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Abstract

[Excerpt] This essay starts with an anecdote to suggest that foreign direct investment can serve workers' interests when their rights are respected. The rewards of investment should not be limited to U.S. workers, either. Workers around the world can benefit from investment flows linked to policies that advance workers' labor rights and living standards.

In this light, an investment agreement that promotes stability, predictability, the rule of law, and fairness in international trade can be a positive force for a "high road" dynamic in the rapidly globalizing economy, if it takes workers' rights into account. However, if such an agreement fails to incorporate strong protection for labor rights, it can make inevitable a "low road" of worker exploitation in global trade and investment flows.

Keywords

Multilateral Agreement on Investment, MAI, labor rights

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The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection

Lance Compa*

Introduction

After law school, I worked as a union organizer and negotiator for the United Electrical, Radio and Machine Workers of America (UE). Since the early 1950's, the UE represented workers at a General Electric Co. plant in Baltimore, Maryland, that produced porcelain insulators for electric power transmission lines. In 1975, GE announced it would close the plant, putting more than 500 workers out of their jobs, unless a buyer could be found.

A Japanese firm called NGK Ltd., the largest porcelain insulator manufacturer in Japan, bought the plant. NGK Ltd. made large investments in new equipment and technology, introduced new engineering systems, and expanded the facility. The new company also recognized the union, assumed the existing collective bargaining agreement (the sale took place during the term of the contract with GE), and bargained in good faith for a series of contracts in the years after it bought the plant. The Japanese firm even agreed to a "union shop" provision, something GE had never conceded.¹

The relationship should not be sugar-coated. There were occasional strikes and layoffs, and the union resisted company appeals to accept Japanese-style labor-management cooperation schemes. But for nearly a quarter-century after its imminent shutdown, the plant has been a thriving

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1. "Union shop" is a phrase used in U.S. labor relations to describe a contract clause that requires employees covered by a collective agreement to become union members and pay union dues, or to pay the equivalent of union dues in an agency relationship if they choose not to become union members. Such "union security" arrangements are normally a top priority for trade unions in bargaining, since the arrangements help maintain stable financial support for union activities. See generally E. EDWARD HERMAN ET AL., *COLLECTIVE BARGAINING & LABOR RELATIONS* 369 (2d ed. 1987); Steven E. Abraham, *How the Taft-Hartley Act Hindered Unions*, 12 HOFSTRA LAB. L.J. 1, 23 (1994).

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enterprise in working-class South Baltimore with a strong, active local union and good wages and benefits for company employees.

This essay starts with an anecdote to suggest that foreign direct investment can serve workers' interests when their rights are respected. The rewards of investment should not be limited to U.S. workers, either. Workers around the world can benefit from investment flows linked to policies that advance workers' labor rights and living standards.

In this light, an investment agreement that promotes stability, predictability, the rule of law, and fairness in international trade can be a positive force for a "high road" dynamic in the rapidly globalizing economy, if it takes workers' rights into account. However, if such an agreement fails to incorporate strong protection for labor rights, it can make inevitable a "low road" of worker exploitation in global trade and investment flows.²

Other critics in this symposium, and in the broader public debate over the Multilateral Agreement on Investment (MAI), offer detailed critiques of proposed MAI rules on national treatment, most-favored-nation status, performance requirements, expropriation, investor-state dispute settlement procedures, and other measures.³ Vigorous criticism contributed to the MAI's apparent demise, at least for the time being, in the Organisation of Economic Cooperation and Development (OECD).⁴

2. "High road" versus "low road" is a common distinction in international labor rights discourse, at least among labor rights advocates. The former generally refers to employment policies promoting workers' education and training, high skills, high wages, high productivity, strong unions, universal social insurance, high labor standards, effective enforcement of labor laws, and other characteristics of a thriving industrial democracy with growth in workers' living standards. The latter generally implies violations of workers' rights, restrictions on union organizing and collective bargaining, deliberate suppression of wages below levels that workers' productivity should afford them, widespread sweatshop conditions that may include child labor, exclusion of large groups of workers (often women and minorities) from the formal labor market, and other features of a labor market that fail to serve workers but may sustain the enrichment of owners and investors. For discussion and analysis of high road/low road approaches, see NATIONAL CTR. ON EDUC. AND THE ECON., *AMERICA'S CHOICE: HIGH SKILLS OR LOW WAGES!* (1990); Michael J. Piore, *Labor Standards and Business Strategies*, in *LABOR STANDARDS AND DEVELOPMENT IN THE GLOBAL ECONOMY* 35 (Stephen A. Herzenberg & Jorge F. Perez-Lopez eds., 1990); Richard Freeman, *A Hard-Headed Look at Labor Standards*, in *INTERNATIONAL LABOR STANDARDS AND GLOBAL ECONOMIC INTEGRATION* (U.S. Dept. of Labor ed., 1994); Stephen Herzenberg, *In From the Margins: Morality, Economics, and International Labor Rights*, in *HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE* (Lance A. Compa & Stephen F. Diamond eds., 1996).

3. Such a global critique is not the topic of this paper. Extensive anti-MAI literature has emerged in the past two years. Much of it is Internet-driven or of the journalistic op-ed variety; the slow pace of academic publishing makes for scant scholarly treatment thus far. For a recent comprehensive treatment, see Stephan J. Kobrin, *The MAI and the Clash of Globalizations*, *FOREIGN POL'Y*, Fall 1998, at 97-109. See *Public Citizen* (visited Mar. 15, 1999) <<http://www.citizen.org>> (providing popular criticism). See also DAVID KORTEN, *WHEN CORPORATIONS RULE THE WORLD* (1996); Noam Chomsky, *Domestic Constituencies: MAI, the Further Corporatization of America and the World*, *Z MAG.*, May 1998, at 16-25. Mainstream economists are also beginning to caution against the excesses of free market policies that insufficiently account for social concerns. See, e.g., DANI RODERIK, *HAS GLOBALIZATION GONE TOO FAR?* (1997).

4. See Jane Bussey, *New Rules Could Guide International Investment: Efforts to Draft Accord Meet Criticism*, *MIAMI HERALD*, July 20, 1997, at 1F; Paul Magnusson & Stephen

This essay analyzes the labor rights provisions of the MAI draft text⁵ and compares them with labor rights regimes in other international contexts. The essay first examines the MAI's labor rights provisions. Then it undertakes two critiques of these provisions. One critique discusses the inadequacy of MAI labor clauses on their own terms, applying general rules of language construction without reference to other, comparable instruments. The second critique seeks to show how the MAI's labor rights language falls far short of labor rights provisions in other international agreements and related instruments. Finally, this essay provides a detailed summary and analysis of labor rights clauses in international instruments and suggests how a restructured MAI might incorporate such features.

I. Labor Rights Language in the MAI

A. Labor Rights Clauses in the MAI's Draft Text

MAI negotiators should be credited with recognizing the need to address labor rights in the Agreement and for conceding, at least in principle, that violating workers' rights should not be a means of gaining a comparative advantage in trade and investment. However, the language in the draft text is unable to protect, let alone promote, labor rights and labor standards in global commerce.

The draft text of the MAI contains three clauses on labor rights and labor standards: one in the preamble calling for "commitment" to core labor standards, one in the body of the text with a "not lowering standards" caution, and one in an annex incorporating OECD guidelines that contain certain labor provisions.

1. Preamble

First, a declaration in the MAI's Preamble would have Parties "[R]enewing their commitment . . . to the observance of internationally recognized core labor standards"⁶ and "[a]ffirming their support for the OECD Guidelines

Baker, *The Explosive Trade Deal You've Never Heard Of*, Bus. Wk., Feb. 9, 1998, at 51; Madelaine Drohan, *How the Net Killed the MAI: Grassroots Groups Used Their Own Globalization to Derail Deal*, TORONTO GLOBE & MAIL, Apr. 29, 1998, at 1.

5. See Directorate for Financial, Fiscal and Enterprise Affairs, Organisation for Economic Co-operation and Development (OECD), *The Multilateral Agreement on Investment: The MAI Negotiating Text* (last modified Dec. 14, 1998) <<http://www.oecd.org/daf/cm/mai/negtext.htm>> [hereinafter *MAI Negotiating Text*].

6. *Id.* art. I(Preamble). Core labor standards are defined as freedom of association, the right to organize and bargain collectively, prohibition of forced labor, the elimination of exploitative forms of child labor, and non-discrimination in employment. In general, the term "core" rights or standards (sometimes called "human rights" standards) refers to norms with universal application regardless of a country's or an employer's level of development or technology. "Non-core" or "economic" rights or standards refer to norms that may vary with the level of development. For example, minimum wage requirements and social insurance protection are often included in this category. It must also be recognized that several important labor norms, such as limits on child labor and occupational safety and health protection, have both "core" properties and "economic" properties. Developing countries may generally maintain a lower age for admission to employment (14 years of age versus 16 in developed countries, for exam-

for Multinational Enterprises . . . which are non-binding and which are observed on a voluntary basis”⁷

2. Body

Second, in the body of the MAI text under the heading “Not Lowering Standards,” the Parties would agree that it is “inappropriate to encourage investment by relaxing . . . [domestic][core] labour standards.”⁸ This clause goes on to say that “[I]f a Party considers that another Party has offered such encouragement, it may request consultations with the other Party, and the two Parties shall consult with a view to avoiding any such encouragement.”⁹ In the same draft clause, an alternative formulation would state that a Party “[shall][should] not waive or otherwise derogate from . . . [domestic] labor standards” to encourage foreign investment in the country.¹⁰

3. Annex

A third clause on labor rights appears under the heading “Relationship to Other International Agreements” and suggests “associating” the OECD Guidelines on Multinational Enterprises to the MAI.¹¹ The OECD Guidelines’ section on Employment and Industrial Relations contains a nine-point proclamation that multinational enterprises “should” respect various trade union rights, such as affording information and consultation to workers’ representatives.¹² The OECD states explicitly that “observance of the Guidelines is voluntary and not legally enforceable.”¹³

For such an association, negotiators propose an annex to the MAI containing the OECD Guidelines. Parties to the MAI would be “encouraged to participate in the Guidelines work of the [OECD] in order to promote cooperation . . . and to facilitate the maintenance of consensus”¹⁴ on matters addressed in the Guidelines. However, annexation of the Guidelines to the MAI “shall not bear on the interpretation or application of the Agreement, including for the purpose of dispute settlement; nor change [the Guide-

ple), and they are not expected to require expensive, state-of-the-art occupational safety and health technology in workplaces. At the same time, bonded child labor, labor by extremely young children, or failing to provide minimal health and safety protection to guard against serious injury or illness, cannot be conceded on the basis of a lower level of development.

