

## MAKING GLOBALISM WORK FOR EMPLOYEES

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### INTRODUCTION

It is perhaps a cliché to describe globalism as a monumental development in the world economy. Yet, at least with regard to the workplace, the cliché holds true. The ability of many businesses to produce goods and sell them virtually anywhere in the world has put enormous competitive pressure on employers. This pressure, in turn, extends to workers, as they also face competition from nearly every corner of the world.

The increase in global competition has pushed employers to search for ways to cut labor costs—a strategy made easier by the increased availability of lower-cost foreign labor. Many workers, therefore, have seen their compensation and work conditions deteriorate or have simply lost their jobs altogether. Moreover, workers' ability to fight these changes and pressure employers for better conditions has been undermined by the same global competition that has led employers to cut labor costs. Demands for better wages and other benefits are often ineffective, as employers know that they can eventually move their production elsewhere.

The combination of employers' increased need for lower labor costs and the decreased effectiveness of employee pressure aimed at improving workplace conditions has meant that for many of today's workers, globalism has been a disaster. Worker advocates have attempted to address the problems faced by these workers, but there are significant limits to what they can achieve. Traditional collective action—usually in the form of trade unionism—has rapidly waned over the past few decades, and even where unions are still active, their influence is often a shadow of what it once was. Into this void have entered several other strategies intended to gain benefits for workers, although substantial success has thus far been lacking.

The different forms of collective action that have arisen in the face of globalism reflect the problems currently faced by workers. These strategies include cooperation and coordination among foreign employee groups,

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pressure on employers to adopt codes of conduct or other voluntary labor standards agreements, new types of employee groups that focus on the needs of workers in the global economy, and government action intended to protect workers affected by global competition.<sup>1</sup> All of these strategies involve attempts to reach across borders in much the same way that business has. There have been some successes, but they are often isolated and have yet to stem the negative effects of globalism on workers. Despite this discouraging situation, there remains some hope for workers, largely in the possibility that governments will begin to take worker rights seriously. Government pressure, in addition to resourceful uses of the other strategies, could provide real benefits for workers. That outcome is far from certain, or even likely, but it remains one of the few hopes for workers as long as globalism's competitive pressures still exist.

Part I of this article discusses globalism's effect on workers and their ability to pressure employers for better working conditions. Part II explores various collective action strategies and their effectiveness in the global economy. Finally, Part III argues that the main hope for workers is a multifaceted approach to collective action, combined with governments' providing domestic legal protections for such action and pressuring other countries to support basic labor standards. These strategies would not be guaranteed to succeed, yet without them, workers would almost certainly continue to suffer under globalism.

## I. THE GLOBAL MARKET FOR LABOR AND ITS EFFECT ON WORKERS

### A. *The Global Economy*

It is difficult to overstate the impact that globalism has had on the world economy, including demand for and supply of labor. Although globalism has not fully reached all countries and industries, where it has taken hold, it has had a transformative effect. The changes accompanying globalism have produced many gains, such as increasing the availability of goods and making those goods much cheaper. Not all effects of globalism are positive, however. For many workers, globalism has produced far more costs than benefits.

Much of globalism's rise can be attributed to technological advances that have made communication and transportation far more effective and inexpensive.<sup>2</sup> The increased ability of companies to transmit information

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1. The terms "employee" and "worker" will be used interchangeably, although they can have significant differences under the law. See *infra* note 151 and accompanying text.

2. Bruno Caruso, *Changes in the Workplace and the Dialogue of Labor Scholars in the "Global Village,"* 28 COMP. LAB. L. & POL'Y J. 501, 520–21 (2007) (citing RICHARD SENNET, *CULTURE OF THE NEW CAPITALISM* (2006)); Katherine V.W. Stone, *A New Labor Law for a New World of Work: The Case for a Comparative-Transnational Approach*, 28 COMP. LAB. L. &

instantly and to ship goods easily across most of the world has made the idea of a local competitive market quaint. For companies that do not face significant geographic limitations, the world is their competitive market. They must compete against businesses from numerous countries, all of which can supply their goods to the same markets. In turn, businesses can expand their own chains of production. Whether by contracting work to foreign producers or simply hiring workers in other countries, many businesses have become truly global in scale.<sup>3</sup>

The expansion of business opportunities around the world has meant that workers face a global market as well.<sup>4</sup> Competition for jobs is no longer limited by geography, especially in the long run. As long as businesses can expand or subcontract operations to different countries, workers from those countries will be competing against each other for jobs. The result is a dramatic growth in the global supply of labor.<sup>5</sup> One example of this effect is the dramatic increase in outsourcing—that is, the shift of jobs from one, generally high-wage country to another generally low-wage country—which has resulted in the transfer of millions of jobs.<sup>6</sup>

This increase in labor supply has had a negative effect on workers, as it has placed downward pressure on wages and made workers' attempts to obtain better work conditions more difficult.<sup>7</sup> The rise in labor supply occurred in

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POL'Y J. 565, 571 (2007) [hereinafter Stone, *A New Labor Law*]; U.S. GEN. ACCOUNTING OFFICE, GAO-04-845SP, WORKFORCE CHALLENGES AND OPPORTUNITIES FOR THE 21ST CENTURY: CHANGING LABOR FORCE DYNAMICS AND THE ROLE OF GOVERNMENT POLICIES 6 (2004), available at <http://www.gao.gov/new.items/d04845sp.pdf>.

3. Kenneth Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 913 (2007); KATHERINE V.W. STONE, WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 289 (2004) (describing how globalism has helped to change the employment relationship).

4. See Stone, *A New Labor Law*, *supra* note 2, at 571 (describing globalism's impact on the workplace).

5. One estimate is that the world labor supply nearly doubled in the 1990s due to the rise of globalism. See Dau-Schmidt, *supra* note 3, at 914 (noting rise to 6 billion workers from 3.3 billion).

6. See George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 NOTRE DAME L. REV. 955, 957–58 (2007) (estimating that 4.1 million service jobs will have moved from developed economies to developing economies by the end of 2008).

7. See *infra* Part I.C; George S. Roukis, *Global Labor's Uncertain Future*, 30 J. COLLECTIVE NEGOTIATIONS 271, 274 (2005) (listing countries in which union density has declined as a result of globalization); Brian Burgoon & Wade Jacoby, *Patchwork Solidarity: Describing and Explaining US and European Labour Internationalism*, 11 REV. INT'L POL. ECON. 849, 855–64, 867 (2004) (describing types and extent of United States and European transnational unionism); Andreas Breitenfellner, *Global Unionism: A Potential Player*, 136 INT'L LAB. REV. 531, 533–35 (1997) (describing the tradeoff between unemployment and reduced wages).

countries with relatively little capital, like India and China, which has further suppressed wages and exacerbated the effect of the increase in labor supply.<sup>8</sup>

The increased supply of low-cost labor has also made employee collective action more difficult. As businesses find it easier to hire workers, those workers in turn lose some of their ability to pressure employers for better compensation. One illustration of this problem is the increased challenges for formal unions in the global economy, as reflected by the worldwide decline in union membership.<sup>9</sup> And although not the sole factor, globalism has been a significant contributor to this trend.<sup>10</sup> Among the sharpest drops in union density is in the United States, where private sector union membership declined from 21.7% in 1977 to 7.2% in 2009.<sup>11</sup> And although often not as severe as in United States, major economies throughout the world have also seen falling union density over the past couple of decades. Indeed, the decline in France's union density almost exactly mirrors that of the United States, falling from 21.3% in 1977 to 7.8% in 2007.<sup>12</sup> Countries with much higher union densities have seen similar declines over the same time period, such as Germany, where union membership fell from 35.2% to 19.9%; the United Kingdom, which fell from 51.1% to 28%; and Canada to a lesser extent, which decreased from 35.1% to 29.4%.<sup>13</sup>

8. Dau-Schmidt, *supra* note 3, at 914–15. The increase in supply of labor without a similar increase in supply of capital lowers the global economy's capital-to-labor ratio, which in turn makes wages decrease. *Id.* In other words, if the amount of capital is low relative to the amount of labor, this means that there is not enough capital to use all the available labor, causing a surplus of labor and a decrease in wages.

9. Roukis, *supra* note 7, at 274 (listing countries in which union density has declined as a result of globalization).

10. Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 13 (1993).

11. This union "density" statistic represents the percentage of all private wage and salaried workers who are members of a union. See BARRY T. HIRSCH & DAVID A. MACPHERSON, UNION MEMBERSHIP, COVERAGE, DENSITY, AND EMPLOYMENT AMONG PRIVATE SECTOR WORKERS, 1973–2009 (2010), <http://unionstats.gsu.edu>. Public-sector union density rose from 32.8% in 1977 to 37.4% in 2009. *Id.*; see also Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey*, 56 INDUS. & LAB. REL. REV. 349, 349–51 (2003) (describing method used to compile union membership data).

12. Exact comparison between transnational union densities is difficult because of differences in the way the data is computed; but virtually all countries saw significant declines in union coverage over the past few decades. See ORG. FOR ECON. CO-OPERATION AND DEV., TRADE UNION DENSITY IN OECD COUNTRIES 1960–2007, available at <http://www.oecd.org/dataoecd/25/42/39891561.xls>. The United States union density in 2007 was 7.5%. See Hirsch & Macpherson, *supra* note 11.

13. Hirsch & Macpherson, *supra* note 11.

Globalism, therefore, has been a troublesome issue for workers.<sup>14</sup> It has generally suppressed their wages and compensation, while also hindering their ability to pressure for improvements in the workplace. Workers and advocacy groups acting on their behalf have begun to seek ways to work together against these challenges. Yet, their efforts thus far have not been widely successful. Even the accomplishments that do exist are often isolated events and are dwarfed by the experiences of other workers who have fared much worse under globalism.<sup>15</sup>

There is no quick answer to this dilemma. Workers can improve the way they engage in collective action, becoming more flexible and more willing to act on numerous fronts. But truly significant, long-term improvements in the workplace—especially for the poorest workers—cannot be achieved through employee collective action alone. Government pressure on workers' behalf, whether through modifications to domestic law or the implementation and enforcement of global labor standards, is needed to provide real change. Whether countries will begin to exert real pressure on behalf of workers remains an open question. But an examination of the global labor market and workers' available strategies to combat its effects demonstrates the need for government action on workers' behalf.<sup>16</sup>

#### B. *The Economics of Employee Collective Action*

The increasingly global labor market is an extreme example of the conflict between workers' desires and the competitive pressures faced by employers. This conflict has long been an underlying theme in labor economics, which has struggled to explain how unions and other employee groups can extract benefits from employers facing competition from firms without such pressure. Globalism makes this tension between the needs of workers and employers more severe.<sup>17</sup>

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14. See Harry Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271, 273–74, 278–85 (2001) (giving overview of globalism and its effect on labor law); Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 990–97 (1995) (discussing globalism's effects on labor movements, including decreasing unions' bargaining power, race-to-the-bottom wages, organizational fragmentation, and decreasing unions' political clout).

15. See *infra* Part II.

16. See *infra* Part II.D.

17. For a more thorough discussion of the economics of employee collective action in the global economy, see Jeffrey M. Hirsch, *Employee Collective Action in a Global Economy*, in LABOR AND EMPLOYMENT LAW AND ECONOMICS 606, 613 (Kenneth G. Dau-Schmidt et al. eds., 2d ed. 2009). Also, some of the collective action strategies the author discusses in this chapter will be explored in Part II of this Article. See *id.* at 614–25.

The goal of unions and other employee groups is to improve work conditions. This can mean different things, but generally involves seeking better wages and other forms of compensation, improved work conditions and safety, and increased voice in the workplace.<sup>18</sup> With the possible exception of increased voice, these goals usually conflict with employers' economic performance—at least under a traditional, neoclassical economic view of the firm.

The conflict arises from the idea that the employer and workers are playing “a zero-sum game.”<sup>19</sup> That is, extra expenditures that go to workers are taken away from other firm expenditures.<sup>20</sup> In a perfectly competitive economy—where entry and exit is easy and no firm is big enough to set wage levels—this additional expenditure is crucial. A firm that has to spend more on its workers will be less profitable than other firms and will ultimately be forced out of business.<sup>21</sup>

Unions and other employee groups, of course, exist and are able to achieve gains.<sup>22</sup> The incongruity with neoclassical theory illustrates its limits, yet the underlying tension between workers' attempts to obtain better work conditions and the competitive pressures faced by employers still remains relevant in the global economy. Indeed, a brief look at some of the explanations for workers' ability to exact benefits from firms—including workers' exerting monopolistic pressure, improving firm productivity, and capturing employer rents—shows how this type of pressure has become more difficult as the economy has become more globalized.

### 1. Employee Control of the Labor Market

The traditional explanation for employee collective action—particularly in the union context—is that workers possess monopolistic power that allows more gains for employees than would be possible in a perfectly competitive market. The literature on this explanation is extensive,<sup>23</sup> but its major argument is that employee groups with significant control over the supply of labor can achieve compensation levels and workplace conditions that would not otherwise be possible. Although this may explain a significant portion of

18. Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private-Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1146 (2007) (citing RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 52 (1999)).

19. See Samuel Estreicher, “Think Global, Act Local”: *Employee Representation in a World of Global Labor and Product Market Competition*, 4 VA. L. & BUS. REV. 81, 84 (2009).

20. See Kenneth Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 426 (1992) (citing data on union wage premiums).

21. See *id.* at 426–27.

22. See *id.* at 426.

23. See, e.g., *id.* at 471 (noting that few unions currently have monopolistic power).

union and other employee group victories in the past, monopolistic pressure is increasingly hard to come by in the global labor market.

