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NAFTA, GATT, AND THE CURRENT FREE TRADE SYSTEM: A DANGEROUS DOUBLE STANDARD FOR WORKERS' RIGHTS

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The single, clearest, most direct result of economic globalization to date is a massive global transfer of economic and political power away from national governments and into the hands of global corporations and the trade bureaucracies they helped create. This transfer of power is producing dire consequences for the environment, human rights, social welfare, agriculture, food safety, workers' rights, national sovereignty, and democracy itself.¹

I. INTRODUCTION

A. *The 1999 Seattle Round and WTO's Future*

From November 30th through December 3rd 1999, the 135 member States of the World Trade Organization (WTO)² were scheduled to convene for a round of negotiations in Seattle, Washington "to review the global trading system and ensure its dynamism and responsiveness in the years ahead."³ The Seattle Round is ninth in a series of "negotiating rounds," including the Uruguay Round of 1986-94 that resulted in the official birth of the WTO.⁴ Each round has built off of the last and each has brought in more member countries to negotiate rules for liberalized

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1. The International Forum on Globalization is a research and educational institution comprised of 60 researchers, scholars, activists, and economists from 20 countries. DEBI BARKER & JERRY MANDER, *INVISIBLE GOVERNMENT 1* (International Forum on Globalization, Oct. 1999)[hereinafter *INVISIBLE GOVERNMENT*].

Editor's Comment: This article has not been revised since spring 1999.

2. AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, adopted 14 Apr. 1994, entered into force, Jan. 1, 1995, *reprinted in* 33 I.L.M 1125 (1994)[hereinafter *WTO AGREEMENT*]. In the words of the WTO itself: "... the World Trade Organization (WTO) is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible." See <<http://www.wto.org/wto/about/about.htm>> (visited Dec. 22, 1999). The WTO currently has 135 members, including both industrial and developing nations.

3. World Trade Organization, *Seattle: What's At Stake 1* (1999) [hereinafter *What's at Stake*].

4. *WTO AGREEMENT*, *supra* note 2.

trade.⁵ The Seattle Round was considered the most significant meeting of the members since the 1994 establishment of the WTO because the members intended to map out the WTO's work agenda for the months and years ahead.⁶ It was this part of the agenda that roused controversy between the government bureaucrats and citizen action groups, whose visions for the future of the WTO were in direct conflict.

To many, and particularly to organized labor, the Seattle Round constituted a rare opportunity to capture the attention of global bureaucrats who for years have been crafting international trade rules without democratic participation, transparency or accountability. As early as November 26, 1999, fair trade⁷ activists from all over the world began sprinkling into Seattle homes, hotels and streets — just the beginning of an ultimate activist monsoon. It was earlier predicted that fair trade demonstrators would outnumber the bureaucrats of the WTO by the thousands, and some international trade bureaucrats and lawyers in Washington, D.C. anticipated "real blood and guts."⁸ Their predictions came true . . . with a vengeance.

The controversy between organized labor and the trade bureaucrats of the WTO, while multifaceted, can be plainly stated: the WTO openly declares that labor is not on the agenda and labor thinks it ought to be. According to the WTO, "there is no work on the subject [of labor] in the WTO, and it would be wrong to assume that it is a subject that 'lies ahead.'"⁹ Rather than integrate labor standards directly into WTO rules and agreements, WTO members defer the issue to the International Labour Organization (ILO): "The International Labour Organization (ILO) is the competent body to set and deal with these standards and we affirm our support of its work in promoting them."¹⁰ Conversely, the AFL-CIO,¹¹ America's largest labor union and an avid opponent of the existing WTO,¹² argues:

5. WHAT'S AT STAKE, *supra* note 3, 10-12 (1999); *See also discussion infra* note 52.

6. *Id.* at 15 (1999).

7. The term "fair trade" is often used by opponents of "free trade" agreements such as the North American Free Trade Agreement, the World Trade Organization.

8. Helene Cooper, *Will Human Chains and Zapatistas Greet the WTO in Seattle? Globalization Foes Plan to Hit November Trade Event; 'Make Love, Not Profit,'* WALL ST. J., July 16, 1999. [hereinafter *Make Love, Not Profit*].

9. WORLD TRADE ORGANIZATION, TRADING INTO THE FUTURE 60 (2d ed. 1998)[hereinafter *TRADING INTO THE FUTURE*].

10. *Id.* at 61; *see also infra* notes 134-138 for further discussion of the ILO.

11. Add definition and explanation of AFL-CIO.

12. *See generally* AFL-CIO, WORKERS' RIGHTS AT THE WORLD TRADE ORGANIZATION AND IN U.S. TRADE POLICY 5 (Publication No. 99155-06-0-5)[hereinafter *WORKERS' RIGHTS*](Unlike some organizations that propose the WTO be completely dismantled, the AFL-CIO takes a reformist approach: calling for the WTO to, among other things, establish a working group on workers' rights, to fix current trade agreements like the North American Free Trade Agreement (NAFTA), and to incorporate enforceable labor stan-

WTO failure to enforce minimum labor standards results in ongoing exploitation of workers in the global market . . . The WTO enforces intellectual property rights, market access and government regulation of investment – and there is no reason why it also cannot enforce basic minimum standards for the humane and decent treatment of workers.¹³

B. Summary

This article compares the corporate rights embodied in the North American Free Trade Agreement (NAFTA) and the GATT/WTO with workers' rights embodied in the North American Agreement on Labor Cooperation (NAALC) and the International Labor Organization (ILO), suggesting that corporations enjoy far greater protection in the global marketplace than workers. This article further argues that unless the system is reformed, workers will continue to be exploited at the expense of corporate profits. By contrasting the NAFTA and the GATT/WTO enforcement mechanisms for commercial rights versus labor rights, this article attempts to expose how the current free trade paradigm procedurally and substantively promotes a double standard. These inequities reflect a fundamental flaw perpetuated in international trade policy today — that international commercial interests can somehow be divorced from the very labor market that fuels globalization.

Section two of this article presents a general background of the NAFTA and the GATT/WTO, including discussion from both sides of the debate and current efforts to clone the agreements in new trade accords. Section three compares the NAFTA's rights for corporations with the NAALC's rights for labor, noting two specific cases brought by corporations under the NAFTA dispute settlement provisions. Similarly, section four compares the GATT/WTO rules governing corporate rights with the ILO principles addressing labor standards. Section five presents conflicting progress reports in the years since NAFTA and GATT/WTO took effect. Finally, this article concludes with recommendations and alternatives to reshape the current trade policy.

II. NAFTA, GATT/WTO, AND THE WALLS CAME TUMBLING DOWN

Two major congressional votes in the early 1990's continue to shape the direction of international trade policy today – the 1993 approval of NAFTA and the 1994 approval of the GATT and the WTO.¹⁴

dards into all new trade agreements).

13. *Id.*

14. DAVID J. SAARI, GLOBAL CORPORATIONS AND SOVEREIGN NATIONS: COLLISION OR

A. NAFTA

1. Background

Although Ronald Reagan was the first U.S. President to propose a trilateral free trade pact between Canada, the United States and Mexico, no one took the notion seriously until the Bush Administration picked up the idea in 1991.¹⁵ At the time, Mexican President Carlos Salinas de Gortari had undertaken major steps to revitalize Mexico's economy, including "the pursuit of a free trade pact with Washington."¹⁶ On February 5, 1991, after the Salinas and Bush Administrations privately affirmed mutual interest, President Bush officially announced to Congress his commitment to negotiate a North American Free Trade Agreement, calling NAFTA "the first step toward a hemispheric common market."¹⁷

Since its inception, the heart of the NAFTA has been to open up markets between Canada, Mexico and the United States.¹⁸ Some of NAFTA's key provisions include:

Elimination of tariffs on North American industrial products within 10 years of implementation;

Elimination of non-tariff barriers and other trade distorting restrictions, such as import licenses, local content, local production, and export performance requirements;

COOPERATION? 103 (Quorum Books 1999) (the author asserts that the beneficiaries of the NAFTA and GATT/WTO trading system consist of CEOs from *Fortune 500* global corporations and World Bank and International Monetary Fund officials, while the non-beneficiaries consist of the "weaker public voice" and "downsized industrial employees.") [hereinafter SAARI.]

15. WILLIAM A. ORME, JR., UNDERSTANDING NAFTA 34 (University of Texas Press 1996)[hereinafter UNDERSTANDING NAFTA].

16. *Id.* at 32.

17. *Id.* at 33-4.

18. North American Free Trade Agreement, signed 1993, Canada, Mexico, United States, available at <<http://www.sice.oas.org/trade/nafta/naftatce.asp>>(visited Dec. 4, 2000 [hereinafter NAFTA])(The North American Free Trade Agreement officially entered into force in 1994 and opened the borders for free trade between Mexico, the United States and Canada. The principle objectives of NAFTA are defined in the first chapter of its text: fundamental principles of national treatment, most-favored-nation (MFN) treatment, and transparency; a commitment to facilitate the transboundary movement of goods and services; and a commitment to provide adequate and effective protection and enforcement of intellectual property rights) see NAFTA, art. 102; see also *NAFTA Key Provisions* <<http://www.mac.doc.gov/nafta/3001.htm>>(visited Feb. 26, 2000)[hereinafter *NAFTA Key Provisions*].

Elimination of investment conditions, such as technology transfers, use of domestic goods or services, set export levels or percentages, and limits on percentage of imports relative to exports;

Guarantees that investors be treated the same as domestic investors (national treatment);

Guarantees to investors the right to fair compensation in the event of expropriation, the right to dispute settlement and monetary damages (legal standing), and the right to repatriate profits and capital (capital mobility);

Expansive protection of intellectual property rights; and

Access to government procurement.¹⁹

2. Proponents of NAFTA and Their Promise to Labor

Congress had not considered the notion of incorporating core labor standards during NAFTA negotiations with Mexico and Canada, rather, their focus was strictly commercial.²⁰ Labor issues became a central part of the debate when Bill Clinton made a 1992 campaign pledge to complete the NAFTA negotiations — but with added protections for labor, the environment and other social issues.²¹

Initially, Clinton was pushing for a NAFTA virtually identical to the Reagan-Bush proposals already on the table. It was not until massive opposition erupted from organized labor and the environmental community, both important constituents to Clinton's campaign, that he pledged to include side agreements on the issues.²² This strategy managed to satisfy the business lobby by keeping labor issues out of the body of the agreement, while appeasing labor groups by not wholly ignoring labor standards.²³ Clinton promised that the proposed labor side agreement would include "strong resolution mechanisms and effective remedies,"²⁴ and a team of Clinton administration economists projected

19. *Id.*

20. CENTER FOR COMMERCIAL LAW STUDIES, *NAFTA AND BEYOND*, 450 (Joseph Norton and Thomas L. Bloodworth, eds.) (1995)[hereinafter *NAFTA AND BEYOND*].

