Denver Journal of International Law & Policy

Volume 32
Number 4 *Fall*

Article 5

January 2004

Invigoration Enforcement Mechanisms of the International Labor Organization in Pursuit of U.S. Labor Objectives

Phillip R. Seckman

Invigoration Enforcement Mechanisms of the International Labor Organization in Pursuit of U.S. Labor Objectives

Keywords

Labor, Right to Strike, States, International Trade

INVIGORATING ENFORCEMENT MECHANISMS OF THE INTERNATIONAL LABOR ORGANIZATION IN PURSUIT OF U.S. LABOR OBJECTIVES

Phillip R. Seckman

INTRODUCTION

The purpose of international labor law at the beginning of the twentieth century and a motivating influence behind the formation of the International Labor Organization ("ILO") was the prevention of international competition that exploited the vacuum of labor regulation at the expense of workers.[1] World governments were hesitant to institute greater protections for workers due to a concern that doing so would make their domestic labor more expensive and therefore less competitive with other markets where cheaper labor could be found.[2] Thus, the ILO was created in part to protect national economies by promoting enhanced protections in all member states, thereby ensuring labor protections would be to some extent equivalent between the member states.[3]

In 1944, the Declaration of Philadelphia reaffirmed the purpose of the ILO following the Second World War by primarily focusing on economic and social progress for all workers.[4] In the 1970s, the notion that increasing the protections of workers in developing nations would materially impact the competitive edge of developed labor markets was no longer seen as a primary justification for international labor standards.[5] By the beginning of the 1990s, however, with a new

---

J.D. Candidate 2004, University of Denver, College of Law.

1. Nicolas Valticos & K. Samson, *International Labour Law, in* COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMICS, 110 (Roger Blanpain & Chris Engles eds., 1998) [hereinafter *Labour Law*]. The Treaty of Versailles created the ILO in 1919. *See* Treaty of Peace Between the Allied and Associated Powers and Germany, pt. XIII, June 28, 1919, 2 Bevans 43, 225 Consol. T.S. 188. The Treaty of Versailles was not the first international agreement concerning labor. The first agreement was the 1890 Conference of Berlin, and later, non-governmental institutions created private organization called the International Association of Labor Legislation. *See* Jennifer L. Johnson, *Public-Private-Public Convergence: How the Private Actor Can Shape Public International Labor Standards*, 24 BROOKLYN J. INT'L L. 291, 305 (1998).

2. ILO, ILO History, *at* http://www.ilo.org/public/english/about/history.htm (last visited, Mar. 13, 2004) [hereinafter ILO History]; ILO CONST. pmbl.

3. *See* ILO History, *supra* note 2.

4. ILO CONST. Declaration Concerning the Aims and Purposes of the International Labor Organization, art. I [hereinafter Declaration of Philadelphia]; *see also Labour Law, supra* note 1, at 110.

5. *See* Nicolas Valticos, *International Sources and International* Aspects, *in* 15 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 4-5 (1978).

wave of globalization,[6] the proposition that a labor market with significantly greater labor protections is less competitive than labor markets having fewer protections once again became a primary concern of ILO member states.[7]

The first part of this paper will argue that U.S. employers are moving "white-collar" positions[8] overseas partially because of stronger worker protection enforcement in the U.S. relative to developing countries and partially because the effects of globalization have vastly enhanced the viability of exporting labor. The second part of the paper will explore two possible avenues for enforcing higher labor standards globally.[9] Thus, the discussion in the second part will be broken up into two sub-parts. In the first sub-part, the presumption against extraterritorial application of U.S. labor laws will be explored. The second sub-part will assess whether the ILO can serve as an engine to further U.S. labor objectives. The discussion will survey a number of ILO conventions, argue there is presently a lack of effective enforcement of those conventions, and assess the viability of using the World Trade Organization's (WTO's) dispute resolution process as template for change. Finally, the third part of the paper will argue that U.S. lawmakers should take a leadership role in the ILO, first by ratifying more ILO conventions, and second by working to invigorate ILO enforcement mechanisms in an effort to ensure the U.S. labor market remains competitive with developing markets.

I. WHY U.S. EMPLOYERS ARE EXPORTING LABOR ABROAD

A. A Brief History

At the turn of the century, U.S. workers and the labor they provided were seen as mere commodities by businesses.[10] Employers acted swiftly to prevent their

6. Globalization has been described, and will be used in this paper to refer to, the "integration of economies and societies driven by new technologies, new economic relationships, and the national and international policies of governments, international organizations, business, labour and civil society. *See* World Commission on the Social Dimension of Globalization, *The Social Dimension of Globalization*, *at* http://www.ilo.org/public/english/wcsdg/globali/index.htm (last visited Jan. 9, 2004).

7. *See Labour Law*, *supra* note 1, at 110.

8. The problem facing U.S. white collar workers is that countries like India and Russia have similarly educated workers whose wages are substantially lower than those in the U.S. ASHOK DEO BARDHAN & CYNTHIA A. KROLL, THE NEW WAVE OF OUTSOURCING 4 (Fall 2003), *available at* http://www.haas.berkeley.edu/news/Research_Report_Fall_2003.pdf (last visited Jan. 4, 2004) [hereinafter *New Wave*]. Thus, Multinational companies can hire those workers and use new technologies like the Internet to further decrease operating and management costs. *Id.*

9. This paper will focus on the options of applying U.S. domestic labor laws to conduct abroad and invigorating the ILO enforcement mechanisms by vesting the ILO with powers akin to the WTO Dispute Resolution Procedures. This paper will not discuss other potential options for enhancing enforcement of international labor standards. Among the options not addressed in this paper are increased U.S. involvement in the ILO technical assistance program and the initiation of unilateral trade sanctions by the U.S. For a detailed discussion of U.S. unilateral action, see Sarah H. Cleveland, *Norm Internationalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1 (2001).

10. Terry Collingsworth, *American Labor Policy and the International Economy: Clarifying Policies and Interests*, 31. B.C. L. REV. 31, 37 (1989).

workers from forming into unions and the government was complicit in this endeavor.[11] Additionally, the courts at this time were wedded to the freedom of contract theory, which held that when a worker and employer were dickering the terms of the employment contract, the two parties had equal bargaining power.[12] This period is now pejoratively referred to as the *Lochner* era and pointed to as an example of empty formalism.[13] In truth, the *Lochner* era worker did not have anything close to equal bargaining power and both the courts and Congress came to recognize that workers needed the assistance of the government to level the playing field.[14]

Following the U.S. Great Depression, the government adopted a new approach when it came to the everyday worker.[15] Congress passed laws making substantial gains in protecting the ability of working men and women to organize and bargain collectively.[16] Such laws also ensured that workers received a fair wage for their labor and created maximum limits on working hours per week.[17] The substance of these laws represented valuable gains for workers. During the past decade, the protections of equal opportunity the right to a fair wage, and the freedom to organize gained by U.S. workers generally, have been threatened by the competition of cheap labor abroad.[18] The danger is that the struggle endured to win these rights will amount to a "Pyrrhic victory" because employment protections are worthless if the worker is unemployed.[19]

While U.S. workers made great strides in terms of acquiring enhanced labor protections over the last century, there is concern that these protections will be lost, in part, due to the current lack of enforceable international labor standards.[20] The U.S. worker is left unemployed, and history suggests that if they are lucky to find new work, it is often for less compensation than the previous position.[21] Moreover, the foreign worker captures a small fraction of the value their work creates for the multi-national corporation (MNC).[22] Additionally, a U.S. worker

---

11. *Id.*

12. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 57 (1905) (holding a law regulating the hours a baker could work in given day to ten hours day unconstitutional because it interfered with the freedom to contract between the worker and the employer).

13. Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C.L.REV. 115, 127 (2003).

14. *See* Collingsworth, *supra* note 10, at 37-38.

15. *Id.*

16. *Id.* at 40.

17. *Id.* at 41.

18. Karen Vossler Champion, Comment, *Who Pays for Free Trade? The Dilemma of Free Trade and International Labor Standards*, 22 N.C. J. INT'L L. & COM. REG. 181, 192 (1996); *see also New Wave*, *supra* note 8, at 1.

19. Collingsworth, *supra* note 10, at 32.

20. *See* Champion, *supra* note 18, at 192

21. LORI G. KLETZER, JOB LOSS FROM IMPORTS: MEASURING THE COSTS 33 (2001) (examining job losses in manufacturing from 1979 to 1999 and finding that a quarter of factory workers who found work took a cut of twenty five percent or more in compensation).