7. *The OECD Guidelines for Multinational Enterprises*, OCDE/GD(97)40 (1997) [hereinafter *OECD Guidelines*]. The OECD Guidelines were adopted in 1976 and have been periodically updated since then. An “Employment and Industrial Relations” section of the Guidelines contains nine points on labor rights. For more discussion, see *infra* note 12 and accompanying text.

8. See *MAI Negotiating Text*, *supra* note 5, art. III(Not Lowering Standards). Bracketed words or phrases reflect options that are still under debate.

9. *Id.*

10. *Id.*

11. *Id.* art. X; see *OECD Guidelines*, *supra* note 7.

12. See *OECD Guidelines*, *supra* note 7, at 46-47.

13. *Id.* at 7.

14. *MAI Negotiating Text*, *supra* note 5, art. X.

lines'] non-binding character."¹⁵ Finally, an introduction to the annex would hold out the Guidelines as "a joint recommendation by participating governments to multinational enterprises operating in their territory . . . to help multinational enterprises ensure that their operations are in harmony with other national policies of the countries in which they operate."¹⁶

With so much encouragement, consultation, cooperation, and harmony in the MAI negotiators' draft language on labor rights, an uninformed observer may well ask why this issue is so controversial, and why popular protest on labor rights, among other causes, contributed to the MAI's downfall.¹⁷ The problem is that the negotiators' language trivializes the realities of labor rights violations related to trade and investment and their effect on workers in the new, globalizing economy¹⁸ and falls far short of labor rights protection in other international instruments.¹⁹

B. Two Critiques of the MAI Labor Rights Language

The MAI's treatment of labor rights gives rise to two central critiques. First, on its own terms, without comparing it with any other instrument, the MAI draft text is woefully lacking in labor rights substance. Negotiators set forth no clear norms of behavior for governments or multinational investors, created no binding obligations on them, set up no mechanism to scrutinize government or enterprise treatment of workers, and established no penalties, economic or otherwise, when investors violate workers' rights. Second, the MAI lags far behind other international trade regimes and their more extensive and sophisticated treatment of labor rights. Fifteen years ago, the MAI's labor rights language might have been worthy of attention. Today, it has been overtaken by developments in the labor rights field that make the MAI negotiators' attempts at dealing with labor rights seem shallow.

I. MAI On Its Own Terms

a. Preamble

A statement of "commitment" to core labor standards or "support" for OECD Guidelines in the Preamble to the MAI is no more than a weak

15. *See id.*

16. *Id.*

17. *See* Valerie Lawton, *Global Investment Talks Collapse Without Deal*, *TORONTO STAR*, Oct. 21, 1998, at 1; Guy de Jonquieres, *Retreat Over OECD Pact on Investment*, *FIN. TIMES* (London) Oct. 21, 1998, at 4 (citing the lack of strong labor rights protection and trade union opposition as contributing to the collapse of MAI negotiations).

18. The International Confederation of Free Trade Unions (ICFTU) produces an annual report on workers' rights violations around the world, with special attention to the imprisonment or murder of trade unionists. The report is available at the ICFTU's website at <<http://www.icftu.org>>. The International Labor Organization provides similar information, with lengthy documentation of child labor abuses around the world, at <<http://www.ilo.org>>. The U.S. Labor Department has also produced a four-volume study of child labor which is available at the Department's website at <<http://www.dol.gov>>. For another recent, vivid account of labor rights violations around the world, *see* WILLIAM GREIDER, *ONE WORLD, READY OR NOT* (1997).

19. *See infra* Part I.B.2.

exhortation that creates no obligations among signatories, let alone any implementation mechanism.

Both the definition of "core" labor standards and the content of the Guidelines are excessively narrow. Core standards cover only freedom of association, collective bargaining, child labor, forced labor, and discrimination. While their importance cannot be questioned, "core" standards leave aside matters like the right to strike, workplace health and safety, migrant worker protection, minimum wages that provide decent living standards, job security, social insurance, adjustment assistance for workers displaced by trade, and other vital workers' concerns. These rights and standards are affected perhaps even more than "core" concerns by trade and investment pressures on many governments to deregulate their domestic labor markets.²⁰

"Commitment" to core standards has no effect without a mechanism to hold parties accountable for their actions. A preamble statement may be useful as a basis for criticizing a country's failure to respect core labor standards. However, without a system for filing complaints and putting a party's conduct to a test of proof and defense and a method for imposing sanctions where violations are established, this clause is merely a statement of good intentions with no force.

A preamble statement of "support" for OECD Guidelines is likewise wanting. First, the Guidelines are even narrower in scope than core labor standards. Of the nine points in the Guidelines' "Employment and Industrial Relations" section, seven cover collective bargaining and related issues, one calls for training host country employees, and one urges non-discrimination in employment.

In general, the OECD Guidelines assume a mature collective bargaining relationship reflecting institutional interests of large employer federations and trade union groupings that serve on OECD advisory committees.²¹ They make no mention of discrimination or violence against workers who try to organize, child labor, forced labor, minimum wages, occupational health and safety, migrant labor, job security, social insurance, the right to strike, or other labor standards. While the OECD creates a quasi-"complaint" mechanism (although the word "complaint" is taboo; only "enquiries" are permitted), it has no enforcement regime to deal with violations of the Guidelines.²²

b. "Not Lowering Standards"

Although it looks reasonable and widely applicable on its face, the clause stating that MAI parties should not relax labor standards to attract invest-

20. The term "deregulation" in U.S. discourse is often characterized as "flexibilization" in other countries.

21. The Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC) are accredited to the OECD as official advisory bodies composed of business and labor federations in member countries. Both entities participated in MAI negotiations in their advisory capacity.

22. See *infra* Part I.B.1.c.

ment is starved for content and marginal in application. The unresolved choice between "domestic" and "core" standards is significant, with disadvantages attaching to each formulation. Using "core" standards instead of "domestic" standards greatly narrows the range of working conditions covered by the clause, as noted above in the discussion of core standards in the Preamble.

Using "domestic standards" could constrain cuts in such areas as minimum wages, social insurance benefits, or job security protection.²³ However, it would relieve a country of the need to comply with international "core" standards where its domestic law and practice may fall short of compliance with core standards. For example, Malaysia severely limits independent unionism in its important electronics sector (only unions that are affiliated with the official government-sponsored union may be formed). Until recently, Indonesia outlawed independent unions altogether and imprisoned the most prominent independent labor leader.²⁴ Both measures violate workers' freedom of association and right to bargain collectively. In the United States, "right to work" laws in twenty-one states obstruct the freedom of unions and employers to negotiate union shop agreements,²⁵ and U.S. legal doctrine allows the permanent replacement of strikers.²⁶ These features of U.S. law arguably violate workers' rights of association and collective bargaining when employers use them with the intention of interfering with or destroying workers' rights of association and collective bargaining.²⁷ These laws would be unaffected by a MAI labor rights provision proscribing cuts in domestic labor standards.

A "no-lowering" rule rewards countries with already low standards. Such countries may retain whatever advantage they derive from their domestic labor law and practice, even where it arguably violates workers' rights, such as Malaysia's limits on unionization in its large electronics sector, or the United States' "right to work" laws and permanent striker replacement doctrine. It also negates any pressure to improve labor standards, thus foreclosing any possible dynamic of "upward harmonization" of labor rights linked to increased trade and investment flows.

23. This leaves aside issues of exchange rates and the effects of currency devaluations. Any country could effectively "cut" wages in the global marketplace by devaluing its currency.

24. On both Malaysia and Indonesia, see OECD, *TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE* 58 (1996); Cindy Shiner, *Cries of Freedom Sound in Jakarta: New Regime Releases 2 Political Prisoners*, WASH. POST, May 26, 1998, at A11.

25. See discussion and sources cited *supra* note 1; 29 U.S.C. §§ 151-69, 164(b) (1994). The term "right to work" does not appear in Section 14(b) of the National Labor Relations Act. "Right to work" is a colloquial expression used to describe state laws forbidding employers and unions from agreeing to require dues payments from all represented employees covered by a collective bargaining agreement. Of the 50 states, 21 have such "right to work" laws, most of them in the South and Southwest.

26. See *NLRB v. Mackay Radio & Tele. Co.*, 304 U.S. 333 (1938).

27. See, e.g., ILO Committee on Freedom of Association No. 1543, 74 Official Bull., Ser.B, No. 2, 278th Rep., 15 (1991) (on the permanent replacement of striking workers).

Even more artfully, the clause proposed here would forbid lowering standards only “as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.”²⁸ The constraint only applies to a specific act of lowering a labor standard to attract a specific investment from a specific investor. For example, Malaysia might say to a U.S. electronics firm contemplating a new factory: “[W]e already restrict independent union organization in the electronics sector, but if you make this investment, we will ban outright all unionization in the sector.” Or New York State might say to a large European auto company deciding whether to invest in South Carolina (a “right to work” state) or in New York (a state where union security clauses are permitted): “[I]f you invest here, we will pass a ‘right to work’ law in New York.”²⁹

Presumably, such offers would be captured by the MAI’s language barring specific *quid pro quo* lowering of labor standards (whether the offer would be prevented by the MAI is another matter — there is no mechanism to enforce it). However, a decision by Malaysia to enact a general ban on unionization, or by New York to pass a “right to work” law, would not be reached by the MAI because it is not an encouragement of an investment by an investor. It is a general lowering of labor standards to create a more favorable climate for investors. The MAI does nothing to constrain such measures.

