deliberations. They drafted a Social Charter, which includes specific references to the ILO Conventions on freedom of association, rest days, wages, equal pay for men and women, abolition of forced labor, industrial health and safety, and nondiscrimination. So far, the governments and employer groups have blocked efforts to include the unions' proposals in the Mercosur framework.[65]

d. Asian Pacific Economic Cooperation (APEC)

Several countries in Asia have formed the APEC, a loose federation to discuss economic integration amongst some of the Asian countries. Several unions and NGOs have tried to use the APEC meetings as a forum to publicize issues of international labor rights and to argue that economic integration be framed in a way that protects human and labor rights. Because the APEC effort is still in its infancy, it is too soon to know whether the APEC unions will have any success.

3. Unilateral Action to Protect Multilateral Labor Rights

Despite the advent of international and regional trading organizations, it remains to be seen whether international or regional mechanisms are capable of providing a mechanism to protect transnational labor rights. Therefore, it is necessary to consider whether more reliable tools are available in the domestic setting to effectuate transnational labor regulation. Here I want to explore the possibility that unilateral action in the domestic arena of the nation-state can achieve global labor standards. I discuss two types of labor regulation that operate at the domestic level, yet have an impact on global labor standards: extraterritorial application of domestic laws and trade conditionality.

a. Extraterritorial Jurisdiction of Domestic Laws

One way to achieve transnational labor regulation that equalizes labor standards between states, thus eliminating races to the bottom and

[65] For a detailed discussion of Mercosur, see Harvey et al., *supra* note 8, at 15-18.

prisoner's dilemmas, is to apply domestic labor regulation extraterritorially. From an American standpoint, this means applying U.S. labor law to labor disputes that occur beyond U.S. boundaries or to parties who are not U.S. citizens. Extraterritorial jurisdiction has become an increasingly important feature of American labor law. Until recently, U.S. courts applied an almost irrebuttable presumption that American labor law does not apply extraterritorially.[66] However, in the 1990s, U.S. courts and the National Labor Relations Board (NLRB) began to interpret some of the labor relations statutes in ways that give them extraterritorial reach.[67]

These case law developments evidenced a change in the attitudes of courts and agencies about the scope of jurisdiction of U.S. labor laws.[68] But these changes are not always protective of labor rights—extraterritorial jurisdiction is a two-edged sword. The decisions that apply U.S. secondary boycott law extraterritorially are restrictive of workers' rights to engage in collective action, while those that apply bargaining rights to workers overseas promote labor rights and collective bargaining. In 1995 the District of Columbia Circuit reversed a decision of the NLRB to apply the secondary boycott provisions of the NLRB extraterritorially. In *International Longshoremen's Association v. NLRB*, the NLRB had found that the ILA engaged in an unlawful secondary boycott when the union went to Japan and urged Japanese unions to refuse to unload fruit that had been loaded by nonunion workers in the United States. The District of Columbia Circuit reversed because it said that the boycott occurred in Japan by Japanese workers and that the conduct could not give rise to a violation of the NLRA unless the Japanese unions were agents of the ILA, which

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[66] *See, e.g.*, Foley Bros. v. Filardo, 336 U.S. 281 (1949) (refusing to apply the federal eight-hour law to U.S. construction workers working abroad because, the Court stated, in the absence of clear language, it should presume that Congress did not intend the statute to have extraterritorial reach).

[67] *See* NLRB v. Dredge Operators, Inc., 19 F.3d 206 (5th Cir. 1994) (holding that the NLRB had jurisdiction over unfair labor practice charges filed by U.S. nationals who were employed on a U.S. vessel that was operating indefinitely in Hong Kong, and enforcing NLRB's decision that required the shipper-employer to bargain with the union elected to represent the ship's crew); Dowd v. International Longshoremen's Ass'n, 975 F.2d 779 (11th Cir. 1992) (holding that secondary boycott provisions of NLRA apply to American union that requested Japanese unions to exert economic pressure against their own, Japanese employer); *see generally* Stone, *supra* note 1 (describing problems for labor created by the globalization of the world economy and examining models of transnational regulation including the application of domestic labor regulation extraterritorially).

[68] The no-extraterritorial principle has not evaporated in labor law, but its rationale has changed. For example, in *Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.*, the Second Circuit refused to find jurisdiction for a claim arising under section 301 of the Labor Management Relations Act brought by foreign workers against their employer, a foreign subsidiary of an American corporation, stating that to enforce collective agreements between foreign workers and foreign corporations doing work in foreign countries could lead to "embarrassment in foreign affairs." Labor Union of Pico Korea, Ltd. v. Pico Products Inc, 968 F.2d 191, 195 (2d Cir. 1992).

they were not.[69] The outcome expanded union cross-border power and at least arguably aided international labor solidarity.[70]

On two occasions in the past ten years, Congress made certain U.S. labor laws explicitly extraterritorial. In 1984 it amended the Age Discrimination in Employment Act, and in 1991 it amended the Civil Rights Act, making both statutes applicable to U.S. corporations employing U.S. workers and operating overseas.[71] In addition, the Americans with Disabilities Act of 1990 is co-extensive in its extraterritorial application with the Civil Rights Act of 1991, so that it too applies to American corporations operating overseas.[72]

