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Comments

The 1998 ILO Declaration on Fundamental Principles and Rights at Work: Promoting Labor Law Reforms Through the ILO as an Alternative to Imposing Coercive Trade Sanctions

“The drive to forge the global market was led primarily from the suites—the plush offices of banks and corporations, the comfortable seminar rooms of the foreign policy community. The new internationalism—the drive to make this economy work for people, to secure basic worker and human rights, environmental and consumer protections, sensible anti-trust and financial regulation—is being driven from the streets.”

John J. Sweeney, AFL-CIO President¹

I. Overview

Since the conclusion in 1994 of the Uruguay Round of the World Trade Organization’s General Agreement on Tariffs and Trade (WTO/GATT), there has been substantial pressure from unions for “social clauses” in trade agreements, linking trade sanctions and fundamental, internationally-recognized workers’

1. Remarks by John J. Sweeney, *New Internationalism Council on Foreign Relations* (visited Apr. 1, 1998) <<http://www.aflcio.org/publ/speech98/sp0401.htm>>.

rights.² Led by the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”), U.S. unions have agitated for enforceable international labor standards and codes of conduct as a check on the social consequences of economic globalization.³ Union pressures for trade sanctions have significantly influenced the U.S. congressional debate on trade legislation, including NAFTA and “fast track” authority, as well as negotiations in international trade forums.⁴

On June 18, 1998, the Eighty-Sixth International Labor Conference of the United Nations’ International Labor Organization (“ILO”)⁵ adopted the ILO Declaration on Fundamental Principles and Rights at Work (“ILO Workers’ Rights Declaration”).⁶ The ILO Workers’ Rights Declaration, together with its annex for follow-up procedures adopted by the ILO Governing Body on November 19, 1998,⁷ obligates the United States and the ILO’s other 173 member nations to adhere to four fundamental principles of labor and employment law.⁸ Those principles, as set forth in the Declaration, are embodied in the ILO’s seven core workers’ rights Conventions:

- freedom of association and the effective recognition of the right of collective bargaining [C. 87 and C. 98];

2. *Report of the Committee on the Declaration of Principles, International Labor Conference, 86th Sess.*, (visited June 1998) <http://www.ilo.org/public/english/10ilc/ilc86/com-decl.htm>. Provisional Record of Proceedings, International Labor Conference, Doc. 20A, 86th Sess., (visited June 1998) <<http://www.ilo.org/public/english/10ilc/ilc86/com-deed.htm>>.

3. *Trade Unions Urge Negotiations to Mandate Core Standards in Investment Agreement*, 11 DAILY LAB. REP. (Jan. 16, 1998) (BNA) A-4.

4. *Unions will Again Urge Trade Ministers to Create Labor Working Groups at WTO*, 70 DAILY LAB. REP. (Apr. 13, 1998) (BNA) A-3.

5. The International Labor Conference is the plenary body of the International Labor Organization. The ILO is the oldest specialized agency of the United Nations. It was founded in 1919 under Part XIII of the Treaty of Versailles. Following the demise of the League of Nations it became part of the United Nations system in 1946. *See generally*, ANTHONY ALCOCK, *HISTORY OF INTERNATIONAL LABOR ORGANIZATION* 18-37(1971). *See also*, Jay M. Vogelsson, *International Labor Organization, Report of the ABA Section on International Law and Practice*, 30 INT’L L. 654-663 (1996).

6. *ILO Declaration on Fundamental Principles and Rights at Work, International Labor Conference, 86th Sess.*, (visited June 1998) <<http://www.ilo.org/public/english/10ilc/ilc86/com-dxt.htm>>.

7. *ILO Adopts Action Program on Declaration Follow-Up*, 224 DAILY LAB. REP. (BNA) A-6 (Nov. 20, 1998).

8. *ILO Declaration on Fundamental Principles and Rights at Work*, *supra* note 6, at para. 2(a)-(d).

- the elimination of all forms of forced or compulsory labor [C. 29 and C. 105];
- the effective abolition of child labor [C. 138]; and
- the elimination of discrimination in respect of employment and occupation [C. 100 and C. 111].⁹

The failure of the United States to ratify all but one (C. 105) of these core workers' rights Conventions has shielded the U.S. Government, and thus American corporations, from most forms of ILO supervision regarding labor relations and employment practices within the United States, although not in ratifying host countries where American corporations operate.¹⁰ Adoption of the new Workers' Rights Declaration, which is mandated as a condition of ILO membership, still does not subject the United States to the same level of ILO supervision as countries which have ratified Conventions.¹¹ The ILO Conventions and the 1998 Declaration apply to governments and the relevant supervisory or follow-up mechanisms cannot be extended to companies. The Declaration does, however, provide an increased level of international scrutiny of domestic U.S. labor and employment practices.¹² In this way, the 1998 Declaration is intended to encourage governments to adopt and/or enforce existing labor standards consistent with the ILO standards referenced in the Declaration to which countries are required to adhere. In addition, the Declaration offers ILO technical cooperation and assistance to member governments, and employers' and workers' organizations in promoting the ratification and implementation of the core Conventions. (see para. 3 of ILO Workers' Rights Declaration)

For multinational employers, the overriding importance of the Declaration is its preemptive effect on emerging "social clauses" in trade agreements. The Declaration provides: "the ILO is the constitutionally mandated international organization and the competent body to set and deal with international labour stan-

9. *Id.*

10. Vogelson, *supra* note 5 at 658.

11. The Declaration in paragraph 3 merely obligates ILO members to adhere to the principles embodied in the fundamental Conventions, but does not go beyond the present text of the ILO Constitution. Report of the Committee on the Declaration of Principles, *supra* note 2 at para. 10; *Provisional Record of Proceedings*, *supra* note 2 (Remarks of Mr. Potter, Employer Vice Chair). That is, the Declaration and its follow-up annex impose no new reporting or compliance requirements on the United States other than those already required of all members under the ILO Constitution. *Id.*

12. *Id.*

dards.”¹³ The Declaration continues: “it is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of [these] fundamental principles and rights . . . and to promote their universal application.”¹⁴

The Declaration’s preemptive effect is supported by the December 1996 WTO Ministerial Conference in Singapore, which recognized that the ILO is the competent body to address fundamental labor standards in a multilateral trading system.¹⁵ The United Nation’s World Summit for Social Development (Copenhagen 1995) also expressed support for the preeminent role of the ILO concerning internationally recognized core labor standards as a means to address the possible social consequences of trade liberalization.¹⁶

This Comment, in Parts II and III, considers the 1998 ILO Workers’ Rights Declaration in the context of existing international and intergovernmental codes and trade mechanisms for supervising global labor and workplace standards. It continues, in Part IV, to examine two of the core ILO Conventions incorporated in the Declaration, C. 87 and C. 98, and actual or potential conflicts with U.S. law and practice. Part V analyzes the Declaration and its follow-up annex. Finally, in Part VI, the Comment considers the Declaration *vis a vis* the expectations of trade unions and employers.

The Comment concludes, in Part VII, that the 1998 ILO Workers’ Rights Declaration reestablishes the preeminence of the ILO as the most competent international body for the promulgation, supervision and promotion of international labor standards. Adoption of the Declaration reduces pressures on other international bodies, particularly trade organizations such as the WTO, to adopt trade sanctions as the appropriate means of enhancing workers’ rights and improving working conditions. The Declaration provides an important means for promoting workers’ rights and labor standards among U.S. trading partners around the world. At the same time, the Declaration’s follow-up mechanisms may expose weaknesses in current U.S. labor laws and labor-management

13. *ILO Declaration on Fundamental Principles and Rights at Work*, *supra* note 6 at Preamble.

14. *Id.*

15. See, 241 DAILY LAB. REP. (BNA) A-1 (Dec. 16, 1996). See also, Abraham Katz, *WTO and the Social Clause*, J. COM., Jan. 8, 1997. Report of the Committee on the Declaration of Principles, *supra* note 2 at par. 8.

16. *Report of the Committee on the Declaration of Principles*, *supra*, note 2 at para. 17.

practices. Consistent with the Declaration's promotional objectives, the result may be additional pressures on Congress to reform U.S. labor and employment statutes to conform to the principles of the international standards enunciated in the Declaration.

II. International Supervision of U.S. Labor and Employment Practices

A. Introduction

Unions in the United States face dual crises: (1) rapidly declining union density as a percentage of the American private sector workforce;¹⁷ and (2) rapidly increasing economic globalization which has further eroded union influence over U.S. and foreign multinational companies.¹⁸

Traditional collective bargaining pressures have failed to stem the flow of American corporate investments and jobs to more attractive overseas markets.¹⁹ Union efforts in Congress have failed to change U.S. labor laws to increase union influence over such decisions.²⁰ Several decades of experiments in coordinated

17. In 1997, union membership in the United States comprised 14.1 percent of the total workforce (including public sector workers), but only 9.8 percent of the private sector, nonagricultural workforce. Bureau of Labor Statistics, U.S. Department of Labor reported in 21 DAILY LAB. REP. (BNA) D-13 (Feb. 2, 1998). Private sector union membership has declined steadily since 1950.

The decline in union density in the United States parallels union membership decline in other industrialized countries. W.B. GOULD, AGENDA FOR REFORM 16-17 (1993). ("The retreat of labor is surely an international phenomenon," citing the decline over the last decade in union density in Japan (from 32 to 25 percent), the Netherlands (from 42 to 28 percent) and Britain (from beyond 50 percent to approximately 46 percent). *Id.* U.S. private sector union membership is the lowest among industrialized countries except France and Spain. *Id.* There is natural competition, therefore, among foreign unions to increase employment levels of multinationals in their countries as the basis for new union membership.

18. See, e.g., *Global Integration Seen Focusing New Attention on Trans-National Union Efforts*, 210 DAILY LAB. REP. (BNA) A-9 (Oct. 30, 1998); W.B. Gould, *Multinational Corporations and Multinational Unions; Myths, Reality and the Law*, 10 INT'L L. 655 (1976); R.J. BARNET AND R.E. MÜLLER, GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS (1974).