MAI negotiators also did not resolve the “should not waive” versus “shall not waive” labor standards debate. “Should” is simply hortatory. “Shall” suggests a binding obligation, but the MAI contains no mechanism for testing whether a country has complied with such an obligation. The lack of any forum for filing complaints or obtaining redress under MAI labor rights provisions reduces the “shall” to another exhortation with no practical effect.

c. Associating OECD Guidelines

In addition to the narrow scope of the OECD Guidelines’ labor provisions, the explicit reminder in the MAI of their “non-binding character” demonstrates the negotiators’ indifference to whether labor standards might improve in connection with expanded trade and investment. The OECD Guidelines set up a complicated system of “contact points” in government agencies that “identify and clarify issues that may arise in the Guidelines’ application.”³⁰

28. See MAI Negotiating Text, *supra* note 5, art. III(Intellectual Property) (emphasis added).

29. On the right-to-work law as an inducement to investment, see, for example, Doron P. Levin, *What BMW Sees in South Carolina*, N.Y. TIMES, Apr. 11, 1993, at C5; William Roberts, *New South Sees Future and It’s in Global Trade*, J. COM., Oct. 31, 1996, at 1A (“It was no accident that BMW chose South Carolina, a right to work state with little union activity, as the site for its first and only North American manufacturing plant”); Kenneth Cole, *Alabama’s Benz, UAW Don’t Mix: Unionizing a German Manufacturing Plant in the Right-to-Work State Won’t Be Easy*, DETROIT NEWS, May 10, 1998, at C1.

30. See OECD Guidelines, *supra* note 7.

Under OECD Guidelines, trade unions must lodge complaints about a corporation's alleged violations of the guidelines with the "contact point" of their own government, normally a designated individual (not very high-ranking) in an executive agency. The "contact point" communicates the concern to a counterpart in the country where the alleged violation took place. The latter contact point may then discuss the issue with officials from the offending company to urge corrective action, but there is no means of compelling any correction under OECD procedures.³¹

Complaints that identify a multinational enterprise as an alleged violator of the Guidelines are not permitted. Only "matters for consideration" may be raised, and "the resulting clarification . . . is not a judgment on the behavior of an enterprise, and thus does not refer to the enterprise by name."³²

Despite its limitations, some unions have been able to use the OECD Guidelines to advance their agenda, though more by public relations or inter-union solidarity measures than through pressure brought from the OECD. The United Mine Workers turned to the OECD following a 1988 labor dispute over layoff and recall protections at Enoxy Coal Co., a West Virginia mine owned by ENI, the Italian state-run energy company. A complex "exchange of views" was held among the union, the employers (both the U.S. subsidiary and ENI), and government "contact points" who obtained the views of their own ministries or departments. Pressure on the Italian government by unions helped resolve the dispute to the UMWA's satisfaction.³³

In the 1980s, a U.S. union facing anti-labor conduct by the local management of a U.S. subsidiary of the Swedish Electrolux corporation used the OECD contact points system. Swedish unions pressured their government to persuade Swedish parent company managers to convince U.S. executives to halt their objectionable conduct.³⁴ In 1990, the United Food and Commercial Workers made a similar move to the OECD in a dispute with the Belgium-based Carrefour supermarket chain. International pressure that included solidarity moves by Belgian unions brought about a settlement in April 1991, by which the company recognized the union and entered into bargaining.³⁵

Success in advancing labor rights through the OECD Guidelines is heavily dependent on just such idiosyncratic relationships. Swedish unions, for example, represent ninety percent of the labor force there,³⁶ giving them weight in dealings with Swedish-based multinational firms. The OECD system could hardly be transposed to the Indonesia of Presi-

31. For a detailed explanation, see *id.* at 11-17.

32. *Id.* at 15.

33. A management-side account of this and other labor disputes brought by unions to the OECD is contained in B. Glade & E. Potter, *Targeting the Labor Practices of Multinational Companies*, FOCUS ON ISSUES (July 1989).

34. *Id.*

35. See David Wallace, *Carrefour, Union Reach Truce in 2-Year Dispute*, PHILA. BUS. J., Feb. 19, 1990, at 1.

36. See INT'L LABOR ORG. (ILO), WORLD LABOR REPORT 8 (1997).

dent Suharto, for example, where a worker seeking to unionize might be found dead in a river.³⁷

2. *The MAI Compared with Other Labor Rights Regimes*

Since the early 1980s, several new legal and quasi-legal regimes have taken shape to address labor rights in the global economy. Some are new, like labor rights amendments to U.S. trade statutes since the mid 1980s, or the 1993 labor side-agreement to the North American Free Trade Agreement (NAFTA). Others evolved from older frameworks, like the recent emergence of "core labor standards" among Conventions of the International Labor Organization (ILO) since its founding in 1919, or the growth of the European social charter as the European Union (EU) expanded in membership and scope of authority since six original partners signed the Treaty of Rome in 1957.³⁸

The premise of labor rights advocacy is a simple one: no country — and no company operating in the country — should gain a competitive advantage in global trade by killing union organizers, banning strikes, using forced labor or brutalized child labor, or otherwise violating workers' basic rights. Besides such fundamental human rights concerns, a labor rights regime should also prevent government policies that deliberately hold wages and working conditions below levels consistent with a dignified workplace in a society with a fair distribution of wealth.

The challenge for labor rights advocates has been twofold. One challenge is to establish universal norms that comport with international law. Another is to fashion a system of enforcement that moves such "law" beyond a statement of good intentions — in the overworked metaphor, to give "teeth" to the norms.³⁹

37. See Merrill Goozner, *Indonesia Ignores U.S. on Rights*, CHI. TRIB., Nov. 8, 1994, at 22.

38. There is a rapidly growing amount of literature on international labor rights and trade. For a recent comprehensive review of legal analysis, see Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533 (1998) (book review). For a recent economic analysis, see GARY S. FIELDS, *THE ROLE OF LABOR STANDARDS IN U.S. TRADE POLICIES* (1998) and sources cited therein.

39. "Teeth" abound in discussions of international labor rights. NAFTA's labor agreement "lacks teeth to correct any wrongdoing," says U.S. Congressman Peter DeFazio. Dean Calbreath, *Lawmakers Condemn Maquiladora Firings*, SAN DIEGO UNION-TRIB., Oct. 30, 1997, at C1. A major union leader, CWA President Morton Bahr, asserts that the side agreement "has no real teeth to enforce basic worker rights." Tim Shorrock, *Mexico Approves Union at Taiwan-owned Firm*, J. COM., Apr. 18, 1997, at 3A. Speaking of the ILO, a British analyst says its child labor efforts have failed "because they lacked teeth." Michael Prest, *Profit Bows to Ethics*, INDEPENDENT (London), Oct. 26, 1997, at 3. An ILO official concedes "the question is whether the ILO countries are willing to give the ILO teeth to enforce its agenda." John Zarocostas, *Labor Watchdog Stresses Core Social Standards*, J. COM., Jan. 16, 1997, at 2A. A prominent U.S. trade analyst notes the need to put teeth into UN agencies like the ILO, "which monitors treatment of workers worldwide but lacks the power to condemn countries with egregious labor practices." Jeffrey Garten, *Congress Wages War on Free Trade*, N.Y. TIMES, May 28, 1997, at A21. Another commentator calls the WTO's final declaration on labor rights "nice words without teeth." Larry Weiss, *Global Trade Pact on Worker Rights: More Nice Words Without Teeth*, MINNEAPOLIS STAR-TRIB., Jan. 31, 1997, at 16A. Turning to Europe and its new

A. Unilateral Measures

While neither of these challenges has been fully resolved, issues of international labor rights and fair labor standards have moved high on the agenda of world trade concerns in recent years. In the United States, a coalition of trade union, human rights, religious, consumer, and allied groups succeeded in adding social conditionality to a range of trade and investment legislation. Labor rights amendments have been added to statutes governing the Generalized System of Preferences (GSP) in 1984,⁴⁰ the Overseas Private Investment Corporation in 1985,⁴¹ the Caribbean Basin Initiative in 1986,⁴² Section 301 of the Trade Act of 1988,⁴³ and Agency for International Development (AID) funding for economic development grants overseas.⁴⁴

A 1994 act requires U.S. delegates to the World Bank, the International Monetary Fund and other international lending agencies to condition their support for projects on labor rights guarantees.⁴⁵ Also, in 1997, Congress adopted a measure prohibiting the importation of products made by bonded child labor.⁴⁶

The United States is not alone in developing a unilateral labor rights regime. Acting as a bloc, the EU has also adopted a labor rights clause in its GSP program. Rather than threatening sanctions against countries that purportedly violate labor standards, the EU offers enhanced access to European markets for developing countries that respect workers' freedom of association, non-discrimination, and child labor protection.⁴⁷

Works Council Directive requiring European firms to consult with worker representatives on an EU-wide basis, the head of the European Commission "wants the law to have teeth in the form of penalties against firms that flout the legal obligation to consult." Charles Bremner, *New Law Under Social Chapter Would Require Agreement on Sackings*, TIMES, Nov. 5, 1997, at 1. An innocent observer might be excused for thinking the debate is between competing schools of dentistry, but underneath the overworked metaphor is a serious debate about the appropriate mix of moral and economic sanctions linking labor standards to international trade.

40. 19 U.S.C. § 2461 (1996). The GSP program permits a developing country to export goods to the United States on a preferential, duty-free basis as long as the country meets the conditions for eligibility in the program.

41. 22 U.S.C. § 2191 (1994). OPIC insures the overseas investments of U.S. corporations against losses due to war, revolution, expropriation or other factors related to political turmoil, as long as the country receiving the investment meets conditions for eligibility under OPIC insurance.

42. 19 U.S.C. § 2702 (1996). A 1990 labor rights amendment to what is now called the Caribbean Basin Economic Recovery Act (CBERA) expanded the worker rights clause to comport with GSP and OPIC formulations. CBERA grants duty-free status to exports into the United States from Caribbean basin countries on a more extensive basis than under GSP provisions.

43. 19 U.S.C.A. § 2411 (1996). Section 301 defines various unfair trade practices, now including worker rights violations, making a country that trades with the United States liable to retaliatory action.

44. Amendment to the Foreign Assistance Act, 22 U.S.C.A. §§ 2151 (1994).

45. 22 U.S.C. § 1621 (1996).

46. 19 U.S.C. § 1307 (1997).

47. See Neil Buckley, *EU to Offer Tariff Carrot to Poor States*, FIN. TIMES (London), Oct. 30, 1997, at 5. For text of the clause, see Council Regulation 11541-98 of May 25, 1998, 1998 O.J. (L 160) 3-7.

