
'Core Labour Standards' and the Transformation of the International Labour Rights Regime

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Abstract

The past decade has seen a transformation of the international labour rights regime based primarily on the adoption of the 1998 ILO Declaration on Fundamental Principles and Rights at Work, and the widespread use of the concept of 'core labour standards'. Notwithstanding the enthusiasm which has greeted these innovations, it is argued that the resulting regime has major potential flaws, including: an excessive reliance on principles rather than rights, a system which invokes principles that are delinked from the corresponding standards and are thus effectively undefined, an ethos of voluntarism in relation to implementation and enforcement, an unstructured and unaccountable decentralization of responsibility, and a willingness to accept soft 'promotionalism' as the bottom line. The regime needs urgent reforms, such as anchoring the principles firmly in the relevant ILO standards, giving greater substance to the Follow-up mechanism, extending monitoring under the Declaration to include an empirical overview of practice under the bilateral and regional mechanisms which have invoked ILO principles and the Declaration itself, and adequately funding the commitment to workers' rights.

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1 Introduction

The international labour rights regime has undergone fundamental change in the space of less than a decade. The system that was long held up as one of the most successful of international regimes has been transformed in almost every respect, albeit with very little acknowledgement of the implications and consequences of the far-reaching changes that have taken place. For most observers the narrative runs as follows: in the face of an ever more powerful set of rules and institutions promoting international trade liberalization, the International Labour Organization (ILO) responded to pressures to promote respect for labour standards by adopting, in 1998, a soft law instrument — the Declaration on Fundamental Principles and Rights at Work.¹ The Declaration provided the necessary flexibility in the face of forces of globalization and universalized the reach of the core labour standards. While it left intact the pre-existing labour law regime, it made it potentially more effective.

In my view, however, the 1998 Declaration is the harbinger of a revolutionary transformation, the extent and nature of which continue to be downplayed by its proponents, while many traditional supporters of labour rights appear to be oblivious to the consequences of the changes that have been wrought. Instead of consisting of a heterogeneous and wide-ranging set of labour rights, a new normative hierarchy has been established. It privileges a set of four ‘core labour standards’ (hereinafter CLS), consisting of freedom of association, freedom from forced labour and from child labour, and non-discrimination in employment. A focus on rights, the content of which is relatively well defined in international treaties, has been replaced by a focus on more generally formulated ‘principles’. There is now an emphasis on soft promotional techniques, one which over time is likely to see a gradual downgrading of the role of the ILO’s traditional ‘enforcement’ mechanisms. And the main focus of the system of oversight or monitoring of these four standards has been decentralized so that the ILO remains only nominally at centre stage.

While each of these characterizations is likely to be contested by proponents of the new regime, the purpose of this article is to explore how the transformation has occurred and to show that it is indeed more far-reaching, more fully in place, and above all more problematic than has generally been acknowledged.

The process of transformation began in 1995 at the Copenhagen World Summit for Social Development. It was formalized by the adoption of the Declaration in 1998, and since then has been gaining pace as a result of developments in a diverse array of institutional and other settings. The essential features of the Declaration for present purposes are its identification of these four core standards, its application of those standards to all Member States of the ILO whether or not they have ratified the key conventions dealing with those matters, and the creation of new monitoring measures which will be examined below.

The resulting transformation of international labour law has not only been

¹ ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 86th Session, Geneva, June 1998. [hereinafter ILO Declaration], available at <http://www.ilo.org/public/english/standards/decl/declaration/index.htm>.

relatively uncontroversial but has been warmly welcomed in most quarters. Thus, for example, the application of the principles to all ILO Member States regardless of ratification of relevant conventions has been said to be 'nothing short of a revolution in legal terms', and the Declaration itself portrayed as 'a common vision of the necessary social dimension of progress',² and as a 'very significant ... step in international constitutional law'.³ Others have suggested that some observers view the Declaration as a defining turning point, or 'constitutional moment', in the life of the ILO.⁴ The Declaration's principles are said by some authors to have attained an elevated status in international law as 'fundamental international norms',⁵ and by another to have attained *jus cogens* status.⁶ And one of the four principles has been characterized as being 'constitutive of the essence of humanity'.⁷ While other commentators have used less effusive language, the Declaration has unquestionably attracted enormous attention and has transformed the international discourse of labour rights.⁸ The previously unknown concept of CLS is now ubiquitous. There are at least five reasons which its proponents would invoke to explain the new found importance of the concept and of the the 1998 Declaration which proclaimed the standards and bestowed the international community's imprimatur upon them.

First, the concept of 'core' standards constituted a very significant departure from the insistence within the international human rights regime on the equal importance

² Maupain, 'The Liberalization of International Trade and the Universal Recognition of Workers' Fundamental Rights: The New ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up', in L.-A. Sicilianos and M. Gavouneli (eds), *Scientific and Technological Developments and Human Rights* (2001) 35, at 44 and 47, respectively.

³ Maupain, 'Worker Rights and Multilateral Trade', Vienna 1999, cited in Charnowitz, 'The ILO in its Second Century', 4 *Max Planck United Nations Year Book* (2000) 147, at 154.

⁴ Langille, 'The ILO and the New Economy: Recent Developments', 15 *Int'l J. Comp. Lab. L & Ind. Rels.* (1999) 229, at 232. Langille suggested that while optimists would portray the Declaration in this way, viewing it as 'a moment of renewal and reaffirmation by the virtually global membership of basic constitutional values', sceptics might view it very differently. The significance of a 'constitutional moment' was first developed a decade earlier by Ackerman, 'Constitutional Politics/Constitutional Law', 99 *Yale Law Journal* (1989) 453.

⁵ J. Wouters and B. de Meester, *The Role of International Law in Protecting Public Goods. Regional and Global Challenges*, Leuven Interdisciplinary Research Group on International Agreements and Development, Working Paper No 1 — December 2003, at 21.

⁶ This claim was developed in a doctoral thesis defended at Leuven in 2003 by Arne Vandaele, 'A Critical Analysis on the Use of International Trade Measures as a Means to Enforce Basic Labour Rights', Ch. 3 of which apparently develops this argument. See 'Executive Summary Ph.D. Thesis', at <http://www.law.kuleuven.ac.be/iir/eng/research/infopublications/ExSumDoctArne.pdf>.

⁷ Langille, 'Seeking Post-Seattle Clarity — and Inspiration', in J. Conaghan, R. M. Fischl, and K. Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2002) 137, at 152.

⁸ Other authors have, of course, been much more critical. Langille argues that only 'the very naïve' would invoke the 1998 Declaration 'as clear evidence of widespread and renewed agreement on the importance of core labour rights ...'. Langille, *supra* note 7, at 148. The critics' views are considered later in the present analysis.

of all human rights.⁹ Previously, discussions of a hierarchy of standards among the various rights recognized within the conventions and recommendations of the ILO had been approached delicately and with few clear outcomes beyond a *de facto* privileging of the right to freedom of association. The idea that there is an identifiable, fundamental, 'core' of standards which are (in practice, if not necessarily in theory) more important than the rest and warrant priority attention by governments, corporations, and labour rights proponents generally, has been greeted with enthusiasm and even relief in most quarters. Rather than concentrating on what was often seen as an unwieldy hotchpotch of complex and overly detailed international labour standards promulgated by the ILO, the principal focus henceforth was to be on a small and eminently manageable set of standards.

Second, the Declaration has laid the groundwork for a decentralized system of labour standards implementation which significantly reduces the emphasis on governmental responsibilities and encourages a diverse range of actors, from transnational corporations to consumers, to take the lead in defining, promoting, and even enforcing core standards.

Third, the CLS approach has the potential to liberate the relevant standards from the legalism of ILO conventions, thus facilitating a more flexible approach tailored to the exigencies of particular situations and thereby making the standards more readily applicable in a diverse range of contexts and more palatable to employers.

Fourth, the focus on CLS has acted as a very effective lightning rod by providing what many observers see as a satisfactory way of resolving the highly controversial debate over trade and labour standards. In this respect, the adoption of the Declaration was a crucial step to enable the ILO to placate those of its critics who had argued that it seemed incapable of responding effectively to the growing demand that 'something' be done to underscore the relevance of labour standards in the context of the rapidly evolving international trading regime.

Fifth, and finally, the Declaration enabled the debate to break free of the sanctions context within which many unsuccessful 'social clause' proposals had been situated in the preceding decade. By emphasizing the role of promotional techniques and in effect loosening the links between the core standards and the ILO's traditional supervisory machinery, the Declaration put forward a vision of labour standards which was much more palatable to many governments and most employers in a world of ever increasing capital mobility.

There is no doubt that the CLS approach has attracted a great deal of attention and has facilitated the inclusion of a dialogue about labour conditions in contexts in which such matters had previously largely been eschewed. But there is, in practice, a significant downside to the assumptions underpinning most of the arguments listed

⁹ Since the Vienna World Conference on Human Rights, the official United Nations position has been that '[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.' See the Vienna Declaration and Programme of Action, para. 5, in *Report of the World Conference on Human Rights: Report of the Secretary-General*, UN Doc. A/CONF.157/24 (part I), 13 Oct. 1993.

above. As a result, it cannot be taken for granted that this new development is necessarily a positive one from a labour rights perspective, or that it is evolving in ways that are most conducive to an effective international regime for the protection of workers. This is not to say, however, that the new regime is irremediably flawed. Rather, the thrust of my analysis is that the new regime should be assessed on the basis of four criteria:

- (i) the extent to which the content of the core standards is defined by reference to the specific normative profile which the relevant rights have been given in the appropriate ILO conventions;
- (ii) the promotion of this limited range of core standards does not serve to undermine the status of other labour rights which have long been recognized as human rights;
- (iii) the arrangements for implementation which attach to the core standards are meaningful and not just promotional in a soft or tokenistic sense; and
- (iv) those arrangements neither undermine the ILO's existing supervisory arrangements nor discourage the serious reforms which the supervisory system requires.

On the basis of developments in the six years since the adoption of the 1998 Declaration, it is by no means clear that the CLS system satisfies these criteria. To the extent that it fails to do so in the years ahead, it will have a negative net effect on the international labour rights regime as a whole. Taken to its logical extreme, the risk would be that the concept and practice of international labour standards, implemented within a framework first established in the 1920s and subsequently developed through many decades of gradual advances, could, in the space of only a few years, be systematically superseded by a much less effective system for the protection of the rights of workers.

This would, of course, be a paradoxical outcome given that the CLS initiative was launched with the aim of improving the situation and that its sponsors went to considerable pains to emphasize that it was designed to complement and not in any way replace or downgrade the pre-existing arrangements. Such an outcome could not have been guaranteed in advance, however, because the fragile consensus which permitted the adoption of the Declaration would have been broken by attempts to gain overt acceptance of preconditions satisfying the criteria identified above. Nevertheless, it was widely assumed by labour rights proponents that the trajectory followed in practice would emulate the well-known ILO tradition of gradually ratcheting up the nature of the obligations assumed by governments. This trajectory has involved a gradual hardening of initially soft standards, an incremental strengthening of supervisory processes and the adoption, with the acquiescence of governments and other actors, of innovative promotional and other measures. To date, however, that type of dynamic has distinctly failed to emerge in relation to the Declaration and arrangements for its implementation remain determinedly weak, even if superficially convincing. More importantly, the concept of CLS has come to have many and diverse manifestations and at least some of them are increasingly difficult to reconcile with the original design.

It bears emphasis, however, that this result can still be avoided if a determined effort is made in the years ahead to remedy the specific defects of both the CLS system and the much broader international labour standards supervisory system. While the institutional rhetoric of the ILO and of the governmental proponents of CLS would have us believe that these two components have always been part of an integrated approach, much remains to be done to make that a reality.

This article begins by situating the CLS concept within the context of the international labour regime and traces the origins of the 1998 Declaration from the end of the Cold War to its adoption. Particular emphasis is placed in this respect on the role of the United States, which is presented as having had a major self-interest in moving the focus of ILO labour rights activities away from the old convention-based approach and towards a more malleable one. Consideration is then given to the centrality of the ILO in the debate over trade and labour standards, given the preference of most governments to keep labour issues well away from the World Trade Organization. The article then turns to examine the major problems of the CLS approach, including the inadequacy of the core list, the unsatisfactory nature of the rationale for calling them principles rather than rights, the inevitable downgrading of non-core rights, and the consequences of the lack of definition of the new principles. Finally, the article traces the influence of the 1998 Declaration on the labour rights provisions of an increasingly significant array of bilateral and regional agreements and of a plethora of voluntary codes of conduct, and argues that it facilitates a minimalist approach in most instances.