19. *Id.*

20. See, e.g., House Labor-Management Relations Subcommittee, *Report on Failure of Labor Law - A Betrayal of American Workers*, 193 DAILY LAB. REP. (BNA) (Oct. 4, 1984), reporting on *Has Labor Law Failed?* Joint Hearings before the House Education and Labor Subcommittee on Labor-Management Relations and the House Government Operations Subcommittee on Manpower, to Assess the Adequacy of Federal Labor Laws, 98th Cong., 2d Sess. (1984). See also,

multinational collective bargaining have been frustrated by the conflicting "self interests" of foreign, host country unions. Those unions seek to promote U.S. multinational investments abroad as a means of job creation, higher standards of living, and increased union membership in host countries.²¹ Although the increasing pace of economic globalization has encouraged transnational union dialogue and, in some cases, collaboration, there is little evidence that such cooperation has had a significant effect on labor and employment policies.²²

B. *International Labor Codes*

International instruments which establish a worker's right to form and join unions and bargain collectively are not a recent phenomena. Prior to the promulgation of separate international labor codes, worker's rights to organize were included among the "human rights" which are basic to freedom of association as defined in Article 23(4) of the United Nation's Universal Declaration of Human Rights (1948).²³ More recently, the International Covenant on Civil and Political Rights (ICCPR),²⁴ which the United States ratified in 1992, and the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁵ as yet unrat-

INDUSTRIAL UNION DEPT., AFL-CIO, WORKPLACE RIGHTS: DEMOCRACY ON THE JOB 10 36 (Elmer Chatak, Richard L. Trumka & Joe Uehlein, eds., 1994)

21. *Global Integration Seen Focusing New Attention on Trans-National Union Efforts*, 210 DAILY LAB. REP. (BNA) A-9 (Oct. 30, 1998). See, e.g., *Three Rail Unions in North America Form Alliance to Coordinate Strategies*, 176 DAILY LAB. REP. (BNA) B-1 (Sept. 11, 1998) (Coalition of railway unions representing 150,000 rail workers in the United States, Mexico, and Canada organized to coordinate collective bargaining and strikes "that can meet with equal strength the large multinational railroad corporations." *Id.*) Efforts have focused on coordinated bargaining strategies and sharing of information to assist bargaining among unions representing multinational corporations. *Id.* But as one labor commentator observed, "strictly speaking, there is no such thing as international collective bargaining. ERNST B. HAAS, BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION, 292 (1968).

22. *Id.*

23. Art. 23.4, Universal Declaration of Human Rights. <<http://www.un.org/overview/rights.html>>. *Everyone has the right to form or join trade unions for the protection of his interests.*

24. Art. 22, International Covenant on Civil and Political Rights (ICCPR) <<http://www.tufts.edu/fletcher/multi/texts/BH498.txt>> For the U.N.'s summary of ICCPR, see <<http://www.hrweb.org/legal/undocs.htm#CPR-Prot>>.

25. Art. 8, International Covenant on Economic, Social and Cultural Rights (ICESR). <<http://www.tufts.edu/fletcher/multi/texts/BH497.txt>> For the U.N.'s summary of ICESCR, see <<http://www.hrweb.org/legal/undocs.htm#ESCR>>.

ified by the United States, incorporated workers' rights to form and join unions as fundamental civil and economic rights.²⁶

For workers and trade unions, however, such general hortatory statements supporting worker's "human rights" to form and join unions and bargain collectively are unenforceable.²⁷ Set forth in international instruments as non-self executing treaties, such rights are not subject to private causes of action in U.S. courts.²⁸ For years, U.S. unions paid little attention to these international instruments or to the more specific International Labor Code promulgated by the ILO.²⁹ Until recently, there was little union agitation for the United States to ratify international labor conventions since U.S. unions felt well served by the 1935 Wagner Act ("National Labor Relations Act").³⁰

Following the 1947 and 1959 Taft-Hartley and Landrum - Griffin Act amendments, which reduced labor's organizing and bargaining clout, U.S. unions have been less satisfied with the adequacy of domestic labor laws.³¹ As union concerns increased over growing multinational investments abroad, American unions promoted alternative methods of regulating the labor and employment practices of multinationals through two international labor codes — the Organization for Economic Cooperation and Development's 1976 Employment and Industrial Relations Guidelines for Multinational Enterprises ("OECD Guidelines"),³² and the 1977

26. *Id.*

27. See, Remarks by John J. Sweeney, *New Internationalism Council on Foreign Relations* (visited Apr. 1, 1998) <<http://www.aflcio.org/publ/speech98/sp0401.htm>>. See also, *Law Linking Bailouts With Labor Records Is Ignored, Congressional Group Charges*, 235 Daily Lab. Rep. (BNA) A-2 (Dec. 4, 1997) (urging linkage with international financial institutions, including the World Bank, IMF, Asian Development Bank); *The Future of the World Trading System*, address by Renato Ruggiero, Director-General of the World Trade Organization to the Institute for International Economics (visited Apr. 15, 1998) <<http://www.wto.org/wto/speeches/bergen>>.

28. *Id.*

29. ERNST B. HAAS, *BEYOND THE NATION STATE* 234 (1964).

30. WILLIAM B. GOULD IV, *AGENDA FOR REFORM 201* (1993); *Industrial Union Dept., AFL-CIO, Workplace Rights: Democracy On The Job* 8-9 (Elmer Chatak, Richard L. Trumka & Joe Uehlein, eds., 1994).

31. *Workplace Rights: Democracy On The Job*, *supra*, note 30 at 10-11; Gould, *supra* note 30; U.S. H.R. Subcommittee on Labor-Management Relations and Committee on Manpower and Housing, Joint Oversight Hearings, "Has U.S. Labor Law Failed?" 98th Cong., 2nd Sess. 1984; "House-Labor-Management Subcommittee Reports on Failure of Labor Law-A Betrayal of American Workers," 193 DAILY LAB. REP. (Oct. 4, 1984).

32. See *OECD Guidelines for Multinational Guidelines* (visited Apr. 1, 1999) <<http://www.oecd.org/daf/cmismime/mnetext.htm#employment>>

ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (“ILO Tripartite Declaration”).³³

In the 1980’s, following defeat of labor law reform legislation in Congress, union pressures mounted for U.S. ratification of international labor conventions with the surprising support of the Reagan administration’s Secretary of State George Schultz and the conservative Republican Chairman of the Senate Labor and Human Resources Committee, Orrin Hatch.³⁴ At U.S. Senate hearings on the ILO, AFL-CIO President Lane Kirkland urged U.S. ratification of C. 87 and C. 98, stating:

The argument that U.S. ratification of human rights conventions would create new rights for employees which they do not now have is harmful to the image of an America that has been in the forefront in the promotion and defense of fundamental rights of freedom of association.³⁵

In recent years, as trade liberalization has flourished, unions have responded with such measures as the North American Agreement on Labor Cooperation (NAALC, the “labor side agreement” to the North American Free Trade Agreement).³⁶ In addition, there are at least 215 voluntary corporate codes of conduct and social labeling programs promoted by labor and

33. See *Multinational Enterprises: Tripartite Declaration of Principles* (visited Apr. 1, 1999) <<http://www.ilo.org/public/english/85multi/tridecl/index.htm>>.

34. See Orrin G. Hatch, *Ratify International Labor Conventions*, CHRISTIAN SCI. MONITOR, Dec. 10, 1985. See Statement of Secretary of State George P. Schultz, Hearings on U.S. Relations with the ILO, U.S. Senate Committee on Labor and Human Resources, 99th Cong., 1st Sess. (reprinted at 177 DAILY LAB. REP. (BNA) E-1 (Sept. 12, 1985); see also, Statement of Secretary of Labor William E. Brock, Hearings on U.S. Relations with the ILO, *supra*, reprinted at 177 DAILY LAB. REP. (BNA) E-3 (Sept. 12, 1985).

35. Statement of AFL-CIO President Lane Kirkland, hearings on U.S. Relations with the ILO, U.S. Senate Committee on Labor and Human Resources, 99th Cong., 1st Sess. 1985, reprinted at 177 Daily Lab. Rep. (BNA) E-6 (Sept. 12, 1985). The legal problem created by U.S. ratification of C.87 and C. 98, as discussed in this Comment, is that ratified conventions would have the force and effect of treaty obligations superseding conflicting provisions of domestic U.S. labor statutes. For that reason, at the 1985 U.S. Senate hearings Abraham Katz, president of the U.S. Council for international Business testified that “it is not feasible to ratify ILO conventions which contain legal requirements different from U.S. law without having a detrimental effect on U.S. labor laws.” Statement of Abraham Katz, Hearings on U.S. Relations with the ILO, *supra*, reprinted at 177 DAILY LAB. REP. (BNA) E-6 (Sept. 12, 1985).

36. North American Agreement on Labor Cooperation (NAALC), reprinted at <<http://www.sice.oas.org/trade/nafta/labor-c1.stm>>

consumer organizations to address issues ranging from child labor to occupational safety and health.³⁷

C. *Emerging International Trade Sanctions*

Of greater concern to the business community, the AFL-CIO has pressured for new, enforceable labor rights and environmental provisions, set forth in a broad range of voluntary guidelines, principles, and codes.³⁸ Unions have also sought to include enforceable labor rights through the GATT/WTO, the International Monetary Fund ("IMF"), and the OECD's proposed Multilateral Agreement on Investment ("MAI").³⁹

Since 1995, the MAI negotiations involving the United States and the other twenty-nine OECD nations,⁴⁰ have focused primarily on the objectives of ensuring equal treatment of national and foreign investment and protection of those investments against expropriation.⁴¹ The AFL-CIO has insisted, however, that the MAI must include effective sanctions, rather than "weak hortatory language,"⁴² for violations of internationally recognized labor rights. The AFL-CIO also has demanded that the MAI must allow governments to impose restrictions on foreign investors - i.e., giving preference to domestic inputs, requiring domestic content and local

37. 224 DAILY LAB. REP. (BNA) A-6 (Nov. 20, 1998).

38. See Statement of the United States Council for International Business, Position paper on Codes of Conduct, (Dec. 21, 1998), and accompanying Press release. See also John M. Kline, *International Codes and Multinational Business: Setting Guidelines for International Business Operations*, 73-74 (1985).