An expansive extraterritoriality principle could enable U.S. courts to impose some protection for minimal labor standards on MNCs operating in a global labor market.[73] However, there are many obstacles, both practical and doctrinal, that make such an approach arduous and unlikely to succeed. Even if there were extraterritorial jurisdiction for U.S. labor standards, workers overseas would have difficulty ensuring that such standards are enforced. Workers abroad are likely to encounter several difficulties in attempting to exercise such rights. First, they have to hire a U.S. lawyer and come to a U.S. court in order to bring a lawsuit. Those workers who are most in need of the protections of U.S. labor standards and who are likely to benefit from extraterritoriality are the most exploited workers in the LDCs: the child garment workers in Vietnam laboring for thirty-five cents per day or the women assembly workers in Bangladesh who earn twelve cents per hour. It is inconceivable that these workers would have the resources or sophistication to vindicate their rights in a U.S. court. To date, most extraterritoriality cases are brought by labor unions, who have the resources and sophistication to do so. However, unless a labor organization or other labor rights organization can establish standing, such a suit cannot be maintained.[74]

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[69] International Longshoremen's Ass'n v. NLRB, 56 F.3d 205 (D.C. Cir. 1995).

[70] Joseph Bonney, *ILA Wins Appeal of Boycott Case*, AM. SHIPPER, Sept. 21, 1995, at 76.

[71] Older Americans Amendments of 1984 to the Age Discrimination in Employment Act of 1967, Pub. L. No. 98-459, 99 Stat. 1767 (1984) (codified in scattered sections of 42 U.S.C.) (age discrimination); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 2 U.S.C.) (civil rights).

[72] Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994).

[73] *See* Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123, 123-25 (1996) (urging courts to expand scope of extraterritoriality in order to protect workers of U.S. firms operating overseas).

[74] In *International Labor Rights Educ. & Research Fund v. Bush*, 954 F.2d 745, 750-52 (D.C. Cir. 1992), 23 labor and human rights organizations sought to enforce the workers' rights provisions of the Generalized System of Preferences Act. The case was ultimately dismissed because the plaintiffs lacked standing. Harvey et al., *supra* note 8, at 227-34.

In an unusual case, *Dow Chemical Co. v. Alfaro*,[75] a group of farmworkers who worked for Standard Fruit Company on its banana plantation in Costa Rica brought suit for injuries they suffered from working with a toxic pesticide. The pesticide had been banned in the United States after it was found to cause neurological damage, birth defects, and sterility, yet it continued to be produced and distributed overseas by its manufacturers, Dow Chemical, Shell Oil Corp., and Occidental Chemical. Costa Rican doctors and toxicologists discovered and diagnosed the illnesses of the Costa Rican workers and referred them to a law firm in Texas. The lawyers brought product liability tort claims against two manufacturers of the product, Dow Chemical and Shell. Dow Chemical, a U.S. corporation with its major establishment in Texas, and Shell, with its world headquarters in Houston, pleaded forum non conveniens and moved to have the case dismissed. The plaintiffs chose to sue in a U.S. court because their maximum recovery in Costa Rica was less than $1,500. After extensive litigation of the procedural issue, the plaintiffs ultimately prevailed, and shortly thereafter the case settled.[76]

The plaintiffs won in the *Alfaro* case because the court held that the Texas legislature had abolished the doctrine of forum non conveniens in 1913.[77] As the concurring judge noted, Texas was then one of a small minority of states where U.S. corporations could be held responsible for the harms they inflict on their workers overseas; in most other states the defense of forum non conveniens is invariably successful in defeating the claims of foreign plaintiffs.[78] In response to the *Alfaro* decision, the Texas legislature amended the Texas Code of Civil Procedure in 1995 to adopt the doctrine of forum non conveniens.[79]

Some commentators criticize all forms of extraterritorial application of U.S. labor laws on the ground that it involves the United States imposing its views on other countries and is therefore comparable to the U.S. invasion of Grenada or the U.S. involvement in the war in Vietnam.[80] However, the situations are far from comparable. The imposition of civil liability is obviously a far cry from military intervention. Furthermore, it is

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[75] Dow Chem. Co. v. Alfaro, 786 S.W.2d 674, 675 (Tex. 1990). For an interesting account of the litigation and the events leading to it, see Harvey et al., *supra* note 8, at 273.

[76] Harvey et al., *supra* note 8, at 278.

[77] *Alfaro*, 786 S.W.2d at 677-78.

[78] *Id.* at 688-94.

[79] TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 1997). *See* Carl Christopher Scherz, Comment, *Section 71.051 of the Texas Civil Practice and Remedies Code—The Texas Legislature's Answer to* Alfaro*: Forum Non Conveniens in Personal Injury and Wrongful Death Litigation*, 46 BAYLOR L. REV. 99 (1994).

[80] *See generally* Christopher Wall, *Human Rights and Economic Sanctions: The New Imperialism*, 22 FORDHAM INT'L L.J. 577, 578-79 (1998) ("While many nations may indeed look to the United States for leadership in forming and implementing their human rights policies, a fundamental difference exists between various states looking toward the U.S. torch for enlightenment and having that torch thrown at them.").

inevitable that one state will impose civil liability on a citizen of another state whenever goods are produced in one country by a firm headquartered or residing in another. Questions of the extraterritorial application of domestic law arise in every setting in which a production relationship crosses national boundaries. In such transnational transactions, at least two countries' laws arguably apply. The issue of which country's law applies can have serious consequences for the parties, and hence it is often a fiercely contested issue. If the host country determines that the substantive law of the foreign country applies, then the host country's rule about choice of law is given effect. If the host country refuses to apply the substantive law of the foreign country, then it is applying its own choice of law rule to reach that result.