2 Situating the 1998 Declaration within the International Labour Regime

A *The Origins of the CLS Approach*

The role of the 1998 Declaration and the concept of CLS can only be fully appreciated in light of the background against which it was adopted. Although these events have been well chronicled by others elsewhere, the analysis in this section highlights certain aspects which are of particular importance and which do not emerge as clearly from more traditional accounts.

1 *The Historical Background*

Some form of nexus between trade and labour standards has been a consistent feature of international regulatory endeavours since the end of the 19th century.¹⁰ The push

¹⁰ See generally Huberman, 'International Labor Standards and Market Integration before 1913: A Race to the Top?' (August 2002) available at <http://www.hist.umontreal.ca/U/huberman/huberman.pdf>; J. Follows, *Antecedents of the International Labour Organization* (1951); and Charnowitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview', 126 *Int'l Lab. Rev.* (1987) 565.

for minimum standards after World War I, under the slogan of 'fair competition',¹¹ was significantly trade-driven in the wake of what is today generally recognized as one of the first major waves of globalization.¹² But the linkage was never taken to its logical extreme, partly because the United States did not join the ILO until 1934 and also because international trade law remained embryonic until much later in the century.¹³ After World War II the links between social and economic policy were given unprecedented recognition in both the United Nations Charter and the ILO's Declaration of Philadelphia,¹⁴ as well as in the broader institutional arrangements made to establish a 'working peace system'.¹⁵

At its peak, in the 1960s and 1970s, the outcome of these developments was commonly referred to as the International Labour Code¹⁶ — a term which only scholars invoke today,¹⁷ but which has never been formally abandoned by the ILO. By the 1980s, however, these efforts were under threat. The initial attack was launched by some of the countries of Eastern Europe which had come under fire in the ILO context, such as Poland and Czechoslovakia. Subsequently the fall of the Berlin Wall and the impact of globalization were to undermine further the support for the quest to develop a comprehensive international code to regulate labour matters. The definitive proof that communism was not economically viable removed the countervailing force that had long prompted liberal politicians to pay attention to a labour rights agenda at both the national and international levels. The emphasis on freedom of association and on non-discrimination that had been a feature of ILO action during the Cold War became less appealing when the prime targets were no longer communist governments such as those in Poland, Czechoslovakia, and the USSR, but instead were countries pursuing the neo-liberal agenda of labour market reform. As the Director-General of the ILO put it in 1994, in uncharacteristically political terms, the end of the Cold War 'uncovered certain latent reservations or hostility vis-à-vis standards'. That hostility had previously been restrained 'so as not to weaken a system whose pluralist and reformist nature had always made it an objective ally against totalitarian regimes'.¹⁸ Once that alliance had run its course, employer groups began to identify with liberalizing free market governments, as well as those of countries 'in

¹¹ T. Novitz, *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, The Council of Europe and the European Union* (2003) 97.

¹² K. O'Rourke and J. Williamson, *Globalization and History: The Evolution of a Nineteenth-Century Atlantic Economy* (2001).

¹³ For a review of some of the early efforts in this regard see Alston, 'Linking Trade and Human Rights', 23 *German Yearbook of International Law*, (1980) 126; and Alston, 'Commodity Agreements: As Though People Don't Matter', 15 *J. World Trade L.* (1981) 455.

¹⁴ Declaration Concerning the Aims and Purposes of the International Labour Organization, 1946, ILO Constitution, Annex, at <http://www.ilo.org/public/english/about/iloconst.htm#annex>.

¹⁵ D. Mitrany, *A Working Peace System* (1943).

¹⁶ N. Valticos and G. von Potobsky, *International Labour Law* (1995).

¹⁷ For an attempt to revive this terminology see three forthcoming volumes: N. Rubin, E. Kalula and B. Hepple (eds), *Code of International Labour Law* (2004), Vols. 1–3.

¹⁸ *Defending Values, Promoting Change: Social Justice in a Global Economy: An ILO Agenda*, Report by the Director General for the International Labour Conference 81st Session, 1994, at 42.

transition', many of which had little time for the protection of labour rights. When a few of them sought to maintain social rights provisions in the very same constitutions that were being designed to bury the legacy of communism they were told in no uncertain terms that such rights had no place in the constitutional order. Instead, they were advised that the recognition of labour rights would 'pose especially severe risks' because they 'could work against general current efforts to diminish the sense of entitlement to state protection and to encourage individual initiative'.¹⁹

And indeed this advice was consistent with trends at the national level which had seen state labour law 'rolled back by aggressive deregulation, enfeebled by the funding of workplace inspectorates, dependent on the support of rump unions and workers terrified that their work will be "outsourced" and their jobs moved "offshore"'.²⁰

But at the same time as the processes of deconstitutionalizing and voluntarizing social rights were occurring at the national level, a renaissance of interest in soft law or promotional approaches to labour rights at the international level began to occur. To a far greater extent than during the 1970s or 1980s, the years since 1990 have seen labour rights issues appearing much more frequently on the international agendas of multilateral and regional institutions, governments, the private sector and non-governmental organizations (NGOs). There have been various impetuses for this resurgence of interest. They include the accelerating liberalization of trade and financial markets, the anti-globalization movement (the impact of which has been somewhat muted since 9/11), the sustained exposure of the role of transnational involvements in exploitative labour practices and the resulting growth of consumer demands for fair labour, and the concerns of workers in the North that their jobs are being taken by workers in the South who are exploited in countries in which labour rights can be ignored. Most importantly, employers were turning to the international community to bless the sort of voluntary codes which they had succeeded in promoting at the national level and which provided them with an important element of legitimacy and enabled the larger and more reputable among them to distinguish themselves from rogue exploiters whose sometimes well-publicized practices threatened the standing of transnational corporations as a whole.

2 *Copenhagen and Beyond*

In the ILO context this new voluntarism was to be formalized in the 1998 Declaration on Fundamental Principles and Rights at Work. Its immediate origins are usually traced back to a 1994 report by the then Director-General of the ILO, Michel Hansenne, who proposed some differentiation among the rights promoted by the ILO and urged an emphasis on a limited list of seven conventions. Thus Francis Maupain notes that Hansenne's 'vision ... gradually made headway through the United Nations system' with the Copenhagen Conference taking a 'decisive step in this

¹⁹ Sunstein, 'Against Positive Rights', 2 *East Eur. Constit' al Rev.* (1993) 35.

²⁰ Arthurs, 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation', in *Labour Law in an Era of Globalization*, *supra* note 7, at 471 and 473.

direction by stressing the importance of these principles ...'.²¹ According to the received wisdom as recounted by Janice Bellace, the US expert on the ILO's Committee of Experts, this list:

met with approval in Copenhagen, and emerged as the agreed upon basis for the four basic rights set forth in the 1998 Declaration. This was a major political victory for Hansenne ...'.²²

But the story is rather more complicated than such accounts would suggest. Hansenne's 1994 report²³ contained a slew of different proposals ranging from the need for new soft law norms,²⁴ the possibility of replacing the ILO's traditional 'maximalist' approach with 'conventions' (presumably as opposed to declarations) that aim to define a 'general framework',²⁵ through expansion of the mandate of the Committee on Freedom of Association to cover additional standards, and the option of establishing a permanent voluntary mediation and arbitration service',²⁶ to the adoption of a new convention under the terms of which developing countries would do more to uphold labour rights in return for an undertaking by other states to refrain from applying unilateral trade restrictions.²⁷ Moreover, his report also sought to strengthen the supervisory arrangements which applied to those standards, rather than to develop a wholly promotional option.²⁸

In Copenhagen, Hansenne's speech focused not on the need for a hierarchy of rights but almost entirely on the importance of job creation. Although he used the term 'workers' rights', a turn of phrase drawn from American practice but hardly ever previously used in the ILO, he did not use the term 'core' rights or standards at any stage. He referred instead to 'the importance of fundamental rights and freedoms recognized in ILO standards'.²⁹

The outcome of the Copenhagen Conference is also worth examining carefully. Labour *rights* (as opposed to principles or standards) are actually referred to on three occasions in the Programme of Action which emerged.³⁰ The first referred to small enterprises and the informal sector and called for measures to encourage developments therein to 'be accompanied by protection of the basic rights, health and safety of

²¹ Maupain, *supra* note 2, at 42.

²² Bellace, 'The ILO Declaration of Fundamental Principles and Rights at Work', 17 *Int'l J. Comp. Lab. L & Ind. Rels.* (2001) 269, at 271.

²³ *Defending Values, Promoting Change*, *supra* note 18.

²⁴ *Ibid.*, at 49. Such law was defined as having 'a shorter life and [being] less binding than standards in the strict sense'.

²⁵ *Ibid.*, at 45.

²⁶ *Ibid.*, at 53.

²⁷ *Ibid.*, at 62. He acknowledged that this Convention, which he suggested would be 'coupled with the guarantees afforded by the supervisory machinery for Conventions', would 'certainly represent a quantum leap'. *Ibid.*, at 63.

²⁸ *Ibid.*, at 43-46 ('for better utilization of standard-setting machinery and other instruments').

²⁹ Statement by Mr Michel Hansenne, Director-General, International Labour Office, to the World Summit for Social Development, (Copenhagen, 9 March 1995), available at <http://www.un.org/documents/ga/conf166/una/950309093806.htm>.

³⁰ See Programme of Action of the World Summit for Social Development, Ch. 3, 1994, available at <http://www.un.org/esa/socdev/wssd/agreements/poach3.htm>.

workers and the progressive improvement of overall working conditions . . .'.³¹ The second was a reference to the importance of creating 'quality jobs, with full respect for the basic rights of workers as defined by relevant International Labour Organization and other international instruments'.³² And the third, which is the one always cited in tracing the evolution of the Declaration, called for:

Safeguarding and promoting respect for basic workers' rights, including the prohibition of forced labour and child labour, freedom of association and the right to organize and bargain collectively, equal remuneration for men and women for work of equal value, and non-discrimination in employment, fully implementing the conventions of the International Labour Organization (ILO) in the case of States parties to those conventions, and taking into account the principles embodied in those conventions in the case of those countries that are not States parties to thus achieve truly sustained economic growth and sustainable development.³³

What is striking is that the term 'basic' rather than 'core' rights is used, and that in each instance the list goes beyond the four standards subsequently singled out in the 1998 Declaration. When these four are cited specifically, the use of the word 'including' suggests that they are among the basic rights, not that they exhaust the list. Nevertheless, the Copenhagen outcome was seized upon by an ILO membership which was under great pressure to demonstrate the Organization's continuing relevance, or 'credibility' as the ILO's Legal Adviser at the time put it.³⁴

3 *The Role of the United States*

At the ILO annual Conference in June 1996 the United States, along with other states, sought to underline the importance of the concept of CLS and linked it to a form of soft supervision which would be applicable to all ILO Member States. US Labor Secretary Robert Reich volunteered the USA to be 'the first country to be formally reviewed for compliance with the core labor standards we have agreed upon. We welcome such scrutiny — with an understanding that all ILO members should be prepared to demonstrate the same commitment.'³⁵

One of the reasons for this United States push for a promotional and non-convention-based approach to CLS³⁶ has been well explained by the US expert member of the ILO Committee of Experts. Rather than mentioning the US by name she refers to the 'view expressed by some Member States who had not ratified many of the core conventions'. In her words:

These Member States felt that they were unfairly criticized as not applying basic labor rights simply by virtue of the fact of their non-ratifying status. In addition, these Member States felt

³¹ *Ibid.*, at para. 44.

³² *Ibid.*, at para. 47.

³³ *Ibid.*, at para. 54(b).

³⁴ Maupain, *supra* note 2, at 39.

³⁵ 'Reich Urges Adherence to "Core" Labor Standards, (Reconciliation of trade, labor rules needed)', 11 June 1996, available at <http://www.usembassy-israel.org.il/publish/press/labor/archive/june/d11-6-12.htm>.

³⁶ *Ibid.*

that some of the criticism was particularly unfair because it was voiced by Member States who had ratified the convention in question, but who in practice failed to apply it.³⁷

In fact, none of the enthusiastic proponents of a strong, sanctions-based trade and labour linkage, apart from the United States, was in this position. The US had, at the time of adoption of the Declaration, ratified only one of the seven ILO conventions dealing with the relevant rights. Since the adoption of ILO Convention No. 182 (Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour) of 1999 it has now brought its record to two of the eight conventions. The result is that, despite its ever expanding role³⁸ as the champion of 'internationally recognized workers' rights', the United States has failed to ratify the core conventions dealing with freedom of association, the right to bargain collectively, non-discrimination in the workplace, and child labour in general.