A union with monopolistic power—for instance, the United Auto Workers decades ago<sup>24</sup>—has different means of exerting that pressure. One strategy is to demand more compensation from a given firm, depending on that firm's ability to pay. This "price discrimination" can earn more for workers if successful; it is a risky strategy, however, because an employer could decide not to purchase any labor at that price, as might happen during a lockout or when an employer is willing to accept a strike rather than pay the demanded wages.<sup>25</sup> Price discrimination is thus more common against employers with specialized labor demands or other conditions that allow the firm less ability to reject demands for higher wages. Such employers have a low "elasticity of demand" for labor, meaning that their demand for labor stays relatively stable in the face of wage increases.<sup>26</sup> The concept of demand elasticity is an important one because it is a major determinant in whether unions' and other employee groups' pressure for increased compensation will be successful.<sup>27</sup>

The second means of employee or union pressure focuses on controlling the supply of labor by restricting the availability of nonunion workers or other workers not intended to benefit from the collective action.<sup>28</sup> Although reducing the labor supply lowers the number of workers who get jobs, the strategy increases compensation for those who are employed.<sup>29</sup> Unions or employee groups with enough strength to exert monopolistic pressure are better able to restrict the supply of labor, but even weaker groups can use this strategy. Efforts to implement firm-specific training or licensing requirements, among other barriers to entry, can assist all workers in a given industry by restricting the supply of labor.<sup>30</sup> Workers can also try to make alternate sources of labor—for instance, foreign workers—more expensive by engaging in activities such as encouraging sympathy strikes during a labor dispute,

24. The United Auto Workers had control over the supply of employees to American automakers prior to the steep declines in the U.S. auto industry. See Daniel J. Gifford, *Labor Policy in Late Twentieth Century Capitalism: New Paradoxes for the Democratic State*, 26 HOFSTRA L. REV. 85, 116–17 (1997); see also *infra* note 59 (discussing SAG Global One Rule).

25. See Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 997 (1984).

26. See Thomas Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1008, 1020, 1022 (1986).

27. See *id.* at 1017 (demonstrating the correlation between compensation and demand).

28. See Dau-Schmidt, *supra* note 20, at 427.

29. See Campbell, *supra* note 26, at 1006. Employers will be willing to pay more to hire from a smaller pool of workers—in other words, if employers want to keep the same level of employment when the supply of labor goes down, wages must go up. We are currently seeing the opposite situation; as the supply of available workers has increased (because of significant layoffs), employers can pay less to hire workers from the expanded pool of labor.

30. See Dau-Schmidt, *supra* note 20, at 427.

discouraging other workers from working for lower wages, and asking consumers to avoid employers using alternate forms of labor.<sup>31</sup> Finally, obtaining legal protections can be a successful means of restricting labor supply, particularly for nonunion employee groups, which often lack the ability to use other forms of pressure.<sup>32</sup>

An important caveat to these strategies is that employers' demand elasticity is a significant limitation on the ability of workers to achieve benefits by restricting the supply of labor. An employer that is less sensitive to wage increases—that is, an employer with a relatively inelastic demand for labor—will be willing to pay more for a shrinking pool of workers than an employer with more sensitive, or elastic, demand for labor.<sup>33</sup> This means that employees with some control over the supply of labor will be able to extract more compensation from the former type of employer. Employers' enhanced ability to hire workers or outsource, however, means that an inelastic demand for labor is not the norm.

## 2. Increasing Productivity and Capturing Rents

Two other explanations for workers' ability to extract gains from employers in a competitive market are the opportunity for workers to increase firm productivity or to capture firm rents.<sup>34</sup> Both explanations are relevant to the formal union/employer collective bargaining relationship, but like the monopolistic pressure theory, they may explain some collective action successes or opportunities in the global economy.

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31. As Judge Richard Posner has noted, workers will be wary of crossing a picket line when, as is often the case, there is a good chance that they will have to work next to striking employees in the future. *See* Posner, *supra* note 25, at 998; Campbell, *supra* note 26, at 1034.

32. Estreicher, *supra* note 19, at 84–85 (citing tariffs, minimum-wage laws, immigration law, and extension laws). Unions, however, also use legal protections to their advantage. *See* Campbell, *supra* note 26, at 1006. Examples of legal protection include minimum wage laws, prevailing wage requirements, and the Davis-Bacon Act. As Professor Estreicher notes, legal changes also hampered unions' ability to control the labor supply by prohibiting certain types of pressure on employers not directly involved in a labor dispute. Estreicher, *supra* note 19, at 87 (describing 1947 and 1959 amendments to the NLRA restricting unions' ability to use secondary pressure).

33. Milton Friedman, *Some Comments on the Significance of Labor Unions for Economic Policy*, in *THE IMPACT OF THE UNION: EIGHT ECONOMIC THEORISTS EVALUATE THE LABOR UNION MOVEMENT* 204, 207 (David McCord Wright ed., 1956).

34. Another explanation that is generally relevant only in a formal union collective bargaining context is the ability of unions and employers to bargain off the labor supply curve. The traditional bargaining model assumes that a monopolistic union sets a wage rate upon which employers choose how much labor to use. Unions and employers, however, can engage in more nuanced bargaining that involves options—such as various combinations of wages and employment levels—that the parties prefer to the options that lie on the traditional monopolistic supply curve. *See* Dau-Schmidt, *supra* note 20, at 423–24.



Economists Richard Freeman and James Medoff notably argued that one way unions can secure improvements for workers is by increasing an employer's productivity.<sup>35</sup> Although Professors Freeman and Medoff focused on traditional trade unions, factors associated with fostering productivity gains suggest that less formal employee groups could also improve firm performance. These factors include improving morale, especially by supplying information about employees' preferences to employers and by giving employees voice in the workplace;<sup>36</sup> monitoring managers and other employees;<sup>37</sup> convincing the employer to implement changes that help all employees but that no one employee could negotiate;<sup>38</sup> and assisting internal grievance procedures.<sup>39</sup> If these claims are accurate, they could be particularly relevant in an increasingly competitive global economy.<sup>40</sup> Empirical evidence on unions' productivity effects, however, has been mixed, with some studies finding significant improvements and others finding none.<sup>41</sup>

A further explanation of employee gains in a competitive market is the ability to capture what is referred to as employer "rents" or "quasi-rents." Basically, these rents describe an employer's ability to achieve more revenue than is required to produce a good.<sup>42</sup> Because this revenue is in excess of what the employer would receive in a perfectly competitive market, employees are theoretically able to capture part of the rents without putting the employer out of business.<sup>43</sup> This excess revenue may exist where an employer has

35. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 97, 101 (1984).

36. *See id.* at 95 (noting that increased voice can decrease quit rates); Posner, *supra* note 25, at 1000.

37. *See* Dau-Schmidt, *supra* note 20, at 431 (noting that union can help monitor with a lower fear of retaliation).

38. *Id.* One such "collective good" is "just cause" protection, which restricts an employer's ability to terminate employees (for example, terminations may be permitted only for a valid business reason or for a specific list of reasons). Just cause protection could improve productivity by encouraging senior employees to share information with the employer without fear of being terminated—a fear that is particularly strong given senior employees' relatively high wages. *See* Posner, *supra* note 25, at 1000.

39. Estreicher, *supra* note 19, at 85.

40. *See infra* notes 47–54 and accompanying text.

41. *See* MICHAEL C. HARPER ET AL., LABOR LAW 22 (6th ed. 2007) (citing Maryellen R. Kelley & Bennett Harrison, *Unions, Technology, and Labor-Management Cooperation*, in UNIONS AND ECONOMIC COMPETITIVENESS 247, 269 (Lawrence Mishel & Paula B. Voos eds., 1992) (finding approximately 30% increase in metal working industry)); Barry T. Hirsch, *What Do Unions Do for Economic Performance?*, 25 J. LAB. RES. 415, 430 (2004) (concluding that there is no average effect of unions on productivity).

42. *See* BARRY T. HIRSCH & JOHN T. ADDISON, THE ECONOMIC ANALYSIS OF UNIONS 209 (1986); Dau-Schmidt, *supra* note 20, at 428.

43. *But see* HIRSCH & ADDISON, *supra* note 42, at 214 (expressing doubt about significant rent capture in concentrated industries).

monopolistic power,<sup>44</sup> an employer produces a good that is unusually productive or scarce within the market,<sup>45</sup> or an employer has invested in highly specialized equipment.<sup>46</sup>

It is difficult to pinpoint the magnitude of the effect of possible productivity improvements or rent capture. Yet, to the extent that workers can take advantage of these opportunities, the expansion of global competition has a significant, and largely negative, impact on those efforts. As employers face an increasing number of firms competing against them, the likelihood of employer rents—and the size of such existing rents—decreases. Whether the impact of increased competition is insurmountable still remains to be seen.

### 3. Effects of Globalism on Employee Collective Action

Globalism has significantly impacted all strategies for employee collective action.<sup>47</sup> Whether workers attempt to limit the labor supply or exert other types of monopolistic behavior or capture some of the increased productivity that they offer firms or capture employer rents, globalism has made their task more difficult. The extent of globalism's impact is highly case-specific, however, so general lessons must be considered in tandem with the circumstances of a given case.

One of the biggest impacts of globalism is its effect on the ability of employees to limit labor supply to their advantage. Employers' enhanced capacity to expand their production chains across much of the world, whether directly or through subcontractors, presents two related problems for employees. First, a global labor market is far more difficult for employees of a given country to influence than a smaller, more local market.<sup>48</sup> Second, to the extent that employee groups still retain some control over the supply of labor, globalism has made employers' demand for labor more elastic. The availability of workers from different corners of the world increases the pool of labor, making it easier to resist worker demands.<sup>49</sup> For instance, an employer's

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44. These "market power rents" allow employers to profit above the normal, competitive rate of return. See Dau-Schmidt, *supra* note 20, at 428–29.

45. These rents are called "Ricardian rents." *Id.* at 429.

46. These "quasi-rents" may occur if an investment in specialized equipment locks the employer into use the equipment for a period of time—allowing employees to capture some of its value. *Id.* at 430. In the long run, however, an employer can adjust its capital investments to avoid these quasi-rents. See Friedman, *supra* note 33, at 207–08.

47. For a discussion of globalization's effect on international labor standards, or lack thereof, see generally Kevin Banks, *The Impact of Globalization on Labour Standards: A Second Look at the Evidence*, in GLOBALIZATION AND THE FUTURE OF LABOUR LAW 77 (John D.R. Craig & S. Michael Lynk eds., 2006).

48. See Stone, *supra* note 2, at 571 (discussing globalism's effect on labor organizations).

49. See Campbell, *supra* note 26, at 1022 (discussing subcontracting's effect on the elasticity of labor demand). Friedman notes four factors affecting an employer's demand elasticity for

ability to eventually shift jobs to workers in a different country makes that employer better able to resist strikes and other types of pressure from incumbent workers.<sup>50</sup> Technological advances have made this reality more potent, as enhanced communication and transportation capabilities have made outsourcing labor more cost effective.<sup>51</sup>

The increase in global competition and the availability of foreign labor also limits employees' ability to capture employer rents—in large part because globalism has reduced the quantity of such rents and the magnitude of rents that do exist. Although employer rents still occur—especially through the lock-in effect that may accompany significant employer investments<sup>52</sup>—globalism in general has made this strategy less effective.

In contrast, the effect of unions and other advocacy groups represents a rare opportunity for workers in the global economy. The expansion of competitive markets around the world means that workers are not the only ones facing increased pressure; employers have also had to confront a significant rise in the level of competition. If unions or employee groups are able to enhance an employer's productivity, without capturing all of the benefits of that productivity increase, then the employees could be an important factor in whether the employer stays in business. Increased competition, however, has also put more of a premium on business flexibility, which makes the relatively slow collective-bargaining model of traditional unions less desirable.<sup>53</sup> Thus, workers' ability to act through more flexible and non-adversarial entities represents a partial solution to the challenges of global collective action.<sup>54</sup>

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labor; demand for labor will be more inelastic: "(1) the more essential the given item is in the production of the final product, (2) the more inelastic the demand for the final product, (3) the smaller fraction of total costs accounted for by the item in question, and (4) the more inelastic the supply of co-operating factors." See Friedman, *supra* note 33, at 207 (noting that the first and third factors are the most significant) (citing ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 385–86 (8th ed. 1920)).

50. See Charles B. Craver, *The Labor Movement Needs a Twenty-First Century Committee for Industrial Organization*, 23 HOFSTRA LAB. & EMP. L.J. 69, 83–84 (2005) (noting globalization's negative impact on American job opportunities and wages); Posner, *supra* note 25, at 1002.

51. See Justin K. Holcombe, *Solutions for Regulating Offshore Outsourcing in the Service Sector: Using the Law, Market, International Mechanisms, and Collective Organization as Building Blocks*, 7 U. PA. J. LAB. & EMP. L. 539, 542 (2005); Stone, *supra* note 2, at 571; Estreicher, *supra* note 19, at 87.

52. See *supra* note 46 and accompanying text.

53. See Dau-Schmidt, *supra* note 3, at 917; Estreicher, *supra* note 10, at 10; John T. Addison & Barry T. Hirsch, *The Economic Effects of Employment Regulation: What Are the Limits?*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 125, 165–66 (Bruce E. Kaufman ed., 1997).

54. See discussion *infra* Part II.D.

Moreover, globalism has spread certain industries to new parts of the world. These developing countries represent an opportunity for unions or employee groups. If workers can sell themselves to employers in these countries as a source of expertise about a relatively new business, then the workers can improve firm performance and capture part of that increase in new business for themselves.