The business community's greatest fear is that voluntary intergovernmental codes for MNCs will evolve into binding international labor standards, or will stimulate new national law patterned on voluntary international codes. This fear is hardly groundless since such a development is the explicit desire and intention of both organized labor and many developing countries. *Id.*

39. Sweeney, *supra* note 27. See also *AFL-CIO Executive Council Statement Trade and Deindustrialization* (visited Feb. 18, 1999) <<http://www.aflcio.org/publications/feb99/cstrade.htm>>.

40. The OECD is an intergovernmental organization consisting of the following 29 major industrialized countries: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

41. See Amb, Kjell Lillerud, *The OECD Guidelines for Multinational Enterprises: Symposium on the MAI* Cairo, Egypt (visited Oct. 20, 1997) <<http://www.oecd.org/daf/cmism/maillillerud.htm>>.

42. Sweeney, *supra* note 27; see also, *Trade Unions Urge Negotiations to Mandate Core Standards in Investment Agreement*, 11 DAILY LAB. REP. (BNA) A-4 (Jan. 16, 1998).

hiring, or other domestic political and economic objectives to preserve jobs or protect natural resources.⁴³

The recent adoption of the 1998 ILO Workers' Rights Declaration is a response to these growing pressures for linkage of workers' rights and world trade. It is appropriate, therefore, to consider the new Declaration in the context of these existing and other emerging international labor codes.

III. Examination of Selected International Codes

A. *OECD Guidelines for Multinational Enterprises*

In 1976, the OECD issued "Guidelines for Multinational Enterprises" in the areas of: disclosure of information, competition, financing, taxation, employment and industrial relations, and science and technology.⁴⁴

The OECD Employment and Industrial Guidelines, *inter alia*, encourage multinational enterprises in each of the countries in which they operate to:

1. respect the right of their employees to be represented by trade unions and . . . engage in constructive negotiations . . . with a view to reaching agreements on employment conditions . . . ;
3. provide to representatives of employees . . . information which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole . . . ;
8. in the context of bona fide negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to utilise a capacity to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise . . .⁴⁵

The issuance of the Employment and Industrial Relations Guidelines "forced the OECD into the posture of a quasi-regulatory agency" with "strong, third-party involvement in the forms of active trade union initiatives and discussions between multinational

43. *Id.*

44. OECD Guidelines, *supra* note 32.

45. *Id.*

firms and governments.”⁴⁶ Each of the nine paragraphs in the Employment and Industrial Relations Guidelines has been the subject of OECD review and interpretation based on alleged infractions reported by international trade union secretariats, such as the International Metalworkers’ Federation (IMF) and the International Federation of Commercial, Clerical, Professional, and Technical Employees (FIET).⁴⁷ The union complaints are channeled to the OECD through the Trade Union Advisory Committee (TUAC), which has consultative status with the OECD.⁴⁸ The TUAC consists of national trade unions, such as the AFL-CIO in the United States, the Deutsche Gewerkschaftsbund (DGB) in Germany, and the Trade Union Congress (TUC) in the United Kingdom.⁴⁹

The “cases” of alleged infractions of the Employment and Industrial Relations Guidelines are referred to the OECD’s Committee on International Investment and Multinational Enterprises (CIIME) for review.⁵⁰ Often the “cases” are reviewed with reference to the practices of individual enterprises and are designed to “illustrate the types of problems which in the experience of the trade unions, the implementation of the Guidelines involves.”⁵¹

Although the OECD lacks authority to impose sanctions or order remedial measures against offending parties, publicity surrounding review of the “voluntary” guidelines constitute a form of “enforced international regulation of multinationals.”⁵² As one commentator noted, “soft law” can have “hard” consequences for multinational corporations.⁵³ Several early cases demonstrate the legal and public relations problems posed by the Guidelines for the multinational enterprises in the sensitive areas of union organizing and collective bargaining.

Several cases which arose under the OECD Guidelines go beyond the requirements of the U.S. or the host country’s labor

46. DUNCAN C. CAMPBELL & RICHARD L. ROWAN, MULTINATIONAL ENTERPRISES AND THE OECD INDUSTRIAL RELATIONS GUIDELINES, 6-7 (1983).

47. *Id.* at 7.

48. *Id.* at 4.

49. *Id.* at 5.

50. *Id.* at 2.

51. CAMPBELL, *supra* note 46, at 7.

52. *Id.*

53. Kline, *supra* note 38, at 49 (quoting JOHN ROBINSON, MULTINATIONALS AND POLITICAL CONTROL, 111 (1983)). Robinson defined “soft law” as “politically-agreed behavior which cannot be directly legally enforced but cannot either be legitimately infringed.” *Id.*

laws. In 1977, for example, TUAC submitted a case to the OECD's CIIME initiated by the International Metalworkers' Federation.⁵⁴ The case alleged that U.S.-owned Black & Decker's refusal to grant recognition of two British unions - the General and Municipal Workers' Union and the Amalgamated Union of Engineering Workers - at the company's Spennymoor (U.K.) Plant violated paragraph 1 of the OECD.⁵⁵ The company's defense was that the employees in question had previously voted against representation by the unions in a secret ballot, which under U.S. and British labor laws would have exonerated the company.⁵⁶

Similarly, in 1977 two British white-collar unions submitted a charge through TUAC to the OECD's CIIME.⁵⁷ The charge alleged that the U.S.-owned Citibank-Citicorp violated paragraph 1 of the Guidelines by the distribution of anti-union literature opposing the union's organizing campaign at its U.K. subsidiary.⁵⁸ Although the labor relations practices of the two companies proved not to be violations of either American or British labor laws, CIIME commented that paragraphs 1 and 2 of the Guidelines encourage that "management adopt a positive approach toward the activities of trade unions . . . and, in particular, an open attitude towards organizational activities."⁵⁹ To one commentator, CIIME's admonition suggested that under the Guidelines employers should be required to take a "neutral" approach on matters of unionization,⁶⁰ although that is contrary to U.K. and U.S. labor relations statutes. U.S. labor law permits employer "free speech" opposing unionization through non-threatening, non-coercive communications with employees.⁶¹

In another early case, during the 1979 review of the Guidelines, CIIME considered the transfer of employees from Hertz Corporation's subsidiaries in the U.K., Italy, and France to maintain business operations during a strike at Hertz's Danish facilities.⁶² CIIME held that the company's practice of attempting to operate during a strike using the company's employees from

54. CAMPBELL, *supra* note 46, at 39.

55. *Id.*

56. *Id.*

57. *Id.* at 46.

58. *Id.*

59. CAMPBELL, *supra* note 46, at 50.

60. *Id.*

61. 29 U.S.C. §158(c).

62. CAMPBELL, *supra* note 46, at 183.

other locations did not violate either Danish or U.S. labor laws.⁶³ Nor was it at that time specifically mentioned as a prohibited practice in the Guidelines. CIIME concluded, however, that the practice was not in conformity with the “spirit” of paragraph 8 of the Guidelines and that “enterprises should definitely avoid recourse to such practices in the future.”⁶⁴ Thereafter, the OECD amended paragraph 8 to include language that enterprises should not “transfer employees from the enterprises’ component entities in other countries” in order to influence a labor dispute.⁶⁵

B. ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

The ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (“ILO Tripartite Declaration”) was promulgated in 1997 as a voluntary code of conduct to guide governments, employers’ and workers’ organizations, and multinational enterprises in the fields of employment, training, conditions of work and life, and industrial relations.⁶⁶ Under the follow-up procedures of the ILO Tripartite Declaration, complaints concerning a multinational corporation’s noncompliance with the code’s provision should first be raised with the corporation itself and the host government.⁶⁷ If the dispute is not resolved at the first level, the host government or a labor union may invoke review by the ILO’s tripartite Subcommittee on Multinational Enterprises,⁶⁸ assuming the “case” satisfies the jurisdictional threshold, in the same way that complaints concerning noncompli-

63. *Id.* at 188.

64. *Id.* at 187.

65. *Id.*

66. ILO Tripartite Declaration, *supra* note 33.

67. Kline, *supra* note 38, at 64.

68. Unlike the OECD procedure for submitting cases, the tripartite structure of the ILO permits direct participation by unions as well as employers in the Subcommittee on Multinational Enterprises. Kline, *supra* note 38, at 64. Thus, although the International Confederation of Free Trade Unions (ICFTU) and the International Organization of Employers (IOE) are the ILO’s counterparts to the OECD’s consultative TUAC and the Business and Industry Advisory Committee (BIAC), it is not necessary that submissions be referred by consultative bodies in the ILO system. National unions, such as the AFL-CIO, have standing in the ILO’s Subcommittee of Multinational Enterprises to initiate and participate in the consideration of matters concerning interpretation of the Tripartite Declaration of Principles. *Id.*

ance with OECD Employment and Industrial Relations Guidelines are referred to the OECD's CIIME.⁶⁹

As with CIIME, the ILO's Subcommittee on Multinational Enterprises lacks the power to impose sanctions or order remedial measures for noncompliance with the organization's voluntary code. It does, however, issue a public report designed to give effect to the principles of the code and, while not "ruling" on individual cases, interpreting it in the context of the activities of multinational corporations.⁷⁰

C. NAFTA's Agreement on Labor Cooperation (NAALC)

Since its adoption, the North American Free Trade Agreement (NAFTA) has authorized the receipt of complaints against the United States, Canada, and Mexico involving the labor and employment practices of U.S. corporations.⁷¹ Submissions are lodged in the National Administration Office (NAO) of the appropriate host country pursuant to the North American Agreement on Labor Cooperation ("NAALC" or "Labor Side Agreement").⁷² As of December 21, 1998, twenty submissions had been filed. Eleven were filed with the U.S. NAO involving allegations against Mexico. Two were filed involving Canada. Five were filed with the Mexican NAO involving allegations against the United States. And two submissions were filed with the Canadian NAO, one raising allegations against Mexico and one against the United States.⁷³ Several of the submissions involved U.S. companies, or their subsidiaries operating in Mexico's export processing ("maquiladora") industry, alleging violations of occupational safety and health,⁷⁴ gender discrimination,⁷⁵ and various other unfair labor

69. Vogelson, *supra* note 5.

70. *Id.*

71. North American Agreement on Labor Cooperation (NAALC), *North American Free Trade Agreement (NAFTA)*, <<http://www.sice.oas.org/trade-nafta/labor-c1.Stm>>

72. *Id.* at Part 3, Section C, Articles 15-16 <<http://www.sice.oas.org/trade-nafta/labor-c1.Stm#art15>>

73. National Administrative Office, U.S. Dept. of Labor, *Status of Submissions Under the North American Agreement on Labor Cooperation (NAALC)*, Sept. 18, 1998; 244 DAILY LAB. REP. (BNA) A-10 (Dec. 21, 1998).