B. Regional Measures

The churning of labor rights initiatives is not confined to unilateral moves by the United States or by Europe. Several new regional initiatives have taken shape in recent years. The "Social Chapter" of the European Union and its reaffirmation in the 1997 Amsterdam Treaty incorporate a twelve-point program of EU labor standards in the 1989 Community Charter of Fundamental Rights of Workers. The Amsterdam Treaty allows for a Europe-wide labor legislation on some of the twelve points, either by unanimity or by a qualified majority.⁴⁸ However, the social chapter does not apply to union organizing, collective bargaining, or the right to strike. These matters are left exclusively to domestic law.⁴⁹

In the Western hemisphere, social "linkage" advocates convinced the Clinton administration to seek a supplemental labor agreement to NAFTA. The labor side accord was then negotiated with Mexico and Canada.⁵⁰ The Mercosur group of South America's Southern Cone has created an Economic and Social Consultative Forum (FCES) to treat labor standards in their economic integration efforts.⁵¹ The FCES includes an Economic and Social Consulting Forum embracing unions, social movements, and other NGOs from all member countries. Mercosur has also created a tripartite Working Group 10 in which government, business, and union representatives from member countries discuss labor relations, employment, and social security matters. Finally, the Southern Cone countries have established a Joint Parliamentary Committee where legislators from all member countries come together to discuss regional trade and investment issues.⁵²

C. Multilateral Developments

Besides labor rights developments at a unilateral level typified by the U.S. GSP regime, and at a regional level like those of the EU, NAFTA, and Mercosur, there has also been movement in multilateral settings. Important labor rights considerations come into play in the United Nations, the

48. For a discussion, see European Trade Union Information Bulletin, *The Amsterdam Treaty: A Trade Union Guide* (Sept. 30, 1997) <<http://www.ecu-notes.org>> [hereinafter *The Amsterdam Treaty*].

49. *Id.* art. 118(6).

50. The strength of the labor side accords is a subject of debate among supporters and critics. See Lance Compa, *American Unions and NAFTA*, in INTERNATIONAL TRADE UNIONISM AT THE CURRENT STAGE OF ECONOMIC GLOBALIZATION AND REGIONALIZATION 97-118 (Hideo Totsuka et al. eds., 1994) (proceedings of International Conference held at Saitama University, Japan, Apr. 6-9, 1994); Lance Compa, *Another Look at NAFTA*, 44 DISSENT 45-50 (1997); Jefferson Cowie & John D. French, *NAFTA's Labor Side Accord: A Textual Analysis*, LATIN AM. LAB. NEWS, 1993-94, at 5. See also public comments received by the Secretariat of the Commission for Labor Cooperation in connection with a four-year review of the NAALC at <<http://www.naalc.org>>.

51. OSCAR ERMIDA URIARTE, *MERCOSUR Y DERECHO LABORAL* (1996).

52. See *Textos para Debate Internacional* No. 7, Central Unica de los Trabajadores (CUT) and Confederation Française Democratique de Travail (CFDT), June 1996, at 23-24; Marta Haines-Ferrari, *MERCOSUR: A New Model of Latin American Economic Integration*, 25 CASE W. RES. J. INT'L L. 413, 437 (1993); URIARTE, *supra* note 51.

World Trade Organization, the International Labor Organization, and international financial institutions like the World Bank and the IMF.

Three principal UN instruments, the Universal Declaration of Human Rights,⁵³ the International Covenant on Civil and Political Rights,⁵⁴ and the International Covenant on Economic, Social and Cultural Rights⁵⁵ (sometimes referred to as the "International Bill of Rights") treat an array of workers' rights. They include both human rights matters (e.g., freedom of association, forced labor, child labor) and economic and social issues (e.g., decent wages, adequate health insurance, periodic holiday with pay).

While the WTO fended off direct treatment of labor concerns at its December 1996 trade ministers' meeting, the ministers had to concede the link between labor rights and trade.⁵⁶ They declared that the ILO is the proper arena for labor rights issues. However, labor rights advocates and some governments (including the United States) are still pressing for a labor rights link within WTO disciplines.⁵⁷

At its 1998 Conference, the ILO expanded its realm of "constitutional" norms from Convention Nos. 87 and 98 on freedom of association and the right to organize and bargain, to a set of "core" labor rights contained in seven Conventions covering the right to bargain collectively, prohibitions on forced labor, limits on child labor, and an end to race and sex discrimination in employment.⁵⁸ Under ILO jurisprudence, every member state is bound to respect such constitutional norms whether or not the country has ratified the relevant ILO Convention.⁵⁹

After years of resisting links to social dimensions in their grant and loan programs, the World Bank and the IMF have begun addressing labor rights. The Bank's 1995 World Development Report was devoted to labor market issues, and offered a definition of core workers' rights.⁶⁰ In 1997, the World Bank announced the creation of a Structural Adjustment Par-

53. G.A. Res. 217(III)(A), U.N. GAOR, 3rd Sess., pt. 1, U.N. Doc. A/810 (1948).

54. G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

55. G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

56. See *Singapore Ministerial Declaration*, WTO FOCUS NEWSLETTER (World Trade Org.), Jan. 1997, at 7.

57. See, e.g., Howard Wachtel, *Labor's Stake in the WTO*, AM. PROSPECT, Mar.-Apr. 1998, at 34-38. See also Gerard Baker, *Clinton Urges New, Faster Trade Round*, FIN. TIMES (London), May 19, 1998, at 7 (discussing President Bill Clinton's call for the WTO to deal with labor rights). For academic treatment, see Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 36 (1996).

58. See *ILO Core Conventions*, ILO Focus (Washington Branch Office of the International Labor Organization, Washington, D.C.), Winter/Spring 1997.

59. This has particular relevance for the United States. Of the seven core conventions, the United States has ratified only one: Convention No. 105 on the abolition of forced labor. *Id.* Other countries that have ratified only one of the core conventions are Bahrain, Cambodia, China, Laos, Qatar, Solomon Islands, United Arab Emirates, and Zimbabwe. See *id.*

60. See World Bank, *Workers in an Integrating World*, in WORLD DEVELOPMENT REPORT 78 (1995).

ticipatory Review Initiative (SAPRI) to engage trade unions and non-governmental organizations in reviews of Bank policy effects on workers and other social actors.⁶¹ In the wake of the Asian financial crisis, and particularly in connection with developments in Indonesia, the IMF has conceded a need to take workers' rights into account in its lending programs.⁶² Additionally, the United States has moved towards new measures making U.S. financial support of the Fund conditional upon labor rights considerations.⁶³

D. Codes of Conduct

The proliferation of labor rights regimes does not stop with intergovernmental action. Private actors have formulated several "codes of conduct" on labor rights in recent years. Prominent among them are brand name companies including Levi's, Reebok, and Nike.⁶⁴ Most recently, a group of such firms negotiated the Apparel Industry Partnership with a coalition of labor, religious, and human rights organizations. Their goal is to formulate common labor standards and a common monitoring and enforcement mechanism for labor rights in firm subsidiaries and subcontractors.⁶⁵

This brief survey of labor rights regimes in a variety of international settings suggests the paltry nature of the labor rights language in the MAI. International negotiators, heads of international organizations, national legislators, and even some multinational corporate executives acknowledge in the instruments they have produced that a labor rights regime worthy of the name must go beyond the merely hortatory language contemplated for the MAI. MAI negotiators should study other instruments for guidance in formulating language that can gain support from labor rights advocates.

II. Features of a Labor Rights "Regime"

What does it mean to speak of a "labor rights regime" that might have relevance for the MAI? Like any structured system of law, the more devel-

61. See Mark Suzman, *World Bank to Assess Policy Impact on Poor*, FIN. TIMES (London), July 15, 1997, at 5.

62. See Ronald Brownstein, *If Clinton Pushes, Asia's Breakdown Could Drive Labor Reforms Forward*, L.A. TIMES, Dec. 15, 1997, at A5.

63. See David E. Sanger, *I.M.F. Loans to Rights Violators Are Attacked in Congress*, N.Y. TIMES, Apr. 22, 1998, at 8.

64. See Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663 (1995); Jorge Perez-Lopez, *Promoting International Respect for Worker Rights through Business Codes of Conduct*, 17 FORDHAM INT'L L.J. 1, 5-26 (1993); Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 N.W. J. INT'L L. & BUS. 66, 67, 106-08 (1993). See also John H. Cushman Jr., *Nike Pledges to End Child Labor and Apply U.S. Rules Abroad*, N.Y. TIMES, May 13, 1998, at D1 (detailing promises Nike made to raise the minimum hiring age and to meet U.S. air control standards in foreign factories).

65. See Pamela M. Prah, *Clinton Endorses Plan to Curb Sweatshops Through Using Code of Conduct, Monitoring*, Daily Lab. Rep. (BNA), Apr. 15, 1997, at A-1, E-5; Steven Greenhouse, *Apparel Industry Group Moves to End Sweatshops*, N.Y. TIMES, Apr. 9, 1997, at A14.

oped systems of labor rights have four general aspects in common: 1) an elaboration of norms; 2) a statement of obligations; 3) a method for filing complaints and presenting evidence of violations; and 4) some measure of sanctions when violations are found.

Within each of these aspects, a variety of features can be distinguished. This section reviews elements of the most prominent labor rights regimes, and points out important differences within each. Such a "mapping" of elements in labor rights regimes and their optional features can help guide the fashioning of a new regime for the MAI.

A. Cross-Border Norms: Core and Core-Plus

The first element in an international labor rights regime is a set of norms with extraterritorial reach. Among current labor rights regimes, there are two poles of normative formulations. One is devoted to a relatively narrow "core." The other is more expansive. At extremes, the number of norms can actually vary from one, such as with some corporate codes or social labeling schemes which are limited to the issue of child labor,⁶⁶ to the 176 Conventions of the ILO (although the ILO cites only seven as "human rights" Conventions).⁶⁷

Inside these extremes, the elaboration of labor rights norms generally follows "core" and "core-plus" tracks. The core track contains a limited number of standards usually addressing freedom of association (and related rights of organization and collective bargaining), forced labor, child labor, and non-discrimination. The standards reflect fundamental human rights that cannot vary based on a country's level of development.

Advocates of core standards argue that limiting a labor rights regime to universal human rights standards sustains a consensus in favor of labor rights. Sticking to a narrow, non-economic core disarms critics who see a labor standards-trade link as a form of protectionism in disguise, meant to deprive developing countries of their comparative advantage in low labor costs.⁶⁸

The other current model goes beyond the so-called "core" to embrace social and economic standards related to wages, hours, and working conditions, usually bringing the number of specific standards closer to a dozen. A wider set of norms is more responsive to workers' concrete concerns and needs, and addresses some governments' attempts to gain trade advantages through economic and social repression. For example, the NAFTA and the

66. The "Rugmark" program involves a code of conduct limited to the issue of child labor. See Julie V. Iovine, *Must-Have Label: Rug Makers and Sellers Are Seeking Ways to Trumpet Compliance with a New Child-Labor Law*, N.Y. TIMES, Oct. 16, 1997, at F1.