22. Christopher Farrell, *Protectionism Won't End Workers' Pain*, BUS.WK.ONLINE, Oct. 20, 2003, *available at* http://web10.epnet.com/ (last visited Jan. 9, 2004) (noting that "for every $1.45 to $1.47 of value created globally by offshore outsourcing, the U.S. captures $1.12 to $1.14 and the

may be wary of exercising his or her right to organize when doing so presents the risk that the employer will move operations abroad to take advantage of both cheap foreign labor and the relative absence of labor law enforcement.[23] This state of affairs stymies the rights of U.S. workers, causing a type of "race to the bottom"[24] that the ILO was originally created to prevent.[25]

B. The Globalization Debate

There are a number of conflicting views on the actual impact of globalization on the U.S. economy. Recent reports from financial and economic research firms have been cited by mass media news reports for the proposition that millions of U.S. jobs, particularly white-collar positions, are being lost to overseas competition.[26] The fact that a large number of jobs are being moved to other countries, primarily India, is not really in doubt.[27] The actual impact that this new trend will have on the U.S. job market, however, has been interpreted differently

One view looks to recent U.S. history, when the offshore outsourcing trend was hitting the American manufacturing sector.[28] Indeed, recent figures compiled by the International Economics Institute show that U.S. manufacturing workers who lost their jobs during that period, and who were subsequently able to find other work, were forced to accept lower wages.[29] This history may support the proposition that a similar fate awaits U.S. workers in white-collar positions currently losing their jobs.[30]

The other view has looked behind the absolute figures reported by major media sources to show the actual job losses the U.S. labor market is likely to suffer because of outsourcing is closer to 214,000.[31] The point has also been made that

---

receiving country on average 33 cents").

23. Champion, *supra* note 18, at 192-93.

24. A race to the bottom could occur if labor markets with greater protections are willing to sacrifice those protections to remain competitive. Thus, instead of attempting to pull the market with lower standards up, the protections of workers everywhere are sacrificed in an effort to gain or maintain competitive edge. *See* BERNARD M. HOEKMAN & MICHAEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO 263 (1995).

25. ILO History, *supra* note 2.

26. Steve Lohr, *New Economy; Offshore Jobs in Technology: Opportunity or Threat*, N.Y. TIMES, Dec. 22, 2003, at C1 (citing Forrester Research report published in November 2002 that predicted 3.3 million services jobs in the U.S. would be outsourced to foreign countries by 2015); *see also* David Zielenziger, *U.S. Companies Moving More Jobs Overseas*, YAHOO FINANCE, *at* http://biz.yahoo.com/rb/031223/tech_techjobs_2.html (last visited Jan. 9, 2004); *see also* Betsy Stark, *White-Collar Exodus: High-Paying Jobs Are Moving Overseas, U.S. Workers Replaced by Foreigners*, ABC NEWS, *at* http://abcnews.go.com/sections/wnt/Business/jobless030729_offshoring.html (last visited Jan. 9, 2004).

27. *New Wave*, *supra* note 8, at 1; *see also* Zielenziger, *supra* note 26; Stark, *supra* note 26; Farrell, *supra* note 22.

28. *See New Wave*, *supra* note 8, at 4.

29. *See* KLETZER, *supra* note 20, at 33.

30. *New Wave*, *supra* note 8, at 6.

31. Lohr, *supra* note 26 (explaining that the large number of 3.3 million services jobs being moved offshore needs to be taken in the context of normal job creation and destruction in the U.S.

the media is looking at figures that tell an inaccurate story. It has been argued that media reports have failed to consider figures spanning the period before and after the U.S. economy went into its recent three-year recession.[32] Therefore, the figures reported by mass media may more accurately be explained by other economic activity aside from the influence of globalization.[33]

A recent report of the World Commission on the Social Dimension of Globalization[34] (WCSDG) lends support for the argument that the benefits of globalization are being disproportionately captured by MNCs to the detriment of workers,[35] that the situation must change,[36] and one of the changes needs to come in the form of more effective global institutions.[37] The report noted "[p]eople are most directly affected by globalization through their work and employment."[38] Indeed, the report cites the statements of some union leaders in industrialized countries who lament that "[i]ncreased global competition [has] encouraged employers to play 'fast and loose with labor practices, including the replacement of decent employment with insecure work."[39]

The debate over the true effects of globalization will likely continue to capture the public's attention in the coming months and years. In the meantime, invigorating international labor enforcement would protect U.S. workers most vulnerable to overseas competition by ensuring fair competition between labor markets. The U.S. should assume a leadership role in the ILO to advocate for such change on behalf of its labor market and its workers.

II. TWO OPTIONS FOR ENFORCING LABOR STANDARDS INTERNATIONALLY

As discussed above, U.S. employers often move labor abroad because of the cost savings afforded in terms of lower labor standards. Additionally, globalization has been identified as an unstoppable force, due in part to recent enhancements in technology and the decrease in the cost of moving goods.[40] The benefits of the global economy have, however, been falling into the hands of a small segment of the world's population.[41] Moreover, the competitive edge that

---

economy).

32. Catherine L. Mann, *Globalization of IT Services and White Collar Jobs: The Next Wave of Productivity Growth*, in INTERNATIONAL ECONOMICS POLICY BRIEFS 6, at 4 (Dec. 2003), *at* http://207.238.152.36/publications/pb/pb03-11.pdf (last visited Jan. 4, 2004).

33. *See id.*

34. World Commission on the Social Dimension of Globalization, Report of the World Commission on the Social Dimension of Globalization, *at* http://www.ilo.org/public/english/wcsdg/index.htm (last visited Feb. 24, 2004) [hereinafter *WCSDG Report*].

35. *Id.* at 46 ("The increased mobility of capital combined with high levels of unemployment has weakened the bargaining position of workers vis-a-vis employers.").

36. *Id.* at 2 ("The current path of globalization must change. Too few share in its benefits. Too many have no voice in its design and no influence on its course.").

37. *Id.* at 79.

38. *Id.* at 64.

39. *Id.* at 21.

40. *Id.* at 24.

41. *Id.* at 2.

developing countries' labor markets currently hold over the U.S. because of lower labor standards is not a salve for their problems. The result of competition where the labor market with the lowest standards wins is that global labor standards are undermined and all workers suffer,[42] with the only true winner being the MNC.

A. The Presumption Against Extraterritoriality

This sub-part will focus on the extraterritorial application of Title VII of the Civil Rights Act.[43] While the discussion will be limited to Title VII, it is important to note that this particular statute represents merely a fragment of the overarching regulatory framework in the U.S. Moreover, the presumption against the extraterritorial application of U.S. laws applicable to Title VII is also the scheme applied to other labor laws.[44] This sub-part intends to show that the presumption against extraterritorial application of U.S. domestic labor laws enables U.S. MNCs to take advantage of relatively lower labor protections in foreign countries. Additionally, due to the presumption's strength, it is unlikely U.S. domestic labor laws can be used to enforce labor standards internationally

1. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 was part of a cadre of legislation intended to remedy a number of evils in U.S. society, of which the U.S. public was made painfully aware during the Civil Rights Movement.[45] The scope of Title VII's applicability to employment outside the U.S. was the primary issue in the Supreme Court case of *EEOC v. Aramco* ("*Aramco*").[46] The plaintiff in *Aramco*, Ali Boureslan, was a naturalized U.S. citizen born in Lebanon who had originally been hired by and worked for Aramco in the U.S.[47] Boureslan requested and was later transferred to Aramco's offices in Saudi Arabia.[48] Aramco discharged him in 1984, and he alleged his termination was caused by religious, racial, and ethnic discrimination by his immediate supervisor.[49] The defendant filed a motion to dismiss with the District Court arguing that Title VII did not extend to U.S. citizens employed by U.S. corporations abroad.[50] The District Court granted the

42. *See* ILO CONST. pmbl.

43. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000). For a more thorough examination of the extraterritorial application of Title VII, see Kathryn M. Murphy, *Title VII and Its Ability to Bind American Companies Acting outside the United States*, 16 SUFFOLK TRANSNAT'L L. REV. 593 (1993).

