Trade Law, Labor, and Global Inequality

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Globalization is transforming the conditions of labor around the world. These changes are facilitated by developments in trade law and the larger trade and investment regime of which it is a part. While trade law has done a great deal to foster economic integration and increase cross-border flows of goods and services, workers in many countries and in many industries have suffered job losses, declining wages, and abusive conditions that can be attributed at least in part to trade pressures.

This chapter examines the effects of globalization on labor and what is being done to offset its negative consequences. We show that the benefits of globalization are not evenly spread, and that workers are often losers in the trade game. We explain how globalization can weaken domestic labor protections and indicate that the trade regime has yet to provide compensating protection. We suggest that there is a way to construct a transnational labor regime to maintain labor standards and protect labor rights in a globalized economy. We show how negative effects might be counteracted by coordinated action at domestic, regional, and global levels and suggest that the lack of a clear vision of how transnational labor law might operate is hampering progress toward an effective transnational labor regime.

I. The Scope of Trade Law

Trade law sets the legal framework for cross-border commercial transactions. Trade law takes shape in global, regional, and subregional arrangements among governments. At the same time, all countries maintain
domestic laws on trade, and much of trade law's application involves reconciling conflicting supranational rules and domestic statutes.

Domestically, the United States has an extensive system of law governing international trade. First and most simply, U.S. laws set tariffs on imports into the United States. Many people are not aware that the infamous and high Smoot-Hawley tariffs of the 1930s are still on the books. They are superseded by application of the WTO's most-favored-nation (MFN) rule, which requires that WTO members must extend to all trading partners the tariff levels granted to their single “most-favored” partner. This is why MFN status for China was such a contentious issue through much of the 1990s, when China was not a WTO member and Congress had to act annually to grant MFN status to China. If MFN were not granted, tariffs on imports from China would snap to Smoot-Hawley levels, making Chinese products prohibitively expensive.

Congress finally granted permanent MFN status to China to avoid the annual dust-up, though in the process proponents changed the nomenclature from “most-favored-nation” to “normal trade relations” (NTR) to avoid giving the impression that China was getting some kind of favorable treatment. NTR has now become the term of art in U.S. trade discourse for the MFN principle, and is catching on in the rest of the world.

In 2002 Congress granted trade negotiating authority to President Bush under what was used to be called “fast track” terms, by which the executive negotiates a complete trade agreement with a trading partner or group of partners, and Congress quickly votes yes or no, without amendments, on the final deal. Fast-track authority had earlier been denied to President Clinton largely over concerns that labor standards and environmental protection were inadequately addressed in the legislation.1

The Bush administration renamed fast-track “trade promotion authority” (TPA)—another nomenclature change, this time to avoid the implications of “pulling a fast one” that critics had used to derail fast track for Clinton. In the 2002 TPA, Congress included a labor clause making enforcement of labor standards a required objective in any trade deal.2 The United States also has labor rights clauses in statutes governing preferential trade arrangements with developing countries, such as the Generalized System of Preferences (GSP), about which more below.

Bilaterally, the United States has negotiated several trade agreements, notably with Jordan, Chile, Singapore, and Australia, opening selected product and service markets and reducing tariffs and nontariff barriers. These agreements also contain labor rights clauses requiring the parties to effectively enforce their labor laws. Many labor advocates view the Jordan agreement in particular as a strong template for trade-labor linkage. It sets out International Labour Organization (“ILO”) core labor standards as relevant norms and incorporates labor standards into the text of the agreement, rather than standing as a separate “side agreement,” and it subjects labor violations to the same dispute settlement regime as commercial violations. One problem, however, is that the U.S.-Jordan agreement only contemplates “complaints” by one of the governments against the other, not a complaint system open to submissions by unions, human rights groups, or other civil society forces. These entities would have to lobby their government to launch a complaint, making government willingness, not citizen initiative, the trigger for investigating workers’ rights violations.

One innovative bilateral trade-labor arrangement should be noted here. The U.S.-Cambodia textile trade agreement provides positive incentives for garment manufacturing firms in Cambodia to comply with international labor standards. Under the agreement, compliance—certified by an equally innovative monitoring system run by the ILO—brings increased quota opportunities to export products to the United States. In fact, firms and workers in Cambodia made substantial gains under this accord.3 The quota system providing the incentive ended with the demise of the Multi-Fibre Arrangement as of January 1, 2005; nonetheless, Cambodia hopes to retain its export industry based on its reputation for fair treatment of workers built up under the agreement.4

Regionally, the United States is party to the North American Free Trade Agreement (NAFTA), which constructs a detailed set of trading rules among Canada, Mexico, and the United States. In the wake of NAFTA, the United States has negotiated with other Western Hemisphere nations for a U.S.-Central America Free Trade Agreement (CAFTA—still subject to ratification, and a subject of controversy in the House of Representatives as we write). Negotiations have also proceeded on a Free Trade Agreement of the Americas (FTAA), but talks are stalled, largely over disputes over agricultural subsidy policies.4

The United States also participates in the Asia-Pacific Economic Cooperation (APEC), a much looser trade coordinating body so oddly named precisely because the countries want to avoid suggesting that they have created an “organization” setting rules for trade. Other countries have their own regional trade arrangements, notably the European Union (which is much more than a simple trading area) and the Common Mar-
ket of the South (Mercosur), which includes Argentina, Brazil, Paraguay, and Uruguay, with Chile, Bolivia, and Peru as associate members, who are likely to be joined by Mexico.