74. U.S. NAO Submission No. 9702 (filed Oct. 30, 1997; alleging safety and health violations at the Han Young maquiladora plant in Tijuana Mexico); *Mexico NAO Submission No. 9801* (filed Apr. 13, 1998; alleging safety and health violations at Solec, Inc. in Carson, California); *Mexico NAO Submission No. 9802* (filed May 27, 1998; alleging safety and health violations for migrant workers employed in the apple industry in the State of Washington).

practices relating to union organizing.⁷⁶ The most recent submission to the U.S. NAO involves a complaint filed by the International Brotherhood of Teamsters against the Canadian province of Quebec regarding union organizing at a McDonald's restaurant.⁷⁷

1. *U.S. NAO Submission 9703*—Among recent actions before the U.S. NAO, Submission No. 9703 was submitted on December 15, 1997 by a number of American and Canadian unions, and over 30 U.S. and Mexican labor, human rights and non-governmental organizations.⁷⁸ The submission alleged violations of freedom of association and occupational safety and health at the ITAPSA export processing plant in Ciudad de los Reyes, Mexico. ITAPSA is a subsidiary of the U.S. corporation Echlin, Inc., based in Bradford, CT, that produces and distributes automotive parts in the United States, Canada and Mexico.⁷⁹

The U.S. NAO accepted the submission on January 30, 1998, and completed its review on March 23, 1998 following a public hearing.⁸⁰ The NAO's public report on July 31, 1998 concluded that ITAPSA's management and the incumbent union (Confederacion de Trabajadores Mexicanos, or "CTM"), engaged in unlawful acts of anti-union discrimination against the petitioning Union of Metal, Sheet, Iron, and Allied Workers (Sindicato de Trabajadores de la Industria Metalica, Accro, Hierro, Conexos Similares, or "STIMAHCS") under Mexican labor laws.⁸¹

75. *U.S. NAO Submission No. 9701* (filed May 16, 1997; alleging pregnancy-based discrimination in Mexico's maquiladora industry by denying employment and terminating pregnant women).

76. U.S. NAO Submission No. 940001 and 940002 (filed Feb. 14, 1994; alleging violations of workers' rights to organize by the Mexican subsidiaries of Honeywell Corp. and General Electric Corporation); *U.S. NAO Submission No. 940003* (filed Aug. 16, 1994; alleging violations of freedom of association and the right to organize by the Mexican subsidiary of Sony Corporation); *U.S. NAO Submission No. 9602* (filed Oct. 11, 1996; alleging violations of workers' rights to organize a Mexican maquiladora facility in Sonora, Mexico owned by Maxi-Switch, S.A. de C.V.).

77. 244 DAILY LAB. REP. (BNA) A-10 (Dec. 21, 1998).

78. *U.S. NAO Submission No. 9703*. The unions filing the submission were the United Brotherhood of Teamsters, the Union of Needletrades, Industrial and Textile Employers (UNITE), the United Electrical, Radio and Machine Workers (UE), the United Auto Workers (UAW), the Canadian Auto Workers (CAW), the United Paperworkers International Union (UPIU), and the United Steelworkers of America (USWA). *Pub. Rep. of Review NAO Submission No. 9703*, U.S. National Administrative Office, U.S. Dept. of Labor (July, 31, 1998) at 2.

79. *Id.*

80. *Id.*

81. *Id.* at 69.

The NAO's findings established threats of retaliation and acts of intimidation against supporters of STIMAHCS, including surveillance, imposition of increased workloads, retaliatory discharges, and physical attacks by persons associated with the established union at the plant in the presence of company officials.⁸² The findings also included election misconduct which: (1) excluded a number of STIMAHCS supporters from voting in the union representation election; (2) obligated voters to state their union preference in the presence of company officials and CTM representatives rather than voting through a secret ballot; (3) allowed non-employees to vote; and (4) manipulated the timing and conduct of the election.⁸³ The election misconduct included postponing the election without informing STIMAHCS, then videotaping workers who showed up to vote, and rescheduling the election following threats of reprisals. Workers were forced to vote in the intimidating presence of armed "thugs" patrolling the factory grounds.⁸⁴

The U.S. NAO's public report recommended ministerial level consultations regarding the denial of freedom of association and union organizing protections among Mexican workers at Echlin's ITAPSA plant.⁸⁵ The same issues were raised before the Canadian NAO, which conducted public hearings on September 14 and November 5, 1998.⁸⁶

2. *Mexican NAO Submission 9501*—Among the original cases under NAFTA's Agreement on Labor Cooperation, the Mexican Telephone Workers Union challenged the closure of a subsidiary of the Sprint Corporation in San Francisco shortly before a scheduled union representation election.⁸⁷ Submission 9501 was filed with the Mexican NAO on February 9, 1995, at the same time the Communications Workers of America ("CWA") filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") in the United States.⁸⁸ On May 31, 1995, the public report of the Mexican NAO condemned the plant closure, and recommended ministerial level consultations regarding plant

82. *Id.*

83. *U.S. NAO Submission No. 9703* at 69.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Status of Submissions Under the North American Agreement on Labor Cooperation (NAALC)*, *supra* note 73, at 6.

88. *Id.*

closings timed to avoid union organizing efforts.⁸⁹ A public hearing was conducted in San Francisco, and a study was completed and released on the rights of workers to organize in the United States, Canada, and Mexico.⁹⁰

Responding to the CWA's unfair labor practice charge, the NLRB on December 27, 1996 ordered Sprint to reinstate the dismissed workers and awarded back pay.⁹¹ On November 25, 1997, the U.S. Court of Appeals for the District of Columbia reversed the NLRB's findings and ruled that the company closed the facility for lawful and legitimate financial reasons.⁹²

IV. Selected ILO Conventions

A. *Convention 87 - Freedom of Association and Protection of the Right to Organize*

The ILO's Convention 87 (C. 87), promulgated in 1948, establishes several fundamental rights governing union organizing. Among those rights, Article 2 provides that "workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization."⁹³

Article 3 provides for the non-interference of governmental authorities in the internal affairs of labor organizations.⁹⁴ The specific language prohibits "any interference" which would "restrict . . . or impede" the ability of workers' organizations "to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes."⁹⁵

Article 4 provides that labor organizations "shall not be liable to be dissolved or suspended by administrative authority."⁹⁶

89. *Id.*

90. *Id.*

91. *La Connexion Familiar & Sprint Corp.*, 322 NLRB 774 (1996).

92. *LCF, Inc. v. NLRB*, 129 F. 3d 1276 (D.C. Cir. 1997).

93. Art. 2, C. 87 (1948), in *ILO Conventions and Recommendations Adopted by the International Labor Conference*, 663, (Geneva: International Labor Office, 1966).

94. Art. 3, C. 87, *supra* note 93, at 664.

95. *Id.*

96. Art. 4, C. 87, *supra* note 93, at 664.

Article 11, entitled "Protection of the Right to Organize," provides that:

Each member of the International Labour Organization for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.⁹⁷

Thus, Article 11 broadly "lays down an obligation for the State to take measures to prevent any interference with such rights without qualification that is, interference by individuals, by organizations or by public authorities."⁹⁸

1. Conflicts Between C. 87 and U.S. Labor Law—The broad standards of C. 87 (prohibiting *any* employer interference *without qualification*, in workers' efforts to form or join unions), and their interpretation by the ILO's supervisory authorities, cannot be reconciled with the substantially more precise legal requirements of U.S. labor law and practice in both the private and public sectors.⁹⁹ For example, Article 11 is incompatible with Section 8(c) of the National Labor Relations Act ("NLRA").¹⁰⁰ Section 8(c)

97. Art. 11, C. 87, *supra* note 93, at 664.

98. EDWARD E. POTTER, FREEDOM OF ASSOCIATION, THE RIGHT TO ORGANIZE AND COLLECTIVE BARGAINING 43 (1984), quoting International Labor Conference, record of Proceedings, 32nd Sess. 306, 470 (1949).

99. *Id.* at 5-7, 44-45. For a more detailed analysis of the conflicts between U.S. labor law and ILO Conventions 87 and 98, and arguments as to why the United States should not ratify those conventions, see Potter's Treatise, *supra* note 98 at 43. Among the other conflicts identified by Potter and discussed in the text of this Comment, one of the most fundamental principles of U.S. labor law is the concept of "exclusive recognition" – i.e., the union receiving the majority of votes as the "exclusive representative" of all employees in the bargaining unit. If the union fails to achieve majority status, under U.S. labor law the minority has no representational rights. While, as Potter notes, the concept of an exclusive bargaining representative is generally compatible with C.87, the ILO's Committee of experts has ruled contrary to U.S. labor law that "[m]inority organizations should be allowed to function and at least have the right to make representations on behalf of their members and to represent them in the case of individual grievances." 1983 Report of the Committee of Experts, para. 141, cited in Potter, *supra* at 15. The AFL-CIO has included a similar position as one of its domestic labor law "reform" goals in Congress. See, e.g., *Right to be Represented by a Non-Majority Union* in Industrial Union Department, AFL-CIO, *Workplace Rights: Democracy on the Job* 30 (Elmer Chatak, Richard L. Trumka & Joe Uehlein, eds. 1994) ("explicit organizational rights for unions without majority status (should) include the right to pay dues (through dues checkoff) . . . to have the union present grievances to management, and the right to negotiate with management on behalf of its members." *Id.*

100. 29 U.S.C. §158 (c). See also, S. Rep. No. 105, 80th Cong., 1st Sess. 23-24 (1947), *reprinted* at Vol. 1 Legislative History of the Labor-Management Relations

grants employers “free speech” rights to communicate their opposition to unions openly among employees if such views, arguments or opinions contain “no threat of reprisal or force or promise of benefit.”¹⁰¹ Employers in the United States may require employees to attend the employers’ anti-union speeches on company property during working time within 24-hours of the election - “captive audience speeches” - while denying union organizers the same forum.¹⁰² In addition, employers are permitted under the NLRA to restrict union access to employees throughout the preelection campaign by excluding non-employee union organizers from company premises,¹⁰³ and prohibiting employees from soliciting union support during working time¹⁰⁴ or distributing union literature in work areas.¹⁰⁵ The NLRA also restricts the ability of unions to engage in organizational picketing for recognition [Section 8(b)(7)],¹⁰⁶ and “hot cargo” agreements [Section 8(e)],¹⁰⁷ and secondary boycotts.¹⁰⁸

Another important conflict between C. 87 and U.S. labor law is the NLRA’s exclusion of certain categories of workers - *e.g.*, supervisors, agricultural workers, public employees, and independent contractors.¹⁰⁹ While such workers still have the right to freedom of association under the first and fourteenth amendments

Act, 1947 (GPO: 1985), 407, 429-430; 13 NLRB Ann. Rep. 49-50 (1948), reprinted at Vol. II, Annual Reports of the National Labor Relations Board, Annual Reports 1943-1949 (GPO:1985). Cf. *NLRB v. Gissel Packing Co.* 395 U.S. 575, 617 (1969) (The NLRA’s “free speech” doctrine includes the right of employers to address employees in mandatory meetings held on company time without affording equal time to the union or to pronoun employees. See *e.g.*, *Livingston Shirt Corp.*, 107 NLRB 400 (1953); *Peerless Plywood Co.*, 107 NLRB 427 (1953).