44. The non-extraterritorial scope of other U.S. statutes protecting rights of workers mirrors the analysis applied to Title VII. These statutes include: the Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2000); the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2000); and the National Labor Relations Act, 29 U.S.C. §§ 151–169 (2000).

45. *See generally* CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S (1995).

46. EEOC v. Aramco, 499 U.S. 244, 246 (1991).

47. *Id.* at 247.

48. *Id.*

49. Boureslan v. Aramco, 653 F.Supp. 629, 631 (S.D. Tex. 1987).

50. *Id.*

motion and dismissed the claim.[51] Boureslan appealed the decision to the Fifth Circuit Court of Appeals, which affirmed the decision of the district court.[52] The Fifth Circuit reasoned that the absence of language addressing possible conflict-of-law issues and the potential for broad applicability of Title VII to foreign employers of U.S. citizens outside the U.S. counseled against interpreting Title VII to apply extraterritorially.[53]

The U.S. Supreme Court granted *certiorari* and acknowledged that Congress clearly has the authority under the Constitution to enforce its laws outside the territorial boundaries of the U.S.[54] The Court went on to hold that when Congress fails to clearly express its intent to extend laws abroad, courts should interpret such silence to mean Congress meant the law to apply only domestically.[55] This rule of statutory interpretation is referred to as the presumption against extraterritoriality.[56]

Congress quickly responded and amended Title VII that same year.[57] The amendment's impact, however, was limited in that it extended the protections of Title VII only to U.S. citizens employed abroad by U.S. corporations.[58] The amendment also included a provision that settled the conflict-of-laws issue by including an exception applicable in the event a U.S. corporation doing business in a foreign country would be forced to violate the law of that country if it were to follow Title VII.[59] Under such circumstances, the U.S. corporation is not required to comply with Title VII.[60]

Courts have addressed the presumption against extraterritorial application in the context of the Fair Labor Standards Act (FLSA),[61] the Age Discrimination in Employment Act (ADEA),[62] and the National Labor Relations Act (NLRA).[63] The cases addressing these acts help show the presumption's breadth and how it is applied in labor dispute controversies.[64] The scope of the presumption against

51. *Id.* at 631.

52. Boureslan v. Aramco, 857 F.2d 1014 (5th Cir. 1988), *aff'g en banc*, 892 F.2d 1271 (5th Cir. 1990).

53. *Aramco*, 892 F.2d at 1273-74.

54. *Aramco*, 499 U.S. at 248.

55. *Id.* at 255.

56. *Id.* at 248.

57. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

58. 42 U.S.C. § 2000e(f).

59. *See* 42 U.S.C. § 2000e-1(b) ("It shall not be unlawful under [this section] for an employer (or corporation controlled by an employer) to take any action otherwise prohibited if compliance with such section would cause such employer to violate the law of the foreign country in which such workplace is located.").

60. *Id.*

61. Fair Labor Standards Act, 29 U.S.C. §§ 201–219.

62. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634.

63. National Labor Relations Act, 29 U.S.C. §§ 151–169.

64. Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218, 231-32 (3d Cir. 1991) (holding seamen employed on Kuwaiti vessels reflagged to gain U.S. protection during the Iran-Iraq war were not covered by the FLSA); Reyes-Gaona v. North Am. Growers' Assoc., 250 F.3d 861, 866-67 (4th Cir. 2001) (holding the ADEA was inapplicable to foreign nationals applying for work in a foreign country that would ultimately be performed inside the U.S., due to the presumption against extraterritoriality); NLRB v. Dredge Operators, Inc., 19 F.3d 206, 212 (5th Cir. 1994) (holding the NLRB did have

extraterritorial application was tested in *Chaudhry v. Mobil Oil Corporation*, where Title VII was interpreted to provide protection to aliens employed within the U.S.[65]

In *Chaudhry*, the Fourth Circuit Court of Appeals expanded upon the facts required before the protections of Title VII will be extended to a foreign national applying for work in the U.S. Chaudhry, a Canadian citizen, worked for Mobil in London, England and in Doha, Qatar for eighteen years.[66] Mobil terminated him in 1997 and he brought suit claiming his discharge was a retaliatory act by Mobil because of his complaints about discrimination.[67] Mobil filed a motion to dismiss Mr. Chaudhry's suit on grounds that it failed to state a claim upon which relief could be granted.[68] The district court granted the motion and Chaudhry appealed.[69] On appeal, the Fourth Circuit held that "a foreign national who applies for a job in the United States is entitled to Title VII protection 'only upon a successful showing that the applicant was qualified for employment.'"[70] The court explained that in order to be qualified, the prospective employee must have been eligible for work in the U.S. under the Immigration Reform and Control Act.[71] Chaudhry conceded that he did not possess the documentation required by the Act, and therefore the court affirmed the decision of the District Court.[72]

The foregoing discussion shows that the presumption against extraterritoriality has two effects upon the U.S. labor market. First, because U.S. laws are not applicable to U.S. corporations employing foreign nationals abroad, it affords these companies access to relatively cheap foreign labor. Second, because MNC's can readily move their labor to foreign markets, U.S. workers may be more reluctant to enforce protections the law provides them.[73]

2. Contexts Outside Labor

In areas other than the labor context, U.S. courts have been more inclined to enforce U.S. laws outside the territorial boundaries of the U.S.[74] In these

---

jurisdiction over the defendant's operations because U.S. citizens were the majority of workers employed on the *Stuyvesant* and because the ship flew a U.S. flag, effectively making it part of U.S. territory).

65. Chaudhry v. Mobil Oil Corp., 186 F.3d 502 (4th Cir. 1999).

66. *Id.* at 503-04.

67. *Id.*

68. *Id.* at 504.

69. *Id.*

70. *Id.* (citing Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 187 (4th Cir. 1998)).

71. *Chaudhry*, 186 F.3d at 504-05.

72. *Id.*

73. *See* Champion, *supra* note 18, at 192.

74. *See* Stephen B. Moldof, *The Application of U.S. Labor Law to Activities and Employees Outside the United States*, 2001 A.B.A. SEC. LAB. & EMP L., pt. I, at 2-3, *available at* http://www.bna.com/bnabooks/ababna/annual/2001/moldof.doc (last visited, Jan. 11, 2004); *but see* Subafilms, Ltd. v. MGM-Pathe Communications, Co., 24 F.3d 1088, 1097 (9th Cir. 1994) (applying the presumption against extraterritoriality and holding that the Copyright Act does not apply extraterritorially).

situations, the strong presumption against extraterritoriality, which operates to forestall the application of many U.S. labor laws, gives way to other analytical approaches.[75] For example, U.S. law is applied to extraterritorial conduct in the context of antitrust violations.[76] The Supreme Court has stated that the federal anti-trust act covers foreign conduct intended to produce substantial effects in the U.S.[77] The Supreme Court has also extended application of the Lanham Trademark Act to conduct occurring outside U.S. territorial boundaries.[78]

Yet another example is *Environmental Defense Fund, Inc. v. Massey*, where the Court of Appeals for the District of Columbia was faced with the issue of whether the presumption against extraterritoriality prevented application of the National Environmental Policy Act of 1969 ("NEPA")[79] to a plan of the National Science Foundation to incinerate food waste in Antarctica.[80] In *Massey*, the court acknowledged the presumption against extraterritoriality, but held that it was not applicable.[81] The court further stated that there are at least three categories of cases where the presumption against extraterritoriality does not apply: first, "where there is an 'affirmative intention of the Congress clearly expressed;'" second, "where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States;" and third, "when the conduct regulated by the government occurs within the United States."[82] In its analysis, the court determined the NEPA was intended to regulate federal agencies' decision making, but not the substance of those decisions.[83] Thus, the court concluded that the case did not raise an issue of extraterritorial application because the conduct being regulated had effectively occurred in the U.S.[84] The court also distinguished the case on its facts, stating the issue of extraterritorial application was less troublesome because Antarctica was not a sovereign territory and the U.S. had substantial authority over it.[85]

The foregoing discussion highlights the fact that the presumption against extraterritoriality has been applied differently to contexts other than labor. It also appears the presumption has added vigor when the case is couched in the labor context. While it is clear Congress has the power to extend application of U.S. labor laws to conduct abroad,[86] as the situation currently stands, it is unlikely Congress will express its intent to extend U.S. laws abroad, because notions of

75. Moldof, *supra* note 74, at 2-3.

76. Edieth Yvette Wu, *Evolutionary Trends in the United States Application of Extraterritorial Jurisdiction*, 10 TRANSNAT'L LAW. 1, 17-20 (1997).