67. See ILO, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS (1992); ILO, *International Labor Organization-ILO Web Site* (visited Dec. 12, 1998) <<http://www.ilo.org>> (providing updates).

68. For an argument to this effect, see World Bank, *supra* note 60, at 78-79. See also *Singapore Ministerial Declaration*, *supra* note 56, which asserts: "We reject the use of labour standards for protectionist purposes, and agree that the comparative advantages of countries, particularly low-wage developing countries, must in no way be put into question."

EU set out eleven and twelve basic labor standards, respectively, that mix human rights with social and economic concerns. Taken as a whole, the UN's International Bill of Rights covers more than a dozen labor-related concerns.⁶⁹ Most corporate codes of conduct contain more than core-norm construction, but do not usually reach as many concerns as the NAALC, EU, and UN formulations. Generally, they cover working hours and occupational safety and health; rarely do they address cost factors like wages and benefits beyond compliance with relevant domestic laws.

Scope of Norms in Selected International Labor Rights Instruments:

1) "Core" Norm Construction

Frameworks based on core labor standards include the following:⁷⁰

*EU's GSP system:*⁷¹

- freedom of association;
- the right to bargain collectively;
- limits on child labor.

*World Bank:*⁷²

- freedom of association;
- the right to collective bargaining;
- elimination of forced labor;
- elimination of exploitative forms of child labor;
- non-discrimination in employment.

*OECD:*⁷³

- freedom of association;
- collective bargaining;
- elimination of exploitative forms of child labor;
- prohibition of forced labor;
- non-discrimination in employment.

*ILO Human Rights Conventions:*⁷⁴

69. See sources cited *supra* notes 53-55. These instruments address, *inter alia*, freedom of association, organizing and bargaining rights, forced labor, child labor, non-discrimination, adequate wages, social security, workplace health and safety, limits on working hours, paid holidays, and the right to strike.

70. Some of these formulations group either the right to organize or the right to bargain collectively, but not both, with freedom of association. Others leave freedom of association standing alone, and group organizing with the right to bargain collectively. Still others place the rights of organizing and collective bargaining in separate categories. These differences appear random, but they can be important. The difference between organizing or collective bargaining as a manifestation of freedom of association, in contrast with organizing or collective bargaining as a means to economic ends, is critical in determining workers' fundamental rights. A related debate is whether the right to strike is based on freedom of association, and thus can be seen as a "core" human right, or whether it is an instrument of "economic" bargaining that can be constrained by legislation. None of the core constructions, and only the NAALC among core-plus constructions, contains the right to strike among its formulation of workers' basic rights. While there is no ILO convention on the right to strike, ILO jurisprudence has established the right to strike as an element of Conventions 87 and 98. See, e.g., ILO COFA Case No. 1543, 74 Official Bull., Ser. B., No. 2, 278th Rep., 15 (1991) (discussing the U.S. permanent strike replacements doctrine).

71. See European Union, Council Regulation, *supra* note 47.

72. See World Bank, *supra* note 60, at 78.

73. See OECD, TRADE, EMPLOYMENT, AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE 26 (1996).

74. Recall that these are the Conventions the ILO is seeking to elevate to constitutionally binding status. See *supra* note 67 and accompanying text.

- freedom of association and protection of the right to organize;
- the right to organize and bargain collectively;
- minimum age for admission to employment;
- abolition of forced labor (2 conventions);
- non-discrimination in employment;
- equal pay for men and women.

*World Trade Organization:*⁷⁵

The WTO has affirmed a "commitment to the observance of internationally recognized core [labour] standards" and declared that the ILO "is the competent body to set and deal with these standards."⁷⁶

2) "Core-Plus" Formulations:

*U.S. GSP and other domestic U.S. trade laws (OPIC, Section 301 et al.):*⁷⁷

- the right of association;
- the right to organize and bargain collectively;
- prohibition of forced labor;
- limits on child labor;
- "acceptable conditions" on minimum wages, hours of work, and occupational safety and health;⁷⁸

*EU Community Charter of Fundamental Social Rights for Workers:*⁷⁹

- the right to freedom of movement;
- free employment and fair remuneration;
- the improvement of living and working conditions;
- the right to social protection;
- the right to freedom of association and collective bargaining;
- the right to vocational training;
- the right of men and women to equal treatment;
- the right to information, consultation, and participation;
- the right to health and safety in the workplace;
- the protection of children and adolescents in employment;
- the protection of elderly persons in employment;
- protection of persons with disabilities in employment.

*Labor Principles of the North American Agreement on Labor Cooperation (NAALC):*⁸⁰

- freedom of association and protection of the right to organize;
- the right to bargain collectively;
- the right to strike;

75. See *Core Labour Standards*, Singapore Ministerial Declaration, Dec. 13, 1996, WTO Ministerial Conference, 36 I.L.M. 218, 221 (1997).

76. *Id.*

77. See *supra* notes 40-47 and accompanying text.

78. See 19 U.S.C. § 2462(a)(4). U.S. legislation labels these norms "internationally recognized worker rights," but does not ground them in ILO Conventions, international human rights instruments, or any other internationally accepted definitions of labor rights. What qualifies as "acceptable" conditions of labor, therefore, is what is found "acceptable" to the particular U.S. agency conducting a review under the relevant statute. Significantly, the U.S. formulation does not include a universal core norm on non-discrimination. A proposed non-discrimination clause was dropped from the draft legislation at the insistence of Reagan administration officials concerned about Middle East oil-producing allies. See Karen Travis, *Women in Global Production and Worker Rights Provisions in U.S. Trade Laws*, 17 YALE J. INT'L L. 1, 173 (1992).

79. See *Community Charter of the Fundamental Rights of Workers*, reprinted in EUROPEAN COMMUNITY LAW SELECTED DOCUMENTS 661-67 (George A. Bermann et al. eds., 1993) [hereinafter *Community Charter*].

80. North American Agreement on Labor Cooperation, Sept. 13, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499, 1515-16 (1993) [hereinafter NAALC].

- prohibition of forced labor;
- labor protections for children and young persons;
- minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements;
- elimination of employment discrimination on the basis of such grounds as race, religion, age, sex, or other grounds as determined by each Party's domestic laws;
- equal pay for men and women;
- prevention of occupational injuries and illnesses;
- compensation in cases of occupational injuries and illnesses;
- protection of migrant workers.

*Apparel Industry Partnership Code of Conduct:*⁸¹

- forced labor;
- child labor;
- harassment or abuse;
- non-discrimination;
- health and safety;
- freedom of association and collective bargaining;
- wages and benefits;
- hours of work;
- overtime compensation;

*Levi Strauss Code of Conduct:*⁸²

- wages and benefits;
- working hours;
- child labor;
- prison labor/forced labor;
- non-discrimination;
- disciplinary practices (i.e. "corporal punishment or other forms of mental or physical coercion").

*Reebok Code of Conduct:*⁸³

- non-discrimination;
- working hours/overtime;
- forced or compulsory labor;
- fair wages;
- child labor;
- freedom of association;
- safe and healthy work environment.

B. Obligations Across Borders

Like the Cheshire Cat's grin, an elaboration of international labor norms is just floating in air without attaching some level of obligation to respect the norms. Like norms, obligations vary in their number and level of detail. In some instruments, a single phrase announces the obligation, while in others, a detailed statement lays out myriad obligations. They also vary in

81. See Report of Apparel Industry Partnership to President Clinton, *Workplace Code of Conduct*, Daily Lab. Rep. (BNA), No. 72, at E-5 (Apr. 15, 1997).

82. See Levi Strauss & Co., *Business Partner Terms of Engagement and Guidelines for Country Selection* (on file with the Levi Strauss corporate office); Compa & Hinchliffe-Darricarrère, *supra* note 64, at 677.

83. See Reebok Human Rights Production Standards (on file with Reebok corporate office); Compa & Hinchliffe-Darricarrère, *supra* note 64, at 681.

their reach, sometimes binding governments only, sometimes binding private actors as well.

U.S. and European GSP laws obligate developing countries to respect labor rights norms or lose their GSP beneficiary status. In the U.S. GSP scheme, the operative language imposing an obligation requires beneficiary countries to "tak[e] steps to afford" the five "internationally recognized worker rights" defined in the Act.⁸⁴ In contrast, Section 301 of the Trade Act puts the obligation in the negative: U.S. trading partners are engaged in "unreasonable" trade practices if they "deny" or "fail to provide" the five rights.⁸⁵ The EU's GSP regime requires countries to "undertake to respect" standards on child labor, freedom of association and collective bargaining.⁸⁶

NAFTA's labor side accord says that the eleven Labor Principles are "guiding principles that the Parties are committed to promote," but cautions that they "do not establish common minimum standards for their domestic law."⁸⁷ The NAFTA labor accord defines six obligations of the parties to the Agreement using operative obliging language such as "shall ensure," "shall promote," and "shall provide." The six obligations consist of maintaining high standards, effectively enforcing domestic labor laws, providing for private rights of action, due process, and transparency in labor tribunals, and publishing and publicizing labor laws and decisions.⁸⁸

The European Union's Community Charter of Fundamental Social Rights of Workers urges member states to guarantee the rights in the Charter "in accordance with national practices" through legislation or collective agreements.⁸⁹ Binding obligations arise under complex EU voting procedures that allow "Directives," the term for Europe-wide legislation, to be adopted on subjects authorized by the Treaty as appropriate for EU rulemaking. Directives bind EU members as to their results, but leave to the individual countries the precise form of implementation of the Directive under domestic law.⁹⁰

Some EU Directives may be adopted by qualified majority vote (a weighted voting system meant to balance interests of large and small members). This system prevents a single country from vetoing a Directive and binds countries that vote against a Directive passed by a qualified majority.

84. "Taking steps" is an elastic statement of obligation that can give rise to conflicting interpretations. In a legal challenge to the Bush administration's alleged non-enforcement of the U.S. GSP law, for example, a court found that the "taking steps" criteria was so broad that there was "no law to apply" and that the President enjoyed complete discretion in enforcing the GSP labor rights provision. See *ILRERF v. Bush*, 752 F. Supp. 495, 497 (D.C. 1990), *aff'd by a divided opinion*, 954 F.2d. 745, 746 (D.C. Cir. 1992).