The ILO website highlights the poor comparison with other states by showing that only four of the ILO's 177 Member States have ratified fewer of the fundamental conventions than the United States. They are the Democratic Republic of Timor-Leste, which only joined the ILO very recently, Vanuatu and the Solomon Islands (each of which has a population of less than 500,000) and the Lao People's Democratic Republic. Equal with the US, in fifth place from the bottom, are Myanmar and Oman.³⁹

But the proposed Declaration and its soft monitoring system provided an ideal route through which the United States could escape from the dilemma of not having ratified the key conventions itself while applying sanctions in its domestic legislation and seeking them at the WTO level for other countries' violations of CLS. Liberating the standards from the conventions and setting up an entirely new mechanism was an ideal solution. And, as Bellace candidly notes, the views of the US Government were especially important since it contributed one quarter of the budget and this amount would be cut 'if the ILO did not make a case for its continued relevance'.⁴⁰ The US could push hard for the new mechanism to name names and to lay the groundwork for sanctions, despite its unwillingness to accept the convention-based form of those standards for itself. A good illustration of the use that has been made of this no-lose formula is the claim made recently by the former Special Representative for International Labour Affairs at the US State Department during the Clinton Administration that the core rights, having been recognized in the 1948 Universal Declaration and the 1998 ILO Declaration 'may not be denied, regardless of level of economic development They do not depend on expenditures, but rather on political will . . . and a culture that requires compliance with the rule of law by the strong as well as the weak'.⁴¹ No reference is made to the relevant ILO conventions,

³⁷ Bellace, *supra* note 22, at 279.

³⁸ See the analysis below of free trade agreements being entered into by the US and which contain a commitment to these rights. Text accompanying notes 188–226 *infra*.

³⁹ ILO, Ratification of the ILO Fundamental Conventions (As of 19 March 2004), available at <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN>.

⁴⁰ Bellace, *supra* note 22, at 271.

⁴¹ S. Polaski, *Trade and Labor Standards: A Strategy for Developing Countries*, Carnegie Endowment for International Peace (2003) 20.

nor to the International Human Rights Covenants, nor to the Convention on the Rights of the Child, presumably because treaty-based formulations are too precise and because the United States is in a class by itself as a result of having ratified so few of those standards. The claim that these standards are to be respected regardless of economic development is also inaccurate as a matter of law.

The trajectory of United States' policies in this respect has particularly interesting historical parallels, the significance of which seems to have escaped even seasoned observers. In an insightful historical review of American attitudes towards the ILO, Lorenz documents the extent to which the US displayed what Daniel Patrick Moynihan referred to as a nearly pathological fear of the ILO in the years after World War II.⁴² For a period of 35 years after that war (from 1953 to 1988) the United States refused to ratify even a single ILO convention.⁴³ The bevy of standards adopted by the Organization in the immediate postwar period also provoked major business-funded campaigns in the US against the ILO. It was portrayed as being a threat to free enterprise, and as attempting to impose 'Western European Socialism' on the US.⁴⁴ Far from being altruistic, the ILO was in fact a 'gushing fountain of statist social and economic schemes, which aimed at higher living standards through more and more government decree [sic] . . .'.⁴⁵

Having documented this historical antipathy towards the ILO, however, Lorenz concludes his analysis by suggesting that the adoption of the 1998 Declaration 'proved once again that, with timely support from within the US policy process, labor standards advocates could win'.⁴⁶ But in the absence of any detailed argument for this proposition, the reader is left to wonder why he would not instead see the Declaration and its embrace by government and business representatives of the United States as a perfect illustration of pursuing hostility to all binding standards through a different means.

Indeed, it is another, closely related, historical parallel which is of direct relevance in this regard. Despite the failure of efforts to pass the Bricker Amendment to the US Constitution in 1952–1953 (an initiative driven by a hostility to international treaties),⁴⁷ the incoming Eisenhower Administration announced in 1953 that it

⁴² D. P. Moynihan, *The United States and the International Labor Organization 1889–1934* (1960) 335, cited by Lorenz, 'The Search for Constitutional Protection of Labor Standards, 1924–1941: From Interstate Compacts to International Treaties', 23 *Puget Sound L. Rev.* (2000) 569, at 598, n. 73.

⁴³ Indeed the only conventions ratified in the 50 years between 1938 and 1988 were one of an internal administrative nature (No. 80 of 1946) and one dealing with the certification of able seamen (No. 74 of 1946). See the list provided at <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN>.

⁴⁴ McCormick, 'ILO — A Body That Might Make America's Laws', *The Magazine of American Affairs*, March 1952, at 86, cited in Lorenz, *supra* note 42, at 601.

⁴⁵ McCormick, 'We're Using the Socialist Soapbox', 50 *Nation's Business*, March 1952, 43, at 44, cited in Lorenz, *supra* note 42, at 601–602.

⁴⁶ See also E. Lorenz, *Defining Global Justice: The History of US International Labor Standards Policy* (2001), at 224.

⁴⁷ The Amendment provided, *inter alia*, that: 'A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.' See generally D. Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* (1988).

would terminate all United States participation in the drafting of the International Human Rights Covenants and would call on all other states also to abandon the effort. As both a compensation and a diversion it proposed the introduction of a wholly voluntary reporting process based on what were then the soft standards contained in the Universal Declaration of Human Rights. Although the resulting reports were rarely of any value, and the UN Commission on Human Rights did nothing of significance with the reports, the exercise limped along for almost 30 years before eventually being abandoned because nothing had been achieved.⁴⁸ It can only be hoped that there will not be too close a parallel in this regard with the prospects for the 1998 Declaration.

Perhaps predictably, in reviewing the outcome of the Declaration process, some ILO officials have criticized the United States for continuing 'to stand aside from international standards' while pressuring other countries to embrace them and for preferring 'to keep its own internal references' in the sense of setting its own standards.⁴⁹ According to this analysis, the Declaration and the United States' strong support for it have not overcome the problems that existed a decade or more ago in which the 'lack of US commitment to the same standards that governed the rest of the world undermined the US's credibility when preaching conformity to these standards by others'.⁵⁰

Human rights advocates on the other hand have already begun to make use of the Declaration to argue before international tribunals that the United States is bound by the principles of non-discrimination and freedom of association 'as a result of its ILO membership, despite its failure to ratify the two relevant ILO conventions'.⁵¹ But such arguments are unlikely to carry great weight, especially given the uncertainty as to the precise content to be accorded to the principles by which the United States is thereby bound.

4 From the United States Push to the Adoption of the Declaration

The United States' June 1996 embrace of soft standards was followed up in the debates held within the ILO Governing Body's Committee on Legal Issues and International Labour Standards. The debate that took place in November 1996 was vigorous and demonstrated the lack of a clear consensus on the next steps. Many of the delegations were resistant to the idea of a promotional focus on a core group of standards. The Workers' representative indicated that they wanted to discuss the strengthening of the supervisory procedures rather than promotional approaches.⁵² Some of the

⁴⁸ Alston, 'The Commission on Human Rights', in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (1992) Ch. 5.

⁴⁹ L. Sweptson, *International Labor Standards and the US*, at <http://images.ctsg.com/pdfs/ilo/speeches/02leesweptson.pdf> (2003), at 1.

⁵⁰ *Ibid.*, at 4.

⁵¹ Cleveland, Lyon and Smith, 'Inter-American Court of Human Rights *Amicus Curiae* Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status', 1 *Seattle J. for Soc. Just.* (2003) 795, at 844.

⁵² Reports of the Committee on Legal Issues and International Labour Standards, ILO Doc. GB.267/9/2 (1996), para. 50.

Workers' delegates endorsed the idea of adopting a World Charter of Workers' Rights. Even the Employers representative indicated that the discussion should focus on 'promotion of the core conventions' as well as on 'the fundamental rights expressed in those conventions and the Constitution'.⁵³

Later the same year the social clause issue, as it was still referred to, was a major focus of the WTO Ministerial Meeting in Singapore. The Declaration adopted at the meeting made very clear that the WTO saw no role for itself but added an important statement to the effect that the ILO 'is the competent body to set and deal with these [internationally recognized core labour] standards', and reaffirmed the Ministers' 'support for its work promoting them'.⁵⁴

But by the time of the debate at the ILO's Conference in 1998 a consensus had emerged which emphasized the softness of the Declaration. While this is not the place to undertake a detailed analysis of those debates, it is essential to recall the conditions on which many of the participants indicated they would join the consensus. The Employers' group, for example, while characterizing the Declaration as 'perhaps the single most important undertaking in which any of the Committee members had ever been engaged',⁵⁵ insisted on six negative aspects which must be reflected. Thus the Declaration: (i) 'should establish no new legal obligations on Members'; (ii) 'should impose no new reporting obligations on member States'; (iii) 'should not impose on member States detailed obligations arising from Conventions they had not freely ratified'; (iv) 'should not be concerned with technical and legal matters but only with making an overall policy assessment'; (v) 'should not result in new complaints based bodies'; and (vi) 'no links should be made with questions of international trade'.⁵⁶ In response, the Workers' members played down the importance of the Declaration, but did not seek to contest any of the conditions stated by the Employers.

The Asia and Pacific group insisted that the Declaration should be strictly promotional in nature, with the major focus on advisory programmes. It 'should not target specific countries nor be used to criticize specific country situations' and 'no new supervisory mechanisms should be established'. In general the Declaration should focus on principles and not on rights.⁵⁷ While the debate was long, especially in relation to the follow-up arrangements, these excerpts give a flavour of the conditions on which the Declaration was accepted by most actors. Although the optimists can point to the precedent of the Universal Declaration which was adopted with equally adamant assertions of its non-binding character, it is difficult to imagine that the 1998 Declaration will be permitted to escape from the straitjacket which was very clearly applied to it by its drafters.

⁵³ *Ibid.*, para. 77.

⁵⁴ WTO, Singapore Ministerial Declaration, WTO Doc. WT/MIN(96)/DEC/W, 13 Dec. 1996, para. 4, available at <http://www.wto.org/english/thewto-e/minist-e/min96-e/wtodec-e.htm>. See generally Leary, 'The WTO and the Social Clause: Post-Singapore', 8 *EJIL* (1997) 118.

⁵⁵ Report of the Committee on the Declaration of Principles, 86th Session of the International Labour Conference, 1998, para. 16.

⁵⁶ *Ibid.*, para. 10.

⁵⁷ *Ibid.*, para. 21 (Government member from Japan).

B *The Role of the ILO and of CLS in the Current Trade and Labour Debate*

The 1998 Declaration was, in many respects, a product of the almost universal lip service which is paid to the view that the liberalization of international trade and improved labour standards at the national level are, in some way, linked. But this apparent consensus obscures a radical divergence in relation to the appropriate means to be used to achieve the objective. Neo-liberal economists assume that trade liberalization will in itself inexorably, if gradually, lead to improvements in working conditions within any given economy. Some argue that any artificial attempts to raise standards, such as those implicit in international labour law, are at best sure to fail, and at worst will distort the functioning of the labour market and thus be counter-productive. The view has even been put that any sanctions flowing from insistence upon labour standards would themselves be a violation of rights — to property and contract — and must thus be avoided.⁵⁸

Those writing from within the law and economics paradigm tend to see labour standards as simply unrealistic and impractical. David Charny, for example, lists a series of insurmountable barriers to international labour standards. They include irreconcilable cultural traditions, the unaffordability of social insurance schemes in the absence of international transfer payments, the inflexibility of international immigration policies which inhibits labour flexibility, and the problematic nature of international enforcement mechanisms.⁵⁹ Soft, flexible, arrangements which leave most of the choices to the national level might, however, be workable.⁶⁰ In a similar vein, Alan Sykes has argued that the best form of linkage between trade and human rights is to rely primarily on the benefits of trade since empirical data show that 'rising real incomes and greater openness to trade tends to promote human rights'.⁶¹

Human rights and labour lawyers on the other hand tend to characterize at least some labour standards as being fundamental to human dignity and assume that the essential minimum standards will only be ensured if a strong legal regime, including both national and international components, is put in place in order to encourage governments to ensure the protection of their workers' rights. Brian Langille, for example, has argued that labour standards are closely linked to the fundamental goal of encouraging human freedom, and invokes the work of Amartya Sen in that regard.

⁵⁸ Y. Yoon and R. McGee, *Incorporating Labor Standards into Trade Agreements: An Ethical Analysis*, paper presented at the Korea Labor Institute — Korea America Economic Association Joint Conference, Seoul, Korea, 9–10 July 2003, at <http://papers.ssrn.com/sol3/papers.cfm?abstract-id=410362> (arguing that the imposition of sanctions violate not only utilitarian ethics but also 'rights based ethics, since sanctions prevent buyers and sellers from trading' their property, and also 'violate contract rights'. Thus since the imposition of labour standards actually violates rights, the only solution lies in reliance upon the 'markets [which] have been effective at raising labor standards and working conditions.'