101. 29 U.S.C. § 158 (c).

102. *Livingston Shirt Co.*, 107 NLRB 400, 409 (1953) (“an employer does not commit an unfair labor practice if he makes a preelection speech on company time and company premises to his employees and denies the union’s request for an opportunity to reply.”). See *NLRB v. Steelworkers (Nutone Inc.)*, 357 U.S. 357 (1958). Under the NLRB’s “24-hour rule,” however both unions and employers are prohibited from delivering captive audience speeches to massed groups of employees within 24-hours of an election. *Peerless Plywood Co.*, 107 NLRB 427 (1953).

103. *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

104. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798, 803, fn 10 (1945); *Beverly Enterprises-Hawaii (Hale Nani)*, 326 NLRB No. 37 (1998).

105. *NLRB v. Steelworkers (Nutone, Inc.)*, 357 (1958); *Our Way Inc.*, 268 NLRB 394 (1983).

106. 29 U.S.C. § 158 (b)(7).

107. 29 U.S.C. § 158(e).

108. 29 U.S.C. § 158(b)(7).

109. 29 U.S.C. § 152(2).

to the U.S. Constitution, employers are not required to recognize them or accord them collective bargaining rights under the NLRA.¹¹⁰ So, too, plant guards are not permitted under the NLRA to belong to the same bargaining unit as other represented employees.¹¹¹ These provisions clearly conflict with Article 2 of C. 87 which provides that “workers and employers, *without distinction whatsoever*, shall have the right to establish and . . . to join organizations of their own choosing.”¹¹² (emphasis added)

Article 2 also may conflict with U.S. labor laws concerning “contingent workers,” such as those temporary employees who are supplied under contract by an agency or labor broker. Under the National Labor Relation Board’s *Greenhoot* doctrine,¹¹³ such employees may not be placed in the same bargaining unit with other regular employees, regardless of the employees’ wishes, absent the consent of both the “joint employers” - i.e., the temporary staffing agency and the contracting employer.¹¹⁴

Other articles in C. 87 relating to the internal administration of union affairs are incompatible with provisions of U.S. law in the Labor-Management Reporting and Disclosure (“Landrum-Griffin”) Act.¹¹⁵ For example, C. 87 is designed to prevent government actions from interfering with the institutional rights of labor organizations to organize their administration and activities.¹¹⁶ The Landrum-Griffin Act, however, is concerned with the

110. 29 U.S.C. § 258(b)(4). Before the 1947 Taft-Hartley Act amendments, “secondary boycotts were among the most effective economic weapons in labor’s arsenal” by permitting a union to apply economic pressure against a “secondary” or neutral in the dispute between the union and the primary employer. The 1947 amendments prohibited many forms of secondary boycotts [Section 8(b)(4)] and added two remedial enforcement provisions: Section 10(l), which requires the NLRB to seek federal court injunctions to stop secondary boycotts, and Section 303, which allows the injured party to sue in federal court for damages. 29 U.S.C. § 164 (a). Section 14(a) of the National Labor Relations Act provides, for example, “Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law either national or local, relating to collective bargaining.” ABA *The Developing Labor Law*, *supra* note 32 at 1211,1215-16. The AFL-CIO’s legislative goals (see notes 161 and 162) include eliminating all Taft-Hartley restrictions on secondary boycotts. Note 162 *supra*, at 135.

111. 29 U.S.C. § 159(b)(3).

112. Art. 2, C. 87, *supra* note 93.

113. *Greenhoot, Inc.*, 205 NLRB 250 (1973).

114. *Id.*

115. 29 U.S.C. § 401 *et seq.*

116. Potter, *supra* note 98 at 5.

protection of individual union members from the improper conduct of labor organizations with regard to union membership, union election conduct, union funds, and other internal union affairs.¹¹⁷ For example, while the Convention prohibits government interference in the activities of trade unions, the Act authorizes the federal government to regulate, and thus interfere with, internal union conduct in such areas as the election of union officers for national, international, and local unions.¹¹⁸ Landrum-Griffin also establishes the maximum terms of union office and methods of election [Section 401 (a), (b) & (d)],¹¹⁹ the nomination of candidates and voting rights of union members [Section 401 (e)],¹²⁰ the financing of union elections and support for individual candidates [Section 401 (h) & (i)],¹²¹ and procedures to enforce those regulations [Section 402].¹²²

The fundamental differences between C. 87 and U.S. labor law were highlighted by a 1959 ILO Fact-Finding Mission to the United States which investigated American compliance with the standards of “freedom of association” embodied in C. 87 and the ILO Constitution.¹²³ The Mission noted the “deterioration of the legal right to freedom of association” as a result of restrictions on trade unions under the Taft-Hartley (1947) and Landrum-Griffin Act (1959) amendments.¹²⁴ It further commented critically on the difficulties unions face in organizing certain business and geographical sectors in the United States. The Mission’s report concluded:

“[T]he acceptance of trade unionism [in the United States] is more in the nature of resignation to the fact that unions exist than of positive approval. Such persons are willing to accept the unions and to deal with them because they have succeeded

117. 29 U.S.C. § 401 *et seq.*

118. *Id.*

119. 29 U.S.C. § 401 (a),(b) & (d).

120. 29 U.S.C. § 401 (e).

121. 29 U.S.C. § 401 (h) & (i).

122. 29 U.S.C. § 402.

123. Haas, *supra* note 22, at 236-238. At the same time, the ILO sent a Fact-Finding Mission to the Soviet Union. The ILO reported much more favorably on the rights of labor organizations in the Soviet Union, as compared with the United States, concerning freedom of association under C. 87. International Labor Office, *The Trade Union Situation in the U.S.S.R.* (Geneva, 1960) (cited in Haas, at 232 n.57).

124. International Labor Office, *The Trade Union Situation in the United States* (Geneva, 1960) at 9 (quoted in Haas, *supra* note 22 at 237). In particular, the Report was very critical of employer practices, permitted under U.S. labor laws, to influence representation elections.

in establishing themselves; but they would not go so far as to say that trade unions are desirable or necessary.”¹²⁵

As one commentator observed, under the ILO’s definition “freedom of association” was not firmly established under U.S. labor law since “it is not enough merely to tolerate your partner and to negotiate with him in a context of interest confrontation; you must actually love him too!”¹²⁶

2. *ILO Committee on Freedom of Association*—As stated earlier, since the United States has not ratified Convention 87, it is not subject to the full supervisory machinery of the ILO with regard to the precise legal obligations of that Convention. Thus, there is no body of ILO case law or established legal precedent involving U.S. law and practice from the ILO’s Committee of Experts, or from the ILO’s Conference Committee on the Application of [Ratified] Conventions and Recommendations (“CACR”). It is difficult, therefore, to state conclusively that non-conforming aspects of U.S. labor law would in fact be determined to be in noncompliance with the conventions if ratified by the United States.

Appropriate guidance may be derived, however, not only from the critical comments of the 1959 Report of the ILO Fact-Finding Mission to the United States, discussed above, but also from the more recent decisions of the ILO’s Committee on Freedom of Association regarding U.S. labor-management relations. While the United States has not ratified the underlying Conventions, it is subject to limited scrutiny by the Committee on Freedom of Association (“CFA”) which reports to the ILO’s Governing Body regarding complaints against any ILO member for violations of the right to organize and bargain collectively.¹²⁷

Recent charges brought before the CFA against the U.S. government include President Reagan’s firing of the PATCO strikers in 1981.¹²⁸ Although the President’s actions were upheld in the U.S. federal courts,¹²⁹ the CFA concluded that “the application of excessively severe sanctions against public servants on account of their participation in a strike cannot be conducive to the

125. Haas, *supra* note 21, at 237.

126. *Id.* at 238.

127. C. 87 <<http://www.tufts.edu/fletcher/multi/texts/BH219.txt>>

128. Freedom of Association Committee, Case No. 1974. Para. 372 (Nov. 1981).

129. *PATCO*, 7 F.L.R.A. No. 16 (1981), *Professional Air Traffic Controllers v. FLRA*, 685 F. 2d 549 (D.C. Cir. 1982)

development of harmonious industrial relations".¹³⁰ Therefore, the CFA encouraged the government to reinstate the strikers, reduce their fines, and renew bargaining with the union.¹³¹

In 1991, an AFL-CIO complaint¹³² against the U.S. government raised the legitimacy of U.S. law concerning the permanent replacement of economic strikers - the *Mackay* doctrine¹³³ - which was under assault in Congress.¹³⁴ The CFA concluded that the basic right to strike, which is essential to freedom of association, "is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally".¹³⁵ Therefore hiring permanent replacements is "a risk of derogation from the right to strike, which may affect the free exercise of trade union rights."¹³⁶

B. Convention 98 - Right to Organize and Bargain Collectively

The ILO's Convention 98 (C. 98), promulgated in 1949, establishes the obligation of governments to encourage voluntary negotiation of collective bargaining agreements in the private and public sectors. Ratification of C. 98 would be incompatible with the more precise provisions of U.S. labor laws.