At the multilateral level, the United States is involved in global trade law matters through participation in the World Trade Organization (WTO) and, to a lesser extent, the Organization for Economic Cooperation and Development (OECD). The WTO has a complex rule-making and adjudicative system. As in any such system, parties win and lose cases. The WTO does not have the power directly to force a country to change its trade laws or regulations, but can authorize the prevailing party in a WTO case to take trade countermeasures against the violating party. Such sanctions are used rarely. Most WTO rulings push contending parties into negotiations to settle the dispute before sanctions are imposed or soon after sanctions begin to pinch. Settlements usually lead to a change in the violating party's offending law or practice. However, these WTO disciplines do not extend to labor rights violations.

II. Trade and Labor Standards

Labor law, broadly defined, involves measures to provide social protection and offset negative effects of an unconstrained market. It includes industrial relations regimes allowing (and regulating) workers’ collective action such as trade union organizing, collective bargaining, and strikes. It sets labor standards like minimum wage, overtime limits, child labor restrictions, nondiscrimination protections, and more. What most of the world calls “social security law” provides programs like health insurance, pensions, unemployment benefits, and workers’ compensation for job-related injuries.

In the predominantly national frameworks that characterized most of the twentieth century, workers could achieve bargaining rights, fair labor standards, and social protection through class-based political action in local and national legislatures. They made such gains both in the industrial countries then doing most of the world’s high-value-added production and in larger developing countries that protected leading national sectors under import substitution industrialization (ISI) policies.

These standards could be maintained in part because national economies were not subject to major shocks from outside their borders. But global competition that arose in the last part of the twentieth century—where, for example, auto workers in Mexico and electronics workers in Malaysia could produce cars and computer hardware with high levels of quality and productivity at a fraction of wage costs in developed countries—put enormous downward pressure on collective bargaining, labor standards, and social protection systems everywhere. This happened regardless of the geography of competition: North-North, North-South, or South-South.

The results of global competition vary in different countries and regions, but much of the effect on labor conditions is to reduce effective protection. Workers in the United States have seen job losses, wage and benefit cuts, and accelerated trade union decline. Even in Europe, which has tried to resist such pressures, the European social model is now under siege as pressures mount for longer hours, less job security, and fewer benefits in many countries. To a degree, Europe has sought to adjust to these pressures while creating new approaches to providing security and protection under the ungainly rubric of “flexicurity,” but in many cases there has been a net loss for labor.

In developing countries, race-to-the-bottom competition, especially in labor-intensive sectors like garment and electronics manufacturing, results in worsening conditions as governments seek to lure investors with promises of low labor costs and no unions. Where unions are allowed to exist, they are often government-dominated unions that serve as a labor discipline mechanism, not as workers’ representatives. Such is the case in two of the largest exporting countries, Mexico and China.

Many mainstream economists, government officials, corporate spokespersons, and pundits assume that free trade creates net gains in wealth for society as a whole—and it may. But society as a whole is an intellectual construct, not real people in the real world. In real economies, there are winners and losers, and workers are often the losers. While trade clearly benefits multinational corporations and those that serve them, its effect on workers is varied and often negative. To be sure, workers in some sectors and some industries in some countries gain jobs. In the United States, workers handling imports from Asia at Pacific coast ports are an example. But many more workers suffer lost jobs, lower wages, and reduced social protection. Even those workers in developing countries who have gained employment as a result of globalization may be working under abusive conditions and earning subsistence wages.

The proclaimed “net gains” mask a small number of winners and huge number of losers in the globalized economy. And if the many losers get no
recompense from the winners, the results are unjust. For example, in the North American context, U.S. workers have inadequate unemployment insurance and a scandalous lack of health insurance when they lose their jobs; Mexican workers have no unemployment insurance; and Mexican farmers thrown off their land by the effects under NAFTA of imported U.S. corn receive no help from transition programs. Indeed, migrating illegally to the United States is their adjustment program.

Imbalance between the power of labor and that of capital preserves the injustice. We are seeing on a global scale a repeat of the situation that prevailed in domestic markets a century ago, when the power of capital often crushed workers’ aspirations. Workers in the global economy face the same challenge now that workers in national economies faced then: how to halt race-to-the-bottom competition among states, provinces, and regions with differing levels of economic development and natural endowments. The response a century ago, taking decades to advance (and still not fully accomplished) was to set a rules-based floor of labor standards which subnational jurisdictions and firms were not permitted to undercut. The solution today must be to construct an international system that has a similar effect.

Within the economy of the United States, the process of constructing a uniform labor standards “floor” started in the early twentieth century with states-based initiatives like the first workers’ compensation and child labor laws. Regulation moved to the federal level in the 1930s with New Deal legislation like the National Labor Relations Act and the Fair Labor Standards Act. Later came equal pay laws, nondiscrimination laws, occupational safety and health laws, and others.

The United States was not alone; European countries, South American countries, Canada, Japan, and many others moved in the same direction, with precedent-setting measures in many labor areas. Mexico set out the most advanced national labor rights and standards in its 1917 Constitution, guaranteeing the right to organize, the right to strike, the eight-hour day, and other basic labor protections.

None of these national legal frameworks is perfectly administered or enforced. Still, they deter a race to the bottom in labor standards inside national borders. Now this brake needs to be applied internationally by the application of transnational labor law. Achieving this goal is a challenge because there is no global authority that enjoys the same sovereign power that national governments enjoyed when twentieth-century labor law was created.