⁵⁹ Charny, 'Regulatory Competition and the Global Coordination of Labour Standards', in D. Esty and D. Geradin (eds), *Regulatory Competition and Economic Integration: Comparative Perspectives* (2001) 311, at 328.

⁶⁰ *Ibid.*, at 329.

⁶¹ A. Sykes, *International Trade and Human Rights: An Economic Perspective*, John M. Olin Law & Economics Working Paper No. 188 (2d series), University of Chicago Law School, May 2003, at 4.

Accordingly, freedom of association can be seen to be ‘constitutive of the essence of humanity’ and a right which, ‘as an aspect of freedom in general, has the deepest normative salience for humans ...’.⁶²

Trade lawyers generally find themselves caught in the middle, with a strong attachment to free market principles, moderated by respect for international human rights law and a belief that the two sets of norms (trade and human rights) can be reconciled with one another through the identification of appropriate legal rules and the allocation of separate institutional roles. Thus, for example, Michael Trebilcock has argued that, ‘to the extent that core labour standards are appropriately characterized as basic or universal human rights, a linkage between trade policy and such labour standards is not only defensible but arguably imperative ...’.⁶³

The position adopted by one of the WTO’s legal advisers, Gabrielle Marceau, is reasonably representative of the approach adopted by those trade lawyers who have sought to accommodate the (potentially) competing normative dimensions.⁶⁴ On the one hand, she adopts a rather formalist position according to which WTO and human rights law remain distinctly separate bodies of law. Accordingly the WTO Appellate Body has no role in expanding the obligations of WTO Member States in relation to human rights and no justification for reading down a clear WTO provision in favour of an inconsistent human rights norm. On the other hand, by invoking the presumption of good faith to the effect that states must have negotiated their WTO obligations with a view to respecting their existing human rights commitments, by highlighting the ‘inherent flexibility of many of the WTO obligations’,⁶⁵ and by emphasizing the need to adopt a teleological approach to interpretation, she opens up a huge window through which human rights norms can be taken into account in WTO adjudication. As a result, she reduces very significantly the likelihood of what she terms ‘irreconcilable’ conflicts between the two bodies of law and urges that any such conflicts be resolved through multilateral negotiation rather than the pronouncements of adjudicatory bodies.⁶⁶ So, institutions are important, but their political organs rather than their expert or supervisory organs ought to have the central role when real conflicts emerge.

An alternative to this type of accommodating approach is to acknowledge that labour standards are important but that they are the exclusive province, not of the WTO, but of other international organizations. For a few commentators, this does not include the ILO. Thus Stern and Terrell have recently argued that the only way to improve labour standards in ‘poor countries [is] to continue the many existing economic and social development efforts, deployed by the international organizations (such as the OECD, UN agencies and the World Bank), government aid agencies, NGOs, etc.’ For them, any attempt to influence or regulate the labour market seems to

⁶² Langille, *supra* note 7, at 152.

⁶³ M. Trebilcock, *Trade Policy and Labour Standards: Objectives, Instruments, and Institutions*, University of Toronto, Faculty of Law, Law and Economics Research Paper No. 02–01, 2002, at 13.

⁶⁴ Marceau, ‘The WTO Dispute Settlement and Human Rights’, 13 *EJIL* (2002) 753.

⁶⁵ *Ibid.*, at 813.

⁶⁶ *Ibid.*, at 791.

be doomed to failure and their policy prescriptions thus emphasize the provision of 'financial and technical assistance to deal with the underlying causes of poverty'.⁶⁷ On this view, intervention in other sectors seems, almost magically, to be feasible, whereas in the labour market it is sure to be counter-productive.

But for the great majority of labour rights sceptics it is the ILO that should take the lead and leave the WTO to get on with what it does best. Thus, for example, the Carnegie Endowment for International Peace called in 2001 for the de-linking of trade and labour debates, by excluding labour issues from regional trade agreements, abandoning sanctions as a means of promoting labour rights, and focusing future efforts almost exclusively upon the ILO.⁶⁸

Perhaps the best-known individual proponent of such a watertight division of labour between the WTO and the ILO is Jagdish Bhagwati, who has argued that issues of trade and labour must be kept institutionally separate, with each being dealt with by the 'international agencies suited to the specific agendas for which they were set up'. This starting point is usually followed in his writings by lavish praise for the ILO, an agency which was 'set up explicitly for that purpose' and can bring to the table 'a vast amount of postwar experience and thought'.⁶⁹ Rather than contemplating more creative possibilities, Bhagwati assumes that bringing labour issues into the WTO would involve the imposition of trade sanctions, an approach which he considers ineffective in relation to issues such as child labour. Instead, he extols the ILO: its 'Program for the Eradication of Child Labour does just what is necessary'.⁷⁰ But Bhagwati does not acknowledge the crisis in the ILO itself, the failure of the United States to ratify most of the key standards, or the fact that the organization is under-resourced (while suggesting that the WTO is 'cash-starved'⁷¹). Nor does he foresee any cooperation between the ILO and the WTO of the type that most of those favourable to labour rights have urged.⁷² And nor, despite arguing strongly against extending the WTO's mandate beyond trade issues, narrowly defined, does he have any difficulty defending the inclusion of intellectual property rights within that

⁶⁷ Stern and Terrell, 'Labor Standards and the World Trade Organization: A Position Paper', The University of Michigan, Gerald R. Ford School of Public Policy, Discussion Paper No. 499 (2003), available at <http://www.fordschool.umich.edu/rsie/workingpapers/Papers476-500/r499.pdf>, at 9.

⁶⁸ Carnegie Endowment for International Peace, in conjunction with the Trade Policy Group of the Inter-American Dialogue, *Breaking the Labor-Trade Deadlock*, Working Paper No. 25 (2001).

⁶⁹ J. Bhagwati, *Free Trade Today* (2002), at 75.

⁷⁰ Bhagwati, 'Free Trade and Labour' (2001), available at <http://www.columbia.edu/jb38/papers/ft-lab.pdf>, p. 5.

⁷¹ *Ibid.*, p. 6.

⁷² Elsewhere he has urged that the ILO collaborate with the United Nations Conference on Trade and Development (UNCTAD), even though such collaboration would still seem to violate his rule that institutions should stick to the purposes for which they were created. He doesn't mention that unlike the WTO the UNCTAD is widely considered to have been ineffective in relation to trade matters and certainly has a poor track record on dealing with labour standards. Bhagwati, 'Let the Millennium Round Begin in New Delhi', article cited in Panagariya, 'Trade-Labor Link: A Post-Seattle Analysis' (2000), available at <http://www1.worldbank.org/wbiop/trade/videoconf/panagariya.pdf>, at 18.

mandate, despite the fact that there is a separate international organization charged with responsibility for those issues (the World Intellectual Property Organization).⁷³

But the purpose of this review of attitudes adopted in relation to the trade and labour debate is not to provide a detailed survey of the positions espoused in what is now a truly voluminous and ever growing literature.⁷⁴ It is rather to emphasize the importance attached to international organizations and the follow-up mechanisms available to them by the great majority of writers, and hence the centrality of considering the position of the ILO.

This point is perhaps best illustrated by a petition lodged in March 2004 ‘on behalf of the 13 million members of the AFL-CIO (American Federation of Labor and Congress of Industrial Organizations), including nearly 6 million manufacturing workers alleging that ‘China’s brutal repression of internationally recognized workers’ rights constitutes an unfair trade practice under Section 301(d) of the Trade Act, and that such repression “burdens or restricts US commerce”’.⁷⁵ The complaint was subsequently endorsed by both Human Rights Watch and Amnesty International.⁷⁶ According to the complaint, ‘Chinese workers do not have the right to form independent unions, and hundreds of millions of migrant workers are trapped in a government-enforced system that condemns them to artificially low wages, long and often unpaid overtime, few legal protections, and unsafe working conditions’. The cost advantage thereby gained by China was said to translate into a reduction of between 268,345 to 727,130 jobs in the United States. In order to satisfy the three elements required by Section 301 of the Trade Act, the petition (1) details China’s allegedly persistent denial of the workers’ rights covered by Section 301, citing its violations of the right to freedom of association and rights of collective bargaining, its encouragement of forced labour, and its failure to enforce its own laws with respect to wages, hours, and occupational safety and health; (2) seeks to show that this conduct imposes a burden on US commerce; and (3) calls upon the US Trade Representative (USTR) and the President to impose commensurate trade sanctions against China and ‘to negotiate a binding agreement with the Chinese government to come into compliance with internationally recognized workers’ rights’.⁷⁷

⁷³ This point is conceded by Panagariya, *ibid*. It is also an analogy that the AFL-CIO and other proponents of labour standards regularly draw: ‘[T]here is no intellectual basis for distinguishing between enforcing business interests such as intellectual property rights and investor rights with trade sanctions and enforcing workers’ rights with trade sanctions’. AFL-CIO, ‘Common Questions about ILO Core Labor Standards and Trade’ (2002), at <http://www.aflcio.org/mediacenter/resources/upload/commonquestionsonfastrackilo.pdf>.

⁷⁴ For an excellent review of the literature up until five years ago see D. Brown, *International Trade and Core Labor Standards: A Survey of the Recent Literature*, Department of Economics, Tufts University, Discussion Paper 2000–05 (2000).

⁷⁵ ‘When China Represses Workers’ Rights, US Workers Lose Jobs’, 16 March 2004, at <http://www.aflcio.org/issuespolitics/globaleconomy/ExecSummary301.cfm>.

⁷⁶ Joint HRW — AI USA Letter to United States Trade Representative Robert B. Zoellick Regarding AFL-CIO Petition Submitted on China under Section 301 of the Trade Act of 1974, 13 April 2004, at <http://hrw.org/english/docs/2004/04/13/china8428.htm>.

⁷⁷ *Ibid*.

While the initiative was criticized as 'cynical opportunism' in a Presidential election year by a leading newspaper,⁷⁸ the petition nevertheless serves to underscore the continuing vitality of the labour standards issue, and most importantly from the perspective of the present analysis, the vital role attributed to international institutions in the context of the debate. Thus the final demand put forward by the AFL-CIO was for the President to:

direct the USTR to enter into no new WTO [World Trade Organization]-related trade agreements, until the WTO requires each of its members to comply with the core labor rights of the ILO. Core labor rights must be given international protections that are equivalent to the protections afforded commercial rights under the WTO. Labor rights must be enforced against all countries, not just China, to end the international race to the bottom.⁷⁹

The AFL-CIO petition constituted the first occasion on which a petition under Section 301 has sought to characterize the violation of workers' rights as an unfair trade practice. The Bush Administration dismissed the complaint as isolationist and litigation for its own sake. The remedies sought would have worsened 'the very problems they are trying to solve'.⁸⁰ But while this was perhaps predictable, given the overall state of US policy towards China, the more problematic part of the USTR's response was that the United State and China would together launch 'a comprehensive joint effort aimed at the effective implementation by China of . . . ILO core labor standards, in keeping with China's level of development . . .'. Both countries would work in the ILO 'toward a Chinese labor system that better respects internationally recognized worker rights'.⁸¹

But despite its rejection, the petition clearly underscores the continuing vitality of the labour rights issue in the world's largest economy and the fact that international institutions such as the WTO and the ILO will continue to be an important part of the equation even in domestic debates over these issues.

Although there continues to be little prospect of the inclusion of a social clause within the WTO trading regime, the CLS debate has succeeded in breathing new life into the campaign to link trade and workers' rights. Before reviewing the various contexts in which that campaign is being pursued, it is instructive to note that two common threads can be found running through the approach of the many actors now turning their attention to workers' rights. The first is that virtually all of them adopt a CLS approach in identifying the rights with which they are concerned. The second is

⁷⁸ 'Labour Wrongs: US Unions' Move against China is Cynical Opportunism', *Financial Times*, 17 March 2004, at 12, col. 1.

⁷⁹ *Supra* note 75, at 6.

⁸⁰ USTR, 'Statement of US Trade Representative Robert B. Zoellick on US-China Trade Relations', 28 April 2004, at 4.

⁸¹ *Ibid.*, at 3.

that the ILO is almost always invoked in a general sense but that the specifics of its system of international labour standards feature only tangentially, if at all.⁸²

3 Some Problems of the CLS Approach

A 'Rights' or 'Principles'?

