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PUBLIC-PRIVATE-PUBLIC CONVERGENCE: HOW THE PRIVATE ACTOR CAN SHAPE PUBLIC INTERNATIONAL LABOR STANDARDS

*"Private Law' is an oxymoron."*¹

INTRODUCTION

International law, like domestic law, does not operate in a vacuum.² As the interdependence of peoples, markets, and systems intensifies, international law must necessarily adapt to the new and changing relationships which result. While domestic law is arguably prepared, through its legislative and constitutional governance, to recognize these new relationships, the perception and practice of international law faces fundamental change.³ While this interdependence presents a challenge, it also offers many opportunities to both the global community of States and, more than ever before, to the increasingly global community of private actors. This Note explores one aspect of the challenge presented in addressing the potential impact of normative market actions on the formation of customary international law.

While international law has long recognized the relationship between the States' legal convictions and their correlating actions in the formation of customary international law, customary law's formation has remained exclusively an interstate dynamic. The private actor's impact on such governmental

1. Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 34 (1996).

2. See G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 1 (1993) (observing that "[i]t is well accepted that one of the most important features of an effective legal system is its capacity to reflect the changing needs and demands of a society in which it operates").

3. As one commentator observes:

Sovereignty, the preoccupation of classical public international law, has meant having the authority to control actors and activities within the sovereign's own territory. Yet today, sovereigns cannot control what their national actors do outside their territory, nor how those activities directly affect their territory. From this perspective, the reach of the state has contracted before the market.

Joel R. Paul, *The New Movements in International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 607, 613-14 (1995).

conviction and action has been contained in the political dynamic, as shaped by internal State governance. Yet, as international private and public law "converge"⁴ to accommodate evolving interdependence, it is argued that there is a "rebound convergence"⁵ found in the relation between private legal action and governmental legal response which must be acknowledged.

Traditionally, the private actor's role has been seen as reactive; scholars, practitioners, and governments have focused mainly on the impact of international law upon the private actor. This Note seeks instead to analyze the converse: the impact of the private actor upon international law. The stance taken is not purely theoretical: the private actor's impact on international law is seen as a reality and it is the acknowledgement and legal accommodation of that impact by both governments *and* the private actor which are encouraged. Further, a conscious and active partnership (as opposed to an *ad hoc* response and reaction) is sought between private actors and governments on the international plane—a partnership in which the private actor actively embraces its role in international law formation and in which governments accommodate that role when it benefits all.⁶

4. The term "converge," used in this paper to describe the blurring of traditional boundaries in international law formation and application, is borrowed from Ronald Brand of the University of Pittsburgh. See Ronald A. Brand, *Semantic Distinctions in an Age of Legal Convergence*, 17 U. PA. J. INT'L ECON. L. 3, 3 (1996).

5. This term acknowledges that, except in certain contractual relationships, horizontal relations between private parties and States will likely remain more or less anomalous due to the scope and nature of State power. The relation examined here is one of impact, and can be visualized in the cause and effect of a bouncing ball as it rebounds among surfaces placed at different levels in a given universe. A similar dynamic lies in the concept of "subsidiarity," in which rationales and goals are formulated at the individual level, and then are filtered upward as "each individual enters successively higher levels of social organization to achieve his or her goals more effectively than is possible alone, or at lower levels of organization." Trachtman, *supra* note 1, at 50 n.40. Subsidiarity is more vertical in nature, however, and can be captured with terms such as the "domino" or "ripple" effect. This paper examines a more symbiotic relation, with the impact of action and law flowing reciprocally, that is, in both (or, more aptly, many) directions.

6. In exploring changing global relations due to current widespread political and technological changes, James Rosenau examines the "shifts in the loci of authority" which result from subnational interdependencies, as well as concurrent factionalism, and the impact of these shifts on sovereign authority and centralized government action. James N. Rosenau, *Governance, Order, and Change in World Politics*, in JAMES N. ROSENAU & ERNST-OTTO CZEMPIEL, GOVERNANCE WITHOUT

This Note examines the convergence and the rebound convergence⁷ formed by private legal action and public legal accommodation. Its focus will be on the interaction between current State-created labor standards in the "public" international arena with global market implementation of those standards in the "private" arena. Ultimately, this Note will extend its analysis, to examine the effect of State action accommodating such "private" market implementation on the formation of customary international law.

After examining the current role of private actors within international law in Part I, this Note will narrow its analysis in Part II, examining the implications of a recent initiative in the U.S. apparel and footwear industries. The initiative calls for those industries to compel certain wage and working conditions standards in their foreign operations and sourcing. In exploring the impetus for the initiative, Part III will survey the labor standard's historical treatment within public international law, pointing to the gap between interstate aspiration and sovereign practice. Part IV will then maintain that the gap between international standards and domestic practice can and should be filled by a private market initiative. By creating and enforcing contractual obligations that substantiate international labor standards, global industry revokes its role as an isolated market beneficiary, directly addressing its emerging accountability to both the consumers it serves and the governments that regulate it. Part V then scrutinizes the potential impact of such a cohesive industry initiative, foreseeing State accommodation of the market-implemented labor standard through national legislation. Finally, Part VI examines the effect of that legislation, in conjunction with market practice,

GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 3 (1992). This Note starts with the concept of "governance without government—of regulatory mechanisms in a sphere of activity which function effectively even though they are not endowed with formal authority." *Id.* at 5. This Note goes on to focus on the "aggregation of individual decisions . . . serv[ing] immediate subsystem concerns" which "cumulate to system-wide orderly arrangements." *Id.* at 5. This Note encourages an order deriving "from activities that are self-consciously designed to maintain [that] order," *id.* at 6, and continues by examining the symbiotic relation between informal governance and formal government which can serve to transform the informal prerogatives of private actors into formal imperatives of national governments. Finally, this Note examines how these national imperatives are then authoritatively acknowledged and enacted within the international order.

7. See *supra* notes 5, 6 and accompanying text.

on the formation of customary international law.

I. THE PRIVATE ACTOR IN CURRENT INTERNATIONAL LAW

The current restructuring of national borders and political systems,⁸ the opening up of global markets,⁹ and the recognition of both economic¹⁰ and environmental¹¹ interdependence have naturally led to the reexamination of international law's traditional constructs.¹² The constructs which have in the past so solidly upheld the international legal order are proving inadequate.¹³ There are many arguments calling for shifts in legal perspectives, for new mechanisms of State cooperation, for innovative private legal relations, and for the basic proposi-

8. "[T]he end of the cold war is going to require ultimately that we reassess policy both domestically and internationally in a far more profound way and in a far more extensive and pervasive way than I think any of us realized at the time." Bowman Cutter, U.S. Assistant Deputy for Economic Policy, Address at the Meeting of the American Bar Association International Law Section (Apr. 30, 1993) (transcript on file with author).

9. For example, the economies represented in the Asia-Pacific Economic Cooperation forum expanded between five and eight percent in 1993. China's economy alone has shown double-digit growth in the past few years. See Peter S. Watson, *The Framework for the New Trade Agenda*, 25 LAW & POLY INT'L BUS. 1237, 1239-40 (1994).

10. One U.S. official has acknowledged that, as the global trade agenda becomes one that deals with "the real kind of integrating effects that the globalization of the world economy is having," one issue faced is the harmonization of "various kinds of situations and legal regimes that have been quite different in the past and may not have mattered very much." Bowman Cutter, U.S. Assistant Deputy for Economic Policy, Foreign Press Center Briefing 11 (Dec. 23, 1993) (transcript available from Federal News Service).

11. One commentator has questioned the ability of current mechanisms to address the growing global awareness of environmental interdependence and effect. Watson, *supra* note 9, at 1244 (acknowledging that "[t]here is a real question as to whether we can begin addressing the new policy issues [such as environmental protection] through the principles and techniques of the old trade regime.").

12. See DANILENKO, *supra* note 2, at xiii-xiv. A classic statement of the traditional construct is found in the S.S. "Lotus" case:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.

S.S. "Lotus" (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7).

13. "The global changes in security, politics, and most fundamentally, economics and trade since the beginning of the Uruguay Round have created a new construct that requires a serious examination of not only evolving precepts, but indeed new realities." Watson, *supra* note 9, at 1237.

tion that international law is only barely keeping up with global reality.¹⁴

If international law is lagging behind global reality, however, it is not for want of trying. In recent years there has been a proliferation of multilateral efforts to meet global changes, addressing trade and economic issues, and common concerns regarding the environment and social considerations.¹⁵

These efforts have not been without success. Pervasive to each, however, is the dilemma of how to effectively accommodate new and varied interests within traditional constructs which have historically either ignored those interests or have at least separated them from, and subordinated them to, sovereign State concerns.¹⁶

Global reality, however, has given wider play to these private interests, be they individual, communal or corporate. Their impact on the statist infrastructure can be ignored only at the peril of international law's viability.¹⁷ As such, a "convergence"¹⁸ of interests, public and private, is reshaping the

14. "Market economic theory and democratic process have become defining elements of contemporary international relations. With their increasing acceptance has come increased involvement of the private party in transborder transactions. The structure of international law has yet to catch up with these developments." Brand, *supra* note 4, at 5-6.

15. See, e.g., Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act]; General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]; North American Free Trade Agreement Implementation Act, 107 Stat. 2057 (1993); *Report of the United Nations Conference on Environment and Development*, U.N. DOC. A/CONF.151/26 (1992); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. No. 10 (1987); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, pt. 3, at 52, U.N. Doc. A/6316 (1967) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, G.A. Res. 2200 A, U.N. GAOR, 21st Sess., Supp. No. 16, pt. 3, at 49, U.N. Doc. A/6316 (1966) [hereinafter ESCR].

16. For a related discussion on what has been termed the "international economic law revolution," which calls for the breakdown of this traditional dynamic, see Trachtman, *supra* note 1, at 36-37.

17. Brand, *supra* note 4, at 7 (contending that "the failure of the legal system to fit the underlying economic and political structures can only lead to the disintegration of the structures that do exist.").

18. Such convergence of "law applicable to private party transactions with law traditionally reserved to sovereign relationships" is placed under the banner of "international economic law;" the body of law that "represents much of the future

creation and formation of international law, as well as the way such law is effected in our market places and our societies.¹⁹

The reshaping of international law's formation has been acknowledged in the multilateral framework, on a limited basis, particularly in the area of information sharing.²⁰ Further, there is a continual call for non-governmental and public participation in multilateral policymaking and dispute resolution.²¹ Yet even with this greater transparency and input, the traffic of the law remains vertical.²² Despite evolving reconstructions within international law, it currently "retains notions rooted in concepts of second-tier sovereignty that allow only the sovereign to speak for the subject, and do not allow a relationship between the subject and international law unless and until the sovereign permits it."²³ States continue to react

of international law generally." *Id.* at 3-4. International economic law has been called a "prime example[] of legal developments based on increasing international interdependence and cooperation." DANILENKO, *supra* note 2, at 1.

19. As Brand points out, the interplay of domestic and international law is changing as global economic relations evolve and proliferate, as exemplified in increasing commercial partnerships between States and private parties. These partnerships subject States to both domestic law and international arbitration. In other instances, these partnerships make private parties subject to public international law, which has traditionally been reserved for State application. Brand, *supra* note 4, at 5. *See, e.g.*, Award on the Merits in Dispute Between Texaco Overseas Petroleum Company and the Government of the Libyan Arab Republic, *reprinted in* 17 I.L.M. 1, 30 (1978) (in commercial relations between private parties and States, private parties can choose applicable law at arbitration, be it national law, international law or both). *See also* Ronald A. Brand, *The Role of International Law in the Twenty-First Century: External Sovereignty and International Law*, 18 FORDHAM INT'L L.J. 1685, 1692 (1995) [hereinafter Brand, *External Sovereignty and International Law*].

20. In the WTO context, commentators point to Article 5(2) of the Final Act as providing a small window of opportunity for democratic mechanisms and transparency within the trade forum. *See* Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L.J. 699, 713 (1994). That provision allows the WTO to "make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO." Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. 5(2), LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 1144, 1146 (1994).

21. *See, e.g.*, Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996); *see also* Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295 (1996).

22. *See* Housman, *supra* note 20, at 713.

23. Brand, *supra* note 4, at 6. The recent incorporation of the GATT into the WTO does not appear to have changed the equation. While the WTO framework gives more weight to State enforcement of international trade rules, private parties

and respond to private interests from above, while private interests knock at the door from below, requesting entry.²⁴

It is this author's contention that the "bottom-up" dynamic inherent to the formation of international law will become more prevalent as the world's markets and societies globalize, particularly in light of current technological advances in transportation and communications²⁵ and the resurgence of democratic governance.²⁶ It is only by responsibly and consensually seizing control of the private relation on the global scale that private actors can become partners with States in the creation of public international law.²⁷

have little voice in the process and remain absent from the workings of policy-making. *See id.*

24. Some commentators argue that the future development of international law, however, depends on an evolved conception of State sovereignty which "recognizes that international law in the twentieth century has developed direct links between the individual and international law." Brand, *External Sovereignty and International Law*, *supra* note 19, at 1686. *See also* Trachtman, *supra* note 1, at 34-35 (stating that "[t]he very term 'international law' must be revisited and re-evaluated, as the system of law that governs international relations has both states and individuals as its subjects and objects").

25. *See* Rosenau, *supra* note 6, at 13.

26. Some commentators point to the resurgence of democracy as an engine of change in and of itself within global relations and markets. *See* Brand, *External Sovereignty and International Law*, *supra* note 19, at 1691-92. Conversely, one author argues that democracy is not the engine of change, but the result of change and contends that "aspirations [for democracy] are seen, rather, as a consequence of the skill revolution that has transformed the competencies of citizens." James N. Rosenau, *Citizenship in a Changing Global Order*, in ROSENAU & CZEMPIEL, *supra* note 6, at 290. Others argue that globalization has actually led to the loss of democratic process and national governance. *See* JEREMY BRECHER & TIM COSTELLO, *GLOBAL VILLAGE OR GLOBAL PILLAGE: ECONOMIC RECONSTRUCTION FROM THE BOTTOM UP* 29-31 (1994). The globalization of capital has decentralized the loci of democratic processes, and has left governmental control to the mercy of capital flight. *See id.* Because international mechanisms of control have not kept up with globalization, the corporate accountability which arguably exists at the national level does not exist on the international plane. *See id.* at 31. At the same time, however, Brecher and Costello claim that purely economic governance through international forums, such as the World Trade Organization, would "pre-empt democratic self-government at local, national, regional and global levels" on issues such as labor conditions and wages. *See id.* at 58. They argue that both global business and global governance "is not based on the consent of the governed" and that both remain isolated from the very public that their decisions impact. *See id.* at 63.

27. For example, demand for "participation in [international law's] creation, interpretation and application" will grow with the proliferation of multilateral rules that have an impact on the private actor. Brand, *supra* note 4, at 5. Currently, however, "[t]he state remains the organ through which the individual is represented in the development of international norms and mechanisms . . ." Brand, *Exter-*

The concept of "bottom-up" lawmaking is not new; indeed, it is the foundation of democratic governance. While this Note will touch upon the political dynamic found in such governance, the dynamic focused on here²⁸ is one of market action and its normative implications. The model being established is one of a symbiosis of State conviction (be it aspirational or regulatory), private response (transactions between market actors) and State accommodation (supportive State action and interstate acceptance). The interplay of private interest and public law implicated by this model currently exists within the confines of multilateral formation of international labor law.²⁹ It is contended, however, that this interplay will become more visible outside of those confines as the global authority and accountability of private actors deviates from the historical context of sovereign State power.³⁰ Indeed, it is the Clinton

nal Sovereignty and International Law, *supra* note 19, at 1695. The change, thus far, is that the State "may not always interfere when those norms are applied and those mechanisms are implemented." *Id.* at 1695-96.

28. To a certain extent, this paper tracks "the Efficient Market Model" as outlined in G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 367-69 (1996). This model views private individuals, business, and interest groups, rather than States, as "the 'essential players in international society who, in seeking to promote their own interests, influence the national policies of States' in international relations." *Id.* at 367. Philosophically, however, the argument in this Note is more closely aligned with Shell's "Trade Stakeholders Model," which is comparable to the Efficient Market Model in that it views individuals and groups as "primary actors" in international law, but is broader in scope due to its recognition of values and interests outside of traditional trade issues (such as environmental and labor issues). *See id.* at 369-70. While this author does not argue that market actors should be the sole arbiters of these non-trade values and interests, the present argument for market implementation of fair labor standards does call upon market actors to recognize labor standards as a matter of strategic business policy and judgment.

29. Indeed, private interests provided the initial impetus for State action concerning labor law, and have had representation within the International Labour Organisation from its formation. *See* discussion *infra* Part III.A.1.

30. *See generally* Rosenau, *supra* note 6. "Globalization transforms the bases of state authority from within and produces a multilevel post-Westphalian world order in which the state remains important but only as one among several levels of authority." Mark W. Zacher, *The Decaying Pillars of the Westphalian Temple: Implications for International Order and Governance*, in ROSENAU & CZEMPIEL, *supra* note 6, at 58, 81. Zacher continues to contend that "states are losing their degree of autonomy in managing their domestic and international economic policies, because of both the intensity of the [global] interdependence and the development of both explicit and implicit regimes." *Id.* This statement questions both the authenticity and the viability of current emphasis on State action alone in the formation of international law and norms.

Administration's exploitation of international industry's increased accountability that provides a fulcrum for the analysis that this Note presents.

II. THE PRIVATE ACTOR IN CURRENT INTERNATIONAL REALITY

On August 2, 1996, spurred by public pressure, President Clinton held a press conference, where he was joined by leaders of the U.S. apparel and footwear industries (the Industry).³¹ The conference called for greater private oversight of the operations and labor conditions of U.S. foreign production and sourcing.³² The Initiative announced the formation of a presidential task force consisting of Industry representatives, as well as labor union and human rights activists.³³ The task force's goal is to determine "steps" to be taken by the Industry to assure humane working conditions abroad, and to formulate domestic mechanisms for promulgating consumer information regarding those conditions.³⁴

Although the Initiative's work is behind schedule,³⁵ the

31. Present at the press conference, and committed to the initiatives announced, were Nike Inc., Liz Claiborne, L.L. Bean, Tweeds, Patagonia and Nicole Miller. *Reich Hails Breakthrough at White House Meeting with Apparel and Footwear Industry*, FDHC FED. AGENCY DOCS. (Dep't Labor), Aug. 2, 1996, available in LEXIS, Nexis Library, Feddoc File. Although the task force has since been named the Apparel Industry Partnership, hereinafter it will be referenced as the "Initiative" and the apparel industry will be referenced as the "Industry."