77. *See* Hartford Fire Ins., Co. v. California et al., 509 U.S. 764, 796, (1993); *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986).

78. Steele v. Bulova Watch Co., 344 U.S. 280, 285 (1952) (holding the Lanham Trademark Act applies extraterritorially when defendant is a U.S. national).

79. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2000).

80. Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528 (D.C. Cir. 1993).

81. *Massey*, 986 F.2d at 532.

82. *Id.* at 531.

83. *Id.* at 532.

84. *Id.* at 533.

85. *Id.*

86. *Aramco*, 499 U.S. at 248.

sovereignty and jurisdiction[87] coupled with the potential for international discord counsel against such change.[88] It is therefore worthwhile to explore another option for better enforcement of international labor standards.

B. International Labor Laws and the ILO

While there are a number of sources of international labor law,[89] the conventions and recommendations of the ILO are currently viewed as the foundation of international labor principles.[90] Indeed, the ILO has been repeatedly named as the international organization that should lead the charge for improving international labor standards.[91] Yet, the ILO's valuable contribution to the development of international standards and its ability to serve as the leader in the future is undermined by the ILO's primary weakness: its lack of a viable enforcement scheme.[92]

1. The Structure of the ILO

The ILO is made up of three main bodies. The body most representative of

---

87. Sovereignty, seen as an equivalent for independence and an important element of statehood, carries with it "a jurisdiction, prima facie exclusive, over territory [and] a duty of non-intervention in the area of exclusive jurisdiction of other states. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 78, 287 (4th ed. 1990). Jurisdiction operates as limit on the scope of a national court's power to hear a case or controversy brought before it and falls under the umbrella concept of sovereignty. *Id.* at 298.

88. *See id.* at 308 ("American [extraterritorial] policies have provoked strong reaction from large number of foreign governments.").

89. Labor issues have been addressed in a number of United Nations instruments concerning human rights. *See e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, U.N. GAOR. 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1971); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., annex, Supp. No. 49, at 167, U.N, Doc. A/44/49 (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., annex, Supp. No. 49A, at 262, U.N. Doc. A/45/49 (1990). Additionally, the European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89 (entered into force Feb. 26, 1965), and the American Convention on Human Rights, 1144 U.N.T.S. 123, 9 I.L.M. 99 (1970), also address labor issues. *See Labour Law*, *supra* note 1, at 114.

90. *WCSDG Report*, *supra* note 34, at 82.

91. *Id.*, WTO, *Singapore Ministerial Declaration*, WT/MIN(96)/DEC (Dec. 19, 1996), ¶ 4, 36 I.L.M 218, 221 (1997) [hereinafter *Singapore Ministerial Declaration*]; *see also* XI Summit of the Heads of State and Government of the Group of Fifteen (May 30-31, 2001), ¶ 17, *available at* http://www.un.org/esa/ffd/themes/g15-2.htm (last visited Mar. 14, 2004) ("We also strongly reiterate that non-trade issues such as labour standards should not be included in the WTO agenda.").

92. GEORGE TSOGAS, LABOR REGULATION IN A GLOBAL ECONOMY 44, 54 (2001); *see also* Johnson, *supra* note 1, at 307.

the member states is the International Labour Conference (ILC).[93] The ILC normally meets once a year and is the body that adopts ILO conventions and recommendations.[94] The ILC consists of representatives who are selected by member states.[95] The ILO also has a Governing Body. The Governing Body consists of fifty-six members; twenty-eight represent member governments, while the other twenty-eight are equally divided to represent the interests of workers and employers equally.[96] Finally, the ILO has a permanent secretariat called the International Labour Office.[97]

There are two ostensible enforcement procedures available to assist members and employers or workers put pressure on member countries that have ratified an ILO convention, but that have had a poor record in implementing the convention. The first procedure is a complaint.[98] Complaints may, however, only be made by a member state against another member state if both countries have ratified the convention at issue.[99] The second procedure is called a representation.[100] Representations are made either by employers' or by workers' organizations on the grounds that the member state has failed to implement a ratified convention.[101]

The enforcement powers of the ILO have been viewed as insufficient, however, to meet the task of protecting the rights of workers.[102] Support for this proposition is found in ILO Committee on Freedom of Association cases.[103] Indeed, in some cases, a few of which will be discussed below, the Committee fails to make any concrete determination due to a lack of sufficient information.[104]

---

93. *See Labour Law*, *supra* note 1, at 111.

94. ILO conventions are similar to codified law in the U.S. Conventions are binding upon member states that have ratified the convention. *Id.* Recommendations are analogous to comments following a code section. The purpose of recommendations is to clarify and further develop the policy expressed in the convention. *Id.* Recommendations are non-binding by design. *Id.*

95. *Id.*, there are a total of four delegates from each member state: two represent the member state's government, one advocates for the interests of workers and another one advocates for the interests of employers. WALTER GALENSON, THE INTERNATIONAL LABOR ORGANIZATION: AN AMERICAN VIEW 11 (1981).

96. *Labour Law*, *supra* note 1, at 111.

97. *Id.*

98. ILO CONST. art. 26.

99. *Id.*

100. *Id.* art. 24.

101. *Labour Law*, *supra* note 1, at 125.

102. TSOGAS, *supra* note 92, at 54.

103. *See* Complaint Against the Government of India Presented by the Centre of Indian Trade Unions, Case No. 2228, Rep. No. 331, (ILO Committee on Freedom of Association 2003), *available at* http://www.ilo.org/ilolex/ (last visited Mar. 14, 2004) [hereinafter *India I*] , *see also* Complaints against the Government of the United States Presented by the American Federation of Labor and the Congress of Industrial Organizations and the Confederation of Mexican States, Case No. 2227, Rep. No. 332, (ILO Committee on Freedom of Association 2003), *available at* http://www.ilo.org/ilolex/ (last visited Mar. 14, 2004) [hereinafter *AFL-CIO*].

104. *India I*, Case No. 2228, Rep. No. 331, ¶ 468; *AFL-CIO* Case No. 2227, Rep. No. 332, ¶ 616.

2. Survey of Relevant Conventions

To date, the ILC has adopted 185 conventions[105] and 194 recommendations[106] addressing a host of labor related issues. One of the main problems facing the ILO in formulating its standards is the need to account for the vast differences between economic and social conditions in member countries.[107] At the same time, the ILO seeks to pass conventions advancing upon existing common practices in an effort to improve the overall conditions of the average worker.[108] In order to achieve these goals, the ILO often uses conventions to create a floor for labor protections and simultaneously promotes higher standards through its recommendations.[109] A discussion of select ILO conventions, and their application in states like India, will provide an example of how the ILO's weak enforcement powers are a stumbling block for effective protection of all workers.[110]

The ILC adopted the Convention Concerning Discrimination in Respect of Employment and Occupation in 1958.[111] The term discrimination includes: "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."[112] Other classes of workers, like the aged and those with disabilities, are not explicitly protected by the convention, but ratifying member states have the discretion to extend protection to those classes of workers as well.[113] The convention also provides that exclusion for a specific position based upon the "inherent requirements" of the job will not be considered discrimination.[114] The convention further provides that any member state ratifying the text is obligated to implement the text as part of its national policy.[115] The selection of appropriate convention enforcement and implementation methods are left to the ratifying

105. *See* International Labour Organization Internet Library, *at* http://www.ilo.org/ilolex/english/cvlist.htm (last visited Mar. 13, 2004) (note that not all ILO conventions are currently in force).

106. *See* International Labour Organization Internet Library, *at* http://www.ilo.org/ilolex/english/reclist.htm (last visited Mar. 13, 2004).

107. *See* NICOLAS VALTICOS, INTERNATIONAL LABOUR LAW 49-52 (1979).

108. *Id.* at 50 ("[T]he purpose of standards is not simply to harmonize legislation, but primarily to promote generalized progress.").

109. *Id.* at 44-45.

110. Note that this paper will focus on conventions where U.S. law covers the same subject matter in an effort to show that some ILO conventions largely mirror protections already afforded workers in the U.S.

111. *See* Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, *at* http://www.ilo.org/ilolex (last visited Mar. 14, 2004) [hereinafter Discrimination Convention].