The issue of extraterritorial application of domestic law is not necessarily limited to the United States, nor is it necessarily pernicious. For example, European multinationals are often subject to the law of their country of origin when they operate in a foreign environment. Presently, Ireland is becoming the country of choice for European multinational firms to register because they want to be subject to Irish law for works councils. In such cases, Irish law applies to the European-wide works councils that exist in Belgium, Spain, Germany, and so forth.[81] We can expect to see more and more issues of extraterritoriality arise as production becomes more transnational.

While extraterritorial jurisdiction is more common than generally recognized, many nations nonetheless experience such an act as an invasion of their sovereignty. For this reason, extraterritorial application of American commercial law has been a source of great controversy in recent years.[82] Some countries have enacted blocking legislation designed to prevent the application of U.S. law within their territories.[83] Blocking legislation to date has been enacted to prevent U.S. antitrust rules and U.S. procedural rules from applying in foreign fora. But there is reason to believe that extraterritorial application of U.S. labor law will similarly be greeted with hostility by the international community. And blocking legislation can lead to a round of retaliation and escalation, akin to a tariff war, with each nation attempting to keep foreign law out of its borders while imposing its law on others. Thus, extraterritorial jurisdic-

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[81] Padraig Yeates, *Legislation Will Enforce Work Councils*, IRISH TIMES, June 7, 1996, at Supp. 6.

[82] *See* Lea Brilmeyer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, LAW & CONTEMP. PROBS., Summer 1987, at 11 (noting the hostility of other countries to extraterritorial application of the Sherman Antitrust Act); James Michael Zimmerman, *Extraterritorial Application of Federal Labor Laws: Congress's Flawed Extension of the ADEA*, 21 CORNELL INT'L L.J. 103, 120-25 (1988) (describing international reactions to extraterritorial application of U.S. laws).

[83] Carl A. Cira, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247, 253 (1982).

tion is an approach that is destabilizing of international order, even as it offers the promise of protecting global labor standards.

b. Trade Conditionality

Some commentators have suggested that the United States should link access to the global market with adherence to specified minimum labor standards. In fact, such trade conditionality has been a feature of U.S. trade law for a long time. Several U.S. trade laws contain provisions permitting the executive branch to withhold trade privileges from other countries that do not give their workers basic protections, including protection for the right to organize. Of these, the most significant are the 1983 Caribbean Basin Initiative (CBI), the 1984 Amendments to the Generalized System of Preferences (GSP), the Omnibus Trade and Competitiveness Act of 1988 (OTCA), and the Overseas Private Investment Corporation Act of 1985 (OPIC).[84] All of these acts give the U.S. executive branch the power to import labor rights into trade decisions.

The trade conditionality provisions in U.S. trade laws have been utilized from time to time by U.S. Presidents and by other executive agencies that regulate trade. For example, in 1987 President Reagan, acting pursuant to the 1984 amendments to the GSP, denied trade preferences to Nicaragua, Paraguay, and Romania on the basis of their alleged labor rights violations. Also in 1987, the Overseas Private Investment Corporation withdrew insurance coverage from projects in Nicaragua, Paraguay, Romania, and Ethiopia for their failure to adopt internationally recognized worker rights.[85] In keeping with the spirit of these laws, Congress recently enacted the Assistance for Mauritania Act of 1996, which prohibits the President from providing any economic or military assistance to the government of Mauritania until Mauritania enacts and enforces antislavery laws.[86]

One virtue of trade conditionality is that it can promote uniformity of labor standards without requiring international consensus. This can work, however, only if trade conditionality is imposed in a consistent and uniform fashion. To date this has not been the experience. Rather, the

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[84] For a description of each of these measures and others that preceded them, see Steve Charnovitz, *Fair Labor Standards and International Trade*, 20 J. WORLD TRADE L. 61 (1986); Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 125 INT'L LAB. REV. 565 (1987). *See also* Ian C. Ballon, *The Implications of Making the Denial of Internationally Recognized Worker Rights Actionable Under Section 301 of the Trade Act of 1974*, 28 VA. J. INT'L L. 73 (1987) (examining the proposed amendments to section 301 authorizing the President to unilaterally act against countries that deny their citizens internationally recognized workers' rights); Thomas Howard, *Free Trade Between the United States and Mexico: Minimizing the Adverse Effects on American Workers*, 18 WM. MITCHELL L. REV. 507, 518-22 (1992) (detailing the workers' rights provisions in the CBI, GSP, OPIC, and OTCA).

[85] Charnovitz, *Influence of International Labour Standards*, *supra* note 84, at 573-74.

[86] Human Rights, Refugee, and Other Foreign Relations Provisions Act of 1996 § 202, Pub. L. No. 104-319, 110 Stat. 3864 (1996).

U.S. labor rights provisions in trade laws vest a great deal of discretion in the President and U.S. Trade Representative to decide when and which workers' rights violations to address, discretion which they exercise to further their own political agenda. For example, the Reagan and Bush administrations were not at all receptive to requests that trade preferences be revoked for workers' rights violations. In 1988, when the AFL-CIO filed a petition alleging serious violations of rights of association and collective bargaining and the use of forced labor in Malaysia, the Bush administration's GSP subcommittee refused to revoke the GSP status on the grounds that Malaysia was "taking steps" to improve its practices. Two years later, when the labor federation brought a new petition documenting continuing violations of the same types, the GSP subcommittee refused to entertain the petitions on the ground that they had been previously reviewed.[87]

In 1990 several human rights and labor organizations brought a lawsuit to challenge the Bush administration's failure to implement the workers' rights provisions of the GSP legislation.[88] The case was dismissed by the district court for lack of jurisdiction. A divided panel of the court of appeals affirmed, with one judge ruling that the court lacked jurisdiction and another that the plaintiffs lacked standing to sue. Judge Mikva, in dissent, argued that the GSP system should be amenable to judicial review and that the labor organizations bringing the suit were appropriate plaintiffs to seek it. Despite Judge Mikva's admonishments, the outcome established that presidential decisions concerning GSP labor provisions are not amenable to judicial review.[89]

In addition to the problem of erratic and arbitrary application, trade conditionality has certain other drawbacks. First, while trade conditionality can set a floor for labor standards, it can only do so on a piecemeal basis. It cannot provide systematic application of an entire regulatory regime. Thus, it is a model of regulation that has only limited ability to deter labor standards races to the bottom or regulatory competition.