21. See discussion *infra* note 177.

22. Jerome Levinson, *Certifying International Worker Rights: A Practical Alternative*, ECONOMIC POLICY INSTITUTE BRIEFING PAPER, at 2 (May 1999)[hereinafter Levinson].

23. *Id.*

24. *Labor, Business, Agriculture, and Environmental Issues Relating to NAFTA: Hearings Before the Committee on Finance*, 103rd Cong. 169 (1993) [hereinafter 1993 Hearing] (preliminary Analysis by the AFL-CIO).

figures of 200,000 new jobs for Americans in the first two years of NAFTA alone.²⁵

Other proponents of NAFTA made dramatic projections that U.S. export increases to Mexico would create thousands of new, high-paying jobs for Americans. In 1993, Robert B. Reich, Secretary of the U.S. Department of Labor, testified before the U.S. Senate:

In addition to generating more jobs in the United States, NAFTA will lead to better jobs. Jobs created by expanded trade typically are the sorts of higher wage, higher skilled jobs in which the future of the American work force depends. Missing the boat on NAFTA, we will prevent us from reaping these potential gains.²⁶

Senator Lloyd Bentsen also testified to the U.S. Senate that:

Now 700,000 Americans depend on trade with Mexico for their jobs. And things are going to get even better with NAFTA. We calculate that we'll pick up 200,000 more jobs in the next two years alone, and jobs related to trade with Mexico pay about 12 percent better than average . . . This agreement is clearly good for America, and it's clearly good for American workers. We're getting a deal here.²⁷

To ensure that the NAFTA gain much needed approval in the House, the Clinton administration sought assistance from business leaders. In an effort to dispel some of the widespread concern that NAFTA would encourage U.S.-based companies to relocate in Mexico where labor and other standards were lax, Clinton urged major companies to formally pledge that they would not relocate their plants if NAFTA were approved.²⁸ U.S. companies balked at the idea of being bound to such a pledge and ultimately refused to sign.²⁹

The business leaders did, eventually, come to the rescue because they were committed to one thing: passage of a NAFTA without labor or environmental obligations at any cost. To ensure that this goal be met, a coalition of 2,700 companies, including most of the *Fortune* 500, launched a massive campaign called USA*NAFTA.³⁰ USA*NAFTA inundated the American public with radio, television, and news paper ads attempting to ease suspicion about NAFTA benefiting special-interests

25. NAFTA AND BEYOND, *supra* note 20, at 453.

26. 1993 Hearing, *supra* note 24 at 56-57 (statement by Robert B. Reich, Secretary of the U.S. Dept. of Labor).

27. *Id.* at 25-7 (statement of Hon. Lloyd Bentsen, Secretary, U.S. Dept. of the Treas).

28. Asra Q. Nomani, *Clinton Urges Firms to Keep Jobs in U.S.*, WALL ST. J. Nov. 11, 1993.

29. *Id.*

30. *Businessmen for NAFTA*, THE ECONOMIST, Oct. 16, 1993.

at the expense of American workers.³¹

3. NAFTA's Labor Opponents: Promises Not Enough

Opponents of NAFTA argued that even with the labor side agreement, the pact failed to adequately protect labor rights.³² They argued that while private corporations are entitled to enforceable rules protecting their assets, workers are denied enforcement rules to protect their livelihoods.³³

Notwithstanding Clinton's strategy to gain NAFTA approval, the NAALC labor side agreement was not enough to squelch the opposition of organized labor.³⁴ Labor unions predicted that massive job loss and wage stagnation would result in part from U.S. based companies relocating south of the border to capitalize on cheaper markets and lax labor laws.³⁵ In addition, labor advocates predicted that Mexico's already poor enforcement of labor laws would worsen and thus further encourage a southbound exodus.³⁶ A preliminary analysis of the NAFTA by the AFL-CIO stated:

The AFL-CIO believes that the [NAFTA] . . . would be ruinous to the U.S. economy, resulting in the loss of hundreds of thousands of American jobs and a general decline in wages. One of the agreements' primary – though far from only – flaws is its complete failure to promote the upward harmonization of living standards by linking market access with the enforcement of worker rights and labor standards . . . the Clinton campaign promised to solve the problem by negotiating a side agreement . . . [u]nfortunately, the final product negotiated by the Clinton administration falls far short of its stated purpose.³⁷

Additional critics estimated job loss resulting from NAFTA at over 500,000 and anticipated that companies in the U.S. would use the NAFTA as leverage against their workers, thwarting union organizing

31. DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD*, 144-145 (1995)[hereinafter KORTEN].

32. 1993 Hearing, *supra* note 24 (preliminary Analysis by the AFL-CIO).

33. See NAFTA, Chap. 11; *see also* 1993 Hearing, *supra* note 24 (preliminary Analysis by the AFL-CIO).

34. See, e.g., Levinson, *supra* note 22, at 2; and AFL-CIO: 23rd BIENNIAL CONVENTION, '99 RESOLUTIONS (1999) <http://www.aflcio.org/convention99/res1_6.htm> (visited Dec. 20, 1999).

35. See, e.g., Thea Lee, *Happily Never NAFTA: There's No Such Thing as Free Trade*, *THE CASE AGAINST FREE TRADE* 70-77 (Victor Menotti ed., Earth Island Press and North Atlantic Books 1993)[hereinafter *THE CASE AGAINST FREE TRADE*]; and 1993 Hearing, *supra* note 24, at 169 (preliminary Analysis by the AFL-CIO).

36. John P. Isa, *Testing the NAALC's Dispute Resolution System: A Case Study*, 6 AM. U.J. GENDER & LAW 615 (1998).

37. 1993 Hearing, *supra* note 24 (preliminary Analysis by the AFL-CIO).

by threatening to move to Mexico.³⁸ In his statement at the 1993 Senate hearing on NAFTA, Thomas R. Donahue concluded that, all projections aside:

The real story is not that NAFTA has the support of five former presidents. Rather, it is the fact that NAFTA is understood and opposed by the majority of American citizens – autoworkers in Illinois, truck drivers in California, maritime workers on the East Coast. They know that no promise of worker retraining, no breakthrough in technology, no government-business partnership scheme, can bring back the jobs and investment dollars that NAFTA will take from the U.S. under the conditions enshrined by NAFTA.³⁹

When labor unions demanded an equal voice at the NAFTA negotiating table to ensure that labor rights were given the same merit as capital mobility and investment protections, they were ignored, and NAFTA negotiators ultimately crafted an unbalanced agreement bolstering commercial interests at the expense of labor rights.⁴⁰ After exhaustive debate and massive grassroots opposition, the free-trade champions triumphed and NAFTA was implemented January 1st, 1994.⁴¹

B. GATT/WTO

1. *The Birth of the WTO: From Havana to Uruguay*

NAFTA was the first major trade fight . . . A year after NAFTA took effect, a whole new trade regime came into being with the birth of the [WTO] in January 1995, replacing the much looser set of agreements that had regulated world trade since the late forties.⁴²

The decades-long process of approving the GATT and WTO in 1994 actually began in 1948 with the Havana Charter. Struggling to recover from the hardships of World War II and the Great Depression, countries sought economic security through international cooperation.⁴³ To that end, fifty countries convened in 1946 to negotiate expeditious trade liberalization and "to begin to correct the large legacy of protectionist

38. NAFTA AND BEYOND, *supra* note 20, at 451.

39. 1993 Hearing, *supra* note 24, at 168 (prepared statement by Thomas R. Donahue, explain who he is).

40. See, e.g., Lori Wallach, *Hidden Dangers of GATT and NAFTA*, THE CASE AGAINST FREE TRADE, *supra* note 35.

41. See NAFTA, *supra* note 18.

42. Doug Henwood, *Whose Trade?*, THE NATION, Dec. 6, 1999, at 11.

43. WHAT'S AT STAKE, *supra* note 3, at 10.

measures which remained in place from the early 1930s."⁴⁴ This meeting constituted the first of many future negotiating "rounds." Of the fifty participating countries, twenty-three signed what is now known as the Havana Charter.⁴⁵ The Charter had two primary goals: to establish a multilateral set of rules between participating countries and to establish a regulating body of which each contracting party was a member.⁴⁶ The multilateral rules, namely, the General Agreement on Tariffs and Trade (GATT) was a combination of trade rules and "45,000 tariff concessions affecting \$10 billion of trade, about one-fifth of the world's total."⁴⁷ From 1948 until the Uruguay Round in 1994, the GATT operated as the primary *provisional* agreement regulating multilateral trade.⁴⁸ The second goal of the Charter, to establish the International Trade Organization (ITO) as a regulating body, failed primarily due to opposition from the U.S. Congress.⁴⁹ It was not until fifty years later that this goal was finally achieved with the establishment of the WTO.⁵⁰

2. The "New" GATT and the WTO

The Uruguay Round took seven and a half years, almost twice the original schedule. By the end, 125 countries were taking part. It covered almost all trade, from toothbrushes to pleasure boats, from banking to telecommunications, from the genes of wild rice to AIDS treatments. It was quite simply the largest trade negotiation ever, and most probably the largest negotiation of any kind in history.⁵¹

In several rounds of negotiations after the Havana Charter, an ever-growing number of countries convened to expand the skeletal trading provisions outlined in the 1948 GATT.⁵² The Uruguay Round was

44. TRADING INTO THE FUTURE, *supra* note 9, at 8; see also WHAT'S AT STAKE, *supra* note 3, at 11 ("During the 1930s, in the economic and social disaster of the Great Depression, countries turned inwards. . . they resorted to extreme protectionism, raising tariffs and other trade barriers to levels that choked off imports, and setting up discriminatory arrangements that favoured some countries and excluded others.")

45. TRADING INTO THE FUTURE, *supra* note 9, at 8.

46. JOHN CROOME, *Epilogue to RESHAPING THE WORLD TRADING SYSTEM* 333 (World Trade Organization 1999)[hereinafter CROOME].

47. Trading into the Future, *supra* note 9, at 8.

48. *Id.* at 9, 11 (unlike the GATT as reformed in 1994, the 1948 GATT was merely provisional meaning it was never ratified by members' parliaments and therefore did not constitute binding law).

49. *Id.* at 9.