Particularly troubling for employers would be the Convention's expansion of a union's right to strike and to engage in other economic actions designed to support the union's bargaining position.¹³⁷ Although the National Labor Relations Act and the

130. CFA Case No. 1974, *supra* note 128.

131. *Id.*

132. Freedom of Association Committee, case No. 1543 (May 1991).

133. *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938).

134. See H.R. 5/S. 55, 102nd Cong. 1st sess. (1991) (amending the National Labor Relations Act and the Railway Labor Act to make it an unfair labor practice for an employer to hire permanent replacements for striking employees). See also, Daniel V. Yager, *Loading the Scales: Is the Balance Between the Right to Strike and the Right to Operate in Need of reform?* (Employment Policy Foundation 1993).

135. Report of the Committee on Freedom of Association, Case No. 1543, para. 92 (May 1991)

136. *Id.*

137. Potter, *supra* note 98, at 27-33. Although neither C. 87 nor C. 98 specifically addresses the right to strike, the ILO and its Committee of Experts link that right to the Conventions as "one of the essential means available to all workers and their organizations for the promotion and protection of their economic and social interests." 1983 Report of the ILO Committee of Experts, ¶200, cited in Potter, *supra* at 27.

Railway Labor Act protects the right to strike,¹³⁸ such protections are not without limits.

Section 8(b) of the NLRA, for example, sets forth several restrictions on a union's right to exert economic pressure in support of collective bargaining demands. A strike in support of "featherbedding"¹³⁹ is illegal under Section 8(b)(6).¹⁴⁰ Jurisdictional strikes¹⁴¹ and other job actions in violation of "no strike" clauses¹⁴² in collective bargaining agreements are unprotected under the NLRA.¹⁴³ The ability of employers to lock out their employees to support bargaining positions¹⁴⁴ or, as stated above, an employer's right to hire permanent replacement workers in place of economic strikers¹⁴⁵ also seem to be incompatible with C. 98.

The scope of bargaining - particularly, the important distinction in the NLRA between "mandatory" and "permissive" subjects of bargaining¹⁴⁶—is blurred under C. 98.¹⁴⁷ Legal criteria and

138. 29 U.S.C. § 163 ("Nothing in this Act [National Labor Relations Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.").

139. "Featherbedding" is the practice of causing or attempting to cause an employer to pay for services not performed. *American Newspaper Publishers Assn. v. NLRB*, 345 U.S. 117 (1953).

140. 29 U.S.C. § 158(b)(6)

141. 29 U.S.C. § 158(b)(4)(D); *Plumbers & Pipefitters local 195 (Gulf Oil Corp.)*, 275 NLRB 484 (1985); *Operating Eng'rs Local 825 (Building Contractors Assn. of NJ)*, 118 NLRB 978 (1957).

142. *Boys Market, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

143. Other examples of "unprotected" and "prohibited" strikes include: "sit-down" or "sit-in" strikes, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); "partial" or "intermittent" strikes, *Pacific Tel. & Tel. Co.*, 107 NLRB 1547 (1954); and strikes in pursuit of illegal objectives proscribed by the National Labor Relations Act or other statutes.

144. *NLRB v. Brown Food Stores*, 380 U.S. 278 (1965); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *Central Illinois Public Service Company*, 326 NLRB No. 80 (1998).

145. *NLRB v. Mackay Radio and Tel. Co.*, 304 U.S. 333 (1938).

146. The NLRA provides in Section 8(d) a requirement to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. §158(d). The U.S. Supreme Court has developed the distinction between those mandatory subjects of bargaining and other "permissive" subjects. *See, NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). The importance of the distinction is that a party may insist to impose on mandatory subjects, and strike or unilaterally implement contract terms. Insistence on bargaining to include permissive subjects of bargaining on which there is no statutory duty to confer to include "closed shop" provisions and "hot cargo" clauses in violation of Section 8(e).

factual interpretations of “good faith” bargaining consistent with established National Labor Relations Board (“NLRB”) precedents under Sections 8(b)(3) and 8(a)(5)¹⁴⁸ also would be at risk under C. 98. So, too, NLRB standards for the adequacy of information required of employers to support bargaining may be incompatible with C. 98.¹⁴⁹

One of the endemic problems under the administration of U.S. labor laws is lengthy delays as a result of the NLRB and judicial processes in the scheduling and final certification of union elections and in remedying unfair labor practices.¹⁵⁰ The ILO Supervisory bodies, including the Committee on Freedom of Association, have stressed repeatedly that such delays infringe on freedom of association and collective bargaining rights.¹⁵¹ In the U.S., lengthy delays in bargaining, especially for initial contracts following union certification, may result in the failure of the parties to ever come to an agreement.¹⁵² This, too, may present a

147. See Potter, *supra* note 98 at 58.

148. 29 U.S.C. §158 (b)(3) &(b)(4).

149. The NLRA’s requirement that the parties bargain in “good faith” obligates employers to furnish relevant information to union representatives necessary to the proper discharge of their duties as bargaining agents. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956). A similar duty to furnish information is owed by unions. *Printing & Graphic Communications Local 13 (Oakland Press Co.)*, 233 NLRB 994 (1977), *aff’d* 598 F.2d 267 (D.C. Cir. 1979). The relevance, necessity, and timing of particular information for bargaining has been the subject of extensive litigation and controversy before the NLRB and federal courts. See e.g., PATRICK HARDIN, ED., *THE DEVELOPING LABOR LAW*, 3D ED. at 650-684(1992).

150. Industrial Union Dept., *AFL-CIO, Workplace Rights: Democracy on the Job* 12 (Elmer Chatak, Richard L. Trumka & Joe Uehlein, eds., 1994); Gould, *supra* note 31, at 159. (“the past decade has seen an enormous increase in the time it takes to decide unfair labor practice cases. The median . . . was 300 days as compared with 133 days . . . in 1980 . . . For representation cases . . . medians ranged from 190 days to 256 days – also considerably in excess of the medians established during the 1970s.” *Id.*). Christopher D. Cameron, *How the ‘Language of the Law’ Limited the American Labor Movement*, 25 U.C. DAVIS L.R. No. 4 (Summer 1992) (finding that election delays contribute to union defeats).

151. See Potter, *supra*, note 98, at 52. See e.g., 256th Report of the (ILO) Committee on Freedom of Association, Case No. 1437 (BASF), para. 214 et seq., May 1988 (urging “speedy” U.S. legal procedures to resolve a labor dispute involving BASF plant in Geismar, LA); 262 Report of the (ILO) Committee on Freedom of Association, Case No. 1467 (Enoxy Coal), para. 203 et seq., March 1989 (criticizing “excessive” delays and length of appeals procedures under U.S. labor laws).

152. U.S. Commission on the Future of Worker-Management Relations Fact Finding Report, 73-74 (May 1994) (In the late 1950s, unions failed to secure a first contract 14 percent of the time, but in the 1980s the percentage increased to between 20 to 37 percent. The Commission reported that over one-third of newly certified unions are unable to produce a contract.)

potential conflict under C. 98, because even where the NLRB determines that the employer has failed to bargain in good faith, and that such delays are intended to frustrate bargaining, the usual remedy is an NLRB order to continue bargaining.¹⁵³

C. *The Challenge of International Labor Standards for Domestic Labor Law Reform*

Each of the potential conflicts discussed above between ILO Conventions 87 and 98 and domestic U.S. labor law are areas in which the AFL-CIO has proposed labor "reform" legislation in Congress. For instance, during the Ninety-Fifth Congress (1977-1978), labor law reform legislation passed the U.S. House of Representatives but was narrowly defeated in the Senate on an extended filibuster.¹⁵⁴ That legislation, H.R. 8410/S. 2467,¹⁵⁵ contained proposed amendments to the National Labor Relations Act which provided, inter alia, the following: expedited union representation elections;¹⁵⁶ limited judicial review of NLRB certifications of election results;¹⁵⁷ and "equal access" rules giving non-employee union organizers the right to campaign for employee support on company property,¹⁵⁸ and "make whole" remedies for delays in collective bargaining on initial contracts where employers refuse to bargain in good faith.¹⁵⁹

More recently, in the 103rd Congress (1993-1994) labor law "reform" legislation prohibiting employers from hiring permanent replacements for economic strikers passed the U.S. House of Representatives but was defeated by a Senate filibuster.¹⁶⁰ Other U.S. labor law changes advocated by the AFL-CIO include those recommended to the U.S. Commission on the Future of Worker-Management Relations ("Dunlop Commission") in 1994,¹⁶¹ and

153. U.S. Commission on the Future of Worker-Management Relations, Report and Recommendations, 21-22 (Dec. 1994) (As an alternative remedy, the Commission recommended first contract arbitration and extending the "certification year" in which the union's majority status is presumed).

154. H.R. 8410, 95th Cong., 1st Sess. 1977. See reprint on Thomas, <<http://thomas.loc.gov/cgi-bin/bdquery>>

155. Sec. 5, H.R. 8410.

156. *Id.*

157. Sec. 3, H.R. 8410.

158. Sec. 8, H.R. 8410.

159. Sec. 3, H.R. 8410.

160. H.R. 5 - S. 55, 103rd Cong., 1st Sess. (1993). See <<http://thomas.loc.gov/cgi-bin/bdquery>>.

161. U.S. Commission on the Future of Worker-Management Relations Report and Recommendations, *supra* note 153 at 15-24.

in an accompanying white paper “Workplace Rights: Democracy on the Job” (1994) prepared by the AFL-CIO’s Industrial Union Department.¹⁶² *Among those proposed labor law reforms are areas that are identified in this Comment as potential conflicts with the ILO principles in the new Declaration. Those include:*

- * repealing Section 8(c) of the National Labor Relations Act;¹⁶³
- * permitting unlimited access for non-employee union organizers to outdoor employer property, such as parking lots, and to workplace entrances and exits;¹⁶⁴
- * providing opportunities for the union to address employees on company property at specified times;¹⁶⁵
- * requiring automatic union recognition without a representation election where a majority of employees have signed union authorization cards expressing a desire to be represented (i.e., card check certification);¹⁶⁶
- * requiring the NLRB to direct union elections within five days of the petition for election;¹⁶⁷
- * removing all current exclusions for employee coverage under the National Labor Relations Act (i.e., agricultural and domestic workers, supervisors, independent contractors, plant guards, and government contractors treated as public employees);¹⁶⁸ and
- * prohibiting employers from hiring permanent replacements for economic strikers;¹⁶⁹ and requiring binding interest arbitration of initial collective bargaining agreements where the parties have failed to reach agreement within six months from the union’s certification or when the parties agree that they are at impasse.¹⁷⁰

V. 1998 ILO Declaration on Fundamental Principles and Rights at Work

In the context of existing voluntary codes of conduct (see Parts II and III *supra*), and the unratified ILO Conventions discussed

162. INDUSTRIAL UNION DEPT., *AFL-CIO Workplace Rights: Democracy on the Job* (eds. Chatak, Trumka & Uehlein) 1994.

163. *Id.* at 21.

