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Comments

The Second Wave: IT Outsourcing, Globalization, and Worker Rights

Vincent C. Avagliano*

Abstract

By deconstructing the trend of outsourcing U.S. “high tech” jobs, this comment further exposes the increasing incompatibility between current globalization and international labor law as well as the reprehensible antinomy engendered by such divergence.

[It is] essential that the international system stops acting as if it were a series of unconnected islands, and begins to put together the type of integrated responses required by the interrelated challenges of the global economy. We must have the will to make a difference to the path of globalization. We must contribute to fair rules of the game. . . .

Juan Somavia, Director-General of the ILO¹

* J.D. candidate 2005, Pennsylvania State University The Dickinson School of Law. Querida Mamá, te agradezco todo lo que has hecho por mí and thanks to my father for his constant strength, support, and guidance.

1. Juan Somavia, Statement at the International Labour Conference (June 11, 2001) available at <http://www.ilo.org/public/english/bureau/dgo/speeches/somavia/2001/ilc.htm> (last visited Oct. 15, 2003).

I. Introduction

As capital voracity for developing foreign markets is concomitantly matched by technological advances which facilitate supplying the demand for information technology (IT) and foreign direct investment, many services such as research and development, procurement, accounting, and data entry and processing are continually relocated outside of the country.² Although most people living in the United States know that the phrase “Made in the U.S.A.” has gone the way of the dodo, many people haven’t noticed that the “Tech” industry is following the same path taken by the manufacturers.

All things being relative, a point of reference for analyzing the conditions that have spurred the outsourcing craze and more specifically, the realization that not only manufacturing but IT work can be performed outside of the U.S. at a fraction of the cost, is readily available in the island country that once was home to the aforementioned flightless bird.

Mauritius, in remaining consistent with the global trend, has created what are known as export processing zones (EPZs).³ In return for tax benefits, duty-free imports of raw materials and machinery, and other inducements, the owners of EPZ enterprises agree to export all their products.⁴ The EPZs were primarily characterized by manufacturing sectors, but in 1991 the government urged diversification of EPZ industries and pledged to give priority to non-clothing industries such as electronics.⁵ In addition, because of the threats to agriculture resulting from Europe’s common agricultural policy and the potential effects on textiles of the General Agreement on Tariffs and Trade (GATT),⁶ Mauritius hopes to transform itself into a center for offshore banking and financial services.⁷

Due to a heavy dependence on sugar as its main export in a failing

2. Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401, 439 (2002); *see infra* Part II.A. and note 16.

3. Mauritian Information Resource at <http://www.lupinfo.com/country-guide-study/mauritius/mauritius25.html>. (last visited Oct. 16, 2003) [hereinafter “*Mauritian*”].

4. *Id.*

5. *Id.*

6. *General Agreement on Tariffs and Trade*, IISDnet Trade and Investment—World Trade Organization, at <http://www.iisd.org/trade/wto/gatt.htm> [hereinafter “*GATT*”]. The WTO has evolved from a series of trade negotiations held under the General Agreement on Tariffs and Trade (GATT). GATT originated as a result of a 1944 meeting of the United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire, which spawned both the IMF and the World Bank. GATT/WTO negotiations have been aimed at reducing tariffs and producing rules to govern international trade.

7. *Mauritian*, *supra* note 3.

sugar market, Mauritius approached the International Monetary Fund⁸ (IMF) and the World Bank⁹ for assistance.¹⁰ In exchange for loans and credits to help pay for imports, the government agreed to institute certain measures, including cutting food subsidies, devaluing their currency, and limiting government wage increases.¹¹ Most wage settlements take their lead from the annual settlement between the government and public sector employees.¹² The government allowed EPZ firms to deny their workers fair wages, the right to organize and strike, and the health and social benefits afforded other Mauritian workers.¹³

This example is a microcosm of a larger epidemic. It is representative of what many have now come to recognize as a pattern in the pursuit of free trade by governments and corporations. Multinational companies reap the economic benefits and foreign governments stimulate their economies at the expense of both domestic workers and displaced workers whose jobs have been outsourced to the lowest bidder. The thesis of this comment is captured in Juan Somavia's remarks above. It is time the international system utilizes the tools both domestic and international labor laws provide to alter the path of globalization because to continue irrespective of these laws is to live in Somavia's fiction.

II. The IT Outsourcing Phenomenon

A. *The Second Wave*

The rise of neo-liberalism¹⁴ in policy making, the lure of

8. *Articles of Agreement Shape IMF Structure*, 32 IMF SURV. SUPPLEMENT 29, 29-30 (2003) [hereinafter "*IMF Structure*"]. The IMF was developed by a group of countries that met in Bretton Woods, New Hampshire in 1945. Among its goals, the IMF seeks to promote international monetary cooperation and provide countries with temporary financial assistance. The IMF's Board of Governors consists of ministers of finance or heads of central banks from the 184 member countries. Member countries communicate their views through their countries' executive director. The Executive Board is made up of 24 executive directors, 5 appointed by countries with the largest quotas, taking into account member GDPs, current account transactions, and official reserves, the other 19 are elected by one country or a group of countries.

9. See *GATT*, *supra* note 6 (stating the origin of the World Bank can be traced back to the same Bretton Woods meeting that spawned the IMF and GATT); see also *IMF Introduces New Measure of Capacity to Make Loans*, 32 IMF SURV. SUPPLEMENT 29, 25-27 (2003) (describing the World Bank as a sister organization of the IMF that provides financial assistance for specific development projects).

10. *Mauritian*, *supra* note 3.

11. *Id.*

12. *Id.*

13. *Id.*

14. Martin H. Wolfson, *Neoliberalism and the Social Structure of Accumulation*, 35 REV. RADICAL POL. ECON. 255 (2003). "In the United States, neoliberalism has meant increased income inequality, deregulation of industrial and financial markets, increased

comparative advantage in regional low wages,¹⁵ and the ability to conduct operations via internet or satellite where physical contact with customers is not necessary, have led most of the world's largest companies to rethink locating operations fitting the above description within their targeted markets.¹⁶ Routine accounting, labor intensive computer programming, and data processing operations can be located virtually anywhere while remaining connected to the primary office a la cyber space.¹⁷ Although IT and other white collar outsourcings are receiving increased attention, this is by no means a new phenomenon and by all accounts has been occurring for the last twenty years.¹⁸

However mundane, integral daily activities of the U.S.'s largest businesses have been globalized so that the preparation and handling of tax returns, insurance claims, and the processing of airline tickets are handled in outsourcing centers established in China, India, Singapore, Hong Kong and Taiwan.¹⁹ Companies such as GE route customer inquiries to supermarket size call centers in Bangalore, India where fictitious American lives are assigned to the Indian workers so that they will have answers in case callers ask personal questions.²⁰ GE sent

influence of financial markets over corporate decision making, fiscal policy emphasizing tax cuts for the wealthy and cutbacks in social programs, a bias toward restrictive monetary policy, and relatively sluggish economic growth." *Id.*

15. Dong-One Kim & Seongsu Kim, *Industrial Relations In Asia: Transformation or Transition?*, 42 INDUS. REL. 311 (2003).

16. See generally Andrew Pollack, *Latest Technology may Spawn the Electric Sweat Shop*, N.Y. TIMES, Oct. 3, 1982, § 4 at 18. "The movement of factory jobs out of the United States and into countries where low wages prevail has long been a sore point with American labor unions. They have new cause for upset, because advances in computer and telecommunications technologies are beginning to move office jobs offshore as well. Fueling the migration of white-collar work is corporate America's newly found ability to type information—taped dictation, for example, or the text of a book—into a computer at one place and rapidly transmit it by satellite to another." *Id.*; *War of the Worlds*, ECONOMIST, Oct. 1, 1994, at 5. "People can be employed anywhere to carry out labor-intensive computer programming and data processing, keeping in touch with the head office by computer network and satellite. Routine accounting work could be subcontracted to developing countries." *Id.*

17. See *supra* note 16.

18. See Pollack, *supra* note 16 (reporting on high-tech outsourcing in 1982).

19. See *supra* note 16.

20. Mark Landler, *Hi I'm in Bangalore (but I Can't Say So)*, N.Y. TIMES, Mar. 21, 2001, at A1.

"Hi, my name is Susan Sanders, and I'm from Chicago," said C. R. Suman, 22, who is in fact a native of Bangalore and fields calls from customers of a telecommunications company in the United States. . . . At Customer Asset and other call centers, Indian trainers who have lived in the United States drill new employees in phonetics, American pop culture and colloquialisms. . . . The regimen includes listening to the likes of "Friends" and "Ally McBeal" without the picture, and then reconstructing the dialogue. The new recruits are put through role-playing sessions in which the trainer, posing as a caller, interrogates them on American movies, sports and television programs.

10,000 information service jobs from Georgia to India.²¹ Electronic Data Systems exported 13,800 jobs to several nations.²² Microsoft is spending \$100 million on a call center in the Philippines.²³ AT&T and Hewlett-Packard also have set up call centers in the Philippines.²⁴ Costa Rica's incentive package has landed a \$300 million deal with Intel to establish a semi-conductor and assembly plant outside of San Jose.²⁵ In semiconductor production employees routinely come into contact with toxic chemicals, and the fears that the health concerns of these workers are not being properly addressed here in this country only multiply when plants move to other countries willing to relax their laws for economic profit.²⁶

B. *Controversy Surrounding the H1-B Visa*

The H1-B visa program has arisen as one of the most contentious topics associated with the IT outsourcing phenomenon.²⁷ As a preliminary matter, to be eligible under the H1-B visa program one must be a nonimmigrant in the sense that she must be "coming temporarily to the United States."²⁸ Eligibility also turns on whether the individual is coming to the U.S. to work in a "specialty occupation,"²⁹ which means the individual's job requires the application of a body of highly specialized knowledge and attainment of a bachelor's degree in the specialty area or its equivalent.³⁰ The H1-B visa is not to be confused with the employment based preference category of the Immigration and Nationality Act (INA) which is designed to admit a non-citizen into the U.S. for permanent residence.³¹ However, a recipient of an H1-B visa is not barred from becoming a permanent citizen should the situation avail itself subject to a factual determination if the person's intentions are

Id.

21. Mark Gruenberg, *White-collar Job Flight Concerns Lawmakers*, Press Associates Union News Service at http://www.washtech.org/wt/news/legislative/display.php?ID_Content=4624 (Oct. 24, 2003).

22. *Id.*

23. *Id.*

24. *Id.*

25. Chen May-Yee, *Let's Make a Deal*, WALL ST. J., Sept. 25, 2000, at R10.

26. See Susan Q. Stranahan, *The Clean Room's Dirty Secret*, MOTHER JONES, March/April 2002, at 44.

27. See generally Anil Padmanabhan, *Back to the Future*, INDIA TODAY INT'L, Nov. 17, 2003, at 26-8; Eileen Appelbaum & Cecilia Rouse, *Easing Restrictions on Visas Doesn't Help Any High-Tech Workers*, Economic Policy Institute at http://www.epinet.org/content.cfm/webfeatures_viewpoints_h1-bvisas (Apr. 18, 2001).