112. *Id.* art. 1(1)(a).

113. *Id.* art. 1(1)(b) ("[S]uch other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.").

114. *Id.* art. 1(2).

115. *Id.* art. 2.

member state's discretion.[116]

The U.S. has not ratified the ILO Convention Concerning Discrimination.[117] However, Title VII gives U.S. workers protections analogous to those recited in the ILO convention. Title VII provides for enforcement through individual lawsuits filed by persons who have been the victims of discriminatory treatment or impact.[118] The Equal Employment Opportunity Commission can also initiate actions against employers who have allegedly committed acts of discrimination.[119] Title VII protects the same classes of people from discriminatory treatment as the ILO convention.[120] Title VII also includes a defense for employers, similar to the ILO convention exclusion for jobs with "inherent requirements, called the "bona fide occupational qualification."[121]

Unlike the U.S., India has ratified the Convention Concerning Discrimination.[122] The Indian government ratified the ILO Convention Concerning Discrimination in Respect of Employment and Occupation in 1960.[123] As part of the ILO's enforcement scheme, it periodically dispatches observers to countries that have ratified its conventions, and the Committee of Experts on the Application of Conventions and Recommendations ("CEACR") publishes a report of these observations.[124] In 2003, the CEACR released its report on observations in India concerning the implementation of the Convention Concerning Discrimination.[125] The report noted that the Indian government had made some progress toward improving discrimination against women, but added that there remained substantial room for improvement.[126] Specifically, the report found that discrimination continued in the form of restricted access to education for Indian

116. *Id.*

117. To date, the U.S. has ratified fourteen ILO conventions, only twelve of which remain in force. These twelve are: Officers' Competency Certificates Convention No. 53, Shipowners' Liability Convention No.55, Minimum Age (Sea) Convention (Revised) No. 58, Certification of Able Seamen Convention No. 74, Final Articles Revision Convention No. 80, Abolition of Force Labour Convention No. 105, Tripartite Consultation (International Labour Standards) Convention No. 147, Labour Administration Convention No. 150, Labour Statistics Convention No.160, Safety and Health in Mines Convention No. 176, and Worst Forms of Child Labour Convention No. 182. *See* List of Ratifications of International Labour Conventions: United States, *at* http://www.ilo.org/ilolex (last visited Mar. 16, 2004) [hereinafter U.S. Ratifications].

118. 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(a)(2).

119. *See* 42 U.S.C. §§ 2000e-4(g)(6), 2000e-5(a).

120. Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(a)(2).

121. 42 U.S.C. § 2000e-2(e)(1).

122. The degree of enforcement of the ILO convention in India will be discussed because India is the destination of a substantial number of outsourced U.S. jobs. *See* Stark, *supra* note 27.

123. *See* List of Ratifications of International Labour Conventions: India, *at* http://www.ilo.org/ilolex/ (last visited Mar. 13, 2004) [hereinafter India Ratifications].

124. *See* VALTICOS, *supra* note 107, at 242.

125. *See* CEACR, Individual Observation Concerning Convention No. 111, Discrimination (Employment and Occupation), 1958 India (ratification: 1960) (2003), *at* http://www.ilo.org/ilolex/english/newcountryframeE.htm (last visited Mar. 14, 2004) [hereinafter Discrimination Observations].

126. *Id.* ¶ 2.

females.[127] Furthermore, the fact that women constitute only a small minority of the formal workforce was indicative that discrimination continued to exist in the labor market.[128] This conclusion is also supported by statistical figures compiled by the statistics division of the United Nations, which show Indian women only represented about seventeen percent of the non-agricultural workforce in 2001.[129]

The ILC adopted Convention Number 26, Concerning Minimum Wage-fixing Machinery, in 1928.[130] The convention provides that a ratifying country must apply or maintain a regulatory scheme for jobs where the rate of compensation is exceptionally low.[131] The convention additionally requires a ratifying country to institute a complaint process by which workers who have been under compensated may seek the appropriate compensation required under national law.[132]

The U.S. has not ratified this Convention.[133] The Fair Labor Standards Act ("FLSA") is the U.S. statute most analogous to this Convention, and it provides for a minimum wage as well as setting the maximum hours for work in a given week.[134] If an employee exceeds the maximum hours and is not otherwise exempt, then the employee is entitled to receive overtime pay at the rate of one and one-half his or her base wage rate.[135] The enforcement procedures in the U.S. are highly developed and provide for a private cause of action for workers in addition to enforcement by the Secretary of Labor.[136]

The Indian government ratified ILO Convention Number 26 in 1955.[137] Similar to the status of implementation found with regard to the Convention Concerning Discrimination, the CEACR found in 2003 that the Indian government's implementation of this Convention was lacking.[138] In its report on observations in India, the CEACR found there was no established national minimum wage,[139] but the government had passed a law creating a national "floor-level" wage.[140] The report also found varying minimum wage rates in different states in India.[141] The national government explained that decentralized legislation

127. *Id.*

128. *Id.*

129. United Nations Statistics Division Millennium Indicators, *at* http://unstats.un.org/unsd/ (last visited Jan. 7, 2004).

130. *See* Convention No. 26 Concerning the Creation of Minimum Wage-Fixing Machinery, June 16, 1928, *at* http://www.ilo.org/ilolex/ (last visited Mar. 14, 2004) [hereinafter Wage-Fixing Convention].

131. *Id.* art. 1.

132. *Id.* art. 4.

133. *See* U.S. Ratifications, *supra* note 117.

134. 29 U.S.C. §§ 206, 207

135. 29 U.S.C. § 207(a)(1).

136. 29 U.S.C. § 216(c).

137. *See* India Ratifications, *supra* note 123.

138. CEACR, Individual Observation Concerning Convention No. 26, Minimum Wage-Fixing Machinery, 1928 India (ratification: 1955) (2003), *at* http://www.ilo.org/ilolex/english /newcountryframeE.htm (last visited, Jan. 10, 2004) [hereinafter Wage-Fixing Observations].

139. *Id.* ¶ 2.

140. *Id.*

141. *Id.*

was necessary due to the different living cost rates in each state.[142]

Another problem the report uncovered was the influence corporations were exerting on the Indian state governments' legislative process.[143] This pressure created industry specific wage rates below the states' own established minimum wage.[144] The state governments' explanation for this discrepancy was that employers have threatened to relocate their businesses to other neighboring states where the minimum wage is lower.[145] Finally, the report explained that recent changes in some Indian states' regulations deny labor inspectors charged with the task of monitoring minimum wage legislation application the power to carry out their inspections.[146] This state of affairs highlights the lack of bite in current ILO enforcement processes. A country ratifying a convention has an obligation to implement the ratified convention, but there is no effective means of ensuring it actually accomplishes the goal.

The foregoing discussion of a few ILO conventions supports two points. First, the ILO's observation and reporting mechanisms are not sufficient to ensure countries that have ratified conventions live up to their obligations. Second, the discussion also shows U.S. laws analogous to the surveyed conventions currently extend essentially the same protections to U.S. workers.[147]

3. ILO Enforcement Lacks Bite

All member countries are required to protect certain rights represented by ILO conventions, regardless of ratification.[148] Freedom of association is one of the key rights protected by the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.[149] The right of association is unique in the context of the ILO. Since the ILO's purpose was reaffirmed at the Declaration of Philadelphia in 1944, the right of workers to associate for the purpose of organizing has been considered fundamental.[150] Furthermore, if member states have violated the right of association, they are subject to the complaint procedures before the Committee on Freedom of Association.[151]

Neither the U.S. nor India has ratified any of the ILO conventions concerning

142. *Id.* ¶ 3.
143. *Id.* ¶ 8.
144. *Id.*
145. *Id.*
146. *Id.*
147. *See infra* Part III for a discussion on the significance of the second point.
148. *See* ILO, Declaration of Fundamental Rights at Work, ¶ 2, *available at* http://www.ilo.org/ilolex/ (last visited, March 6, 2004) [hereinafter Declaration of Fundamental Rights].
149. *Id.*, *see also* TSOGAS, *supra* note 92, at 51-52.
150. *See* ILO CONST. Declaration of Philadelphia.
151. *See* VALTICOS, *supra* note 98, at 249 (explaining that the Committee on Freedom of Association is a nine person committee appointed by the Governing Body from among its own membership. Three of the members represent the interests of governments, three represent employers, and three represent workers.).