## II. OPTIONS FOR EMPLOYEE COLLECTIVE ACTION IN A GLOBAL ECONOMY

Globalism's rise may well represent a permanent constraint on traditional collective bargaining. Although formal union representation and bargaining is unlikely to disappear completely, it is even less likely that we will see the level of union density that existed in the 1950s.<sup>55</sup> Increased competition, both for workers and employers, in combination with the natural turnover of labor markets, makes widespread coverage by traditional unions inconceivable absent radical changes in labor law.<sup>56</sup> But that reality does not doom all forms of employee collective action. Instead, it has (or it at least should) transform the means by which workers attempt to exert pressure on employers.

As employees' ability to exert monopolistic-like pressure or capture employer rents decreases, the goals of collective action must also change. Employees, as well as policymakers, need to be cognizant of the problems they are addressing and formulate their strategies accordingly. Globalism's effect on the workplace is complex, and it is difficult to identify precisely what issues should be targeted. But several issues that are frequently mentioned include the need to correct market failures; avoid a race-to-the-bottom among low-labor-cost countries; take into account human rights concerns; and overcome coordination problems, such as low trust among countries seeking to enforce basic labor standards.<sup>57</sup> The severity of these issues and others in various

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55. Private-sector union density has been estimated as high as 35.7% in 1953. See LEO TROY & NEIL SHEFLIN, U.S. UNION SOURCEBOOK A-1-A-2 (1985).

56. See Hirsch & Hirsch, *supra* note 18, at 1144-45.

57. Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 206-07 (2007); Alan Hyde, *A Game Theory Account and Defense of Transnational Labour Standards—A Preliminary Look at the Problem*, in GLOBALIZATION AND THE FUTURE OF LABOUR LAW 143, 149-50 (John D.R. Craig & S. Myles Lynk eds. 2006) (describing low trust as a major impediment to international labor improvements and a reason for implementing transnational labor standards that may build trust among parties). These issues mentioned are merely intended as a sample of those frequently cited, even though empirical support may be lacking for some of them. See, e.g., Kristen H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 348 (1997) (noting doubts about "race-to-the-bottom" argument). Moreover, some issues—such as low trust—may be considered part of the broader market failure category.

contexts will help determine which form of collective action is most appropriate and most likely to benefit workers.

At present, the effectiveness of various forms of international collective action has been mixed. Isolated successes exist, but it is far more difficult to identify any long-term strategies that would provide a blueprint for worker gains around the world. Despite this bleak outlook, there remains hope that workers—particularly with the assistance of governments—can establish themselves as meaningful players in the world economy. Whether and how that may occur is not clear, but it is likely to involve some combination of strategies that are protected and encouraged by government action. These strategies include coordinating between foreign employees, pressuring employers to adopt codes of conduct or other labor standard agreements, seeking new forms of employee organizations, and encouraging governments to establish and enforce basic labor standards.<sup>58</sup> None of these strategies is a panacea, yet they serve as the best options available to address the problems that workers face in the global economy.

#### A. *Coordination and Transnational Organizations*

Although traditional unions have had a difficult time maintaining membership in the global economy—much less monopolistic power<sup>59</sup>—they still remain among the most significant players in seeking out new collective-action strategies. One of these strategies involves working with unions and other employee groups in different countries or even forming new entities that include employee groups from around the world.<sup>60</sup>

This cooperative approach recognizes that as business becomes more global in nature, employee collective action must as well. Indeed, international

58. See Dau-Schmidt, *supra* note 3, at 926–27 (citing examples); John Russo, *Strategic Campaigns and International Collective Bargaining: The Case of IBT, FIET, and Royal Ahold NV*, 24 LAB. STUD. J. 23, 34–35 (1999) (describing earlier problems with global collective action).

59. One rare exception is the Screen Actors Guild (SAG), which represents a unique pool of labor in an equally unique industry, thereby giving it enough power to enforce its “Global Rule One.” This rule prohibits any SAG member from working with a producer anywhere in the world who does not have a contract with SAG or provide compensation that approximates what is guaranteed by a SAG contract. See SCREEN ACTORS GUILD, *CONSTITUTION AND BY-LAWS*, at 34–35 (Oct. 2007), available at <http://www.sag.org/files/documents/2007%20October%20SAG%20Constitution%20and%20By-Laws.pdf>; Hirsch, *supra* note 17, at 614–16 (discussing SAG’s unique situation and Global Rule One); Gail Frommer, *Hooray for . . . Toronto? Hollywood, Collective Bargaining, and Extraterritorial Union Rules in an Era of Globalization*, 6 U. PA. J. LAB. & EMP. L. 55, 85–86 (2003) (discussing SAG’s Global Rule One).

60. See generally Ian Greer & Marco Hauptmeier, *Political Entrepreneurs and Co-Managers: Labour Transnationalism at Four Multinational Auto Companies*, 46 BRIT. J. INDUS. REL. 76 (2008) (discussing transnational efforts in auto industry and determining that such efforts can increase solidarity among workers and transform relationships with employers).

coordination represents one of the ironies of globalization: the technological advances that have allowed employers to expand their chains of production throughout the world and diminish workers' influence over their employment conditions have in turn provided workers with more tools and opportunities to pressure employers for better conditions.<sup>61</sup> Every expansion of an employer's presence throughout the world provides its workers with an additional target for collective action. These additional locations can be particularly useful if the workers are able coordinate with their foreign colleagues to exert widespread pressure against the employer, no matter where the primary dispute occurs.

The possibility of coordinated collective action is aided by a further irony. Globalism's expansion of the world-wide labor market, and the resulting downward pressure on wages, has made employees more open to the possibility of engaging in collective action.<sup>62</sup> Many problems still exist in coordinating employee action,<sup>63</sup> but the strategy is likely to continue to represent an important feature in the arsenal of workers.

There are numerous examples of international coordination among unions and other employee groups—usually efforts that have occurred on an ad hoc basis. One such instance is the Service Employees International Union (SEIU) and its ability to achieve benefits for American workers by targeting employers' operations in other countries. Among the SEIU's attempts to broaden American-based labor disputes are its protests against European-owned hotels in their home countries<sup>64</sup> and coordination with French unions to pressure Sodexho, a multinational food service employer based in France, to stop fighting organizing attempts among its American work force.<sup>65</sup> The SEIU has been active in non-European countries as well, including building

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61. See Charles Heckscher, *Organizations, Movements, and Networks*, 50 N.Y.L. SCH. L. REV. 313, 331 (2005–2006) (noting that multinational corporations are often vulnerable to rapid, targeted pressure, especially via the Internet).

62. See Jackie Smith, *Economic Globalization and Labor Rights: Towards Global Solidarity?*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 873, 877 (2006); Dau-Schmidt, *supra* note 3, at 918–21.

63. For instance, coordination generally requires a certain level of resources and expertise that many employee groups lack. See Frank Borgers, *Global Unionism—Beyond the Rhetoric: The CWA North Atlantic Alliance*, 24 LAB. STUD. J. 107, 109–11 (1999) (discussing coordination attempts by Communication Workers of America); *infra* notes 71–72 and accompanying text.

64. See Dau-Schmidt, *supra* note 3, at 922; see also Matt Bai, *The New Boss*, N.Y. TIMES MAG., Jan. 30, 2005, at 44–45.

65. The Sodexho pressure took advantage of the company's reputation in Europe as being union-friendly, and ultimately led to a neutrality pledge by the company. See Bai, *supra* note 64, at 45.

relationships with China's official labor union, the All-China Federation of Trade Unions (AFTCU).<sup>66</sup>

Another international coordination effort was an influential factor in the 1997 strike against United Parcel Service, one of the most influential in recent memory. The International Brotherhood of Teamsters has stated that support from international unions—including a “World Action Day” of demonstrations, sympathy strikes, and sickouts in support of the American union—helped it achieve virtually all of its aims during the strike against UPS.<sup>67</sup>

In addition, the garment industry has produced some of the most high-profile international coordination efforts, as major companies such as Nike and Gap have become embroiled in well-publicized international labor troubles.<sup>68</sup> These retail businesses are particularly susceptible to picketing, advertising, and other consumer-oriented publicity, aimed at decreasing demand for goods made under substandard labor conditions.<sup>69</sup> This collective activity can both improve conditions for nonunionized workers in foreign countries and for American workers who benefit indirectly from the added labor costs involved with such improvements. Moreover, successful coordination efforts can lead to more formal organizing efforts among previously nonunion workplaces, as Nike discovered through its experiences with one of its Mexican contractors.<sup>70</sup>

Professors Alan Hyde and Mona Ressaissi recently explored the effectiveness of these types of international coordination efforts, which they refer to as “transnational unionism,” and have made several important recommendations.<sup>71</sup> For instance, Hyde and Ressaissi stress the need for cooperative efforts that are permanent, strategic, and reciprocal—particularly where one of the goals is to improve trust or to remove other barriers to coordinated activity.<sup>72</sup> Unlike more ad hoc arrangements, these types of efforts

66. The United Autoworkers Union (UAW) has also been actively engaging with the AFTCU, a currently feckless state-run union that has the potential—albeit unmet—to actually help workers. See *Union Leader Sees Possibility of Changed Chinese Labor Union*, Daily Lab. Rep. (BNA) No. 97, at A-4 (May 22, 2009).

67. See Stephen B. Moldof, *Union Responses to the Challenges of an Increasingly Globalized Economy*, 5 RICH. J. GLOBAL L. & BUS. 119, 133 (2005).

68. See generally Rob van Tulder & Ans Kolk, *Multinationality and Corporate Ethics: Codes of Conduct in the Sporting Goods Industry*, 32 J. INT'L BUS. STUD. 267 (2001) (providing overview of sporting goods codes of conduct).

69. See *supra* note 31 and accompanying text.

70. See *infra* note 103 and accompanying text.

71. See Alan Hyde & Mona Ressaissi, *Unions Without Borders: Recent Developments in the Theory, Practice and Law of Transnational Unionism*, 14 CAN. LAB. & EMP. L.J. 47, 48 (2008).

72. See *id.* at 75; see also *supra* note 57 and accompanying text; see generally Henry J. Frundt, *Four Models of Cross-Border Maquila Organizing*, in UNIONS IN A GLOBALIZED ENVIRONMENT 45 (Bruce Nissen ed., 2002) (discussing challenges to transnational union efforts).

are likely to promote trust among the involved groups, which can result in significant achievement for all sides as the relationship develops.

Hyde and Ressaissi's analysis of international coordination highlight the tradeoff between easier-to-attain, but less valuable, ad hoc coordination efforts and more valuable, but less attainable, permanent transnational unionism. Some commentators have described ad hoc cooperation efforts as largely ineffective.<sup>73</sup> Yet, as described above, many ad hoc campaigns have achieved real gains for workers.<sup>74</sup> The difference may be definitional, as "success" can be defined as including incremental improvements or as something more substantial and permanent.<sup>75</sup> As Hyde and Ressaissi emphasize, ad hoc campaigns promise far less stable coordination efforts—particularly from the perspective of non-American employees and unions.<sup>76</sup> But ad hoc attempts can still be helpful even if they are suboptimal. For example, Hyde and Ressaissi describe the American UNITE union's missteps in its efforts to coordinate with other unions against Swedish retailer H&M.<sup>77</sup> As they note, however, one outcome of those efforts was a subsequent card-check recognition for another union and a large unit of employees involved in a later dispute.<sup>78</sup> Later, H&M and the other union entered into a collective bargaining agreement that increased wages, expanded benefits, and established a joint union-management committee to enhance worker voice.<sup>79</sup> Although more permanent coordination efforts would have been more beneficial—especially for UNITE—some workers did achieve gains as a result of the unions' ad hoc efforts.

73. See Hyde & Ressaissi, *supra* note 71, at 73 ("[I]t is hard to find a successful recent transnational *ad hoc* campaign of union support."); see also Pablo Ghigliani, *International Trade Unionism in a Globalizing World: A Case Study of New Labour Internationalism*, 26 *ECON. & INDUS. DEMOCRACY* 359, 377–78 (2005) (describing limited gains in five-day effort by European unions and NGOs to challenge McDonald's labor practices).

74. See *supra* notes 64–68 and accompanying text.

75. See, e.g., Hyde & Ressaissi, *supra* note 73, at 48 ("As a means of *overcoming collective action problems and achieving stable transnational regulation*, transnational institutions are far superior to *ad hoc* campaigns that in practice often exacerbate low trust.") (emphasis added).

76. See Peter Fairbrother et al., *Unions Facing the Future: Questions and Possibilities*, 31 *LAB. STUD. J.* 31, 45–46 (2007) (describing Italian steel unions' pressure against German multinational corporation as being successful in Italy, but foundering when the unions attempt to expand the dispute to other countries).

77. See Hyde & Ressaissi, *supra* note 73, at 72–73.

78. *Id.* at 73.

79. This development occurred after Hyde and Ressaissi finished their article. See *RWDSU First Contract With H&M Covers 1,000 Workers in Manhattan Stores*, Daily Lab. Rep. (BNA), No. 99, at A-14 (May 27, 2009) (describing Retail, Wholesale and Department Store Union contract that gives a minimum 3% wage increase, guaranteed minimum hours for full-time employees, and new leave and benefit provisions).