50. CROOME, *supra* note 46, at 333-34.

51. Trading into the Future, *supra* note 9, at 12.

52. See generally CROOME, *supra* note 46, *Foreword*; and TRADING INTO THE FUTURE, *supra* note 9, at 9 (The list of negotiating rounds and their subject matter after Havana include: Annecy on tariffs in 1949; Torquay on tariffs in 1951; Geneva on tariffs in 1956; Dillon Round on tariffs 1960-61; Kennedy Round on tariffs and anti-dumping measures

the most expansive of them all, broadening the 1948 GATT rules from trade in goods to include trade in services, creating the WTO, and constructing an unprecedented dispute settlement mechanism.⁵³ Explicitly omitted from the 1994 GATT and WTO, however, are provisions on core labor standards.⁵⁴

The Uruguay Round was plagued with constant frustrations and seemingly irreconcilable differences that took over seven years to surmount. But even still, negotiating countries were not convinced of the GATT or WTO's actual fruition until the U.S. Congress was ripe for ratification. The negotiating countries had not forgotten 1948, when congressional disapproval caused the demise of the ITO. Unlike the 1948 GATT, this proposal required that each members' parliament ratify its provisions into law. Thus, a defining moment approving the Uruguay Round was when Congress approved the NAFTA.⁵⁵ Negotiating countries viewed NAFTA approval as a crucial positive signal that Congress would not reject the Uruguay Round proposals, and they were right.⁵⁶

Two key provisions of the GATT (also embodied in NAFTA) are "most favored nation"⁵⁷ and "national treatment."⁵⁸ Most favored nation (MFN) requires governments to treat all products equally regardless of their country of origin; and national treatment (NT) requires governments to accord foreign products the same treatment as domestic products. Thus, actual enforcement of the newly adopted ILO Convention on exploitive child labor⁵⁹ is ironically moot because the convention inherently violates these GATT principles — governments cannot ban products made with child labor and favor products that are not.⁶⁰ These

1964-67; Tokyo Round on tariffs, non-tariff measures, and "framework" agreements 1973-79; Uruguay Round on tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, and creation of the WTO 1986-94; and recently the Seattle Round on the future working agenda of the WTO in 1999).

53. CROOME, *supra* note 46, at xiii (summarizing the substantive accomplishments celebrated by negotiators of the Uruguay Round: "... the deep cuts to be made by all countries in their barriers to trade; the coming liberalization, at last, of world trade in agricultural products, textiles and clothing; the far-reaching overhaul of the rules for international trade in goods; the new rules to govern and encourage trade in services and the protection of intellectual property; the strengthened system to settle trade disputes among governments; the new World Trade Organization that will put the whole trading system on firm foundations for the first time.").

54. GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) 1947, concluded at Geneva, 30 Oct. 1947, currently in effect as part of GATT 1994, Annex 1A [hereinafter GATT 1994]; *see also* TRADING INTO THE FUTURE, *supra* note 9, at 60.

55. CROOME, *supra* note 46, at 317.

56. *Id.*

57. GATT 1994, *supra* note 54, art. I.

58. GATT 1994, *supra* note 54, art. III.

59. *See discussion infra* note 181.

60. LORI WALLACH & MICHELLE SFORZA, WHOSE TRADE ORGANIZATION? 175 (Public

provisions are especially powerful when combined with the GATT's unprecedented dispute resolution mechanism.⁶¹

C. Cloning NAFTA and GATT/WTO.

Having won the hard fought battle for NAFTA and GATT/WTO,⁶² the Clinton Administration has wasted no time attempting to replicate the pacts with regional trading blocs around the world.⁶³ Thus, NAFTA's flaws are relevant not only to the three States currently bound by the pact, but also to the countless regions where the Clinton Administration intends to expand NAFTA-like accords. Negotiations to expand NAFTA into Chile have been contemplated for several years with the only hold-up being the fast-track debate⁶⁴ and on-going debate in the Congress contemplates NAFTA-like accords with Africa and the Caribbean Basin.⁶⁵ The NAFTA has also spurred negotiations for the Free Trade Agreement of the Americas (FTAA), a free trade pact that would create one market "from Alaska to the Tierra del Fuego."⁶⁶ The FTAA now has support from every Latin American country except Cuba and would "create a free trade zone of nearly one billion consumers, with a gross domestic product reaching at least \$9 trillion by the year 2005."⁶⁷

Indeed, part of the volatility surrounding the NAFTA and the GATT/WTO is because its proponents extol the agreements as a model for trade policy worldwide. Pointing to "runaway plants, lost jobs, de-

Citizen 1999)(emphasis added) [hereinafter WHOSE TRADE ORGANIZATION?].

61. UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, concluded at Marrakesh, 15 April 1994, entered into force 1 January 1995, Marrakesh Agreement Establishing the World Trade Organization, Annex 2; reprinted in 33 I.L.M. 1226 (1994)[hereinafter UNDERSTANDING ON DISPUTES].

62. The Uruguay Round not only established the member organization, WTO, but also expanded the 1948 GATT, which focused on simply trade in goods, to include trade in services, intellectual property, and to establish the most expansive international dispute settlement system to date. See generally, TRADING INTO THE FUTURE, *supra* note 9.

63. James M. Cooper, *Spirits in the Material World: A Post-Modern Approach to United States Trade Policy*, 14 AM. U. INT'L L. REV. 957, 979-80 (1999).

64. Carol Pier, *Labor Rights in Chile and NAFTA Labor Standards: Questions of Compatibility on the Eve of Free Trade*, 19 COMP. LAB. L. 185 (Winter 1998) (Fast-track authority gives the United States President executive power to negotiate trade agreements and limits Congressional input to a mere "yes" or "no" vote after extremely limited debate and with no power to change or otherwise amend the text. Chilean leaders will not sign a NAFTA with the United States until it has the guarantee of fast-track because they do not want Congressional scrutiny. Due to congressional skepticism and public dissent, Clinton has not yet convinced Congress to renew fast-track authority).

65. Bureau of National Affairs, *Ways and Means Approves Sub-Saharan Trade Measure*, Daily Report for Executives, Jun. 11, 1999.

66. Second Summit of the Americas, Declaration of Santiago, Santiago de Chile Apr. 18-19, 1998 at <<http://www.summitamericas.org/chiledc.htm>>.

67. *Id.*

clining tax bases, and increased downward pressures on the wages and benefits" of American workers, Congresswoman Marcy Kaptur warned that if NAFTA "is intended to be a blueprint for future accords" than we must first reexamine its impact and "if we can't fix it, then we should junk it."⁶⁸

III. NAFTA'S FREE TRADE RULES: CORPORATE VERSUS WORKER RIGHTS.

From GATT to NAFTA . . . Agreements where the protections for international investors and transnational corporations would fill every phonebook in my home state of Michigan – but where the guarantees for workers, consumers and the environment could be written on a postcard . . . Agreements which make it easier to challenge the infringement of a copyright than the imprisonment of a striking worker.⁶⁹

Absent in the body of the NAFTA and the GATT/ WTO texts are meaningful, binding provisions to enforce labor rights and protections. According to the International Chamber of Commerce, "the trading system was not designed to address these non-trade issues . . . [t]o call on it to do so would expose the trading system to great strain and the risk of increased protectionism . . ."⁷⁰

A. *A Corporate Bill of Rights*

Perhaps the most poignant difference between corporate (or investor) rights and workers' rights in the NAFTA, is the mechanism for enforcement. Chapter 11 of the NAFTA provides that private investors, on behalf of themselves or on behalf of an enterprise, may *directly sue* a national government — a powerful grant of legal standing.⁷¹ Under Article 1116, a claim may be submitted to arbitration if an investor believes that a government has breached an obligation under the NAFTA and that the breach caused the investor to incur a loss or damage as a result.⁷² Nowhere in the NAFTA is this kind of extraordinary power granted to a worker if the worker believes that another Party has caused them damage as a result of job loss, wage reduction, or poor working conditions.

68. *Id.* at 24 (statement of Hon. Marcy Kaptur, a Representative in Congress from the State of Ohio).

69. Statement by Congressman David E. Bonior (D-MI), *Defending Democracy in the New Global Economy*, Speaking at a conference hosted by the AFL-CIO on Workers' Rights, Trade Development, and the WTO (Dec. 1, 1999).

70. Peter Capella, *Business Backs Trade Role for UN*, THE GUARDIAN, London, July 6, 1999.

71. NAFTA, Chap. 11, art. 1116

72. *Id.*

Corporations have an additional dispute remedy provided in Article 20 of the NAFTA. Article 2018 provides that when a government is not in conformity with NAFTA provisions, the government must either agree not to implement the offending measure (typically a federal law) or agree to remove the offending measure.⁷³ If the government continues to be in noncompliance, appropriate compensation must be offered or the aggrieved party may suspend benefits until a settlement is reached.⁷⁴ Both the settlement between the Canadian federal government and Ethyl Corporation and the recent Loewen Funeral Home Trial Case demonstrate how powerful a corporation becomes using the NAFTA investor-state dispute procedure to enforce their rights in the global economy.⁷⁵

1. Ethyl

In the interest of protecting public health, Canada in 1997 banned the importation and transport of methylcyclopentadienyl manganese tricarbonyl (MMT), a gasoline additive and dangerous neurotoxin already banned by the U.S. Environmental Protection Agency.⁷⁶ Ethyl Corporation based in the United States, produces MMT and until the ban enjoyed steady sales to Canadian gasoline refiners.⁷⁷ Six months before the legislation passed in the Canadian Parliament, Ethyl attempted to block the law by notifying the Canadian government that if the law prevailed, the corporation intended to sue for monetary damages under NAFTA Chapter 11.⁷⁸ In spite of Ethyl's threats, Canada passed the ban and less than a week later Ethyl filed a claim for \$250 million in damages.⁷⁹ Ethyl claimed that the Canadian import ban constituted an illegal expropriation (a taking of private property for public use) by precluding sales to Canadian refiners and by tarnishing the company's "good reputation."⁸⁰

Rather than face the \$250 million in damages, Canada instead chose to settle the case. The Canadian government repealed its ban on

73. NAFTA, Chap. 20, art. 2018.

74. NAFTA, Chap. 20, art. 2019.

75. Ethyl Corporation v. Government of Canada: Now Investors Can Use NAFTA to Challenge Environmental Safeguards (Public Citizen Briefing Paper) <<http://www.citizen.org/pctrade/nafta/cases/Ethylbri.htm>> (visited Dec. 19, 1999)[hereinafter Ethyl Briefing Paper].

76. BRIEFING PAPER, NAFTA'S CORPORATE LAWSUITS 2 (Friends of the Earth and Public Citizen, Apr. 1999).

77. *Id.*

78. *Id.* See also MAUDE BARLOW & TONY CLARKE, MAI: THE MULTILATERAL AGREEMENT ON INVESTMENT AND THE THREAT TO AMERICAN FREEDOM 61 (Stoddart Publ'g Co. Ltd. 1998)[hereinafter MAI].

79. *The Sting in Trade's Tail*, THE ECONOMIST, Apr. 18, 1998.