28. 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2000).

29. *Id.*

30. 8 U.S.C. § 1184(i)(1).

31. 8 U.S.C. § 1153(b).

called into question by the Bureau of Immigration and Customs Enforcement (formerly the Immigration and Naturalization Service).³² Although the program does not involve jobs leaving the country, it does provide temporary visas for college educated workers that can fill IT positions.³³ The number of workers permitted to enter the country on H1-B visas was previously capped at 195,000.³⁴ For fiscal year 2004, this number will revert to the 65,000³⁵ limit that existed prior to 1999, possibly as a result of recent economic downturns and mounting pressure on Congress from domestic IT workers.³⁶ Ironically, the number of L1 visas being granted, a visa similar to the H1-B, is slowly increasing.³⁷

The H1-B visa program has been operating for more than a decade and it draws its main support from a large portion of the U.S.'s Fortune 500 Companies, the main employers of the temporary workforce.³⁸ These employers have organized into a single coalition so as to maintain low visibility while lobbying for Congress to lift limits on the number of foreign worker visas.³⁹ Claiming there exists a shortage of qualified domestic IT workers, these businesses constantly lobby for the removal of H1-B caps.⁴⁰ In 2000, Congress released a study on the IT workforce which yielded some surprising results.⁴¹ Despite finding that the market was tight in the last half of the 1990s, there was no evidence of a shortage.⁴² Consequently, allegations of a shortage are brought into question when the purported shortages are not followed by traditional increases in wages.⁴³ This irregularity may stem from the potential of foreign workers to depress wage growth.⁴⁴

Conversely, a 2003 study by the General Accounting Office has found in three occupational groups (electrical engineers, system analysts and programmers, and accountants) salaries offered to H1-B workers between the ages of 18-30 were higher than those reported for American

32. STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY, 334, 373-74 (3d ed. 2002).

33. Appelbaum & Rouse, *supra* note 27.

34. 8 U.S.C. § 1184(g)(1)(A)(iv-vi) (2000).

35. 8 U.S.C. § 1184(g)(1)(A)(vii).

36. *See infra* pp. 13-17.

37. Jeff Nachtigal, *Tech Visa Lawsuit Raises Questions about New Jersey Politicians*, WashTech News, at http://www.washtech.org/wt/news/industry/display.php?ID_Content=4640 (Dec. 18, 2003).

38. Padmanabhan, *supra* note 27.

39. *Id.*

40. *Id.*

41. Appelbaum & Rouse, *supra* note 27.

42. *Id.*

43. *Id.*

44. *Id.*

workers of the same age group and education level.⁴⁵ But, salaries for H1-B workers between the ages of 31-50 were either similar or lower than their American counterparts.⁴⁶ Domestic workers fear that their employers are training foreign workers in the U.S. so that when they relocate to another country they will have experienced personnel ready to handle operations.⁴⁷ The inability of U.S. immigration law to keep pace with the temperamental program often leaves foreign workers in a virtual limbo where they cannot adjust their status and may be forced to leave the country.⁴⁸

It is no surprise that debate over whether domestic workers are sufficiently safeguarded from adverse effects of the H1-B visa program is as volatile as the statistics that justify the need for such a program. An employer is required to file a "labor condition application" (LCA) with the Department of Labor.⁴⁹ This certifies the following: (1) the employer is paying the prevailing wage level in the area of employment or the actual wage level at the place of employment, whichever is greater (2) employer affords working conditions to H1-B employees on the same basis as it affords working conditions to U.S. employees similarly employed and that visa holder's conditions of employment will not adversely affect the working conditions of such workers (3) that there is not a strike or lockout (4) if there is a collective bargaining representative, the employer shall provide notice to the representative that an LCA will be filed and if there is no collective bargaining representative the employer shall notify the existing employees as specified whereas employees are authorized to file complaints challenging the veracity of the LCA.⁵⁰ Positing as to the efficacy of these measures to protect domestic U.S. workers has yielded mixed results.⁵¹ Evocatively entitled legislation such as the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) and the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) reflect Congress' concerns.

45. Padmanabhan, *supra* note 27, at 27.

46. *Id.*

47. Mark Gruenberg, *Lawmakers Seek Fix on White-collar Job Visas*, Press Associates Union News Service, at http://www.washtech.org/wt/news/legislative/display.php?ID_Content=4618 (Sept. 19, 2003).

48. See Appelbaum & Rouse, *supra* note 27; see also Padmanabhan, *supra* note 27, at 28.

49. 8 U.S.C. § 1182(n)(1) (2000).

50. 8 U.S.C. § 1182(n)(1)(A)-(C); 20 C.F.R. § 655.731-655.734 (2004).

51. Compare 73 INTERPRETER RELEASES 653 (May 13, 1996), with Stuart Anderson, *Widespread Abuse of H1-Bs and Employment-Based Immigration? The Evidence Says Otherwise*, 73 No. 19 Interpreter Releases (1996); Leah Phelps Carpenter, Comment, *The Status of the H1-B Visa in These Conflicting Times*, 10 TULSA J. COMP. & INT'L L. 553, 568-89 (2003).

Attempting to strike a balance between the interests of U.S. labor and companies seeking to employ foreign workers eligible for H1-B visas, Congress temporarily increased the number of visas issued while beefing up several provisions to decrease the exploitation of foreign workers and adverse effects on domestic workers. In amending the INA, the ACWIA requires an employer fitting the definition of an "H1-B dependent employer"⁵² and employers that have been found to have committed a willful failure or misrepresentation during the five year period preceding the application to make additional attestations on their LCA application.⁵³ These additional attestations essentially parallel the labor certification requirement imposed on an employer seeking to petition an immigrant employee under one of the employment-based immigration categories. Where, except for extremely rare instances, an employer is required to show that no U.S. workers are available to fill the position.⁵⁴ Both the "H1-B dependent employer" and an employer that has committed a willful failure or misrepresentation must certify that no U.S. worker will be displaced ninety days before or after the date of filing and that the H1-B visa holder will not be placed with another employer intending on displacing a U.S. worker ninety days before or after the placement of the nonimmigrant.⁵⁵ They must also certify good faith steps have been taken to recruit a U.S. worker for the job.⁵⁶

A critical characteristic of the H1-B program that receives little attention is the precarious situation of dependence where the H1-B employee relies heavily on their employer for virtually securing and maintaining their lawful presence in the U.S. Such asymmetrical positioning leaves the employee vulnerable to exploitation. Therefore, in enacting AC21, Congress facilitated the ability of H1-B visa holders to change employers.⁵⁷ In addition, the ACWIA called for a report on the characteristics of H1-B visa holders to be conducted by the INS, providing the agency with a sharper image for assessing the program.⁵⁸ As a domestic measure, Congress increased the filing fees for H1-B visa petitions. The proceeds from these fees, paid by the employer, are used to fund job training programs for U.S. workers.⁵⁹ However, due to the

52. See 8 U.S.C.A. § 1182(n)(3) (providing that an H1-B employer is dependent when the number H1-B employees is above a designated figure or percentage).

53. 8 U.S.C. § 1182(n)(1)(E)(ii), (G)(i).

54. 8 U.S.C. § 1182(a)(5)(A)(i), (D).

55. 8 U.S.C. § 1182(n)(E)(i), (F) (2000).

56. 8 U.S.C. § 1182(n)(G).

57. 8 U.S.C. § 1184(m) (two subsections (m) have been enacted); see 77 INTERPRETER RELEASES 200-01 (Feb. 14, 2000).

58. The American Competitiveness and Workforce Improvement Act of 1998, Pub. L. 105-277 § 418.

59. *Id.* at § 414(a), 415 (a); see 77 INTERPRETER RELEASES 261-62, (March 6, 2000);

tenuous nature of their employment, attributable to a struggling economy and the looming specter of severe immigration consequences upon unemployment, H1-B visa holders remain more vulnerable to exploitative employment conditions.⁶⁰

A new twist in the H1-B saga involved two IT workers who were granted federal class action status in their lawsuit against their former employer Wilco Systems Inc. for violation of Title VII of the Federal Civil Rights Act.⁶¹ In *Shah v. Wilco Systems Inc.*,⁶² the plaintiffs brought charges against the software company on behalf of U.S. workers who were discriminated against in favor of foreign workers and foreign workers who were paid less than the prevailing wage for similar U.S. workers.⁶³ Because the American plaintiff's nation of origin was India, the Second Circuit affirmed the District Court's decision holding no claim had been made under Title VII.⁶⁴ Because the defendant was not accused of discriminating against the plaintiff as an Indian but as an American citizen, there could be no claim because Title VII proscribes discrimination on the basis of national origin, not citizenship.⁶⁵ The Second Circuit also upheld the District Court's finding that the plaintiff representing H1-B workers failed to state his national origin.⁶⁶ The irony in this case is that the two workers that initiated the lawsuit belong to groups that have typically been on opposing sides of the H1-B visa debate.⁶⁷ They make for strange bedfellows indeed, but perhaps this is a sign of the times. It's quite possible the workers most affected by the program will play a pivotal role in removing its inherent divisiveness.

III. High Tech Outsourcing, the Unemployment Rate, and What the Pros Have to Say About It?

During the last several years unemployment in the U.S. has been steadily increasing from the rate of 3.9% in December 2000⁶⁸ to the rate

see also 8 U.S.C. 1184(c)(9)(A), (B).

60. Yan Chen, Comment, *An Examination on Regulating the Employment of Foreign Skilled Workers in the United States*, 6 U. PA J. LAB. & EMP.L. 179, 191-92 (2003).

61. *Shah v. Wilco Systems Inc.*, 76 Fed.Appx. 383, 2003 WL 22221359, at **2 (2nd Cir. Sept. 26, 2003).

62. *Id.*

63. *Id.*

64. *Id.*

65. 42 U.S.C. § 2000e-2(a) (2000); see also MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION, 631 (6th ed. 2003) (providing issues and analysis arising from cases involving claims of discrimination on the basis of citizenship).

66. *Shah*, 2003 WL 22221359, at **1.

67. See Nachtigal, *supra* note 37.

68. Labor Force Statistics from the Current Population Survey, Bureau of Labor Statistics, at http://data.bls.gov/servlet/SurveyOutputServlet?data_tool=latest_numbers&

of 6.1% for September 2003,⁶⁹ which is the highest unemployment rate in the last ten years.⁷⁰ The number of unemployed persons for the month of September 2003 is estimated to be at approximately 9 million.⁷¹ Also in September, 1.5 million persons were marginally attached to the labor force. These individuals were available to work and had looked for a job sometime in the prior 12 months. They were not counted as unemployed, however, because they did not actively search for work in the 4 weeks preceding the survey.⁷² Because it is impractical to actually count every unemployed person each month, the government conducts a monthly sample survey called the Current Population Survey (CPS) to measure the extent of unemployment in the country.⁷³ But in counting the true number of those unemployed many argue that in terms of the non-working poor, the current method of calculating our unemployment rate is sheer hypocrisy because the current method masks the larger problem of joblessness in depressed areas where most of our poor exist.⁷⁴

Regardless of the fact that the number may actually be much larger than the CPS indicates, the CPS figures provide enough grounds for concern. The present unemployment rate is especially alarming when considering that last year the Forrester Research firm predicted that companies would move 3.3 million U.S. service industry jobs and \$136 billion in wages out of the country over the next fifteen years,⁷⁵ an estimate that is not at all dubious in light of present trends in outsourcing "Tech" jobs.⁷⁶ The Gartner research firm has stated, "One in ten

series_id=LNS1400000.