85. 19 U.S.C. § 2411(d)(3)(B)(iii) (1996).

86. See *The Amsterdam Treaty*, *supra* note 48.

87. NAALC, *supra* note 80, Annex I (Labor Principles).

88. *Id.* art. 2(Levels of Protection).

89. *Community Charter*, *supra* note 79, § 27.

90. For discussion of EU rulemaking procedures, especially regarding labor matters, see Janice R. Bellace, *The European Works Council Directive: Transnational Information and Consultation in the European Union*, 18 *COMP. LAB. L.J.* 325 (1997).

In the area of workers' rights, for example, the EU can adopt Directives by qualified majority voting in matters of health and safety, working conditions, information and consultation of workers, persons excluded from the labor market, and equality between men and women.⁹¹

For other subjects, binding Directives can only be adopted by unanimity, which allows a single-country veto. Unanimity is required for Directives that deal with social security, job security, worker participation, employment of third-country nationals, and job creation.⁹²

Still other topics cannot be made the subject of binding measures at the European level under any circumstances. The EU *precludes* any Directives on union organizing, collective bargaining, or the right to strike. European states reserve these matters to the domestic polity since they are so integral to national character and so dependent on national history.⁹³

The ILO's basic Conventions reflect subtle differences. ILO member states must "undertake to give effect" to Convention No. 87 on freedom of association and protection of the right to organize, while "measures appropriate to national conditions shall be taken, where necessary" to implement Convention No. 98 on collective bargaining.⁹⁴ Member states must "undertake to suppress any form of forced labor" under Convention No. 105, but "undertake to pursue a policy" to abolish child labor under Convention No. 138.⁹⁵ In these instances, the formulations "give effect" and "suppress" suggest more decisive action than taking "appropriate measures" or pursuing a policy.

Corporate codes of conduct introduce a new definition of who is obligated to comply with the norms contained in the code. The regimes discussed above put obligations on *governments*, leaving private firms subject only to the domestic law of the countries where they do business and to the vagaries of enforcement by domestic authorities. Depending on the country, labor law enforcement may be weak, underfunded, or corrupt. Codes of conduct create obligations for *companies*, which can range from a principal enterprise that issues or signs the code, to subsidiaries and subcontractors to whom the principal company is applying the code.

Corporate codes of conduct obligate foreign subsidiaries or subcontractors to comply with international norms or risk losing their commer-

91. See *The Amsterdam Treaty*, *supra* note 48, art. 118(1).

92. *Id.* art. 118(3).

93. *Id.* art. 118(6). Unresolved differences exist among EU partners on such issues as exclusive representation versus plural unionism, majority unionism versus minority unionism, compulsory union dues payment versus voluntary dues payment, compulsory arbitration versus voluntary arbitration, and other fault-line issues.

94. ILO, *Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize*, in 1 INTERNATIONAL LABOR CONVENTIONS AND RECOMMENDATIONS 1919-1991, at 435 (1992) (convention entered into force July 4, 1950); ILO, *Convention No. 98 Concerning the Application of the Principles of the Right to Organize and Bargain Collectively*, in *id.* at 524 (convention entered into force July 18, 1951).

95. ILO, *Convention No. 105 Concerning the Abolition of Forced Labor*, in *id.* at 618 (convention entered into force Jan. 17, 1959); ILO, *Convention No. 138 Concerning the Minimum Age for Admission to Employment*, in *id.* at 1030 (convention entered into force June 19, 1976).

cial relationship with the parent company. The Levi's code, for example, states "[W]e will not utilize partners who use child labor in any of their facilities."⁹⁶ Reebok states it will "apply the Reebok Human Rights Production Standards in our selection of business partners."⁹⁷ The Apparel Industry Partnership requires any signatory company to "comply with" the code, to "require its contractors . . . to comply . . . with this Code," and to "condition future business with contractors and suppliers upon compliance with the standards."⁹⁸

C. Arenas to Test Compliance with Obligations

A third common element in a labor rights regime is the existence of a forum or arena where compliance can be examined. This element normally involves a "complaint" mechanism that 1) permits an allegation that a party has violated labor rights norms, 2) defines who may file such a complaint, and 3) provides procedures for reviewing a complaint to determine whether or not a breach of obligations occurred.

The unilateral scheme in U.S. trade laws usually provides for an administrative process where a complaint, often called a "petition," may be lodged with the administrative agency responsible for the trade program. In general, any "person" may file a complaint or petition under labor rights provisions in U.S. trade law. This makes the process available to any trade union, NGO, company or other organization, as well as concerned individuals.

The Office of the United States Trade Representative (USTR) receives petitions arguing that a country should be removed from GSP beneficiary status because it is not "taking steps to afford" internationally recognized worker rights.⁹⁹ The Overseas Private Investment Corporation (OPIC) receives petitions for removal of countries from OPIC insurance eligibility because of labor rights violations.¹⁰⁰ The Treasury Department receives requests for its delegates to the World Bank, IMF, and other international lending institutions to use "voice and vote" against funds for governments that violate workers' rights.¹⁰¹ The Customs Bureau (a division of the

96. See sources cited *supra* note 82.

97. See sources cited *supra* note 83.

98. See Prah, *supra* note 65, at E-5, E-6.

99. Procedures for filing GSP labor rights complaints are found at 15 C.F.R. § 2007 (1998). Over 50 such petitions have been filed since the clause took effect in 1985, and are on file at the GSP office of the Office of the United States Trade Representative, Washington, D.C. Several countries have been removed or suspended from GSP beneficiary status, and some have been restored after labor rights improvements. See sources cited *infra* note 103. See also U.S. GENERAL ACCOUNTING OFFICE, USGAO PUB. GAO/GGD-95-9, INTERNATIONAL TRADE - ASSESSMENT OF THE GENERALIZED SYSTEM OF PREFERENCES, at 107-08.

100. See, for example, United Auto Workers, Petition to Remove South Korea from Coverage under the Overseas Private Investment Corporation (1988) and other OPIC labor rights petitions (on file with the Overseas Private Investment Corporation, Washington, D.C.).

101. There are related requests by the International Labor Rights Fund (ILRF) on file with the office of the United States delegation to the World Bank and with ILRF in Washington, DC.

Department of the Treasury) receives demands that goods allegedly made by exploited child labor should be denied entry into the United States.¹⁰²

In administering the GSP and OPIC labor rights clauses, the Office of the United States Trade Representative (USTR) and the Overseas Private Investment Corporation (OPIC) provide for public hearings in which interested parties, including petitioning labor and human rights organizations, can testify. In addition to petitioners, government officials from countries subject to a petition, their representatives, or employers implicated in a petition, may appear at public hearings. Witnesses provide testimony to and respond to questions from GSP Subcommittee of the Trade Policy Staff Committee (for GSP) or the OPIC President and top staff assistants (for OPIC).¹⁰³

The same openness in the form of access to a complaint mechanism, without strict "standing" requirements that allow only injured parties to file complaints, also marks the NAALC's review procedures. Any "person," including trade unions, NGOs, and other organizations, may file a complaint on any of the NAALC's eleven Labor Principles (technically the complaint is called a "public communication" — international dispute resolution language tends to the euphemistic). The complaint must be filed with the National Administrative Office (a NAALC agency within each country's labor department) of the country that seeks review of another country's alleged failure to meet its obligations under the NAALC.¹⁰⁴

Technically, complaints should allege a failure by a neighboring government to effectively enforce its domestic labor law. In practice, however, most complaining unions and human rights organizations have targeted corporations in their complaints.¹⁰⁵ More recently, systemic complaints have been filed under several of the NAALC Labor Principles covering a whole industry.¹⁰⁶

There are no citizenship requirements for filing a NAALC complaint. One may file a complaint in another country's labor department about his own country's failure to meet its obligations, or in their own country's

102. The first such demand was filed by the ILRF in November, 1997, and is on file with the ILRF in Washington, D.C.

103. See 15 C.F.R. § 2007 (1998). See, e.g., petitions and testimony from the International Labor Rights Fund, the U.S.-Guatemala Labor Education Project, and other NGOs, on file with the Office of the United States Trade Representative, Washington, D.C.

104. NAALC, *supra* note 80, art. 16(3); see also Revised Notice of Establishment of United States National Administrative Office and Procedural Guidelines, 59 Fed. Reg. 16,660-62 (1994) [hereinafter U.S. NAO Guidelines].

105. Cases filed thus far have alleged labor rights violations by General Electric, Honeywell, Sony, Sprint, and other multinational firms. Petitions, reports of review, and related materials are available from the National Administrative Office of each NAALC country's labor department.

106. See, e.g., Steven Greenhouse, *Mexicans Were Denied U.S. Rights, Suit Says: A complaint on behalf of migrant apple pickers in Washington State*, N.Y. TIMES, May 28, 1998, at A18.

labor department about another country's violations.¹⁰⁷ There is no requirement that all domestic legal recourse be exhausted before a NAALC complaint can be filed.¹⁰⁸

Public hearings on a complaint are conducted as a matter of course by the United States National Administrative Office.¹⁰⁹ The Canadian National Administrative Office may hold "public meetings or consultations."¹¹⁰ The NAO of Mexico contemplates "informative sessions" tantamount to hearings.¹¹¹ These hearings provide forums for both passionate advocacy and public debate on alleged labor rights violations.¹¹²

The NAO then reviews the country's labor law enforcement and issues a written report, which can itself contain powerful criticism that generates change.¹¹³ Optionally, the report may conclude with a recommendation for ministerial consultation. This option gives rise to a new forum for public intervention as ministers devise programs to address matters raised in the complaints and treated in the reports.¹¹⁴ Most ministerial consultations have resulted in new public hearings and in workshops, seminars, and other educational activities that have wide public participation.¹¹⁵

As the power to move from first-stage review/consultation to second-stage evaluation and then to third-stage arbitration under the NAALC's three-stage complaint procedure reverts to governments, the scope of review narrows. By itself, a government can invoke an evaluation by an independent panel of experts of another country's alleged failure to meet its NAALC obligations.¹¹⁶ However, complaints concerning the first three Labor Principles, those dealing with freedom of association, collective bar-

107. For example, in recent NAALC complaints about alleged violations by a U.S.-based auto parts manufacturer at its plant in Mexico, Canadian, U.S., and Mexican trade unions filed complaints both in the United States and in Canada. See matters involving Echlin Corp., on file with U.S. National Administrative Office, Washington, D.C., and with National Administrative Office of Canada, Ottawa, Ontario.