32. See *id.* See also Nancy Dunne & Stella Burch, *Clinton Moves on Sweatshops*, FIN. TIMES (USA Edition), Aug. 15, 1996, at 3; John F. Harris & Peter McKay, *Companies Agree to Meet on "Sweatshops"*, WASH. POST, Aug. 3, 1996, at A10; *Clinton, Clothing Industry Announce Anti-Sweat Shop Plans*, AGENCE FRANCE PRESSE, Aug. 3, 1996, available in LEXIS, News Library, Curnws File; *When It's Cruel To Be Kind*, STRAITS TIMES (SINGAPORE) (Comment/Analysis), Aug. 7, 1996, at 26 [hereinafter *Cruel to Be Kind*].

33. Steven Greenhouse, *Apparel Industry Group Moves to End Sweatshops*, N.Y. TIMES, Apr. 9, 1997, at A14.

34. At the press conference, President Clinton explained that industry representatives had agreed to do the following:

"First, [to] take additional steps to ensure that the products they make and sell are manufactured under decent and humane working conditions.

Second, [to] develop options to inform consumers that products they buy are not produced under exploitative conditions."

WebWire-Delivers Statement on Fair Labor Practices; Washington D.C., FDCH POLITICAL TRANSCRIPTS, Aug. 2, 1996, available in LEXIS, News Library, Curnws File. President Clinton also urged corporations to be "good corporate citizens by monitoring working conditions" of their contractors. Dunne & Burch, *supra* note 32, at 3.

35. See Courtney Schlisserman, *Coalition Will Take On Sweatshops*, PORTLAND

substance of its work is slowly evolving, taking tentative shape through various commitments and standards being negotiated among its members. Despite the fact that a "groundbreaking agreement" was reported in April of 1997 between Industry representatives and other task force members, as of December 1997, a stalemate on the wage standard has been reported and a sense of inertia intimated.³⁶ The April announcement called for Industry compliance with host countries' minimum wage laws and further encouraged "a link between wages and the basic needs of workers."³⁷ Since then, other market actors have made concerted efforts and have apparently embraced wage standards reflecting, if not actually referencing, international standards.³⁸ As nebulous as this all may seem, articulations of the prevailing international wage standards are now being scrutinized by individuals and companies who can affect and are affected by the standards, and while codes of conduct do not have legal force, they have historically proven efficacious where widely accepted and buttressed by positive law.

It is likely that the Clinton Administration is aware of this dynamic and is addressing the problem of sweatshop labor in a manner that, arguably, makes an endrun around the barriers created by traditional State sovereignty on the interstate level. As such, the Initiative raises questions regarding the efficacy of international law in addressing transnational labor practices. A survey of international law evinces the fundamental

OREGONIAN, Nov. 29, 1997, available in 1997 WL 13141465.

36. This agreement sought to create "a code of conduct on wages and working conditions, including a maximum 60-hour work week, for apparel factories that American companies use around the world." Greenhouse, *supra* note 33.

37. *Id.*

38. See generally Ron Scherer, *Eye on Firms That Use Cheap Labor Abroad—Service Will 'Certify' That Wares Meet Work Standards*, CHRISTIAN SCIENCE MONITOR, Fri., Nov. 14, 1997, available in 1997 WL 280522 (comparing the Initiative unfavorably with a more recently formed New York non-profit think tank called Council on Economic Priorities, a group that allows a business to buy its certification if the business complies with certain labor standards formulated by a consortium of international business, labor unions and human rights groups). See also Aaron Bernstein, *Sweatshop Police: Business Backs an Initiative on Global Working Conditions*, BUS. WK. (Analysis & Commentary), Oct. 20, 1997, available in 1997 WL 14813867. It should be noted, however, that many human rights and labor groups view the Council on Economic Priorities with skepticism, and have expressed fear that the CEP auditing process will require no "real change in sweatshops," while serving as a public relations front for companies which receive certification. *Id.*

disconnection forming between interstate aspiration and private result when sovereignty is given full sway in a world where sovereign power is diminished by market influence.³⁹

Moreover, whatever the motivation behind the Initiative, it exemplifies a market actor forced to step beyond its market operations in order to address broader issues which reshape its societal role in a transborder context;⁴⁰ a step which, if broadly taken, impacts not only the market relation, but the legal context within which the Industry operates.

This Note, thus, goes beyond a mere examination of the Initiative itself, to address the potential legal impact of a concerted industry enforcement of normative practice within the market relation. In so doing, this Note urges the Industry to go beyond the Initiative's announced measures by acquiring contractual commitments within its foreign market relations that support existing international labor standards. In so urging, the efficacy of international labor standards must be explored, and the bottom line concerns of the Industry addressed. In essence, it is argued that the long-term self-interest of the Industry requires such responsible action.⁴¹ Finally, the im-

39. See generally Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 988 (1995) (noting that numerous scholars have acknowledged that the "global economy diminishes the regulatory capacity of the nation-state.").

40. As two commentators observe, "questions relating to the human rights responsibility of transnational investors stand at the intersection of public and private spheres of law and policy." Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L. & BUS. 66, 69 (1993). While acknowledging the importance of legislative regimes on the subject, Orentlicher and Gelatt conclude that "effective leadership in defining those [corporate] responsibilities must come from the business community itself." *Id.*

41. No one would deny that labor standards can encourage basic human rights and serve to promote social justice. Yet, there has always been tension in the labor context between social concerns and business objectives. "The dualistic argument of the protection of workers on the one hand and of competitiveness on the other is the foundation of international labour law." LAMMY BETTEN, *INTERNATIONAL LABOUR LAW: SELECTED ISSUES 2* (1993). A survey of economic analysis on world trade clearly establishes wages and working conditions as "commodities" within the operation of comparative advantage and industrial policy. See, e.g., Bruce Cummings, *The Origins and Development of the Northeast Asian Political Economy: Industrial Sectors, Product Cycles, and Political Consequences*, 38 INT'L ORG. 1, 27-28 (1984) (explaining how the comparative advantage over other economies of both Taiwan and Korea derived from "relatively well-educated and skilled, but low-paid, labor.") The argument made here regarding market implementation does not dismiss the fundamental social concerns inherent to labor standards; it

pect of potential State and international accommodation of such contract relations will be discussed. It is State action that will ultimately buttress market-implemented labor norms, extending them into the realm of customary international law.

III. MULTILATERALISM AND THE STATE: THE ATTENUATION BETWEEN PUBLIC LAW AND PRIVATE RESULT

Accountabilities shifting between the State and the market, and the evolving amalgam of public need and private power, are sharpening the impact of sovereignty's operation within the present multilateral construct. The historical competence of multilateral solution rests in an accommodation of sovereign concern and reliance upon State enforcement; yet, as "the reach of the state [is] contract[ed] before the market,"⁴² State power and will to regulate transnational actors diminishes. Thus, while multilateral efforts to address substandard labor conditions are not to be discouraged, without market volition, the multilateral labor standard may likely remain aspirational.⁴³

In form, labor standards are by no means absent from current international law. They exist in numerous treaties promulgated in various international forums. Such standards have been expressed in broad human rights measures and specific labor regulations. There is growing pressure to address labor issues in trade forums as well. Yet there is attenuation between the international labor standard and the actual mar-

merely acknowledges the private market actor's ability to contractually demand such standards and explores the particular impact of that demand on international law formation.

42. Paul, *supra* note 3, at 614.

43. A traditional argument is that all international "law" is merely aspirational in that, without centralized international enforcement power, it relies on sovereign will and command. *See, e.g.,* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., 1954). Others argue that a less vertical dynamic within the international order must be legally cognizable, thereby framing international law as "legitimized politics." Burns H. Weston, *The Role of Law in Promoting Peace and Violence: A Matter of Definition, Social Values, and Individual Responsibility*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY* 114, 116-17 (W. Michael Reisman & Burns H. Weston eds., 1976). Regardless of how one frames the issue of what law is, law's legitimacy lies with its perceived impact; unsupportable law is ultimately not perceived as law within the contexts in which it is supposed to have effect. Accordingly, as widespread reporting of substandard labor practices grows, international labor law is losing its legitimacy.

ket practice which calls for an examination of the process from which the standard derives. The dynamics of multilateralism inform both the labor standard's scope and content, as well as its viability in current market practices.

A. *Multilateralism*

While States often disagree on substantive rules governing the global order,⁴⁴ a general consensus has been reached among nations regarding the procedural rules.⁴⁵ Principles underlying such agreed-upon procedures "identify the participants of the law-making process and establish appropriate procedures to be followed for the generation of generally binding rules of conduct."⁴⁶ The participants identified are the States, and a generally recognized and increasingly powerful mechanism is the multilateral treaty.

Such State consensus underlies multilateralism, the process by which States come together to form a common legal response to various international needs. Multilateralism has been recognized as "[o]ne of the most important political-legal factors" in the development of modern international law.⁴⁷ The rubric of "political-legal" is essential to an understanding of the multilateral process; "political considerations have to be singled out as one of the most important factors influencing present and future law-making activities."⁴⁸

The political essence of the multilateral mechanism is

44. See DANILENKO, *supra* note 2, at 13.

45. *Id.* at 13-14.

46. *Id.* at 14.

47. *Id.* at xiii. In the first 35 years of the United Nations' existence, over 200 multilateral treaties were concluded under its auspices. See *id.* at 2 n.1.

48. *Id.* at 4. The increasingly strident political dynamic involved in all things international evidently presents a challenge for economists as well as law makers. For instance, international law-making has proven difficult for economists to grasp analytically. Benjamin Cohen explains that a convergence of political science and economics is increasingly necessary to analyze international relations because the standard economic models generally exclude non-economic motivation. See Benjamin J. Cohen, *The Political Economy of International Trade*, 44 INT'L ORG. 261, 271-72 (1990). Political scientists, on the other hand, have long recognized that States have objectives beyond the mere maximization of income. See *id.* at 272. "At a minimum, states also care about the preservation of their political sovereignty and territorial integrity At a maximum, there may be a whole range of additional values that they pursue, covering everything from domestic distributional objectives to the international prestige of their national language and culture." *Id.*

founded on the traditional maxim of sovereign State equality and consent.⁴⁹ It is the express consent of ratifying States that gives treaties their force.⁵⁰ Yet a particular State's consent on one issue is often used as a bargaining chip—creating leverage and effecting compromise in consensus building.⁵¹ As a result, internal domestic interests and the need to balance varying State interests and power are often given sway over any inherent practical value of the norms to be established.⁵²

In examining existing labor standards, the political dynamic of international law creation cannot be ignored. State self-interest and national market concerns have, to a very large degree, shaped the articulation of international labor standards, and the same considerations have determined their implementation, or not, on the global scale.

1. Current Labor Standards Derived from the Multilateral Process

From the beginning, international labor law was seen as "the only possible solution" to provide humane working conditions to employees while protecting the interests of employers.⁵³ This balance between sustenance of the work force and maintenance of competitive advantage is the same balance argued for in this Note; it is the manner of implementation which is different.⁵⁴

49. See DANILENKO, *supra* note 2, at 53.

50. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 2 (4th ed. 1990).

51. See generally Bernard M. Hoekman, *Multilateral Trade Negotiations and Coordination of Commercial Policies*, in *THE MULTILATERAL TRADING SYSTEM: ANALYSIS AND OPTIONS FOR CHANGE* (Robert M. Stern ed., 1993). This dynamic has been referred to as "issue linkage," whereby a country's "behavior on a given issue is contingent on others' actions on other issues." *Id.* at 36. See also DANILENKO, *supra* note 2, at 17-21 (discussing the struggle between developing and developed nations in identifying sources of law from which they can respectively exercise new-found leverage or preserve historical power in the law-making process).

52. For a general overview of the issues faced in multinational trade negotiations, see Hoekman, *supra* note 51.

53. See JAMES MICHAEL ZIMMERMAN, *EXTRATERRITORIAL EMPLOYMENT STANDARDS OF THE UNITED STATES* 9 (1992).

54. This Note does not argue that private market action should supplant international efforts; it is the symbiotic relation between the two that is explored. Further, the paper does not seek to deny the success of international labor efforts thus far. It is also acknowledged that the elements missing in this Note's analysis are the vital roles played by both employees and labor unions. Their exclusion

It must be noted that private action's role in forming international labor standards is by no means a new concept; private interests had goaded State efforts regarding labor standards in the first instance, and private interests have a continuing presence within the operations of the International Labour Organisation (ILO).

The first initiatives seeking formulation of international standards were private; indeed, employers played a dominant role in the initiatives.⁵⁵ Private concerns and collective actions led to the 1890 Conference of Berlin, the first multilateral effort to address international labor issues.⁵⁶ While the Conference did not promulgate international standards, it did stimulate subsequent national legislation.⁵⁷ Further non-governmental initiatives led to the formation of the private International Association of Labor Legislation (IALL), the direct predecessor to the ILO.⁵⁸ It was the IALL that urged a 1905 governmental conference in Switzerland which led to the first interstate conventions on the subject.⁵⁹

Several years later, in the aftermath of World War I, the newly-drafted Treaty of Versailles⁶⁰ authorized the formation of a permanent agency to address common international concerns regarding conditions of employment.⁶¹ Accordingly, the ILO was created as an autonomous affiliate of the League of Nations.⁶² After the League of Nations dispersed, the ILO was

from the analysis is not meant to downplay their importance in forming labor standards, but merely to narrow the analysis presented here. Indeed, the labor efforts of the United States in the trade arena, as well as the industry efforts cited in this article, were prompted by employee and union actions. See BRECHER & COSTELLO, *supra* note 26, at 129-38.

55. See BETTEN, *supra* note 41, at 1-2.

56. See ZIMMERMAN, *supra* note 53, at 7-9. The Conference issued recommendations concerning mine and factory regulations, limits on Sunday hours and child labor. See *id.* at 9.

57. See BETTEN, *supra* note 41, at 3-4.

58. See ZIMMERMAN, *supra* note 53, at 10. This organization is referred to by some authors as the International Association for the Legal Protection of Workers (IALPW). See BETTEN, *supra* note 41, at 4.

59. See *id.* The IALL drafted two conventions. One addressed night work for women. The other addressed the use of white phosphorous in the match industry. These treaties entered into force in 1912. See *id.*

60. Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, 2 Bevans 43, 225 Consol. T.S. 188 [Treaty of Versailles].

61. See BETTEN, *supra* note 41, at 7-9.

62. See ZIMMERMAN, *supra* note 53, at 11. Thirty-nine nations attended the ILO's first Conference in 1919, where six Conventions were adopted. See BETTEN,

secured in a 1946 agreement as a specialized agency of the United Nations.⁶³

An examination of the ILO's work presents both a vivid example of the traditional multilateral process as well as a unique model for private participation in that process. From its formation, the ILO acknowledged the interdependency of national labor regulations,⁶⁴ and the interrelation of interests needing representation in the international arena. The ILO's tripartite structure accommodates an interplay of interests by involving governmental representatives, employers and workers.⁶⁵ The ILO has been heralded as a positive example of private participation in international law.⁶⁶ Yet, its comprehensive approach has never been free from conflict; issues of State sovereignty and industrial protectionism were obstacles to early initiatives,⁶⁷ and have remained so throughout the

supra note 41, at 11. Those six conventions covered hours of work; unemployment; maternity protection; night work for women; minimum age; and night work for young persons. *See id.* The States involved were the European nations and the Soviet Union (both as then formulated), the United States, China, Japan, India, Persia, Thailand, Canada and South Africa. Note, however, that the United States did not actually become a member of the ILO until 1934. *See id.*

63. *See BETTEN, supra* note 41, at 11.

64. "[T]he failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries." ZIMMERMAN, *supra* note 53, at 11.

65. The ILO consists of three main organs: the General Conference, the Governing Body, and the Secretariat. *See BETTEN, supra* note 41, at 13. The first two of these organs are tripartite in nature: its members are workers, employers and governmental agents. *See id.* The balance, however, even within this structure is weighted toward governmental interests, with each member nation having two representatives, and one representative from the employer and worker factions. *See id.* at 10. It must be noted, however, that the ILO Conference Committee on the Application of Conventions and Recommendations, which has certain oversight functions, is composed of governmental, industry and labor representatives, all with equal voting power. *See VIRGINIA A. LEARY, INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW: THE EFFECTIVENESS OF THE AUTOMATIC INCORPORATION OF TREATIES IN NATIONAL LEGAL SYSTEMS* 19 (1982). This Conference Committee makes partial review of reports submitted by an independent Committee of Experts regarding State compliance, and can address noncompliance in its own report. *See id.* at 19-20. The process is essentially political because inclusion of a State's noncompliance in the Committee's report is considered "the most serious moral censure available within the ILO regular supervisory system." *Id.* at 20. Thus, due to the political sensitivities involved, the ILO General Conference has, at times, not adopted portions of the Committee's reports involving these censures. *See id.*

66. *See BETTEN, supra* note 41, at 13-19.

67. For instance, when the first 1890 multilateral conference attempted to establish a reporting system, strict measures were rejected, with the British dele-

ILO's existence.⁶⁸

The ILO's main function is to establish labor standards and promote information sharing among member States.⁶⁹ Yet despite declarations, and even legislation, many note that the standards promulgated have had little force in the actual workplace.⁷⁰ This failure of implementation is largely due to lack of an interstate enforcement mechanism attaching to the ILO promulgations.⁷¹ From the beginning it was decided that nations would be bound by ILO commitments only to the extent that such obligations were incorporated into national law.⁷²

gates making it clear that "they refused to allow their industrialists to be subjected to the control of a foreign power." BETTEN, *supra* note 41, at 3-4. *See also*, ZIMMERMAN, *supra* note 53, at 13-14 (discussing the United States' turbulent relationship with the ILO).

68. The ILO has, particularly in the 1960s and 1970s, experienced major controversy due to the politics of State sovereignty and was accused of going beyond its mission in taking political stances. *See* BETTEN, *supra* note 41, at 19. Among the actions that caused such controversy were the ILO's condemnation of South Africa's apartheid regime; its criticism of Chile's gross violations of the freedoms of association; its attack on alleged racial discrimination of Israel's trade union policy; and its granting observer status to the PLO. *See id.* In response to such actions, the United States withdrew from the ILO in 1977, but returned two years later. *See id.* The political strife abated somewhat during the 1980s, *id.*, and the United States modified its attitude toward the ILO. *See* Secretary of State George Shultz, U.S. Role in the ILO (statement before the Senate Committee on Labor and Human Resources, Sept. 11, 1985), in DEP'T ST. BULL., Nov. 1985, available in LEXIS, DOS File (explaining why the United States left, and returned to, the ILO and encouraging broader U.S. ratification of ILO conventions).

69. *See* ZIMMERMAN, *supra* note 53, at 11. The ILO's goals, enumerated in a 1944 amendment to its Constitution include full employment and a higher standard of living; wage policies that "ensure a just share of the fruits of progress to all;" protection of collective bargaining; ensuring safety standards; equality; and the protection of women and children in the work force. Declaration Concerning the Aims and Purposes of the International Labour Organisation, Oct. 9, 1946, art. III, 62 Stat. 3554, 15 U.N.T.S. 104 [hereinafter Philadelphia Declaration]. *See also* Constitution of the International Labour Organisation, June 28, 1919, 49 Stat. 2712, 225 Consol. T.S. 378 [hereinafter ILO Const.].