80. Ethyl Briefing Paper, *supra* note 75, at 1.

MMT and agreed to pay Ethyl \$13 million (USD) in compensation.⁸¹ To restore the damage caused to Ethyl's reputation, the Canadian government was required to issue a statement that MMT poses no health risk.⁸²

This case raises two significant concerns among NAFTA opponents. First, NAFTA's dispute settlement provisions enable foreign corporations to intimidate governments by threatening to sue over potentially unfavorable legislation.⁸³ Taken in the context of labor, corporations could threaten to challenge minimum wage or occupational safety laws to prevent increased employment costs. Second, allowing corporations to directly sue governments for limitless monetary damages could mean, as it did in the Ethyl case, that governments would rather overturn vital public legislation than face monetary damages.⁸⁴

2. Loewen Funeral Home Trial Case

Another case that exemplifies the extraordinary power conveyed to corporations under NAFTA is the Loewen Funeral Home Trial Case. The Loewen Group, a Canadian-based funeral home conglomerate, was the defendant in a Mississippi lawsuit and found liable for fraud and gross business conduct.⁸⁵ The trial focused on Loewen's aggressive attempts to ruin a small local funeral home and insurance operator, and the jury awarded damages to the plaintiff in the amount of \$100 million in compensatory damages and \$400 million in punitive damages.⁸⁶ According to Mississippi state law, losing defendants must post a bond worth 125% of damages owed before entitled to pursue a civil appeal.⁸⁷ Rather than appeal, Loewen settled the case for \$150 million.

Now, Loewen has filed a claim for \$725 million from the U.S. government under NAFTA's Chapter 11 claiming that the jury verdict, the punitive damages, and the bond requirement "violated international legal norms of 'fairness,' discriminated against the Canadian-based corporation and attempted to 'expropriate' or seize Loewen's assets. . ." in derogation of NAFTA guarantees.⁸⁸ In addition, Loewen claims that

81. *Id.*

82. NAFTA'S CORPORATE LAWSUITS, *supra* note 76, at 2.

83. *See generally id.*; MAI, *supra* note 78, at 61; and Ethyl Briefing Paper, *supra* note 75, at 1.

84. *Id.*

85. PUBLIC CITIZEN GLOBAL TRADE WATCH, *Briefing Paper: Canadian Corporation Found Liable in Mississippi Courts Uses NAFTA to Claim Legal System Violated Its Rights* at <<http://www.citizen.org/pctrade/nafta/cases/Loewen.htm>> (visited Dec. 12, 1999) [hereinafter Loewen Briefing Paper].

86. *Id.*

87. *Id.*

88. *See* Loewen Briefing Paper, *supra* note 85, at 2; and NAFTA'S CORPORATE

the Mississippi court system was plagued with an "anti-Canadian bias."⁸⁹ The Loewen case is concerning to the public interest community because corporations could utilize NAFTA as a tool to evade liability in local courts — particularly civil and tort liability.⁹⁰ For workers, who lack judicious remedies in the international system, this threatens to take away their only mechanism for justice, namely, domestic courts.

B. Workers Rights: The North American Agreement on Labor Cooperation (NAALC).

In response to the forcible NAFTA opposition from organized labor, the U.S. was compelled to condition its ratification of NAFTA on the drafting of a labor side agreement — the North American Agreement on Labor Cooperation (NAALC).⁹¹ Although the purported purpose of the NAALC was to ensure protection for workers from adverse NAFTA backfire, the final agreement is a fiction. Because all three governments resisted a labor side agreement that would restrict their sovereign right to control domestic labor laws, the language of the NAALC is deliberately vague.⁹² The Mexican government was particularly resistant of the NAALC. To them, cheap labor and lax labor laws are a competitive advantage without which foreign investment could decline.⁹³ Thus, Mexico's support of the NAALC was dependent on vague language and total control over domestic labor laws. In addition, NAFTA drafters feared that enforcement of stringent labor laws would impose new trade barriers and thereby defeat the central purpose of the pact.⁹⁴

For the foregoing reasons, the NAALC did not oblige the government "Parties" to adhere to an internationally set core labor standard, and did not even oblige the Parties to strengthen existing domestic standards, but rather, it simply required that Parties enforce the standards that were already on the books in their respective countries.⁹⁵ "In the end, the NAALC was approved containing strong language in support of workers' rights but weak mechanisms for ensuring their respect in the signatories' countries."⁹⁶ As provided in Article 3 of the agreement, the purpose of the NAALC is "to promote compliance with and ef-

LAWSUITS, *supra* note 76, at 5.

89. NAFTA'S CORPORATE LAWSUITS, *supra* note 76, at 5.

90. *Id.*

91. NAFTA AND BEYOND, *supra* note 20, at 450.

92. Isa, *supra* note 36, at 615.

93. Isa, *supra* note 36, at 616.

94. NAFTA AND BEYOND, *supra* note 20, at 450.

95. North American Agreement on Labor Cooperation, Sept. 13, 1993, at <<http://www.naalc.org/english/infocentre/NAALC.htm>> (visited Apr. 7, 2000), arts. 2, 3 [hereinafter NAALC].

96. Joel Solomon, *Mexico, Labor Rights and NAFTA*, 8 HUM. RTS. WATCH/AMS 2 (1996)[hereinafter Solomon].

fectively enforce" each Party's own domestic labor laws.⁹⁷ Article 2 summarizes the "Levels of Protection" embodied in the NAALC:

Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.⁹⁸

The NAALC lays out eleven labor principles "that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law:

1. Freedom of association and protection of the right to organize
2. The right to bargain collectively
3. The right to strike
4. Prohibition of forced labor
5. Labor protections for children and young persons
6. Minimum employment standards
7. Elimination of employment discrimination
8. Equal pay for women and men
9. Prevention of occupational injuries and illnesses
10. Compensation in cases of occupational injuries and illnesses
11. Protection of migrant workers.⁹⁹

These principles provide a fine framework for *thinking* about labor issues, but are meaningless because they lack effective enforcement capability. Although NAFTA proponents point to the NAALC's extremely

97. NAALC, *supra* note 95, art. 3.

98. *Id.*

99. *Id.* at Annex 1.

limited enforcement mechanisms as a coup for labor advocates, these mechanisms are deliberately convoluted such that "the process weeds out most labor-related issues from the ultimate enforcement weapon of imposing sanctions."¹⁰⁰

Structurally, the Commission for Labor Cooperation, Ministerial Council is the highest level of the NAALC and facilitates cooperative compliance among the Parties.¹⁰¹ Below the Ministerial Council, each Party has a National Administrative Office, or NAO, that serves as an in-country contact on NAFTA labor issues.¹⁰² Allegations that a Party has violated the principles of the NAALC are first received by the NAO.¹⁰³ The NAO then determines if the complaint warrants review and if so, initiates consultations with the accused Party.¹⁰⁴ The NAO review is the first of many daunting hurdles that an aggrieved worker, public interest group, labor organization or other complainant must face. There are *no enforcement* provisions at this consultation level, only cooperation and recommendation.¹⁰⁵ Typically, violations of freedom of association, the right to organize, and the right to strike and bargain collectively *never exceed* this first level of review.¹⁰⁶

Only consultations that have reached the Ministerial Council may continue to the second phase of enforcement. However, the issue must involve one of the following: "forced labor, equal pay for men and women, worker' compensation, and protection for migrant workers."¹⁰⁷ Violations in these areas *not* resolved by the Ministerial Council undergo evaluation by an independent panel of experts called the Evaluation Committee of Experts, or ECE.¹⁰⁸ However, as provided in Article 49, before an ECE is commissioned, the issues must be either "trade-related" or covered by "mutually recognized labor laws."¹⁰⁹ Even at this level, the only remedy of the ECE is "non-adversarial and non-binding recommendations on the issue."¹¹⁰ If the ECE determines the issue does not meet the appropriate criteria "the Party has no other recourse."¹¹¹

If the ECE deems the issue worthy, recommendations are submitted to the Ministerial Council. The Ministerial Council is then only ob-

100. NAFTA AND BEYOND, *supra* note 20, at 456

101. North American Agreement on Labor Cooperation, *Review of the NAALC Annual Report*, at <http://www.naalc.org/english/publications/review_annex1_1.htm>

102. *Id.*

103. NAALC, *supra* note 95, art. 3.

104. *Id.*

105. *Id.*

106. Solomon, *supra* note 96, at 2.

107. *Id.* at 3.

108. NAALC, *supra* note 95, art. 23.

109. *Id.*, art. 49

110. Solomon, *supra* note 96, at 3.

111. NAFTA AND BEYOND, *supra* note 20, at 457.

ligated to respond to violations of child labor, minimum wage, and occupational health and safety.¹¹² Even if the violations qualify, the Ministerial Council may only respond if proof exists of a "*persistent pattern* of failure by the other Party to effectively enforce" those standards.¹¹³ Thus, a single incident of failure that results in egregious harm would not qualify unless repeatedly occurring. Perhaps the grandest loophole of the NAALC enforcement mechanism is found in Article 49 defining "failure":

A Party has not failed. . . where the action or inaction by agencies or officials of that Party: (a) reflects a reasonable exercise of the agency's or the official's discretion . . . ; or (b) results from bona fide decision to allocate resources to enforcement in respect of other labor matters determined to have higher priorities.¹¹⁴

So long as Parties can demonstrate that their failure to comply with labor standards was the consequence of a "reasonable" exercise of "discretion" or the result of a "bona fide" prioritization, than governments are off the hook. Combined with the burden to prove a "persistent pattern" of failure that was unreasonable, non-discretionary and wrongly prioritized, workers have little chance to successfully adjudicate their grievances.

Arbitration may be sought if resolution has failed, but only upon a two-thirds vote of the Ministerial Council.¹¹⁵ The arbitration panel may impose fines or sanctions but *only for persistent patterns* of child labor, occupational safety and health or minimum wage violations that are *trade-related* and covered by mutually recognized labor law.¹¹⁶

The NAALC and its lack of accessible enforcement mechanism may have been a temporary resolution to allow NAFTA passage, but if labor rights are to be truly respected worldwide this kind of agreement must be reformed. According to the AFL-CIO:

[The NAALC], established a lengthy and cumbersome process to impose penalties if a country persistently fails to enforce minimum wage, child labor and safety and health protections. But there are no penalties for violations of freedom of association and workers' right to organize, which is why most unions regard the NAALC protections as inadequate.¹¹⁷

Steve Beckman, an international economist for the International

112. NAALC, *supra* note 95, art. 27.

113. *Id.*, art. 27.

114. *Id.*, art. 49.

115. *Id.*

116. *Id.*

117. WORKERS' RIGHTS, *supra* note 12.

Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) assessed the NAALC as an utter failure:

Violations of the fundamental rights of freedom of association and the right to organize and bargain are not even subject to the labor side agreement dispute resolution procedures. The cases that have been filed have not led to the illegally fired workers being rehired, and the offending employers have suffered no sanctions. The ability of independent unions to survive and expand in Mexico has not been advanced by the NAALC. They remain under attack.¹¹⁸

In sum, corporations under NAFTA enjoy the power to sway legislation, to overturn domestic laws that infringe on their profits, to demand compensation for any expropriation of profits, and to exercise unlimited capital mobility; while workers are forced to endure the extremely limited, virtually remediless bureaucracy of the NAALC.