108. U.S. NAO Guidelines, *supra* note 104, § G(3)(c).

109. *Id.* § H(3).

110. See Canadian NAO Guidelines for Public Communications Under Articles 16.3 and 21 of the NAALC, § 5(a) (available from Department of Human Resources Development, Office of the North American Agreement on Labour Cooperation, Ottawa, Ontario).

111. See SECRETARIAT OF LABOR AND SOCIAL WELFARE, WHAT IS THE MEXICAN NATIONAL ADMINISTRATIVE OFFICE? 12 (1995).

112. See, e.g., Nancy Cleeland, *Labor Panel Told of Problems at Tijuana Plant*, L.A. TIMES, Feb. 19, 1998, at A3; Molly Moore, *Mexican Farmhands Accuse U.S. Firms: Panel Hears Washington Apple Pickers*, WASH. POST, Dec. 3, 1998, at A36.

113. See, e.g., Sam Dillon, *Sex Bias is Reported by U.S. At Border Plants in Mexico*, N.Y. TIMES, Jan. 13, 1998, at A8; Sam Dillon, *Bias Said to Hurt Independent Mexican Unions*, N.Y. TIMES, Apr. 30, 1998, at A8.

114. NAALC, *supra* note 80, art. 22 (containing terms and conditions of ministerial consultations).

115. See, e.g., Robert Collier, *Sprint Accused Under NAFTA at S.F. Hearing*, S.F. CHRON., Feb. 28, 1996, at A3; Compa, *infra* note 121, at 15-17 (discussing ministerial consultations in the *Sony*, *Sprint*, and *Pesca Union* cases).

116. NAALC, *supra* note 80, art. 23(1). The Evaluation Committee of Experts (ECE) is composed of one private sector expert from each NAALC country. The committee conducts a comparative review of labor law enforcement in all three countries on matters raised in the complaint.

gaining, and the right to strike (called the "industrial relations principles"), are not permitted to advance beyond review and optional ministerial consultations following a review.¹¹⁷ The remaining eight principles are subject to treatment by an Evaluation Committee of Experts (ECE). Private actors may participate in an evaluation through public hearings or other devices employed by the independent evaluation committee.¹¹⁸

Two of the three NAALC governments must agree to move a complaint from the ECE to the arbitration stage.¹¹⁹ However, alleged violations of only three of the Labor Principles are subject to arbitration: those stemming from child labor, minimum wage, and occupational health and safety complaints.¹²⁰ No NAALC complaints have yet reached the arbitration stage.¹²¹

The European Union's mechanisms have a narrower scope of review and stricter standing requirements than the NAALC. Complaints may not be filed regarding every element of the Community Charter, but only with respect to on those which have been implemented by binding Directives. Directives have mostly been limited to matters of safety and health, non-discrimination, and consultation with workers.¹²²

Citizens or organizations claiming a violation of labor rights may complain to the European Commission that their government has failed to implement a Directive, at which point the Commission may take the matter to the European Court of Justice. Alternatively, aggrieved individuals or organizations may bring a complaint directly to the European Court alleging that their rights under EU Directives have been violated by their government's failure to interpret national law in conformity with a Directive. While the national government is the defendant, these proceedings implicate the conduct of a corporation which can give rise to a domestic legal proceeding. This opens the door to judicial scrutiny of employer conduct and whether or not the employer violated employees' labor rights.¹²³

In the ILO, complaint mechanisms are not open to individual workers or NGOs. Only trade union organizations, employer organizations, or governments may file complaints with the ILO. Furthermore, with the excep-

117. *Id.* art. 23(3). The distinction is based on the definition of "technical labor standards" in NAALC Article 49 (Definitions). See NAALC, *supra* note 80. For a discussion, see Lance Compa, *Another Look at NAFTA*, DISSENT, Winter 1997.

118. See Procedural Guidelines for Evaluation Committees of Experts (on file with the Secretariat of the Commission for Labor Cooperation, Dallas, Texas).

119. NAALC, *supra* note 80, art. 29(1). The arbitration panel is composed of five non-governmental experts from the three countries.

120. *Id.*

121. For a fuller discussion of NAALC cases and procedures, see Lance Compa, *NAFTA's Labor Side Accord: A Three-Year Accounting*, 3 NAFTA LAW AND BUS. REV. AM. 6-23 (1997).

122. See generally THE SOCIAL DIMENSION: EMPLOYMENT POLICY IN THE EUROPEAN COMMUNITY (Michael Gold ed., 1993); JAMES D. DINNAGE & JOHN F. MURPHY, THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION (1996).

123. For a broader discussion of EU complaint procedures, see Lisa Borgfeld White, *The Enforcement of European Union Law: The Role of the European Court of Justice and the Court's Latest Challenge*, 18 HOUS. J. INT'L L. 833 (1996); Lenore Jones, *Opinions of the Court of the European Union in National Courts*, 28 N.Y.U. J. INT'L L. & POL. 275 (1996).

tion of the seven "core human rights," governments may only allege an ILO Convention violation by another country's government if both countries have ratified the relevant Convention. Within these constraints, however, the ILO is judged to have the most comprehensive oversight system for international norms.¹²⁴

The United Nations provides ample forums for raising human rights complaints, including labor rights violations. Complaints must be initiated by governments, but hundreds of NGOs are officially recognized by the UN.¹²⁵ They can influence their governments to lodge complaints, and they may provide testimony and related information to UN agencies and to a recently-created High Commissioner for Human Rights.¹²⁶

D. Sanctions

Current international labor rights regimes contain a broad range of possible consequences for parties in violation of their obligation to comply with labor rights norms. At one end of a sanctions continuum, quiet diplomacy among governments, or between an international body and a government, is the only result. No promise of remedial action lies in such "soft" reproof, where the violator can ignore its critics. Dealings among "contact points" in the OECD are an example of such "soft enforcement."¹²⁷ However, when such quiet diplomacy goes public, the force of public opinion should not be underestimated. In some circumstances adverse publicity can change behavior as effectively as economic sanctions.¹²⁸

At the other end of the spectrum, some labor rights regimes provide for "hard" reproof for violating workers' rights. At their strongest, these measures take the form of trade sanctions such as the loss of favorable tariff treatment or import bans. Such measures can be used to force corrective action to cure a violation or to punish a violator who refuses to take corrective action. For example, the GSP and other unilateral U.S. labor rights clauses provide for the removal or suspension of beneficiary status. Between 1986 and 1995, removal, suspension, or partial suspension of GSP benefits resulting from labor rights violations were applied against Nicaragua, Paraguay, Chile, Central African Republic, Burma, Liberia, Syria, Sudan, Mauritania, Maldives, and Pakistan.¹²⁹ Nicaragua, Paraguay, and Chile have since regained beneficiary status following improvements in their labor rights.

124. For a comprehensive account of ILO procedures, see HÉCTOR BARTOLOMEI DE LA CRUZ ET AL., *THE INTERNATIONAL LABOR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS* 67 (1996).

125. For a recent discussion of NGOs and the UN, see Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 249 (1997).

126. See *The United Nations and Human Rights*, N.Y. TIMES, Oct. 20, 1997, at A18.

127. See *supra* notes 30-34 and accompanying text.

128. See John H. Cushman, Jr., *Nike Pledges to End Child Labor And Apply U.S. Rules Abroad*, N.Y. TIMES, May 13, 1998, at D1.

129. Case summaries are available for review at the GSP Office of the USTR, Washington, D.C.; table of petitions and results on file with author.

Between these two extremes of allegedly "toothless" moral suasion and economically harmful trade sanctions lie several intermediate mechanisms. They include self-reporting requirements, investigations, reviews and reports by other governments, by international bodies, or by NGOs that expose violations and generate public pressure for redress, consultations among government ministries or with tripartite bodies that can lead to remedial action, evaluations and recommendations by independent committees of experts, labeling requirements, fines, and others.

The oversight system established by the ILO contains a variety of measures. Countries that have ratified a convention are subject to complaints of violations by another ratifying country, or by a bona fide trade union in any country. Constitutionally, all countries are bound by Conventions 87 and 98 on freedom of association and the right to organize and bargain collectively, and are subject to complaints whether or not they have ratified them. These constitutional obligations have now been extended to other "core" Conventions.¹³⁰ Moreover, all countries must report annually on their progress toward ratification of ILO Conventions.

All countries potentially face investigations by a Committee of Experts or Committee on Freedom of Association and findings that they have violated an ILO Convention. Although the ILO has no coercive power to compel correction or to sanction a violator, reproof here takes the form of what the ILO calls "the mobilization of shame." That is, the ILO hopes that public exposure of violations and embarrassment before the international community will have the effect of correcting violations.¹³¹

The NAALC's review stage results in a "report of review" characterizing the reviewed country's performance in enforcing its labor law, but stopping short of outright accusation. Instead, the report may recommend ministerial consultations on the matter. While there is no requirement for corrective action and no prospect of sanctions to compel correction at this stage of the NAALC process, reports and consultation can create embarrassing publicity for a government or employer that compels changed behavior.¹³² Sometimes, the mere prospect of a NAALC complaint may effectively foster change.¹³³

Further NAALC proceedings show other elements of the sanctions continuum. Following a review, an independent Evaluation Committee of Experts investigates and files a report and recommendations on a country's alleged violation of its NAALC obligations. The ECE's recommendations are non-binding, but their implicit criticism would create an

130. See *Declaration Affirms ILO Principles*, Daily Lab. Rep. (BNA), July 6, 1998, at D23.

131. The ILO points to several instances where the moral force of its findings put a stop to labor rights violations. See DE LA CRUZ ET AL., *supra* note 124, at 29-36, 106-07.