Philosophers have long debated the distinctions between terms such as principles, rights and goals.⁸³ In this context the very title of the Declaration on Fundamental Principles and Rights at Work raises some immediate questions. What are the differences between 'principles' and 'rights', and why is it necessary to refer to both in the title? The ILO webpage devoted to the Declaration avoids the use of either term by describing the document as 'a reaffirmation ... of *central beliefs* set out in the organization's Constitution.'⁸⁴ A straightforward explanation of the difference was offered by the original provision contained in the 1995 Copenhagen text, which suggested that the standards to be applied in countries which had ratified the relevant conventions were to be considered as 'rights', while those to be applied in states which were not parties to the conventions were 'principles'.⁸⁵ But such a distinction is, at best, very difficult to justify. The fact that a country has not ratified a particular legal standard does not determine whether or not the relevant value is to be considered a human right. This is true both at a philosophical level and in terms of international law. Philosophically a right is a right, even if a government has refused to acknowledge that fact. A government which has not ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide cannot thereby insist that the prohibition on genocide is merely a 'principle' rather than a matter of rights. It might perhaps be objected that this is not a fair example of the role that custom has played in ensuring the status of the norm even in relation to non-states parties to the treaty. But the same argument holds true even for the most commonly challenged of human rights, that to adequate rest and leisure, famously derided by Maurice Cranston and others as the 'right to holidays with pay'. In international law terms a right is a human right if it has been recognized by the United Nations in instruments such as the Universal Declaration of Human Rights, which is the case with all of the core labour rights.

In common parlance a 'principle' has a lower status than does a right. It is true,

⁸² Thus, for example, in putting forward one of the most unorthodox programmes for promoting CLS, Sabel, *et al.* make several references to the important role of the ILO. A. Fung, D. O'Rourke, and C. Sabel, *Can We Put an End to Sweatshops? A New Democracy Forum on Raising Global Labor Standards* (2001), but, as Macklem observes, 'their proposal is ultimately one in which neither international nor domestic law appears to play much of a role in its implementation'. Macklem, 'Labour Law beyond Borders', 5 *J. Int'l Econ. L.* (2002) 605, at 637.

⁸³ E.g. R. Dworkin, *Taking Rights Seriously* (1977); and R. Dworkin, *A Matter of Principle* (1985).

⁸⁴ 'About the Declaration', available at <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var-language=EN> (emphasis added).

⁸⁵ See text of para. 54(b), *supra* note 30.

however, that the usage of the term in international law and diplomacy is more complex. In essence, there are three different usages which might be identified. The first is its use in the context of the concept of 'general principles of law', but if we follow the lead of the majority of commentators, this category covers mainly or even wholly procedural rather than substantive principles.⁸⁶

The second usage, which is by far the most common, is as a description of a normative proposition to which the Organization attaches significance but which falls well short of being given the status of a human right. Some of those principles, such as the list contained in the 1959 Declaration of the Rights of the Child, have subsequently gained treaty recognition as rights. And others, such as some of the 'Guiding Principles' contained in the Standard Minimum Rules for the Treatment of Prisoners,⁸⁷ have gone on to achieve customary law status. But the great majority of 'principles' proclaimed in United Nations instruments, or those adopted under the auspices of various UN Specialized Agencies (such as the United Nations Educational, Scientific and Cultural Organization — UNESCO) have retained a decidedly soft status.⁸⁸ As a consequence, the vast majority of 'principles' proclaimed by international legal instruments hold a status which is significantly lower in the normative hierarchy than that of a human right. In that respect, the fact that the 1998 Declaration has both invoked and encouraged the drawing of a distinction between labour rights and labour principles could be seen as a backward step, given that all of the relevant standards have long been recognized as human rights.

The third usage, which might arguably be said to be most akin to that of the 1998 Declaration, consists of references to broad overarching principles such as those contained in the United Nations Charter. These references are in turn rather diverse. Thus among the Organization's 'Purposes' as listed in the Charter we find references to 'the principles of justice and international law, adjustment or settlement of

⁸⁶ I. Brownlie, *Principles of Public International Law* (6th ed., 2003), at 18–19; and M. Shaw, *International Law* (5th ed., 2003), at 92–94. But, for an alternative approach, see Alston and Simma, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, General Principles', 12 *Aust. Y. B. Int'l L.* (1992) 82.

⁸⁷ Standard Minimum Rules for the Treatment of Prisoners, Economic and Social Council Res. 663 C (XXIV) (1957) and 2076 (LXII) (1977). The 'Guiding Principles' are contained in Part IIA.

⁸⁸ See, e.g., in the UN context the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, GA Res. 41/85 (1986); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res. 43/173 (1988); the Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 37/194 (1982); the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 (1985). For examples of instruments adopted by UNESCO see the Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights, and to Countering Racialism, Apartheid and Incitement to War, proclaimed by UNESCO General Conference, 1978; and the Declaration of the Principles of International Cultural Cooperation, adopted by UNESCO General Conference, 1966.

international disputes or situations which might lead to a breach of the peace' and 'the principle of equal rights and self-determination of peoples'.⁸⁹ Article 2 of the Charter is then specifically devoted to listing a range of 'Principles', which include sovereign equality, the good faith fulfilment of obligations, the peaceful settlement of disputes, the non-use of force, and non-intervention in the domestic jurisdiction of states. The actual practice of the Organization has been fairly liberal in terms of subsequent references to the Charter's principles.⁹⁰ Thus, for example, the preamble to the Declaration on Social Progress and Development reaffirms faith 'in the principles of peace, of the dignity and worth of the human person, and of social justice proclaimed in the Charter . . .'.⁹¹ And the first preambular paragraph in each of the International Covenants on Human Rights proclaims that:

in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.⁹²

Perhaps the main conclusion to be drawn from this brief survey of United Nations' usage of the third category of broad overarching principles is that they are almost always devoted to relatively abstract notions such as peace, dignity and justice, and not to very specific principles such as a particular human right. The major exception is the principle of self-determination which is specifically referred to in the Charter as a principle⁹³ rather than as a right.⁹⁴ It is relevant to note in this respect that great importance was attached to the subsequent 'up-grading' of self-determination from its status in the Charter to that of a right in the Declaration on the Granting of Independence to Colonial Countries and Peoples.⁹⁵

This conclusion as to UN instruments is reinforced by the usage reflected in the European Union's Charter of Fundamental Rights. While the great majority of the Charter's provisions deal with rights per se, there are also various references to 'principles'. Thus, in the second preambular paragraph, it is proclaimed that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law'. In other words the importance of 'principles' in this context is clearly acknowledged but at the same time they are distinguished from the universal values of human

⁸⁹ UN Charter, Article 1(1) and 1(2) respectively.

⁹⁰ For an effort to spell out the content of these principles see the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (1970); and G. Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of the Sources of International Law* (1979), at 143.

⁹¹ Declaration on Social Progress and Development, GA Res. 2542 (XXIV) (1969), 2nd preambular para.

⁹² GA Res. 2200 A (XXI) (1966).

⁹³ Article 55.

⁹⁴ Its 'transformation' into a right was initiated in the landmark Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV) (1960), para. 2 of which proclaimed that 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development', a formulation subsequently transposed into the text of the two International Human Rights Covenants.

⁹⁵ *Ibid.*

dignity etc. and the preamble goes on to talk about the need to strengthen the protection of fundamental rights. There are several other points at which reference is made to principles, including the principle of subsidiarity,⁹⁶ 'democratic principles',⁹⁷ 'the principle of equality',⁹⁸ the 'principle of sustainable development',⁹⁹ and the principle of proportionality.¹⁰⁰ In short then, principles in the EU Charter are just that, they are umbrella principles which are distinguishable from rights in a technical sense. It is not a term used to refer to human rights.

The term 'principles' might have come to be used in the 1998 Declaration because it had been adopted in the North American Agreement on Labor Cooperation (NAALC),¹⁰¹ the labour side agreement to the North American Free Trade Agreement which uses the phrase 'guiding principles' to describe the 11 labour standards which it seeks to promote. But there is a very clear reason why the NAALC had to use a neutral term with no real legal significance. That is because the agreement specifically avoided references to international standards, and the drafters needed a term which would embrace the principles underlying the disparate national law of the three contracting states (Canada, the United States and Mexico) without in any way implying that those national laws needed to be changed in order to conform to the agreement.

The justification which the ILO itself would presumably offer for using the term 'principles' in the 1998 Declaration is relatively close to this third category of usage in international legal instruments in general.¹⁰² It is that the reference is actually to 'constitutional principles' and that such principles inevitably have an especially elevated status. Such an argument was proffered during the debates that led up to the adoption of the Declaration when the ILO was considering whether compliance with certain standards could be demanded of Member States which had not ratified the relevant conventions. The answer which was given, and which drew on the key historical precedent of the right to freedom of association, is that the Organization is empowered to take appropriate promotional measures to advance the principles contained in the Constitution.

The argument is reflected in the text of the Declaration, with an insistence that is

⁹⁶ Charter of Fundamental Rights, preambular para 5, and Article 51.

⁹⁷ *Ibid.*, Article 14(3) on the right to education recognizes: 'The freedom to found educational establishments with due respect for democratic principles and the right of parents . . .

⁹⁸ *Ibid.*, Art. 23.

⁹⁹ *Ibid.*, Art. 37.

¹⁰⁰ *Ibid.*, Art. 52.

¹⁰¹ See *infra* note 190.

¹⁰² During the debates at the International Labour Conference in 1998 leading to the adoption of the Declaration, the ILO Legal Adviser was asked by a number of speakers to explain the difference between 'values' (a term favoured by the employers but ultimately discarded from the text), 'principles' and 'rights'. His answer was that values referred to widely shared conceptions of moral order, principles translated those values into a concrete context (e.g. the principle of freedom of association), and rights 'constituted an acknowledgement in law of the principles'. Report of the Committee, *supra* note 55, para. 73. While clearly reassuring to delegates, these explanations are not especially helpful for present purposes.

almost sufficient in itself to generate suspicion as to its strength. Thus the Preamble first asserts that ‘the ILO ... enjoys universal support and acknowledgement in promoting fundamental rights at work as the expression of its constitutional principles’¹⁰³ and then goes on to note the urgency of reaffirming ‘the immutable nature of the fundamental principles and rights embodied’ in the ILO Constitution and of promoting ‘their universal application’.¹⁰⁴ In case the legal basis for the Declaration has not been sufficiently justified by these references, the first two paragraphs expand further on the same point:

1. Recalls: (a) that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia ...; and (b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions ...

In many ways this is a standard legal argument to justify the adoption of measures which are not explicitly provided for by the terms of the Constitution itself but which can reasonably be argued to be implicit in the overall arrangements. In the ILO’s case the argument had assumed a very specific historical importance in 1950 when the Organization sought to take stronger steps than were otherwise available to it for addressing violations of the right to freedom of association. In a way which is reminiscent of the pressures that the ILO faced in the mid-1990s to demonstrate that it was not irrelevant to the ‘social clause’ debate that was being fought out around the WTO, the ILO in 1950 was fighting off a major jurisdictional challenge that had been set up by the UN’s Economic and Social Council suggestion that a joint UN–ILO mechanism should be set up for dealing with threats to freedom of association. The ILO was mindful of the fact that the UN had recently adopted the 1948 Universal Declaration of Human Rights and that this document dealt with very many of the labour rights which the ILO saw as being its specialist domain. If the UN were to take the lead, or even be permitted to play a prominent part in supervisory machinery dealing with freedom of association, it might also ‘offer’ to do so in relation to conditions of employment and many other matters, thus undermining the specialist competence of the ILO.¹⁰⁵

In order to safeguard the ILO’s role in this respect the Governing Body proposed to adopt a new procedure which would apply even to countries which had not ratified

¹⁰³ Declaration, *supra* note 1, preambular para. 6.

¹⁰⁴ *Ibid.*, preambular para. 7.