Furthermore, as Philip Alston has argued, trade conditionality is an approach to transnational labor regulation that is inconsistent with a commitment to internationalism. Trade conditionality is not integrative in its aspirations; it does not contribute to the formulation of shared norms and uniform standards between nations. When the United States penalizes another country for refusing to apply minimal labor standards, the United States is applying norms that it has developed unilaterally, not norms that have the sanction and legitimacy that would attach if they had been crafted in a multilateral forum. Indeed, some of the labor standards

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[87] Harvey et al., *supra* note 8, at 227, 230-31.

[88] International Labor Rights Educ. & Research Fund v. Bush, 954 F.2d 745 (D.C. Cir. 1992).

[89] *Id.* at 756 (Mikva, J., dissenting). See Harvey et al., *supra* note 8, for a detailed discussion of the legal issues in the case.

that the U.S. trade legislation purports to apply are embodied in ILO conventions that the United States itself has not ratified.

Critics of trade conditionality also point out that the labor rights that are embodied in these initiatives are ridden with ambiguous provisions and thus invite manipulation by the U.S. government for political ends.[90] The GSP legislation permits the U.S. government to revoke preferences for a country that "has not taken or is not taking steps to afford [its workers] internationally recognized worker rights . . . ."[91] The CBI calls for the President to take into account the extent to which the workers have "reasonable workplace conditions and enjoy the right to organize and bargain collectively . . . ."[92] The OPIC requires participating countries to take "steps to adopt and implement laws that extend internationally recognized worker rights" to its workers.[93] And the OTCA calls the denial of internationally recognized workers' rights an unreasonable trade practice, subject to trade sanctions.[94] The vagaries of these provisions permit the U.S. government to invoke the trade sanctions when it has other political agendas. For example, the Reagan administration utilized the GSP labor conditions to terminate trade privileges for Nicaragua, Romania, Ethiopia, Chile, and Paraguay, at the same time that it refused to do so for El Salvador, Guatemala, Haiti, Singapore, Suriname, and Gambia.[95] Thus, it appears that to date, trade conditionality has been utilized not to protect labor standards, but to further other foreign policy goals. Some have criticized the U.S. government's use of trade conditionality as another example of U.S. arrogance in dealing with LDCs.[96]

While trade conditionality, as presently structured, is subject to serious objections, most of the objections could be cured. There could be trade laws that *require* the U.S. government to remove trade preferences for countries that do not live up to certain specified labor standards. Furthermore, the legislation could incorporate those labor standards deemed to be core labor standards by the ILO. Indeed, the U.S. Trade Representative could utilize ILO fact-finding to determine which countries fail to comply.[97] In such events, trade conditionality would provide a reasonably effective mechanism for enforcing multilateral goals.

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[90] Philip Alston, *Labor Rights Provisions in U.S. Trade Law–Aggressive Unilateralism, in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 32, at 81-82.

[91] 19 U.S.C. § 2462(b)(2)(G) (Supp. III 1997).

[92] 19 U.S.C.A. § 2702(c)(8) (1990).

[93] 22 U.S.C. § 2191a(a)(1) (1994).

[94] 19 U.S.C. §§ 2901(b)(14), 2903(a)(2)(B)(i) (1994).

[95] Alston, *supra* note 90, at 71, 82.

[96] *Id.* at 87.

[97] In one recent case an international labor group attempted to utilize ILO findings of labor law violations in Romania as an argument for denying it GSP status. So far, however, the U.S. GSP Subcommittee has refused to give such weight to ILO conclusions on labor law violations. Larry Bush, *Romanian Regulation of Trade Unions and Collective Bargaining*, 32 CORNELL INT'L L.J. — (forthcoming 1999).

The United States is not the only nation to use trade conditionality to impose its notion of fair labor standards on foreign countries. In May 1998 the EC adopted a regulation that parallels the U.S. system of GSPs and other forms of trade conditionality for labor standards. EC Regulation Number 1154/98 allows the EU to give tariff reductions to developing countries upon written proof that the recipient country applies legislation that embodies the substance of ILO conventions on the right to organize, to bargain collectively, and to protect child labor.[98] Thus the EU offers preferred trade status to those countries that protect certain labor rights. This form of trade conditionality offers trade advantages for those countries that comply with certain international core labor standards. The U.S. legislation permits the United States to withdraw privileges from countries that fail to comply. It is too soon to know which approach is more likely to be effective, but we have seen that to date, the U.S. approach has not yielded much result.

This section has examined hard law approaches to transnational labor regulation and found that there are serious impediments to using the regulatory capacity of either the nation-state or existing international agencies to achieve global labor rights. Political opposition from the developing countries has prevented international organizations from providing meaningful protection for labor. Within the United States, opposition by U.S. employers and their political allies has rendered unilateral mechanisms ineffective. Regional trade blocs have had mixed success in protecting labor rights, with the EU actively pursuing some social policies, while the NAALC has given only lip service to social goals. This finding is not surprising: the EU is comprised of social democratic countries in which the labor movements have played major roles in government. However, if the European unions' role diminishes as a result of the worldwide trends in membership decline, as well as the shift in political power away from the nation-state, then the EU may cease to offer labor much protection within its regional labor market.