70. *See* ZIMMERMAN, *supra* note 53, at 2.

71. *See id.*

72. *See* BETTEN, *supra* note 41, at 10. This has led to much confusion in States where "automatic incorporation" of international commitments occurs, especially where the concept of "self-execution" can bar national courts' recognition of the obligations. *Id.* at 20-25. It has also led to reticence in ratification on the part of "legislative incorporation" States where, once an international obligation is incorporated, its binding character is clear. For a thorough treatment of the incorporation issue within international labor law, see LEARY, *supra* note 65. A large number of States have automatic incorporation whereby an international treaty becomes national law immediately upon the treaty's ratification (although some countries require subsequent publication before the treaty takes legal force). *See id.* at

Even with its unique tripartite structure of representation,⁷³ the ILO's competence is shaped by the accommodation of sovereign prerogatives which impair the labor standard's operation in national law and, therefore, in private practice. Moreover, as capital and labor have mobilized, States' power and will to effectuate labor standards within their own borders have been subverted.⁷⁴ Thus, national law is more often used to deflect, rather than implement, the international labor standard.

2. The ILO as a "Political-Legal" Body

A survey of the ILO's work regarding international wage and working conditions evinces the "political-legal" rubric at play. The ILO Constitution provides that States with "imperfect development" may modify or "opt out" of norms established by the Organization.⁷⁵ The provision allows countries with

2. However, the doctrine of "self-execution" can block national enforcement of a treaty norm even if ratification has been achieved. If a treaty has not been legislatively enabled, the doctrine requires a judicial determination of the self-executing nature of the treaty norm at issue. The norm will not be enforced unless an intent that it should operate with legal force is found. *See* BURNS H. WESTON, ET AL., *INTERNATIONAL LAW AND WORLD ORDER 194-96* (2d ed. 1990) [hereinafter *WORLD ORDER*]. "Legislative incorporation," on the other hand, requires statutory enactment of all treaties before they have the force of national law. LEARY, *supra* note 65, at 2.

73. Ironically, the realization of international labor standards has been frustrated by the power dynamics between the ILO constituencies. While the ILO's tripartite structure has "without doubt contributed greatly to the relatively successful functioning of the Organisation[, it has also] been a source of serious conflict." BETTEN, *supra* note 41, at 14. For instance, in the late 1930s, employer delegates challenged the newly-joined Soviet delegation, arguing that the notion of the "State" as employer prevented the delegation from being truly tripartite in composition. The Soviet Union maintained that the concept of an "employer" did not necessarily mean "private" employer. The issue was debated before the ILO's Governing Body with no resolution. Ultimately, the Soviet Union withdrew from the ILO in 1940, but the issue arose again upon its return in 1954 (when challenges were also levelled at six other socialist countries). *See id.* at 14-15. In-fighting continued between employer delegates until 1968 when the employers' group stopped trying to bar the voting power of socialist employers. *See id.* at 15. Another problem within the ILO's structure has been trade union representation from countries where the freedom to associate is regularly violated. *See id.* at 16. A common practice in this context has been the establishment of "puppet" unions by dictatorships existing in such States. The ILO's response here has been that, while freedom to associate is a basic tenet of the Organization's constitution, its existence is not a prerequisite to a State's membership. *See id.* at 16-17.

74. *See* Van Wezel Stone, *supra* note 39, at 989.

75. ILO Const., *supra* note 69, art. 19(3).

"insufficiently developed economies" to apply lower standards than others.⁷⁶ This provision, along with other mechanisms of "flexibility" (including permissible denunciation of isolated clauses and the use of "open" wording subject to wide interpretation)⁷⁷ exemplify both the necessities and vagaries of multi-lateral law-making.⁷⁸

Many of the ILO Conventions address working conditions within specific industries, but a large number of them have received little support from membership.⁷⁹ Among the conventions receiving substantial support are those prohibiting forced labor, supporting freedom of association, and requiring equal pay for equal work.⁸⁰ These labor norms are three which have been viewed historically as "fundamental," receiving State support not only via the ILO, but through numerous human rights instruments as well.⁸¹

But it is working conditions, including pay, that the Industry Initiative addresses. These have received far more varied ILO treatment for reasons that elucidate the "endrun" on sovereignty perceived in the Initiative's establishment.⁸²

The chief barrier to an effective international approach to working conditions and pay is that, regardless of international declarations, such issues are ultimately issues of national law and are typically regulated by national labor codes, collective

76. BETTEN, *supra* note 41, at 22.

77. *See id.*

78. One example of this dynamic is that the revision of an ILO convention's standard does not necessarily lead to universal renunciation of the initial promulgation. *See* BETTEN, *supra* note 41, at 23. States can choose to remain committed to the first Convention, can renounce the first by ratifying its revision, or can choose to be bound by both promulgations. *Id.* This structure obviously impairs uniformity, but may be helpful when a convention is based on reciprocity and creates obligations between States. *Id.*

79. *See* BETTEN, *supra* note 41, at 25 n.21. It should be noted that many non-ratifying States are less developed than those that do ratify. *See id.* at 27.

80. *See* BETTEN, *supra* note 41, at 25. Among these are the Forced Labour Convention No. 29 (128 ratifications as of 1992), the Forced Labour Convention No. 105 (111 ratifications as of 1992), the Freedom of Association Conventions Nos. 87 and 98 (with 99 and 114 ratifications respectively), the 1951 Equal Remuneration Convention No. 100 (112 ratifications), the 1958 Discrimination in Employment and Occupation Convention No. 111 (110 ratifications). *Id.*

81. BETTEN, *supra* note 41, at 66. For a thorough discussion of the freedom of association in the international trade context, see *id.* at 67-123. For the same on forced labor, see *id.* at 125-55, and on equality on employment, see *id.* at 157-85.

82. *See* discussion *supra* Part II.

agreements within given sectors, and judicial decisions.⁸³ Despite this barrier, the ILO has consistently addressed working hours and leisure requirements, as well as wage and safety standards.⁸⁴

The issue of working hours received attention at the first ILO Congress in 1919.⁸⁵ Varying norms have been debated and articulated ever since,⁸⁶ but with mixed success.⁸⁷ For example, Convention No. 61, which attempts to extend limited work weeks to the textile industry, did not have enough ratifications to enter into force as of 1993.⁸⁸

International wage standards have also proven difficult to implement and regulate.⁸⁹ A determination of what constitutes a "fair wage" in any given environment or occupation depends greatly on national circumstances.⁹⁰ Moreover, macroeconomic issues—such as fluctuations in commodity prices at the international level—thwart wage policy advancement at

83. See BETTEN, *supra* note 41, at 187-88.

84. See *id.* at 189-211.

85. See *id.* at 11, 189. The first Convention was limited to the industrial sector. That convention set the work day at eight hours and the work week at 48 hours. See *id.* at 191. Industrial enterprises that involved processes requiring continuous shifts were allowed a 56-hour work week. See *id.* This convention was ratified by 50 member States. See *id.* at 192.

In the 1930s, additional ILO conventions attempted, albeit with very limited success, to reduce the standard 48-hour work week to 40 hours. See *id.* at 192-93. In the 1960s, all that could be achieved on this front was Recommendation No. 116, which encourages member States to formulate policies which would reduce work hours and to strive for the standard of a 40-hour work week. See *id.* at 193.

86. See generally NICHOLAS VALTICOS, *INTERNATIONAL LABOUR LAW* 134-40 (1979).

87. See *id.* (highlighting the difficulties encouraged by the labor movement in working toward a reduction of work hours). Valticos calls the effort to reduce hours the "most prized" of the labor movement's achievements. *Id.* at 134.

88. See BETTEN, *supra* note 41, at 193 n.15. While some western countries recently have shown a willingness to lessen working hours; absent from this trend are the United States, Japan and Great Britain, each fearing the loss of a competitive edge to the others. See *id.* at 197 n.29. As automation and communications have advanced, employers have generally showed more interest in "flex" hours than hour reductions, and have sought support for the use of part-time workers to meet productivity needs. See *id.* at 197-198. While employees and their representatives have not fought these adjustments, there is general concern that workers will, as a result, receive less protection. See *id.* at 198. While the ILO has conducted various studies relating to this concern, normative work has yet to be conducted in the area. See *id.*

89. See VALTICOS, *supra* note 86, at 125.

90. BETTEN, *supra* note 41, at 206; see also VALTICOS, *supra* note 86, at 126.

the national level.⁹¹ Nonetheless, the ILO has followed a policy stating that economic and social conditions of a given country will not excuse abrogation of any ILO convention obligations to which a State has consented.⁹²

It should be noted that wage policy does not consist of wage fixing alone, but also encompasses overtime pay and prohibited wage deductions.⁹³ While these additional factors were addressed in the 1951 ILO Equal Remuneration Convention,⁹⁴ the earliest wage standards set forth by the ILO involved only the fixing of minimum wages.⁹⁵ In 1970, a new convention of broader application was promulgated to address sub-subsistence wages; Convention No. 131 along with Recommendation No. 135 (hereinafter 1970 Convention), requires the establishment of minimum wage structures and states that such measures must "have the force of law."⁹⁶ Although the 1970 Convention's provisions contain open language—and seek to accommodate traditional State concerns—the earlier, less specific and less demanding Convention has received almost twice the State ratifications as has the 1970 Convention.⁹⁷

While the ILO has done a great deal to raise awareness of, and address varying labor concerns among the States,⁹⁸ the

91. See BETTEN, *supra* note 41, at 206-07.

92. See *id.* at 207.

93. See *id.* at 208.

94. See *id.* at 215.

95. See *id.* at 208-09 (discussing ILO Convention No. 26 and Recommendation No. 30, adopted in 1928). The Convention requires ratifying States to "create or maintain a minimum wage fixing machinery" in certain occupational sectors. *Id.* See also VALTICOS, *supra* note 86, at 126-28 (discussing the 1928 Convention).

96. BETTEN, *supra* note 41, at 209 (citing Convention No. 131, arts. 1 and 2(1)). Under Convention No. 131, States may decide for themselves the measures to be taken to fulfill their obligations under the treaty. See *id.* at 210. The Convention demands, however, that States, when devising such measures, take the following into account:

(a) the needs of workers and their families, bearing in mind general levels of wages, cost of living, social security benefits and living standards of other social groups[,] and

(b) economic factors, including requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

Id. at 210 (citing Convention No. 131, art. 3).

97. As of 1992, the 1919 Convention had received 69 ratifications, while the 1970 Convention had only 34 ratifications. See BETTEN, *supra* note 41, at 211.

98. Even without extensive ratification, the ILO's work has compelled the revision of numerous national labor laws, in that "sometimes whole passages of ILO Conventions are transcribed into national law, even if the Convention itself is not

recent expansion of global trade has heightened those concerns.⁹⁹ In response, the ILO has begun to consider addressing labor standards by "tackling" trade issues, while continuing its "social focus" agenda. In its Spring 1996 meeting, the ILO Governing Body decided to extend the tenure of its Working Party on the Social Dimensions of the Liberalisation of International Trade.¹⁰⁰ This step was taken to foster member States' commitment to a parallel development of trade liberalism and social progress, in order to fulfill their obligations to the ILO.¹⁰¹ The convergence of approaches reflects a growing State acknowledgement of the impact low wages and labor conditions have on the flow of international trade.¹⁰²

3. International Labor Standards and Trade

The issues of sovereign power and State concerns that exist within the international labor law context are equally prevalent in the international trade arena.¹⁰³ While linkage between the labor standard and trade has been attempted in such arenas as the GATT and the WTO,¹⁰⁴ some States re-

ratified." *Id.* at 389. *See generally id.* at 386-94. Moreover, the many separate ILO Conventions and Recommendations "adopted over the years . . . constitute, from a certain point of view, a comprehensive whole which has often been described as the International Labour Code." *See* BRECHER & COSTELLO, *supra* note 26, at 46.

99. *See ILO Governing Body Tackles Social Dimensions of Global Trade*, EUR. INFO. SERV., Apr. 1, 1996, available in News Library, Ecnews File [hereinafter *Social Dimensions of Global Trade*].

100. The Working Party first met in November of 1995. *Id.*

101. *See id.*

102. *See* WILLIAM A. LOVETT, *WORLD TRADE RIVALRY: TRADE EQUITY AND COMPETING INDUSTRIAL POLICIES* i-xvi (1987) (focusing on job relocation and wage impact within advanced industrialized nations).

103. This is exemplified by the Special and Differential Treatment (S&DT) received by lesser-developed countries (LDCs) under the GATT. *See generally*, David M. Trubek, *Protectionism and Development: Time for a New Dialogue?*, 25 N.Y.U. J. INT'L L. & POL. 345 (1993). According to the "structuralist" school of economic thought (which stresses the historical trade relations between developed and lesser-developed), the GATT's General System of Preferences (GSP) and the system of S&DT were adopted to ameliorate income disparities between developed and developing countries. *See id.* at 350. The GSP relaxes the core GATT principles of liberalization for LDCs, providing for graduation into the formal GATT structure once an LDC's economy develops. *See id.* at 350-52. Countering this mechanism are GATT "safeguards," which enable developed countries to protect their domestic employment levels, which ultimately would be threatened by wage differentials as a factor of "comparative advantage." *Id.* at 353-54.

104. For instance, a fair labor standard was informally proposed for the GATT by the United States in 1953, but the initiative failed. *See* Watson, *supra* note 9,

main reluctant to commit labor issues to the "liberalization" trend in global trade policy.¹⁰⁵

Current trade policy among nations can be characterized as striving—to the extent possible—for absolute free trade. As an economic theory, free trade strives for the least amount of trade restriction and governmental intervention, and the greatest amount of economic openness in light of various political concerns. Thus, doctrinally governmental regulation, be it domestic or international, is antithetical to traditional free trade doctrine.¹⁰⁶ The inherent paradox of this perspective is that, in the multilateral context, it is the State which, in effect, intervenes and stands as exclusive arbiter of its internal market interests.¹⁰⁷ Moreover, with the globalization of markets,

at 1253. Further U.S. initiatives were put forward during the 1974 Tokyo Round of the GATT. *Id.* The initiatives received little or no support, and the United States eventually dropped them because they "might have complicated ongoing negotiations on other issues." *Id.* The United States did, however, submit a proposal to the 1979 GATT Consultative Group of 18, "calling for consideration of minimum international labor standards as part of the post-Tokyo Round work program." *Id.* As in 1953, these initiatives failed. *See id.* More recently, in anticipation of the April 15, 1994 signing of the Uruguay Round, U.S. Trade Representative Mickey Kantor announced that the Clinton Administration would issue a statement outlining initiatives addressing, among other issues, "workers' rights." *Id.* at 1245.

The WTO, at its December 1996 Ministerial Conference, hotly debated the linkage of labor to trade. *See WTO Ministerial Conference—Day 3: Labour Standards Still the Thorny Issue*, STRAITS TIMES (Singapore), Dec. 12, 1996, at 47 available in NEXIS, News Library, ALLNEWS file.

Ultimately, a reference to labor standards was included in the binding Ministerial Declaration, which establishes the ILO to be the competent forum for labor standards, and emphasizes that the comparative advantage for low-wage countries would not be questioned. *See Gary G. Yerkey, U.S. Fails to Win Backing for Plan to Study Trade/Labor Standards Link*, 13 Int'l Trade Rep. (BNA) No. 50, at 1939 (Dec. 18, 1996).

105. *See, e.g., WTO Ministerial Conference, supra* note 104 (pointing out opposition to linkage by such States as Malaysia, Pakistan and India). While U.S. efforts at linkage have been hampered by the various national agendas typically present at multinational trade negotiations (MTNs), *see generally* Hoekman, *supra* note 51, the United States received tentative support from some developed countries on its GATT labor initiatives. *See* Watson, *supra* note 9, at 1254-55. Some developing countries, however, have rejected the initiatives as "protectionist" and "misplaced Western paternalism." *Id.*

106. *See generally* Hoekman, *supra* note 51.

107. This construct dovetails with the "historical underpinnings" of sovereignty, which is explored in Brand, *External Sovereignty and International Law, supra* note 19, at 1687-90. Brand refers to Hobbes' influence, elaborating the social contract between sovereign and individual where the individual surrenders his or her voice on certain issues to the sovereign, in order that the sovereign can preserve

international trade law is arguably the most intrusive of international legal regimes, except perhaps, those addressing the methods of war.¹⁰⁸

While it is clear that the State plays a role in the trade arena, the role of market actors—the very actors that effect trade—in multilateral trade negotiations (MTNs) remains a passive one, in the sense of the traditional social contract between government and private actors.¹⁰⁹ While calls to change this dynamic are steadily growing, they have yet to be answered.¹¹⁰ Thus, while it would logically seem that the labor standard (as a component of comparative advantage)¹¹¹

“peace and common defense” for all. *Id.* at 1687. While Brand feels that the notion of sovereignty as a social contract is an “internal concept,” and is “a mistake” as “applied to states in their relations to other states,” *id.* at 1690, “current notions of sovereignty” cannot be generalized. For a survey of authors writing on the issue, see *id.* at 1685 n.2.

108. In the context of threats to global peace, United Nations member States place themselves under the auspices of the Security Council. See U.N. CHARTER, CHAP. VII. Similarly, changes made to the dispute resolution process of the WTO (as compared to the prior GATT system) evince an erosion of the sovereignty principle in the face of global trade regulation. See Shell, *supra* note 28, at 362-65. Shell argues that the GATT's dispute resolution system supported the realist construct of international relations by assuming “that a state would comply with international trade rules only when that state deemed it in its immediate self-interest to do so.” *Id.* at 365. Under the GATT system, a disfavored State had the ability to veto a panel decision with a single vote. See *id.* at 362. The WTO structure (which displaces the GATT's system) denies the losing State a veto, and only permits a panel decision to be overturned if all member States, including the winning State, vote to reverse it. See *id.* at 362-63. Thus, by participating in the WTO to legislate trade, a State allows its sovereignty to be diminished.

Conversely, some commentators argue that the WTO's dispute resolution process actually bolsters State sovereignty through its reliance on voluntary compliance in connection with a system of graduated incentives which serve a State's interests. See Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416 (1996).