the rights of workers to associate.[152] In the U.S., the National Labor Relations Act (NLRA) is the statute most analogous to these ILO conventions and confers upon covered U.S. workers the right to associate, organize, and bargain collectively [153] Both the U.S. and India have been subject to the Committee on Freedom of Association's complaint procedures.[154] These cases help emphasize the point that the enforcement procedures of the ILO lack bite. In both cases, the Committee found there was insufficient information and merely tasked both countries with further fact finding.[155]

The American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) together with the Confederation of Mexican Workers (CTM) brought the case against the U.S.[156] The complaints alleged the U.S. Supreme Court's decision in *Hoffman Plastic Compounds v. National Labor Relations Board*[157] divested millions of immigrant workers of their protection under the law ensuring their freedom of association.[158] In the *Hoffman* decision, the Court held that the NLRA does not extend to an undocumented immigrant who was dismissed from his position for exercising rights protected under the Act.[159] The Committee identified the case's issue as a question of whether the *Hoffman* Court's decision limited the remedies available to undocumented workers to such an extent that the protection of such workers' freedom of association no longer had any real meaning.[160] The U.S. government's reply to the complaint was quick to point out that the *Hoffman* decision was very narrow, applying only to the remedy of back-pay [161] The Committee noted, however, that with back-pay unavailable, the only remedies still available were a cease and desist order and possible contempt sanctions if the employer failed to comply.[162] The Committee determined that the U.S. position was insufficient to ensure the fundamental right of freedom of association.[163]

It was in the Committee's recommendations, however, where its lack of true enforcement power is revealed. The most the Committee could muster was to recommend that the U.S. government "explore all possible solutions, including amending the legislation to bring it into conformity with freedom of association

152. *See* U.S. Ratifications, *supra* note 117; *see also* India Ratifications, *supra* note 123.

153. National Labor Relations Act, 29 U.S.C. §§ 151–169.

154. *See CITU I*, Case No. 2228, Rep.No. 331; *AFL-CIO*, Case No. 2227, Rep. No. 332.

155. *AFL-CIO*, Case No. 2227, Rep. No. 332., ¶ 613; *See* Complaint Against the Government of India Presented by the Centre of Indian Trade Unions, Case No. 2228, Rep. No. 332, ¶¶ 751(a), (c) (ILO Committee on Freedom of Association 2003), *available at* http://www.ilo.org/ilolex/ (last visited Mar. 14, 2004) [hereinafter *CITU II*] Note that while the cases cited here will be discussed in this paper, there are many more Freedom of Association Cases. *See* Freedom of Association Cases, *available at* http://www.ilo.org/ilolex/ (last visited Mar. 14, 2004).

156. *AFL-CIO*, Case No. 2227, Rep. No. 332, ¶ 551.

157 Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002).

158. *AFL-CIO*, Case No. 2227, Rep. No. 332., ¶ 555.

159. *Hoffman*, 535 U.S. at 149.

160. *AFL-CIO* Case No. 2227, Rep. No. 332, ¶ 603.

161. *Id.* ¶ 580.

162. *Id.* ¶ 609.

163. *Id.* ¶ 610.

principles with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the *Hoffman* decision."[164] The Committee found the U.S. legal position left millions of workers effectively unprotected, yet it could merely make a recommendation that the U.S. "explore all possible solutions.

The second case is one involving the Indian government and instances of anti-union activity in that country.[165] In this case, the Centre of Indian Trade Unions (CITU) filed a complaint with the ILO alleging anti-union discrimination.[166] Specifically, the complaint alleged that the Development Commissioner of one of India's Export Processing Zones (EPZ) had personally warned workers they could lose their jobs if they joined a trade union.[167] Additionally, the complaint claimed that the workers of one EPZ had gone on strike and that both the employer and the state police took actions to "brutally suppress" and "terrorize" the workers.[168] Finally, the complaint alleged the employer had taken retaliatory action by terminating a number of the workers viewed as instigators of the strike.[169] The Government's response denied the allegations as untrue and explained some workers were later terminated because of "indiscipline, irregularity and failure to learn."[170] The Committee initially found it had insufficient information and instructed the government to provide more detailed information.[171] The Indian government followed up with a communication dated August 5, 2003, and attached a report from the Development Commissioner of the EPZ at issue in the case.[172]

After reviewing the report, the Committee was once again left with insufficient and non-responsive information from the Indian government.[173] The Committee, however, merely requested that the Indian government take efforts to conduct a thorough investigation of the incident.[174] Ultimately a statement CITU made in its complaint—that its only true recourse for protection was the Chief Justice of the Indian Supreme Court— appears to have been an accurate assessment of the Committee's inability to provide meaningful assistance.[175]

The foregoing cases show the complaining parties received no dispute resolution and no Commitee statement on what remedial measures either country would be required to perform. The absence of meaningful enforcement arguably encourages member countries to disregard even ratified ILO conventions and violate the fundamental right of association.[176] In order for the ILO to effectively

164. *Id.* ¶ 613.
165. *See CITU I*, Case No. 2228, Rep. No. 331.
166. *Id.* ¶ 451.
167. *Id.*
168. *Id.* ¶ 454.
169. *Id.* ¶ 452.
170. *Id.* ¶ 460.
171. *Id.* ¶ 467.
172. *CITU II*, Case No. 2228, Rep. No. 332., ¶ 733.
173. *Id.* ¶¶ 740, 742, 745.
174. *Id.* ¶ 751(a).
175. *See CITU I*, Case No. 2228, Rep. No. 331, ¶ 455.
176. Tsogas, *supra* note 92, at 54 (stating that governments "suffer no penalties when

improve working conditions and ensure fundamental rights of workers are protected, it must be vested with powers that will give its enforcement bite.

4. The WTO as a Model for Enforcement Powers

This section will provide a brief overview of the enforcement scheme employed in the WTO. Following the overview, the paper will argue that the WTO's enforcement powers should be used as a model for ILO enforcement, thus ensuring workers' rights are protected. The ancillary benefit of such enforcement powers is that they will promote a greater degree of fair competition between the U.S. and foreign labor markets because egregious practices amounting to unfair competition could be effectively combated.

a. The WTO Enforcement Processes

Early dispute resolution procedures employed under the General Agreement on Tariffs and Trade (GATT),[177] which preceded the WTO, relied primarily upon negotiations between member states to resolve disputes.[178] This process eventually gave way to the more formal legalistic procedures of adjudication.[179] The change was motivated by two factors. First, parties to a dispute often met with significant delays and problems in enforcing their negotiated settlement; second, there was a need for increased dispute resolution process legitimacy [180]

During the Uruguay Round, the enforcement procedures of international trade took steps[181] toward their current form; two years later, [182] those changes were the foundation for the Understanding on Rules and Procedures Governing the Settlement of Disputes.[183] Under the WTO's dispute resolution rules, a member state may bring a complaint before the WTO's dispute resolution body· following a hearing, the losing party may appeal the decision.[184] Decision enforcement is usually accomplished by withdrawal of trade concessions or compensation for harm resulting from violations of trade sanctions.[185]

These processes allow WTO member states to resolve disputes primarily

---

[conventions] are breached").

177 General Agreement on Tariffs and Trade, Oct. 30, 1947 T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT]; *see also* Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40 AM. BUS. L. J. 511, 512 (2003).

178. *See* Roberts, *supra* note 177, at 512.

179. *Id.* at 513-18.

180. *See id.* at 516-17

181. Conciliation Improvements to the GATT, Apr. 12, 1989, GATT B.I.S.D. (36th Supp.) at 61-67 (1990) [hereinafter Improvements].

182. Roberts, *supra* note 177, at 517-23.

183. General Agreement on Tariffs and Trade – Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, MTN/FA II-A2 (Dec. 15, 1993), 33 I.L.M. 112 (1994).