B. Soft Regulation

Because it is difficult to achieve labor standards by means of hard regulation at an international, regional, or domestic level, it is useful to explore the prospects for a soft regulation regime. Soft regulation refers to a regulatory regime that is comprised of an interwoven network of private sector actors and voluntary associations acting within the context of market forces to establish and enforce rules of conduct. In the area of labor rights, one would look to labor activists, trade unionists, enlightened firm managers, academics, and progressive political leaders to fashion such a regime. This approach suggests that regulation can arise without emanating from the state or from state-like institutions.

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[98] Council Regulation No. 1154/98 (May 25, 1998).

1. Legal Pluralism

One approach to soft regulation is known as legal pluralism. Harry Arthurs, one of the prominent theorists of legal pluralism, posits:

> If the WTO were to dissolve, . . . if transnational corporations were all to settle into the congenial domesticity of social markets, this would not mean the end of globalization. We would still be deeply implicated in a global system driven not only by trade and economics, but also by transnational social and cultural, intellectual and ideological forces—what I refer to as 'globalization of the mind.'[99]

If globalization occurs in the mind, then, legal pluralists suggest, regulatory structures might reside there too. Professor Arthurs posits that norms of corporate conduct transcend or operate apart from hard regulatory regimes and impose their own powerful constraints on corporate actors.[100]

The legal pluralists propose that a system for the protection of labor standards will emerge not from official enactment or parliamentary promulgation, but from decentralized behaviors generating norms of conduct with informal sanctions for their breach. They propose that such a regulatory system is in fact forming, even if it has not yet achieved a juridical embodiment.[101] For example, Professor Arthurs argues that U.S. and European lawyers in transnational law firms who deal with transnational firms and banks serve to disseminate norms of conduct that are taking root in cultures far removed from their Western points of origin.[102]

There is some additional evidence to support the legal pluralist view. For example, some multinational firms apply American industrial relations practices in their foreign subsidiaries, practices which include providing nondiscrimination assurances, rest periods, sanitary conditions, and even U.S.-style internal grievance procedures.[103] They do so, reportedly, not out of legal compulsion or humanitarianism, but to gain the benefits of company-wide uniform human resource policies. If all multinational firms were to adopt such an approach—and impose it on their suppliers and subcontractors—then globalization might not be a threat to labor either at home or abroad. But this is a big "if."

Legal pluralism may be more useful as a description of observed phenomena than as a prescription for social policy. It provides a means to understand rule-like conduct by social actors, even when it is not in their self-interest to comply with such rules and even when the rules carry no

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[99] Harry Arthurs, *Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields*, 12 CAN. J.L. & SOC'Y 219, 222 (1997).

[100] *Id.* at 219.

[101] *Id.* at 220.

[102] *Id.* at 237.

[103] Eugene B. Mihaly, *Multinational Companies and Wages in Low-Income Countries*, 3 J. SMALL & EMERGING BUS. L. 1 (1999).

formal sanctions.[104] However, it has not yet been demonstrated how legal pluralism can provide a reliable method to protect labor standards in the face of a global labor market. The argument assumes the existence of a humanistic corporate culture as well a mechanism to disseminate norms and impose sanctions. While such a culture and mechanism may result from the spread of global capital and their global lawyers advising them,[105] it is not the only, the necessary, or even the most plausible result.

2. Exposé Strategies and Codes of Conduct

Lacking a universally humanistic corporate culture, we need to consider whether there are other ways in which nonstate actors can effectively impose global labor standards. One of the most effective strategies to change the labor practices of MNCs has been exposé campaigns waged by human rights NGOs. By waging publicity campaigns against MNCs that engage in egregious labor practices abroad, human rights and labor rights groups often have been successful at improving labor conditions in the absence of a regulatory structure. For example, in 1995 labor rights groups publicized the sweatshop conditions in Kathie Lee Gifford factories in Honduras and New York. The publicity cited instances of Kathie Lee Gifford workers being assaulted, sexually abused on the job, denied the right to use the bathroom, and forced to work long hours, while earning pennies a day to produce expensive designer garments. The media campaign threatened to seriously damage the corporation's image with the U.S. buying public. As a result, Kathie Lee Gifford cried and expressed remorse on national television and promised to improve the company's labor standards.

In 1997 Gifford joined with two hundred other industry executives at an apparel industry meeting convened by U.S. Secretary of Labor Robert Reich. The meeting produced an organization, the Apparel Industry Partnership to End Sweatshop Practices, composed of representatives of unions, manufacturers, NGOs, and government, who together drafted a code of conduct for the industry. The Partnership's Code of Conduct commits the signatory firms to eliminate forced labor; refuse to employ children under the age of fourteen; protect against harassment, abuse, and discrimination; provide a safe and healthy workplace; recognize freedom of association and collective bargaining; pay wages at the level of the local minimum wage; provide legally mandated benefits; and limit excessive overtime.[106] The Code also provided for outside monitors. After participating for two years in the drafting of the Code, the AFL-CIO and its affiliated apparel unions refused to endorse it on the grounds that it did

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[104] *See, e.g.*, B. DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995).

[105] Arthurs, *supra* note 99, at 237.