109. See generally Brand, *supra* note 4.

110. See generally Watson, *supra* note 9.

111. The theory of comparative advantage has been described as the “driving force behind international trade.” *Not So Absolutely Fabulous*, ECONOMIST, Nov. 4, 1995, at 89. It is rooted in the work of David Ricardo, which posits that “nations are materially better off, individually as well as collectively, if they produce only those goods and services that they are most efficient at producing and import the rest of what they need.” Shell, *supra* note 28, at 364 n.27. From the perspective of classical free trade theory, emerging industrial countries within today's market are a “a natural outcome” of the evolution of comparative advantage when that term is defined as having resulted from “relative factor endowments in the availability of land, labor and capital” held by a particular country. James M. Lutz & Young Whan Kihl, *The NICs, Shifting Comparative Advantage, and the Product Life Cycle*, 24 J. WORLD TRADE 113, 115 (1990) (addressing the “shifting” quality of com-

would be intrinsic to international trade negotiations, its absence from current trade negotiations speaks less to logic, than to State sovereignty, interest and politics.¹¹² Ultimately, the prospect of an international labor standard becoming a trade rule may be defeated by issues of sovereignty. Unlike the prospect of trade constraints on environmental standards,¹¹³ "trade constraints on domestic labor standards" may not be so readily accepted because such standards may not have "demonstrable external effects."¹¹⁴ The issue is complicated by the fact that any possible showing of external effects from domestic labor standards gives rise to the specter of protectionism.¹¹⁵

parative advantage in conjunction with the "product life cycle"). When demand for a particular product line increases and its manufacture becomes more standardized, new producers enter the market (for example, a newly industrialized country (NIC) such as China). *See id.* at 115-16. To counter, the original producer (usually an already industrialized nation), who has higher operation costs, shifts production to less industrialized nations to take advantage of that nation's resources and low wages. *See id.* At a later stage, when the NIC finds itself with an evolved economy and increased operational costs, it too shifts production to foreign shores. *See id.* at 115-16.

Such shifts in comparative advantage, and the elemental factors involved (such as wages and operational costs), impact the shaping of global trade and the exercise of competition policies. Indeed, the operation of comparative advantage and product life cycle theory could be likened to what some authors refer to as the "race to the bottom" and "downward spiral" of the global economy. *See BRECHER & COSTELLO, supra* note 26, at 22-28.

112. For instance, in a 1994 Association of Southeast Asian Nations (ASEAN) communique, foreign ministers expressed serious concern that attempts by developed States to include "social clauses [addressing such issues as a labor standard] into international trade agreements would restrict market access and adversely affect the employment opportunities in developing countries." ASEAN Post-Ministerial Conference, DEPT ST. DISPATCH, Aug. 8, 1994, at 545. Interestingly, some labor activists agree with this stance. BRECHER & COSTELLO, *supra* note 26, at 136. One such activist has attacked U.S. attempts to inject labor issues into the WTO framework as "quite clearly prompted not by feelings of goodwill toward Third World workers, but by protectionist attempts to prevent the transfer of jobs from the North to the South." *Id.* at 136 (quoting Martin Khor, director of the Third-World Network).

113. A strong argument can be made that the effects of a State's environmental practices on its neighbors, as well as on the global commons, warrant multilateral efforts addressing environmental issues. While many developing countries are wary of such efforts, there is a growing recognition among these countries that "upward harmonization of environmental standards" can sometimes be to their advantage. *See* Watson, *supra* note 9, at 1257.

114. Watson, *supra* note 9, at 1257.

115. Many developing countries object to the imposition of international labor standards. *See* Kimberly Green, *Labor Standards in the European Union: The Effects on Multinationals*, 18 HOUS. J. INT'L L. 497, 517 (1996). Further, these low-wage countries argue that these standards are merely an attempt by the more

The labor standard has not, however, been totally divorced from trade discussions. In fact, the labor standard has some historical basis in at least one trade forum—the 1948 Havana Charter for an International Trade Organization (ITO).¹¹⁶ The Havana Charter states that member States “recognize that unfair labor conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each member shall take whatever action may be feasible and appropriate to eliminate such conditions within its territory.”¹¹⁷ The ITO, however, never materialized, and, instead, the General Agreement on Tariffs and Trade (GATT)¹¹⁸ was established and has since become the “primary multilateral [trade] forum.”¹¹⁹

The GATT did not adopt the fair labor provisions of the Havana Charter,¹²⁰ although its “Preamble recognizes that expanded trade is not an end itself and that it should contribute to other objectives (e.g., ‘. . . raising standards of living, ensuring full employment’).”¹²¹ Despite this language, however, the implementation of international labor standards is, at best, “an indirect objective” of the GATT.¹²²

Despite this fact, labor issues have played an increasingly prominent role in the GATT, and now in the WTO.¹²³ Yet,

developed countries to “take away their comparative advantage.” Pratap Chatterjee, *Trade—GATT: Last Minute Drive to Highlight Workers’ Rights*, INTER PRESS SERV., Apr. 13, 1994, available in LEXIS, News Library, Intres File, at *1. Moreover, this perspective is not limited to underdeveloped countries. Ongoing conflict exists between the United Kingdom and the rest of the European Union regarding implementation of the 1989 Community Charter of Fundamental Social Rights and the Social Charter Action Programme, both of which contain certain measures regarding labor treatment. See Green, *supra* at 500-03. The United Kingdom’s ongoing obstructionist tactics has brought about accusations that the United Kingdom is engaging in “social dumping—eroding workers’ rights in a bid to attract foreign investment.” *Europe’s Single Market Labour Pains*, ECONOMIST, Feb. 6, 1993, at 71.

116. *Havana Charter for an International Trade Organization*, U.N. Conference on Trade and Employment, Ch. II, art. 7, U.N. Doc. E/CONF. 2/78 (1948) [hereinafter *Havana Charter*].

117. *Havana Charter*, *id.*, art. 7.

118. GATT, *supra* note 15.

119. Hoekman, *supra* note 51, at 29.

120. Note, however, that the GATT at Article XXIX “states that contracting parties undertake to observe the general principles of certain chapters of the Havana Charter, including Chapter II.” GATT, *supra* note 15, art. 29. See also Watson, *supra* note 9, at 1253.

121. Watson, *supra* note 9, at 1253.

122. *Id.* at 1253.

123. Citing “renewed interest” in the labor issue and its incorporation into the

protectionist motives (real and perceived) may very well stymie the integration of labor into the trade arena.¹²⁴ Some, however, point to the recent North American Agreement on Labor Cooperation (NAFTA Labor Agreement)¹²⁵ as “open[ing] a new chapter in the relationship between worker rights and trade policy.”¹²⁶

GATT agenda, Watson contemplates future discussions, framing them in the lexicon of trade concerns: “We are likely . . . to hear variations on the theme that trade policy must ‘level the playing field’ by making labor standards, wage rates, and worker benefits identical around the globe.” *Id.* at 1255.

124. The mere threat of foreign competition has become a “chief bargaining card” for employers negotiating with labor unions. BRECHER & COSTELLO, *supra* note 26, at 22. Recent U.S. legislation acknowledges this development and its impact on workers. Pub. L. No. 100-418, § 1101(14)(B), 102 Stat. 1121, 1125 (*codified as amended* at 19 U.S.C.A. § 2901 (1988)) (where the United States aimed for GATT adoption of the principle that “denial of worker rights should not be a means for a country or its industries to gain competitive advantage in international trade”). Moreover, developing countries’ fears of protectionist motives may not be unfounded. United States Trade Ambassador Mickey Kantor has publicly stated that to have “prosperity here at home, build jobs and serve the American people,” this country will have to insist “that its trading partners follow the same standards, including worker standards and environmental rules, that we do.” Hobart Rowen, *New Trade Buzzword*, WASH. POST, Dec. 31, 1993, at A21. French officials have used similarly strong language in addressing the issue within the context of the European Union, arguing that the Union should seek “protection against unfair foreign competition which is based on lower wages . . . and environmental standards” and that without resolution of these problems, there will be “major distortions of competition and uprooting of companies [in western Europe].” Andrew Gowers & David Buchan, *Balladur Calls for EU Action Against ‘Unfair’ Trade*, FIN. TIMES, Dec. 31, 1993, at 1 (quoting French Prime Minister Edouard Balladur).

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

126. Watson, *supra* note 9, at 1256. Upon the Bush administration’s 1990 announcement that it would pursue a trade agreement with Mexico, labor groups raised concerns that such an agreement would hurt U.S. workers and manufacturers. See Michael S. Barr et al., *Labor and Environmental Rights in the Proposed Mexico-United States Free Trade Agreement*, 14 HOUS. J. INT’L L. 1, 3 (1991). These groups argued against the agreement based on the troubling wage differential between Mexican and U.S. workers. See *id.* As of 1988, the Mexican wage was one-ninth the American wage. See *id.* at 10 n.43. The fear was that lower Mexican wages would lead to unfair price competition for American businesses, which would result in a lowering of U.S. wages and/or the transplantation of production and jobs to Mexico. See *id.* at 3-4. Both Mexican and American labor groups voiced concern that the agreement would also serve as a disincentive for the Mexican government to improve enforcement of wage and labor standards within its borders. See *id.* In response to these fears, the NAFTA Labor Agreement was adopted. NAFTA Labor Agreement, *supra* note 125. It entered into force on January 1, 1994 between Canada, Mexico and the United States as a side agreement to the North American Free Trade Agreement. See also North American Free

4. The NAFTA Labor Agreement as a "Political-Legal" Framework

A close review of the NAFTA Labor Agreement reveals the presence of the same sovereign protections apparent in ILO promulgations; protections which present a framework for sovereign control of labor practices more than an articulation of international labor standards.

The NAFTA Labor Agreement establishes eleven "guiding" labor principles¹²⁷ to be promoted by the State Parties to "the maximum extent possible."¹²⁸ The agreement requires its parties to enforce their domestic labor laws,¹²⁹ affirms that labor standards are primarily a domestic concern,¹³⁰ and further

Trade Agreement, done Dec. 17, 1992, Can.-Mex.-U.S., art. 2022, 32 I.L.M. 296, 32 I.L.M. 605, 698 (1993) [hereinafter NAFTA].

127. NAFTA Labor Agreement, *supra* note 125, Annex 1. The eleven principles are enumerated as follows:

- (1) Freedom of association and protection of the right to organize . . . ;
- (2) The right to bargain collectively . . . ; (3) The right to strike . . . ;
- (4) Prohibition of forced labor . . . ; (5) Labor protections for children and young persons . . . ; (6) Minimum employment 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 injuries and illnesses . . . ; (11) Protection of migrant workers.

Id.

128. NAFTA Labor Agreement, *supra* note 125, art. 1(b). Although Mexico's labor standards (many of which are constitutionally based) are quite strong on paper, the enforcement of those standards has been very weak, particularly in the "informal" job sector. *See Barr, supra* note 126, at 11-13. While there has been incremental gain and enforcement in wage and condition practices within Mexico's formal sector, the relationship between the Mexican government and labor unions has led to collective wage agreements negotiated at levels below the inflation rate. *See id.* at 12-13. Evidently, the Mexican government perceived its labor problems as "a choice between foreign investment and workers rights." *Id.* at 14. This perception was supported by the statements of some U.S. officials. For instance, in 1987 House Representative Jim Kolbe, wrote in *The New York Times* that despite substandard wages, deplorable working conditions, and environmental hazards within Mexico's border industries, if standards were raised, American manufacturers would be faced with moving their operations to the Pacific Rim or "going out of business altogether." Jim Kolbe, *Made In Mexico; Good for the U.S.A.*, N.Y. TIMES, Dec. 13, 1987, §3 (Business), at 2.

129. *See* NAFTA Labor Agreement, *supra* note 125, arts. 1(f), 3(1), 4(2)(a). The Agreement also provides for certain "procedural guarantees," involving administrative and judicial enforcement and review, requiring, among other things, due process of law, transparency, disinterested tribunals and written decisions. *Id.* art. 5, 32 I.L.M. at 1504. Each State Party must publish its labor laws and regulations after public comment, and promote public awareness of its labor law. *Id.* arts. 6, 7.

130. NAFTA Labor Agreement, *supra* note 125, art. 2. Each State Party does

requires the States to ensure that their domestic policy supports "high labor standards."¹³¹ As such, the sovereign prerogatives of each State govern the labor practices within its borders;¹³² indeed, the introductory paragraph to the NAFTA Labor Principles exemplifies sovereignty at work:

The following are guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law. They indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces.¹³³

The guiding principles enunciated are general in nature, and the wage provision is not normative in substance.¹³⁴

It would seem, therefore, that the NAFTA Labor Agreement, while unprecedented in that it is linked to multilateral trade agreement, ultimately bows to the same sovereignty concerns which have thwarted international labor standards in other regimes. Still, the growing "social dimensions of trade . . . [make it] increasingly difficult to divorce economics and trade from social issues. In fact, certain domestic forces remain ever vigilant to ensure that the promotion of international trade efficiency does not result in, or serve as an excuse

have the discretion to form national advisory committees, comprising members of the public (including labor and business representatives) and governmental advisory committees (including State and provincial representatives.) *Id.* arts. 17, 18.

131. *Id.* art. 2.

132. For example, the Agreement's dispute mechanism which permits an Evaluation Committee of Experts (ECE) to be convened. *See id.* art. 23(1). This ECE then considers, in a "non-adversarial manner, patterns of practice by each Party in the enforcement of its . . . labor standards." *Id.* art. 23(2).

133. NAFTA Labor Agreement, *supra* 125, Annex 1.

134. The principle addressing wages refers to "[t]he establishment of minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements." NAFTA Labor Agreement, *supra* note 125, Annex I, para. 6. The only principle addressing working conditions calls for State parties to "minimize the causes of occupational injuries and illnesses." *Id.*, Annex I, para. 9, 32 I.L.M. at 1516. The non-normative nature of the wage principle is emphasized by the inclusion of wages in the definition of "technical labor standards." *Id.* art. 49, 32 I.L.M. 1513-14. As such, the wage provision remains unlinked to any articulated specific standard of living, much less a "decent" one. *See supra* text accompanying note 69.

for, the 'erosion' of social policies (*e.g.*, . . . labor policy).¹³⁵ Nowhere is this more evident than in the area of human rights, where there is a conviction that human dignity and sustenance cannot be sacrificed to sovereign agendas or to corporate bottom lines.

5. The Labor Standard as a Human Right

Various human rights documents include broad statements supporting fair wage and labor conditions standards. In 1945, United Nations member States committed themselves to "promoting higher standards of living, full employment, and conditions of economic and social progress and development . . ."¹³⁶ In 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights.¹³⁷ This Declaration states that "[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment."¹³⁸ It further provides that all workers have a right to "just and favourable remuneration ensuring . . . an existence worthy of human dignity," a right to form and join trade unions, and a right to a "reasonable limitation of working hours."¹³⁹

These principles have been reiterated in subsequent international covenants.¹⁴⁰ The International Covenant on Eco-

135. Watson, *supra* note 9, at 1246.

136. U.N. CHARTER art. 55(a). Article 1(3) of the U.N. Charter additionally establishes the overall goal of "achiev[ing] international cooperation in solving international problems of an economic, social, cultural or humanitarian character . . ." *Id.* art. 1, para. 3.

137. UDHR, *supra* note 15.

138. *Id.* art. 23, para. 1.

139. *Id.* art. 23, paras. 3-4, art. 24.

140. Regional covenants have also addressed the issue. *See, e.g.*, EUROPEAN SOCIAL CHARTER, *as revised* May 3, 1996, arts. 2-4, 36 I.L.M. 31, 34, 35-36 (1997) (addressing "just conditions of work", the "right to safe and healthy working conditions," and establishing a right "to remuneration such as will give [workers] and their families a decent standard of living"); Association of Southeast Asian Nations: Agreements and Statements from the Third Summit, Dec. 15, 1987, para. 48, 27 I.L.M. 596, 608 (1988) (cooperation sought among the ASEAN nations to seek continuous improvements in "the level of income, the quality of life and the environment" by achieving sustainable development); Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 14, 1988, art. 7(a), 28 I.L.M. 156, 163 (1989) (calling for remuneration guaranteeing a minimum of "dignified and decent living conditions . . . and fair and equal wages . . ."); Banjul Charter on Human and Peoples' Rights, *adopted* June 27, 1981, art. 15, O.A.U. Doc.

conomic, Social and Cultural Rights (ESCR) provides that State parties recognize the universal right to favorable work conditions including "fair wages;" a "decent living" for self and family; "[s]afe and healthy working conditions;" and "reasonable limitation of working hours."¹⁴¹ Moreover, the State parties' commitment to recognize and ensure the right "to an adequate standard of living" is reiterated throughout the ESCR.¹⁴² The International Covenant on Civil and Political Rights (ICCPR) prohibits "forced or compulsory labour,"¹⁴³ and protects the "freedom of association . . . including the right to form and join trade unions."¹⁴⁴ The inclusion of wage and condition rights within the ESCR is significant in that many nations associate that Covenant with the notion of "positive" duties,¹⁴⁵ which has led to lesser State adherence than that ascribed to the ICCPR.

The concept of a fair labor standard as a human right is not questioned. It is noted, however, that those capable of directly implementing the standard and recognizing the right—employers and managers—are not directly subject to the obligation created.¹⁴⁶ It is regrettable that State enforcement is required for the realization of the rights and that issues of sovereignty impair accountability.¹⁴⁷

CAB/LEG/67/3/Rev.5, reprinted in 21 I.L.M. 58 (granting every individual the "right to work under equitable and satisfactory conditions [and to] receive equal pay for equal work.").

141. ESCR, *supra* note 15, art. 7(a), (b), (d).

142. *Id.* art. 11, para. 1.

143. ICCPR, *supra* note 15, art. 8(3).

144. *Id.* art. 22.

145. One author sees the "positive" right as "demanding more than forbearance from those upon whom the right's correlative duties fall." THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 68 (1989). Due to the "welfare rights" established under both the UDHR and the ESCR, many nations have balked at signing these instruments, "arguing that no one can have a right to a specific supply of an economic good." *Id.* at 69.

146. International labor standards—whether framed as general human rights or as specific obligations established by the ILO—operate solely between States because they are promulgated in multilateral State treaties. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 2.1(a), 1155 U.N.T.S. 331 reprinted in 8 I.L.M. 679, 681 (1969) (defining treaties as written agreements between States) [hereinafter Vienna Convention]. Some commentators argue, however, that transnational market actors should recognize certain basic human rights within their business operations. See, e.g., Orentlicher & Gelatt, *supra* note 40, at 111-17. For an extensive analysis of the degree to which corporations are bound to effectuate international human rights, see DONALDSON, *supra* note 145.

147. See *Dateline: Toy Story* (NBC television broadcast, Dec. 17, 1996) (tran-

It is not suggested that human rights efforts regarding labor regulation should be abandoned. Yet, aside from the argument here regarding law formation, the proximity between the enforcer and the beneficiary of the rights argues for parallel implementation by market actors vis-à-vis their employees.