IV. THE GATT/WTO: LABOR STANDARDS "NOT ON THE AGENDA."¹¹⁹

As seen in both the NAFTA and GATT/WTO negotiations and final texts, labor issues are deliberately omitted and instead deferred to side agreements such as the NAALC and alternative institutions, such as the United Nations or the International Labor Organization. Trade bureaucrats openly advocate that enforceable labor standards incorporated into the rules-based trading system would create protectionist policies that impede the ultimate commercial goal of "trade flow as free as possible."¹²⁰ As well, many developing countries of the WTO resist enforceable core labor standards for fear that such standards "undermine the comparative advantage of lower wage trading partners."¹²¹ Yet, in the words of the WTO itself: "[w]ithout a means of settling disputes, the rules-based system would be worthless because the rules could not be enforced." Accordingly, the GATT/WTO established the strongest international enforcement measures of any multilateral agreement to date but for corporate rights, not labor rights.

A. *Dispute Settlement under the GATT/WTO.*

The former Director General of the WTO proudly acclaims that the dispute settlement procedure is the WTO's "most individual contribu-

118. *President's Comprehensive Review of the NAFTA, Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means, 105th Cong. 200 (1997)* [hereinafter *Hearing on President's Report*] (statement of Steve Beckmen, international economist, International Union, UAW), available at 1997 WL 570269.

119. *Trading into the Future*, *supra* note 9, at 60.

120. *Id.* at 3, 60.

121. *Id.* at 60; Solomon, *supra* note 96, at 2.

tion."¹²² Unlike the United Nations, the ILO, the NAALC, or any other international body, the WTO has granted itself enforcement powers to "demand compliance from its members, and to coerce and force compliance where necessary by means of a variety of disciplines, penalties, and trade sanctions. . ."¹²³

Procedurally, the WTO dispute settlement mechanism embodied in GATT Articles XXII and XXIII, apply strictly to "consultations and the settlement of disputes *between Members concerning their rights and obligations*."¹²⁴ The Dispute Settlement Body (DSB) holds express quasi-judicial authority to settle disputes between member countries by the establishment of dispute panels and the rejection (by consensus) of their recommendations.¹²⁵ A dispute panel is only convened after a requisite sixty-day consultation period.¹²⁶ If consultations fail, the disputing parties seek resolution from a three-person dispute resolution panel, or tribunal. The panelists are selected by the parties from a designated list of "trade officials and commercial trade lawyers."¹²⁷ Once the panel issues a ruling against a country, the country faces suspension of benefits and trade sanctions unless they overturn or conform the offending law, or pay permanent compensation to the impacted country.¹²⁸ The losing country can appeal, but the ruling is only overturned by a unanimous vote of all 135 members — including the country that brought the challenge.¹²⁹

Critics of the GATT/WTO oppose this dispute mechanism because it allows member countries to challenge virtually any domestic law if it can be shown that the law impedes the free flow of trade.¹³⁰

To date, WTO tribunals have almost always sided with a *challenging* country and ruled *against* the targeted law. In only three out of 22 completed WTO cases did the respondents win. As of July 1999, the U.S. had lost every completed case brought against it, with the WTO labeling as illegal U.S. policies ranging from sea turtle protection and clean air regulations to anti-

122. *About the WTO: The WTO's 'most individual contribution' at* <<http://www.wto.org/wto/about/dispute1.htm>> (visited Mar. 3, 2000).

123. *Invisible Government*, *supra* note 1, at 2.

124. UNDERSTANDING ON DISPUTES, *supra* note 61, Annex 2, art. 1(1). (emphasis added).

125. *Id.* at Annex 2, arts. 2, 11.

126. *Id.* at Annex 2, art. 16.

127. *INVISIBLE GOVERNMENT*, *supra* note 1, at 8.

128. *Id.*

129. *Id.*

130. *Id.* at 7.

dumping duties.¹³¹

Further, critics argue that the dispute resolution process is conducted in secret without public participation or accountability.¹³² The press, the public, labor unions and other non-governmental organizations are totally excluded at each stage of the stealth dispute settlement process.¹³³

A recent example of how the WTO dispute resolution mechanism impacts domestic law is the Massachusetts selective purchasing law. In 1996, Massachusetts passed a law banning state contracts with companies that invest in or do business with Burma.¹³⁴ The Burmese government had been executing egregious human and labor rights violations, including forced labor of women, children, elderly and other unfit citizens.¹³⁵ The Massachusetts law, along with dozens of similar municipal and county ordinances, was passed to "ensure that public money is not used to indirectly support a regime whose conduct taxpayers find repugnant" and to encourage transnational corporations to divest in Burma.¹³⁶ The law was attacked on two fronts: in the U.S. courts by the powerful corporate lobby USA*Engage,¹³⁷ and in the WTO by Japan and

131. WHOSE TRADE ORGANIZATION?, *supra* note 60, at 194.

132. *Id.* at 197 ("Under this WTO rule, dispute panels operate in secret, documents are restricted to the counties in the dispute, due process and citizen participation are absent and no outside appeal is available.").

133. Invisible Government, *supra* note 1, at 8.

134. See *The Case Against the WTO*, THE PROGRESSIVE 9 (Jan. 2000)[hereinafter *The Case Against the WTO*].

135. See e.g., International Labor Organization, *Forced Labour in Mynammar*, July 21, 1998, at <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/mynammar.htm>> (visited Apr. 6, 2000) ("There is abundant evidence before the Commission showing the pervasive use of forced labor imposed on the civilian population throughout Myanmar. . . sometimes for the profit of private individuals. . . all of the information and evidence before the Commission shows utter disregard by the [government] authorities for the safety and health as well as the basic needs of the people performing forced or compulsory labor.").

136. WHOSE TRADE ORGANIZATION?, *supra* note 60, at 187-88; see also INVISIBLE GOVERNMENT, *supra* 1, at 38 (It was precisely these kind of sanctions that were used in the anti-apartheid movement in the 1980s to "hasten the transition to democracy in South Africa.").

137. USA*Engage is a coalition of 674 American businesses, including huge multinational corporations such as ARCO, AT&T, Boeing, Coca-Cola, Dow Chemical, GTE, IBM, and Proctor & Gamble. For a complete list of members see <<http://usaengage.org/background/about.html>> (visited Mar. 10, 2000). The coalition was launched on April 16th, 1997 primarily for the purpose of fighting trade sanctions such as this. They claim that "sanctions don't work, and only serve to cut U.S. firms out of lucrative deals while giving them a reputation for unreliability." So far, USA*Engage has succeeded: the Massachusetts state court and a subsequent appellate court has ruled that the law is an unconstitutional intrusion into foreign policy powers. The challenge is now facing a Supreme Court review. Bernard J. Wolfson, *Group decries Mass. Law on business with Burma*, BOSTON HERALD (May 1, 1998) found at

the European Union. The Japan/EU challenge claims such sanctions are patent violations of GATT rules and therefore should be overturned.¹³⁸ Meanwhile, to avoid additional embarrassing WTO challenges, President Clinton has dispatched his Administration to prevent passage of similar human rights sanctions.¹³⁹ In 1998, the Administration successfully persuaded the Maryland legislature to abandon a law barring business with Nigeria.¹⁴⁰

This case is an important statement, not only to the sovereignty of local governments to enact their own public policy, but also to the merits of the ILO. If the WTO turns a blind eye to the ILO report, which details abundant evidence of egregious human and labor rights violations, than what does that say about the effectiveness of ILO protections for workers?

B. Labor Rights Deferred to the International Labor Organization (ILO)

Rather than address labor standards within the WTO, member countries defer all labor issues to the International Labor Organization (ILO), founded in 1919 at the Peace Conference in Paris, France.¹⁴¹ The Peace Conference set up the Labour Commission,¹⁴² who wrote the ILO Constitution between April and January 1919.¹⁴³ The Labour Commission also elects the Governing Body, the ILO Executive Council, structured as a tripartite organization by specifically electing representatives of governments, employers and workers.¹⁴⁴ The two principle functions of the ILO are to set labor standards and to promote the observance of those standards through good faith and, essentially, peer pressure.¹⁴⁵ These standards are embodied in Conventions and Recom-

<<http://usaengage.org/news/980501bh.html>> (visited Mar. 10, 2000).

138. Under GATT rules, when a state or local law is challenged the federal government is responsible for bringing that sovereign into compliance. WHOSE TRADE ORGANIZATION?, *supra* note 60, at 194.

139. *The Case Against the WTO*, *supra* note 134.

140. *Id.*

141. International Labor Organization, *ILO History at* <<http://www.ilo.org/public/english/about/history.htm>> (visited Mar. 5, 2000)(the nine founding countries of the Labour Commission were Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States under the chairmanship of American Federation of Labour head Samuel Gompers); *see also* TRADING INTO THE FUTURE, *supra* note 9, at 45.

142. *Id.*

143. *See* ILO Constitution <<http://www.ilo.org/public/english/about/iloconst.htm>> (visited Apr. 5, 2000); *ILO History* <<http://www.ilo.org/public/english/about/history.htm>> (visited Mar. 5, 2000).

144. ILO Constitution, *supra* note 143, at Ch. 1, art. 7 (1) (the Governing Body shall consist of fifty-six persons: Twenty-eight representing governments, fourteen representing the employers, and fourteen representing the workers); *see also* *ILO History* <<http://www.ilo.org/public/english/about/history.htm>> (visited Mar. 5, 2000).

145. ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-

mentations debated, drafted, and eventually ratified by willing countries.¹⁴⁶

At the core of the ILO Conventions are four fundamental rights which all Members, whether they have ratified the Conventions or not, "have an obligation. . . to respect, to promote and to realize, in good faith. . . : (1) freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of all forms of forced or compulsory labour; (3) the effective abolition of child labour; and (4) the elimination of discrimination in respect of employment and occupation."¹⁴⁷

While the Conventions espouse seemingly industrious labor stands, in fact the principles are meaningless without a concomitant enforcement mechanism. Exactly like the NAALC, the ILO lacks any teeth. For example, ILO Conventions 98 and 87, freedom of association and collectively bargaining, respectively, and the ILO Constitution itself,¹⁴⁸ establish a quasi-judicial committee to which complaints may be filed by either workers or employers.¹⁴⁹ Upon receipt of the complaint, the committee notifies the government concerned and, with their permission only, the committee may conduct an onsite investigation.¹⁵⁰ The committee collects all the evidence and may issue a proposal¹⁵¹ for remedial action: "[t]he committee's effectiveness has, like that of the ILO itself, been limited by the fact that it has neither sanctions nor resources with which to induce an offending government to change its behavior. It has relied upon public suasion and moral authority."¹⁵² Thus, the most powerful remedies for aggrieved workers under the ILO are

up (June 1998) [hereinafter ILO Declaration].