Moreover, the possible benefits of more permanent coordination efforts have limits as well. Hyde and Ressaissi note two of the more successful transnational worker organizations: the International Transport Workers' Federation (ITF) and European Works Councils.<sup>80</sup> Both of these long-existing organizations are fairly unique. The ITF—an example of a Global Union Federation (GUF) of national unions in the same industry<sup>81</sup>—represents merchant seamen on “flag-of-convenience” ships.<sup>82</sup> These seamen are skilled employees with atypical jobs that involve significant periods of isolated travel. They also work in an industry with severe time-pressure that make employers particularly vulnerable to the delays in shipments that can occur with strikes and other employee collective action.<sup>83</sup> Organizing these workers is much easier than in most other industries. For that reason, most other GUFs are far less successful than the ITF.<sup>84</sup>

Similarly, the successes of European Works Councils derive largely from one important fact—the organizations are protected and promoted by law.<sup>85</sup> Thus, the councils provide little solace for employees without equivalent legal protection. The Works Councils do show, however, the importance of legal protection for employee collective action. Where such protection exists, employees have a much better chance of achieving benefits.<sup>86</sup>

The message from these various examples seems to be that ad hoc efforts can be useful, but that employee groups should strive to make them as permanent and comprehensive as possible. The promise of more extensive ad hoc international coordination efforts was revealed in a labor dispute at one of

80. See Hyde & Ressaissi, *supra* note 73, at 53–54.

81. See *id.* at 57.

82. “Flag of convenience” ships are those that are registered in a certain country for the purpose of reducing costs or avoiding regulations. See Iliana Christodoulou-Varotsi & Dmitri A. Pentsov, *Labor Standards on Cypriot Ships: Myth and Reality*, 37 VAND. J. TRANSNAT'L L. 647, 649 (2004). For a detailed description of the ITF and some of its successful actions, including those involving coordination with other employee groups, see generally Peter Turnbull, *The War on Europe's Waterfront—Repertoires of Power in the Port Transport Industry*, 44 BRIT. J. INDUS. REL. 305 (2006).

83. See Hyde & Ressaissi, *supra* note 71, at 58 (noting also political regulations, dockworkers' solidarity, and long history of the group).

84. See *id.*; see also Turnbull, *supra* note 82, at 320–21 (noting that the ITF was unique because, in part, the workers better appreciated the value of collective action, had a much higher union density, and were more active than most workers).

85. See Council Directive 94/45, 1994 O.J. (L 254) 64, 65 (EC) (requiring works councils in all companies that had operations in multiple EU countries).

86. See Peter Wad, “Due Diligence” at APM-Maersk: From Malaysian Industrial Dispute to Danish Cross-Border Campaign, in GLOBAL UNIONS 40, 40–41, 43–45 (Kate Bronfenbrenner ed., 2007) (describing union's success at Malaysian factory after thirty years of effort because of court holding).

Nike's Mexican garment contractors.<sup>87</sup> This dispute, and a similar one in Indonesia, involved the American employee rights group, Workers Rights Consortium (WRC). As described by one of its participants, Professor Mark Barenberg, the WRC was able to achieve substantial benefits for workers by stressing, in part, the involvement of local Non-Governmental Organizations (NGOs) and other groups that sought to protect employee rights.<sup>88</sup>

The WRC formed out of protests by American university students against the conditions faced by foreign workers who manufactured clothing licensed to various schools.<sup>89</sup> After student protestors objected to a weaker labor monitoring organization that was initially proposed,<sup>90</sup> approximately 150 schools joined with the newly formed WRC.<sup>91</sup>

The WRC leadership included students, labor experts, and university administrators.<sup>92</sup> The consortium established a set of principles that emphasized the need to remain neutral in disputes between management and apparel unions, involve local workers and communities, promote local jobs by insisting on continued investment by retailers and vendors, and publish information obtained through factory monitoring.<sup>93</sup>

One of the WRC's primary functions was to conduct audits of factories. These audits involved extensive interviewing of workers and stressed the involvement of local NGOs, local labor experts, community members, and on-site workers.<sup>94</sup> The WRC typically becomes involved at factories where workers have already instigated some action against unfair conditions—including a Mexican factory that made apparel for Nike, Reebok, and other retailers, as well as an Indonesian factory that made apparel for Gap and others.<sup>95</sup> The WRC's experience in both plants revealed the potential gains from international cooperation among employee groups.<sup>96</sup>

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87. The high-profile nature of the American garment industry was undoubtedly another factor in the workers' ability to achieve improvements at work in this factory. *See supra* notes 31, 69 and accompanying text.

88. *See* Mark Barenberg, *Legitimacy and Capacity in Private Labor Monitoring: Two Case Studies*, in COMPENSATION, WORK HOURS AND BENEFITS 39, 45–46 (Jeffrey M. Hirsch ed., 2009); Katie Quan, *Strategies for Garment Worker Empowerment in the Global Economy*, 10 U.C. DAVIS J. INT'L L. & POL'Y 27, 33 (2003).

89. *See* Barenberg, *supra* note 88, at 41.

90. *See id.* at 42.

91. *Id.* at 39.

92. *Id.* at 42.

93. *Id.* at 42–43 (noting that WRC would not certify factories as being compliant with labor rights).

94. Barenberg, *supra* note 88, at 22–93.

95. *Id.* at 45, 47, 59.

96. *Id.* at 70.

In Mexico, the Kukdong factory was a South Korean owned garment plant that had Nike as its highest-profile retailer.<sup>97</sup> The workers in the plant had complained to the WRC about violations of basic labor standards<sup>98</sup> and sought to create an independent union that would replace the incumbent union, an affiliate of a state-controlled federation that the workers viewed as corrupt and uninterested in helping them.<sup>99</sup> The WRC conducted several days of interviews and issued multiple reports on the need for remedial action, including a cooperative effort among local workers, local employee groups and NGOs, international employee groups and NGOs, and apparel retailers such as Nike that would address the problems at the plant.<sup>100</sup>

The retailers initially resisted the WRC's recommendations, but after continued pressure by workers, the WRC, and the media, the WRC eventually agreed to substantive changes.<sup>101</sup> Those changes occurred gradually—and often only as the result of pressure by the WRC's university members—but ultimately produced significant improvements for the Kukdong workers.<sup>102</sup> These improvements included the expulsion of the corrupt incumbent union, recognition of a union elected by a large majority of workers, the formation of a collective-bargaining agreement with the new union, and a promise by plant officials to comply with a Nike code of conduct.<sup>103</sup>

The WRC's successful cooperation with local groups at Kukdong was repeated in the PT Dada apparel plant in Indonesia, which made clothes for companies such as Gap, Adidas, and Disney.<sup>104</sup> The story at PT Dada was very similar to Kukdong: workers went on strike and protested substandard labor conditions.<sup>105</sup> Unlike Kukdong, however, the PT Dada plant had three independent unions seeking to represent workers,<sup>106</sup> none of which were

97. *Id.* at 47.

98. *Id.* (noting conditions such as physical abuse, child labor, minimum wage violations, and sick and maternity leave violations).

99. Barenberg, *supra* note 88, at 47.

100. *Id.* at 48–49, 53. For further discussion of the Kukdong action and other employee groups involvement, see generally César A. Rodríguez-Garavito, *Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle Over International Labor Rights in the Americas*, in *LAW AND GLOBALIZATION FROM BELOW* 64 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005).

101. See Barenberg, *supra* note 88, at 53–58.

102. *Id.*

103. *Id.* at 58; see also *infra* notes 144–146 and accompanying text (discussing WRC codes of conduct).

104. See Barenberg, *supra* note 88, at 59.

105. *Id.* at 60 (noting complaints of forced unpaid work, corporal punishment against workers taking sick leave, and other physical and verbal abuse).

106. *Id.*

clearly favored by a majority of workers, although the plant management strongly supported one of them.<sup>107</sup>

After the WRC became involved at the PT Dada plant, it again enlisted cooperation from local groups; local employees, NGOs, and labor experts made up half of the assessment team conducting an initial audit at the plant.<sup>108</sup> Moreover, learning from the initial difficulties with remediation in Kukdong, in which its compliance audit team had only a small number of local groups, the WRC's PT Dada compliance team was comprised almost entirely of local labor advocates and experts.<sup>109</sup> The belief was that a local team would have more flexibility and knowledge to secure improvements at the plant, particularly given the difficulties in sorting out the three competing unions.<sup>110</sup> This belief was confirmed as plant officials eventually began to bargain with all three unions, which formed a coordinated bargaining committee.<sup>111</sup> As was the case in Kukdong, the PT Dada workers also saw improvements, including employer commitments to free association and improvements in leave policies.<sup>112</sup>

Although the WRC's successes were due to many factors,<sup>113</sup> its emphasis on meaningful coordination and deference to local groups was important.<sup>114</sup> In addition, the WRC's experiences demonstrate the importance of establishing legal recognition of the right to engage in international coordinated collective action.<sup>115</sup> Without such protection, employers will be able to stamp out such efforts through terminations and other punitive measures. For example, countries have very different rules regarding work stoppages, particularly those in sympathy with a foreign labor organization or against a company with which they do not have a direct conflict.<sup>116</sup> Thus, unions and other employee groups must be cognizant of these legal differences before engaging in

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107. *Id.*

108. *Id.* at 61.

109. Barenberg, *supra* note 88, at 62, 67.

110. *Id.*

111. *Id.* at 66.

112. *Id.* at 67–68.

113. Other factors include, at PT Dada, the competency of some local labor officials. *See id.* at 70.

114. Barenberg, *supra* note 88, at 73–74; *see also* Ashwini Sukthanker & Kevin Kolben, *Indian Labor Legislation and Cross-Border Solidarity in Historical Context*, in *GLOBAL UNIONS* 57, 68–77 (Kate Bronfenbrenner ed., 2007) (describing failure of foreign trade unions, and success of international cooperative initiative, in helping Indian workers).

115. *See* Hyde & Ressaissi, *supra* note 71, at 50–52.

116. The NLRA, for instance, prohibits many types of “secondary pressure” that attempt to draw a neutral employer in a dispute with a different employer. *See* 29 U.S.C. § 158(b)(4)(B) (2006) (prohibiting encouragement of an employee to strike or refusal to handle goods, or coercion of person engaged in commerce, for the purpose of “forcing or requiring any person to cease . . . doing business with any other person”); *see also supra* note 32 and accompanying text.

coordinated pressure involving foreign employers.<sup>117</sup> This concern also suggests need for reform.

Globalism has expanded competition in product and labor markets, and thus, domestic labor laws should be changed to reflect this new competitive environment. One such reform would be to permit work stoppages and other types of economic pressure against employers currently protected from such activity because another employer is the primary target, especially when these protected employers are subcontractors of a foreign primary employer.<sup>118</sup>

### B. Codes of Conduct and Global Framework Agreements

Although international coordination has been important, the most publicized type of global employee collective action involves what are referred to as either “codes of conduct” or “global framework agreements.”<sup>119</sup> These terms eschew precise definitions, but basically involve companies and possibly their contractors, promising to comply with some set of labor policies and obligations.<sup>120</sup> These policies come from many sources, although their core provisions often emulate the basic rights embodied in conventions such as that of the International Labor Organization (ILO).<sup>121</sup> Companies often agree to

117. For instance, Hyde and Ressaissi note a European Court of Justice case that restricted international labor efforts. In that case, the court held that a EU directive—which allows a foreign company to hire workers from its country rather than the country in which it is performing, as long as those workers are given the terms of employee guaranteed by the host country or applicable collective agreements—provided both minimum and maximum protection for employees, thereby prohibiting labor unions from pressuring the company for additional benefits. Thus, a multinational company with business in Europe will be shielded from certain types of labor pressure. See Hyde & Ressaissi, *supra* note 71, at 87–90 (citing *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2008 O.J. (C341/05)).

118. See *supra* note 116 and accompanying text.

119. Global framework agreements may also be called “global labor agreements” or “international framework agreements.” See Jill Murray, *Corporate Codes of Conduct and Labour Standards*, in *MASTERING THE CHALLENGE OF GLOBALIZATION: TOWARDS A TRADE UNION AGENDA* 47, 47 (Robert Kyloh ed., 1998); Owen E. Herrnsstadt, *Are International Framework Agreements a Path to Corporate Social Responsibility?*, 10 U. PA. J. BUS. & EMP. L. 187, 188 (2007).

120. See Murray, *supra* note 119, at 47. Codes of conduct have been described as “formal policies which purport to shape corporate conduct in certain ways.” *Id.* These policies are implemented through compliance codes, which are defined as “directive statements giving guidance and prohibiting certain kinds of conduct.” Int’l Labor Org., *Corporate Codes of Conduct*, <http://www.itcilo.it/english/actrav/telearn/global/ilo/code/main.htm> (last visited Feb. 15, 2010). For an example of the text of a compliance code, see VOLKSWAGEN, INC., *DECLARATION ON SOCIAL RIGHTS AND INDUSTRIAL RELATIONSHIPS AT VOLKSWAGEN* (2002), <http://www.imfmetal.org/main/index.cfm?id=47&lid=2&olid=2&cid=7215>.

121. The core ILO standards include: freedom of association; right to collective representation; elimination of compulsory labor; effective abolition of child labor; and elimination of workplace discrimination. Int’l Labour Org., *ILO: Declaration on Fundamental*

adopt these codes in reaction to negative publicity and other types of pressure.<sup>122</sup> Codes of conduct and global framework agreements have the potential to provide real gains for workers; they can, however, also amount to little more than a public relations ploy.<sup>123</sup>

The difference between policies that are considered “codes of conduct” and those that rise to the level of “global framework agreement” highlight some of the factors needed to make such policies effective. Unlike typical codes of conduct, which a company unilaterally implements, global framework agreements are created in conjunction with employee groups and usually involve compliance measures, application to suppliers and contractors, and some form of employee voice and participation in the workplace.<sup>124</sup> Not surprisingly, global framework agreements are more effective than codes of conduct in advancing employee concerns, particularly where substantial monitoring,<sup>125</sup> significant employee participation,<sup>126</sup> and more established employee groups, such as unions, are involved.<sup>127</sup> Yet even weaker codes remain one of few options for certain employees to achieve improvements in their work conditions.<sup>128</sup> In China, for instance, codes of conduct have

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*Principles and Rights to Work*, 37 INT’L LEGAL MATERIALS 1237–38 (1998). Another international organization that, according to some, may also provide an opportunity for enhancing worker protections across the world is the Organization for Economic Cooperation and Development. See James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT’L L. 769, 772, 788–804 (2000).