6. The Status of Existing Labor Standards in International Law

Virtually all multilateral forums addressing labor standards, whether the ILO or various human rights bodies, refer to the concept of a "decent standard of living."¹⁴⁸ The problem lies in supplying the concept with substance within the various environments in which the principle is applied. Moreover, there is a dynamic quality to the principle as applied to individual workers; while it may initially address basic needs, in its evolved state the principle refers as well to educational and cultural factors.¹⁴⁹

In 1977, the European Social Charter's Committee of Experts (ESC Committee) attempted to define the "decent standard of living" as a concept that:

must take account of the fundamental social, economic and cultural needs of workers and their families in relation to the stage of development reached by the society in which they live; furthermore this concept must also . . . be judged in the light of the economic and social situation in the country

script on file with the *Brooklyn Journal of International Law*) (covering substandard wages, child labor and poor working conditions existing in the operations of U.S. toy companies' foreign contractors and observing that the companies relied on host State law as a defense). With growing media coverage, however, it is unclear how much longer this "defense" will work. A review of the NEXIS databank reveals at least 10 major newspapers covering the "sweatshop" issue in December of 1996. Some commentators point out that it is global business that implicitly and explicitly forces governments in need of foreign contracts to lower their legal labor standards. See, e.g., BRECHER & COSTELLO, *supra* note 26, at 16-17. Thus, it is questionable, at best, for businesses, when held accountable for substandard labor practices, to then hide behind those legal standards they fostered. Such "scapegoating" leaves accountability to the States enacting such laws, or not enforcing such laws; States which are, after all, only exercising their sovereign prerogatives in establishing national labor standards.

148. BETTEN, *supra* note 41, at 212-15.

149. See *id.* at 212 (referring to studies conducted by the European Social Charter's Committee of Experts regarding Article 4 of the Charter, which "recognises the right of workers 'to a remuneration such as will give them and their families a decent standard of living.'")

which is being considered.¹⁵⁰

The ESC Committee also defined a "representative wage" as the wage that is paid to the majority of workers "in a given country at a given time,"¹⁵¹ and stated that a wage excessively lower than that wage was substandard.¹⁵² One problem with this formulation is that it does not address occupational differences. Accordingly, the ESC Committee set a "decency threshold," at sixty-eight percent of the national average wage.¹⁵³ On an international level, however, this method can be used only for States having "comparable socio-economic structures," and even then other factors such as governmental benefits and subsidies must be considered.¹⁵⁴ This method also requires a State's willingness to provide sufficient data to a central body in order for a threshold in common with other States to be determined.¹⁵⁵ This willingness may not exist outside of a regional structure such as the European Union.¹⁵⁶

The ILO, forming its own committee of experts (ILO Committee), has distinguished minimum wages, which are established by national law, from the notion of minimum income, a broader term embracing minimum living conditions.¹⁵⁷ The distinction is helpful when examining State action because, while a State addresses issues of poverty in general through its

150. BETTEN, *supra* note 41, at 213.

151. BETTEN, *supra* note 41, at 213.

152. *See id.*

153. *Id.*

154. *Id.* at 214.

155. *See id.*

156. Trachtman calls the European Union (EU) both a model and a catalyst for the paradigm shift discussed in Part I of this paper. *See* Trachtman, *supra* note 1, at 37. In arguing for a broader constituency within the WTO framework, Shell also references the EU, taking note of the fact that the EU has evolved from "a cooperative steel and coal arrangement in the 1950s into the wideranging social and economic entity of today . . ." Shell, *supra* note 28, at 370. Others disagree with the use of the EU as a model for evolving institutionalism, as it is a unique law-making body consisting of States sharing a "commonality of values, experiences, and perspectives." Nichols, *supra* note 21, at 322. For a survey of the EU's development from a limited sectoral trade regime to a comprehensive constitutional framework, see Donald C. Dowling, Jr., *Worker Rights in the Post-1992 European Communities: What "Social Europe" Means to United States-Based Multinational Employers*, 11 NW. J. INT'L L. & BUS. 564, 574-84 (1991).

157. *See* BETTEN, *supra* note 41, at 215-16.

minimum income policy, minimum wages are but one factor in that policy.¹⁵⁸ As formulated by the ILO Committee, a minimum wage is both remuneration for worker services provided—which must ensure the worker's and her family's subsistence—and a “production cost and component of general consumer expenditure.”¹⁵⁹

Formulating the minimum wage as both remuneration and a production cost is perhaps stating the obvious for market actors. Yet as demonstrated above, for States attempting consensus within the multilateral framework, this type of formulation alternately provides the threshold of negotiation, the sovereign boundaries of discussion, and the political nemesis of effective action.

B. The Attenuation between the Standard and the Market: State Implementation and Enforcement

While issues of sovereign concern and control pervade the multilateral process as it exists within international law's present construct, it is at the level of implementation and enforcement where a convergence of public and private motivation informs sovereign will, attenuating the relation between standard and practice. The ILO labor standards and labor-related human rights that are found in the multilateral agreements discussed throughout this Note reveal that many States are willing to formally recognize that decent wages and safe working conditions are of international concern. But many of those States which formally obligate themselves to labor standards do not, in practice, live up to their commitments.¹⁶⁰

158. See BETTEN, *supra* note 41, at 217. The distinction is useful in understanding the Industry effort urged here, see discussion *supra* Part II, which applies solely to wages and working conditions. It does not seek to expand Industry efforts to address minimum income policy in general. Not only would such an effort be unwelcomed by market actors, governments would likely perceive such unilateral efforts as offensive at best, and overreaching at worst.

159. BETTEN, *supra* note 41, at 217.

160. The reasons for this noncompliance are founded not only in internal State politics, but are increasingly impacted by capital demands. Another reason for State noncompliance with labor laws is that many States base their investigations into employer noncompliance largely on worker complaints; for example, 80% of U.S. workplace inspections are initiated by workers' complaints. See Gideon Yaniv, *Complaining About Noncompliance with the Minimum Wage Law*, 14 INT'L REV. L. & ECON. 351 n.1 (1994) (providing an economic analysis regarding the ineffectiveness of this approach).

While both international law and the ILO require States that ratify ILO Conventions to conform their national laws to those conventions,¹⁶¹ the internal constitutional issues and the lack of reciprocity between States has hindered implementation overall.

Many ILO convention provisions are not "self-executing,"¹⁶² thus requiring national implementation. Even where a State's constitution provides for "automatic incorporation,"¹⁶³ such States have either been reluctant to ratify ILO conventions,¹⁶⁴ or have insisted that automatic incorporation alone is sufficient evidence of national compliance—despite the fact that the State's positive law and enforcement practices conflict with the convention at issue.¹⁶⁵ Finally, where an ILO labor provision is considered self-executing, questions of its rank within federal legal systems arise.¹⁶⁶ In many States, if a convention norm conflicts with earlier law, the convention norm may clearly supersede that law in theory. But lack of public dissemination of the superseding norm may prevent its effective application in the workplace.¹⁶⁷ Whether a conflicting ILO provision will prevail over subsequent national law depends on the individual operation of law within a given State.¹⁶⁸ Where a conflict is evident, the ILO's supervisory body will point out resulting discrepancies to the States, which

Furthermore, there are many States that have not signed on to labor treaties, or have opted out as lesser developed economies unable to support the standards required.

161. See LEARY, *supra* note 65, at 10. For much of the ILO's history, there was debate as to whether ILO conventions create interstate obligations or whether the ratifying State simply owed a duty to the ILO institution only. See *id.* at 12. The issue was apparently settled during the drafting of Article 5 of the Vienna Convention on the Law of Treaties in 1968, where it was "assumed that ILO conventions were within the scope" of the law of treaties. *Id.* at 12, 16 n.28.

162. See *supra* note 72.

163. See, e.g., LEARY, *supra* note 65, at 25-26 (noting Mexico's constitutional framework and its practices regarding ILO implementation).

164. For instance, Switzerland, which has ratified relatively few ILO conventions in comparison to other Western European countries, announced in 1969 that ILO conventions would be ratified only when there is pre-existing national legislation substantially supporting the standards contained in the convention. See LEARY, *supra* note 65, at 30-31.

165. See *id.* at 25-29 (surveying the issue in connection with Mexico, Columbia, Guatemala and Argentina).

166. See generally *id.* at 116-36.

167. See *id.* at 125.

168. See *id.* at 127-32.

often are slow to respond for internal political reasons.¹⁶⁹

Moreover, States have traditionally viewed other States' internal labor practices as having no reciprocal impact, and thus have not generally sought institutional enforcement of ILO standards.¹⁷⁰ Thus, while conflicting national law creates an international delinquency for the State at issue, if the State knows it will not be sanctioned for that delinquency on an international level, internal political pressure will prevail.¹⁷¹

Thus, while international law presently does not suffer from a lack of words on labor standards, State action is missing and the resulting economic impact is shrouded in political motivation and issues of sovereignty. If, however, concerted market action were taken to support international labor norms, that action could translate the market dynamic into a normative function, transforming market action into State accommodation and practice.

IV. BRIDGING THE GAP: THE PRIVATE ACTOR AND MARKET IMPLEMENTATION OF INTERNATIONAL LABOR STANDARDS

Interstate aspiration does not equate with international law.¹⁷² Without States' implementation and enforcement of

169. *See id.*

170. *See generally id.* at 17. Although the ILO Constitution provides a mechanism for interstate complaints, it has rarely been used. *See id.* at 18. This may, however, change in the future. Note, also, that the ILO Constitution allows industrial associations to make a "representation" that a State is not complying with assumed convention obligations. ILO Const., *supra* note 69, art. 24. In the 46 years between 1924 and 1970, only eight such representations were made, but notably, in the 12-year period between 1970 and 1982, five representations were submitted. *See LEARY, supra* note 65, at 18.

171. Besides difficulties with implementation, ILO labor norms suffer from ineffective application as well. *See generally LEARY, supra* note 65, at 137-49. This problem derives from poor publicity and dissemination of the ILO norm's requirements, as well as judicial confusion over which law to apply when confronted with an ILO provision and a conflicting national law. *See id.* at 139. Beyond confusion, however, national judges are sometimes reluctant to directly apply treaties for both technical and political reasons. *Id.* at 163-64.

172. Going beyond the threshold of general normative prescriptions (in this case, a market norm defying unfair labor practices) and into the realm of "law" is essential to the universal legitimacy of the fair labor standard.

[D]omestic and international experience demonstrates that a legal system which lacks more or less clear criteria separating its content from politically desirable rules, moral rules or courtesy rules runs a risk of allowing a high degree of subjectivity in the ascertainment of the applicable rules of conduct. If the formal tests of validity delineating law from non-law are

the labor standard, sovereignty serves only to attenuate the connection between the standard and the market in which it must be effected. To bridge that gap either the multilateral construct must fundamentally change¹⁷³ or an alignment of interests between States and the market must be fostered to the good of all.¹⁷⁴ As it is, the attenuation between public law and private result increasingly undercuts political acceptance of global market practice, as well as the legitimacy of both the words and the force of international labor law.

To discuss an alignment of interests between the State and the market outside of economic gain is not conjecture, given current global relations. The shifting of priorities and the expansion of opportunities present in the global market do not affect States alone, for "an order is ensconced in widening economic discrepancies among its actors, the pressures for change and a new order are likely to be extensive and unremitting."¹⁷⁵ Although the following analysis necessarily addresses specific examples and issues arising within international market operations, it is underscored by the stance that, just as the notion of State sovereignty is evolving, so is the role of the market actor in terms of its impact and accountability.¹⁷⁶ The

absent or are not sufficiently clear, the subjects of law, law-applying institutions and commentators will tend to invoke in support of their positions the most different rules allegedly constituting 'law.' The inevitable result of such a trend will be a general decline in the authority and normative power of the law. The law will lose much of its quality as a body of rules having a special binding character, which is lacking in all other social norms.

DANILENKO, *supra* note 2, at 16-17. Arguably, the current state of the international labor standard is one "experience" that evinces this dynamic.

173. See discussion *supra* Part III.

174. This alignment of interests may explain States' greater willingness to subject themselves to affirmative international trade regulation. See discussion *supra* Part I. Yet, as this paper argues, the same alignment is possible in the labor context, for reasons of both political and economic stability for both nations and market actors.

175. Rosenau, *supra* note 6, at 21.

176. In the languages of neoclassical economics and international relations, State interests have traditionally been viewed from the perspective either of "liberalism" or "realism." See Cohen, *supra* note 48, at 272-74. Liberalism posits that States are concerned "only about the absolute gains from trade and indifferent to the gains achieved by others." *Id.* at 274. Realism, on the other hand, "suggests that every state . . . valu[es] relative gains (positional advantage) above all." *Id.* Both stances "can be assumed to be in constant competition for the minds and hearts of policymakers." *Id.* In essence, it is argued here that the same competing objectives exist in the global marketplace and, to operate in that market, a market

impact, as addressed herein, is normative; the accountability is both political and economic.

A. *The Political and Economic Accountability of the Global Market Actor*

Global business operations expose a market actor to multiple accountabilities including political accountability to the home and host State populations, as well as an increasingly prevalent mix of the two. Additionally, economic and legal demands from governments on both domestic and international fronts will intensify as global business' impact grows. The Initiative implicates all of these accountabilities, each of which presents a challenge to normative action.

The challenges presented in transforming a market norm into international practice are, admittedly, large and complex. Yet, if the Industry commits to market implementation and enforcement¹⁷⁷ of labor standards, particularly by coordinated effort, it will be proactively shaping the norm's creation and setting it in motion within the market. The Industry will thus have a voice in the substance of international law, rather than passively reacting to State rule.

1. What are the costs?

The primary challenge to the Industry's implementation of fair labor standards involves cost concerns, which raises questions regarding the Industry's willingness to implement fair standards. Yet, the choice to implement the standards can be a component of a long-term Industry policy to promote both a stable host market and the stability of its own market position within the host market, the home market and, with consensus, globally. Thus, costs cannot be the sole consideration; price cannot be the sum total of the Industry's policy.¹⁷⁸

actor must encompass both objectives within its business policy and practice. Moreover, the objectives—at least in relation to labor standards—are not necessarily competing. Ultimately, a market actor's "absolute gain" will depend upon its positional advantage, and, it is argued that the actor's labor practices will directly impact that advantage.

177. See discussion *supra* Part II.

178. By limiting its vision to cost concerns, global industry exposes itself to intensified regulation, as governmental policy implementation often "rests on market shortcoming caused by myopia and the absence of markets by which future

Why should the Industry pay higher wages when host State law does not compel it? Traditional wage policy argues against increases because they impact the bottom line and may impair future expansion.¹⁷⁹ Yet, a narrow vision of the bottom line will likely impair an industry's ability to meet the expanding demands of a global constituency.

It is not suggested that the Industry implement the premium wage acceptable by the host State; some economists acknowledge that there is a plateau between a country's established minimum wage and its premium wage, that can be reached by many, if not all, foreign producers without losing a still sizeable profit margin.¹⁸⁰ Further, given the costs of not addressing substandard foreign wages, be they political costs at home or stability costs abroad, myopic emphasis on cost alone can create losses far greater than the sacrificed profit portion discussed here.¹⁸¹

The core issue, as with any labor standard, is whether the Industry can accommodate paying higher wages.¹⁸² Yet, it cannot be ignored that the very question raises political con-

and present generations can trade with each other." J. David Richardson, *The Political Economy of Strategic Trade Policy*, 44 INT'L ORG. 107, 117 n.32 (1990) (book review).

179. See Rafael Albuquerque, *Minimum Wage Administration in Latin America*, 6 COMP. LAB. L. 57, 57 (1984).

180. See Sue A. Fauber, *Minimum Wage Legislation in Developing Countries: Zimbabwe—A Case in Point*, 13 CASE W. RES. J. INT'L L. 385, 392 (1981) (noting that "[b]ecause profit can provide a cushion against unemployment and a rise in productivity can compensate for higher labor costs, there is a narrow range within which such wage increases are economically sound.").

181. At the U.S. Department of Labor's prodding, investment community leaders recently participated in a press roundtable, announcing their second "Call to Action" for the eradication of sweatshops. *Labor Secretary, Investment Leaders to Hold Roundtable on Sweatshops*, U.S. NEWSWIRE, Sept. 19, 1997, available in 1997 WL 13912971. These investment community leaders—called the "Socially Responsible Investment Community"—represent a market of \$639 billion in capital investment, and their efforts "prove that looking after the bottom line does not mean looking toward the bottom." *Labor Secretary Herman Announces Second Sweatshop Call to Action by Socially Responsible Investment Community*, U.S. NEWSWIRE, Sept. 22, 1997, available in 1997 WL 13913005 (quoting Secretary of Labor Alexis M. Herman).

182. The employer's ability to pay, "that is, their capacity to accommodate higher labor costs," is among the criteria examined by governmental agencies when making wage policy. See Albuquerque, *supra* note 179, at 60 (discussing Latin American legislative methods). Here, it is assumed that foreign producers would externalize costs by building the higher wage into their contract price with the Industry.

cerns, given public awareness of the tremendous profit margins for those businesses producing and subcontracting abroad.¹⁸³

2. The Political Dimension

Just as it is increasingly difficult to segregate domestic law and policy from international relations, grassroots political action has, as well, become global.¹⁸⁴ While the political dynamic spurring the Initiative can be traced to domestic agitation, the fact that U.S. citizens are demanding action on behalf of foreign workers¹⁸⁵ reveals a new constituency—and type of

183. For instance, one statistic involves the fact that Nike's entire 1992 payroll for its Indonesian factories was less than the cost of Michael Jordan's sponsorship fee of reportedly \$20 million. See Richard J. Barnet & John Cavanagh, *Just Undo It: Nike's Exploited Workers*, N.Y. TIMES, Feb. 13, 1994, §3, at 11. The shoes sold by Nike at that time cost \$5.60 per pair to produce, but sold in the United States for \$45 to \$80 a pair. *Id.*

Additional factors fuelling the political fire are the increasing international identity of business, and the perceived and real national disloyalty of international business judgment, as well as the growth of global corporate wealth. See BRECHER & COSTELLO, *supra* note 26, at 17-18 ("[t]hree hundred companies now own an estimated one-quarter of the productive assets of the world. Of the top 100 economies in the world, 47 are corporations—each with more wealth than 130 countries.").

184. One scholar notes that "domestic values can be maximized through international action. In this sense, all politics is domestic, at least in its origins. Increasingly often, however, it is necessary to enter the market of international relations to maximize domestic values, such as wealth, employment, and environmental protection." Trachtman, *supra* note 1, at 51.