[106] *Report of Apparel Industry Partnership* (visited May 27, 1999) <http://www.dol.gov/dol/esa/public/nosweat/partnership/report.htm>.

not guarantee a living wage or include an effective mechanism for monitoring.[107] However, the International Labor Rights Fund, an NGO that was involved in the drafting, voted to endorse the Partnership's efforts.

Similar exposé campaigns have been conducted against the Gap, Nike, Banana Republic, and other well-known U.S. labels, dramatizing their substandard labor conditions and the use of child labor in their overseas factories. Exposé strategies usually attempt to induce the target firms to adopt a code of conduct, committing the corporation to maintain certain specified labor standards.

In 1998 the U.S. Department of Labor reported that numerous U.S. companies as diverse as Gillette, Polaroid, Starbucks, Sara Lee, Hallmark, Home Depot, Honeywell, JC Penny, Wal-Mart, Sears, and dozens of others had adopted codes of conduct to apply in their overseas as well as their domestic operations. In the garment and apparel industry alone, it found over thirty-five such codes in prominent brand-name companies such as Nike, Levi Strauss, Van-Heusen, Liz Claiborne, the Gap, and others.[108] Many of these were instituted in response to media exposés of substandard labor conditions.

The Reebok code demonstrates that achieving a code is not sufficient to ensure adequate labor standards. Reebok Corporation is a company that built its reputation on sponsoring human rights causes. In addition to establishing a Reebok Foundation to support human rights causes, Reebok adopted a code of conduct for its workers. The Reebok Human Rights Production Standards commits the company and its subsidiaries to prohibit discrimination, forced labor, and child labor and to provide freedom of association, fair wages, and a safe and healthy working environment. While the Reebok code also commits the company to seek business partners that share its labor rights commitments, the company has come under attack for utilizing suppliers in Indonesia, where unions are brutally suppressed.[109]

Exposé strategies work by appealing to the conscience and sense of outrage of middle class consumers in the North. The campaigns seek to provoke enough outrage and disgust to shame consumers out of their buying habits. They have been criticized for being arbitrary because they are effective only when directed at goods that are end products with brand-name identification.[110] While consumers are willing to boycott

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[107] Steven Greenhouse, *Two More Unions Reject Agreement for Curtailing Sweatshops*, N.Y. TIMES, Nov. 19, 1998, at A15.

[108] U.S. Dept. of Labor, *Codes of Conduct in the U.S. Apparel Industry* (visited May 27, 1999) <http://www.dol.gov/dol/ilab/public/media/reports/apparel/2b.htm>.

[109] Lance A. Compa & Tashia H. Darricarrere, *Private Labor Rights Enforcement Through Corporate Codes of Conduct, in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 32, at 181, 191-93.

[110] Langille, *supra* note 36, at 37-38.

Reebok or Banana Republic, they are less willing or able to boycott an obscure brand of machine tools.[111]

Sometimes the exposé strategies can overcome the lack of a brand name by targeting an entire industry and developing an industry label. For example, in Europe a successful campaign against the use of child labor in Indian and Pakistani rug factories led to the RUGMARK, a symbol that appears on rugs that are produced without child labor. The RUGMARK is well known in Europe and has been an effective mechanism for mobilizing consumer outrage to change labor standards.[112] A similar program conducted by the Soccer Industry Council of America is attempting to protest soccer balls made with child labor and to provide a label for balls made under fair conditions.[113] The garment industry is attempting to affix "No Sweat" labels to goods that are not made under sweatshop conditions.

These labor standards seals of approval are another potentially effective way to harness the buying power of the consuming public around labor standards. Together with exposé strategies, they promise to be a powerful means of effectuating global labor standards. However, as noted, they are limited to consumer products that have identifiable trademarks or to those goods whose producers can easily be identified. Furthermore, the codes of conduct and the seals of approval require monitoring. It would undermine the entire endeavor if companies could claim to abide by a code of conduct or acquire the use of a "No Sweat" label, yet continue to engage in substandard labor practices.

Some have argued that social labeling and codes of conduct are impossible to monitor. Most firms subject to industry-wide codes and labeling programs rely on subcontractors and sub-subcontractors for their production. For example, Richard Freeman reports that "Sears [Roebuck] gets its goods from 10,000 companies worldwide, many of which hire subcontractors and all of which buy goods from other firms. How is Sears to guarantee that the products it sells are made under acceptable labour standards?"[114] Apart from whether Sears can make such a guarantee, the subcontracting companies are far-flung and often nameless entities, impervious to meaningful efforts at monitoring.[115]

While all concerned recognize the importance and difficulty of monitoring, a debate has developed over who should do the monitoring. Most human rights and labor groups insist on monitoring by outsiders, usually by NGOs like themselves. Some companies insist on self-monitoring and

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[111] OECD STUDY, *supra* note 24 (reporting that such social labeling practices are effective only for products that are exported and purchased directly by consumers).

[112] Candland, *supra* note 27, at 11.

[113] Justin Boyd, *Soccer Industry Works to Stop Child Labor*, RUBBER & PLASTICS NEWS, Sept. 21, 1998, at 14, *available in* 1998 WL 8648233.

[114] Richard Freeman, International Labour Standards and World Trade 92 (unpublished manuscript, on file with author).

[115] Langille, *supra* note 36, at 35-37.

are opposed to giving outsiders access to their facilities for that purpose. Traditional labor organizations contend that they are the appropriate candidates to do the monitoring because they possess the necessary expertise to determine whether labor conditions are substandard or acceptable. The Apparel Industry Partnership calls on companies to self-monitor to identify instances of noncompliance and to work with company personnel as well as contractors and suppliers to remedy them. The Partnership has been criticized on this account.[116] The monitoring issue has become the focus of much controversy in the area, and the issue is far from settled.