122. The pressure is typically consumer-oriented. See Arthurs, *supra* note 14, at 289; Quan, *supra* note 88, at 32–34.

123. See Hyde & Ressaissi, *supra* note 71, at 76; Richard Locke et al., *Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike’s Suppliers*, 146 INT’L LAB. REV. 21, 22 (2007).

124. Niklas Egels-Zandén & Peter Hyllman, *Evaluating Strategies for Negotiating Workers’ Rights in Transnational Corporations: The Effects of Codes of Conduct and Global Agreements on Workplace Democracy*, 76 J. BUS. ETHICS 207, 209 (2007); Herrnsstadt, *supra* note 119, at 188; JENNY HOLDCROFT, *INTERNATIONAL FRAMEWORK AGREEMENTS: A PROGRESS REPORT 18* (2006), [http://www.imfmetal.org/files/06091210511779/WEB\\_sp\\_report\\_3-06.pdf](http://www.imfmetal.org/files/06091210511779/WEB_sp_report_3-06.pdf) (describing International Metalworkers Union’s approach to agreements and describing its agreements with various companies).

125. William B. Gould IV, *Labor Law for a Global Economy: The Uneasy Case for International Labor Standards*, 80 NEB. L. REV. 715, 751–52 (2001); Jane Wills, *Bargaining for the Space To Organize in the Global Economy: A Review of the Accor-IUF Trade Union Rights Agreement*, 9 REV. INT’L POLIT. ECON. 675, 678 (2002).

126. See Locke et al., *supra* note 123, at 25–26, 38–39 (examining Nike’s code of conduct).

127. Niklas Egels-Zandén & Peter Hyllman, *Exploring the Effects of Union-NGO Relationships on Corporate Responsibility: The Case of the Swedish Clothes Campaign*, 64 J. BUS. ETHICS 303, 313 (2006); Locke et al., *supra* note 123, at 35.

128. See Hyde & Ressaissi, *supra* note 71, at 76 (using China as an example of a weaker code helping employees improve labor conditions).

provided much greater benefits to employees than domestic law or other types of collective action.<sup>129</sup>

Although weaker codes can provide some benefit to workers, they are typically far inferior to strong framework agreements. Weaker codes of conduct often end up disappointing workers because they lack a clear statement of company or contractor responsibility and fail to establish the monitoring or enforcement structures needed to make promises a reality.<sup>130</sup> Moreover, these codes may not only leave workers without any tangible improvements, but they may also act as window-dressings that undermine efforts to implement more substantive government or employee action.<sup>131</sup>

In contrast, employer-adopted global framework agreements that include well-developed guarantees and effective compliance provisions can provide workers with substantial improvements. This is particularly true where few other options are available, such as countries with little union presence or few legal protections for collective activity; but these benefits are significantly enhanced in countries with stronger labor laws.<sup>132</sup> In addition, because employers can control the specifics of these policies, global framework agreements can provide more flexibility—a particularly valuable characteristic in the global economy—than other types of employee collective activity.<sup>133</sup> Effective monitoring also provides workers with information that can aid their attempts to seek compliance with existing agreements and to make future demands as new problems arise.<sup>134</sup>

One of the first major codes of conduct involved the multinational banana company, Chiquita. A major player in the world banana market, Chiquita's self-promoted image as a socially responsible corporation began taking hits following claims that it poisoned its workers through pesticide exposure, engaged in extremely hostile antiunion activity, and was involved with

129. See *id.* and text accompanying note 87 (citing studies of codes of conduct operating in China).

130. See Locke et al., *supra* note 123, at 23.

131. *Id.* at 22; Egels-Zandén & Hyllman, *supra* note 124, at 215 (noting company that, despite a code of conduct that stated its support of unions, refused to allow workers to voice their opinion about union representation).

132. Locke et al., *supra* note 123, at 24 (studying Nike's code of conduct and its effectiveness in various countries and plants); see also Herrnsstadt, *supra* note 119, at 192 (arguing that successful framework agreements "must cover the entire enterprise as well as *all* related entities of the enterprise. . . must, at a minimum, explicitly include [ILO] labor standards, referenced directly to the appropriate Conventions. . . must be effectively implemented through communication and education[, and] . . . must be enforced in a transparent, meaningful, and effective manner").

133. See Locke et al., *supra* note 123, at 22.

134. *Id.* at 22–23.

political corruption in some of the Latin American countries in which it owned plantations.<sup>135</sup>

Exhibiting some of the international coordination strategies discussed earlier,<sup>136</sup> NGOs from these Latin American countries and the United States—later joined by unions from the same countries—began publicizing the allegations and demanding that Chiquita adopt labor and environmental protections for its plantations workers.<sup>137</sup> At first, Chiquita adopted its own code of conduct, with no input from employee groups.<sup>138</sup> The code failed to promise any real changes which led to increased pressure on Chiquita, who ultimately signed an agreement with a set of NGOs and unions that was as multinational as the company itself.<sup>139</sup> The agreement adopted numerous substantive provisions—including recognition of the right to unionize and bans against discrimination, child labor, and forced labor—and, importantly, also applied to Chiquita's suppliers and contractors.<sup>140</sup>

The Chiquita agreement demonstrated the ability of international employee groups to successfully pressure employers to make changes that benefits workers. Most workers at Chiquita-owned plantations believed that the agreement's provisions had resulted in better working conditions.<sup>141</sup> Yet, workers at Chiquita's contractors saw no benefits—a reminder that, despite the historic nature of the agreement, it had significant limits.<sup>142</sup> In particular, the agreement's implementation in contractor plantations suffered from inadequate monitoring and enforcement, which prevented employees from enjoying its promises.<sup>143</sup>

The WRC codes—which can be considered a framework agreement because they are formed based on international norms and local needs, all with input from multiple sources<sup>144</sup>—further illustrate the importance of monitoring and cooperation in determining the effectiveness of an agreement's labor protections. The successes of WRC's compliance work at the Kukdong and

135. See Lone Riisgaard, *The IUF/COLSIBA—CHIQUITA Framework Agreement: A Case Study* 11 (Int'l Labour Office, Working Paper No. 94, 2003), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_101049.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_101049.pdf); Mike Gallagher & Cameron McWhirter, *Chiquita Secrets Revealed*, CINN. ENQUIRER, May 3, 1998, at A1.

136. See *supra* Part II.A.

137. See Riisgaard, *supra* note 135, at 11.

138. *Id.* at 12.

139. *Id.* at 8.

140. *Id.* at 12.

141. *Id.* at 16–17.

142. Riisgaard, *supra* note 135, at 14–15.

143. See *id.* at 14–15 (blaming, in part, NGOs and unions lack of experience in cooperating to enforce such agreements and difficulties in ensuring that interested parties had necessary information).

144. See Barenberg, *supra* note 88, at 45, 74.



PT Dada plants were due in large part to continuous and thorough monitoring, the involvement of numerous groups that included local organizations, and input from labor experts.<sup>145</sup> This level of monitoring and remediation, however, requires a significant amount of resources. Moreover, the fact the plants manufactured many visible consumer products aided in the WRC's success.<sup>146</sup> So the WRC's accomplishments often will not be attainable for many workers. Yet, the importance of detailed monitoring and participation from a variety of groups are lessons that can improve subsequent attempts to implement and enforce international framework agreements.

In short, these agreements—while no panacea—offer the possibility of substantial benefits for workers if properly implemented. Despite this promise, agreements with effective monitoring, employee participation, and coverage over all of the links of production appear to be underused at this point, with most existing in workplaces controlled by companies centered in Europe or the United States.<sup>147</sup> Employee groups should address this underuse by increasing pressure for such agreements where appropriate, but in doing so, those groups must ensure that the agreements will accomplish more than satisfying public relations strategies. In many instances, a lack of resources, inadequate legal protections, or a company that is able to resist employee pressure will make a substantial framework agreement impossible. Where there is an opportunity for such an agreement, however, employee groups should remain open to this strategy and recognize that it can not only result in genuine gains for workers, but perhaps also establish footholds upon which future labor reforms can be built.

### C. *Employee Group Organizational Reform*

Although pressuring employers for better working conditions captures the traditional concept of collective action, that strategy may ignore some of the needs of workers in the global economy. In particular, the globalization of the labor market may require a shift from more traditional goals of collective activity towards different aims, such as the need for a consumer-oriented strategy.<sup>148</sup> Under this strategy, employee groups would attempt to provide workers with services that are needed in an economy that has seen

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145. *See id.* at 71–74.

146. *See id.* at 75.

147. *See* Demetris Stevis & Terry Davis, *International Framework Agreements: Opportunities and Challenges for Global Unionism*, in *GLOBAL UNIONS*, *supra* note 86, at 174, 174–79; Harry Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION* 471, 487 (Joanne Conaghan et al. eds., 2002) (stressing need for employee participation in establishing workplace codes).

148. *See supra* note 57 and accompanying text.

improvements in communications technology, expansion of business production chains, and increasingly mobile workers.

Many of these changes have had a direct impact on workers. For example, in contrast to the static workforces that existed decades ago, workers frequently change employers,<sup>149</sup> and these changes increasingly involve moves across national borders. Work relationships are also becoming more flexible as employers are increasingly using temporary or contract labor.<sup>150</sup> Similarly, a worker may be considered an independent contractor or some designation other than a formal employee, which affects that worker's eligibility for employment and retirement benefits and coverage by various work laws.<sup>151</sup>

The cruel irony is that, as the highly competitive global marketplace has created more of a need for employee collective action, it has also eliminated traditional unionism as an option for most workers.<sup>152</sup> But even if formal collective bargaining is less viable than it once was, workers still have an unmet desire to express their views and push for changes in the workplace.<sup>153</sup> If, as seems apparent, traditional unionism is unable to fully meet this demand, then there is a growing need for new forms of employee groups—a need that is beginning to be addressed. These attempts are still in their infancy and have the lack of meaningful success to prove it. Their development and growth, however, could ultimately prove significant.

Traditional unions—perhaps paradoxically—have led the development of these new forms of employee groups.<sup>154</sup> These groups can serve many purposes, but typically assist workers in some manner, whether by providing an outlet for expressing views to an employer, providing services to members,<sup>155</sup> or acting as a source of information.<sup>156</sup>

149. See Stone, *supra* note 2, at 92–94.

150. See *id.*

151. See, e.g., *Wojewski v. Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338, 344–45 (8th Cir. 2006) (holding that worker was an independent contractor and cannot bring claim under Title VII); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) (setting forth multi-factor test for employee classification under the Employee Retirement Income Security Act); *Sec'y of Labor, United States Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1534–35 (7th Cir. 1987) (quoting *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 299 (5th Cir. 1975) (describing test for “employee” under the Fair Labor Standards Act); see also 29 U.S.C. § 152 (2006) (excluding supervisors under NLRA).

152. See Hirsch & Hirsch, *supra* note 18, at 1137–40 (describing reasons for decline in union density); *supra* notes 11–13 and accompanying text.

153. See *supra* note 18 and accompanying text.

154. Hirsch, *supra* note 18, at 1148. Given the decline in union density, it may not be paradoxical that unions are seeking different strategies to maintain their relevance.

155. Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. Rev. 827, 833–34 (1996) (arguing for more employee groups that provide services to members, such as professional development and job placement assistance).

A key challenge for employee groups in the global economy is the need to recognize the changes taking place and to adjust their strategies accordingly. For example, the rise of globalism has been accompanied by more temporary work relationships as employers increasingly use contractors or transient workers—often located in different countries—to either limit labor costs or to address short-term business needs.<sup>157</sup> Although employee groups have begun to address the needs of workers in these situations, they need to do much more. One instance of a group attempting to meet the needs of temporary workers, although not directly involving the global labor market, is the Communication Workers of America's (CWA) "WashTech" effort. The CWA established WashTech to assist contract and temporary workers at Microsoft, but did not engage in any bargaining on their behalf.<sup>158</sup> Because of the difficulties in organizing temporary workers, the CWA viewed less formal assistance as a more realistic and ultimately more helpful means of addressing some of these workers' concerns.<sup>159</sup> Yet, WashTech was viewed as so beneficial that it ultimately began formally representing certain groups of technology workers.<sup>160</sup> The WashTech experience demonstrates that traditionally unrepresented workers often have an unmet need for some level of assistance—a need exacerbated by globalism and its increased competitive pressures. WashTech also shows the benefits that can accrue to unions and other groups that address that need.

Employee groups can organize members outside the representational context in other ways. The AFL-CIO's "Working America" group, for instance, does not engage in any representational activities.<sup>161</sup> Instead, Working America encourages members to engage in various political actions<sup>162</sup> and provides information to all workers through its database on companies' executive compensation, outsourcing, and labor violations.<sup>163</sup>

156. Hirsch & Hirsch, *supra* note 18, at 1148 n.73.

157. Stone, *supra* note 2, at 990–97.

158. See Stone, *supra* note 2, at 234–35. For a detailed background of WashTech, see Danielle D. van Jaarsveld, *Overcoming Obstacles to Worker Representation: Insights from the Temporary Agency Workforce*, 50 N.Y.L. SCH. L. REV. 355, 373–84 (2005–2006).