184. *Id.*

185. *Id.*

because the WTO includes meaningful and effective enforcement provisions.[186] If a member country is subject to repercussions for violating its obligations under the WTO, it is the threat of such a result that promotes compliance.

b. The WTO as an Example for the ILO

The ILO needs an enforcement scheme that is robust and effective like that of the WTO if it is to be successful in both setting international labor standards and ensuring they are followed. However, an enforcement process similar to that available to WTO member states will be difficult to achieve. There are two primary reasons for this difficulty First, developing countries view enhanced labor regulation as a form of protectionism that will wrest one of their primary competitive advantages, luring MNC investment through cheap labor, from them.[187] Second, the Director General of the ILO has stated that use of coercive economic enforcement mechanisms is beyond the jurisdiction and institutional expertise of the organization.[188]

ILO member states that are developing countries will likely resist the implementation of more effective enforcement mechanisms because it will threaten one of the few competitive advantages they currently possess to attract MNC investment.[189] Their reasoning, however, is faulty because it is susceptible to the counter-argument that foreign investment is not currently beneficial to developing countries' workers because most of the value created by their labor is not captured by the local economy.[190] Rather, the large profits MNCs obtain by exploiting foreign workers are exported along with the goods or services to the U.S. market.[191] Thus, as the situation stands today, foreign workers lose because they fail to retain any significant portion of the wealth they help create, and U.S. workers lose because they are unable to retain employment. The only interest winning in the current vacuum in enforceable labor legislation is that of MNCs.

With the increased enforcement power of the ILO would come an ancillary benefit to the U.S. labor market: fair competition abroad. Of course, identifying this situation as beneficial is problematic; it lends credence to the argument that the U.S. would only pursue such a course because of protectionist motivations.[192] There is, however, a distinction between protectionism and unfair international labor competition. As stated in the introduction to this paper, one motivating reason the ILO was created was to ensure that member countries could take actions

186. *See* Steve Charnovitz, Symposium, *The Boundaries of the WTO: Triangulating the World Trade Organization*, 96 AM. J. INT'L .L. 28, 29 (2002) ("[T]he WTO has become magnet for expansionist ideas because it is perceived as powerful and effective.").

187. *See* TSOGAS, *supra* note 92, at 28, 44-45; *see also Singapore Ministerial Declaration*, *supra* note 91, ¶ 4, 36 I.L.M. at 221.

188. TSOGAS, *supra* note 92, at 47.

189. *Cf id.* at 45 (noting that developing countries have been against linking labor standards to trade because they view it as motivated by protectionism).

190. *See* Lohr, *supra* note 26.

191. *See id.*

192. *See* TSOGAS, *supra* note 92, at 45.

to protect workers without fear that other countries would be free to undercut the market.[193] Additionally, requiring a country to adhere to its ratified obligations under an ILO convention is not protectionist, but rather a demand that such countries honor their commitments. If a country finds a convention it ratified unfair or protectionist, it is free to denounce the convention.[194] Therefore, U.S. policy would be one of fair competition rather than protectionism.

The reluctance of the ILO to take on economic enforcement powers is at odds with its Constitution, which states that member states ratifying ILO conventions have a binding obligation to undertake actions toward implementation.[195] As discussed above, the absence of enforcement has allowed member states to ratify conventions without fear of reprisal if they subsequently fail to implement.[196] This state of affairs undermines the ILO's goals of promoting economic and social justice.[197] Indeed, lack of meaningful enforcement has, in some cases, rendered both conventions and the Declaration of Fundamental Principles and Rights at Work essentially empty promises.[198] The ILO should not balk at obtaining the tool of enforcement, which will enable it to effectively carry out its goals.

III. U.S. LEADERSHIP IN THE ILO AND ENHANCED ENFORCEMENT

This section will discuss two connected actions the U.S. should take in order to enhance the ILO's viability as an international organization which simultaneously works to protect the interests of the U.S. labor market and the rights of workers abroad. First, the U.S. should take a leadership role in the ILO by ratifying as many conventions as possible in the near term. Second, the U.S. should work toward enhancing the ILO's enforcement powers. As part of this second step, the U.S. should make efforts to vest the ILO with trade sanction enforcement powers similar to the WTO's enforcement powers.

A. U.S. Ratification of ILO Conventions

The U.S. has failed to ratify a significant number of ILO conventions. Indeed, the U.S. rate of ratification is on par with countries like Afghanistan[199] and Indonesia.[200] One reason for the failure of the U.S. to ratify a number of ILO

193. *See Labour Law*, *supra* note 1, at 110; ILO History, *supra* note 2.

194. *See Labour Law*, *supra* note 1, at 123; *see also* VIRGINIA A. LEARY, INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW 10 (1982).

195. ILO CONST. art. 20; *see also* LEARY, *supra* note 194, at 10; *see also* TSOGAS, *supra* note 92, at 51.

196. *See, e.g.*, Discrimination Convention, *supra* note 111; Discrimination Observations, *supra* note 125; Wage-Fixing Convention, *supra* note, 130; Wage-Fixing Observations, *supra* note 138; *AFL CIO*, Case No. 2227, Rep. No. 332; *CITU I*, Case No. 2228, Rep. No. 331.

197. *See Labour Law*, *supra* note 1, at 110.

198. *See CITU I*, Case No. 2228, Rep. No. 331, ¶ 455 (noting the CITU stated in its complaint that its only true recourse for protection was the Supreme Court of India).

199. *See* List of Ratifications of International Labour Conventions: Afghanistan, *at* http://www.ilo.org/ilolex/ (last visited Mar. 13, 2004) (listing fifteen ratifications).

200. *See* List of Ratifications of International Labour Conventions: Indonesia, *at*

conventions is the concern that ratified ILO conventions could conflict with national and state laws.[201] Moreover, under the current machinery in place, no ILO convention is forwarded for ratification if such ratification would require a change in U.S. federal and state laws.[202]

Under the U.S. Constitution, adopted treaties become the "supreme Law of the Land."[203] The U.S. has recently begun to insert reservations into treaties in order to: prevent conflicts between ratified treaties and the Constitution; clarify that U.S. ratification does not carry with it an obligation to change domestic laws; and render treaties non self-executing, meaning U.S. courts do not need to enforce the treaty unless Congress passes laws making the treaty enforceable.[204] These practices undermine the credibility of U.S. leadership in foreign affairs because the U.S., through such qualified ratification, is arguably acting to remove the treaty obligations while simultaneously sitting in judgment over other countries.[205] Notably, this practice is not possible with ILO conventions, because ILO convention ratification must be unqualified.[206] The failure of the U.S. to ratify ILO conventions might be explained by the recent U.S. practice of qualified treaty ratification, which is not available for ILO conventions.

Yet, where the international standard expressed by ILO conventions would extend analogous protections as those already afforded under current U.S. laws, then the U.S. should not be hesitant to ratify.[207] Indeed, as discussed above, current U.S. law extends equal or greater protections to U.S. workers than those in a number of ILO conventions.[208] Thus, the U.S. should not find ratification of such conventions problematic. For example, the Convention Concerning Discrimination in Employment and Occupation is narrower than current U.S. laws concerning discrimination.[209] Indeed, the ILO convention calls for the protection of fewer classes of persons than are protected by the combination of Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities

---

http://www.ilo.org/ilolex/ (last visited Mar. 14, 2004) (listing sixteen ratifications).

201. Advisory Committee on Labor Diplomacy, Second Report to the Secretary of State and the President of the United States, Dec. 31, 2001, *at* http://www.state.gov/g/drl/rls/10043pf.htm (last visited Jan. 7, 2004) [hereinafter Second Report].

202. *See* Advisory Committee on Labor Diplomacy, Minutes, Dec. 19, 2001 *at* http://www.state.gov/g/drl/rls/11253pf.htm (last visited Jan. 7, 2004).

203. U.S. CONST. art. VI, § 2, cl. 2 , *see also* TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 1 (2001).

204. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

205. *Id.* at 344.

206. *Labour Law*, *supra* note 1, at 123.

207. *See* Justine Nolan & Michael Posner, *International Standards to Promote Labor Rights: The Role of the United States Government*, 2000 COLUM. BUS. L. REV. 529, 535 (2000) (arguing the U.S. should take action to ratify ILO Conventions); see also Richard B. Lillich, *The Constitution and International Human Rights, in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 145, 154 (Louis Henkin et al. eds., 1990) (arguing the exchange of ideas concerning human rights needs to be a "two-way proposition if the United States, as well as other countries, is to prosper over the long haul")

208. *See supra* notes 111-36 and accompanying text.

209. *Compare* Discrimination Convention, *supra* note 111, art. 1(a)-(b), *to* Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2(a)(1)-(2).