164. *Id.* at 22.

165. *Id.*

166. *Id.* at 19.

167. INDUSTRIAL UNION DEPT. *supra* note 162 at 27.

168. *Id.* at 30.

169. *Id.* at 12.

170. *Id.* at 23.

above (see Part IV *supra*), the United States tripartite delegation to the ILO supported adoption of the new 1998 Workers' Rights Declaration. The "social partners" sought the new Declaration for very different reasons. The AFL-CIO wanted another, perhaps more effective, international supervisory mechanism to monitor and regulate corporate behavior in the global market.¹⁷¹ Employers, led by the United States Council for International Business ("USCIB"), wanted to reduce pressures for linking trade sanctions and workers' rights.¹⁷² See discussion in Part VI *infra*.

The only opposition to the 1998 Declaration was from a number of developing countries, led by Mexico, Pakistan, Egypt, and India. They feared that it would be used for protectionism.¹⁷³ In particular, they protested the Declaration's lack of a "safeguard clause" that would bind developed countries from unilaterally or collectively revoking trade preferences, or imposing trade sanctions based on negative findings under the Declaration.¹⁷⁴

The Declaration obligates all ILO member nations, without regard for their record of ratification of the ILO's core workers' rights Conventions, to adhere to the fundamental principals embodied in those Conventions. The Declaration obligates the United States and, therefore, U.S. employers to conform to the labor relations principles of ILO Conventions 87 and 98, discussed above in Part IV, as well as the ILO's core Conventions on abolition of forced labor (C. 29 and C. 105), child labor (C. 138), and employment discrimination (C. 100 and C. 111).¹⁷⁵

The ILO also adopted a follow-up mechanism to implement the Declaration and promote the principles established as fundamental rights at work. The follow-up requires the ILO to publish annual reviews of countries, such as the United States, which have not yet ratified the relevant core ILO Conventions. The schedule of annual reviews is: 2000 - freedom of association (C. 87 and C. 98); 2001 - forced labor (C. 29 and C. 105); 2002 - employment discrimination (C. 100 and C. 111); and 2003 - child labor (C. 138).¹⁷⁶ Interpretation of those Conventions' substantive requirements, and assessment of the extent of compliance by non-ratifying

171. 128 DAILY LAB. REP. (BNA) C-1 (July 6, 1998).

172. *Id.*

173. *Id.* at C-4.

174. *Id.*

175. *Id.* at C-2.

176. *ILO Adopts Action Program on Declaration Follow-Up*, 224 DAILY LAB. REP. (BNA) A-6 (Nov. 20, 1998).

ILO member nations, shall be undertaken by the ILO's existing supervisory bodies.¹⁷⁷

As legislative history, six criteria to define and limit the parameters of the new Declaration were carefully enumerated during the plenary session of the International Labor Conference by the U.S. Employer Delegate Edward Potter, who served as the Employer Vice Chair on the Declaration's negotiating committee.¹⁷⁸ Those criteria are:

- (1) "the Declaration establishes no *new* legal obligations on ILO members, but reflects policy obligations which Members incur by virtue of their membership of [sic] the Organization." (emphasis added)
- (2) "the Declaration's follow-up does not go beyond the present text of the ILO Constitution. The follow-up procedure is based on the constitutional provisions in force and does not impose *new* reporting and compliance obligations on member States over and above those covered by the Constitution. In addition . . . there is no duplication or double jeopardy as a result of the follow-up procedures. [i.e., countries that have ratified the relevant ILO conventions will not be subject to 'double scrutiny' under the Declaration]." (emphasis added)
- (3) "the Declaration does not impose on member States the detailed [reporting] obligations of conventions that they have not freely ratified and does not impose on countries that have not ratified the fundamental conventions [such as the United States] the supervisory mechanisms that apply to ratified conventions. The principles and rights of the Declaration therefore only encompass the essence, that is, the goals, objectives and aims of the fundamental Conventions . . . the test is whether there is a pervasive failure of policy to meet the goals, policies and objectives of the fundamental Conventions. This is something very different from meeting the detailed legal obligations that come with ratification."
- (4) "the application of the principles of the Declaration is not concerned with technical legal matters or matters of detail."

177. *Id.*

178. Provisional Record of Proceedings, International Labor Conference, Doc. 20A, 86th Sess., June 1998 (remarks of Mr. Potter, Employers Vice Chair) <<http://www.ilo.org/public/english/10ilc/ilc/ilc86/com-decl.htm>>.

- (5) “the Declaration does not lead to setting up new complaints-based [supervisory] bodies like the Committee on Freedom of Association.”
- (6) “there is no link with questions of international trade and follow-up methods are limited to the ILO.”¹⁷⁹

While each of the criteria above is an important restraint on the use of the Declaration in the context of the ILO, the most important for U.S. employer interests is the understanding that there is “no linkage” with trade agreements and that promotional follow-up mechanisms are confined to the ILO. During the drafting of the Declaration employers successfully removed language that would have encouraged the World Bank, International Monetary Fund, and the World Trade Organization to support the ILO’s efforts to promote ratification and implementation of the fundamental conventions.¹⁸⁰

The Declaration also contains language - apparently too weak and ambiguous to satisfy developing nations - that neither the Declaration nor its follow-up could be invoked for protectionist trade purposes or used to put into question the comparative advantage of any country.¹⁸¹ Even including anti-protectionist language, however, was obnoxious to the ILO’s Workers’ Group as reflected by the remarks of the U.K.’s Worker Delegate who served as the Workers’ Vice-Chair on the Declaration’s negotiating committee:

The Workers’ Group is quite clear that to ask to belong to a trade union and for it to bargain on your behalf is not protectionism; to seek an end to child labour is not protectionism; to wish to eradicate discrimination in the workplace is not protectionism; to call for an end to the slavery of forced labour is not protectionism; but to deny those rights to workers in the name of comparative advantage - that is truly protectionism.¹⁸²

So, too, employers were careful to ensure that the new Declaration would not subject non-ratifying countries to the same

179. *Id.*

180. 128 DAILY LAB. REP. (BNA) C-1 (July 6, 1998).

181. ILO Declaration on Fundamental Principles and Rights at Work, International Labor Conference, 86th Sess., (last modified June 1998.) <<http://www.ilo.org/public/english/10ilc/ilc86/com-decl.htm>>.

182. Provisional Record of Proceedings, International Labor Conference, Doc. 20A, 86th Sess., June 1998 (remarks of Mr. Brett, Worker Vice Chair) <<http://www.ilo.org/public/english/10ilc/ilc86/com-decl.htm>>.

degree of ILO supervision as countries which have ratified ILO Conventions, or to establish another complaints-based supervisory body like the Committee on Freedom of Association.¹⁸³

VI. Will the 1998 ILO Declaration of Workers' Rights Meet the Expectations of the U.S. Social Partners

For U.S. employers, support for adoption of the 1998 ILO Workers' Rights Declaration was a trade off. The choice was between continued pressures in world trade forums to link workers' rights with trade through the "social clause" in trade agreements, or the creation of another international code to monitor and regulate labor and employment practices.¹⁸⁴ The Declaration had to be a credible and meaningful alternative to the social clause, but not an enforceable set of new legal requirements governing labor and employment practices beyond those set forth in national legislation. Specifically, adoption of the new Declaration could not have the legal effect of ratification of ILO Conventions, superseding existing U.S. labor laws and forcing the United States, as a treaty obligation, to change conflicting domestic legal requirements.¹⁸⁵ For U.S. unions, support for adoption of the 1998 ILO Workers' Rights Declaration was also a trade off. Although the AFL-CIO has announced that it will continue to lobby for "social

183. Remarks of Mr. Potter, *supra* note 178.

184. Among other emerging codes are the following:

The International Confederation of Free Trade Unions (ICFTU) text for a "Basic Code of Conduct governing Labour Practices" adopted at the 111th meeting of its Executive Board in December 1997.

See ICFTU Dept. of Employment and Int'l Lab. Stnds. "ICFTU/ITS Basic Code of Labour Practice," <<http://www.icftu.org/english/tncs/tncscode98.html>>. Also, the Code established by the U.S.-based NGO, the "Council on Economic Priorities" through its Standards and Accreditation Agency Advisory Board, which is an attempt to develop a single international standard for labor and human rights. The Code includes provisions for independent monitoring.

Luc Demaret, "Can Multinationals Buy Good Conduct?" ICFTU Online (visited Mar. 2, 1998) <<http://www.icftu.org/english/pr/epr01051-980225-Id.html>>.

One of the earliest corporate codes of conduct was *A Statement of Principles for U.S. Corporations Operating In South Africa* (Sullivan Principles) created in 1977 by Rev. Leon H. Sullivan to "promote racial equality in employment practices, . . . promote programs improving the living conditions and quality of life for the non-white population, and to be a major contributing factor in the end of apartheid." Jill Murray, *Corporate Codes of Conduct and Labour Standards, ILO Bureau for Workers' Activities*, (visited Jan. 21, 1998) <<http://www.ilo.org/public/english/230actra/publ/codes.htm>>.