¹⁰⁵ The history of the ILO’s complex relationship with the UN in the human rights area and of its ongoing concerns to maintain its role as the ‘lead’ agency in labour matters broadly defined is detailed in Alston, ‘The United Nations’ Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights’, 18 *Columbia J. Transnat’l L.* (1979) 79.

the principal ILO treaty dealing with freedom of association, Convention No. 87.¹⁰⁶ That procedure would not be a means of enforcement, since such a measure would need to be based upon obligations which had been agreed to by the relevant government, but instead would be merely promotional. The argument was that the Organization had an ongoing and relatively open-ended mandate to do what it thought necessary to uphold the 'basic aims and objectives of the Organization'.¹⁰⁷ The Governing Body thus approved a procedure which was said to involve little more than bringing certain matters to the attention of the public and which 'had nothing in common with "jurisdictional" measures relating to specific obligations'.¹⁰⁸ The procedure was, in reality, a fairly thinly disguised major innovation empowering the examination of allegations in situations in which the government concerned had neither ratified Convention No. 87 nor given its voluntary agreement to the ILO to consider the matter.¹⁰⁹ Unsurprisingly, a number of governments objected. The lead was taken by South Africa, which was in the full throes of entrenching the apartheid system. It had good reason to worry out aloud that if the ILO could get away with such an initiative in relation to freedom of association, there was no reason why it could not use identical arguments to do the same thing in relation to 'any other general aim and object of the Organization such as, for example, equal pay for equal work, collective bargaining . . .'.¹¹⁰

The principal objections to the new procedure in 1950 paralleled those that were made in the lead-up to the 1998 Declaration: (i) they were not provided for in the Constitution; and (ii) reliance on the 'aims and objects' of the Constitution sought to attach more weight to a nebulous conception than was justified. In 1950 the arguments put forward by the Legal Adviser, C. Wilfred Jenks, won the day and the procedure was approved over the objections of certain governments.

In the years since 1950 this episode has come to symbolize the capacity of the Organization to innovate in response to new challenges, of the highly influential role played by the Secretariat (the International Labour Office) over the years, and of the assumption that the ILO's supervisory mechanisms were on a continuous upward trajectory in terms of holding governments to account. It is hardly surprising then that the Office recounted the steps in great detail in the mid-1990s debate over the

¹⁰⁶ Convention (No. 87) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.

¹⁰⁷ The Strengthening of the ILO's Supervisory System, ILO Doc. GB.267/LILS/5, Nov. 1996, para. 9.

¹⁰⁸ Minutes of the Sub-Committee of the Selection Committee on the Fact-Finding and Conciliation Commission, at 3.15 p.m. on 20 June 1950, cited in *ibid.*, at n.8.

¹⁰⁹ The formulation used was that the Governing Body could take any action, other than that spelled out in the Convention, 'designed to safeguard rights relating to freedom of association involved in the case, including measures to give full publicity to charges made, together with any comments by the Governments concerned, and to that Government's refusal to co-operate in ascertaining the facts and in measures of conciliation.' Minutes of the Governing Body, 110th Session, Jan. 1950, at 62 *et seq.* cited in *ibid.*, para. 6.

¹¹⁰ International Labour Conference, 33rd Session, 1950, Record of Proceedings, at 255, cited in *ibid.*, at n.6.

strengthening of the supervisory mechanisms in relation to a broader range of fundamental labour standards.

There are, however, several key differences between 1950 and 1998. In 1950 the procedure that the Office presented as being purely ‘promotional’ and not concerned with enforcement, almost immediately developed into a deliberate shaming mechanism and thus acted as a quasi-enforcement measure. In 1998, while the Office gave similar assurances as to the exclusively promotional nature of the initiative, many participants assumed that those statements would be no more of a bar to the evolution of a quasi-enforcement mechanism than they had been almost half a century earlier. In other words, the proposal was palatable to many of the ILO’s constituents because they assumed that a meaningful supervisory mechanism would very quickly evolve.¹¹¹ As argued below, this has clearly not been the case and there is no indication that the approach will change in the years ahead.

Another key difference between 1950 and 1998 concerns the legal argumentation used to justify the introduction of innovative procedures for which the Constitution made no clear provision. In 1950 the justification was that the procedure was designed to further the ‘basic aims and objectives of the Organization’.¹¹² Since these are stated in very broad terms it was not possible to pin down any particular provision as a basis for the action being taken. But in 1998 repeated reference was made to the Constitutional ‘principles’ involved.¹¹³ When one looks at the ILO Constitution it is apparent that it refers only to two ‘principles’ *per se*. They are the principle of freedom of association and the ‘principle of equal remuneration for work of equal value’.¹¹⁴ But since the 1998 Declaration makes no mention of this second principle it must be argued that the reference to Constitutional principles was not intended to be interpreted literally. Rather it is meant in a broader sense to refer to the principles implicit in the Constitution as a whole, a notion which takes us back to the term ‘aims and objectives’ or more accurately ‘aims and purposes’ of the ILO as they are identified in the Declaration of Philadelphia of 1944, which was annexed to the Constitution in 1946.¹¹⁵

The latter loudly proclaims a single foundational theme — that of social justice, with the very first sentence asserting that ‘universal and lasting peace can be established only if it is based upon social justice’. The Declaration of Philadelphia then reaffirms this priority by proclaiming ‘that experience has fully demonstrated the truth’ of the statement concerning the indispensability of social justice. In so far as a definition is offered it might be found in the Preamble to the Constitution which reaffirms the need to address the following issues:

the regulation of the hours of work including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision

¹¹¹ E.g. Moynihan, *infra* note 250.

¹¹² The Strengthening of the ILO’s Supervisory System, *supra* note 107.

¹¹³ See text accompanying note 55 *supra*.

¹¹⁴ ILO Constitution, available at <http://www.ilo.org/public/english/about/iloconst.htm>, preambular para. 2.

¹¹⁵ *Ibid.*

of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures. . . .¹¹⁶

The irony is that the four 'principles' identified in the 1998 Declaration as being fundamental represent only a relatively small part of the commitments contained in the documents from which the Declaration purports to have taken its inspiration.

In summary then, the Declaration places considerable emphasis on the notion of 'principles'. They are acknowledged ahead of 'rights' in the title of the instrument and subsequent practice has seen more frequent references to the principles contained in the Declaration than to the rights. In general international law the term has almost never been used interchangeably with rights. Rather it has been employed to denote either a norm of lesser status than a right or a broad general principle very different in nature from the principles proclaimed in the ILO's 1998 Declaration. In so far as use of the term is justified on the basis that it refers to ILO constitutional principles it has been shown that the four 'core' standards represent a highly selective, even arbitrary, choice from a lengthy list of worthy candidates. And the bottom line is that the Declaration proclaims as 'principles' a range of values which had already been recognized as rights exactly 50 years earlier in the Universal Declaration of Human Rights. In that sense it is difficult to avoid the conclusion that the Declaration legitimates the use of a regressive terminology.

B Determining the Content of the Core: Modified Neo-liberalism in the Ascendancy

The literature of human rights, both in the philosophical and legal domains, is replete with analyses identifying one, two, or more 'central' rights, or organizing principles, from which all other rights are argued to be derivative. Indeed it is at least in part because of the heterogeneity and seeming irreconcilability of such different visions that all of the established international and regional human rights regimes — that of the United Nations, the Council of Europe, the Organization of American States, and the African Union — have steadfastly resisted the designation of a limited core of rights which are considered hierarchically superior, or deserving of chronological priority, to other human rights in the accepted overall catalogue of rights. That is not to say either that in practice all rights are of equal importance in a given situation, or that in law all rights are given the same degree of protection.¹¹⁷ The categories of *jus cogens*, *erga omnes* obligations, and non-derogable norms, all contribute to providing a very mixed picture in terms of obligations and enforcement. But the resulting patchwork is nevertheless premised upon the formal doctrine, restated with

¹¹⁶ *Ibid.*

¹¹⁷ For a long overdue debate over these issues see E. Bribosia and L. Hennebel (eds), *Classer les droits de l'homme* (2004).

unanimity in 1993 by the Vienna World Conference on Human Rights, that ‘all human rights are universal, indivisible and interdependent and interrelated’.¹¹⁸

In order to fully appreciate the significance of the ILO’s decision to designate a core set of rights we need to seek answers to the following questions: What are the origins, in institutional terms, of the core; how was this particular core set chosen; how adequate is the resulting list; how do we explain the choices; and what are the implications for those rights which have been excluded from the premier league?

1 *The ILO Origins of the Core*

In a fascinating survey prepared for the OECD, Drusilla Brown explores several different sources of the core, including philosophical ruminations (albeit mainly by economists), economic analyses of utility and viability, and the institutional initiatives of the OECD.¹¹⁹ It is striking that the history of the relevant debates in the ILO does not feature at all. In terms of an economic analysis, the ILO’s exclusion may or may not be justified, but from an international legal perspective it leaves us with, at best, an incomplete account.

The story from an ILO perspective begins some 40 years before the adoption of the Declaration when the Organization began to make use of a classification according to which there were three different categories of labour standards: (1) those that protect ‘certain basic human rights’; (2) those requiring ‘the maintenance of certain key instrumentalities of social policy’; and (3) those ‘establishing certain basic labour standards’.¹²⁰ It is not clear, however, that any important operational or other consequences attached to these categories, which seem to have been used more for analytical purposes.

It was only after the fall of the Berlin Wall that the idea of seeking to identify a small set of core standards began life within the ILO as part of an attempt to refine and sharpen the original system of classifying international labour standards according to their subject-matter as well as to their centrality to the work of the Organization and to human rights. But those initial efforts cast the net much more broadly, as illustrated by proposals made in the early 1990s by ILO officials.¹²¹ The story then moves to the 1994 proposals of the Director-General and the events in Copenhagen, described above.¹²²

2 *The Criteria for Choosing the Core*

One reason for recounting in some detail above the ways in which the CLS project evolved from the ILO Director-General’s report in 1994 through the adoption of the

¹¹⁸ See *supra* note 9.

¹¹⁹ Brown, *supra* note 74. On the role played by the OECD in this area see Salzman, ‘Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development’, 21 *Mich. J. Int’l L.* (2000) 769.

¹²⁰ C. W. Jenks, *Human Rights and International Labor Standards* (1960), at 127; and C. W. Jenks, *Law, Freedom and Welfare* (1963), at 103.

¹²¹ Bartolomei de la Cruz, ‘International Labour Law: Renewal or Decline?’, 10 *Int’l J. Comp. Lab. L & Ind. Rels.* (1994) 201, at 211.

¹²² See text accompanying notes 29–34 *supra*.

Declaration only four years later¹²³ is to illustrate the point that the selection of which rights would be designated as fundamental or core, and which would not, was neither scientific nor deliberate. In explaining how the decision came to be taken Bellace suggests that the matter was decided in Copenhagen,¹²⁴ almost as though the decision was taken out of the hands of the ILO and that the preferences reflected were those of the conferees whose principal focus was social development. But our review of the Copenhagen documents reveals that the four 'core' standards were far from being locked in at that stage and that there were many subsequent opportunities to build on the somewhat open-ended language adopted at the Social Summit.¹²⁵ The final outcome can certainly be explained but not on the basis that they emerged from the application of systematic or acknowledged criteria to the overall body of labour standards.

Interestingly, scholars have already begun to undertake analyses which rationalize the selection of the four standards contained in the CLS group. Thus a recent doctoral dissertation argues that it is possible to discover 'four fundamental values ... in the moral perspective of international labour law'. They are: 'freedom of labour, the equality in labour, protection of children, and participation'. The resulting 'values' very neatly match the content of the ILO's minimum core.¹²⁶ And Francis Maupain, in a series of Hague Academy lectures, defends the list partly on the grounds that it is much richer than the very limited reach of the second principle proposed by John Rawls in his *Theory of Justice*.¹²⁷ Other commentators have rejected the ILO's list of CLS and come up with their own list of priority rights. Economist Gary Fields, for example, has defined a list of labour rights in terms of a minimum level below which production would be considered 'illegitimate'. The result is a ban on slavery and forced labour, an insistence on the right to be fully informed of any unsafe or unhealthy working conditions, a highly qualified freedom from child labour ('whenever their families' financial circumstances allow'), and freedom of association and the right to collective bargaining.¹²⁸

The bottom line, however, is that the choice of standards to be included in the CLS was not based on the consistent application of any coherent or compelling economic, philosophical, or legal criteria, but rather reflects a pragmatic political selection of what would be acceptable at the time to the United States and those seeking to salvage something from what was seen as an unsustainably broad array of labour rights.

¹²³ See text accompanying note 22 *supra*.

¹²⁴ Bellace, *supra* note 22, at 271.

¹²⁵ See text accompanying notes 30–33 *supra*.

¹²⁶ See Vandaele, *supra* note 6.

¹²⁷ Maupain, 'L'OIT, la justice sociale et la mondialisation', 278 *RdC* 1999 (2000) 205, at 389–396.

¹²⁸ Fields, 'International Labor Standards and Economic Interdependence', 49 *Industrial and Labor Relations Review* (1996) 571, at 572.