III. The Emergence and Limits of Transnational Labor Law

Transnational labor law (TLL) is our term for measures that would do for a global economy what domestic labor law did for the closed national systems of the post–World War II era. We use this term to refer to a package of measures that would operate at various levels from the local to the global, involve the private as well as the public sectors, deploy a range of instruments from hard law to soft guidelines and principles, use new tools to foster a “race to the top,” and provide funding where needed. Such a complex amalgam is the only way that the functions performed by twentieth-century labor law within closed national economic spaces can be performed in the complex transnational space of the present.

Transnational Labor Law, thus understood, would include:

- Trade rules permitting individual countries to use trade sanctions to deter production under substandard working conditions as measured by international standards
- Trade rules granting positive incentives to countries that excel at meeting international fair labor standards
- Regional or global labor standards setting forth obligations and mechanisms to assess compliance, whether such standards are enforceable or just aspirational
- Programs to augment social protection schemes for people adversely affected by trade
- New tools that could encourage a race to the top
- Programs to strengthen domestic labor codes in countries with weak systems
- Public-private codes of conduct providing for voluntary restraint.

In recent years, advocates of linking workers’ rights and trade have made some breakthroughs in creating instruments and mechanisms giving shape to TLL. Experience with the still largely embryonic TLL regime shows mixed results and limited impact. However, some progress has been made. Take as an example the transnational effort to get labor standards considered by the WTO. At the insistence of trade union and environmental advocates, the Clinton administration called for the creation of a WTO labor working group that would merely put the issue on the agenda for discussion. This modest effort was part of the dynamic—
along with 30,000 protesters and a police riot—that broke up the 1999 WTO ministerial meeting in Seattle. Free trade advocates and WTO supporters saw Seattle as a disaster, but for the anti-globalization movement it was a dramatic victory that changed the direction of the international economy.

The "battle in Seattle" appeared to at least stall what globalization critics see as a neoliberal express train bringing "Washington Consensus" policies (market opening, privatization, cuts in public services and public employment, super rights and protections for investors and patent-holders, etc.) to every country, whether or not countries want to adopt these policies and whether or not the policies are good for them. In this new context, the Clinton administration went on to negotiate what some labor rights advocates see as a model labor chapter in the U.S.-Jordan Free Trade Agreement, including it in the main body of the pact (not a "side deal," as in the NAFTA labor accord) and making violations of workers' rights redressable through trade disciplines as with any other violations.

Pursuant to a congressional mandate in 2002's Trade Promotion Authority (TPA) legislation, the United States now demands labor clauses in all trade agreements. Following the TPA labor requirement, bilateral trade agreements with Chile, Singapore, Morocco, and Australia and the regional U.S.-Central American Free Trade Agreement (CAFTA) contain clauses requiring countries (including the United States, it should be clear) to "strive to ensure" compliance with international labor standards and to "effectively enforce" domestic labor laws. However, only the latter obligation on effective application of domestic law is subject to dispute resolution and potential enforcement through trade measures, and countries retain the sovereign power to set labor standards wherever they choose, even below international norms. The "strive to ensure" provision is hortatory, not enforceable. This is a move in the right direction, but it is only a half-step, and it is too soon to know how effective these measures will be.9

IV. The World Trade Organization and the "Social Clause"

While the United States has started to include labor rights in bilateral trade agreements, efforts to get the WTO to enforce international labor standards have been unsuccessful. Labor advocates have long sought an amendment that would explicitly authorize the use of trade sanctions to bar imports from countries that failed to implement core labor standards. However, the WTO has resisted pressures for such a so-called social clause.

While most advocates of a social clause have pressed for a treaty amendment, some have argued that the current treaty provides a textual basis that would authorize WTO sanctions in cases involving gross violations of labor rights. And they suggest that the landmark Shrimp-Turtle case provides a precedent for such an interpretation. In that case, the WTO Appellate Body upheld a U.S. law prohibiting imports of shrimp from countries that did not protect turtles in the shrimp-harvesting process. The Appellate Body said that the U.S. measure fit the Article XX exception allowing a nontariff trade barrier for conservation of exhaustible natural resources.10

Some believe that the same logic applies to trade measures based on failure to protect workers' fundamental rights in the workplace. Article XX explicitly allows countries to take protectionist measures against imports made by prison labor. Robert Howse and Makau Mutua make a powerful argument that other Article XX exceptions covering "public morals" and "protection of human . . . life or health" should allow trade measures for violations of workers' rights:

Trade law itself should be interpreted and evolved in a manner consistent with the hierarchy of norms in international law generally, where many basic human rights have the status of custom, general principles, or erga omnes obligations, which would normally prevail over specific provisions of a trade treaty, assuming an actual conflict. When properly interpreted and applied, the trade regime recognizes that human values related to human rights are fundamental and prior to free trade itself, which is merely an instrument of basic human values. The primacy of human rights over trade liberalization is consistent with the trade regime on its own terms.11

However, Howse and Mutua concede, "The institutions that are the official guardians of trade law pose formidable barriers to the proper and full realization of this insight."12

Resisting any move along these lines, the WTO has so far refused to countenance even a working group on labor, a concession earlier made to environmental concerns. The WTO purported to say its final "no" on trade-labor linkage in the 1996 Singapore Ministerial Declaration, which stated:
We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.¹³