69. *Id.*

70. *Id.*

71. *The Employment Situation: September 2003*, Bureau of Labor Statistics News, at <http://www.bls.gov/news.release/pdf/empst.pdf>.

72. *Id.*

73. *How the Government Measures Unemployment*, Bureau of Labor Statistics, at http://www.bls.gov/cps/cps_htgm.htm.

74. David R. Quammen, *Campaign '96: "Poor" Politics*, at <http://www2.ari.net/home/poverty/mh9618.html> (June 11, 1996).

75. Justin Hyde, *Delphi Globetrots to Cut White-Collar Pay*, Business-Reuters at http://www.j-bradford-delong.net/movable_type/2003_archives/002014.html (Aug. 19, 2003).

76. *See It's Unstoppable: High Tech Jobs Ditching the US*, Associated Press/The Strait Times, at <http://www.freerepublic.com/focus/f-news/957635/posts> (Aug. 03, 2003) [hereinafter "*Unstoppable*"].

When Denver-based software company Quark was deciding where to build a new facility that will employ 1,000 software and technology workers, it chose Chandigarh, India. Late last month, news leaked that IBM would move 1,000 jobs overseas. A couple of weeks earlier, Microsoft said it would hire 5,000 more people, up to 2,000 of them outside the US. At about the same time, Oracle said it will almost double workers in its Indian unit to 6,000. . . . Three years ago, Louisville-based Storage Technology moved its manufacturing operations to Puerto Rico. Agilent Technologies also shipped hundreds of its

technology jobs is likely to move overseas within the next eighteen months.”⁷⁷

Within the outsourcing debate lies a sub-debate regarding the gravity of this trend. Economist J. Bradford DeLong,⁷⁸ proffers that the number of jobs is set by the Federal Reserve which tries to hit that ever elusive “sweet spot.”⁷⁹ He concedes, it is certainly true that what happens in international trade affects employment here,⁸⁰ but reminds us that trade balances.⁸¹ According to DeLong, in the post-World War II world, it seems clear that the U.S. has gained much more than it has lost from the economic development of its trading partners.⁸² If this is not to be the case in the future, there needs to be an argument made as to why the normal post-World War II pattern will be broken.⁸³ In choosing the appropriate public policy response to successful high tech “outsourcing,” DeLong says we are left with two options: either we impose tariffs or quotas to protect domestic demand, or we attempt to slow the rate at which modern technologies are transferred to other countries. DeLong finds neither appealing and opts for a two prong solution; first, remove

Colorado Springs jobs to India and China. Also in the Springs, broadband device maker Actiontec sent several hundred jobs to India, and computer storage firm Quantum sent 865 jobs to Malaysia.

Id.

77. *Id.*

78. J. Bradford DeLong is a Professor of Economics at the University of California at Berkeley.

79. J. Bradford DeLong, *Outsourcing Our Future?* at http://www.j-bradford-delong.net/movable_type/2003_archives/002014.html (Aug. 19, 2003) (last visited Oct. 16, 2004) (meaning high enough demand to produce effective full employment, without so much demand that vacancies become so abundant as to lead inflation to run away).

80. *Id.*

81. *Id.*

Indians want rupees, not dollars: they will only sell us as much as we can pay for in rupees, and the only way we get rupees is by selling things to Indians. The things we sell to Indians are either goods and services exports, or capital exports—Indians buying financial assets or real property in America, the sale of which is used to finance domestic investment spending. Either way (if the Federal Reserve does its job) Americans’ demand for imports made in other countries is recycled into foreign demand that employs Americans in industries that export goods, export services, make producers equipment, or build structures. This is a consequence of Say’s law—an economic principle which is usually true, sometimes false, but which it is the Federal Reserve’s business to try to make as true as possible as much of the time as possible. This means that nightmare scenarios—3.3 million high-tech jobs moving overseas—are beyond the bounds of short-run probability. The current account plus the capital account must balance: if the work that used to be done here by 3.3 million people is to be done there, that means that our export industries here must employ an extra 3.3 million people as well.

Id.

82. *Id.*

83. *Id.*

people from industries where we are about to lose comparative advantage and where wages are about to take a dive; second, ensure public investments in basic research are available to spark applied research and development to create new forms of industry and high tech.⁸⁴

Post World-War II developments including the loss of manufacturing jobs,⁸⁵ the overvaluation of the dollar, large trade deficits, and the failure of new trade agreements to contain provisions enforcing internationally recognized labor standards⁸⁶ are being assembled to lodge the missing argument sought by DeLong. It is argued that while manufacturing jobs in the 1970s were replaced with new and higher-paying jobs in technology, the future for today's jobless Tech workers is not clear.⁸⁷ Also, as economist Paul Craig Roberts⁸⁸ demonstrates, skeptics are too quick to couch the issue of high tech outsourcing within the traditional free trade framework. Roberts argues we are not confronted with phenomena that fit the free trade vs. protectionism framework.⁸⁹ We are confronted with massive desertion of industrial and high tech production and R&D [Research and Development] to foreign countries and a consequent decline in middle class jobs and incomes in the U.S. He explains:

The U.S. is not trading with China in the normal sense, China has

84. *Id.*

85. Josh Bivens et al., *Mending Manufacturing: Reversing poor policy decisions is the only way to end current crisis*, Economic Policy Institute at http://www.epinet.org/content.cfm/briefingpapers_bp144 (Sept. 2003).

Eroding competitiveness led to a staggering rise in the U.S. trade deficit, which is the difference between the volume of a nation's exports and imports. Between the first quarter of 1995 and the second quarter of 2003, the overall trade deficit rose by \$411 billion, dominated by the \$408 increase in the deficit in manufactured goods. In economic terms, the trade deficit represents domestic demand for manufacturing goods that is satisfied by foreign producers.

. . . .

Employment in the U.S. manufacturing sector declined for four straight years between 1999 and 2002. In the first eight months of 2003, manufacturing has shed 431,000 jobs and will almost surely extend the annual streak of employment to five straight years for the first time since World War II. Only once before has employment in the manufacturing sector fallen for four straight years (the other period was 1990-1993).

Id.

86. *Id.* "Compounding the dollar's over valuation was the failure of new trade agreements to contain provisions enforcing internationally recognized labor standards."

Id.

87. *Unstoppable*, *supra* note 76.

88. Paul Craig Roberts is a senior fellow at the Hoover Institution, John M. Olin Fellow at the Institute for Political Economy, and research fellow at the Independent Institute.

89. Paul Craig Roberts, *Trade Dogma and the No-think Nation*, at http://www.vdare.com/roberts/no_think.htm (April 23, 2002).

access to U.S. markets for products made with Chinese labor. In exchange U.S. firms have access to Chinese markets and U.S. markets with products made by Chinese labor. In this “exchange,” where lies the advantage for the U.S. economy? Free traders, forgetting that consumers have to work in order to consume, think everything is fine as long as consumers are paying lower prices. But U.S. consumers are also earning lower wages. The lost manufacturing and high tech jobs are being replaced with low productivity retailing jobs. Wal-Mart is now the largest U.S. corporation—with larger revenues than Exxon-Mobil and Microsoft combined.⁹⁰

Roberts exposes schemes where trade is analyzed in terms of gross exports rather than net exports as subscribing to an Enron/Arthur Anderson view of trade.⁹¹ Despite the \$53 billion trade deficit in manufacturing, many still contend that the effects of high tech outsourcing will only be short term because doing business in countries with weak rule of law and property rights systems cannot be a good long-term strategy for any company.⁹² This would seem to be a viable argument before realizing that competition drives the global economy and when companies can hire qualified engineers at a third to a tenth of what it costs in California or Boston, the urge to outsource is irresistible.⁹³ What’s more, most multinational companies cannot resist the tax benefits, duty free imports of materials and machinery, and suspension of laws securing labor rights offered by many countries as evidenced by the Mauritian example in the introduction to this comment. Adding less stringent laws to address pollution and countless other enticements, many multinational companies have found it to be an extremely profitable strategy to do business in countries with weak rule of law.⁹⁴

90. *Id.*

91. *Id.*

The gross numbers make the U.S. look like a manufacturing powerhouse. The latest numbers reporting the first two months of this year show the U.S. exported \$82.6 billion in manufactured goods and only \$9.3 in agricultural goods. However, exports are only half of the story. During the same period, the U.S. imported \$135.7 billion in manufactured goods and \$6.2 billion in agricultural goods. The net result is a \$53 billion trade *deficit* in manufactured goods and a \$3 billion *surplus* in agricultural goods. A large trade deficit in manufactured goods and a surplus in agricultural goods is the profile of a third world colony.

Id.

92. *A Cure Worse Than The Disease*, at <http://www.jayreeding.com/archives/003596.php> (last visited on Oct. 30, 2003).

93. Dan Gillmor, *Outsourcing Our Future?*, E Journal at <http://weblog.siliconvalley.com/column/dangillmor/archives/001291> (Aug. 19, 2003).

94. See RUSSEL MOKHIBER & ROBERT WEISSMAN, CORPORATE PREDATORS: THE

IV. Unions Take Action: Lobbying, Grass Roots, and Doing What Comes Natural

The Washington Alliance of Technology Workers, a.k.a. WashTech, which is affiliated with the Communications Workers of America (CWA) of the AFL-CIO, has led the fight against outsourcing IT jobs.⁹⁵ Marcus Courtney and Mike Blain, the union's co-founders and former temporary employees of Microsoft, were frustrated by the stratification between fulltime workers and temporary workers in the IT industry.⁹⁶ Along with subjecting them to week-to-week employment, their contingent status meant long hours yielding sub-par health benefits and none of the famed Microsoft stock options.⁹⁷ WashTech has taken on the challenge of representing the interests of IT workers by providing an effective voice in the legislative and corporate arenas advocating for improved benefits and workplace rights.⁹⁸ WashTech belies stereotypical perceptions of unions as organizations relegated to a blue-collar mire by introducing a computer savvy, digitally armed ally to the labor movement. Because the technology industry has not had significant numbers of union members, doubts have arisen as to the chance of WashTech actually succeeding in its effort.⁹⁹ However, along with having successfully negotiated collective bargaining agreements for

HUNT FOR MEGA-PROFITS AND THE ATTACK ON DEMOCRACY (Common Courage Press, 1999) (providing numerous examples of transnational corporations capitalizing on abject legal protections for workers and the environment including; Disney's outsourcing production of toys and clothing to sweatshops in Haiti, Burma, Vietnam and China; well documented reports conducted at Nike's behest revealing that its contractor workers in Asia were being underpaid, physically abused and exposed to hazardous working conditions; Wal-Mart's use of Asian child labor; Freeport McMoRan, operator of the worlds largest gold mine, dumping its refuse into Indonesian mountain rivers which are the lifeblood of thousands of indigenous people).