Another problem with the codes of conduct approach to labor standards is that typically when companies bind themselves to abide by a code, they do not bind their subcontractors. The apparel industry relies almost exclusively on subcontractors overseas, and the codes are not usually able to compel compliance by those firms.[117]

Some have criticized the exposé approach on the grounds that the NGOs and the media who conduct the campaigns have little connection with the workers whose conditions they are protesting and are not accountable to them. Thus, their efforts usually do not lead to the formation of local unions or other local organizations that can actually empower the workers in the long run.[118] In addition, sometimes the campaigns do more harm than good. For example, in 1996 the National Labor Committee decided to protest the low wages and horrendous living conditions of workers for the Walt Disney Company in Haiti. After the labor committee delivered its threat to Disney Company CEO Michael Eisner, the company decided to leave Haiti altogether, leaving the workers worse off than before.[119] The NGO that engaged in the project stood to gain if the campaign succeeded, but it did not share in the risks.

Despite its shortcomings, the exposé approach has proved to be a remarkably successful form of intervention in the global labor market. The campaigns have also illuminated an important dimension of modern production—that many multinational companies are extremely sensitive to the public image of their brand names. It is the vulnerability of the brand name that makes these campaigns possible.

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[116] The Partnership Code also permits, but does not require, companies that lack the resources for internal monitoring programs to utilize external monitors. For a critique of the monitoring aspect of the Partnership Code, see Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111, 144 (1998).

[117] Anner, *supra* note 20, at 6-7.

[118] *Id.* at 12-15. Anner argues that the successful campaigns are those in which Northern NGOs form an alliance with a group of workers in an LDC.

[119] *Id.* at 18.

III. BETWEEN HARD AND SOFT: NEW FORMS OF REGULATION TO PROTECT GLOBAL LABOR STANDARDS

In an effort to define a space between hard and soft regulation, David Trubek and Jeffrey Rothstein have argued for a transnational vision of labor regulation that relies on multiple actors, utilizing multiple legal and political arenas, to generate a regulatory regime protective of labor rights. They present several case studies in which multiple actors mobilize support amongst different groups and bring pressure to bear in multiple arenas to articulate and police global labor standards. Trubek and Rothstein demonstrate that such an approach, in which labor, NGOs, governments, and other actors mobilize around legal rules as well as private norms, can affect behavior across borders.[120]

In the spirit of the Trubek and Rothstein effort to transcend the hard-soft dichotomy, I will make some proposals that draw on the lessons of both hard and soft regulation. These proposals are for regulations that do not reach labor standards directly, but attempt to reshape the regulatory framework for voluntary action. These are proposals to rewrite the rules of economic life in a way that embeds voluntary efforts in a protective regulatory framework. At the same time, they are proposals for regulations that can provide pressure points around which local activists can mobilize.

A. *Codes of Conduct with Teeth*

Although corporate codes of conduct are ad hoc and arbitrary in nature and although there are troublesome problems of accountability by their NGO sponsors, it is possible to imagine a system of regulation that builds on the lessons of the corporate codes of conduct and yet brings them into the public domain. For example, U.S. common law courts could construe the codes of conduct as contracts and make them enforceable. Some state courts have taken this approach to company handbooks in the past two decades, thereby treating promises of job security contained in company handbooks as enforceable obligations.[121] If this approach were transposed to the multinational arena, companies would be obligated to comply with their own codes, and their workers would have standing to sue in U.S. courts if they did not comply.

Such an approach would still present problems for low-wage overseas workers who might have difficulty finding U.S. lawyers to take their cases, and such cases would be subject to the venue and jurisdictional defenses discussed above in the *Alfaro* case. However, it might be possible to overcome jurisdictional and forum non conveniens objections to such suits by

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[120] David M. Trubek et al., Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks (unpublished manuscript presented to Labor and Global Economy Research Circle, The International Institute, University of Wisconsin – Madison, Jan. 1999, on file with author).

[121] *See, e.g.*, Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 445 (N.Y. 1982).

designing a corporate code with an outside monitor with the power to sue on behalf of the affected workers to enforce provisions of the code. Another solution might be for a transnational labor organization to seek to establish standing to enforce a company-wide or industry-wide code. Alternatively, the corporate codes could themselves state that the corporation will not raise a forum non conveniens objection if suit is initiated in a U.S. court.

B. Truth in Social Labeling

Another approach would be for common law courts to provide for protection against false use of social labels. Companies who falsely use no-sweat or child-free labels should be liable for fraud, and consumer groups or labor organizations should have standing to sue. Alternatively, the Federal Trade Commission could enforce the integrity of such product claims, as it polices against other fraudulent product claims.

C. Extending Labor Protections Through the Law

Using common law courts to enforce corporate codes of conduct and to police social labels has the potential to protect labor standards in companies that have agreed to be bound by a code of conduct or display a no-sweat label. Furthermore, it is an approach to transnational labor regulation that does not require multilateral agreement at the outset. However, the approach still suffers from arbitrariness: it does not reach companies that do not agree to adopt codes or utilize labels.