Examples of grassroots political response to market labor practices increasingly abound. For instance, religious and labor organizations recently sponsored a "Day of Conscience" on October 4, 1997 in protest of child labor and sweatshop practices. See Editorial, *No Sweatshops*, BOSTON GLOBE, Sept. 16, 1997, at A16, available in 1997 WL 6269735. Other examples include Duke University's recent steps to disassociate its name from sweatshop labor by requiring licensees of its logo to provide disclosure of its labor practices, see Dan Kane, *Duke to Push Licensees to Shun Workshops*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 3, 1997, at A1 available in 1997 WL 7860470, and attacks by school faculty against the University of North Carolina for signing a contract with Nike who has been accused of using sweatshop labor abroad. See Jane Stancill, *Hooker Defends Nike, Calls Issue Very Complicated*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 13, 1997, at B3, available in 1997 WL 7852792. This sort of line drawing has been spawned by the formation of at least 30 different student chapters across the nation calling themselves "Students Against Sweatshops." See Kane *supra*.

185. A telling example is that of the worker-to-worker exchanges that have taken place between American workers in a Ford truck plant in St. Paul, Minnesota and the Ford Workers Negotiating Committee in Cuautitlán, Mexico. See BRECHER & COSTELLO, *supra* note 26, at 154-56. In the wake of a Ford workers' strike in Mexico (where nine workers were shot, one fatally), the American and

consumer—that global business must face. By involving itself in the Initiative, the Industry has done just that, but it must recognize that merely cosmetic responses¹⁸⁶ will simply prolong ongoing confrontations between business objectives and public concern.

Just as governments and global business no longer view territorial and global objectives as mutually exclusive, individuals too, both singularly and collectively, are recognizing such interdependency and transborder accountabilities.¹⁸⁷ No longer is “citizenship in a globalizing world . . . the same as citizenship in a world that venerated the territorial principle.”¹⁸⁸ With the advancement of global communications, people throughout the world are developing varying levels of “analytic competence,”¹⁸⁹ and are using that competence to serve self-interests.¹⁹⁰ Moreover, as the interrelatedness of the world’s people is brought to light—either through environmental or economic common concern—“self-interest” may expand to include the interests of others, near and far, who increasingly share common experience.¹⁹¹

Mexican Ford workers agreed “to improve labor’s international network for communication and mutual support.” *Id.* at 155 (quoting an article written by members of the Negotiating Committee). The stated goal of the international effort was to push for upward levelling of Mexican conditions. The effort brought about long-lasting links between the two plants and has been followed in other industries worldwide. *See id.* at 155-56.

186. *See, e.g.*, Arthur Friedman, *Shaking the Sweat Shop Stigma (Apparel Industry Public Relations Efforts)*, WOMEN’S WEAR DAILY, Jan. 7, 1997, available in 1997 WL 8143259 (noting that the Industry’s largest trade group, the AAMA, is mounting “an aggressive campaign to fight the bad press and promote a positive image,” consisting of the “grooming of spokespersons,” “developing a long-term strategy that will collect, disseminate and promote the Industry’s ‘good news,’” and lobbying in support of strong U.S. labor laws.). The article does not mention foreign practices.

187. *See* Rosenau, *supra* note 26, at 280-85 (examining this dynamic through the lens of global and the territorial principles, noting their interdependence as citizens, organizations and governments seek out influence in both spheres).

188. *Id.* at 287.

189. *See* Rosenau, *supra* note 6, at 22 (arguing that this competence—that is, peoples’ growing capacity to discern the inappropriateness of global arrangements—informs peoples’ perception of global business operations and its impact on their lives and the world in which they live).

190. *See* Rosenau, *supra* note 6, at 21-22. Rosenau argues that while the point can be overstated—in that citizen impact on macro policy is often blunted by habituation, *id.* at 274—citizens are nevertheless increasingly aware of their own leverage and ability to tip the balance from one sphere of influence to another. *Id.* at 286.

191. *See, e.g., id.* at 294. As expressed by one commentator, specifically ad-

Domestically, a chief political issue for the Industry has been the avoidance of boycott.¹⁹² Prior to the Initiative, human rights groups pressured the Industry to correct foreign subcontractors' abuses with the threat of boycott.¹⁹³ While the efficacy of boycotts in aiding the workers they seek to help is arguable,¹⁹⁴ the threat of a boycott is a real one and could drastically effect the Industry's bottom line. In fact, it is significant that many apparently connect boycott with cessation of the boycotted foreign production. Thus, if the market relation and location of Industry production is of value to the Industry, the mandate of fair labor standards is valuable as well.¹⁹⁵

The political costs of substandard wages and working

dressing international corporate wage policies, it is questionable whether a "race to the bottom" regarding wages serves anyone's interest. See generally, Harry J. Van Buren, III, *Competitiveness, Wages, and Corporate Responsibility*, BUS. & SOC'Y REV. (1995), at 63. As Van Buren recognizes, responsible labor practices ensure the "long-term stability of a society and its economy." *Id.* at 64.

Indeed, the broad-based effect of a downward wage levelling is being felt not only across national borders, but also across traditional class lines. Increasingly professional classes are being impacted. See, e.g., BRECHER & COSTELLO, *supra* note 26, at 20-21. For instance, software programming operations for over 30 global corporations has been moved to India from the United States and Western Europe, and, in other cases, the same type of operations have moved from the United States to Eastern Europe. *Id.* Thus, protective alliances are being built between workers which in the past have been pitted against each other.

192. Indeed, a 1995 survey conducted by Marymount University found that over seventy-five percent of U.S. consumers would boycott stores selling sweatshop goods. See Dunne & Burch, *supra* note 32, at 7. Further, almost 85% of those surveyed said they would be willingly pay up to \$1 more on a \$20 item if it carried labelling guaranteeing it was made under humane conditions. *Id.* Of course, that \$1 may not cover the profit lost if labor standards were forcefully implemented (at least in some markets). However, as argued elsewhere, placing price concerns above all else as a corporate policy is a short-sighted practice, ignorant of global reality and market potential.

193. Dunne & Burch, *supra* note 32, at 3 (noting that a boycott called by a group known as The National Labor Committee forced The Gap to promise action against its subcontractors for poor work conditions).

194. As one editorialist pointed out in response to the Initiative, "any successful boycott by American consumers is just as likely to close down production and destroy badly needed jobs as it is to [improve] pay and working conditions . . ." Bert Emke, Editorial, *If You Really Care, Support 'Sweatshops'*, THE COURIER-JOURNAL, Aug. 18, 1996, at 02D, available in LEXIS, News Library, Curnws File. See also *Cruel To Be Kind*, *supra* note 32, at 11 (observing that "boycotting a country that falls short of international standards can only aggravate unemployment").

195. The traditional business tenet that "social policy and corporate practice occupy distinct spheres—and that a rigid separation [of the two] should be preserved" is no longer viable, and is rarely pressed by business spokespersons. Orentlicher & Gelatt, *supra* note 40, at 97.

conditions are not limited to domestic agitation. The political consequences within a host State are not tangential, and resulting unrest can lead to an excessively high cost of doing business.¹⁹⁶ Political scientists recognize that "economic policy preferences abroad" can have a "political and institutional basis at home."¹⁹⁷ Thus, market actors operating on a global level cannot ignore their social and political effect on the host population, as it may have both immediate economic repercussions and future strategic backlash.¹⁹⁸

3. Host Government Concerns

While market-implemented labor standards are argued to be of benefit to all, one cannot be simplistic in approaching foreign governments' concerns regarding wage levels. Any wage paid within a given structure has a political dimension.¹⁹⁹ Additionally, should market-implemented labor standards create a higher threshold for labor costs for entering foreign

196. *See id.* at 97 (discussing the political unrest prevalent in Latin America during the 1970s and early 1980s as evidence of the correlation between offensive social policies and investment risk). Another example is Korea's experience of major social upheaval in the 1970s, that partially derived from the dissatisfaction of workers who had fed Korea's economic growth without reaping its benefits. *See Cummings, supra* note 41, at 36-37.

197. Cohen, *supra* note 48, at 268.

198. Indeed, newly industrialized countries that in the late 1980s and early 1990s experienced economic booms largely based on cheap labor and low production costs, are beginning to feel the pinch as market actors move to cheaper shores. *See BRECHER & COSTELLO, supra* note 26, at 24. This migration has led to a downward spiral as countries that have lowered wages and public spending to become more competitive, now find themselves faced with stagnation and recession. As workers have less to spend in markets that are left behind by business, their nations simply attempt to lower costs even more to attract other business. In the meantime, national debt is accumulated, and local investment foregone. *See id.* at 25. This dynamic parallels the "small market" analysis explored, *infra* at notes 217-22 and accompanying text. Eventually this dynamic will result in political tension, both within populations and between governments.

199. On a governmental level, "[m]inimum wage fixing is most often viewed as being essentially a matter of striking a balance between social gains and economic costs." Brian Bercusson, *Minimum Wage Objectives and Standards*, 6 COMP. LAB. L. 67, 75 (1984) (quoting G. STARR, *MINIMUM WAGE FIXING* 115 (1981)). Because social gains (and perhaps corresponding losses between groups) implicate the distribution of total wealth, social politics and contention may result from wage adjustments. Because of the economic costs, other industrial and business sectors may view such adjustments adversely, and use their own political voices in response. Referred to as an issue of "acceptability," these political dynamics must be addressed. *See id.* at 74-75.

investment, a host government may move to block such implementation.²⁰⁰

The protection of a country's comparative advantage will be of paramount importance to the host government.²⁰¹ As economic integration between States has increased, host governments have had to address issues of wealth derived from foreign business, especially in relation to wealth derived by other countries.²⁰² This concern is exacerbated because there is no international "community of interest"—whereby each transaction and issue presented is independent from others—and so no "trade-off" between States is possible.²⁰³ This may change as international mechanisms develop to address communal decision making on a market level. The current scenario is, however, that market actors must be aware not only of a host State's internal objectives, but also of its global priorities regarding market operations.

Moreover, while a host country generally will welcome an increased level of wages from foreign business, a host country may simultaneously fear foreign political interference and economic dominance.²⁰⁴ Furthermore, there is a fear of a "form of cultural imperialism," vis-a-vis the imposition of American values on the host culture.²⁰⁵ In the labor context, this fear may be misguided as it ignores international recognition of labor standards. The laws of many States support these international standards, although they may not always be enforced in practice. Thus, it is not exclusively *American* values that are imposed by the implementation of fair labor practices, especially since such practices take into account the cost

200. See Fauber, *supra* note 180, at 393 (discussing parliamentary debates in Zimbabwe in the early 1980s where the argument was advanced that any dynamic which threatens profit in turn threatens foreign investment).

201. There are those who argue, however, that a State's comparative advantage has become less relevant as corporations have become "global networks." Intracompany trading and large scale global sales have rendered the concept merely a guise for the manipulation of global resources. BRECHER & COSTELLO, *supra* note 26, at 68-69. See also, Robert E. Prasch, *Reassessing the Theory of Comparative Advantage*, 8 REV. POL. ECON. 37 (1996) (acknowledging the theory's "problematic assumptions" in the current global context).

202. See generally, JACK N. BEHRMAN & ROBERT E. GROSSE, INTERNATIONAL BUSINESS AND GOVERNMENTS: ISSUES AND INSTITUTIONS 28-29 (1990).

203. *Id.* at 29.

204. BEHRMAN & GROSSE, *supra* note 202, at 30.

205. Orentlicher & Gelatt, *supra* note 40, at 102.

of living and circumstances present in the host State.

Therefore, host governments cannot be expected to support a market initiative unless two priorities are accepted: the broadest implementation possible among States, and equitable treatment to all impacted by the implemented labor standards. Equity, as used here, is not simply an issue of justice, but also one of market creation.

4. The Economic Dimension

A country's labor strategy may involve either offering profit derived from low-wage structures or profit derived from high productivity.²⁰⁶ The low-wage strategy downplays working conditions and labor rights, while the productivity strategy focuses "on improving quality and production through innovative technology, positive incentive systems, and worker training and participation."²⁰⁷ Although it would seem that the latter approach would be more beneficial to both the host country and the foreign producer, developing countries may choose the low-wage approach as a means of becoming "economically competitive."²⁰⁸ Yet the choice made between short-term gain and long-term benefit can have ongoing internal market consequences for both the host nation and market actors operating therein.²⁰⁹

In exploring the problems involved in capital formation within underdeveloped economies, Ragnar Nurkse enunciates the circular dynamic of societal poverty and its impact on mar-

206. See Green, *supra* note 115, at 500.

207. *Id.*

208. *Id.* at 515.

209. This possibility has been explicitly addressed by Latin American and Caribbean countries, as reflected in a 1990 report of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC). See U.N. Economic Comm'n for Latin America and the Caribbean, *Changing Production Patterns with Social Equity: The Prime Task of Latin American and Caribbean Development in the 1990s*, U.N. Doc. LC/G.1601-P, U.N. Sales No. E.90.II.G.6 (1990). While the ECLAC acknowledges that reliance on low-wage, labor intensive production may be necessary for the initial shift to export-led markets, it rejects long-term reliance on low-wage labor as a mechanism for growth. See Trubek, *supra* note 103, at 360. Instead, "ECLAC believes that successful and long-term participation in the global economy must be based on continuous improvement of product quality and constant absorption of new technology." *Id.* Furthermore, ECLAC recognizes that evolving production processes will ultimately lead to the erosion of any competitive advantage gained by a national economy based on low wages. See *id.*

ket size.²¹⁰ First, the general productivity level of a domestic market will determine its size, and, in turn, that productivity level is largely determined by the market's use of capital.²¹¹ Yet, a smaller market will not attract the capital necessary to increase productivity.²¹² Nurkse posits that the ability of a country's citizens to spend domestically allows them to become each other's customers; the internal market will then expand to meet customer need.²¹³ But a populace receiving sub-subsistence wages will not have the buying power necessary, nor be willing, to support new investments in their market.²¹⁴ Thus, the small domestic market will remain small, and the poor will remain poor. While market actors, such as foreign investors or contractors, may counter this dynamic by investing solely for export,²¹⁵ this limited form of investment keeps the domestic internal market stagnant.²¹⁶ Moreover, sole con-

210. See generally, Ragnar Nurkse, *Some International Aspects of the Problem of Economic Development*, in PARADIGMS IN ECONOMIC DEVELOPMENT 47, 47 (Rajani Kanth ed., 1994).

According to one scholar, "the most important ingredients of rapid national growth are:"

- (1) technological progress and improved productivity,
- (2) expanding industries and trade momentum (at least internally, if not through export earnings and increased imports),
- (3) substantial saving and investment from productive enterprise, sustained over a long period,
- (4) moderate, bearable tax loads with no significant disincentive effects, and
- (5) sufficient sharing in improved prosperity to maintain social morale and teamwork.

LOVETT, *supra* note 102, at 36.

211. See Nurkse, *supra* note 210, at 47.

212. See *id.*

213. See Nurkse, *supra* note 210, at 48.

214. See *id.* at 48. Notably, increased wage levels could lead to an increase in local trade, which in turn generates a broader domestic market attracting broader capital investment. Accordingly, industry initiatives to increase wages should be supported by host governments, for without local demand (buying power), there will be no incentive for market supply.

215. See *id.* at 49.

216. An export-led development model "places four critical obstacles in the way of upward mobility of the world system." Cummings, *supra* note 41, at 35. First, lesser-developed countries must find entry into the global market through avenues other than wage-related comparative advantage. See *id.* Reliance on low labor costs alone provides less incentive for the advancement of marketing, technology, and organization. Second, "limited factor endowments and . . . small domestic markets . . . inhibit second-stage industrialization." *Id.* Third, low-cost labor provides only a marginal lead for LDCs over those countries that are even poorer, and that such a lead is easily lost when producers simply move to cheaper shores. See *id.*

centration on higher exports does not provide the counterbalance of domestic savings which leads to long term growth of a domestic economy.²¹⁷

Some governments have attempted to manufacture this counterbalance through central planning²¹⁸ or through investment by public authorities financed by foreign funds.²¹⁹ Yet, balanced growth—the interplay between market capital and domestic spending—is not the sole province of governmental planning; a spontaneous, balanced growth may be achieved by market actors “producing spurts of industrial progress.”²²⁰ Moreover, in light of price and job dislocations which are leading to stagnation in the larger import markets, host governments should welcome market initiatives that increase local spending power because it is the domestic market in which ultimate growth for a country’s economy lies.

5. The Legal Dimension

For long-term global economic viability, the Industry must become a proactive player in the shaping of strategic sectoral

The final obstacle is the political nature of the issue, and the responsive protectionism that results. *See id.*

217. The smaller, underdeveloped domestic market promises little return for any investor, be it domestic or foreign. This may explain why domestic savings in LDCs tend to be used unproductively rather than channeled into local business. *See id.* at 49. Another factor limiting domestic savings, and thus hampering possible investment, is the “widespread imitation of American consumption patterns” by low wage earners in LDCs. *See id.* at 53. For example, the American standard of living, exported to LDCs through media and advertising, impacts the spending and savings pattern of that poorer economy, regardless of the relatively lower income. *See id.* at 53-54. The pre-GATT governmental response (which may continue for non-GATT countries) was to limit imports, particularly of luxury items, in order to dissuade wasteful consumer spending domestically. *See id.* at 55. In the face of the GATT restrictions on such measures, host countries must address the issue differently. One political solution—and a solution providing long-term benefit for both the LDC and foreign investors—is the promotion of a viable internal market which can compete with foreign goods. Thus, higher wages offer common benefits to investors and host governments, as well as local workers.

218. *See id.* at 49.

219. Such governmental investment is “autonomous” of market forces. The private actor’s investment, however, must be induced by market dynamics: *i.e.*, by high productivity and profit. *Id.* at 50.

220. *See id.* at 48-49. Yet, again, it must be emphasized that this paper encourages the Industry, indeed all industries, to act strategically in attempting to create balanced growth, and not to simply react to it should this growth result from spontaneous market forces.

trade policy. Rather than merely being reactive constituents to State regulation,²²¹ market actors should negotiate labor standards from a policy perspective. While American business has resisted being cast as an agent of governmental policy, the Industry can avoid imposition of national, as well as eventual international regulation, thereby building a "win-win" market environment for itself and for the States in which it produces by responsibly embracing the policy (governmental or otherwise) as a business judgment.

By accepting the challenge of market implementation, the Industry not only exercises political and economic wisdom, but can avoid national regulation of its practices, as well as international response to politically and economically damaging wage differentials.²²²

If the Industry follows through on its commitments under the Initiative, and indeed substantiates them legally through enforced contractual obligations, its response would transcend its reactive role in the global dynamic. By taking a proactive stance through the creation and enforcement of concrete market standards, the Industry will anticipate and shape State response to international labor issues, both on the domestic

221. Gittelman argues that even in South Korea, which is considered a free trade miracle by proponents of neoclassical economics, the key variable in South Korea's tremendous growth has been replacement of "the free market with state control" through implementation of strategic sectoral policy. See Michelle Gittelman, *The South Korean Export Miracle: Comparative Advantage or Government Creation? Lessons for Latin America*, 42 J. INT'L AFF. 187, 187-88. Pure free trade proponents contend, however, that the governmental function in South Korea has been merely to "reinforce[] 'natural' market forces." *Id.* at 190. Either case buttresses this paper's argument that national legislation will ultimately support the positive practices of the private market actor, which will in turn receive international governmental support. The extension of market-implemented labor standards into customary international law is the final step, and will be found in the interplay between this support and already articulated and established international labor norms.