V. Labor Rights in Domestic Trade Statutes

Under the Generalized System of Preferences (GSP), WTO law allows countries to provide preferential tariffs for developing countries and condition them in various ways. The United States and the European Union have programs that condition their GSP concessions on adherence to basic labor standards, among other conditions.¹⁴

Congress first inserted a labor rights clause in the 1984 GSP renewal statute conditioning a developing country’s favorable tariff treatment on whether it was “taking steps to afford internationally recognized worker rights.”¹⁵ The GSP labor rights provision defined such rights as:

1) the right of association;  
2) the right to organize and bargain collectively;  
3) a prohibition on the use of any form of forced or compulsory labor;  
4) a minimum age for the employment of children; and  
5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.¹⁶

Trade laws adopted after the 1984 GSP renewal contain similar labor-linked requirements for developing country benefits.

While the United States has used these laws to put pressure on some egregious violators, it has not employed them in an evenhanded manner and has been accused of manipulating the law to achieve unrelated political purposes. Thus the law was applied to cut off GSP benefits to the Pinochet and Strossner dictatorships, while equally abusive governments like those of Indonesia under Suharto and Guatemala under a series of murderous military juntas did not face similar sanctions.¹⁷

Although the unilateral adoption and application of labor rights provisions by the United States in trade laws has had some effect in some cases, the way it has been used provoked widespread criticism from international law experts and from developing country leaders. Human rights lawyer Philip Alston argues:

As international trade becomes even more important in a post-Cold War world with its many additional would-be market economies, and as protectionist pressures increase in the United States and other developed market economies, the more attractive punitive or retaliatory trade measures become. This is especially true if they can be justified not solely by reference to economic considerations but also on human rights grounds. While measures in response to “market dumping” are a form of economic self-defense, measures to combat “social dumping” can be defended in largely altruistic or humanitarian terms. . . . It is difficult to escape the conclusion that the United States is, in reality, imposing its own, conveniently flexible and even elastic, standards upon other states. It is unlikely that the United States would look kindly upon such an approach if it were targeted in a similar fashion.¹⁸

Some developing country leaders condemned linking labor rights and trade in the GSP as being imperialist and protectionist. The Prime Minister of Malaysia expressed the argument thus:

Some of the countries of the South have tried to pull themselves up literally by their own bootstraps. But the moment they appear to succeed, the carpet is pulled out from underneath their feet. GSP privileges are withdrawn and their records of human rights, democracy, etc are scrutinized in order to obstruct their progress. . . . Unemployment in the developed countries is not due to workers in developing countries working hard to compensate for their lack of other competitive advantage, but rather to the profligate ways of the developed nations with their high wages and unemployment benefits. Regrettably, powerful trading nations threaten through unilateral actions to undermine the carefully negotiated agreements. The attempts to link human rights and labor to trade are major threats that would dim the hope of a free environment for trade.¹⁹
These critiques of the use of GSP to encourage compliance with international labor standards have not stopped the use of this instrument by the European Union and the United States. However, a recent decision by the WTO Appellate Body may affect the way such tools can be used in the future. The Appellate Body ruled that GSP preferences like those offered by the European Union must be based on objective and transparent criteria and applied in such a way that identical treatment is offered to all similarly situated developing countries. Although the WTO only ruled on the special treatment given countries that combat drug traffic, the decision could affect the way the European Union manages its program of special benefits for countries that incorporate international labor standards in national law, requiring that care be taken to be sure that all countries that meet the standards receive equal benefits.20

A. Section 301 and China

In 1988, Congress added a labor rights amendment to Section 301 of the Trade Act, using the five-part GSP definition to make systematic workers’ rights violations by any trading partner an unfair trade practice against which the United States could retaliate with economic sanctions. The labor rights clause lay dormant for fifteen years because potential complainants were daunted by evidentiary requirements to show that foreign labor practices placed a “burden or obstruction” on U.S. commerce.

Labor rights advocates made first use of the Section 301 labor rights clause in a complaint against China submitted by the AFL-CIO in March 2004. The China 301 submission, which comprised 108 pages with 345 footnotes, set forth chilling accounts of workers’ rights violations connected to products exported to the United States. The complaint documented the effects of these exports on production by U.S. companies and on jobs and wages of U.S. workers, addressing the “burden or obstruction” element required for a 301 complaint. Violations laid out in the complaint included tight government control of the official trade union organization, the All China Confederation of Trade Unions (ACFTU), and the smashing of workers’ independent organizing efforts through arrest and imprisonment of leaders and activists. The complaint also pointed to widespread use of child labor, horrendous health and safety conditions, and a quasi-apartheid system that discriminates against migrant peasant workers in urban factory zones.

The China 301 complaint posed squarely the tension between assertions of human rights and labor rights in trade relations and assertions that a labor-trade linkage is a pretext for protectionism. What the AFL-CIO really intended, said critics of its 301 petition, was to gain higher tariffs on imports from China to preserve jobs in the United States and stick consumers with higher prices in the process. The AFL-CIO just as strenuously argued that its goal was to advance workers’ rights in China, to “level the playing field” not by tariffs and higher prices but by halting violations of workers’ rights. If the Chinese government continued abusing workers’ rights, the resulting tariff hikes should be laid to it, not to labor rights advocates in the United States.