95. See Andrew Bibby, *IT Outsourcing Goes Global*, International Labor Organization, Department of Communication, World of Work Magazine, available at <http://www.ilo.org/public/english/bureau/inf/magazine/47/globit.htm> (last update: 26 June 2003).

96. See Washtech, Shift.com, at <http://www.shift.com/content/9.1/87/1.html> (describing co-founders Marcus Courtney and Mike Blain as well as co-organizer Gretchen Wilson as innovators, category: High-Tech Workers (Net Slaves No More)) (last visited Nov. 15, 2003).

97. *Id.*

98. *About WashTech*, WashTech at <http://www.washtech.org/wt/about/>

99. See Lou Dobbs Tonight: *Exporting America*, CNN at <http://www.cnn.com/TRANSCRIPTS/0311/17/ldt.00.html> (posting transcript of interview with Marcus Courtney, President of the Washington Alliance of Tech Workers, asking, "Are you fire-breathing union people or are you just sort of white-collar, namby-pamby, we'll-talk-about-it folks?") [hereinafter "*Exporting America*"]; see also Bibby, *supra* note 95 (recognizing that WashTech is trying to persuade professionals, in what has traditionally been a highly individualistic work culture, to consider bargaining collectively with employers) (last visited Nov. 19, 2003).

employees at four private companies and two groups of public employees,¹⁰⁰ WashTech can point to several material results of its grass roots organizing campaign as well as its efforts directed towards Congress.

While many Americans feel victimized by the global economy,¹⁰¹ the U.S. government has taken little action in measuring the effects of the IT outsourcing aspects of globalization. Consistent with tradition, workers have had to call attention to the matter.¹⁰² After several months of lobbying by WashTech and the Society of Professional Engineering Employees in Aerospace (SPEEA), the General Accounting Office agreed to study the trend of U.S. companies exporting engineering and technological jobs overseas to cheaper labor markets.¹⁰³ In addition to the GAO study, the House Small Business Committee has held hearings where displaced IT worker testimony revealed the “catch 22 situation” they found themselves in. One former Silicon Valley tech-worker whose job was outsourced to India testified, “A lot of people are afraid to come forward because of blacklisting, which is a very real fear for a lot of people, and is one of the reasons why Silicon Valley needs a labor union of some sort.”¹⁰⁴ This employee willingly went to Bangalore, India in December 2002 to train Indian software quality assurance engineers hoping there might be a place for her if she stayed loyal to her company.¹⁰⁵

Along with drawing the federal government’s attention, WashTech has won support in several state legislatures. Not only does state legislation banning government high-tech outsourcing facilitate changing national policy and send a strong message to IT companies, but state laws serve the more direct purpose of clamping down on the outflow of government jobs, which to date number at 3,400 state government payroll jobs performed outside the U.S.¹⁰⁶ Pauline Menes, a Democrat from College Park, Maryland, has met with unionists concerned about the issue in order to discuss legislation that would ban state agencies and

100. E-Mail from Karole Gorman, Organizer WashTech/CWA to author (Oct. 13, 2004).

101. Steven Greenhouse, *Looks Like a Recovery, Feels Like a Recession: Job Losses Dampen an Economic Rebound*, N.Y. TIMES, Sept. 1, 2003, at A8.

102. See HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 4 (Lance A. Compa & Stephen F. Diamond eds., University of Pennsylvania Press 1996).

103. GAO *Greenlights Offshoring Study*, WashTech News at http://www.washtech.org/wt/news/legislative/display.php?ID_Content=4601 (Aug. 7, 2003).

104. Jeff Nachtigal, *Silicon Valley Tech Workers Challenge Beltway Politicians*, WashTech News at <http://www.washtech.org/news/legislative/> (Oct. 27, 2003).

105. *Id.*

106. See Gruenberg, *supra* note 21.

contractors from exporting white collar jobs.¹⁰⁷ Legislators in at least nine states have joined the fight to slow job migration.¹⁰⁸ When lawmakers in New Jersey learned eFunds Corp., a company hired to help welfare recipients, had moved its help-center jobs to Mumbai, they began drafting similar legislation. The mere threat of laws banning government outsourcing caused the government contractor to move the jobs back to Camden, an area of high unemployment.¹⁰⁹ Yet none of the bills have become laws, and a recent report in an Indian magazine that the Republican Party has utilized call centers in Noida and Gurgaon, India using automated systems to telephone people in this country and solicit support for President Bush, a story that amazingly escaped mainstream media in the U.S., only confirms that IT outsourcing will be a partisan issue as the GOP's actions clearly condone following the corporate lead.¹¹⁰

Yet, WashTech responds to government indifference with grassroots efforts aimed at raising public awareness.¹¹¹ WashTech's local organizing committees directed demonstrations in front of upscale hotels in San Francisco¹¹² and Boston¹¹³ housing conferences that promoted the practice of IT outsourcing in order to save on labor costs.¹¹⁴ Along with holding demonstrations to promote public awareness, WashTech's local organizing committees take advantage of tech-fairs by handing out flyers to workers and signing up people to receive information.¹¹⁵ Using the job exodus as an organizing tool,¹¹⁶ WashTech's electronic membership list has grown from 2,000 to more than 16,000 people across the country.¹¹⁷ Who better to mount an

107. Mark Gruenberg, *MD State Lawmakers to Fight Export of Jobs*, Press Associates Union News Service, at <http://www.washtech.org/news/legislative/> (Oct. 20, 2003).

108. Murray Hiebert & Joanna Slater, *In Search of a Ready Scapegoat*, 13 FAR E. ECON. REV., Nov. 14 (2003).

109. See *id.*; see also Gruenberg, *supra* note 107.

110. *Automated Call Centers Set Up to Solicit Bush Donations*, WorldNetDaily.com, at http://www.wnd.com/news/article.asp?ARTICLE_ID=34323 (reporting article from Business Standard) (Aug. 29, 2003).

111. See generally Jeff Natchtgal, *Tech Workers, Unions Protest Offshore Outsourcing Conference*, WashTech News, at http://www.washtech.org/wt/news/industry/display.php?ID_Content=4617 (Sept. 17, 2003); *IT Workers Protest Offshoring at Boston Executive Forum*, WashTech News, at http://www.washtech.org/wt/news/industry/display.php?ID_Content=4629 (Oct. 27, 2003) [hereinafter "*IT Workers*"]; *TechsUnite Gives Workers a Voice at NY Tech Fair*, WashTech News, at http://www.washtech.org/wt/news/industry/display.php?ID_Content=4619 (Sept. 24, 2003) [hereinafter "*TechsUnite*"].

112. See Natchtgal, *supra* note 111.

113. See *IT Workers*, *supra* note 111.

114. See Natchtgal, *supra* note 111.

115. See *TechsUnite*, *supra* note 111.

116. See Gruenberg, *supra* note 107.

117. See *Exporting America*, *supra* note 99.

organizing campaign on the “information superhighway” than a bunch of self-pronounced techies.

Joining them on the internet is the AFL-CIO’s Working Families, e-Activist Network. Although IT jobs have not traditionally fallen under the purview of the AFL-CIO, the organization has taken up the flag in raising awareness of the impact of the outsourcing phenomenon in this area. This campaign includes a feature called “Job Tracker,” which identifies companies and industries throughout the U.S. that are outsourcing jobs, as well as a Web video with celebrity Jason Alexander called *Outsource This!*.¹¹⁸ No doubt, Lou Dobbs is the most recognizable media figure to weigh in on this issue. This CNN anchor and managing editor of Lou Dobb’s Tonight, has embarked on a crusade countering the outsourcing phenomenon and all its derivatives during a segment of the show entitled *Exporting America* as well as in his book bearing the same title.¹¹⁹ While providing a valuable forum to explore the issue, the program has been criticized for being overtly xenophobic.¹²⁰ Though, patent and latent hostility towards foreign workers has not gone unanswered. In a recent book entitled *Debugging Indian Computer Programmers: Dude, did I steal your job?*, author and Indian software engineer, Nadarajah Sivakumar, reminds the mainstream media that there are two sides to every coin.¹²¹ While acknowledging domestic concerns, the author presents interesting commentary from a perspective that is often left out of the dialogue. Facing the stark choice between flag-waving jingoism or being an outsourcing cheerleader seems a double edged sword and there must be some middle ground.

V. While Some Say Race-to-the-bottom, Others Say Bottoms Up

The IT outsourcing trend just like any other facet of our world does not exist in a vacuum. Thus before narrowing in on specifics, it is necessary to discuss the environment in which the trend has arisen in order to facilitate the dialectic. Mainly, there exist two views regarding labor standards as they relate to foreign direct investment (FDI), financial globalization,¹²² capital account liberalization,¹²³ and economic

118. Working Families e-Activist Network, peoplepower@aflcio.org, to author (Oct. 7, 2004).

119. See *CNN Programs—Lou Dobbs Tonight*, at <http://www.cnn.com/CNN/Programs/lou.dobbs.tonight/> (last visited Sept. 9, 2004).

120. *Indian Techie Slams Lou Dobbs for Ignorance*, at <http://www.divinetree.com/PressRelease.html> (Sept. 5, 2004).

121. See NADARAJAH SIVAKUMAR, *DEBUGGING INDIAN COMPUTER PROGRAMMERS: DUDE, DID I STEAL YOUR JOB?* (DivineTree 2004).

122. Philip Arestis & Santonu Basu, *Financial Globalization: Some Conceptual Problems*, 29 E. ECON. J. 183 (2003). “Financial Globalization refers to the process by which financial markets of various countries of the globe are integrated as one.” *Id.*

development. These two perspectives are polar opposites,¹²⁴ which would lead one to inquire as to how such a schism could pervade in our society. As the debate rages on between the proponents and critics of the current model of globalization, one must decide where they stand.

One option would be to adhere to the notion that econometric models provide no solid evidence to support the proposition that FDI favors countries with low labor standards.¹²⁵ Yet the cliché about statistics rings true as we are presented with an alternative analysis comparing wages to the value of marginal productivity of labor.¹²⁶ The evidence of this study runs contrary to the neoclassical presumption validating the proposition that labor exploitation exists with tendencies to increase,¹²⁷ arguably attributable to some systemic mechanism obstructing worker influence on pay rates. Hence, one is left to choose whether we are fueling a global race-to-the-bottom or whether trade in our global economy is proceeding as it should.