222. As one commentator observes,

As more issues that were previously part of the domain reserve are addressed in the international sphere, international institutions will be required to replicate some of the functions otherwise performed by domestic institutions. These functions include, most importantly, sensitivity to the wide range of social issues that need to be integrated in any decision Increasingly, we recognize that the world is interconnected not only geographically, but also functionally. Thus, it has become necessary for institutions . . . to be able to address issues such as trade and the environment in an integrated fashion.

Trachtman, *supra* note 1, at 57.

and international planes.

B. The Market Practice as a Market Norm: Past and Present

Given that substandard labor practices are prevalent within the Industry (and within other industries), can it be claimed that these practices represent normative industry consensus? The problem with this claim is one of legitimacy—unless one divorces the international market from the international community, and from the laborers who fuel that market, a legitimate consensus cannot be claimed to exist. In the final analysis, it is the communal recognition of a norm that gives it legitimacy.²²³ As explored above, substandard labor practices are not explicitly supported by law nor by the Codes of Conduct generally promulgated by industry. Moreover, the political agitation that led to the Initiative's creation belies communal recognition of the legitimacy of current labor practices. Without articulated support of its practices by the law, the Industry, and the governments to which the Industry is subject,²²⁴ cannot proclaim their legitimacy to laborers and consumers. They therefore cannot hope for the long-term stability that results from internalized normative practice.

The ultimate viability of any international norm rests with its ability to serve the "collective self-interest" of States.²²⁵ The same can be said for the market norm; its viability requires that the interests of all involved are served. The differ-

223. See, e.g., Robert D. Cooter, *The Theory of Market Modernization of Law*, 16 INT'L REV. L. & ECON. 141 (1996). Cooter illustrates this proposition by relating the evolution of land allocation by the Tolai in Papua, New Guinea. While initially the village's "big man" oversaw land allocation within the village, once a market for land developed, the villagers recognized that this norm in practice could work to their detriment. As such, the big man's power was no longer recognized, and a new norm of communal decision-making was instituted. See *id.* at 148.

224. Cooter argues that centralized law, that is, legislative regulation, is misplaced in a global economy. See Cooter, *supra* note 223, at 148. Again, this author argues that this premise can stand only if the global economy is divorced from the global community; a perspective found unrealistic, and indeed, untenable, both economically and socially.

225. An effective norm imposes on a State a specific obligation in exchange for valuable entitlements. The benefit derived from that norm's operation forms an interweaving of entitlement and duty that ensures that norm's existence. See D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 16-25, excerpted in WORLD ORDER, *supra* note 72, at 34-40.

ence between the statist norm and the market norm is the immediacy of relation between those who effect the norm; the difference is between the vertical hurdles of multilateralism and the horizontal relation of the contract.

Generally speaking, business norms are generated through the cooperation of a network of market actors, using efficient practices established in order to fulfill common objectives.²²⁶

In the initial stages of norm formation, market actors often punish those deviating from articulated norms, although the punishers may not conform to the norm themselves.²²⁷ This is due to a "strain of commitment," created when the payoff for cooperative normative behavior is less than that provided by "appropriation" behavior.²²⁸ It is only when "principled" enforcement of a norm occurs that aggregate cooperation increases, which both levels the cost of conformity and decreases the cost of enforcement, thereby relieving the strain of commitment and fueling the norm's wider acceptance.²²⁹

A powerful example of principled enforcement within the market is the operation of the "Sullivan Principles," which are credited by many as having had normative force in ending apartheid in South Africa.²³⁰ In 1977, businesses operating in South Africa voluntarily adopted the Sullivan Principles, which were later codified in U.S. legislation as conditions to governmental export assistance for employers of a certain size.²³¹ Supporters of the Sullivan Principles credit them with the achievement of equal pay for equal work, nondiscriminatory medical benefits and pensions, and the increased managerial presence of non-white South Africans due to business-funded

226. See Cooter, *supra* note 223, at 150 (discussing the "agency game" theory, where, in long-term relations, the incentive for cooperation is the "pay-off" resulting from the cooperation: continued, efficient operation benefitting those involved).

227. See *id.* at 154. Cooter frames cooperation in terms of "adventitious" conformity, where an actor's conforming behavior rests solely on the objective benefit derived therefrom, as opposed to "principled" conformity, which is based on the internalization of a norm's premise. See *id.* at 154-55.

228. See *id.* at 155 (citing JOHN RAWLS, A THEORY OF JUSTICE (1971)).

229. See Cooter, *supra* note 223, at 155, 157. This is particularly true when entities invested in the norm recognize its benefits to their "reputation": "The possibility of principled enforcement can be captured in the agency game by introducing reputation, which supplements repetition in promoting cooperation." *Id.* at 155-56.

230. See Orentlicher & Gelatt, *supra* note 40, at 83 n.45.

231. See *id.* (discussing the Comprehensive Anti-Apartheid Act of 1986 § 207(a), 22 U.S.C. § 5034(a) (1988)).

education and training.²³² Yet the Sullivan Principles differ from the current Industry Initiative because the Initiative directly implicates the Industry's own practices rather than the abhorrent practices of a foreign State. Both the benefit and the burden of the Initiative lies squarely with the Industry.

Thus, while principled enforcement benefits others (as opposed to oneself),²³³ an enforced fair labor standard will benefit all, including the Industry itself, by equalizing labor costs, decreasing enforcement costs, and increasing the payoff derived for not only the worker, but for market actors and the States in which they operate as well.

1. The Market Practice

The Initiative discussed in this Note differs from most historical examples of transborder market initiatives in that it directly implicates Industry labor practices and Industry accountability regarding those practices. Past efforts have been infused with overt interstate coercion rather than market benefit, and have been implemented largely on an *ad hoc* basis among isolated market actors. As such, the normative equation discussed above did not take root, and except in the instance of the Sullivan Principles, uniform conformity was not achieved.

Prior to the 1996 Initiative certain U.S. businesses instituted codes of conduct for the operation of their Chinese subsidiaries and contractors.²³⁴ These codes were in turn fol-

232. Orentlicher & Gelatt, *supra* note 40, at 92. Another example of norm formation is found in the implementation of the "MacBride Principles," which set employment standards for firms operating in Northern Ireland, and which are used by local governments in Ireland to condition operations and investments in their communities. *Id.* at 83.

The United Nations has also attempted to address corporate conduct on the international plane in its Draft Code of Conduct on Transnational Corporations. *Proposed Text of the Draft Code of Conduct on Transnational Corporations*, U.N. ESCOR, Org. Sess., Provisional Agenda Item 2, at 2, U.N. Doc. E/1988/39/Add.1 (1988). This code has yet to be approved, however, due to "a conflict of ideology and interests." DONALDSON, *supra* note 145, at 37.

233. *Id.* For example, while businesses following the Sullivan Principles may have incidentally benefitted on a political level, the Principles' objectives ran to black South Africans.

234. These businesses included Levi Strauss & Co., Phillips-Van Heusen, Sears Roebuck and Co., Timberland Co. and Reebok International Ltd. See Orentlicher & Gelatt, *supra* note 40, at 67. In 1990, Reebok International Ltd. vowed it would not operate under Chinese martial law, and in 1992 adopted a code of conduct regarding work place conditions in all of its overseas production. See *id.* Sears,

lowed by legislative initiatives, which would have requested companies with significant Chinese presence to make "best efforts" to contribute to the support of human rights reform in China.²³⁵ Adherence to the codes would have been essentially voluntary because noncompliance would not have been penalized; the legislation would have simply required informative registration with the Secretary of State regarding a parent company's participation.²³⁶ While these efforts are not to be derided, they were flawed in that they cast the market as merely an agent of sovereign policy, rather than as an independent force in the global order.

Similarly, the Initiative can be seen as "back door" implementation of governmental policy. Yet, because the Initiative does not explicitly implicate interstate politics, the more apt perspective is that the Industry is being asked to negotiate labor standards from a policy perspective. The policy invoked, however, is not directly attributable to the U.S. government, but rather derived from global industries' accountability, and the increased global authority to which its accountability is incident.²³⁷

Roebuck and Company announced in 1992 that it would not import the products of Chinese involuntary or prison labor, and established monitoring procedures to back up its commitment. *Id.* Both Levi Strauss and the Timberland Company have conditioned investment on the host State's recognition of basic human rights, and, in 1993, both companies followed up on their commitments by removing their investments and sourcing from the PRC. *Id.* Finally, as of 1993, Phillips-Van Heusen (which is also an Initiative participant) "threaten[ed] to terminate orders from suppliers that violate human rights principles enshrined in its ethical code." *Id.*

The uniqueness of these corporate efforts is evident when examining the annual debates regarding the United States' continued recognition of the PRC's MFN status under the GATT. *See id.* at 80-81. The U.S. business community has largely opposed conditioning China's MFN status on its human rights record for fear that a termination of that status would invoke China's retaliation against those U.S. businesses operating in or exporting to China. *Id.* These fears were evidently warranted as U.S. companies are "regularly threatened with cancellation of orders or loss of future deals if China loses its preferred Status." Michael Weisskopf, *Backbone of the New China Lobby: U.S. Firms*, WASH. POST, June 14, 1993, at A2. Moreover, the business community has argued that its mere presence and commercial interaction within Chinese borders "strengthened the pro-democratic forces in China." Orentlicher & Gelatt, *supra* note 40, at 81 (citing Letter from Business Coalition for U.S.-China Trade to President Bill Clinton (May 12, 1993), at 1).

235. *Id.* at 83.

236. *See id.* at 83-84.

237. There is a strident argument that transnational market actors deserve *pri-*

2. The Market Norm

a. The Norm

If the objectives of the Initiative are as reported, it is the notion of a wage compromise that provides the greatest support for the argument presented here. That compromise establishes Industry compliance with host State minimum wage law, but also encourages a linkage between wages and a decent standard of living. Thus, if the Initiative is to succeed, the Industry must commit to market practice explicitly informed by an international labor standard. But before addressing the effect of such market action, questions must be asked as to why and how it should be effected. These questions implicate the shifting authority within the current world order, and, thus, the political and economic priorities of the Industry itself.

For the Industry's commitment to be credible, it cannot merely rely on the established domestic minimum wage in the host country. First, if such reliance were viable, it is doubtful whether the Initiative, and the concern surrounding it, ever would have arisen. Second, both implementation and enforcement of minimum wage standards are difficult to achieve, particularly in developing countries,²³⁸ where the need for economic development may predominate over workers' needs.²³⁹ Further, inflation may be a significant consideration of a government when setting a minimum wage.²⁴⁰ Finally, if the deterioration of real wages has reached drastic levels, the host government under public pressure, will step in to regulate

mary accountability for the degradation of international labor standards, in that: [t]he transnationalization of investment has engendered a global chase for the cheapest labor markets, international investment practices inevitably drive down wage levels as developing countries compete for foreign investment. In this setting, it has become increasingly difficult to persuade governments of developing countries to respect internationally-recognized labor rights, particularly the right to receive a wage that meets 'basic human needs' of workers.

Orentlicher & Gelatt, *supra* note 40, at 100 (citations omitted).

238. See Albuquerque, *supra* note 179, at 63-66. In the end, "a professed minimum wage policy in the Third World may be nothing but government propaganda that is not put into practice." *Id.* at 58.

239. *Id.* at 60.

240. See *id.* at 61. The deterioration caused by inflation can render a fixed wage useless to the long term well-being of a worker. See *id.* (showing inflation's drastic corrosive effect on wages in the Dominican Republic over a eight-year span).

wages²⁴¹—a process in which the foreign market actor may have little say. In sum, relying on a host country's minimum wage will not likely overcome the political pressures here at home. By not otherwise effectively addressing substandard wages and conditions, the Industry exposes itself to governmental action over which it will have no control.²⁴²

To embrace the "decent standard of living" as a market norm, the Industry must be able to give it substance in the market. Any contract provision invoking the standard must have cognizable dimension in order to satisfy market reliance and supply a basis for enforcement. What is being suggested here is a "living wage," based on the living standard within the host environment.

In examining the notion of an Industry wage standard, it is helpful to look at the debate over whether a wage standard should be "absolute" (meeting basic needs) or "relative" (as compared to other pay levels).²⁴³ The standard articulated within most public norms correlates more closely to the absolute standard: the basic needs of a worker within a certain population. Yet, because the basic needs of any particular States' workers will be "relative to the community in which it is measured;" a fixed standard will be arbitrarily set.²⁴⁴ Thus, in creating a contractual wage obligation that meets basic needs, the market actor can take one of two approaches: state a fluid standard and wait for eventual enforcement action to define it, or state a defined standard in the contract itself.

In defining a contractual standard, the Industry can inform its approach by looking at the four traditional criteria cited in minimum wage creation: (1) worker need; (2) comparable wages and income; (3) capacity to pay; and (4) requirements of economic development.²⁴⁵ Some governments, in approaching this criteria, simply index the needs of a

241. *See id.* at 61-62.

242. Although governments may consult with employers in setting minimum wages (for instance, Mexico has established a National Commission for Minimum Wage Rates, encompassing both employer and worker representatives). *See id.* at 64. Given the differing objectives of local employers and foreign producers, such collaboration may not answer the political and stability needs of foreign market actors.

243. *See id.* at 75.

244. Bercusson, *supra* note 199, at 75.

245. *Id.*

common worker and their corresponding costs to arrive at a fixed wage standard.²⁴⁶ Other countries determine the cost of the "market basket"—current prices of goods and services considered vital to meet workers' needs—as determined by the government, which generally also controls consumer price levels.²⁴⁷ While the Industry may not be able to analyze these issues as deeply as a governmental entity, awareness of the components of worker need in any environment should impact the substance of the standard set, whether it be set by the Industry itself, or by a court enforcing the standard.

b. The Norm's Enforcement

As with interstate standards, it is the enforcement of the contractual labor obligation that lends the market standard its normative force.²⁴⁸ It is also broad enforcement by Industry members that will equalize labor costs, decrease enforcement costs, and increase the payoff derived from the norm. Thus, prior to legislative accommodation of industry labor practices, the practice and reliance thereon must be established.

Enforcement of a market norm can derive from market sanctions and/or from arbitration or adjudication. Market sanction is found in the "tit for tat" of reciprocal benefit obtained from established practice; in other words, market enforcement occurs when market actors ensure that the benefit of a bargain derives from conformity with market norms.²⁴⁹ Some argue that market enforcement should, as much as possible, supplant contractual enforcement in order to limit reliance on State

246. Mexico, for instance, has concluded that the "minimum wage must be equal to the income required to meet the cost of lodging, support of the home, food, clothing, transportation, entertainment, sports activities, vocational school attendance, use of libraries and other centers of culture, and education for the children." Albuquerque, *supra* note 179, at 59 (citing Federal Labor Law of Mexico, Art. 652).

247. *See id.* at 59-60.

248. *See* discussion *supra* Part III.B.

249. *See* Cooter, *supra* note 223, at 150-51. As articulated by Cooter, a regularity of practice "results from inclination," while a norm "imposes an obligation." *Id.* at 149. While economists largely ignore the difference between the two in market studies, *see id.*, Cooter (and the author—although to different ends) argues that the distinction can be ignored only at the peril of law's legitimacy. Cooter appears to argue that, absent reference to "the sense of obligation" fueling a norm, its viability cannot be measured by the law supporting it. *Id.*

involvement in market operations.²⁵⁰ Yet, most also recognize that the threat of legal enforcement more fully substantiates the norm,²⁵¹ and that actual enforcement lends credence to the threat.²⁵² For this reason, in conjunction with the fact that the contract legitimizes market relations, the Industry must contractually support and enforce its decent wage and labor conditions standard. Not only will such enforcement serve to crystalize the standards into norms, but it will, with broad enforcement among Industry members, serve to transform the norm into law.

V. STATE IMPLEMENTATION: LEGISLATIVE SUPPORT FOR MARKET ACTION

As explored in Parts I and II of this Note, international law does not operate in a vacuum, but in its current operation, its universe largely consists of States. As such, despite the fact that harmonization of laws is increasingly being sought,²⁵³ international law addresses the private relation as a jurisdictional issue.²⁵⁴ While international economic law, which encompasses "a conglomerate of private law . . . , state law and public international law,"²⁵⁵ has the potential to provide effective labor standards, "at present [it does not establish] a full set of rationales" for such regulation; according to Trachtman, "a full set of rationales . . . must first be articulated domestically."²⁵⁶

Thus, while national boundaries are becoming less definitive of public and private power, they still delineate the allocation of State power and the contexts in which that power is functionally exercised.²⁵⁷ Yet, as Trachtman has stated, inter-

250. See Cooter, *supra* note 223, at 165.

251. See *id.* at 159-60.

252. See *id.* at 160.

253. See, e.g., United Nations Convention on Contracts for the International Sale of Goods [hereinafter CISG], Apr. 10, 1980, U.N. Doc. A/CONF. 97/18 (1980), reprinted in 19 I.L.M. 671 (1980). The CISG attempts "comprehensive codification" of multilateral rules governing international contracts in support of efficiency and standardization within international sales transactions. Peter Winship, *Formation of International Sales Contracts under the 1980 Vienna Convention*, 17 INT'L LAW. 1, 5 (1983).

254. See Trachtman, *supra* note 1, at 46.

255. *Id.* at 49.

256. *Id.* at 50.

257. Thus, the legal relations of market actors operating globally are shaped

national economic law can transcend the absolute (and “artificial”) bifurcation of domestic/international rule because economic law “does not reject domestic values, it absorbs them.”²⁵⁸ Accepting this premise, however, leaves an unanswered question regarding from what practices and mores those domestic values derive:

Economic competition changes products and techniques, which in turn creates new problems of coordination and cooperation. Communities of people solve these problems by developing norms of behavior. Social norms impose obligations and coordinate expectations. The State raises some social norms to the level of law.²⁵⁹

The argument here is that domestic values derive, in part, from accepted market practice, and that while market actors often harness this dynamic for domestic law purposes, they must comprehend that the same dynamic increasingly extends outward into international realms. Thus, if the Industry concertededly implements the fair labor standard through market practice in various contexts, discreet but broadly-placed domestic values could arise; values fueled by market enforcement, with uniform compliance eventually sought under the law. Assuming domestic law reflects the values operating within the society it governs,²⁶⁰ it can equally be assumed that the

fundamentally by conflicts of law analysis, which, at base, deals with “the allocation of public [namely, State] power.” *Id.* at 40.