The Bush administration refused to take up the petition for review, dismissing it as an exercise in “economic isolationism.” Instead, officials argued, it would use the pending designation of China as a “market economy,” a still-unrealized status, as leverage to push for labor reforms. Designation as a market economy rather than a state-run economy carries benefits such as lower penalties in antidumping cases. It is hard to take the administration’s argument seriously as there is no evidence that the United States has raised any labor-related issues in talks with China regarding its “market economy” status.21

B. NAFTA and the NAALC

Upon taking office in 1993, Bill Clinton insisted on and got labor and environmental side accords to NAFTA. The labor side agreement, known as the North American Agreement on Labor Cooperation (NAALC), brings a social dimension in the form of defined “labor principles” and a mechanism for filing complaints and obtaining reports, public hearings, and recommendations. The NAALC, however, is an oversight system, not an enforcement system, and is limited in scope and effectiveness.

In an unusual procedural feature of the NAALC, complaints of workers’ rights violations in a country must be filed with a review body in one of the other two countries, not the country where the alleged violations occurred. Negotiators did not want to establish parallel domestic bodies under the NAALC that would “compete” with their domestic law enforcement agencies and possibly arrive at conflicting conclusions about a case. Instead, they agreed to subject themselves to reviews and reports by each other on their enforcement of national labor laws related to the NAALC’s labor principles.22
Some thirty complaints have been filed under the NAALC alleging violations of workers’ rights by companies in all three countries and accompanying “failure to effectively enforce” domestic labor laws by the relevant government. These complaints have not resulted in remedies. The NAALC is a mostly “soft law” system giving rise to investigations, public hearings, reports, recommendations, and the like, not binding orders to reinstate workers fired for organizing or to fix health and safety problems. Enforcement is left to domestic authorities.

The NAFTA labor agreement does contain a “hard” edge in the form of fines against a government that fails to effectively enforce domestic labor laws on minimum wages, child labor, and occupational health and safety, and even trade sanctions against offending firms or sectors. However, these provisions have never been used, and none of the three governments has so far demonstrated a willingness to invoke them.

The NAALC has been criticized from various viewpoints. Labor advocates often call it toothless, although some employers have found it worrisome. One U.S. employer federation argued, “Unions on both sides of the border are abusing the NAFTA process in an effort to expand their power. NAFTA’s labor side agreement is an open invitation for specific labor disputes to be raised into an international question and could open the door to a host of costly and frivolous complaints against U.S. employers.” A Mexican critic said, “The original goals of the NAALC are becoming adulterated by the perspective which U.S. unions are imposing on it . . . to focus attention on Mexico, which is considered an unfair competitor vis-à-vis the attraction of regional investment.”

While the NAALC’s role as a direct enforcement tool is limited, it has generated new forms of cross-border collaboration among trade unions and NGOs in the three countries. The agreement provides an accessible complaint mechanism with no standing requirements. It lets “any person”—and these have included trade unions, human rights groups, community organizations, NGOs, even student groups—undertake a NAALC complaint for course credit—file a complaint alleging workers’ rights violations in any of the three countries. This contrasts with the labor chapter of the U.S.-Jordan Free Trade Agreement, seen by many as a stronger trade-labor provision, but which requires complaints to be initiated by one government against the other, an unlikely event given the usual niceties of international diplomacy.

Activists in the three NAFTA countries have taken advantage of the NAALC and its procedures to launch organizing and publicity campaigns that sometimes resulted in improvements for workers. Thus, the NAALC provides some transnational labor protection, but more by indirect and creative maneuvering by labor advocates than by “hard” application of TLL.

C. Labor Rights in the European Union

Unlike NAFTA, whose tools are largely of the “soft law” variety, the European Union has the capacity both to establish “soft” principles and guidelines and to create “hard” labor standards that are binding upon the Union’s Member States. Within the area of its legislative competence, the European Union can issue Directives, which require Member States to change their national labor codes to conform to E.U. standards. And a state that fails to conform can be sanctioned by sizable fines.

The European Union has used these powers to establish standards in areas like health and safety, parental leave, consultative employee “works councils,” and employment discrimination. But the E.U. system falls far short of a binding, uniform regional labor code. The Union’s legislative competence in the labor area is quite circumscribed and E.U. treaties specifically exclude collective bargaining, union organizing, and the right to strike from the E.U.’s legislative authority.

In addition to its limited legislative powers, the European Union has several “soft law” mechanisms that can be used to improve labor conditions. These include the Charter of Fundamental Rights of the European Union adopted at a summit meeting in Nice in December 2000. This Charter itself is not directly justiciable, but it can be cited by courts as support for interpretations of national and E.U. law. The Charter has now been incorporated into the new E.U. Treaty Establishing a Constitution for Europe, but the Treaty has not been ratified and the precise effect of incorporation of its workers’ rights provisions has yet to be determined.

Finally, in addition to Directives and the Charter, the European Union has other tools that can be used to improve the condition of workers in the Member States. These include funding through the European Social Fund and structured coordination through the Open Method of Coordination (OMC). The OMC process includes the European Employment Strategy (EES), which deals with problems of employment and unemployment and seeks to reform labor markets. Other OMCs deal with areas like social exclusion, health, and pensions.

The OMC and the Structural Funds have been used jointly to promote voluntary moves toward improved labor conditions in E.U. Member
States. This innovative approach toward facilitating a “race to the top” employs nonbinding guidelines, quantitative indicators, exchange of best practices, peer review, and multilateral surveillance to encourage Member States to make reforms. It has been used to create new policies that increase employment, combat discrimination, and develop labor market policies that would allow Europe to combine job flexibility with adequate security for its workforce.