Before making this choice, one should have an awareness of the oligopolistic nature of the world market.¹²⁸ For example, the current

123. Compare Ream Heakal, *Understanding the Capital and Financial Accounts in the Balance of Payments*, Investopedia, at <http://www.investopedia.com/articles/03/070203.asp> (last visited Dec. 20, 2003). Capital account liberalization that removes restrictions on capital movement leaving governments, corporations and individuals free to invest capital in other countries paving the way for not only more foreign direct investment, but for portfolio investment in the capital market as well. Thus, companies striving for bigger markets and smaller markets seeking greater capital and domestic economic goals can expand into the international arena, resulting in a stronger global economy, with Kavaljit Singh, *When Elephants Dance: MIA Negotiations in the WTO*, Cancun Letters and More at <http://www.cancun2003.org/en/web/161.html> (last visited Dec. 20, 2003) [hereinafter "*When Elephants Dance*"]. There has been a rethink in international policy circles on capital account liberalization in light of recent financial crises. The author emphasizes the volatility of capital flows and the resulting unstable economies of developing countries that have opened their capital accounts.

124. See David Kucera, *Core Labour Standards and Foreign Direct Investment*, 141 INT'L LAB. REV. 31 (2002); but see Arestis & Basu, *supra* note 122; Ajit Singh, *Capital Account Liberalization, Free Long-Term Capital Flows, Financial Crises and Economic Development*, 29 E. ECON. J. 191, 216 (2003).

125. See Kucera, *supra*, note 124.

126. Milan Zafirovski, *Measuring and Making Sense of Labor Exploitation In Contemporary Society: A Comparative Analysis*, 35 REV. RADICAL POL. ECON. 462, 480 (2003).

[A]merican workers can be considered to have fewer economic rights than those in most other advanced countries. Yet this may well in the long run backfire against the U.S. economy in so far as worker rights including collective bargaining, employment protection, and income security, tend to promote productivity growth and vice versa. In this sense, labor exploitation is costly and its reduction compatible with—if not necessary for—a return to economic security and opportunity.

Id.

127. *Id.*

128. Arestis & Basu, *supra* note 122, at 185.

debate concerning the prospect of supplementing the World Trade Organization (WTO)¹²⁹ with a Multi-lateral Investment Agreement is dominated by the conflict between powerful countries and trading blocks, i.e., the U.S. and the E.U., pressing for such an agreement and developing countries opposing it.¹³⁰ Torn between asserting their voices in the global economy and their search for FDI, less developed countries can resist the pressure placed on them for only so long.¹³¹ Adding to their dilemma, the U.S. manages to circumvent multilateral investment agreements by pursuing its investment liberalization agenda in bilateral and regional free trade agreements.¹³²

The dichotomy the two schools of thought represent permeates into each aspect of economic globalization and divisions trickle down from the larger race-to-the-bottom question to auxiliary issues such as capital account liberalization.¹³³ Coinciding with criticisms of capital account liberalization as an area where economic theory is most detached from real-world events,¹³⁴ recent financial crises in Asia, Latin America, and Russia have forced economists to reconsider their views on this issue.¹³⁵ Economists accept that the volatile nature of short term capital flows may have damaging impacts on developing countries.¹³⁶ Therefore, in advocating for capital account liberalization, some economists limit the scope of opening accounts to more stable long term capital flows, particularly FDI.¹³⁷ But, just as the argument has been made against short term capital account liberalization, a similar argument is emerging against long term liberalization.¹³⁸ Advocates of this argument maintain that developing countries require discretion to regulate FDI flows because even FDI may contribute to economic fragility.¹³⁹

At the root of the wide discrepancy in global economic theory, lie controversial decisions made by international organizations overseeing the future of global economic development, such as the International Monetary Fund's request that its mandate include capital market liberalization at the annual meetings in Hong Kong.¹⁴⁰ As one analyst points out, "It should have been clear then, and it is certainly clear now,

129. See *GATT*, *supra* note 6 and accompanying text.

130. See *When Elephants Dance*, *supra* note 123.

131. *Id.*

132. *Id.*

133. See Singh, *supra* note 124.

134. *Id.*

135. See *id.*; see also *When Elephants Dance*, *supra* note 123 and accompanying text.

136. See Singh, *supra* note 124.

137. See *id.*

138. See *id.*

139. See *id.*

140. See *id.* at 192 (quoting Joseph E. Stiglitz, *Reforming the Global Economic Architecture: Lessons from Recent Crises*, 54 J. FIN. 1508-21 (1999)).

that this position was maintained either as a matter of ideology or special interests, and not on the basis of special analysis of theory, historical experience or a wealth of econometric studies."¹⁴¹

While great emphasis is placed on globalization's potential to contribute to growth and reduce poverty,¹⁴² little is mentioned of the disruptions resulting from competitive pressures such as abrogation of job benefits and the gradual replacement of protected status workers by contract workers at State Operated Enterprises (SOEs) in China.¹⁴³ In 2001, there were 6.8 million registered unemployed in urban areas and over 5 million workers laid off from SOEs, the total number rising to 14 million in 2002, and adding those unregistered, the number was estimated to reach 19 million.¹⁴⁴ As workers respond to the spread of privatization in Asia, industrial disputes and informal worker demonstrations have increased by roughly 30% per year.¹⁴⁵ A recent development in India more succinct to the topic of this comment is the formation of fledgling IT Professionals' Forums.¹⁴⁶ These organizations are affiliated with the global union federation, Union Network International (UNI), and one of their goals is protecting against job migration, whether the flow is from the West towards India or from India towards other countries such as China, by enriching individual knowledge.¹⁴⁷ To reiterate, the controversy arising over the proposed Multilateral Agreement on Investment depicts the dissatisfaction developing countries have towards the current model of globalization as India, China, Pakistan and Malaysia express concerns over the constriction of policy space to maneuver investment policies in accordance with their development goals and priorities.¹⁴⁸ Hence, although globalization is touted as an economic equalizer, in many instances, despite the objections of developing nations, it takes a track that is totally anomalous from that which would be selected by the countries it purports to benefit.

Setting aside econometrics and implications on developing countries, critics of the current global economic model cite to disturbing

141. *Id.*

142. See *Globalization: A Framework for IMF Involvement – An IMF Issues Brief*, International Monetary Fund at http://www.imf.org/external/np/extr/ib/2002/031502.htm#P14_80 (March, 2002).

143. Frederic C. Deyo & Kaan Agartan, *Markets, Workers, and Economic Reforms: Reconstructing East Asian Labor Systems*, J. INT'L AFF., Fall 2003, Vol. 57, No. 1, 62, 64-67 (2003).

144. See Jian Fa, *China Faces an Employment War*, BEIJING REV., VOL.46 NO.12 Mar. 20, 2003, at 26, 27.

145. See Frederic C. Deyo & Kaan Agartan, *supra* note 143 at 61.

146. See Bibby, *supra* note 95.

147. *Id.*

148. See *When Elephants Dance*, *supra* note 123.

trends that persist in the U.S. as they make their case for a revision of the U.S.'s policy.¹⁴⁹ Included among these trends are hemorrhaging manufacturing jobs and more recently IT jobs from the U.S. This undermining of the nation's tax base which in turn affects schools and infrastructure resulting in discouragement of young people from studying science and technology thus encouraging a dumbing-down of our nation's future workforce already facing cuts in high-tech pay and health care systems as a response to competitive pressure contributes to the shrinking of the middle class, all posing substantial problems to sustaining our economy.¹⁵⁰ In examining the complexities of the IT outsourcing phenomenon, it is essential not to lose sight of the most palpable argument against this wave of outsourcing.¹⁵¹ Certainly, such outsourcing during a period of high unemployment can have devastating effects on our national economy.¹⁵²

In the midst of global financial crises, many advocate reinforcement of worker rights as a stabilizing institution.¹⁵³

VI. Tweaking International Tax Law: Overlooking the Obvious?

While not the main focus of this comment, tax policies both inside and outside the U.S. have been alluded to as forces aiding and abetting the outsourcing regime. Ignoring this reality does a disservice to any genuine effort at comprehension. Through a comprehensive analysis, Tax Professor William B. Barker proposes a new approach that would save the jobs of many workers while taking into account economic efficiency, fairness to taxpayers, and fairness to governments.¹⁵⁴

Because the international tax system is based on principles that predated major changes in the global economy it does not reflect the realities of the times.¹⁵⁵ Among the disturbing trends that have unfolded under this quandary is intense tax competition.¹⁵⁶ Development in terms of bringing the third world closer to the first can be considered nothing

149. See Alan Tonelson, *IT Industry: A Race to the Bottom?*, TradeAlert.org at http://www.washtech.org/wt/news/industry/display.php?ID_Content=4633 (Nov. 20, 2003); *Unions and Workers to Protest High Tech Offshoring*, WashTech News at http://www.washtech.org/wt/news/labor/display.php?ID_Content=4616 (Sept. 15, 2003).

150. See *supra* note 149.

151. Gruenberg, *supra* note 107.

152. *Id.*

153. See Zafirovski, *supra* note 126 and accompanying text; see also Christian E. Weber et al., *Worker's Rights and Financial Stability*, 35 REV. RADICAL POL. ECON. 287, 295 (2003).

154. William B. Barker, *Optimal International Taxation and Tax Competition: Overcoming the Contradictions*, 22 NW. J. INT'L L. & BUS. 161 (2002).

155. *Id.* at 184-85.

156. *Id.* at 171-84.

but bizarre where jockeying for capital may improve welfare in one nation but undermine it in another.¹⁵⁷ Fear over the loss of the mobile tax base as it tries to keep pace with the race to the bottom in this regard is real.¹⁵⁸ Globalization has meant a heavier burden on less mobile tax bases including consumption, labor, property, and increased administrative costs and compliance on tax authorities and taxpayers.¹⁵⁹ This results in fewer public benefits.¹⁶⁰

The present international tax system based on source taxation, which moors the right to tax to the jurisdiction where the income has arisen, overlooks principles of inter-nation equity.¹⁶¹ Economic efficiency and equity compel progression towards an optimal approach that places tax consequences where they would logically fall. This means the return on capital is sourced to the country from which it came.¹⁶² "Equity among governments requires the assignment of the tax base exclusively to the home because its meritorious conduct provides the environment for the production of the goods, its economy suffers a large loss in income and jobs on account of its export, and the host benefits greatly, disproportionately to the benefit it provides."¹⁶³ The excess of normal return on capital, "economic rent," is left to the capital-importing nation because that nation has provided the system responsible for the creation of the economic rent.¹⁶⁴ This approach minimizes the effects of tax competition because the tax base on capital does not shift when capital is mobile. It also removes the influence of tax incentives installed by capital importing nations in companies' decisions to locate abroad.¹⁶⁵

VII. Unsustainable Contradiction

Maintaining our world is on course to becoming one global economy, while adhering to a *United Fruit v. American Banana Co.*¹⁶⁶ perspective on the "global rules of the game," creates an unsustainable contradiction.¹⁶⁷ The concerns present in today's international market

157. *Id.* at 172.

158. *Id.* at 180.

159. *Id.* at 165.

160. *Id.* at 173.

161. *Id.* at 185.

162. *Id.* at 162.

163. *Id.* at 205.

164. *Id.* at 213.

165. *See supra* note 3.

166. *United Fruit v. American Banana Co.*, 213 U.S. 347 (1909).