159. See van Jaarsveld, *supra* note 158, at 367–77.

160. See Stone, *supra* note 2, at 235; Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 389–91 (2005–2006).

161. See Richard B. Freeman, *From the Webbs to the Web: The Contribution of the Internet to Reviving Union Fortunes* 19 (Nat'l Bureau of Econ. Research, Working Paper No. 11298, 2005), available at <http://www.nber.org/papers/w11298>; Hyde, *supra* note 160, at 389–90.

162. See Freeman, *supra* note 161, at 19.

163. See Lauren Snyder, *Working America*, 50 N.Y.L. SCH. L. REV. 589, 592 (2005–2006) (describing Working America's efforts); Amy Joyce, *Labor Web Site Keeps Tabs on Business: Workers Can Check Executive Salaries, Company Violations*, WASH. POST, Nov. 18, 2005, at D3. The Working America database, which maintains information on tens of thousands of companies, is available at <http://www.workingamerica.org/jobtracker>.

There are limits on what less formal organizations, like Working America, can accomplish for workers. But such groups can be quite helpful, especially to workers who would benefit from more information about current or future employers—information that is increasingly difficult to obtain for firms with operations throughout the world. Additionally, groups can provide portable services, including provisional insurance and retirement benefits for workers who frequently change employers or locations, no matter where or whether they are working.<sup>164</sup>

Employee groups that continue to engage in more formal representation also need to take into account the new challenges posed by globalism. One successful example of this new reality was an electrical machinery union's reaction to General Electric's (GE) rapid expansion into the global market. The Coordinated Bargaining Committee of GE and Westinghouse (CBC) had represented workers at GE since the 1960s,<sup>165</sup> and as GE began to expand its reach across the world, the CBC responded by broadening its focus internationally.<sup>166</sup> The CBC's efforts included the type of international coordination with other unions described earlier,<sup>167</sup> but the CBC also looked to different strategies, such as increasing efforts to educate workers about globalism and to incorporate workers' views on the union's efforts in this area, as well as pushing for minimum standards applicable to GE's operations across the world.<sup>168</sup> The CBC's efforts, although not substantially transforming work conditions, did obtain significant wage and benefit increases.<sup>169</sup> Given the hurdles to collective action in the current global economy, this outcome qualifies as a success.

Employee groups have also sought to assist or organize nonunion workers—especially those with foreign ties—through different means, such as by focusing on issues outside of the workplace.<sup>170</sup> The SEIU's "Justice for Janitors" campaigns, which have generally focused on migrant workers, provide a good example. Although these workers are often low-skilled and do

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164. See Joni Hersch, *A Workers' Lobby to Provide Portable Benefits*, in *EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY* 207, 214–15 (Richard B. Freeman et al. eds., 2005) (describing "The Portable Benefits Network," now known as the "Freelancers Union"); Sarah N. Kelly & Christine Tramontano, *Working Today*, 50 N.Y.L. SCH. L. REV. 597, 601 (2005–2006) (describing Working Today's efforts).

165. Douglas Meyer, *Building Union Power in the Global Economy: A Case Study of the Coordinated Bargaining Committee of General Electric Unions (CBC)*, 26 LAB. STUD. J. 60, 61 (2001).

166. *Id.* at 61.

167. *Id.* at 69–70.

168. *Id.* at 61.

169. *Id.* at 74.

170. As this section describes, unions assistance is often motivated by a desire to organize workers.

not speak English well, the SEIU successfully organized many, in part by focusing on non-work related issues.<sup>171</sup> For instance, a successful campaign in California focused on Mexican culture and involved local religious and political leaders.<sup>172</sup> This campaign shows how employee concerns—especially those of migrant workers—often extend beyond the workplace.

A similar effort between the AFL-CIO and the National Day Laborer Organizing Network (NDLON) further illustrates this point. The two groups established the National Worker Center Partnership, which creates worker centers to assist mainly migrant laborers with a wide variety of services.<sup>173</sup> Efforts like these, which support workers on multiple fronts, will provide greater benefits and greater success for the groups involved.<sup>174</sup>

Although these collective strategies hold promise, they are not without problems—particularly when they do not involve formal representation of workers. The costs of establishing and maintaining an organization that does not receive regular dues or other forms of income must have some other source of funding. This funding problem is exacerbated when a group lobbies on behalf of, or provides services for, all workers, rather than limiting benefits to members, due to the ability of non-member workers to “free ride” on the group’s efforts.<sup>175</sup> Alternatively, these groups could seek to be more service-oriented and avoid broad lobbying. By focusing on the direct needs of a select unit of workers, employee groups could help those workers and maintain a source of regular funding at the same time.<sup>176</sup>

171. See Stone, *supra* note 2, at 224–25; Alan Hyde, *Employee Organization in Silicon Valley: Networks, Ethnic Organization, and New Unions*, 4 U. PA. J. LAB. & EMP. L. 493, 497 (2001–2002).

172. See Christopher L. Erickson et al., *Justice for Janitors in Los Angeles and Beyond: A New Form of Unionism in the Twenty-first Century?*, in *THE CHANGING ROLE OF UNIONS* 22, 48 (Phanindra V. Wunnavu ed., 2004).

173. See *AFL-CIO: Day Laborers Group Sign Pact to Advance Worker, Immigration Rights*, Daily Lab. Rep. (BNA), No. 154, at A-4 (Aug. 10, 2006); see generally Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 419–426 (2005–2006).

174. See Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 518 n.45 (2006) (noting other alternative employee groups’, including the International Ladies Garment Workers Union/UNITE!, immigrant worker centers).

175. *Id.* at 516–18; see also Fred Feinstein, *Renewing and Maintaining Union Vitality: New Approaches to Union Growth*, 50 N.Y.L. SCH. L. REV. 337, 351–52 (2005–2006) (describing several other nontraditional employee groups).

176. Sam Estreicher has made similar recommendations for unions to readjust their strategies to the modern economy, including focusing on helping firm performance, creating portable benefits for contingent and other less traditional workers, and pushing for fair trade and other international labor standards that are not too limiting on lesser developed countries. See Estreicher, *supra* note 19, at 92–95.

Moreover, many domestic laws often create hurdles for nontraditional employee groups. In the United States, for example, the National Labor Relations Act prohibits many informal entities that could provide employees with a voice in the workplace if they receive support from employers.<sup>177</sup> Such legal impediments—which often reflect the older economies in which they were enacted—rather than the economy of today—need to be eliminated if employee groups are able to adapt fully to challenges of globalism.<sup>178</sup>

An alternative to nontraditional private employee groups are the state-assisted entities prevalent in much of Europe and other countries. Works councils are an example of this type of employee group and are often characterized by their non-antagonistic relationship with employers.<sup>179</sup> In Israel and many European countries, many workers—no matter whether they are members of more traditional unions—participate in their respective employers' works councils.<sup>180</sup> The works councils act primarily as a consultative body rather than a bargaining one; employers must often discuss certain matters with a works council, but the council does not engage in formal bargaining.<sup>181</sup>

The type of industry involved and structure of these works councils shape their ability to help both workers and firms. There is also some evidence that works councils tend to lose their ability to improve firm performance when they shift to a more antagonistic role.<sup>182</sup> If true, this further supports the notion that effective employee action in a global economy may require, at times, a less confrontational and more collaborative relationship with employers. The ability to establish such a relationship is often at the mercy of employers, but

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177. See Hirsch & Hirsch, *supra* note 18, at 1152–66 (arguing for a loosening of the definition of “labor organization” under section 2(5) of the NLRA, 29 U.S.C. § 152(9) (2006), which would narrow the “company union” provision of section 8(a)(2); 29 U.S.C. § 158(a)(2) (prohibiting employer support or domination of a labor organization)).

178. See Estreicher, *supra* note 155, at 834–49 (advocating several legal reforms to foster different types of employee groups). For a broad argument urging more innovative worker organizations and more legal protections for such organizations, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 759–60 (1994).

179. See generally Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 MO. L. REV. 607 (2004).

180. See Thomas A. Kochan, *Updating American Labor Law: Taking Advantage of a Window of Opportunity*, 28 COMP. LAB. L. & POL'Y J. 101, 113 (2006).

181. Estreicher, *supra* note 19, at 85–86.

182. See John T. Addison et al., *Works Councils in Germany: Their Effects on Establishment Performance*, 53 OXFORD ECON. PAPERS 659, 661 (2001).

workers could be more assertive about pursuing such relationships and demonstrating their benefits to employers.<sup>183</sup>

Whether through a state-protected works council or a private employee group that provides non-bargaining services, employee collective action must adapt to the current global labor market. Employee groups must recognize not only the differences in various industries, but also the different needs of workers and employers in a more competitive global economy.<sup>184</sup> Many difficulties still exist for such efforts, but they hold more hope for many workers than traditional, representative collective action. Whether unions and other groups sufficiently fill this need remains an open question. But we are likely to see more efforts develop in the future.

#### *D. International Treaties and Governmental Pressure*

In addition to direct employee action, another strategy to protect employee interests in the global economy is to use government power to implement and enforce workplace protections.<sup>185</sup> Such protections generally arise as part of a treaty or other multinational agreement.<sup>186</sup> These agreements can be defended as a means to avoid a race to the bottom in labor standards, as a means to solve coordination problems that prevent voluntary compliance, or on human rights grounds.<sup>187</sup> Despite their promise, however, labor provisions in international agreements have, to this point, been a disappointment. This is unfortunate, as cross-national pressure appears to be one of the few—if not only—options to help a large number of workers, particularly those receiving low-wages or work in industries that do not garner much publicity. But to be effective, international agreements must provide significant remedies that countries actually have the will to use. If countries begin to move in this direction—which they have largely failed to do thus far—they could provide substantial gains for many workers around the world.

183. United States law is a further barrier to many of these collaborative efforts, as employers may violate the NLRA if they engage in bilateral discussions with a group that includes employees. See *supra* note 177 and accompanying text.

184. See Fairbrother et al., *supra* note 76, at 34.

185. See generally Stone, *supra* note 14, at 998–1019 (describing four broad ways in which governments can regulate labor standards, including “supranational” labor standards legislation, multinational harmonization of labor standards, application of one country’s labor standards to another country in certain instances, and extraterritorial application of a country’s laws on a more consistent basis).

186. See generally Richard N. Block & Jonas Zoninsein, *International Labor Standards and International Trade: An Economic Overview*, in *LABOR AND EMPLOYMENT LAW AND ECONOMICS*, *supra* note 17, at 666. Moreover, the European Union has begun to implement requirements that all employers doing business in Europe meet certain labor standards. See Estreicher, *supra* note 19, at 89 (describing the European Union “social charter” campaign); Stone, *supra* note 14, at 1000–01.

187. See *supra* note 57 and accompanying text.

Although the specifics vary, labor agreements generally involve promises by the signatory countries to enforce certain labor rights and to provide a system to ensure compliance within their borders.<sup>188</sup> Failure to meet these promises can subject a country to trade sanctions or other penalties.<sup>189</sup> As described below, however, one of the major problems with using treaties to advance workers' interests is that thus far, countries have been reluctant to push for any substantial remedial action.<sup>190</sup> Instead, attempts to enforce labor standards usually produce little more than intergovernmental discussions.<sup>191</sup> These discussions can be helpful in upholding certain labor rights, but still fall short of the effects that true sanctions could produce.

One of the original attempts to impose international labor standards—the ILO—illustrates some of the difficulties in making these standards effective. During the formation of the post-World War I League of Nations, an attempt was made to establish core labor standards that would apply worldwide. From this attempt, the ILO was born.<sup>192</sup> The ILO set forth several core labor standards, including freedom of association, freedom from discrimination, and the right to collective representation.<sup>193</sup>

Although it remains an important aspirational baseline, the ILO has had a limited effect on actual workplace conditions. One glaring problem is that many countries, including the United States, have failed to ratify many of the ILO standards.<sup>194</sup> Because countries simply choose on their own whether to sign on to various standards, the ILO can be viewed as merely affirming the practices that signatory countries already follow. Thus, there is little pressure for nonsignatory countries—which are often the ones that need to make the most improvements in their labor protections—to agree to comply with the ILO standards.

An additional problem with the ILO is that it has few enforcement measures that can be used against noncompliant countries, even if they are signatories.<sup>195</sup> Aside from some investigatory power and a scheme for intergovernmental discussions, the ILO is powerless to adjudicate alleged

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188. Marley S. Weiss, *Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, Via Chile, to Latin American, and Beyond*, 37 U.S.F. L. REV. 689, 694 (2003).

189. *Id.*

190. *Id.* at 697–98.

191. *Id.* at 698–99.

192. Erickson & Mitchell, *supra* note 192, at 48–49.

193. See *supra* note 121 and accompanying text; Edward E. Potter, *The Growing Significance of International Labor Standards on the Global Economy*, in COMPENSATION, WORK HOURS AND BENEFITS *supra* note 88, at 19, 19–29 (explaining history and role of ILO in enforcing global labor standards).

194. *Id.* at 48–49.