In this system, E.U. Member States agree on reform measures, set targets for improvement, and report periodically on their progress toward these goals. Numerous statistical indicators and “league tables,” which show who are performing and who are lagging, measure progress toward agreed-upon goals. Member States are accountable to each other and the European Commission. They review each other’s progress and exchange best practices. Structural funds are available to support some reform measures. Negotiated guidelines, annual plans, and measured accountability, along with some financial support for selected measures, encourage Member States to make reforms.

The OMC is a relatively new system and evidence of its effectiveness is limited. A recent assessment, based on new empirical work in several countries and drawing on a wider range of studies, concludes that the OMC has changed the way many countries view the employment problem, helped spur government reorganization at the Member State level, facilitated transfer of ideas between countries, and contributed to the enactment of some reform measures. Yet, at the same time, the researchers caution that the system has many weaknesses and has not realized its full potential.29

Compared with NAFTA, the European Union has gone a long way toward creating a working body of transnational labor principles, laws, and programs. It has created standards in areas where it has competence and strongly encouraged voluntary action by Member States where it does not. Taken together with the national labor codes of most of the Member States, the result is a relatively strong protective web.

Of course, there are gaps in the system. The European Union cannot supplement national codes in key areas where it has no competence. Even when it does act, Member States have ways to resist E.U. action.30 And the whole structure depends in large measure on the continued vitality of the national labor law regimes that preceded the creation of the Single Market.

While these regimes are quite strong, they are subject to various pressures that could weaken their effectiveness. These include political pressure for lower standards as well as potential challenges to national laws under the European Union’s guarantee of freedom of movement.

While there are many lessons for Transnational Labor Law to be derived from the E.U. experience, the system cannot simply be copied in other regions nor transposed to the global level. The European Union’s experience builds on some of the strongest systems of social protection and labor standards in the world. It operates in countries that despite many differences have substantial institutional similarities, shared cultures, and common values. It is embedded in a process of regional political integration that goes well beyond anything being tried elsewhere, complete with a European commission, parliament, and court; a single currency, even a new Constitution (though its constitutional effect is yet to be tested). It offers suggestions to be studied and adapted, not models to be copied.

D. The International Labor Organization

The International Labor Organization has adopted 185 standards called “conventions,” but they are only binding on countries that ratify them and enact them into domestic law, and are only enforceable through domestic legal proceedings. The ILO also maintains a technical assistance program meant to help poorer countries strengthen domestic labor codes and enforcement capacity, but its scope and funds are limited.

Rejecting calls to make economic sanctions part of its oversight procedures on workers’ rights violations, the ILO instead adopted a promotional Declaration on Fundamental Principles and Rights at Work in 1998. The Declaration sets out four “core” labor standards covering freedom of association, nondiscrimination, and prohibitions on forced labor and child labor. However, the Declaration explicitly adds that “labor standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.”

Thus, the Declaration is merely hortatory, not enforceable. Indeed, employer delegates to the ILO insisted on and won their demands that the declaration be “on,” not “of,” fundamental principles and rights, and that they be rights “at work,” not “of workers,” to avoid giving any impression that the Declaration established new or stronger labor rights. Another
potential problem in the ILO's focus on four "core" standards is that other labor rights and labor standards such as health and safety, migrant worker protections, workers' compensation for injury, wage and hour laws, and other important matters move to second-class status; in this regard the NAALC's inclusion of these issues is an important positive feature.

Despite these limitations, the ILO has done a great deal of work in defining labor standards, overseeing their application (in a supervisory rather than enforcement capacity), and providing technical assistance to countries with fragile labor enforcement regimes. By itself, it can do little to offset national resistance when governments choose to attract investment through weak enforcement or nonenforcement of labor laws or by outright suppression of organizing and bargaining by workers. But the ILO retains a strong moral authority and a parallel authoritativeness in its treatment of international labor standards, especially through the advisory rulings of its Committee on Freedom of Association. The ILO has far to go to counterweigh the WTO, but its efforts, when linked to other aspects of a transnational regime, could play a useful role.

E. Codes of Conduct

Corporate codes of conduct are a form of private TLL by which multinational companies set out standards for treatment of workers in their own subsidiaries or supplier firms, and "enforce" the standards through private monitoring and reporting. In some cases, violations can lead to loss of supplier contracts or discipline against a company's own employee-managers. A first generation of corporate codes was largely self-promulgated and promoted by individual firms such as Nike, Reebok, and Levi Strauss & Co. But because of the obvious fox-and-henhouse problem, company-generated codes have given way to what are called "stakeholder" codes negotiated among producers, retailers, unions, consumer organizations, human rights groups, sustainable development advocates, and others.

Some of the most prominent "stakeholder" codes are the European-based Ethical Trading Initiative (ETI),31 and Clean Clothes Campaign (CCC),32 and the U.S.-based Fair Labor Association (FLA),33 Worker Rights Consortium (WRC),34 and the Social Accountability 8000 (SA8000) plan of Social Accountability International (SAI).35 These organizations work with companies and unions to identify and promote good practices in the implementation of codes of conduct, including monitoring and independent verification.