167. Eleanor M. Fox, *Can We Solve the Antitrust Problem of Globalization by Extraterritoriality and Cooperation? Sufficiency and Legitimacy*, 48 ANTITRUST BULL. 355, 356 (2003).

are the same as the ones found in allegations brought against the notorious United Fruit Company¹⁶⁸ (now Chiquita¹⁶⁹). In *American Banana*, the U.S. Supreme Court heard claims brought by American Banana Co. alleging that United conspired with the Costa Rican government to run them out of business.¹⁷⁰ Since the conduct occurred within a foreign jurisdiction, the Court established a presumption against the extraterritorial application of domestic antitrust law, which has generally been upheld across the board.¹⁷¹ International juridical abstention from the doctrine of comity¹⁷² presents many quandaries when seeking to hold domestic corporations accountable for what would be considered crimes or civil violations in the U.S., but which take place in foreign states. As this quandary, for the most part, remains unresolved, it should come as no surprise that the circumstances surrounding present day EPZs are no less discerning than the issues raised in *American Banana*. As markets spill over geographic boundaries, so that extraterritoriality places players beyond the reach of the sovereign and simultaneously beyond reproach in their new home due to an economic symbiosis, the world is at risk of the cartelization of industry.¹⁷³ Arguably, this cartelization has already taken place. However, positive parallels can be drawn between the internationalization of antitrust law¹⁷⁴ and the internationalization of labor law.¹⁷⁵

VIII. Globalization Rejuvenates One of the Oldest UN Organizations

There is no doubt the consequences of globalization have engendered a worldwide reevaluation of the capacity of one of the United Nations' Specialized Agencies, the International Labor Organization (ILO).¹⁷⁶ Following World War I, the social and economic

168. SELECTED POEMS OF PABLO NERUDA 148-51 (Ben Litt trans., Grove Press 1961) (depicting the United Fruit Company's support of various dictatorships in Latin America as well as the exploitation of indigenous workers and resources).

169. Penny Bonda & Katie Sosnowchik, *Banana Split*, GREEN AT WORK, July/August 2003, at 18.

170. See *American Banana*, 213 U.S. at 355.

171. *Id.*

172. THOMAS BUERGANTHAL & HAROLD G. MAINER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 178 (2d ed. 1990). "[C]omity is the principle most accurately characterized as a golden rule among nations—that each must give the respect to the laws, policies, and interests of others that it would have others give its own in the same or similar circumstances." *Id.*

173. Fox, *supra* note 167, at 356-57.

174. See Leigh R. Lamendola, *The Continuing Transformation of International Antitrust Law And Policy: Criminal Extraterritorial Application of the Sherman Antitrust Act in United States v. Nippon Paper Industries*, 22 SUFFOLK TRANSNAT'L L. REV. 663 (1999).

175. Fox, *supra* note 167, at 357.

176. WEISSBRODT ET AL., INTERNATIONAL PROTECTION OF HUMAN RIGHTS: LAW,

upheavals manifested in worker movements based upon Marxists principles that altered the political regimes of Europe led the Allied parties to the 1919 Peace Conference at Versailles to include the establishment of an organization to contribute to the goals of “universal and lasting peace” based on “social justice.”¹⁷⁷ The ILO was designed to respond to the destabilizing effects of a race-to-the-bottom, as is evident by the preamble to its constitution which states, “[T]he failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”¹⁷⁸ In 1946, by agreement with the UN, the ILO became a specialized agency.¹⁷⁹ A unique feature of the ILO is its tripartite composition of government, worker, and employer representatives.¹⁸⁰ The diplomatic process benefits from the added input of the two generally polarized factions in ensuring that an accord is reached between the relevant interests in establishing international labor standards which would be applicable to them.¹⁸¹ As the ILO nears its centennial anniversary, dramatic changes brought about by the progress of information technology have revolutionized the employer-employee relationship while reinvigorating the discourse on the necessity of international labor standards.¹⁸²

The debate over whether globalization is the cure or the cause of economic woes¹⁸³ continues and a consensus on this dispute can only be reached if the issues are narrowed so as to filter through the rhetoric¹⁸⁴ and if the dialogue can occur in some widely recognizable institution. In large part, the ILO is giving this global issue a home.

POLICY AND PROCESS, at xxxv (3d ed. 2001).

177. JILL MURRAY, TRANSNATIONAL LABOUR REGULATION: THE ILO AND EC COMPARED 35-37 (Kluwer Law International 2001).

178. About the ILO, Who we are: ILO Constitution, International Labour Organization at <http://www.ilo.org/public/english/about/iloconst.htm#pre> (last update: 2 May 2001); see also Murray, *supra* note 177, at 37.

179. 2 RUDOLF BERNHARDT, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1150 (1992).

180. Structure of the ILO, International Labour Organization, at <http://www.ilo.org/public/english/depts/fact.htm> (last updated: 26 September 2000) [hereinafter “Structure”].

181. NICOLAS VALTICOS & GERALDO W. VON POTOBOSKY, *International Labour Law*, (Supp. 1994) in 1 INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS, para. 36-7, at 34-5 (Roger Blanpain ed., 1977).

182. See generally HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 102; Murray, *supra* note 177; LABOUR LAW IN AN ERA OF GLOBALIZATION (Joanne Conaghan et al. eds., 2002).

183. Background of the World Commission, World Commission on the Social Dimension of Globalization, at <http://www.ilo.org/public/english/wcsdg/commission/background.htm> (updated 11 March 2003).

184. *Id.*

IX. ILO Overview

A. *The Stage is Set for the Globalization Debate*

As previously mentioned, the ILO's tripartite structure already provides that all relevant interests in the globalization debate are represented.¹⁸⁵ Regrettably, NGO participation at the ILO has been rather minimal compared to other branches of the U.N.¹⁸⁶ Low levels of NGO pressure may be attributed to the tripartite structure where representatives of labor organizations are presumed to be promoting awareness of worker issues.¹⁸⁷ However, in February 2002, the ILO established the World Commission on the Social Dimension of Globalization, which promises to facilitate exchanges between all actors involved, thereby broadening the range of participants.¹⁸⁸ The commission's reports will provide the tripartite Governing Body with guidance for promoting the ILO's agenda in the global market.¹⁸⁹

In a discussion identifying the ILO as the appropriate forum for the globalization debate, a deeper examination of the tripartite group clarifies ambiguity and puts a face to the cast of characters. In dissecting U.S. participation, just as every other nation, the U.S. delegates to the Governing Body represent government, worker organizations, and employer organizations.¹⁹⁰ The U.S. government representatives are officials from the Department of Labor, and include Elaine L. Chao, Secretary of Labor.¹⁹¹ U.S. employer interests are represented by the United States Council for International Business (USCIB).¹⁹² By clicking on the membership list on the USCIB website, you will find that practically every major U.S. corporation is accounted for.¹⁹³ U.S. worker interests are represented by the AFL-CIO, the national union

185. See *Structure supra*, note 180.

186. HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 102, at 25.

187. *Id.*

188. Global Consultations, World Commission on the Social Dimension of Globalization, at <http://www.ilo.org/public/english/wcsdgc/consulta/index.htm> (updated 11 December 2003).

189. *Id.*

190. See Valticos & von Potobosky, *supra* note 181, para. 54, at 42.

191. *United States Representatives*, at <http://www.state.gov/documents/organization/26871.pdf> (last visited Jan. 5, 2004); The United States Department of Labor, Secretary of Labor, at <http://www.dol.gov/index.htm>.

192. ACT/EMP—Adresses of Employers' Organizations—America, International Labour Organization, at <http://www.ilo.org/public/english/dialogue/actemp/links/1998/america.htm> (last update: 6 November 2003).

193. United States Council for International Business, List of USCIB Members, at <http://www.uscib.org/index.asp?documentID=1846> (September 2003).

syndicate.¹⁹⁴

B. The Tripartite Framework: Three Sides, Two Perspectives

It is worth noting that historically, worker organizations have not been included in domestic or international policy making by invitation, but rather through a process that could be more likened to crashing the party.¹⁹⁵ The very essence of unionism consists of consolidating atomized workers in an effort to assert power in what would otherwise be a powerless situation.¹⁹⁶ In the last two decades of the twentieth century, the ILO has noted a global increase in the precarious nature of employment and the reduction of workers' protection.¹⁹⁷ The ILO has attributed the commonality of sympathy strikes to the concentration of enterprises, the globalization of the economy, and the delocalization of work centers.¹⁹⁸ The malevolence of repressive regimes is often visited on labor leaders who resist governments that attempt to suppress or control their organizations.¹⁹⁹ It goes without saying that workers are the underdog in the tripartite entente, and nowhere is this inequity more blatant than in the U.S.

The voting structure for ratification of Conventions in the ILO is weighted in favor of the state.²⁰⁰ State delegates cast two votes in choosing whether to ratify a Convention, the worker and employer delegates each have one vote, and ratification requires a two-thirds majority vote.²⁰¹ For those from the U.S., ILO tripartism evokes a certain industrial familiarity in transcending one of the basic constructs of employer-employee dispute resolution to the international level.²⁰² The ILO arrangement provides for government to sit as neutral between

194. National Trade Union Organisations America and the Caribbean, International Labour Organization, at <http://www.ilo.org/public/english/dialogue/actrav/links/tunions/america.htm> (last updated: 3 July 2003).

195. Murray, *supra* note 177.

196. How and Why People Join Unions, AFL-CIO, at <http://www.aflcio.org/aboutunions/joinunions/> (last visited Jan. 5, 2004).

197. LABOUR LAW IN AN ERA OF GLOBALIZATION, *supra* note 182, at 76 (citing ILO, *Meeting of Experts on Workers in Need of Protection: Basic Technical Document*, (Geneva: ILO, 2000 4-6).

198. *Id.* at 379 (citing ILO, *Freedom of Association and Collective Bargaining* (Geneva: ILO, 1994) 74).

199. HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 84, at 102.

200. Murray, *supra* note 177, at 38.

201. *Id.*

202. LABOR LAW CASES AND MATERIALS, 77 (Archibal Cox ET AL. eds., 13th ed., 2001) (describing three-person arbitration panel where each party appoints one member of the panel).

the two contentious parties.²⁰³ Yet this equilibrium is disturbed, as the post-war Keynesian movement towards maintaining full employment succumbs to neo-liberal deregulation and privatization.²⁰⁴ Protocol of the new economic order proscribes law aimed at achieving social democracy from converging with law regulating international commerce.²⁰⁵

The inevitable alignment of government and corporate perspectives in such a paradigm is made apparent by a simple juxtaposition of a statement made on behalf of the USCIB with the basic tenet of the "Washington Consensus." The "Washington Consensus" has come to be known as an embodiment of the presuppositions espoused by the Washington-based international financial institutions claiming adherence to the free-trade dogma (economic development through trade and foreign investment liberalization, privatization, and deregulation) enables people to afford social justice and human rights.²⁰⁶ A statement from the USCIB website reads, "[T]he key to better labor standards is economic development, which can be achieved through increased trade and investment flows, not sanctions."²⁰⁷ Successive U.S. administrations have towed the corporate line by consistently arguing sanctions should only be used as a last resort in response to human rights violations.²⁰⁸

It is near impossible for workers organizations to contend with such a united global front, especially in light of the fragmented International Trade Union Movement.²⁰⁹ The effects of the alignment of government and corporate perspectives are present in recent ILO Conventions that are incongruous with the organizations most basic principles.²¹⁰ In hindsight, there is no doubt that thriving international commerce is a

203. See Valticos & von Potobosky, *supra* note 181, para. 37, at 35.

204. See LABOUR LAW IN AN ERA OF GLOBALIZATION, *supra* note 182, at 8.

205. See *id.* at 171.

206. See *id.* at 151.

207. The International Labor Organization: The Right Solution, USCIB, at <http://www.uscib.org/index.asp?DocumentID=2234> (last visited Jan. 6, 2004).

208. HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 84, at 102.

209. JOHN P. WINDMULLER, *International Trade Union Movements*, (Supp. 1992) in 2 INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS, (Roger Blanpain ed., 1977).

210. LABOUR LAW IN AN ERA OF GLOBALIZATION, *supra* note 182, at 362 (citing Frances Raday, *The Insider-Outsider Politics of Labour Only Contracting*, 20 COMP. LAB. L. & POL'Y J. 413 (1999)).

ILO convention 181 does not restrict the use of this mode of employment to temporary work, it does not limit the numerical or percentage extent of recourse to leased workers in order to protect core, in-house employment, it does not equate leased workers employment conditions to those of in-house employees of the user enterprise, and it does not pre-empt the use of this employment to undermine collective bargaining.

necessary quotient in improving worker rights around the world, but persisting that transnational companies will have the discipline or ability to achieve such progress without legal standards to guide their way is to commit to an empty resolution.²¹¹ The rumblings of discontent with this precept of the current model of globalization demonstrate its inherent flaw and many speculate on the design of a "Post-Washington Consensus."²¹²

C. *Halfway There*

One of the strongest arguments in favor of conducting the globalization debate towards the ILO is that there would be no need to bicker over the formulation of acceptable international standards because the ILO already prescribes pragmatically designed international standards applicable to the employment relationship by its Conventions.

Of its 185 Conventions,²¹³ those regarding freedom of association and collective bargaining, the abolition of forced labor, nondiscrimination in employment, and the elimination of child labor have been designated by the ILO as "being fundamental to the rights of human beings at work."²¹⁴ Conventions are designed to create international obligations for states that ratify them.²¹⁵ The distinction between the ILO Conventions and Recommendations is that Recommendations are not designed to create obligations, but to provide guidelines for government action.²¹⁶ Ratification of a Convention cannot be made subject to reservations because of the tripartite structure of the ILO.²¹⁷ The fundamental rights paradigm correlates with U.S. jurisprudence where rights contained in the Constitution vary in priority and certain rights have been identified as fundamental, requiring the highest level of judicial scrutiny in cases discerning whether they have been infringed.²¹⁸ If globalization asks the world what minimum

211. *See id.* at 152.

212. *Id.* at 151; Joseph E. Stiglitz, *More Instruments and Broader Goals: Moving Towards the Post-Washington Consensus*, World Institute for Development Economics Research (WIDER) Lecture 1998, available at www.wider.unu.edu (last visited Jan. 8, 2004).

213. ILOEX Database of International Labor Standards, International Labour Organization at <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited Dec. 28, 2003).

214. Fundamental ILO Conventions, International Labour Organization, at <http://www.ilo.org/public/english/standards/norm/whatare/fundam/index.htm> (last update 20 October 2000).

215. Valticos & von Potobosky, *supra* note 181, para. 78, at 50.

216. *Id.* para. 76.

217. *Id.* para. 76.

218. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 695 (2001).

standards must prevail to protect workers, the legal comparativists dedicated to the study of labor law will resound, "The core standards are contained in the Conventions relating to the four 'fundamental human rights.'"²¹⁹

There exist many theories suggesting the means to remedy the absence of a universal "social clause"²²⁰ creating a nexus between world trade and its seminal, peculiar component of labor.²²¹ But the 'fundamental human rights' Conventions conceivably provide the floor on which all employment provisions can stand across all nations and industries.²²² The idea of a world market is not new, and neither is the assertion that the protection of worker rights is indelible from world harmony.²²³ The delay between the conception of these principles and their effectuation brings us to the crux of this comment. While the ILO proffers expertise, diplomacy, and the mobilization of public shame as incentives for countries to ratify its Conventions, its competence does not extend to enforcement nor can it sanction rogue states. Rather, the ILO must rely on cooperation.²²⁴ To bridge the gap between naivety²²⁵ and practicality, the realization of a "fundamental human rights" factor in the workings of the international market must manifest itself through an organizational "synergy" between the WTO and the ILO.²²⁶

X. More Than Just *Aspirations*

When deflecting criticism for failing to ratify the International Covenant on Economic, Social and Cultural Rights, the U.S. has taken the position that the social and economic rights contained in this treaty are not human rights per se, rather they are more akin to social "aspirations."²²⁷ However, the catalogue of international human rights treaties proves otherwise. The following UN treaties contain numerous

219. See HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 102.

220. See LABOUR LAW IN AN ERA OF GLOBALIZATION, *supra* note 182, at 380.

221. *Id.* at 144 (quoting Polanyi, "labor is the technical term for human beings"). "The answer which 'old' labour law gave to proponents of market ordering was 'labour is not a commodity.'" *Id.* at 146.

222. See generally HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 102; LABOUR LAW IN AN ERA OF GLOBALIZATION, *supra* note 182.

223. Murray, *supra* note 177, at 35-37; HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 102, at 5 (stating as long as nations have traded, states and employers have usually resisted moves to erect enforceable labor standards).

224. HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 102, at 164.

225. LABOUR LAW IN AN ERA OF GLOBALIZATION, *supra* note 182, at 148.

226. HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 102, at 165.

227. *Id.* at 24.

rights relating to work; the Universal Declaration of Human Rights,²²⁸ the International Covenant on Economic, Social and Cultural Rights,²²⁹ and the International Covenant on Civil and Political Rights.²³⁰ The aforementioned ILO conventions designated as fundamental to the rights of human beings at work lend further support to the contention that these rights are of no lesser value than any other internationally recognized human rights. Furthermore, worker rights are preserved in regional human rights treaties such as the European Convention on Human Rights,²³¹ which protects the right to join trade unions, and the Charter of Fundamental Rights of the European Union,²³² which contains an entire title on solidarity. Despite the explicit mention of worker rights in all these human rights laws, the U.S. has only ratified two of the eight ILO “fundamental human rights” Conventions.²³³

The ILO’s ‘fundamental human rights’ have been enshrined in U.S. law for over half a century, and continuing to refuse to recognize them internationally creates a double-standard. One may argue the U.S. is exercising caution due to the fact that some of its laws run contrary to ILO Conventions and because the U.S. does not want to be put in a position where international obligations will prevent it from amending its own labor law. An illustrative example on this point may be drawn from the fact that in the U.S. freedom of association includes both the right to join labor organizations (unions) and the right to refrain from joining.²³⁴ In the U.S., this law is known as the right to work and it is unclear whether this negative right is also inherent in the ILO Freedom of Association Convention.²³⁵ Yet, in applying the primary purposes of the ILO to this predicament one comes to an interesting conclusion. One of the purposes for which the ILO was created was to consolidate national

228. Universal Declaration of Human Rights, *available at* <http://www.un.org/Overview/rights.html>.

229. International Covenant on Economic, Social and Cultural Rights, *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

230. International Covenant on Civil and Political Rights, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

231. European Convention on Human Rights, *available at* <http://www.hri.org/docs/ECHR50.html#C.SecII>.

232. Charter of Fundamental Rights of the European Union, *available at* http://www.europarl.eu.int/charter/default_en.htm.

233. The U.S. has ratified the ILO’s Abolition of Forced Labor Convention and the Worst Forms of Child Labor Convention, ILOLEX Database of International Labor Standards, *supra* note 213 (listing state ratifications of ILO Conventions).

234. 29 U.S.C. § 157 (2000).

235. *See* Convention No. 87 Freedom of Association and Protection of the Right to Organize, ILOLEX Database of International Labour Standards, International Labour Organization *available at* <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited Dec. 28, 2003).

labor law.²³⁶ This means once a state creates a protection for workers it will be prevented from adopting any retrograde measures.²³⁷ Clearly, right to work laws are indicative of government measures making it more difficult for unions to organize. Had the U.S. been bound by the Freedom of Association Convention, it would have had a harder time in altering this segment of its labor law.²³⁸ Regardless of its position on this and similar matters, the U.S. must recognize that worker rights are human rights, because as articulated by Virginia A. Leary, "The status of workers rights in any country is a bellweather for the status of human rights in general."²³⁹

XI. Becoming Accustomed

In her chapter on the paradox of human rights as worker rights, Leary makes a sound argument as to why worker rights and human rights are equivalent while countering claims made against the legitimacy of including basic worker rights in customary international human rights law.²⁴⁰ Since freedom of association does not appear in the Third Restatement of the Foreign Relations Law of the United States,²⁴¹ this right may not be perceived as constituting customary law.²⁴² However, Leary notes that the list of rights in the Restatement is not exclusive.²⁴³ She points out that freedom of association meets the criteria under which a human rights norm becomes customary human rights law as set out in the Restatement.²⁴⁴ Leary explains how the long history of the ILO and recognition of freedom of association work to exempt the right at issue from being included in the Restatement regarding customary law because the Restatement includes only those rights generally accepted as

236. Valticos & von Potobosky, *supra* note 181, para. 25, at 29.

237. *Id.*

238. *Id.*

239. HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 102, at 22.

240. *Id.* at 22-34.

241. 2 Restatement (Third) of the Foreign Relations Law of the United States, sec. 702.

242. HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 102, at 31.

243. *Id.* at 32.