195. *Id.*



violations of its provisions or to impose penalties on noncompliant countries.<sup>196</sup> Not surprisingly, the ILO seems to have little effect on the labor markets of lesser developed countries, which are often most in need of labor reform.<sup>197</sup>

ILO standards, therefore, often provide no more than a means of publicizing countries' purported beliefs in certain labor rights rather than genuine enforcement. Although publicity is of limited value, it can still be an effective part of employee groups' overall strategy. The AFL-CIO, for instance, openly uses the ILO complaint system as a means of attracting attention to what it views as shortcomings in U.S. labor law. In one instance, the union alleged that a series of National Labor Relations Board decisions had systematically denied workers' rights in violation of ILO standards.<sup>198</sup> Although the AFL-CIO requested that the United States restore those rights, the union recognized that the complaint would not bring about any changes on its own.<sup>199</sup> Instead, the hope was that the complaint might help to sway public opinion—and the opinion of other countries—against the U.S. government's labor law positions.<sup>200</sup> This use of the ILO and its standards cannot achieve significant improvements on its own but does represent a potentially valuable strategy, particularly against companies or countries like the United States, which often hold themselves up as a model for others to follow.

Another application of the ILO labor standards is as a template for labor protections in treaties and other international agreements. Indeed, many treaties explicitly incorporate ILO standards. The ILO, therefore, often serves as a common baseline for core labor protections around the world. Whether agreements to comply with those standards are actually met, however, is a different question. As the following examples illustrate, the answer to that question, thus far, has been disappointing.

196. Erickson & Mitchell, *supra* note 192, at 48–49.

197. *Id.* at 84–86; see also George Tsogas, *Labour Standards in International Trade Agreements: An Assessment of the Arguments*, 10 INT'L J. HUM. RESOURCE MGMT. 351, 355 (1999) (noting lack of evidence that labor standards affect trade).

198. Am. Fed'n of Labor and Cong. of Indus. Orgs., *Complaint to the ILO Committee on Freedom of Association by the American Federation of Labor and Congress of Industrial Organizations Concerning the United States Government's Violations of Freedom of Association and Collective Bargaining by Failing to Enforce the National Labor Relations Act*, 10–41, ILO Case No. 2608 (Oct. 25, 2007), available at [http://op.bna.com/dlrcases.nsf/id/mamr-78btn4/\\$File/ILOcomplaint.pdf](http://op.bna.com/dlrcases.nsf/id/mamr-78btn4/$File/ILOcomplaint.pdf) (citing alleged violations of ILO Convention 87, which protects the freedom of association and right to organize, and ILO Convention 98, which applies the principles of the right to organize and to collectively bargain) [hereinafter *AFL-CIO Complaint*].

199. *Id.* at 41.

200. See David Moberg, *Labor Strikes Back*, AM. PROSPECT, Nov. 1, 2007, available at [http://www.prospect.org/cs/articles?article=labor\\_strikes\\_back](http://www.prospect.org/cs/articles?article=labor_strikes_back).

The highest profile treaty with labor standards—at least from the American perspective—is the North America Free Trade Agreement (NAFTA)<sup>201</sup> and its labor side agreement, the North American Agreement on Labor Cooperation (NAALC).<sup>202</sup> The NAALC provisions, which are similar to the ILO standards but do not explicitly derive from them, have been invoked on several occasions. One instance involved Mexican apple pickers in Washington State. Aided by both American and Mexican labor unions, the workers filed a complaint with Mexican officials that alleged improper pesticide exposure, failure to pay minimum wage and overtime owed to nonagricultural workers,<sup>203</sup> and antiunion retaliation.<sup>204</sup> After consultations between Mexican and United States officials, the United States government and apple growers agreed to hold meetings with migrant workers, community leaders, and local public officials in which the complaint's allegations could be discussed.<sup>205</sup> Informing workers was no doubt a positive step, as a significant number of workers were likely unaware of their legal protections.<sup>206</sup> Yet the lack of any concrete remedies was a serious shortcoming—one that has arisen in all NAALC disputes.<sup>207</sup>

NAALC's inability to provide meaningful remedies illustrates the difficulties in enforcing labor standards through the treaty process, but also highlights the possible benefits if countries ever became serious about labor rights. NAALC's provisions reflect the compromises needed to clear the numerous political hurdles to the agreement's creation. The United States

201. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

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

203. The Fair Labor Standards Act's minimum wage and overtime provisions do not apply to agricultural workers. 29 U.S.C. § 213(a)(6) (2006).

204. Steven Greenhouse, *Mexicans Were Denied U.S. Rights, Suit Says*, N.Y. TIMES, May 28, 1998, at A18. This dispute is also an illustration of the reality that labor standards agreements can foster cooperation among employee groups. See Parbudyal Singh, *NAFTA and Labor: A Canadian Perspective*, 23 J. LAB. RES. 433, 441–42 (2002).

205. Paul D. Lall, Note, *Immigrant Farmworkers and the North American Agreement on Labor Cooperation*, 31 COLUM. HUM. RTS. L. REV. 597, 599–600 (1999).

206. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110 (1997) (study showing employees' incorrect views about their rights against discharges); Mark V. Roehling, *The Good Cause Norm in Employment Relations: Empirical Evidence and Policy Implications*, 14 EMP. RESP. & RTS. J. 91, 92–98 (2002) (describing studies); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 229–30 (2001).

207. Diana Chew & Richard A. Posthuma, *International Employment Dispute Resolution Under NAFTA's Side Agreement on Labor*, 53 LAB. L.J. 38, 41–44 (2002) (reviewing all NAALC cases filed at time of publication); see also U.S. GEN. ACCOUNTING OFFICE, NORTH AMERICAN FREE TRADE AGREEMENT: U.S. EXPERIENCE WITH ENVIRONMENT, LABOR, AND INVESTOR DISPUTE SETTLEMENT CASES 31 (2001).

initially proposed a labor side agreement late in the negotiation process, largely as a way for President Clinton to lessen organized labor's objections to NAFTA. Still, unions were critical of the substance of the side agreement.<sup>208</sup> And Mexico and Canada were resistant to adding the labor provisions as well.<sup>209</sup> They ultimately acceded, but the result was a weak agreement.<sup>210</sup>

In particular, NAALC does not require much of the NAFTA signatory countries. The agreement notes various core labor principles, yet it requires only that signatory countries apply their own labor laws.<sup>211</sup> Although it is not always a given that a country will enforce its own laws,<sup>212</sup> this requirement does little to advance labor rights. Indeed, not only does NAALC fail to institute new protections for workers, or enhance previously existing rights, it also allows any country to backtrack on labor protections simply by changing its domestic law.<sup>213</sup>

While NAALC's substantive protections are weak, enforcement of those protections appears even weaker. Theoretically, the agreement allows for a panel of experts to review a complaint and, in certain instances, arbitration that could result in financial penalties.<sup>214</sup> But the reality is that none of the signatory countries have had the stomach to seriously press one another to remedy labor violations. That failure is a serious problem, as it makes NAALC more of a public relations measure—much like certain companies' unilateral codes of conduct<sup>215</sup>—than any meaningful protection for workers.<sup>216</sup>

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208. See Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U. J. INT'L L. & POL'Y 117, 133 (1993).

209. See Singh, *supra* note 204, at 439; Weiss, *supra* note 188, at 702–03.

210. Weiss, *supra* note 188, at 703–05.

211. These principles are:

- (1) freedom of association and the right to organize;
- (2) the right to bargain collectively;
- (3) the right to strike;
- (4) the prohibition of forced labor;
- (5) labor protections for children and young persons;
- (6) assurance of minimum labor standards;
- (7) elimination of employment discrimination;
- (8) equal pay for women and men;
- (9) prevention of occupational injuries and illnesses;
- (10) compensation in cases of occupational illnesses and injuries; and
- (11) protection of migrant workers.

NAALC, *supra* note 202, at 1515–16.

212. See AFL-CIO Complaint, *supra* note 198, at 1.

213. NAALC, *supra* note 202, at 1503.

214. Weiss, *supra* note 188, at 732 (noting that only safety and health, child labor, and minimum wages are entitled to dispute resolution).

215. See *supra* notes 123–127 and accompanying text.

It raises the question, however, of whether genuine intergovernmental pressure over labor violations could be effective.

Unfortunately, most subsequent treaties have failed to provide an answer. For instance, another labor agreement that delivers less than it promises is the recent Dominican Republic Central America-United States Free Trade Agreement (CAFTA-DR). This treaty explicitly incorporated portions of the ILO labor standards, requiring signatory countries to strive to protect the labor rights contained within the ILO's primary conventions.<sup>217</sup> Each country has the freedom to promulgate its own labor laws and enforcement schemes, but, in so doing, it must ensure workers have a fair and transparent means of seeking enforcement and appropriate remedies.<sup>218</sup> Alleged violations of CAFTA-DR's labor standards, however, merely trigger intergovernmental discussions and the possibility of a dispute settlement panel.<sup>219</sup> Thus, CAFTA-DR—like most of the half-dozen or so other American treaties that currently contain labor provisions—share the same serious enforcement shortcomings as NAALC.<sup>220</sup>

This enforcement failure was, theoretically at least, finally breached in the 2007 Peru Free Trade Agreement (Peru FTA).<sup>221</sup> House Representative Charles Rangel described the Peru FTA as an important change from previous agreements like NAFTA and CAFTA-DR, which garnered little support from Democrats in Congress.<sup>222</sup> According to Mr. Rangel, many Democratic lawmakers objected to these earlier treaties because of their failure to include meaning enforcement of labor rights.<sup>223</sup> In contrast, the Peru FTA passed both houses of Congress by large margins—a result that occurred partly because the agreement stated that violations of five basic ILO rights would subject a signatory country to the same penalties as violations of any other section of the

216. See Singh, *supra* note 204, at 442–43 (noting that Canadian unions still resist NAFTA and its labor standards); see also Greenhouse, *supra* note 204, at A18 (describing advocates' belief that NAFTA does not do enough for migrant workers in Washington state).

217. Dominican Republic-Central America-United States Free Trade Agreement, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar., art. 16.1.1, Aug. 5, 2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter CAFTA-DR].

218. *Id.* art.16.1, 16.3.

219. *Id.* art. 16.6.

220. See Jennifer Alewelt, Comment, *The Heat Is on in Latin America: The Future and Implications of the Colombian Free Trade Agreement*, 39 CAL. W. INT'L L.J. 159, 171–72. (2008).

221. United States-Peru Trade Promotion Agreement, U.S.-Peru, ch. 17, Apr. 12, 2006, available at [http://www.ustr.gov/Trade\\_Agreements/free-trade-agreements/peru-tpa/final-text](http://www.ustr.gov/Trade_Agreements/free-trade-agreements/peru-tpa/final-text) [hereinafter Peru FTA].

222. Charles B. Rangel, *Moving Forward: A New, Bipartisan Trade Policy That Reflects American Values*, 45 HARV. J. ON LEGIS. 377, 389–91 (2008).

223. *Id.* at 390.

agreement.<sup>224</sup> It is too early to tell whether any country will have the fortitude to push for the more extreme penalties, particularly trade sanctions,<sup>225</sup> but the explicit possibility of meaningful remedies is a step in the right direction.<sup>226</sup>

Despite the disappointment of NAALC, CAFTA-DR, and other international labor provisions, hope still exists for cross-national labor agreements. The enforcement measures in the Peru FTA and subsequent agreements illustrate that such efforts<sup>227</sup>—particularly bilateral agreements and other efforts in which building trust between the parties is easier<sup>228</sup>—present an opportunity to implement meaningful protections for workers.<sup>229</sup> If countries actually begin to take advantage of the enforcement options available under these agreements, workers around the world could see real gains.

One only need look at countries' reactions to perceived trade violations to see this potential. Governments become apoplectic when they believe that other countries are violating international trade regulations, and they are quick to engage in significant pressure—including demands for retaliatory tariffs and other financial penalties—to remedy the violations.<sup>230</sup> Most recently, for instance, the United States 2009 economic stimulus package created fierce protest from its trading partners, particularly Canada.<sup>231</sup> Although it did not include any measures prohibited by treaties, the United States stimulus package promulgated several “buy American” provisions, requiring United

224. *Id.* at 389–90 (describing votes); Peru FTA, *supra* note 221, art. 21.2.1; *see supra* note 121 and accompanying text.

225. Peru FTA, *supra* note 221, art. 21.16.2; *see also* Laura Ho et al., *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 398 (1996) (arguing that trade sanctions could provide a “powerful disincentive” against labor violations).

226. Alternatively, agreements could use a “carrot” approach by implementing favorable tariffs as a way to give countries an incentive to meet labor standards. Kolben, *supra* note 57, at 254–55.

227. *See* Rangel, *supra* note 222, at 392 (noting that free trade agreement with Jordan had even stronger enforcement for labor protections) (citing United States-Jordan Trade Promotion Agreement, U.S.-Jordan, art. 17, Oct. 24, 2000, *available at* [http://ustr.gov/assets/Trade\\_Agreements/Bilateral/Jordan/asset\\_upload\\_file250\\_5112.pdf](http://ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf)).

228. *See* Kolben, *supra* note 57, at 217; Hyde, *supra* note 57, at 153.

229. Weiss, *supra* note 188, at 697; *see* Francis Lee Ansley, *Rethinking Law in Globalizing Labor Markets*, 1 U. PA. J. LAB. & EMP. L. 369, 410–11 (1998); *But see* Eddy Lee, *Globalization and Labour Standards: A Review of Issues*, 136 INT'L LAB. REV. 173, 183–87 (1997) (countering arguments against linking trade to labor standards); Keith E. Maskus, *Should Core Labor Standards Be Imposed Through International Trade Policy* 66–67 (World Bank, Working Paper No. 1817, 1997), *available at* <http://papers.ssrn.com/abstract=44605> (arguing that economic theory suggests that trade sanctions are not effective remedies for labor violations).

230. *See* Anthony Faiola & Lori Montgomery, *Trade Wars Launched with Ruses, End Runs*, WASH. POST, May 15, 2009, at A1.

231. *Id.*; *see* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, § 1605, 123 Stat. 115, 303.