Codes of conduct are at best a limited and partial solution to the problems addressed in this essay. Codes of conduct may be helpful for workers in brand-name companies facing image damage by exposures of labor rights abuses in their own and supplier factories. The widely heralded KukDong case in Mexico is an example, where the FLA and WRC combined with Nike and Reebok to ensure the survival of an independent union that supplanted a union installed earlier by management of this Korean-owned firm in collusion with government officials and corrupt union leaders.36 But this is a limited field that hardly reaches most global assembly-line workers. Moreover, reliance on privately fashioned codes of conduct and monitoring systems creates a danger of undermining trade union organizing, domestic public approaches, and effective labor law enforcement. Many employers would rather deal with scattered, resource-stretched NGOs monitoring codes of conduct than with strong workplace-based trade unions or tough government labor law enforcement.37

F. Trade Adjustment Assistance: Compensating "Losers"

Analysts on all sides agree that global commercial flows create winners and losers among companies, investors, and workers in countries and economic sectors involved in trade. One policy approach is to "compensate the losers" through enhanced unemployment insurance benefits and job retraining assistance for workers who lose their jobs due to shifting trade flows. Trade adjustment assistance is available in some countries. Here is how one prominent free trade advocate justified such a policy in the United States:

Congressional passage of TPA (Trade Promotion Authority) in the summer of 2002 was a major step forward. The TPA legislation dramatically expands the Trade Adjustment Assistance (TAA) program to sharply increase worker eligibility and financing for both safety-net provisions and retraining, and it starts providing partial coverage for losses of wages and health insurance by trade-dislocated workers. These reforms, championed by Senate Democrats, could begin to allay the fears of globalization. And if implemented effectively, they could begin shifting public attitudes within the United States in a more supportive direction.38

TAA benefits include free testing, counseling and job placement services, tuition payment for retraining, job search assistance, relocation
expenses, and extended weekly unemployment benefits. Workers’ eligibility for these special benefits turns on causality: whether imports from trading partners under liberalized trade arrangements like lower tariffs spurred by the WTO or under NAFTA “contributed importantly” to their job loss, as distinct from more general causes like shifts in customer or consumer preference, new technology, or other nontrade-related factors.

Trade adjustment assistance in the United States has fallen far short of its announced goals. Only a portion of potentially eligible workers receive TAA benefits, and the U.S. Court of International Trade, the judicial body charged with overseeing application of the TAA program, has roundly criticized the Labor Department for failing to grant benefits in accordance with the law. For TAA to be an important part of an effective transnational regime, it would have to be more effective and more universally available.

VI. Taking Stock

Our survey shows that those who seek to create an effective regime of transnational labor law have been at work on a wide variety of fronts. Measures have been pushed at domestic, regional, and global levels, and in the private as well as the public sector. Transnational labor advocates have been able to mount some successful campaigns, at times by employing diverse legal tools. It is clear, however, that all these efforts have had limited effects. Their individual impact is often limited. And they have not been woven into an integrated “regime” with real capacity to offset the negative effects of globalization.

The efforts to date to create a transnational labor regime pale in comparison with the work and energy that has gone into creating the conditions for freer economic exchange, conditions that have left many workers among the losers in the new global economy. The volume of cross-border labor solidarity actions, creative and inspiring as they may be, is puny compared with hundreds of cross-border business transactions occurring every day in the normal course of international trade and investment. Trade law provides a foundation for most of these transactions. But as we have seen, much of the “transnational” labor law that is now on the books is either dependent on implementation that has not always materialized, or is “soft” in the sense that it does not create binding obligations or have enforcement machinery behind it.

The European Union’s highly developed system does offer some lessons for other regions and the global economy. The European Union has created a multilevel structure with a “floor” in some areas and developed mechanisms to stimulate a race to the top in others. It has a complex mix of hard and soft measures and is trying to weave regional and national efforts together to meet common aims. But even this system is of limited scope and effectiveness. Its success depends to no small degree on the prior existence and continued strength of Europe’s traditionally strong national law regimes and the fact that it is embedded in a process of political integration among countries with shared values.

Similarly, some positive lessons can be drawn from experience under the NAALC. The scope of labor rights and standards in its eleven “labor principles” extends far beyond the ILO’s four-part “core” definition. Its open complaint procedure generates new forms of cross-border labor solidarity and creative campaigning by advocates. It contains at least the principle of “hard” economic sanctions for systematic violations of some workers’ rights. But apart from a small number of isolated gains in some cases, the NAALC has not led to broad-scale improvements for workers in North America.

A. A House Divided

One reason for the slow progress toward a transnational labor regime and labor law is that labor advocates in the North and South are often divided. The national labor laws of the twentieth century emerged because domestic labor movements agreed on the measures they needed and fought for them in national politics. In theory such solidarity exists at the global level. Thus, the International Confederation of Free Trade Unions (ICFTU) maintains a public position of North-South unity in favor of a “social clause” in trade agreements backing up labor standards with trade sanctions against violators. But in day-to-day struggles such solidarity is not always present. Thus, many workers still may see TAA as a zero-sum game where any protection for workers in the North will harm workers in the South and efforts by groups in the North to raise labor standards in the South are disguised forms of protectionism.