3 *The Adequacy of the Core List*

While many economists have challenged what they consider to be the excessively ambitious scope of the core standards,¹²⁹ most legal commentators have remarked upon the very limited nature of the core list. Di Matteo *et al.* have characterized the Declaration as offering ‘de minimus [sic] protection’, and observe that it does not protect ‘rights to workplace safety, limits on the hours of work and rights to periods of rest, and freedom from workplace abuse’, and nor does it ‘assert a global minimum wage, or create a right to a fair or living wage’.¹³⁰ Compa notes that it takes no account of ‘the essential economic and social component of rights at work (which legitimates matters such as maternity provisions, pensions and holidays)’.¹³¹

While different authors have stressed the importance of different rights that have been omitted from the core, there is general agreement among the critics that the list should include the right to a safe and healthy workplace, the right to some limits on working hours, the rights to reasonable rest periods, and protection against abusive treatment in the workplace. And it is not only lawyers who have objected to the many omissions. Summers has argued that, from an economic perspective, these rights could be protected in developing country economies without denying countries their comparative advantage in terms of wage costs,¹³² although many other economists would contest this assertion.¹³³ It must be conceded, however, that many of those who favour an expanded list of core rights do little to explain how an expanded list would work in practice and what sort of balance would need to be struck between an international minimum standard and significant discretion at the national level.

Another basis upon which to assess the adequacy of the core list that has emerged is to compare it with other commonly used lists. In terms of traditional categories of human rights, it is noteworthy that, without any acknowledgement, the framers of the Declaration selected a handful of exclusively civil and political rights to constitute the core, and excluded each and every one of the many economic and social rights candidates. It is equally significant in this respect that the CLS list does omit a number of labour rights which have been expressly included in other, albeit themselves selective, listings. Thus, for example, the EU Charter of Fundamental Rights lists, in addition to the various labour-related civil and political rights, such as the freedom to choose an occupation and the right to engage in work (Article 15), contains a range of ‘solidarity rights’ in Chapter IV. They include the workers’ right to information and to

¹²⁹ For a strong case see Srinivasan, ‘International Trade and Labour Standards from an Economic Perspective’, in P. van Dijk and G. Faber (eds), *Challenges in the New World Trade Organization* (1996) 219. For less compelling arguments see also Panagariya, *supra* note 72; and Yoon and McGee, *supra* note 58.

¹³⁰ Di Matteo *et al.*, ‘The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime’, 36 *Vand. J. Transnat’l L.* (2003) 95, at 124.

¹³¹ Compa refers to the ‘risk of grave loss of space, of range of advocacy and of action [of labor rights supporters] by conceding that core standards on association, forced labor, child labor and discrimination are the sum and substance of workers’ concerns in the global economy’. Compa, *The Promise and Perils of “Core” Labor Rights in Global Trade and Investment*, paper for CUNY Conference 17.1.00, at 15.

¹³² Summers, ‘The Battle in Seattle: Free Trade, Labor Rights, and Societal Values’, *UPa J Int’l Econ L* (2001) 61, at 68.

¹³³ See the wide-ranging survey undertaken in Brown, *supra* note 74.

consultation (Article 27); the right of collective bargaining and the right to strike (Article 28), the right of access to placement services (Article 30), and the right to fair and just working conditions (which includes conditions respectful of health, safety and dignity, the right to limited maximum working hours, to daily and weekly rest periods, and annual paid leave (Article 31). Child labour is also prohibited (Article 32).¹³⁴ The list thus extends far beyond the limits of the CLS.¹³⁵

4 Explaining the Choices Made

One straightforward explanation, put forward by Bhagwati among others, is that the choice of CLS reflects the fundamentally protectionist motivation of their proponents.¹³⁶ Thus it could be argued that the CLS list simply reflects those labour practices in relation to which developed countries are seen to perform well and on which at least some of the major exporting developing countries are thought to perform poorly.

But probably the most convincing way of explaining the standards that were chosen is that those contained in the 'core' are process, rather than result-oriented, rights.¹³⁷ This approach is supported by Hansenne's claim in his 1994 report that 'the essential obligation [under the ILO Constitution] is not to achieve results but rather to pursue certain means or lines of conduct'.¹³⁸ This analysis is surely contestable, however. At least some of the key ILO conventions contain both obligations of conduct and of result. If we take freedom of association, it is not sufficient for a government to claim that it has done its best by adopting relevant legislation and other measures. It must also strive to attain a result according to which trade unions can operate freely and effectively. But it follows from the emphasis on process that the common denominator among the standards chosen is 'an attempt to protect freedom of choice', which makes them 'seem not only theoretically consistent with the ideology of free trade, but also required by it'.¹³⁹

This neo-liberal explanation for the choice is in fact reinforced by the analysis presented by Francis Maupain, who played a key role in the drafting process. He has written that the motivation behind the Director-General's proposals in 1994 was to avoid the external imposition of standards relating to working conditions and instead to focus only on the 'individual and collective fundamental rights which allow workers to claim freely and on the basis of equality of opportunity their fair share of the fruits of economic development'.¹⁴⁰ In other words, the international community cannot productively worry about specific social outcomes. Rather, its role is to ensure that workers enjoy certain basic civil and political freedoms.

¹³⁴ Official Journal of the European Communities C 364/15 (18 Dec. 2000).

¹³⁵ See generally T. Hervey and J. Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (2003).

¹³⁶ See the discussion in Brown, *supra* note 74, at para. 141.

¹³⁷ McCrudden and Davies, 'A Perspective on Trade and Labour Rights', 21 *J. Int'l Econ. L.* (2000) 43, at 51–52.

¹³⁸ *Defending Values, Promoting Change*, *supra* note 18, at 59.

¹³⁹ McCrudden and Davies, *supra* note 137.

¹⁴⁰ Maupain, *supra* note 2, at 42.

5 Implications for Non-core Rights

Bellace acknowledges that the choice of which rights to include and which to exclude was ‘delicate, since calling some rights “core” might imply other conventions are less important’.¹⁴¹ Indeed it could hardly be otherwise. Those rights which did not make it into the premier league were inevitably relegated to second-class status. The attention lavished on the Declaration by the ILO in terms of the additional reports undertaken, the promotional activities engaged in, and the manpower and other resources devoted to the tasks, has not been replicated in relation to the non-core standards, at least not within a human rights framework. To the extent that the Declaration has succeeded in one of its principal objectives, which is to make it easy for other actors ranging from corporations, through international financial institutions, to international labour rights monitors, to narrow their gaze and focus on the four core rights, it has by implication taken the pressure off them in relation to the non-core rights, whatever rhetorical assurances to the contrary might issue forth from the ILO or those other actors.

Within the ILO itself, Juan Somavia, the current Director-General, took the initiative to promote a concept of ‘Decent Work’, launched very soon after the adoption of the Declaration. It seems to have been designed in part to adopt a non-normative approach to some of the labour standards that have been left out of the core group.¹⁴² The ‘Decent Work’ Program promotes three objectives, in addition to the Declaration. The first — creation of ‘greater opportunities for women and men to secure decent employment and income’ — is the equivalent of the right to employment or the right to work, around which there are several important conventions, especially Convention No. 122. The second objective is to enhance ‘the coverage and effectiveness of social protection for all’, which translates into a concern to promote the right to social security and the right to safe and healthy working conditions. The final objective, ‘strengthening tripartism and social dialogue’, picks up on the theme of workers’ participation in decision-making in addition to the rights to freedom of association and collective bargaining dealt with in the Declaration. The Program has been welcomed by a number of commentators,¹⁴³ as well as by governments, in part because of its broad sweep and in part because it is not confined to those working in the formal sector but potentially covers all those who work in any context or capacity.

But from a labour rights perspective the problem with the Program is that a range of objectives which could have been promoted in terms of rights, and defined in terms of specific standards, are instead being pursued in a relatively non-legal, non-normative framework. The problem is well illustrated by the Director-General’s Report in 2001, in which he addresses the issue under the heading of ‘universal goals’ and

¹⁴¹ Bellace, *supra* note 22, at 271.

¹⁴² See *Decent Work: Report by the Director General for the International Labour Conference 87th Session, 1999*, at www.logos-net.net/ilo/150-base/en/publ/017-2.htm.

¹⁴³ E.g. B. Hepple, *Work, Empowerment and Equality* (2001).

characterizes decent work as 'a way of stating a development goal'.¹⁴⁴ As if anticipating the criticism that 'rights' (recognized in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, quite apart from the relevant ILO conventions) have been downgraded to 'goals', the report observes that 'fundamental principles and rights at work are the essential foundation, the "floor" of decent work'. But the role of rights is not further elaborated upon and the phrase used would seem to restrict the reference to the standards contained in the 1998 Declaration. The analysis concludes, in an apparent effort to cover every desirable characterization of the Program, that 'decent work is part of development — an aspiration and a precondition, a goal and a measure of progress'.¹⁴⁵ But the role of law is minimal in the vision represented by the Program, even though Somavia refers to the importance of empowering 'people to uphold their rights'. It is perhaps not surprising that a senior ILO official has noted rather defensively that the initiative 'relies heavily on standards (even if this statement might be a slight surprise for some of those working on the subject'.¹⁴⁶

Although Novitz has concluded that the Decent Work Program ensures that "social justice" in the form of "decent work" remains at the heart of ILO objectives',¹⁴⁷ it is not clear that the traditional ILO vision of social justice embodied in the Declaration of Philadelphia can so easily be satisfied by a focus in which normative standards are of relatively minor importance in practice. This is borne out by the other major initiative which Somavia launched in 2001. The report of the World Commission on the Social Dimensions of Globalization was presented in 2004.¹⁴⁸ In terms of labour standards, the Commission's agenda consists of four elements. The first is to mainstream standards by getting other international agencies such as the World Bank to take them into account. The second is to increase technical assistance offered to countries to promote the core labour rights. Third is to increase the resources provided to the ILO itself and the fourth is to contemplate sanctions in the event of persistent violations of labour rights as exemplified by the case of Myanmar. From the perspective of the present analysis two dimensions of the report stand out. One is that the issue of labour standards takes up only a very small part of a lengthy report, thus giving credence to the suggestion that their place in the overall strategic vision being promoted by the current leadership of the ILO is rather limited. The other

¹⁴⁴ *Reducing the Decent Work Deficit — A Global Challenge*, Report by the Director General for the International Labour Conference 89th Session, 2001, available at www.ilo.org/public/english/standards/reim/ilc/ilc89/rep-i-a.html.

¹⁴⁵ *Ibid.*

¹⁴⁶ Swebston, 'Challenges for International Labour Standards: A View from Inside the System', paper presented to ILO, International Labour Standards Department, First Seminar, Geneva, May 2002, at 1.

¹⁴⁷ Novitz, *supra* note 11, at 105–106.

¹⁴⁸ *A Fair Globalisation: Creating Opportunities for All: Report of the World Commission on the Social Dimensions of Globalization* [hereinafter, *A Fair Globalisation*] (2004).

is that very little attention is devoted to labour standards in general, while a great deal of attention is given to the Declaration and to the concept of core labour standards.¹⁴⁹

C The Relationship between ILO Convention Standards and the CLS

Rather than making any formal statement about the legal relationship between the CLS and pertinent ILO conventions, the 1998 Declaration instead contents itself with a statement of fact, into which legal significance might or might not be read. Thus it notes that the principles and rights ‘have been expressed and developed in the form of specific rights and obligations in conventions recognized as fundamental both inside and outside the Organization’.¹⁵⁰ Commentators probing the nature of the relationship regularly assert that the CLS are ‘based upon’, ‘derived from’, or in some other way integrally linked to the standards contained in the eight relevant ILO conventions. An important European Commission policy document therefore states that ‘[t]hese four core labour standards are currently covered by eight ILO conventions’.¹⁵¹ Bellace observes that ‘[a] fuller understanding of the meaning of these four rights comes from the eight core ILO conventions underlying them’.¹⁵² And a policy statement by the AFL-CIO notes that ‘[t]he core labor standards are based on international human rights law’ and that the relevant ILO conventions ‘give content to these core standards’.¹⁵³

What all of these formulations have in common is that they fudge the issue of the precise relationship between the core standards, which are stated in the baldest possible terms and the detailed convention texts. None of these formulations provides a helpful answer to that question, let alone to the issue of the relevance of the jurisprudence of the ILO in relation to these standards. In his 1997 Conference Report, the ILO Director-General sought to shed some light on the relationship when he proposed that a declaration ‘might help to define the universally acknowledged content of the fundamental rights’ proclaimed.¹⁵⁴ But the text of the Declaration as adopted did precious little to eliminate such obfuscatory tendencies. It begins with the statement I have quoted in the preceding paragraph, but does not go on to draw any conclusions from that fact. In the following two paragraphs an extraordinarily opaque formula is repeated in purporting to identify the object of the Declaration, which is ‘the principles concerning the fundamental rights which are the subject of

¹⁴⁹ For a more detailed critique see Alston and Heenan, ‘Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work’, 36 *New York University Journal of International Law and Politics* (2004) forthcoming.