258. *Id.* at 51. As such, those operating internationally must not only “think globally and act locally,” [but] must also think locally and act globally.” *Id.*

259. Cooter, *supra* note 223, at 141.

260. This is an assumption that must be accepted if democratic governance is to be credited with authenticity. Trachtman asserts that the absorption of private international law into public international law is problematic because the latter has failed to address public policy issues implicated in private claims and interests because there is no mechanism “for active legislation and the incorporation of democratic values in legislation in the international legal sphere.” Trachtman, *supra* note 1, at 41. While the argument here examines a legal evolution from private action through State accommodation that leads to international law, Trachtman instead argues that, because limitations to the doctrine of sovereignty are less threatening when addressed in the sphere of trade and business regulation, international economic law could lead directly to *international* legislation on issues pertaining to global market relations. *Id.* Yet, history shows that true interstate legislative treatment of the international labor standard is problematic, and labor issues are likely to remain resident in State sovereignty for some time to come.

fair labor standard, at its normative stage, will invite domestic legislative support.²⁶¹

Moreover, it can be postulated that, if fair labor standards are extensively implemented within various domestic regimes, collective pressure will grow for the norm's implementation on an interstate basis.²⁶² While that implementation could very well be sought within the ILO, or from international economic law forums,²⁶³ such a process constricts market action to the

261. The domestic law discussed in this section refers to the host State's law. The home State's legal response to the fair labor standard abroad cannot, however, be ignored. Sovereignty generally requires that a host State's domestic law govern market actions within its borders. See Orentlicher & Gelatt, *supra* note 40, at 103. However, home State domestic law, particularly that of the United States, increasingly attempts extraterritorial reach. "Municipal law that regulates transnational activities between non-State actors, as well as between such actors and State governments, occupies a growing area of transnational law." *Id.* at 105. Even before the Initiative was announced, United States lawmakers proposed legislative support for fair labor conditions and wages abroad. These efforts, however, face several barriers from the foreign host State and from private resistance in the home State. Commenting on Rep. Gephardt's contemplated expansion of the Trade Act, Watson stated "[t]here may however be some question as to whether alleged infringements of such [expansion] can be sustained (e.g., are the foreign laws unreasonable, or burden or restriction on U.S. Commerce), or whether an action taken thereunder might violate the GATT." Watson, *supra* note 9, at 1246.

Note, however, that when a home State's domestic law contravenes the host State's law, the host State's law "generally should prevail." Orentlicher & Gelatt, *supra* note 40, at 104.

262. Many western countries which presently have committed themselves to higher labor standards domestically are seeking interstate response to wage differentials. It is assumed that if such commitments were made elsewhere due to market support, other countries would seek the same response.

263. In this vein, Trachtman states that "economic integration is the leading motivation for new public international law today, and the most fertile source of new legislation and constitutionalization in international law." Trachtman, *supra* note 1, at 36. For an examination of the historical precursors of current international economic law, including law merchant and conflicts analysis, see Paul, *supra* note 3, at 609-612. Trachtman states that international legal governance within the institutional framework encompasses two separate poles: intergovernmentalism and integration. See Trachtman, *supra* note 1, at 47-48. In his words, "[i]ntergovernmentalism is simply a method of facilitating action by member states without binding them in advance to accept action." *Id.* at 48. In essence, the intergovernmental institution provides a forum and structure in which States act in cooperation, or not, based solely on independent sovereign prerogatives. See *id.* Integration, on the other hand, "pools" sovereign power, which is then transferred to a "governance mechanism" which wields that power on the relevant issue. *Id.* Trachtman argues that "the low politics of international economic law" are more conducive to the use of integration, although integration in the economic area would have spillover effect within interstate cooperation on "high politics" (e.g., issues of war and peace, human rights, etc.). *Id.* It is for this reason that Trachtman insists that conceptual revision of sovereignty will lie in the interna-

political realm. This Note, instead, examines the market norm's potential as a catalyst for customary international law.

VI. STATE ACTION AND STATE CONVICTION: CUSTOMARY INTERNATIONAL LAW

The dynamic explored in this Note has been one of market action and its normative implications; the model examined has sought the symbiosis of State conviction (extant multilateral labor standards), private response (the Initiative), and State accommodation (national legislation and interstate acceptance). It is the final step in the process, interstate acceptance, that this section explores.

International law does not contain the hierarchical structure of law-making found in many national legal systems.²⁶⁴ The International Law Commission has emphasized that "the pre-eminence of fundamental principles of the international legal order are determined by their content, not by the process by which they were created."²⁶⁵ Scholars have long debated the impact of societal dynamics on the law-making process; that is, the legal impact of private action which "ultimately determine[s] the content of the law."²⁶⁶ For the most part, however, the issue has been relegated to law creation within national legal systems,²⁶⁷ the assumption being that State action alone impacts international law formation.²⁶⁸ While many agree that the State is no longer the exclusive constituent of international law, it must be acknowledged that State action is essential to the process of law creation.²⁶⁹

tional economic law revolution. *See id.* Because international labor standards can be framed as both economic and as social/political in nature, where they fall within this construct is an open question.

264. *See* DANILENKO, *supra* note 2, at 7.

265. *Id.* The term "principles" is used here, as often used elsewhere, to mean norms which approach universal validity in the international order in the sense that they substantiate the concept of "general international law". *See id.* at 8-9.

266. *Id.* at 5.

267. *See id.* at 78-79.

268. *See id.* at 82. Note, however, that actions taken by international organization also contribute to customary law formation. *See id.* at 83. Moreover, decisions of international tribunals, particular the ICJ, may inform law creation, to the extent that the decisions impact State practice. *See id.*

269. It is "the legal policies of states" that influence customary international law formation. *Id.* at 87. As such, the present argument does not diverge from the common view that individual actions do not "constitute a law-creating practice;

While an analysis covering multilateral consensus, market action, and then concerted State response seems overextended, the fact is that the formation of customary international law is a complex, extended process in itself. It encompasses State conviction and action derived from multifarious relations and objectives.²⁷⁰ Its formation represents a fluid dynamic ultimately leading to acknowledged State practice on a particular issue, combined with State recognition that the practice is required by international law.²⁷¹ Once formed, however, customary law becomes fixed in its application; it does not rely on State consent, but extends to all States regardless of their individual stance on the issue. That is, once crystallized, customary international law is binding on all States.

While some have argued that customary law is a dynamic by which already existing law becomes conscious,²⁷² most acknowledge that customary law is a conscious law-making process, as well as an ultimate result.²⁷³ The conscious process of customary law-making is what this Note addresses; yet, by addressing market practice as the catalyst for customary law's formation, it diverges from the traditional construct, which looks solely to the impetus provided by concerted State action.

they are simple facts giving rise to international practice of states." *Id.* at 84. However, the present argument does deviate from this view in that it does not acknowledge such an absolute boundary between the individual and State dynamic. It also encourages *conscious* individual action in international law formation, which can transform individual "facts" (of which States may or may not be cognizant) into concerted market demands which converge with State concern.

270. In one view, this extended process is characterized as the "gradual hardening of practice into law." MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* ¶ 77 at 29 (1985). A brief summary of Villiger's treatment of a process expounded by Verdross states a dynamic in which at least three stages of customary law formation exist: (1) State claims or practices are properly made or taken for a variety of reasons encompassing politics, self-interest, and comity; (2) the claims and practices from stage one are reacted to by other States, either upholding or denouncing them, the result of which is State expectation, and an eventual reliance and demand for reciprocity; (3) the claims and practices gradually harden into a general rule, which eventually is looked upon as an emerging customary norm. As State awareness of the norm broadens, a uniformity of State conduct develops, which ultimately is perceived as obligatory. *Id.* ¶ 77 at 29-30.

271. See DANILENKO, *supra* note 2, at 76; Statute of the International Court of Justice, June 26, 1945, art. 38(1)(a), 59 Stat. 1055, 1060 (1945).

272. See DANILENKO, *supra* note 2, at 77-78. This view is influenced by natural law theory, treating customary law's creation as "unconscious or unintentional law-making." *Id.* at 78.

273. See *id.* at 77. Whether or not they declare their motivations, States are well aware that their actions may have law-making force. See *id.* at 79.

Yet, at this point, the analysis must rebound into the traditional construct, recognizing that State action and conviction will be the ultimate vehicle of customary labor law formation.

A. *The Nature of Customary International Law*

Customary law is composed of evidence of State conviction that an interstate obligation exists, and State action meets that obligation.²⁷⁴ Delineating the two can be a difficult undertaking. As defined by one scholar, State practice consists of "any act, articulation or other behavior of a State as long as the behavior in question discloses the State's conscious attitude with respect to—its recognition of—a customary rule."²⁷⁵ A close examination of this definition finds a blurred boundary between action and evidence of conviction. This Note attempts to address this difficulty by distinguishing between multilateralism and enforcement of both national and parallel international law. It is argued that State conviction will be found in existing international standards established in multilateral forums. It is the concerted national legislation supporting market-initiated expectation and practice, coupled with enforcement of the legislation, that will constitute State action.

Thus, interstate acceptance of market-established labor standards contemplates a two-pronged dynamic. The first prong involves the extant international labor standards found in the multilateral efforts discussed in Part III above, and reflected in the market norms implemented by the Industry. The second prong is national efforts to legally integrate those norms, as supported by national laws, to develop a uniformity of standards facilitating global trade.²⁷⁶

274. State practice "crystallize[s] the content of relevant rules of conduct," but it is State "acceptance as law" that transforms those rules of conduct "into legally binding norms." *Id.* at 81.

275. VILLIGER, *supra* note 270, ¶ 18 at 4 (citations omitted).

276. The arguments put forth for uniformity among national regulatory systems break down into one of "practicality" and one of "economic efficiency." *See* Watson, *supra* note 9, at 1242. The practicality argument, in brief, speaks to the difficulties of creating integrated production systems if the components of production are subject, in each State, to different regulatory standards and laws. *See id.* The economic efficiency argument calls for the integration of each national system into a single regulatory system in order to support scale economies and reduce costs. *See id.* at 1242-43.

1. State Conviction on International Labor Norms as Law

While a treaty is generally defined as a written international agreement between States that is governed by international law,²⁷⁷ international law recognizes that treaties impact general law formation in two ways.²⁷⁸ First, a treaty can serve to codify customary international law as it exists at the treaty's drafting.²⁷⁹ Second, the treaty can provide evidence of

277. Vienna Convention, *supra* note 146, art. 2(1)(a). "As a formal matter, general multilateral treaties containing rules of general (conventional) law are a source of international law for the contracting parties—and no one else." DANILENKO, *supra* note 2, at 53.

278. Some argue that a multilateral treaty that is limited and specific in scope must be analogized to a "contract" between States. *See* DANILENKO, *supra* note 2, at 47. Others, however, recognize multilateral treaties as a potential source of general international law. *See id.* at 46, 52-53. "If general law is taken to mean law binding on a great number of states, then it is undisputed that broad multilateral treaties can lead to the creation of general law." *Id.* at 52.

279. *See id.* at 47; Vienna Convention, *supra* note 146, art. 38, in 8 I.L.M. at 694. The treaty as a codification of customary law is treated with caution in international tribunals. The general rule is that "a treaty creates law as between the states which are parties to it." Certain German Interests in Polish Upper Silesia, (Ger. v. Pol.) 1926 P.C.I.J. (Ser. A), No. 7, at 29. However, the proliferation of human rights treaties which create State obligations to individuals within its territories have changed this traditional constraint in response to the increasingly recognized impact of State action on individuals. This reconstruction does not, however, impact the traditional notion that a treaty generally does not create obligations for third States which have not ratified it. Vienna Convention, *supra* note 146, art. 34, in 8 I.L.M. at 693. The basis of this rule lies in State sovereignty. *See* DANILENKO, *supra* note 2, at 48-49.

McNair argued that treaties can create "objective regimes" such that treaty norms, without reference to customary law evolution, can be extended to third States based on the "semi-legislative authority" of the participating States derived from their particular interest in the treaty's subject matter, and the third State's acquiescence. *See id.* at 61. Currently, however, international law does not readily acknowledge this dynamic. *See id.* at 62-63. Yet, it is important to note that, while not without controversy, global interdependency is beginning to give more weight to the creation of universal State obligations, particularly regarding environmental issues falling within "the common heritage of mankind." *See, e.g.,* The United Nations Convention of the Law of the Sea, 1982, U.N. Doc. A/Conf. 62/122 (1982). It must be noted, however, that the force behind this trend may be more political than legal; its future validity as a form of law-making is subject to shifting political needs. *See* DANILENKO, *supra* note 2, at 64-68.

It cannot reasonably be argued that current promulgations of international labor standards represent codification of pre-existing customary law. As Stated by the I.C.J., a normative treaty provision must, at the least potentially, "be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law." North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, para. 72 at 41-42 (Feb. 20). As seen in Part III,

State conviction as an element of customary law formation.²⁸⁰ It is the second function, the treaty as evidence of State conviction, that is essential to this Note's argument.

Whether the State practice derives from extant legal obligation, or forms a basis for eventual acceptance as law, the resulting custom has the same force. The multilateral treaty, however, has created a platform from which State consensus on legal obligation is often formed prior to any resulting State practice.²⁸¹ This staggered dynamic is vital to the argument here: the private market action has fomented State action which supports a consensus of State conviction previously established in multilateral forums.²⁸²

But, if States do not observe the extant labor standards within their domestic law-making and enforcement, those standards cannot base an argument that customary labor law exists, regardless of how many promulgations are made on the subject. "[A] convergence of State positions on the purely verbal level does not suffice to create customary legal prescriptions."²⁸³ For the "decent" wage and working condition to be customary law, it must be "based on constant and uniform practice of states."²⁸⁴

international labor standards have consistently been open-textured in nature in order to encompass individual sovereign interests. Moreover, uniform State practice has yet to be achieved, thus the second element of customary law was certainly absent at drafting.

280. Indeed, the scope of the multilateral forum itself lends increasing credence to this conclusion. See DANILENKO, *supra* note 2, at 79.

281. See *id.* See, e.g., Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, para. 52 at 23 (July 25). In that case, the ICJ stated that the subject fishing rights had "crystallized as customary law . . . arising out of general consensus" evidenced at the Second U.N. Conference on the Law of the Sea. See DANILENKO, *supra* note 2, at 92.

282. See discussion Part III, *supra*. It must be noted, however, that the notion that State consensus on the labor standard has been achieved multilaterally may be undercut by the opt-out provisions prevalent in ILO Conventions, as well as the explicit reservations of States in human rights treaties containing labor norms. Thus, the extant multilateral standards, as presently supported, cannot stand alone as evidence of the customary status of international labor standards. But, to blur the line between action and conviction, it is the potential agitation of a broad collective of States to achieve uniform application of the standards that will buttress the conviction element of the customary labor norm.

283. DANILENKO, *supra* note 2, at 91.

284. *Id.* at 75.

2. State Practice: Implementing and Enforcing International Labor Norms as Law

Because State practice and State conviction must converge to create customary law, the relevant State action must generally be that which manifests the will of the State. Thus, the organs of a State which can impact law formation are those which "normally represent states in international affairs."²⁸⁵ However, on a practical level, various State organs are recognized as able to participate in forming a State's legal position.²⁸⁶ Moreover, the definition of "practice" is generally moving away from sole recognition of actual State practice, and now includes "other persuasive manifestations of state legal policy."²⁸⁷ Importantly, the International Court of Justice has specifically recognized that legislative acts initiate and form State practice,²⁸⁸ although the Court still looks to actual State practice as well. The Court's stance implies that enforcement of legislation, as well as its enactment, is required to form the requisite State action.²⁸⁹

If supportive State practice regarding labor standards is to represent customary law, existing international law, *i.e.*, established labor norms, must determine "the legally relevant manifestations of practice" requisite to customary law formation.²⁹⁰ The State practice contemplated in this analysis is three-fold: (1) the enactment of legislation supporting the market-implemented labor norms within a broad representation of States due to concerted market action;²⁹¹ (2) each State's en-

285. *Id.* at 84.

286. *See id.*

287. *Id.* at 86-87. This view is supported, in particular, by developing nations which strive for greater voice in international law creation. *See id.* at 88.

288. *See id.* at 85 (citing North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 32-33 (Feb. 20)).

289. *See id.* at 91.

290. *Id.* at 81.

291. Isolated evidence of practice does not suffice to create customary law. *See id.* at 94. However, the requisite wide-spread action does not denote universal action, *see id.* at 95, and the generality requirement would be fatal to customary labor norm formation only absent broad-based market implementation.

Because the scope of State practice evincing the norm depends on the norm's sphere of application, regional custom is possible. The problem with regional labor custom is the same as that presented by the current situation: if separate standards exist from region to region, the incentive to derogate from a given standard exist in order to maintain competitive advantage with other regions. *See VALTICOS, supra* note 86, at 49.

forcement of that legislation at the market actor's insistence,²⁹² and (3) the resulting interstate agitation for parallel compliance with ILO and human rights standards.

Thus, if broadly implemented market norms reflecting established interstate obligation find support in domestic law based on market enforcement, the market actor can have normative impact on the international level. Upon the customary labor norm's formation, the conscious partnership between the market actor and the State will bear fruit for both: the market actor has substantiated the norm at play, and both the market actor and the States will benefit from its uniform application.

CONCLUSION

The analysis presented in this Note was born of questions raised by the Initiative regarding the ability of international law to address substandard wages and working conditions on a global basis. Research revealed a microcosm of the global order, with the interests of citizens, business, and States fully implicated. The economic need of workers, the political conviction of individuals, the market practice of global business, and State response represent every level of the global constituency, and the interplay of objectives and policy fueling global change.

But, what was discovered was a clash between the rigid constructs of sovereignty within traditional international law, and the effective operation of that law in current global reality. The issues that arose were the implications of a State's use of a market actor to achieve a transborder result without sovereign line-drawing, the ability and willingness of the market actor to assume the role of policymaker, and the result of a conscious partnership between the State and the market in effecting the operation of international law. While, analytically, the attempt to synthesize the interests of a generic market with generic States can lead to simplism, the conclusion reached is that due to the shifting power of the market and States, market actors not only can, but do, have normative impact on international law. The conviction formed, however, is that in order for international law to sustain its legitimacy,

292. The assumption is that market actors will insist on enforcement in order to comply with their Initiative commitments, and to avoid the political costs discussed in Part IV above.

the market actor must be accountable for that impact, and must consciously address that accountability through normative choice.

Global reality gives wide play to private actors, and international law must reflect and accommodate that reality. Whether one can accept that the market actor is able to impact customary international law is not as important as the recognition that such an analysis is possible given the changing nature of sovereign power and private authority in current international relations. Whether or not the economists are correct in saying that market action does not require legislative sanction is arguable. But it is clear that the law's viability must contend with the norms it supports. If the Industry's current practices cannot viably be supported by accepted international law, for both political and pragmatic reasons, normative stability cannot attach to those practices. It is only by adapting labor practices to those which can be supported by international law, that long-term market stability—and the efficiency that entails—can be achieved.

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