185. See Potter, *supra* note 98, at 71-89 (*Procedural and Substantive Considerations to ratification of ILO Conventions*).

clauses" in trade forums,¹⁸⁶ it must realize that the new ILO Declaration will be used to reduce those pressures. For the AFL-CIO, therefore, adoption of the new Declaration must advance the goal of promoting basic, internationally recognized workers' rights in ways that are "central to the global trading and investment regimes."¹⁸⁷

A. *Can Promotional Standards Be Enforceable?*

Under the 1998 ILO Workers' Rights Declaration, the ILO still lacks authority to impose legal or equitable remedies against employers or governments for infringement of the Declaration's fundamental principles and core Conventions. Under the Declaration's follow-up annex, however, it will now be possible for unions to direct world attention to unfair labor practices and employment policies in non-ratifying ILO member nations, such as the United States, through published annual reviews.¹⁸⁸ The reviews will concern labor and employment practices in the United States, not simply the practices of U.S. multinationals in ratifying host countries.¹⁸⁹

Of course, international notoriety gained through the published reports of a U.N. agency could also be used in union domestic and international "corporate campaigns," shareholder actions, consumer boycotts, and communications with investors and financial institutions.¹⁹⁰ The reports could be used to portray the image of "rogue employers," "international outlaws," violating the most basic standards of workers' and human rights. The reports also could be cited as a non-binding, yet persuasive documents before domestic governmental agencies and courts. Such notoriety also could be used to advance labor law "reform" legislation in the U.S. Congress to conform U.S. labor laws with basic international standards, or to promote ratification of ILO Conventions in the U.S. Senate.¹⁹¹ Thus, although not legally enforceable, the 1998

186. *U.S. Delegates to ILO Conferences Have High Expectations for New Declaration*, 128 DAILY LAB. REP. (BNA), C-1 (July 6, 1998).

187. *Id.*

188. *See* note 176 *supra*.

189. *See* note 177 *supra*.

190. *See generally*, CHARLES R. PERRY, UNION CORPORATE CAMPAIGNS (1987).

191. *See, e.g.*, *Steelworkers Aim to Purge Industry's Global Outlaw*, WASH. TIMES (Feb. 20, 1992); Peter T. Kilborn, *Union Shows How to Fight in West Virginia*, N.Y. TIMES (May 8, 1992); David Corn, *Workers United, A Town Divided*, NATION (Feb. 17, 1992); David Corn, *The Search for Marc Rich*, NATION

Workers' Rights Declaration will be an important union mechanism for promoting labor standards. It has been noted that "unions generally favor binding agreements that place MNCs under tighter government regulation, thereby expanding union leverage at the national level and creating new labor rights regarding consultation and bargaining at the international level."¹⁹² Where the international agreement is neither binding nor legally enforceable, experience with other international codes demonstrates that unions still use the agreement as a "lever" to influence the conduct of employers or to influence the adoption or interpretation of national legislation.¹⁹³ In that practical fashion, the promotional standards become, in effect, "enforceable."¹⁹⁴

As a recent Chair of the ABA's Section of International Law and Practice noted:

The ILO supervisory system relies on the power of persistent persuasion and the mobilization of shame against governments that fail to live up to the obligations they have voluntarily undertaken.¹⁹⁵

B. "Is This the Code to End All Codes?"

The coercive threat of the "social clause" in trade agreements, as well as campaigns by various constituencies for new corporate codes and social labeling,¹⁹⁶ has driven multinational employers to seek a preemptive, uniform set of international labor and employment standards - a "code to end all codes." In its press release on the adoption of the 1998 Declaration, the USCIB hailed the Declaration as a "major breakthrough" which "position(s) the ILO apparatus as a credible alternative to the 'social clause—i.e., the use of trade sanctions to enforce labor standards."¹⁹⁷

It remains unclear, however, whether the 1998 ILO Workers' Rights Declaration will replace or merely supplement other emerging methods of international supervision of labor and

(Feb. 24, 1992); *How the USW Hit Marc Rich Where it Hurts*, Business Week (May 11, 1992); *Steelworkers Wage Corporate Campaign At Ravenswood with Aid From AFL-CIO*, 76 DAILY LAB. REP. (BNA) A-9 (Apr. 20, 1992).

192. Kline, *supra* note 38, at 73.

193. *Id.* at 76-83.

194. *Id.*

195. Vogelson, *supra* note 5, at 660.

196. *See supra* note 184.

197. *USCIB Applauds ILO's Breakthrough in Campaign to Respect Workers' Rights*, USCIB Press Release (June 19, 1998) (the remarks were attributed to Abraham Katz, president of the United States Council for International Business).

employment practices. Some officials, including U.S. Senator Daniel Patrick Moynihan (D-NY), have stated that the new ILO Declaration will assist in passage of "fast-track" authority,¹⁹⁸ which was tabled in the 105th Congress (1998) because of concerns for the lack of enforceable workers' and environmental rights provisions.¹⁹⁹ The same concerns have been injected in negotiations for the Free Trade Area of the Americas ("FTAA")²⁰⁰ and the OECD's Multilateral Agreement on Investment ("MAI").²⁰¹

Further compounding the uncertainty, President Clinton has called repeatedly for linkage of trade with labor and employment standards.²⁰² The AFL-CIO has made it clear that it will continue to lobby for labor standards provisions at the WTO and in U.S. trade policy.²⁰³ AFL-CIO President John Sweeney pronounced that basic, internationally - recognized human rights standards also should be incorporated in "IMF conditionality, World Bank loans, OPIC and Ex-IM Bank activities, and A.I.D. programs."²⁰⁴

Indeed, reported remarks by the U.S. Government representative expressed the view during negotiation of the Declaration that its adoption did not "impinge on the ability of the U.S. to condition the extension of trade benefits on labor standards, or other related

198. 241 DAILY LAB. REP. (BNA) A-1 (Dec. 16, 1996).

199. *Id.*

200. 209 DAILY LAB. REP. (BNA) B-1 (Oct. 29, 1998), Negotiations on the FTAA have centered on the participation of "civil society" in future trade negotiations. A Government Committee on Civil Society has been formed input from labor unions, environmental organizations and consumer activists on linkage of core internationally recognized labor standards with the free trade agreement.

201. *See supra* note 39.

202. *Trade Agenda Outlines New U.S. Effort on Trade Labor Link*, INSIDE U.S. TRADE (Mar. 12, 1999) (U.S. Government will continue to work on building support in WTO for labor work program. "We will also continue to press our trade negotiating partners to observe core labor standards . . . we will continue to work bilaterally through selective application of our duty preference programs, to encourage the adoption and implementation of internationally recognized worker rights." *Id.*) 97 DAILY LAB. REP. (BNA) B-2 (May 20, 1998 (President's Address to WTO Stressing the importance of the "labor dimension" of trade liberalization). *Clinton Administration Committed to Labor/Employment Link in WTO*, 150 Daily Lab. Rep. (BNA) C-4 (Aug. 5, 1998) (Speaking at the American Bar Association's Annual Meeting, representatives of the administration and AFL-CIO agreed that the implementation of the 1998 ILO Worker's Rights Declaration will not prevent them from efforts in other international bodies, such as the WTO, to consider labor and environmental issues).

203. 128 DAILY LAB. REP. (BNA) *supra* note 186; *Unions Will Again Urge Trade Ministers to Create Labor Working Party at WTO*, 70 Daily Lab. Rep. (BNA) A-3 (Apr. 13, 1998).

204. Sweeney, "Remarks" to The New Internationalism Council on Foreign Relations (visited Apr. 1, 1998) <<http://www.aflcio.org/publ/speech98/sp0401.htm>>.

statutes.”²⁰⁵ He concluded that “promulgation of labor standards and social justice must be moved forward consistently and in compliance with an increase in global trade.”²⁰⁶

It appears unlikely, therefore, that adoption of the 1998 ILO Workers’ Rights Declaration will entirely preempt other forums and other supervisory mechanisms from linking workers’ rights and economic policies in the global market. Neither will the Declaration totally remove pressures within the United States to condition trade benefits on acceptable labor standards and working conditions. The new Declaration is, however, an important means of encouraging promotion as a substitute for the compulsion of trade sanctions.²⁰⁷ If the promotion of new Declaration fails, however, it will only accelerate the drive for enforceable international labor standards.

Promoting labor rights is not “just a matter of trying to enforce human rights simply because it is the right thing to do; it is also an economic matter.”²⁰⁸ As Vogelsson states:

[I]t is in the United States’ interest to support a reasonable effort by the ILO to raise working standards in any trading country that has significantly lower standards than the United States has - especially if that country exports its low-labor-cost goods to the United States.²⁰⁹

VII. Conclusion

Economic globalization no longer is confined to a few large multinational corporations doing business in several host countries. The 21st century economy is truly a global market in which communications, transportation, production, marketing, and distribution are international in reach.

U.S. unions are struggling to keep pace with economic globalization by promoting workers’ rights standards in every forum where they can gain standing. The ILO is a forum in which the

205. Report of the Committee on the Declaration of Principles, *supra* note 2, para. 378. (remarks of U.S. government) <<http://www.ilo.org/public/english/10ilc/ilc86/com-decl.htm>>.

206. *Id.*

207. As Vogelsson comments:

[S]harp trade sanctions can harm consumers more than they help labor; they also often lead to retaliation. Voluntary compliance, as in the ILO, removes suspicions of protectionist intent and thus avoids the risk of retaliation. Vogelsson, *supra* note 5, at 661.

208. *Id.*

209. *Id.*

AFL-CIO and its union counterparts from across the world have equal standing to governments and employers.

The 1998 ILO Declaration on Fundamental Principles and Workers' Rights is the latest and potentially most effective mechanism to promote international labor standards. It reestablishes the ILO as the preeminent international body for the promulgation, supervision and promotion of international labor standards. The Declaration reduces pressures on other international bodies, particularly the WTO, to adopt coercive trade sanctions as the appropriate means of enhancing workers' rights and improving working conditions. As such, it is an important accomplishment for U.S. and world employers.

The Declaration is a significant accomplishment for U.S. and foreign unions, as well, by providing an important mechanism for promoting international labor standards and improved working conditions among U.S. trading partners around the world. At the same time, the Declaration's follow-up mechanisms may expose the weaknesses in current U.S. labor laws and labor-management practices which have prevented the U.S. from ratifying the fundamental ILO conventions. Consistent with the Declaration's promotional objectives, the result may be additional pressures on Congress to reform U.S. labor and employment statutes to conform to the principles of international standards enunciated in the Declaration.

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