Act.[210]

The Advisory Committee on Labor Diplomacy recognizes the need for the U.S. to take a leadership position in international labor matters.[211] The Committee acknowledged that some developing countries have referred to the lack of U.S. ratification as a reason why they have either failed to ratify conventions or have not adequately implemented the protections called for by the convention.[212] The view of the Advisory panel is that the U.S. could make substantial progress in its ability to advocate for enhanced labor standards in all countries if it assumed a leadership role in the ILO.[213] A leadership role, however, requires ratification. The U.S. is hardly in a position to proselytize the benefits of enhanced labor protection to the rest of the world if it has failed to bind itself by the same set of rules.

If the U.S. seeks to level the playing field between the domestic labor market and those abroad, then an effective long-term solution is ratification of as many ILO conventions as possible. Once the U.S. has taken the step of ratification, it will be in a better position than it is today to advocate for increased worker protections.[214] This approach represents sound foreign policy as well, because U.S. interests could be protected through its participation in an internationally established organization that counts among its membership nearly every country on the globe.[215]

B. Giving ILO Enforcement Bite

By binding itself to ensure its workers have the same minimum labor standards as other ILO member countries, the U.S. will also be in a better position to advocate for enhanced ILO enforcement powers. In this leadership role, the U.S. could advocate to vest the ILO's Committee on Freedom of Association with powers similar to the WTO's enforcement powers.

It is important to note that many scholars have discussed the concept of creating links between the WTO and the ILO in one form or another.[216] During the 1996 WTO Singapore Ministerial Conference, part of the agenda was determining

---

210. *See* 42 U.S.C. §§ 2000e–2000e-17; 29 U.S.C. §§ 621–634; Equal Opportunity for Individuals with Disabilities Act, 42 U.S.C. §§ 12101–12117 (2000) (this act is often publicly referred to as the Americans with Disabilities Act).

211. *See* Advisory Committee on Labor Diplomacy Minutes, Dec. 19, 2001, *at* http://www.state.gov/g/drl/rls/11253pf.htm (last visited Jan. 7, 2004).

212. *See* Advisory Committee on Labor Diplomacy Minutes, Oct. 4, 2001, *at* http://www.state.gov/g/drl/10044.pf.htm (last visited Jan. 7, 2004).

213. *See id.*

214. *See Labour Law*, *supra* note 1, at 125 (noting that ILO complaint procedures require ratification by both the complaining and defending country).

215. *See* List of Member Countries, *at* http://www.ilo.org/ (last visited Mar. 14, 2004).

216. *See* Robert Howse, *The World Trade Organization and the Protection of Workers Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 169 (1999); Nolan & Posner, *supra* note 211, at 535; Daniel A. Zaheer, Note, *Breaking the Deadlock: Why and How Developing Countries should Accept Labor Standards in the WTO*, 9 STAN. J. L. BUS & FIN. 69 (2003).

whether a formal link should be created between the WTO and the ILO.[217] In the Singapore Ministerial Declaration, WTO member countries decided against creating a link between trade and labor standards, opting to leave labor issues to the ILO.[218] This decision, however, left labor issues in the hands of an international organization without effective enforcement powers.[219] Additionally the notion that the WTO should not take on labor issues was reaffirmed in a Joint Communique from the Eleventh Conference of the Heads of State and the Group of Fifteen,[220] as well as in the Doha Ministerial Declaration.[221]

Most of the thinking in this area argues that the link between trade and labor should vest the WTO with the authority to resolve labor disputes.[222] Alternatively it is also argued that the ILO and WTO should be joint actors in enforcing international labor standards.[223] In light of the Singapore Ministerial Declaration, the Joint Communiqué, the Doha Ministerial Declaration, and the recent report from the WCSDG, the ILO should be vested with enforcement efforts independent of the WTO.[224] The foundation for sanctions-based enforcement arguably already exists in Article Thirty-Three of the ILO Constitution.[225] In addition to the decision in the Singapore Ministerial Declaration, the Joint Communiqué, and the Doha Ministerial Declaration, which show that WTO members are recalcitrant to link the ILO to the WTO, there is arguably an additional reason why enforcement should be vested in the ILO alone.

The WTO's primary objective is arguably focused on the liberalization of trade,[226] and there may be times when protecting labor by limiting trade may create an institutional conflict of interest. The idea that the WTO may at times have

---

217. *See* Howse, *supra* note 223, at 133-35.

218. *Singapore Ministerial Declaration*, *supra* note 91, ¶ 4, 36 I.L.M. 221.

219. *See* Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP L. 257, 275 (2000).

220. XI Summit of the Heads of State and Government of the Group of Fifteen, Joint Communique (May 30-31), ¶ 17, *at* http://www.un.org/esa/ffd/themes/g15-2.htm (last visited, Mar. 6, 2004).

221. WTO, *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1 (Nov. 14, 2001), ¶ 8, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited Mar. 16, 2004).

222. Howse, *supra* note 223, at 170; Nolan & Posner, *supra* note 223, at 535; Zaheer, *supra* note 223, at 100.

223. Daniel S. Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 163 (Lance A. Compa & Stephen F Diamond eds., 1996).

224. *But see id.* at 164 (noting that the ILO has balked at the idea of linking enforcement of labor standards to trade because it was seen as "beyond the expertise and mandate of the organization"); *see also* Tsogas, *supra* note 92, at 47.

225. ILO CONST. art. 33 (stating that "the Governing Body may recommend to the Conference such actions as it may deem wise and expedient to secure compliance if member state fails to comply with recommendations of Commission of Inquiry or a decision from the International Court of Justice); *see also* Zaheer, *supra* note 18, at 84.

226. *See* Agreement Establishing the World Trade Organization, art. II ¶ 1 (stating that the scope of the WTO shall "provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements "); *see also id.*, art. III ¶ 2 (stating that the functions of the WTO shall "provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements "); *see also WCSDG Report*, supra note 34, at 113.

institutional conflicts of interest is supported by findings in the WCSDG report, which noted that some WTO policies are in some ways inimical to developing countries' interests because they reflect an unfair balance in favor of economically powerful nations.[227] The report further stated some WTO policies pose a limit on developing countries and their ability to take advantage of opportunities for economic growth.[228] These examples provide support for the notion that if the WTO were given the mandate to enforce labor rights, the WTO's institutional interest in liberalizing trade might conflict with enforcing labor standards calling for more restrictions, to the detriment of some ILO members. The WTO's success in increasing respect for the rule of law and belief in the efficacy and legitimacy of its enforcement powers counsels in favor of using the WTO as the model for invigorating ILO enforcement.[229] However, it may be time for the ILO to consider using that model independent of the WTO.

The ILO's conventions, recommendations, and Declaration of Fundamental Principals and Rights at Work all represent policies protecting the interests of workers irrespective of their location on the globe.[230] Providing the ILO with an effective means of ensuring all ILO member states live up to their commitments is sound global policy. Indeed, the WCSDG in its recent report recognized the fundamental importance of protecting the rights of workers both in industrialized and developing countries and added that the most effective way to accomplish the goal was to follow the model established by the ILO.[231] Yet, the ILO's standards only have value for everyday workers if there is an effective enforcement regime that delivers on the promises embodied in ratified conventions and the Declaration on Fundamental Principals and Rights at Work.

IV CONCLUSION

MNCs today have ready access to foreign labor markets and take advantage of the current vacuum in enforceable labor regulation to obtain cheap labor and easy access to the wealthiest market in the world. The problems U.S. workers face are compounded by the ever-present threat that if they choose to exercise the protections available under U.S. laws, their employer could leave them unemployed. Today the ILO's conventions represent the international standard of fundamental labor laws. The only short fall of the ILO is its lack of bite in terms of enforcement. While member states have ratified various conventions, they are not subject to enforceable repercussions if they fail to take steps necessary to implement the protections. The U.S. is in a position to change the current situation, but it must be willing to overcome some hurdles. One available course is for the U.S. to ratify as many ILO conventions as possible and to work toward empowering the ILO in a manner similar to the WTO. This path would help to

227. *WCSDG Report*, *supra* note 34, at 81.

228. *Id.*

229. *See* Charnovitz, *supra* note 186, at 29 ("[T]he WTO has become a magnet for expansionist ideas because it is perceived as powerful and effective.").

230. ILO CONST. pmbl.

231. *See WCSDG Report*, *supra* note 34, at 82.

ensure that the U.S. labor market and its workers are not harmed by unfair competition in the new global economy