132. See Cleeland, *supra* note 112; Dillon, *supra* note 113; Collier, *supra* note 115.

133. In 1996, the government of Alberta dropped plans to privatize certain labor standards enforcement after public service unions announced plans to file a NAALC complaint. See Allan Chambers, *Privatization of Labor Rules Raises Fears: Law May Face NAFTA Challenge*, EDMONTON SUN, Sept. 6, 1996, at A6; *Province's Halt of Privatization Plan Ends Looming NAFTA Complaint*, INSIDE NAFTA, Dec. 25, 1996, at 14.

expectation of response by a government and reproof, in the court of public opinion, for failure to respond.¹³⁴

When one moves beyond the ECE level to arbitration, hard reproof starts taking hold in the NAALC. The independent arbitral panel is empowered to impose a fine of up to \$20 million against an offending government.¹³⁵ If a government fails to comply with an arbitral panel's order, trade sanctions in the form of loss of preferential tariff treatment can be imposed against firms or industrial sectors where the violations of workers' rights occurred.¹³⁶

While there is no European police to enforce the judgments of the European Court of Justice, the European Commission may obtain an order from the ECJ to compel penalties in the form of monetary fines. These fines are paid to the Commission if a country refuses to comply with a court order. The court may also order a member state to pay monetary damages to a citizen where the Court determines that the state's government failed to implement or to respect an EU Directive, which led to a violation of the citizen's rights.

National courts are constrained to give effect to ECJ rulings, making them enforceable under domestic law.¹³⁷ In practice, no government has openly spurned an order of the European Court in a labor-related matter, since such an action would be tantamount to renouncing its EU membership.¹³⁸

Conclusion

The purpose of this rapid survey of labor rights regimes is not to suggest that any one of them is a model for the MAI. A generally positive assessment of some features of these regimes, at least as compared with the MAI, should not obscure the fact that each has been subjected to severe, well-founded criticism. In view of the U.S. own serious, unremedied problems of labor rights violations,¹³⁹ the GSP and related labor rights statutory schemes in U.S. trade laws provoke charges of "aggressive unilateralism"

134. This reading is necessarily speculative. No case has proceeded to the ECE level under the NAALC, although cases susceptible to ECE treatment have been filed and are still under consideration at earlier review and consultation stages. See Compa, *supra* note 50, at 50.

135. See NAALC, *supra* note 80, art. 39(4)(b), Annex 39. The amount of the fine must be devoted to strengthening domestic labor law enforcement in the area that is the subject of the complaint.

136. See *id.* art. 41, Annex 41B.

137. See Jones, *supra* note 123, at 281; White, *supra* note 123, at 860.

138. See Kevin Andrew Swartz, *Powerful, Unique, and Anonymous: The European Court of Justice and its Continuing Impact on the Formation of the European Community*, 3 S. CAL. INTERDISC. L.J. 687, 692 (1994).

139. See, e.g., Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (detailing widespread firing of union supporters who seek to organize); SECRETARIAT OF THE COMMISSION FOR LABOR COOPERATION, *PLANT CLOSINGS AND LABOR RIGHTS* (1997) (detailing widespread use of plant closing threats by U.S. employers to deter union organizing efforts and the inefficacy of U.S. labor law in preventing such conduct).

and hypocrisy.¹⁴⁰ In the EU, the adoption of Labor Rights Directives has been limited to relatively uncontroversial issues like equal pay, occupational safety, and the consultation of workers, leaving a wide range of labor rights untouched by European norms. Some critics call the EU labor rights system a failure.¹⁴¹

The NAALC has come under fire for failing to create uniform labor standards for the three nations in NAFTA and leaving existing domestic laws undisturbed. This effectively locks in low standards where countries are unwilling to improve them and blocks any "upward harmonization" dynamic. Furthermore, while the NAALC sets forth eleven Labor Principles, only three are susceptible to arbitration and potential sanctions: those on child labor, minimum wage, and safety and health. Vital labor standards on freedom of association, the right to organize, the right to bargain collectively, and the right to strike cannot pass beyond the initial, arguably "toothless" review and optional ministerial consultation stage of the NAALC process. In any case, specific remedies such as reinstatement of fired workers or recognition of migrant workers' unions are not available under the NAALC.¹⁴²

The United Nations and the ILO have commendable oversight systems that call on countries to account for human rights and labor rights violations. However, they have no power to enforce their decisions or otherwise to change the behavior of recalcitrant labor rights violators. The WTO has not yet integrated labor rights into its disciplines, preferring to refer the issue to the ILO.¹⁴³

Corporate codes of conduct arise mainly from brand name retailers concerned with their image among consumers. Their stance on labor rights seems to be more of a response to the degree of uproar in the buying public than a commitment to sustained efforts to promote labor rights for their employees. Such codes are not catching on with companies less

140. See, e.g., Philip Alston, *Labor Rights Provisions in U.S. Trade Law: "Aggressive Unilateralism?"*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 71 (Lance A. Compa & Stephen F. Diamond eds., 1996).

141. For an overview of the "failure" arguments, see DAVID M. TRUBEK, SOCIAL JUSTICE "AFTER" GLOBALIZATION: THE CASE OF SOCIAL EUROPE (MacArthur Consortium Research Series on International Peace and Cooperation No. 9, Dec. 1996), and sources cited therein, including Stephen J. Silvia, *The Social Charter of the European Community: A Defeat for European Labor*, 44 INDUS. & LAB. REL. REV. 626 (1991).

142. For a representative criticism of the insufficiency of remedies under the NAALC, see Jerome I. Levinson, *NAFTA's Labor Side Agreement: Lessons from the First Three Years*, in INSTITUTE FOR POLICY STUDIES AND INTERNATIONAL LABOR RIGHTS FUND (1996).

143. For a view that the ILO is ineffective, see Thomas J. Schoenbaum, Remarks at Meeting of the Section on International Law of the American Association of Law Schools, in *International Trade and Social Welfare: The New Agenda*, 17 COMP. LAB. L.J. 338, 351 (1996), which argues that few nations have complied with ILO Conventions and that the ILO's impact on international law has been minimal. On the WTO, see Martin Khor, *The World Trade Organisation, Labour Standards, and Trade Protectionism*, in THIRD WORLD RESURGENCE 30 (1994), which argues that labor rights advocates in developed countries are really motivated by protectionism and would use WTO disciplines to further impoverish developing countries.

dependent on consumer goodwill.¹⁴⁴

Rather than looking for models, this review has sought to demonstrate the richness of labor rights discourse in the past two decades and the variety of approaches found in other labor rights instruments that might inform MAI negotiators in any resumed talks on an international investment agreement. The NAALC is perhaps the most variegated and flexible labor rights regime to take shape in recent years and is worth further study for shaping new international agreements with a labor rights dimension. It provides continuing opportunities for cooperation and consultation among governments. At the same time, it provides a contentious complaint mechanism readily accessible to workers, unions, and human rights advocacy groups.

The NAALC does not create uniform supranational standards or a new supranational enforcement agency but rather preserves national sovereignty over labor law matters. However, it does create obligations for effective labor law enforcement susceptible to reviews by other parties and to evaluation, and in some cases arbitration, by independent, non-governmental experts in labor law.

In the long run, the approach contained in the NAALC may move the parties in the direction of harmonized standards and enforcement. If so, this will be accomplished over a long period and at a pace that allows for education, acceptance, and adjustment as the process unfolds. Such a long term evolution is preferable to a Procrustean bed of norms and mechanisms applied immediately in countries as diverse as Canada, the United States, and Mexico.

What, then, might a labor rights component, informed by the NAALC and by other labor rights regimes, look like in the MAI?

Core-Plus Norms

A labor rights-enhanced MAI should affirm a broad set of labor rights and labor standards that begin with core rights and go on to embrace economic and social protections, including wages, benefits, and job security, that are vital to protecting workers against the ravages of unmediated free market policies.

Obligations That Bind States and Enterprises

A labor rights clause in the MAI should create binding obligations on both signatory governments, ensuring that they will implement and effectively enforce the norms, and on multinational enterprises and investors that avail themselves of the benefits of an investment agreement, ensuring that they will comply with the labor rights norms of the agreement. The latter could be accomplished by expanding and strengthening the OECD Guidelines for Multinational Enterprises, making the Guidelines a binding code of conduct.

Complaint Forums and Mechanisms

144. See, e.g., Wendy Bounds & Hilary Stout, *Sweatshop Pact: Good Fit or Threadbare? Industry Could Get a PR Boom, but Activists Worry*, WALL ST. J., Apr. 20, 1997, at A6; Glenn Burkins, *Clinton Plan to Eliminate Sweatshops in Apparel Industry Called Too Weak*, WALL ST. J., Apr. 15, 1998, at A2.

MAI negotiators should establish an arena where workers, unions, human rights organizations, employers, and governments may file complaints alleging a violation of labor rights norms and obligations. A complaint mechanism could be constructed anew, or it might retain elements of the existing mechanism under the OECD Guidelines (but eliminating the fiction that it is only an "enquiry" where accused labor rights violators cannot be named). It may also be possible to use ILO oversight mechanisms to provide a neutral fact-finding function and an assessment of whether an alleged violation indeed contravenes labor rights norms and obligations. The ILO's factual determinations could then be taken up under MAI dispute resolution mechanisms.

Any complaint mechanism should provide opportunities for public hearings and public participation in review, evaluation, and dispute settlement procedures. At the same time, there should be ample opportunity for cooperation, consultation, technical assistance, and other measures that provide a way out of a contentious dispute, allowing parties to settle problems and exit gracefully from the glare of international scrutiny.

Escalating Sanctions

Developing countries rightly question the use of labor rights clauses for protectionist purposes, and developed countries must take care not to let the arrogance of superior economic power drive heavy-handed economic reprisals against weaker countries. A balanced labor rights regime should provide a brief, defined period in which quiet diplomacy — which may in fact require the creation of a new function of international labor conciliation and mediation — can find a solution to a labor rights crisis, or at least steady improvement toward a solution. If an initial behind-the-scenes approach is unavailing, a next stage might involve investigation and critical reporting by a permanent labor rights office in the OECD (or WTO, if the MAI re-emerges there), or reliance on ILO oversight steps. Such a review and reporting stage should allow opportunity for response and correction of the problem in light of the report.

A next stage might involve a further investigation, with a report and recommendation by a distinguished group of experts which squarely challenges the labor rights violator to comply with the recommendations or to declare publicly its intention not to comply. Such defiance would finally trigger economic sanctions ranging from a fine to loss of MAI guarantees in such areas as national treatment, performance requirements, MFN, or expropriation. In short, sanctions must be available for any labor rights regime to be credible and effective, but sanctions should only come after ample opportunities to resolve disputes without them.

MAI negotiators, when and if they reconvene to fashion an international investment agreement, should take these elements into account in adding a labor rights dimension to any new agreement. If instead they stay close to the paltry language of the labor rights clauses in the 1998 draft analyzed here, the human rights and labor rights advocacy communities should again mobilize to halt a MAI that fails to protect workers.