146. ILO Constitution, *supra* note 143, at ch. 1, art. 19 (some of the most significant Conventions to date include: No. 29, *Forced Labour*, 1930; No. 87, *Freedom of Association and Protection of the Right to Organize*, 1948; No. 98, *Right to Organize and Collective Bargaining*, 1949; No. 100, *Equal Remuneration*, 1951; No. 105, *Abolition of Forced Labour*, 1957; No. 111, *Discrimination (Employment and Occupation)*, 1958; No. 138, *Minimum Age*, 1973; and the most recent No. 182, *Worst Forms of Child Labour*); see generally, ILO, ILO Declaration on Principles: A New Instrument to Promote Fundamental Rights, Annex III, ISBN 92-2-111892-4 (2000).

147. ILO Declaration, *supra* note 145, at art. 2 (a)-(d).

148. ILO Constitution, *supra* note 143, at Ch. 1, art. 26.

149. Jerome Levinson, *Certifying International Workers Rights: A Practical Alternative*, ECONOMIC POLICY INSTITUTE 6, (May 1999) [hereinafter *A Practical Alternative*], at <<http://epinet.org>> (last visited Apr. 5, 2000).

150. *Id.*

151. ILO Constitution, *supra* note 143, at ch. 1, art. 28.

152. Levinson, *supra* note 149; see ILO Constitution, *supra* note 143, ch.1, art 29 (1) – (2) (the findings of the committee shall be published, then it is within the *offending government's own discretion* to either voluntarily accept the recommendation, and if not, whether it will choose to submit the complaint to the International Court of Justice – there are *no* consequences if the offending government neither accepts nor submits the recommendation).

remedial proposals, public persuasion and moral authority — a far cry from commercial protections under GATT/WTO-like trade sanctions, an elaborate dispute settlement body, and uncapped monetary compensation.¹⁵³

In June 1998, the ILO adopted new measures to promote the fundamental principles: the ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up (Declaration).¹⁵⁴ Under the Declaration, ILO Member States who have not ratified a particular ILO Convention are now nonetheless obligated to honor "in good faith and in accordance with the Constitution, the principles" therein.¹⁵⁵ The Declaration also requires "an annual follow-up concerning non-ratified fundamental Conventions"¹⁵⁶ and a global report covering one of the four fundamental rights each in turn.¹⁵⁷

While the ILO has made strides in crafting diligent labor standards, far more must be done to equalize labor protections with commercial protections. As stated by the AFL-CIO:

[I]t is not possible for the ILO to take exclusive responsibility for addressing workers' rights violations. The ILO neither has nor seeks enforcement powers — making it all the more critical that international trade and financial organizations repair a trading system that now rewards those who abuse workers' rights . . . The WTO enforces intellectual property rights, market access and government regulation of investment - and there is no reason why it also cannot enforce basic minimum standards for the humane and decent treatment of workers.¹⁵⁸

As evidenced by the massive labor demonstrations during the 1999 Seattle Round, labor leaders are resolved to oppose future free trade accords "until labor has as much influence over the deals being hashed out as do business groups . . ." ¹⁵⁹

V. THE CURRENT TRADE MODEL: RHETORIC AND REALITIES

The immobility of labor and the mobility of capital is the supposed "genius" of the capitalist (global capitalism) production system — buy labor cheaply, sell goods dearly in the most wealthy markets with no tariff barriers. It sounds like GATT, NAFTA and WTO and free trade

153. *Supra* note 110, at 196.

154. ILO Declaration, *supra* note 145, at art. 2 (a)-(d).

155. *Id.* at art. 2.

156. *Id.* at annex I (3).

157. *Id.* at annex III (A)(2).

158. WORKERS' RIGHTS, *supra* note 12, at 5.

159. Frank Swoboda, *Labor Wants Seat at WTO Talks*, WASH. POST, Oct. 13, 1999.

ideology. If any theory in terms of public policy sounds one-sided and is fishy-smelling, it is a deal like that . . . Labor cannot do anything but lose. . .¹⁶⁰

Now, five years since implementation, the NAFTA and GATT/WTO debates are no less dubious than when first proposed. The NAFTA Implementation Act required the President to provide to Congress, by no later than July 1, 1997, a comprehensive review of the effects of the agreement including the extent to which wages and working conditions had been impacted.¹⁶¹ The President's report stirred a new round of NAFTA controversy in Congress, in the public interest community, and among the populous of the three nations.

Congressman Philip M. Crane, Chairman of the Subcommittee on Trade of the Committee on Ways and Means, opened a September 1997 hearing on the President's report by saying; "The President's report . . . confirms my view that NAFTA has had a decidedly positive impact on the U.S. economy by increasing the competitiveness of U.S. industry and contributing to the creation of high-wage jobs for U.S. workers."¹⁶² In same hearing, Deputy U.S. Trade Representative Jeffrey Lang summarized key points of the report: "[t]he President's July Study indicates the NAFTA has had a positive impact on our GDP, employment, income, investment, and wages . . . These estimates suggest that the NAFTA's impact, isolated from other factors, has boosted jobs associated with exports to Mexico between roughly 90,000 and 160,000."¹⁶³

Conversely, the non-profit fair trade group Public Citizen's Global Trade Watch, found the President's report less than accurate "[u]nfortunately, you would be more likely to find little green men on Mars than the truth about NAFTA in the Administration report . . . The evidence of NAFTA's failure is overwhelming . . ."¹⁶⁴

Public Citizen reported that up to 500,000 jobs had been lost as a result of NAFTA and despite promises otherwise, "it has been high-wage, high-tech jobs that have led U.S. NAFTA job losses . . . U.S. data shows a majority of U.S. workers who lose their high-wage manufacturing jobs find new employment in lower-paying jobs in the service sector."¹⁶⁵ In a February 1999 address, the AFL-CIO announced that the

160. SAARI, *supra* note 14, at 128.

161. Section 512 of Pub.L. 103-182.

162. Hearing on President's Report, *supra* note 118 (statement by Congressman Philip Crane), available at 1997 WL 574986.

163. *Id.* at 38 (statement of Hon. Jeffrey Lang, Deputy U.S. Trade Representative) found in Westlaw at 1997 WL 609767.

164. Lori Wallach, *Clinton Administration's NAFTA Report*, Public Citizen Global Trade Watch News Release (July 11, 1997) <<http://www/citizen.org>> (visited Apr. 5, 2000).

165. *Id.*

United States has lost 285,000 jobs since March 1998.¹⁶⁶

In a 1997 study, the Economic Policy Institute (EPI) tackled the complicated task of untangling the conflicting numbers donned by both pro and anti-NAFTA advocates. EPI discovered that failing to account for all economic factors, including exports *and* imports, resulted in many misleading figures:

This study's new model indicates that the reduction in net exports to Mexico has eliminated 227,663 U.S. job opportunities since 1993, and the reduction in net exports to Canada has eliminated 167,172 job opportunities in the same period. In total, NAFTA resulted in a net loss of 394,835 jobs in its first three years.¹⁶⁷

The study also found that a disproportionate number of these job losses were suffered by minorities, women, white males and especially in the manufacturing sector: "Even workers who found new jobs in the growing U.S. economy face a reduction in wages, with average earning dropping over 16%."¹⁶⁸ Moreover, a 1999 follow-up report by EPI indicated that job losses have continued since the implementation of NAFTA:

The U.S. Department of Labor has certified that 216,156 workers have lost their jobs because of either shifts in production to Mexico or Canada or because of increased imports from those countries.¹⁶⁹

Larry Martin, President of the American Apparel Manufacturers Association, frankly stated in his testimony to the House Subcommittee on Trade; "[t]he fact of the matter is that it is no longer economically feasible to make some kinds of garments in the United States. Our average wage level of about \$8 an hour, plus benefits, makes it very difficult to compete with countries where wages are measured in cents, not dollars."¹⁷⁰ Jay Mazur, President of the Union of Needletraders, Industrial and Textile Employees (UNITE) challenges Congress to disallow such corporate strategies; "NAFTA contributes to a corporate strategy – investment overseas, production cutbacks at home and sharp demands for wage and benefit concessions from workers – that has had a devas-

166. AFL-CIO, *Trade and Deindustrialization*, (Feb. 18, 1999) <<http://www/aflcio.org/pub/estatemts/feb99/cstrade.htm>> (visited Apr. 5, 1999).

167. Jesse Rothstein and Robert Scott, *NAFTA's Casualties: Employment Effects on Men, Women, and Minorities*, ECONOMIC POLICY INSTITUTE ISSUE BRIEF #120, Sept. 19, 1997, at <<http://www.epinet.org/Issuebriefs/ib120.html>> (visited Apr. 5, 2000).

168. *Id.*

169. Robert E. Scott, *Trade deficits, job losses increase through 1998*, ECONOMIC POLICY INSTITUTE, TRADE FAX (Feb. 19, 1999), at <<http://www.epinet.org>>.

170. Hearing on President's Report, *supra* note 36 (statement of Larry Martin, President, American Apparel Manufacturers Association), available in Westlaw, at 1997 WL 566021.

tating impact on American families."¹⁷¹

The 5-year progress reports on the GATT/WTO are similarly at variance. While GATT/WTO proponents point to liberalized market access and increases in export jobs; opponents focus on the increasing gap between the rich and poor and the WTO's ability to threaten, weaken, and overturn national laws. The WTO distributed a press packet at the Seattle Round that touted "1.3 million new jobs supported by exports were created in the U.S. between 1994 and 1998."¹⁷² Conversely, opponents point to studies showing a 10 percent decline in median hourly wage over the last 25 years;¹⁷³ and a "job death" of at least 4.6 million in the American industrial manufacturing between 1980 and 1997.¹⁷⁴ Over 1,400 NGOs agree in a joint statement that "in the past five years the WTO has contributed to the concentration of wealth in the hands of the rich few; increasing poverty for the majority of the world's population; and unsustainable patterns of production and consumption."¹⁷⁵

Unlike the employment statistics, no one seems to refute the statistics that show the world's CEOs are currently experiencing record high salaries. In 1960 the average CEO was paid 41 times more than the average worker, and by 1997 the average CEO was paid 326 times more.¹⁷⁶ The International Forum on Globalization¹⁷⁷ points to a recent report that "the wealth of the world's 475 billionaires is equal to the annual incomes of more than 50% of the people on earth;" and a report that American CEO's are now paid 419 times more than their line workers.¹⁷⁸

VI. FREE TRADE: A TIME FOR REVIEW NOT EXPANSION.

A. *Mobilization Against Globalization: Protest on the Puget*

For over a year, the international civil society had been mobilizing to make Seattle a battleground against globalization. An impressive

171. *Id.* at 211 (statement of Jay Mazur, President of the Union of Needletraders, Industrial and Textile Employees), available in Westlaw, at 1997 WL 570309.