States-made materials to be used on various government-funded projects.<sup>232</sup> Canada, among other countries, expressed outrage at the provisions and some Canadian municipalities even barred United States companies from bidding on public contracts.<sup>233</sup> In sharp contrast, one rarely hears high-level U.S. public officials say anything to other nations about egregious violations of basic labor standards.<sup>234</sup>

If countries applied a fraction of the pressure they use for trade disputes to labor issues, workers around the world benefit greatly—particularly the poorest workers, who typically live in countries that are more susceptible to pressure from the United States and other countries that import a lot of goods.<sup>235</sup> Part of the problem is political, as labor groups often oppose free trade agreements as a matter of policy.<sup>236</sup> Groups representing workers, however, need to realize that there is no halting international trade; they must instead work within the confines of these agreements to pursue their interests.<sup>237</sup> Indeed, one of the U.S. statutes that allowed for “fast track” ratification of treaties explicitly stated that it was intended, in part, to “strengthen the capacity of United States trading partners to promote respect for core labor standards.”<sup>238</sup> This statement of intent can prove to be significant, but only if employee groups work to ensure that its aim is met.<sup>239</sup> Until that happens, these international agreements will remain little more than a public relations tool for governments and employee groups that want to try to embarrass them.<sup>240</sup>

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232. See Faiola & Montgomery, *supra* note 230, at A1.

233. *Id.*

234. See John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. L.A. INT’L & COMP. L. REV. 359, 386 (2004). One means to lessen the problem of government unwillingness to enforce labor rights would be to allow nongovernmental entities or individuals to seek private enforcement of an agreement’s labor standards, but the prospect for this enforcement alternative is doubtful. *Id.*

235. One employee group, the International Coalition of Free Trade Unions (ICFTU), has pushed to incorporate ILO standards as part of trade requirements under the World Trade Organization (WTO) framework. See Wills, *supra* note 125, at 68. See Arthurs, *supra* note 14, at 286.

236. See Singh, *supra* note 204, at 436, 439.

237. See *id.* at 443.

238. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. § 3802(b)(11)(C) (2006).

239. See *infra* note 226 and accompanying text.

240. See Singh, *supra* note 204, at 441. Moreover, most studies find that labor standards do not have a significant effect on countries’ labor markets, trade relationships, or overall economy. See Gould, *supra* note 125, at 728–30 (citing ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTERNATIONAL TRADE AND CORE LABOUR STANDARDS (2000)). This lack of effect could be the result weakness of labor standards thus far, but may also indicate that increased enforcement could occur without causing a substantial economic detriment.

### III. THE FUTURE OF GLOBAL EMPLOYEE COLLECTIVE ACTION

The current options for employee collective action in the global economy have a mixed record at best. Whether employees or employee advocates coordinate with foreign workers, persuade companies to adopt labor standards, reform the strategies and goals of their advocacy groups, or work within cross-national agreements, the potential benefits of such actions do not always outweigh the costs. Despite this mixed success, such actions can still deliver advantages to workers in certain instances.<sup>241</sup> Moreover, employee groups are still in the early stages of learning how to engage in collective action in the global economy and will likely become more adept as time passes.<sup>242</sup> Improvements may be especially noticeable as groups expand their ability to pursue multiple strategies at the same time—an ability that appears to be a necessity for sustaining meaningful pressure on employers.<sup>243</sup>

Yet, even when employee groups become adept at using a variety of collective actions, whatever successes they achieve are likely to be limited in the long-term. One of the reasons for this limitation is that workers will be unable to sustain pressure on employers that are able to use lower-cost labor from different countries.<sup>244</sup> Further, employee collective action can maintain a continuous presence only where there are sufficient legal protections for such efforts.<sup>245</sup> Given this reality, the only way to ensure widespread, albeit far from complete, protection for workers in the global labor market is government action. Whether through reforms of domestic law<sup>246</sup> or substantial pressure on countries with low labor standards, government action—

241. See *infra* note 256 and accompanying text (discussing the successful collusive efforts of employment groups with the Coalition of Immokalee Workers).

242. See, e.g., Coalition of Immokalee Workers, About CIW, <http://www.ciw-online.org/about.html> (last visited Feb. 15, 2010) (describing the Coalition of Immokalee Workers as forming only in the past decade).

243. See *infra* notes 256–58 and accompanying text (describing how the Coalition of Immokalee Workers united with groups to keep pressure on employers such as Taco Bell and other restaurant chains).

244. See *supra* note 48 and accompanying text.

245. See Kolben, *supra* note 57, at 242–43 (discussing the necessity of integrative linkage, a complex and de-centralized legal strategy for insuring workers' rights).

246. In addition to protections for domestic workers, legal changes can also provide foreign workers additional litigation options. See generally Lance Compa, *Pursuing International Labour Rights in U.S. Courts: New Uses for Old Tools*, 57 INDUS. REL. 48 (2002) (discussing options for litigating foreign-related labor claims in U.S. courts); Arthurs, *supra* note 14, at 293. But see Mine Eder, *The Constraints on Labour Internationalism: Contradictions and Prospects*, in GLOBAL UNIONS? 167, 177–78 (Jeffrey Harrod & Robert O'Brien eds., 2002) (noting that, thus far, many countries have used globalization as a reason to lower labor standards, rather than raise them).

particularly in combination with employee collective action<sup>247</sup>—provides the best hope for achieving protections for the greatest number of workers.<sup>248</sup>

The need for such protection is real. If there is a basic set of minimum labor standards that most societies believe should exist,<sup>249</sup> then the current global economy is a disappointment. Countries are rewarded for falling below common thresholds of protection, as it allows them to offer lower cost labor.<sup>250</sup> Thus, to extend basic protections for a broad group of workers, especially those in low labor-cost countries, something more than global market forces must be employed.<sup>251</sup> Government action appears to be the best means to achieve this protection, especially for workers who earn too little to attract the assistance of attorneys or who are not fortunate enough to benefit from the attention of employee advocacy groups.

The need for government involvement is apparent, no matter the problems being addressed. Whether because of market failures, coordination problems, or other issues,<sup>252</sup> the unregulated labor market has been unable to ensure basic levels of protection for many workers.<sup>253</sup> Employee collective action can be useful in confronting these problems, but it is unable to achieve widespread and lasting change. In contrast, governments possess the power to establish systems in which certain labor standards are respected and enforced—even in areas where work conditions have traditionally been substandard.

247. See Kolben, *supra* note 57, at 242 (arguing for an “integrative linkage” of private and public enforcement of international labor standards).

248. See GAY W. SEIDMAN, BEYOND THE BOYCOTT 7, 139–40 (2007) (arguing that government action is a necessary aspect of effective international boycotts). It is true, however, that there is no single ideal form of government action and that the gains possible from such action has limits. See Stone, *supra* note 14, at 1019–27.

249. This belief, of course, is not universally accepted. See Lee, *supra* note 229, at 183.

250. See *North American Free Trade Agreement, Implications for the U.S. and Mexico: Hearings Before the House Subcomm. on International Economic Policy and Trade*, 102nd Cong. 71–72 (1991) (statement of Stewart J. Hudson, Acting Director of the International Program Division of the National Wildlife Federation) (citing International Trade Commission study that found that liberal trade and investment agreements would encourage United States companies to move operations to Mexico). Note that countries’ belief that lower labor costs helps economically is sufficient to maintain this incentive, even though there is a lack of evidence that low labor standards leads to more investment in a country. See Hyde, *supra* note 57, at 149–50 n.25; cf. Engel, *supra* note 57, at 347 (noting that state officials’ perception that strong environmental enforcement drives out businesses matters more than actual effect on business migration).

251. Some workers can improve their lot within a more laissez-faire system, but workers with that type of leverage are increasingly rare. See *supra* note 59 and accompanying text (discussing SAG Global One Rule).

252. See *supra* note 57 and accompanying text.

253. See Kolben, *supra* note 57, at 204–05 (noting that a coordinated system is necessary to guarantee basic levels of protection for workers).



What is striking about the current global labor market is that governments need not advance high-level labor protections to improve the lot of a significant number of workers.<sup>254</sup> Countries could still maintain labor cost differences even if some basic labor standards existed, yet those standards would drastically improve working conditions across much of the world.<sup>255</sup> In short, serious attempts by countries to enforce a set of core labor rights would allow low-wage countries to continue to take advantage of their comparative advantage in the global labor market, while ensuring that this advantage creates less of a hardship for workers.

Moreover, governments need not take the lead role in improving conditions for workers. Especially where governments have already established reasonably strong domestic protections for labor rights and employee collective action, relatively modest state assistance could strengthen employees' efforts to improve working conditions.

For instance, one of the American labor movement's bright spots during the last decade has been the work of the Coalition of Immokalee Workers (CIW). The CIW, centered in Immokalee, Florida, started as an effort to aid migrant Hispanic agricultural workers state wide.<sup>256</sup> Its greatest success has been the use of boycotts and other publicity—along with several other advocacy groups—to force Taco Bell and, later, other major restaurant chains and grocery stores to require their tomato suppliers to pay agricultural workers higher wages.<sup>257</sup> This pressure would likely not have been possible in countries that do not protect workers from severe harassment or violence in retaliation for such activities.<sup>258</sup>

The CIW's efforts were extraordinary, as it was a new group led by migrant workers inexperienced in collective action.<sup>259</sup> The CIW, however, had help from organizations that included Florida Rural, a government-funded

254. See Estreicher, *supra* note 19, at 90–91 (discussing the utility of comparative advantage).

255. See Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 21–22 (2007) (arguing that employers need not always lower labor standards to compete in the global economy and that such an argument ignores negative costs of low-standard policies).

256. Coalition of Immokalee Workers, About CIW, <http://www.ciw-online.org/about.html> (last visited Feb. 15, 2010).

257. The companies include McDonald's, Burger King, Subway, and Whole Foods. *Id.*

258. See *supra* notes 135–143 and accompanying text (noting allegations of Chiquita's involvement with harassment against labor leaders in Central America). One irony about the CIW's efforts is that the boycott against Taco Bell and other restaurants—a boycott aimed at getting growers, not the restaurants, to pay more—would be unlawful secondary pressure under the NLRA, save for the act's exclusion of agricultural workers. See 29 U.S.C. § 152(3) (2006) (excluding agricultural workers from NLRA's definition of "employee"); *Id.* § 158(b)(4)(i)(B) (making most types of secondary pressure unlawful).

259. See About CIW, *supra* note 242 (describing the CIW as only forming in 1993).

legal services corporate entity.<sup>260</sup> The CIW workers spearheaded most of the direct collective activity, but, at least in the employee group's earlier days, Florida Rural helped the CIW incorporate as a tax-exempt organization, and it continues to assist with the group's corporate law issues, among others.<sup>261</sup> This partnership made advances that the private employee group likely would not have achieved on its own.<sup>262</sup>

The CIW has also recognized the power of more direct government action, particularly law enforcement. As part of its campaign to end involuntary servitude practices in the Florida agricultural industry, the CIW was able to pressure the federal Department of Justice to criminally prosecute some growers.<sup>263</sup> The CIW's experiences illustrate the possible benefits of strong employee collective action, especially in conjunction with other advocacy groups, while also reinforcing the importance of government support and protection for such efforts.<sup>264</sup>

It is unlikely, if not impossible, that employee collective action will fully reverse the costs that globalism has inflicted on workers. But if workers and governments do a better job of recognizing the new challenges that workers face in the current economy and adopt flexible, multifaceted strategies to address those challenges, the costs of globalism may be reduced. Government action is a particularly important factor, as genuine, widespread improvements in the workplace will exist only with adequate protection for employee collective action and with government pressure against countries with the weakest labor standards.

### CONCLUSION

Globalism has produced numerous challenges to many of today's workers. By dramatically expanding labor market competitiveness, globalism has driven down compensation, while making attempts to achieve better conditions less effective. Despite these challenges, however, opportunities remain for successful collective action.

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260. David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 YALE L. & POL'Y REV. 337, 363 (1998).

261. *Id.* at 363-64.

262. *Id.* at 364.

263. Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397, 420-21 (2004). It took, however, about a year of pressure for the Department of Justice to finally act. *Id.* at 421.

264. See *supra* note 242 and accompanying text; Fran Ansley, *Inclusive Boundaries and Other (Im)possible Paths Toward Community Development in a Global World*, 150 U. PA. L. REV. 353, 371-72, 376 (2001) (noting some successes in getting governments to provide some protection against, or during, plant closings, while also emphasizing the difficulty of such attempts).

No one strategy is a panacea, as the global economy is too complex to navigate with only one mode of activity. Rather, employee groups must learn to use multiple strategies targeted to the needs of a given situation. In some instances, coordination with other advocacy groups or unions may be the best course, while in others working with an employer to implement internal labor standards may be more effective. Similarly, employee groups themselves must change and adapt to the new economic environment, paying special attention to the needs of workers as they attempt to secure their place in an international labor market. Usually, some combination of all of these strategies will produce the best result. Yet, despite the best effort of employee groups, the competitive pressures of globalism may still make many instances of collective action ineffectual.

This reality highlights the need for more government involvement in securing basic labor standards. Employee groups can only achieve so much and that ability is frequently cabined by the lack of legal protections for workers and their efforts to seek changes. In addition to providing legal protection for collective action, governments should also pressure each other to ensure some basic level of labor protections for all workers around the world. Attempts at intergovernmental pressure have been weak thus far, but this type of pressure may provide the best hope for providing real gains for a large number of workers—particularly the workers in most need of protection. Strong government action would not ensure success; however, the lack of such action may well guarantee that many workers will continue to face far worse conditions than existed before the rise of globalism.