To address the problem of arbitrariness, we might take a lesson from European collective bargaining extension laws that extend collectively bargained terms to an entire industry.[122] Extension laws could be framed to provide that when a certain percentage of an industry's firms has agreed to a code of conduct or a social label, then the code's provisions apply to all other firms in the industry. However, using extension laws to extend the scope of codes of conduct and social labeling poses a further problem of legitimacy and potential collusive behavior that must also be confronted. The dangers are that the firms in an industry might decide amongst themselves to adopt a lenient code or that the firms would find a pro-industry NGO to ally with. To prevent such a result, extension must be conditioned upon participation by a bona fide labor organization in the drafting of the code or the conditions of the label. European extension laws provide that only terms bargained by bona fide labor unions are eligible for extension. Similarly, a law authorizing extension of corporate codes of conduct when the affected unions participated in their drafting would prevent corporations from engaging in collusive and anticompetitive practices. Extension could also be premised upon government

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[122] *See, e.g.*, Xavier Blanc-Jouvan, *Worker Involvement in Management Decisions in France*, 58 TUL. L. REV. 1332, 1340 n.23 (1984) (explaining extension laws in France); MANFRED WEISS, LABOR LAW AND INDUSTRIAL RELATIONS IN THE FEDERAL REPUBLIC OF GERMANY (1987) (explaining extensions laws in Germany).

approval of the terms of the code so that there would be public oversight to protect consumers who might be adversely affected by an overly stringent code.

D. Trademark Conditionality

Another approach to transnational labor regulation is to couple labor rights with intellectual property rights. In today's world much global production takes place between MNCs and subcontractors.[123] Theorists describe this form of production as global commodity chains.[124] For example, Gary Gereffi has demonstrated that in today's world, large retailers and brand-named merchandisers establish networks of subcontractors who produce their products in the Third World.[125] Production is diffuse and decentralized. Typically the brand name business does not own the overseas facility, hire the labor, or supply the raw materials. Rather, the MNCs design the product, then subdivide the tasks and subcontract each task to firms in the Third World. The subcontractors themselves often further subdivide and subcontract to thousands of nameless, invisible suppliers. After the composite parts are assembled, often by another specialty subcontractor, the MNC affixes its brand name on the product and then markets it to consumers. While all the constituent suppliers are paid all along the chain, the lion's share of the profit accrues to the MNC.[126]

Commodity chain production gives MNCs high profits as a result of the combination of high consumer prices for the finished good and low-cost production. To reap these profits, the MNCs provide product design, organizational acumen, legal knowledge, and a trademark. Of these MNC inputs, the trademark is beyond doubt the most important source of value. Without trademark protection, others could easily enter the field, copy the product, hire their own subcontractors, and compete away the super-profits. For example, an entire empire has been built upon the image of Mickey Mouse. Millions of dollars are spent by consumers every day on commonplace items such as tee-shirts, mugs, and pens that have a picture of Mickey affixed, for an enhanced price. There is nothing particularly artistic or difficult about the mouse's image itself—most children by the age of seven have learned to draw Mickey. The Disney products' value comes not from the uniqueness of the image, but from the trademark that prevents others from copying it. The alligator on the Izod shirt and the check-mark on the Nike shoes are similarly multimillion dollar stick figures.

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[123] Cecelia Green, *At the Junction of the Global and the Local: Transnational Industry and Women Workers in the Caribbean, in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 32, at 118, 120.

[124] Gary Gereffi, *The Organization of Buyer-Driven Global Commodity Chains: How U.S. Retailers Shape Overseas Production Networks, in* COMMODITY CHAINS AND GLOBAL CAPITALISM 95 (Gary Gereffi & Miguel Korzeniewicz eds., 1994).

[125] *Id.*

[126] *Id.* at 99.

Firms that rely on protected imagery or on a well-known brand name such as Home Depot or Banana Republic are able to profit from global production arrangements because they can affix a protected trademark to the product, no matter who produced the good or under what conditions. Yet the trademarks are protected by the international trading system. Given the dependency of MNCs on the international trading system for protection of their trademarks, it might not be too far-fetched to try to link the right to trademark protection to the labor standards under which the goods are produced. That is, we might redefine the issue of international regulation of labor standards as an aspect of international protection for intellectual property. One method might be to permit parties to challenge a firm's entitlement to trademark on the basis of the poor labor standards the firm employs. Or we might require a party seeking to gain intellectual property rights to demonstrate that it meets some minimum level of labor standards in its facilities. While labor issues may seem irrelevant to intellectual property concerns, we must remember that property is a "bundle of rights," and it is a legitimate matter of social policy to determine what is in the bundle. To grant intellectual property protection in today's world is to give the grantee the right to produce in the global marketplace. It would not be unreasonable for the state to condition that protection with an obligation to produce under fair conditions in the global labor market.

IV. CONCLUSION

In the emerging global labor and capital markets, there is reason for alarm. While multinational firms stand to flourish and some consumers to benefit from increased trade, direct foreign investment, and factor mobility, many workers are likely to be the losers. The need to achieve and protect labor standards in the globalized economy has become one of the most pressing problems of the day. Without some protection for labor, the New World Order that emerges from the newly restructured world trading system is likely to produce wide gaps between rich and poor and to be perceived as fundamentally unjust. And injustice engenders disruptions, instability, and violence. Thus, the problem of labor in the emerging global marketplace is not an isolated problem of a special interest group: It is a problem that is potentially disruptive of the social fabric. Therefore, it is important for legal scholars, perched on the threshold of the next century, to take seriously the challenge of constructing rules for the world trading system that provide social justice as well as efficiencies and wealth. This Article has analyzed existing attempts to build labor rights into the global marketplace and proposed some new ideas for consideration. Given the multiple constraints and competing interests at stake, the task is complex, with no easy path to success, many dead-ends, and many prospects for failure. But like travelers high on a mountain pass on the Yukon Trail, we have no choice but to keep moving ahead.