172. Press Pack, World Trade Organization, Seattle (Nov. 30 to Dec. 3, 1999), at 61.

173. INVISIBLE GOVERNMENT, *supra* note 1, at 4.

174. SAARI, *supra* note 14, at 128.

175. Statement from Members of International Civil Society Opposing a Millennium Round or a New Round of Comprehensive Trade Negotiations, (Nov. 27, 1999), (hereinafter International Statement) <http://www.citizen.org/pctrade/gattwto/Seattle%20Ministerial/intl_no_new_round_letter.htm> (visited Apr. 5, 2000) (includes a list of the 1448 signatories from 89 countries).

176. 1997 *Executive Pay Survey*, BUSINESS WEEK (Apr. 20, 1998), available at <<http://www.businessweek.com>>.

177. See INVISIBLE GOVERNMENT, *supra* note 1.

178. *Id.* at 4.

list of 1,448 NGOs representing 89 countries signed a joint declaration against the proposed new round of comprehensive trade negotiations, instead calling for governments to "review and rectify the deficiencies" of the WTO.¹⁷⁹

The citizen activists went to Seattle to protest the world's most prominent trade regulator,¹⁸⁰ the WTO, whose members were converging in Seattle that week to launch a new round of trade negotiations.¹⁸¹ Though the week's activities commenced with a scholarly conference on globalization hosted by the IFG,¹⁸² massive insurgence ultimately gave rise to pepper spray, rubber pellets, civil disobedience, and arrests.¹⁸³ On November 30, 1999, over 40,000 people from all over the globe, including "union members and students and community activists and farmers and religious leaders and people in turtle and butterfly outfits – came together in Seattle to assert that the global economy must be fundamentally changed to respect people and the environment, and not just the interests of multinational corporations."¹⁸⁴ That same day, the International Longshore and Warehouse Union (ILWU) closed the port of Seattle and other ports along the west coast "demonstrating to the corporate CEOs and their agents here in Seattle that the global economy will not run without the consent of the workers."¹⁸⁵

This unprecedented display of vigilant protest that roused the interest of people all over the world begs the question: If globalization is truly the panacea for economic growth, job creation, and higher living standards worldwide, why are so many people resolved to stop it?

179. International Statement, *supra* note 175.

180. See INVISIBLE GOVERNMENT, *supra* note 1, at 1 (calling the WTO the "primary rule-making regime of the globalization process" that is "rapidly assuming the mantle of *bona fide* global government for the 'free trade era'").

181. WTO MINISTERIAL CONFERENCE PRESS PACK, *Background: The Seattle 'Ministerial'*, at 3 (Nov. 28, 1999) (stating that "What's special about this ministerial" is that "The ministerial will launch major new negotiations to further liberalize international trade . . .") [hereinafter WTO MINISTERIAL CONFERENCE PRESS PACK].

182. The International Forum on Globalization (IFG) is a research and educational institution comprised of 60 researchers, scholars, activists, and economists from 20 countries.

183. See *e.g.*, *The New Trade War*, THE ECONOMIST, Dec. 4-10, 1999, at 25 (noting 2,500 activists gathered for the conference but that the "Sea Town became siege town" when "a furious rag-bag" of protestors shut down the city); REUTERS, *Chaos at WTO talks reflects public mistrust* (Dec. 2 1999); CNN, *Street Violence Erupts as WTO Conference Begins* (Nov. 30, 1999).

184. Statement by AFL-CIO President John J. Sweeney on Collapse of WTO Trade Talks (Dec. 4, 1999) <<http://www.aflcio.org/publ/press1999/pr1204.htm>> (visited Dec. 19, 1999).

185. Brian McWilliams, Speech for the WTO Labor Rally <<http://www.ilwu.org/wto/bmcwspeech.htm>> (Nov. 30, 1999).

B. *The Significance of the Seattle Round*

Throughout his presidency, President Clinton has given lip service to labor organizations at home while surreptitiously selling out American workers in trade negotiations abroad.¹⁸⁶ In his 1999 State of the Union address, President Clinton told America that: "we ought to tear down barriers, open markets, and expand trade. But at the same time, we must ensure that ordinary citizens in all countries actually benefit from trade - a trade that promotes the dignity of work, the rights of workers, and protects the environment."¹⁸⁷

Yet the President has aggressively continued to push the status quo free trade agenda, chartering new accords that replicate the existing failed model and refusing to change one iota of substantive obligations that protect labor at home and abroad.¹⁸⁸ In fact, the *only* thing different is the Administration's public relations campaign, which now

186. See, e.g., Levinson, *supra* note 149, at 2 (President Clinton sold the NAFTA to skeptical American workers by promising to condition his support on the signing of a labor side agreement, then betrayed labor when he ultimately caved in to the dissent of Mexico by deleting from the NAALC "provisions that provided the possibility of trade sanctions and monetary penalties for a persistent failure of a party to the NAALC to enforce its own labor laws . . ." The deletion essentially removed all teeth that the NAALC may have had to enforce workers' right to collective bargaining and freedom of association); see also WHOSE TRADE ORGANIZATION?, *supra* note 60, at 194 (In 1996, Clinton pledged to prioritize labor issues in the WTO but then signed the Singapore Ministerial Declaration which formally banished labor issues to the ILO. Then in 1998, Clinton again promised to make labor a priority in the then upcoming Seattle Round but instead settled for a watered-down ban on child labor that lacks enforcement.)

187. Address Before a Joint Session of the Congress on the State of the Union, 35 Weekly Comp. Pres. Doc. 78, 83-4 (Jan 19, 1999) [hereinafter State of the Union Address], available in Westlaw at 1999 WL 20505.

188. See, e.g., *The People v. the WTO*, THE NATION, Volume 269, Number 19, at 3 (Dec. 6, 1999) (This year the Clinton Administration is vehemently pushing for China to be admitted as a member of the WTO, and even requesting an "expedited" Congressional vote to grant China most-favored-nation trading status, despite the notoriety of Chinese leaders egregious human rights violations, including jailing union organizers and quashing union strikes, and more recently, for threatened attacks against Taiwan. Yet the deliberations over China's accession to the WTO have dealt with the concessions China would make to US industries *not* to human or labor rights); see also, *Barshefsky Reveals US Push to Broaden WTO Services Talks*, INSIDE US TRADE (June 4, 1999) (On the issue of the President's trade agenda over the next year, U.S. Trade Representative Charlene Barshefsky said the U.S. "will push for new and improved liberalization commitments in sectors such as finance, telecommunications, distribution, audiovisual, construction, education, health, travel and tourism, and professional services," but made no mention of his purported commitments to improve labor protections); WHOSE TRADE ORGANIZATION?, *supra* note 60, at 179 (1999) (the authors characterize Clinton's public relations campaign as a "charm" strategy to combat free trade dissent and point to the recent "NAFTA-for-Africa" legislation, completely void of substantive labor standards, as an example of his doublespeak).

must combat rising dissent against globalization in its current form.¹⁸⁹ In response to the mounting dissent expressed by opponents of the Seattle Round, President Clinton attempted to appease protestors by taking a rhetorical high ground. He publicly challenged the other WTO members to substantively address labor issues at the WTO meeting, yet his only key initiatives, a ban on child labor and a WTO working group on labor, were both narrow in focus and lacking enforcement. In the end, WTO members would only agree on a ban of the *worst forms* of child labor¹⁹⁰ and the *possibility of* a working group to study labor rights in the WTO.¹⁹¹ Lori Wallach, director of Public Citizen's Global Trade Watch, testified regarding the Seattle Round:

The Administration must replace this public relations strategy with substance . . . If the President's "proposals" are to be understood as anything other than further domestic political fodder for the Administration's attempts to continue the trade status quo, the Administration must produce tangible changes in the WTO to break what is widely perceived in non governmental organizations (NGOs) and Congressional circles as a pattern of chronic insincerity on WTO accountability and openness on labor and environmental issues.¹⁹²

To North American workers who valiantly fought NAFTA¹⁹³ in the early 1990's and have since struggled to block NAFTA expansion, the WTO agenda for new expansive trade liberalization is like adding salt

189. See e.g., Testimony of Lori Wallach Regarding U.S. Preparations for the World Trade Organization's 1999 Ministerial Meeting (May 14, 1999) <<http://www.citizen.org/pctrade/gattwto/Testimon.htm>> (visited Dec. 20, 1999); and *Democratize the Global Economy: The tide is turning against free trade and the WTO*, 40 GLOBAL EXCHANGE 7 (Fall 1999) (reporting that a recent poll shows 58 percent of Americans agree that foreign trade has been bad for the US economy, and 81 percent of Americans say that Congress should not accept trade agreements that give other countries the power to overturn U.S. laws).

190. See WTO MINISTERIAL CONFERENCE PRESS PACK, *supra* note 181 (briefly summarizing that the ban on child labor only includes the *worst forms* of child labor, including "all forms of slavery, child prostitution and pornography, the use of children to traffic in drugs and work which is likely to harm the health, safety or morals of children").

191. Robert L. Borosage, *The Battle in Seattle*, THE NATION, Volume 269 Number 19 at 20 (Dec. 6, 1999) (While these are important steps to take, labor unions think it insufficient: "As AFL-CIO president John Sweeney has made clear, labor will applaud progress on a working group to study labor rights at the WTO but will not end the demand for enforceable labor rights in trade accords."); *but see* Robert Kuttner, *A Push For Worldwide Labor Standards*, THE AMERICAN PROSPECT ONLINE <<http://www.prospect.org>> (Nov. 7, 1999) (Regarding the proposed WTO working group: "U.S. trade representative Charlene Barshevsky blurted out the truth . . . In a press briefing for foreign media, Barshevsky reassured business interests that the U.S. proposal is 'very limited.' She added, 'This is not a negotiating group,' but merely an 'analytic' one. And '[t]he issue of sanctions is nowhere in this proposal and it is certainly not on the table.'")

192. Testimony of Lori Wallach, *supra* note 189.

193. See NAFTA, *supra* note 18, art. 102.

to an open wound. Thus, the Seattle Round was a singular opportunity to remind trade bureaucrats and the corporate lobby that without the workforce, the engines of globalization would shut down. In the words of ILWU President, Brian McWilliams:

[The Seattle Round] gives us the rare opportunity to express first hand our outrage at how workers have been treated across the planet in the profit frenzy of globalization. It further gives us the chance to express our resolve to fight back against a system where workers pay such a high price for corporate greed.¹⁹⁴

The global insurgence and massive labor protests that erupted in Seattle demonstrate, among other things, that the NAALC, the ILO, and the current trading system have utterly failed to combat the adverse effects of globalization on workers rights.