Some survey research suggests that, at least among trade union representatives, the North-South divide may not be so pronounced. A survey of union delegates at international labor congresses found equal and overwhelming support among trade unionists from both developed and develop-
oping countries for a labor-rights trade linkage based on ILO core labor standards. Even more interesting, there was no statistically significant difference in their support for trade sanctions to enforce labor standards. Of course, the group surveyed comprised exclusively trade union activists already attuned to and involved in international labor work, so results cannot be taken to reflect trade union members’ or workers’ views generally in their countries. Nonetheless, these results indicate that advocates might bridge a North-South gap on labor rights and labor standards.43

B. A Race to the Top?

There is perhaps a win-win solution, but it could come about only if there were an effective transnational labor law regime that generated an “upward harmonization” dynamic in the North and South. Because we lack a complete vision of how such a regime might be constructed, labor in the South has opposed some efforts to use trade law and policy to build it. This undermines labor solidarity and makes it hard to mobilize support for the kind of measures that might lead to a win-win solution.

The result is a vicious circle: lack of a vision of what an effective regime might be undermines labor solidarity, and lack of North-South labor solidarity deters efforts to push through elements of a TLL. Breaking the vicious circle will require a new vision and new approaches. Sanctions are important, but only as part of a larger package. Trade and labor standards must be linked to concern for the broad challenges facing workers in the global economy.

Labor rights advocates must address not only immediate problems of jobs and wages in export- and import-related employment, but also the wider problems faced by developing countries. Some analysts call for a “grand bargain” that incorporates strong, enforceable labor rights and labor standards into international trade disciplines, but only as part of a far-reaching program that includes enhanced adjustment assistance for affected workers, greatly increased development aid, debt relief, controls on currency manipulation and “hot money” investment flows, market access for agricultural and labor intensive products, and other measures to help poorer countries.44

Partial efforts may not be sufficient, but perhaps they can serve as building blocks. Soft as well as hard law could be used with some effect. It may be possible to learn from the European Union’s Open Method of Coordination to create soft law systems that would encourage a “race to the top.” Such systems could use standards drawn from the ILO and the International Covenant on Economic, Social and Cultural Rights.45 In addition, just as the European Union provides funding transfers to poorer new entrants to the Union to help them meet higher social standards, so such funding might be made available through international development agencies for countries that seek to meet international labor standards.

VII. Conclusion

This essay has surveyed some first, partial steps to offset the inequality that has come in the wake of globalization. However, much more would have to be done to realize fully the promise of a transnational labor law that would not only articulate global standards but also provide means for enforcement. Possibly the WTO and the ILO could, jointly, create such a system.46 The WTO might incorporate labor rights and labor standards into its trade disciplines, but base any trade-related sanctions on conclusive findings by the ILO. The latter would be far preferable to unilateral measures presently employed by the United States and a patchwork of regional regimes with different labor standards.

We are a long way from any such arrangement, or from any other approach to creating a global system of labor standards with effective enforcement. Indeed, there is no consensus that empowering the WTO in labor matters is a desirable step.47 Extensive further debate will be needed before agreement is reached on the best way to combine universal standards and effective enforcement. In the meantime, labor rights advocates North and South should work together in the arenas already created, and outlined here, to continue an experience-building process that can inform the ultimate construction of a global regime of transnational labor law.

We have not offered a full vision of such a regime but hope we have at least shown that one is needed and that some elements of a truly effective system already exist.

Notes


10. See Robert Howse, The Appellate Body Ruling in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate, 27 Colum. J. Envtl. L. 491 (2002). The Appellate Body found further that the U.S. law was discriminate, applying the impact of its ruling but not vitiating the basic finding that “process” can be taken into account.


12. Id.


14. But note that U.S. law does not include nondiscrimination, an ILO core standard, among the requirements, while “wages, hours, and health and safety,” which are not part of the ILO core, are included. 19 U.S.C.A. § 2462(b)(2)(G) (West 2002). The E.U. formulation is based on the ILO core standards.


19. See Dr. Mahathir Mohamad of Malaysia, Address at the 50th Session of the UN General Assembly (Sept. 29, 1995).

20. See European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R; (04-1356); AB-2004-1.


22. The NAALC labor principles are: (1) freedom of association and protection of the right to organize, (2) the right to bargain collectively, (3) the right to strike, (4) prohibition against forced labor, (5) child labor protections, (6) minimum wage, hours of work and other labor standards, (7) nondiscrimination, (8) equal pay for equal work, (9) occupational safety and health, (10) workers’ compensation, and (11) migrant worker protection.


25. For an extensive review of NAALC cases and cross-border alliances around them, see Lance Compa, NAFTA’s Labor Side Agreement and International Labor Solidarity, in Place, Space and the New Labour Internationalisms (Peter Waterman & Jane Wills eds., 2001). For a discussion of how systems like the NAALC can be used by transnational coalitions of labor rights advocates, see David Trubek et al., Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks, 25 Law & Soc. Inquiry 187 (2000).


28. For an overview, see David Trubek & James Mosher, New Governance, Employment Policy, and the European Social Model, in Governing Work and...


34. See http://www.workersrights.org.


37. For extended discussion on this point, see Lance Compa, Trade Unions, NGOs, and Corporate Codes of Conduct, 14 DEV. IN PRAC. 210 (Feb. 2004).

38. See C. Fred Bergsten, Liberalization in Retreat, FOREIGN AFF., Nov. 1, 2002, at 86.


40. See, e.g., Trubek et al., supra note 25.


47. Indeed, some critics of corporate-driven globalization would prefer to “shrink or sink” the WTO, not give it expanded new powers in the labor area that might be subjugated to commercial goals. See, e.g., Lori Wallach & Patrick Woodall, Whose Trade Organization? (2d ed. 2004).