244. *Id.*

Those criteria include widespread adherence to instruments containing the norm (ILO Constitution, International Covenant on Civil and Political Rights and Economic, Social and Cultural Rights), declarations of international bodies (ILO commissions and committees), the incorporation of the provision in national constitutions and laws, and international organizations activities and laws. Freedom of association might more clearly satisfy these criteria than some of the norms listed in the Restatement.

customary law as of 1987.²⁴⁵ Lastly, we are reminded that the Restatement is only representatives of U.S. conclusions concerning international law.²⁴⁶ Additionally, the sheer number of conventions and the details of their design contribute to the fact that the basic human right upon which all other conventions are founded must be part of customary international human rights law.²⁴⁷

XII. Guarding Against the Blatant and Arriving at the Bread and Butter

Evidently, in grave cases where workers run the risk of execution or imprisonment because of their affiliation with a union, worker rights such as the right to organize trade unions or the right to a safe and healthy work environment become secondary concerns due to the immediate threat to life.²⁴⁸ Concentrating on the egregious violations obfuscates the economic and political repartee perpetuating these abject occurrences.²⁴⁹ The rally for democracy in the People's Republic of China has been characterized as a student movement and while an accurate characterization, it downplays both the contributions workers have made to this movement as well as the consequences of their involvement.²⁵⁰ Following the massacre in Tiananmen Square, the ILO Committee on Freedom of Association investigated complaints lodged by the International Confederation of Free Trade Unions (ICFTU) that the government of China was violating its obligation under the principle of freedom of association by permitting the killing, imprisonment, and harassment of workers attempting to form independent trade unions.²⁵¹ The government of China has responded to the allegations claiming it is punishing these workers for their criminal acts, not for their pursuance of the right to organize.²⁵² Aside from this harsh reality, as of 1994 China has made significant adjustments yielding somewhat mixed success in expanding contract-based employment in large firms, and introducing new labor legislation tightening the regulation of the private sector.²⁵³

The basic premise underlying the need for interaction between the ILO and international trade organizations militates subduing repression of basic worker rights to ensure the security to pursue collateral rights.²⁵⁴

245. *Id.*

246. *Id.*

247. Valticos & von Potobosky, *supra* note 181, para. 75-76, at 50.

248. HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 102, at 23.

249. *See id.*

250. *Id.*

251. *Id.* at 29-30.

252. *Id.* at 30.

253. Frederic C. Deyo & Kaan Agartan, *supra* note 143, at 68.

254. *See* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note

The IT outsourcing phenomenon is indicative of the quagmire that is today's globalization. Albeit India has an extensive system of labor law²⁵⁵ and IT work could not typically be conducted in abhorrent conditions, the recent flood of transnational IT companies mandates the establishment of "bread and butter" working conditions for the Indian IT Industry.²⁵⁶ Many questions arise in hammering out these provisions. Pay rates must be established, concerns about ergonomics must be addressed, hours and overtime pay requirements must be met, and Indian workers will want information on comparative wage rates in order to discern whether they are receiving a fair share for their contributions. After all, the IT companies will still be charging the same rates while getting cheaper labor.²⁵⁷ Also, the issue of displaced workers in the U.S. must be analyzed to determine whether the benefits of development and efficiency outweigh the weakening of the world's largest consumer base.²⁵⁸ The possibility of loosing work to nations that offer cheaper labor is also a reality for India as its IT subcontractors must compete with China's.

This is the platform of the international union movement today and as always workers must press for these issues to be included in the debate over globalization. The new labor movement is growing on the national level as evidenced by WashTech in the U.S. and the IT worker forums in India, yet its *raison d'être* must be to play a contributing role in shaping international global economic policy by injecting its interests into the debate.²⁵⁹ Unions must gear towards making their presence felt in international conferences such as the World Summit on the Information Society which will be held in November of 2005.²⁶⁰

XIII. Filling the Void: Joint ILO-WTO Framework

The WTO and the ILO are two specialized agencies of the UN respectively supervising international commerce and monitoring adherence to international labor standards. Daniel S. Ehrenberg suggests a model of cooperation to initiate the dialogue and joint action of these

102, at 23.

255. Natlex—Database of National Labor Laws, International Labour Organization, at <http://natlex.ilo.org/scripts/natlexcgi.exe?lang=E> (last visited Jan. 8, 2004).

256. See Andrew Bibby, *Union "dot orgs" Come of Age*, World of Work magazine, Department of Communication—ILO available at <http://www.ilo.org/public/english/bureau/inf/magazine/index.htm> (last update: 25 November 2003).

257. See *id.*; see also Andrew Bibby, *IT Professional's Forum in India*, World of Work magazine, Department of Communication—ILO available at <http://www.ilo.org/public/english/bureau/inf/magazine/42/itindia.htm> (last update: 12 June 2002).

258. See *infra* p. 14 (discussing GAO study of IT outsourcing).

259. See Bibby, note 256.

260. *Id.*

sister organizations.²⁶¹ In bringing the expertise and analysis of the ILO to bear on WTO trade regulation, both organizations would contemporaneously provide for the promotion of social and economic development.²⁶² The full equation entails combining ILO expertise with the WTO's enforcement regime for addressing unfair trade practices.²⁶³ The enforcement process would consist of two stages; one being a determination or discovery stage leading to the second stage. If a severe violation of some labor right is found to exist, the second stage would entail designing a remedy and conditions for compliance.²⁶⁴ In selecting a remedy, the ILO-WTO Dispute Panel would restrain itself to applying economic sanctions in only those instances where labor rights violations appear to be persistent.²⁶⁵ The primary remedial measure would consist of arranging a cooperation program administered by the ILO for the purpose of bringing the infringer into alignment with ILO standards.²⁶⁶ Under such a system, the global economy could expand under the aegis of a multilateral organization and less inhibited by claims of protectionism.²⁶⁷ Developing countries would be free to resist trading social disintegration for the promise of economic integration.²⁶⁸ Consequently, developing countries could not penalize businesses that insist to adherence of certain labor standards when looking to invest in foreign markets or make bids for employment contracts by committing to their less adamant competitors.²⁶⁹ Ehrenberg concludes by stating, "By viewing violations of international labor law not only as human rights violations but also as unfair trade practices . . . the self interests of each state would be harnessed to promote and enforce human rights for all."

Due to the prevalence of regional trade agreements, some argue the harmonization of labor law will occur on a regional basis rather than on a global level and that it will be highly dependent on the similarities in the economic systems involved.²⁷⁰ Reluctance on the part of both governments and multinational companies to develop, enforce, and harmonize labor standards through the regional approach begs the

261. See HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, *supra* note 102.

262. *Id.* at 165.

263. *Id.*

264. *Id.*

265. *Id.* at 166.

266. *Id.*

267. *Id.* at 176.

268. *Id.*

269. LABOUR LAW IN AN ERA OF GLOBALIZATION, *supra* note 182, at 143.

270. Gary Vause, *Labor Issues in International Trade*, 51 LAB. L.J. 86, 92 (2000) (contrasting EU harmonization of labor law to the more isolated approach under the NAFTA Labor Side Agreement).

question whether this would be a futile endeavor.²⁷¹ Also the indefinite future of regional trade agreements in light of recent developments is grounds for favoring a more centralized approach.²⁷² Support for a synergy between the WTO and the ILO is present in observations recognizing the need for constitutionalism in international trade where there can be a balancing of the different interests involved.²⁷³ Incorporating already existing labor protections in effect in regional trade blocs and building upon them connotes an approach more sensitive to local concerns.²⁷⁴ When negotiating future trade agreements, awareness of the host of activities initiated by regional trade blocs to address the impact of economic activity on social policy will ameliorate North versus South tensions.²⁷⁵ Correspondingly, a centralized model such as WTO-ILO interaction, would require an abandonment of certain ILO precepts.²⁷⁶ Whereas the ILO focuses on “developmental” standards, it may have to shift to a “fundamental worker rights” approach that accounts for each states ability to comply and avoids imposing unrealistic standards.²⁷⁷

The proposals above, along with numerous proposals not mentioned here, clearly demonstrate the question is not will international labor law materialize in a manner reminiscent of other international legal fields, but rather over how it will materialize.

XIV. Conclusion & Observations

The nature of IT work eliminates the possibility that outsourcing in this industry will engender public outrage because of nefarious, egregious abuses of fundamental worker rights that are more visible in other industries. Yet, the absence of severe isolated cases of abuse does not warrant dismissing the subtle threat this trend poses to fundamental worker rights. Much is made of the fact that IT workers find themselves in a highly individualistic field unwilling to conform to the contours of unionization. However, little is mentioned of the surrounding

271. *Id.* at 93.

272. See Howard Mann, *NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA: International Investment Agreements: Building the New Colonialism?*, 2003 AM. SOC'Y INT'L L. PROC. 97, 247.

273. Thomas Cottier, *Limits to International Trade: The Constitutional Challenge*, 2000 AM. SOC'Y INT'L L. PROC. 94, 220.

274. Adelle Blackett, *Toward Social Regionalism in The Americas*, 23 COMP. LAB. L. & POL'Y J. 901, 923-55 (2002).

275. *Id.* at 962-64.

276. Carlin Meyer, *International Labor Standards in the WTO's "New World Order": Towards "Development Based" Standard Setting*, 59 GUILD PRAC. 21, 22 (2002).

277. *Id.* at 25.

circumstances that should be examined to determine whether Freedom of Association is even a tangible right available to IT workers. These circumstances include:

- The constant threat of outsourcing because of mobility and foreign cost savings as well as tax incentives
- The pitting of workers as well as countries against one another in a system that does not promote competition but has resulted in a race to the bottom
- Competition from H1-B visa workers that are not likely to organize themselves
- Absence of labor standards in international trade agreements allowing companies to capitalize on global inequities
- Minimal representation of worker interests in international trade policy
- Scant coverage by the media of this issue, and avoidance of critical analysis
- Recent economic downturns and high unemployment
- The absence of alternative occupations for displaced workers

The author recommends mitigating the affect these circumstances have on Freedom of Association in the IT industry by:

- Reinvesting in international organizations such as the ILO and conferring in it enforcement powers, preferably via the WTO sanctioning process
- Greater transparency in international trade organizations
- Consulting international worker representatives when formulating international trade policy
- Progression towards a sounder international tax policy
- Taking the opportunity to re-examine the necessity of the H1-B program in light of the burst of the dot-com bubble
- Resorting to alternative media sources that are not driven by a

corporate agenda that detracts from the gravity of this issue, or that presents it as novel, or blurs it in the flurry of sound bites on global terrorism and U.S. military occupation

- Mobilization of the IT workforce around economic crises much like the growth of unions in the 1930s, where collective action serves to improve the workers economic lot while reshaping both foreign and domestic policy

- Increased investment in training programs for displaced workers, as well as a recommitment to the fields of math and computer science improving access to a technical education beginning with programs designed to generate interest early in a student's life

- IT workers must align themselves with a broad base coalition aimed at reforming globalization and willing to offer public support

As always, the onus remains upon the workers in the industry to ensure these measures are taken. The initial stage of building momentum has occurred in a new and distinct way. IT workers are organizing under a different paradigm. They are rallying around the fact that the ability to do business in underdeveloped countries has become a license to in effect turn back the clock on one hundred years of social progress. Yet, animosity based in nationalism should not be the driving force. Righteous indignation should arise from resentment to profiteering by corporations at the expense of universal labor rights. The installation of readily available, international labor standards, should serve to address the most egregious worker rights abuses as well as the destabilizing effect outsourcing has on worker rights.

As many succumb to the revelations mandating the current model of globalization undergo a drastic overhaul, the U.S. cannot remain recalcitrant. It must play a leading role in securing worker rights and economic stability through acceptance and implementation of international labor standards in its trade agreements. As companies escape into the penumbra where labor law is dim, the U.S. must shine a beacon forcing rogue multinationals into the light where workers are secure. Yet despite foreboding economic indicators, unbridled corporate abuse of worker rights, and history's hard learned lessons, change will only come from the impetus of today's workers.