The Seattle demonstrations have also been a wake-up call for Americans: " At the start of 1999, few Americans could even identify the WTO. . ." and now "polls show that Americans are increasingly ill at ease with free trade policies that boost corporate profits while cutting wages, ending farm subsidies, and deregulating environmental and consumer protections."¹⁹⁵ One of those polls found that 59 percent of Americans surveyed thought the current free trade system hurts Americans workers, while 35 percent thought that it helped;¹⁹⁶ and a second poll found "an overwhelming 83 percent" of Americans surveyed believed that before we negotiate trade with other countries they must "meet environmental, job security and labor condition standards."¹⁹⁷

C. *Fair Trade Alternatives that Promote People, Not Profits*

It is not an answer . . . to say let's leave these issues of a free labor market and environmental issues in the case of labor standards to bodies like the ILO and the WTO . . . We have two real alternatives. Pursue these issues in negotiations where they matter, or assume they don't matter very much to our Nation and relegate them to the shadows.¹⁹⁸

194. Brian McWilliams, *President's Report: Standing Up to the WTO* <<http://www.ilwu.org/wto/standinguptothewto.htm>> (last modified Nov. 8, 1999).

195. John Nichols, *Now What? Seattle is Just a Start*, THE PROGRESSIVE 18 (January 2000)(citing a USA Today/CNN/Gallup survey).

196. *Id.*

197. See Survey Shows U.S. Opinion Moving Against Free Trade, CONGRESS DAILY (Dec. 15, 1999).

198. Hearing on President's Report, *supra* note 118, at 16 (statement of Hon. Sander M. Levin, a Representative in Congress from the State of Michigan), available at 1997 WL 570261.

President Clinton stated in a May 1998 speech: "Globalization is not a policy choice – it is a fact." He and other free trade champions extol "globalization" as an opportunity to be seized, not questioned. However, fair trade advocates argue that such a philosophy is deeply flawed. Even if "globalization" is predestined, the "policy choices" are not. The fact is: governments, trade bureaucrats, and the business lobby that hold sway over them, make policy choices to craft trading rules that advance economic before social welfare. But there are *alternative* policy choices.

For starters, 1,448 NGOs call for an immediate moratorium on further WTO negotiations that strive to expand existing trade rules, and during the moratorium, there must be a "comprehensive and in-depth review and assessment of the existing agreements" conducted with full participation of civil society, addressing issues such as marginalized communities, democracy, labor rights and human rights.¹⁹⁹

Public Citizen, a U.S. NGO whose mission is to dismantle the free trade paradigm and erect a fair trade system in its place, further calls for a moratorium on "WTO dispute resolution challenges to domestic health, environmental, consumer protection, food safety, development and human rights policies and laws. . . so as to provide an incentive to renegotiate [GATT/WTO provisions] and safeguard such policies until such changes are completed."²⁰⁰ In addition, Public Citizen challenges the WTO to become more transparent by making WTO documents publicly available, including those documents of negotiating groups and dispute resolution proceedings.²⁰¹ By making WTO documents available to the public on the WTO website, and at a "publicly accessible document room for hard copies in each WTO member country's capital," governments are more accountable to their citizenry.²⁰² This is not a foreign concept in the United States where Congressional records are readily available for public scrutiny – as it should be in the ever-important arena of international legislation.²⁰³ Finally, Public Citizen attacks the disparate impact of the WTO's dispute settlement proceedings on poorer countries, who are typically out-spent in trade disputes, by proposing a WTO agreement whereby a developed country plaintiff must provide legal fees to a qualifying developing country defendant.²⁰⁴

According to the AFL-CIO, each trade agreement that *lacks* strong enforcement mechanisms for labor protections, enshrined in the body of

199. International Society Statement, *supra* note 175.

200. Testimony of Lori Wallach, *supra* note 189.

201. *Id.*

202. *Id.*

203. *See e.g.*, Freedom of Information Action, 5 U.S.C. 552 (the FOIA requires all government agencies to publicly release copies of government documents upon request).

204. Testimony of Lori Wallach, *supra* note 189.

the text, is a missed opportunity to raise labor standards *with* trade liberalization:

Trade preferences linked to improved labor rights and environmental standards change the financial incentives for countries seeking market access and increased foreign direct investment . . . We must strengthen the labor rights protections in NAFTA, so that violations of core labor standards come under the same strict dispute settlement provisions as the business-related aspects of the agreement.²⁰⁵

The AFL-CIO further contends that the WTO "must be overhauled to guarantee workers' basic rights and to enforce and reverse the inequities in the current global economic system."²⁰⁶ Specifically, the AFL-CIO challenges the U.S. government and the WTO to: incorporate enforceable worker rights, strengthen worker rights in domestic law at home, enforce domestic law more rigorously, learn to enforce existing agreements before adopting new ones, exercise the right to withdraw from trade agreements that fail to adequately protect labor, and undergo massive review and reform of existing trade agreements before forging new agreements.²⁰⁷ The IFG also presents a list of "reform conditions for the WTO" including in part: greater transparency and public accountability for WTO decision-making; NGO representation in the WTO dispute resolution process, including a right to appeal; and a moratorium on future negotiating rounds until a public, democratic "assessment round" can assess the effects of WTO to date.²⁰⁸

Viable fair trade alternatives do exist. The challenge is to persuade global policy-makers to listen, and then to depart from the status quo by adopting a new, inclusive, and democratic system for the future.

VII. CONCLUSION

Fair trade advocates oppose NAFTA, GATT/WTO, and the ideology of an unfettered global marketplace, not because these policies promote trade, but because they fail to promote people.²⁰⁹ This article has at-

205. *Trade and Deindustrialization*, *supra* note 166.

206. WORKERS' RIGHTS, *supra* note 12, at 7.

207. *Trade and Deindustrialization*, *supra* note 166.

208. INVISIBLE GOVERNMENT, *supra* note 1, at 42-43.

209. See e.g., Statement by Brian McWilliams, President of the International Longshore and Warehouse Union – AFL-CIO, *An Injury to One is an Injury to All*, statement for WTO labor rally 11/30/99 ("And let us be clear. Let's not allow the free traders to paint us as isolationist anti-traders. We are for trade. Don't ever forget – it is the labor of working people that produces all the wealth. When we say we demand fair trade policies we mean we demand a world in which trade brings dignity and fair treatment to all workers, with its benefits shared fairly and equally. . .") <<http://www.ilwu.org/wto/bmcwspeech.htm>> (visited Apr. 6, 2000).

tempted to show by comparison that the current trading system has established a dangerous double standard where corporations and private investors enjoy extraordinary profit protections far exceeding the basic rights of workers.

Why are free trade advocates, including NAFTA and WTO negotiating countries, so adamant against incorporation of labor standards? The WTO claims: "developing and developed nations believe the issue has no place in the WTO framework."²¹⁰ Aside from the obvious contradiction that the WTO has no problem incorporating *environmental* issues into the WTO framework,²¹¹ it is absurd to state that labor has no place in trade — labor *is* commerce, and commerce *is* trade. It is also deplorable to use protectionist accusations to wholly excuse labor standards from the WTO. Again, the WTO argues that some nations fear "labour standards. . . are little more than a smokescreen for protectionism;"²¹² and at a 1996 WTO Ministerial meeting in Singapore, members declared that they "reject the use of labour standards for protectionist purposes."²¹³ As long as the WTO is negotiating in the area of capital mobility, government procurement, expropriation, and the like, than labor does have a place in the WTO framework; and occupational health and safety, livable wages, the right to organize, and to bargain collectively, are not protectionist, they are essential. The omission of labor standards in the free trade system is a policy choice, and *that* is a fact.

It is an unacceptable evasion of responsible governance to strategically exclude labor issues from the heart of global commerce and instead "defer" the topic to a perfunctory side agreement or third party. To import equality into the current trading system, it is essential to incorporate workers' rights as a core issue, equal in merit to dismantling trade barriers, and protecting intellectual property, direct investment and other commercial interests. Without major reform, this free trade frenzy will continue to devour the unprotected — the global labor market whose only shields are the unenforceable, hortatory recommendations and reports of the NAALC, and the ILO.

This reform will not come from our world leaders, who relentlessly push free trade accords at any cost.²¹⁴ Rather, the reform must come

210. TRADING INTO THE FUTURE, *supra* note 9, at 60.

211. In 1994 the WTO adopted a working group on environmental issues, but at the 1999 Seattle Round members *refused* to adopt a working group to study labor issues. Apparently WTO members feel the environment has more to do with trade than does labor, or perhaps the issue of the environment is simply more benign for business than labor. See *General Agreement on Tariffs and Trade (the Uruguay Round): Ministerial Decisions and Declarations*, 33 I.L.M. 136 (Dec. 15, 1993).

212. TRADING INTO THE FUTURE, *supra* note 9, at 60.

213. *Id.* at 61.

214. In the U.S., each of the leading Presidential candidates unequivocally supported free trade, and based on the policies supported and proposed by both party's leading con-

from a movement by the people, which began in Seattle last year. Howard Zinn²¹⁵ called the demonstrations in Seattle "the weapon of revolution":

What happened in Seattle recently. . . showed how apparently powerless people – if they unite in large numbers – can stop the machinery of government and commerce. In an era when the power of government, and of multinational corporations, is overwhelming, it is instructive to get even a hint of how fragile that power is when confronted by organized, determine citizens."²¹⁶

For labor organizers and workers all over the world, the mobilization against globalization will continue until the double standard has been dismantled, and global trade is empowering, not exploitive.

tenders, the next Administration will likely follow the current free trade status quo. *See e.g., Free trade supporters dominate the presidential campaign*, <<http://www.cnn.com/ALLPOLITICS/stories/1999/11/29/candidates.wto/index.html>> (Nov. 29, 1999) (visited Feb. 13, 2000); *Clinton asks Congress to pass China trade agreement*, <<http://www.cnn.com/2000/US/03/08/clinton.china.ap/index.html>> (March 8, 2000) (visited Mar. 9, 2000). The sentiment is much the same internationally. *See e.g., WHAT'S AT STAKE*, *supra* note 3, at iii (Tony Blair stated in a recent speech: "The GATT's system of trade rules and agreements has contributed massively to global prosperity. It is not something we should take for granted." Nelson Mandela recently stated: "We are firmly of the belief that the existence of the GATT, and now the [WTO], as a rules-based system, provides the foundation on which our deliberations can build in order to improve. . . let us forge a partnership for development through trade and investment.").

215. Howard Zinn is the author of *A People's America* and Professor Emeritus at Boston University.

216. Howard Zinn, *A Flash of the Possible*, *THE PROGRESSIVE* (January 20, 2000).