¹⁵⁰ Declaration, *supra* note 1, at para. 1(b).

¹⁵¹ Commission of the European Communities, EU Doc. COM(2001) 416 final, 18 July 2001, Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, at 5.

¹⁵² Bellace, *supra* note 22, at 275.

¹⁵³ AFL-CIO, *supra* note 73.

¹⁵⁴ *The ILO, Standard Setting and Globalization*, Report of the Director-General to the 85th Session of the International Labour Conference, 1997, at 3.

those conventions'.¹⁵⁵ It is hardly surprising that a senior ILO official has observed that the legal relationship between the Declaration and other soft instruments, such as the 1976 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy on the one hand and ILO conventions and recommendations on the other, 'is sometimes difficult to fathom'. He added that the promotion of the soft instruments 'sometimes involves a reluctance to cite the Conventions that underlie them, out of a worry by some officials or constituents that a reference to Conventions will complicate the promotion of principles ...'.¹⁵⁶

In seeking to determine what these broad generalities used to describe the relationship actually mean, there are two possibilities, at opposite ends of the spectrum of possibilities, which can presumably be ruled out.¹⁵⁷ The first is that there is no significant link whatsoever between the CLS and the conventions. The language used in the Declaration is sufficient to make clear that there is at least some linkage contemplated. The proposition at the opposite extreme is that the core standards are synonymous in every respect with the content of the relevant conventions. That would mean that every provision of the convention could be read into the core standard and every government will be required to comply with it. But if this had been the intention, none of the governments which have for so long failed to ratify the conventions in question would have supported the adoption of the Declaration. This is certainly the case in relation to the United States, one of the major proponents of the Declaration, but it was hardly alone on this point.

But while it may be easy to rule out these two extreme positions it is difficult to know where on the remaining part of the spectrum — between minimal and extensive coherence — the relationship should be placed. And what would it mean, for example, to say that the conventions constitute 'reference points' or 'benchmarks' against which to determine the content of the core standards? Each of the standards in question is complex. The content of the right to freedom of association has been the subject of innumerable jurisprudential clarifications by the relevant ILO supervisory bodies and the resulting body of law is complicated and nuanced. What part of this case law must be taken into account by those purporting to apply or uphold the core standard on freedom of association? The same applies to the prohibition against child labour, the precise details of which, as reflected in Conventions No. 138 and 182, are also complex and technical.

Since there are no easy answers to these questions and since the relevant authorities have fairly assiduously avoided clarification, the answer can only be derived by examining the practice of the various groups who claim to be applying the

¹⁵⁵ *Ibid.*, paras 2 and 3.

¹⁵⁶ Swepston, *supra* note 146, at 6.

¹⁵⁷ An additional possibility seems to be implied by the statement that 'the fundamental conventions constitute an application of the four fundamental principles and rights' (OECD, *International Trade and Core Labour Standards*, OECD Doc. COM/TD/TC/DELSA/ELSA(2000)4/FINAL, at 14, para. 6). If the conventions were really to be seen only as one application among others, the implication is that the Declaration standards might be interpreted as being more demanding or comprehensive than the conventions. But the drafting history of the Declaration makes such an interpretation untenable.

Declaration. In the case of the ILO an answer is gradually emerging out of the various reports and assessments that have been undertaken on the basis of the Declaration, and they seem to confirm the resulting confusion.¹⁵⁸ In the case of voluntary codes, many of which make reference either to CLS in general, or to the ILO in particular, it is much more difficult to get an accurate picture of the extent to which authentic account is taken of the detailed content of ILO conventions, let alone of the jurisprudence generated by ILO supervisory bodies. Nevertheless, the evidence considered below in relation to the content of the private codes¹⁵⁹ gives little reason for optimism in terms of fidelity to the ILO's detailed standards.

The most promising linkage between the Declaration and the relevant conventions is to be found in the Regulation adopted by the European Union in 2001, which describes the arrangements to be followed in implementing the EU's Generalized System of Preferences (GSP) for a three-year period until the end of 2004. The Regulation envisages the possibility of providing 'special incentive arrangements' to countries which demonstrate their commitment to the protection of labour rights by *inter alia* legislatively incorporating the substance of the standards laid down in what are described as the 'fundamental' ILO conventions.¹⁶⁰ Under this formulation the key reference points are the conventions rather than the 1998 Declaration. In much of its work since 2001, however, the EU has focused more on the latter.¹⁶¹

Despite the difficulty of determining the precise content of each of the core standards, commentators have put forward strong claims as to both the impact and the resulting normative status of the Declaration. Thus Bellace predicted that the characterization of the CLS as 'rights' would resolve once and for all the status of the relevant standards. The Declaration was said to be 'of critical strategic importance' in part because:

... it removed the issue from the arena of national partisan politics. On any given labor standard, one political party might support it and another oppose it. If, however, a right has been declared to be a fundamental human right by the United Nations, and if the ILO has identified it as a human right that must be observed in the workplace, it becomes extremely difficult for any government or political party to oppose acknowledging this right.¹⁶²

This is surprising optimism in view of the fact that all of the rights in question were long ago declared by both the United Nations and the ILO to have been human rights. That designation made no difference whatsoever to the bipartisan opposition within the United States to the ratification of the relevant ILO conventions. Moreover, the debate among economists and others over whether these rights should triumph over economic realities has continued unabated and the Declaration's concession that some of them are better thought of as mere 'principles' does not help matters. But

¹⁵⁸ For details, see text accompanying notes 249–56 *infra*.

¹⁵⁹ See text accompanying notes 227–34 *infra*.

¹⁶⁰ Council Regulation (EC) No. 2501/2001 (10 Dec 2001) Official Journal L346/1, Article 14. See also the Preamble.

¹⁶¹ See Novitz, 'The European Union and International Labour Standards: The Dynamics of Dialogue Between the EU and the ILO', in P. Alston (ed.), *Labour Rights as Human Rights* (forthcoming 2005).

¹⁶² Bellace, *supra* note 22, at 272–73.

Bellace's comment seems more likely to be suggesting that because ratification of the conventions is no longer really necessary as a result of the Declaration, there is no need for any further political debate within the United States. Instead, ratification of the six out of eight core conventions can now be taken off the political agenda in that country and core standards proponents can simply assume that the old arguments have been miraculously transcended.

Another suggestion that has been made is that the CLS have actually assumed the status of 'fundamental international norms', a body of norms which are seen to be constitutive of the international community, and among which also figure the principles contained in the UN Charter. According to this analysis:

... human rights treaties that are ratified by the majority of states also belong to this category of fundamental norms, and so does the core body of social rights enumerated by the [ILO's 1998 Declaration].¹⁶³

The authors do not spell out the ways in which this normative transformation of a document of an avowedly promotional nature has been achieved. It is not to be assumed that they are relying on the criteria traditionally applied in order to establish the formation of customary norms, since they content themselves with a mere majority of states in relation to treaty norms, a proportion which would fall well short of commonly stated requirements. If the customary law route is the one to be taken then it would be necessary to argue that each of the standards contained in the 1998 Declaration has satisfied all of the requirements for the emergence of norms of customary international law.¹⁶⁴ While such an argument could clearly be made, it would certainly be contested by traditionalists whose list of customary norms remains remarkably limited.

But the author's argument seems to be that the standards in the Declaration have gone beyond this so as to be on a par with the UN Charter as part of a category of fundamental norms. Such a claim is difficult to accept given the great hesitance on the part of many governments in adopting the Declaration, the fuzziness of the normative statements that can be derived from it, and the continuing insistence that such fundamental norms, which are said to be constitutive of the international community, should be protected almost entirely on the basis of promotional measures undertaken by states.

Given the centrality of this question, it is at the very least surprising that a greater effort has not been made to clarify the answers, especially on the part of those who would assume that there are major negative consequences that will flow from a

¹⁶³ Wouters and de Meester, *supra* note 5, at 21.

¹⁶⁴ See, for example, the argument equating the worst forms of child labour with slavery, and thus making that prohibition not only a part of customary law but a peremptory norm of *jus cogens*. Lenzerini, 'International Trade and Child Labour Standards', in F. Francioni (ed.), *Environment, Human Rights and International Trade* (2001) 285, at 308. The analysis leads to the conclusion that goods produced by relevant forms of child labour would justify an importing government in suspending the General Agreement on Tariffs and Trade. For a much more qualified approach in relation to the status of forced labour under customary law see Bridgeford, 'Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism', 18 *Am. U. Int'l L. Rev.* (2003) 1009.

minimalist linkage between the two sets of standards. If there really are problems of coherence between the content accorded to the ‘principles’ and that established in relation to the conventions, then it will be far more difficult to defend the former. If the content is in fact entirely open-ended, if governments and private corporations can determine for themselves what it means to respect the principle of non-discrimination, or the principle prohibiting forced labour, and are free to disregard the established conventional jurisprudence then the magnitude of the revolution that has been wrought by the Declaration should become rapidly apparent.

These concerns seem to have been confirmed by statements made by some of the key players in the drafting of the Declaration, who have done nothing to assuage the concerns that the principles are statements whose normative content has been liberated or unhinged from the anchor of the ILO’s painstakingly constructed jurisprudence in relation to these rights. During the drafting of the Declaration the Canadian Government (whose Ambassador chaired the drafting Committee) emphasized that the Declaration ‘should be based on the principles of the Constitution, reflected in the Conventions, but not on specific provisions of Conventions’.¹⁶⁵ The ILO’s Legal Adviser reiterated the same point.¹⁶⁶

The point was made with particular political relevance several years later by the representative of the US Council for International Business, and the US Employers’ delegate who was Vice-Chairman of the Declaration’s Drafting Committee, Edward Potter. He sought to downplay the ‘risk of some concluding that the core conventions and the Declaration are the same thing’. In fact, ‘[t]hey are not as much [alike] as many would like to believe’. In his view:

One thing that was unambiguously clear to every person who negotiated the ILO Declaration ... [is that its] obligations are not the detailed legal requirements of the eight fundamental ILO conventions but rather the failure to achieve the policies underlying them. Thus, the fact that a country does not ratify a core ILO convention because of legal differences does not mean that the country is not meeting its commitment under the Declaration to seek to realize and achieve the principles and rights that are the subject of the ILO fundamental conventions.¹⁶⁷

On its face, this is but another vague, if rather poorly expressed, reassurance that there is no reason for those in favour of, or opposed to, the conventional standards to worry about the Declaration. But on closer scrutiny, the intent is clear. The ‘detailed legal requirements’ of the conventions are not invoked by the Declaration. States do not need to be in compliance with the specific provisions of the conventions in order to satisfy the requirements of the Declaration. Rather, the achievement of the latter is to switch the focus away from the carefully crafted content of the various conventions and on to the ‘policies underlying them’. But since those policies have not been formulated in any authoritative statement, it is for well-intentioned governments, such as that of the United States, to discern for themselves what those ‘underlying

¹⁶⁵ Report of the Committee, *supra* note 55, para. 22.

¹⁶⁶ ‘[T]he Declaration contemplated the implementation, not of specific provisions of Conventions, but rather of the principles of those Conventions’. *Ibid.*, para. 72.

¹⁶⁷ Potter, *Swimming Upstream: Ratification of ILO Conventions*, at <http://images.ctsg.com/pdfs/ilo/speeches/04edwardpotter.pdf> (2003), at 3.

policies' are. The discipline, or the *acquis*, of the conventions has been escaped, and individual governments and employers are now empowered to determine for themselves what the ILO really meant in adopting the standards in question. It is not surprising then that Potter concludes his paper on the Declaration on a triumphant note by proclaiming that:

Over the last 20 years, the US business community has been at the forefront of being a positive, proactive participant in the promotion of ILO human rights in the United States and in other countries through its leadership in the negotiation of the Declaration. . . .¹⁶⁸

4 The Flow-on, or Broader Agenda-shaping, Effects of the Declaration

Although I have argued that the Declaration represents a watershed in the transformation of the international labour regime, it would be unconvincing to suggest that it came as a bolt out of the blue or that it is not integrally linked to a long series of developments that preceded and have followed it at both the national and international levels. The purpose of the analysis that follows is to situate the values reflected in the Declaration within the broader context of trends elsewhere in the international labour regime. In some respects those trends certainly long predated the Declaration and laid the groundwork for its adoption. In others, the Declaration has made a significant impact in accelerating those trends, in facilitating a revision or updating of earlier approaches, and in legitimizing a focus on a narrower range of rights than was previously acceptable.

For this purpose we examine practice at four levels: (a) unilateral approaches such as that under the Generalized System of Preferences legislation of the United States; (b) bilateral approaches as reflected in the increasing number of free trade agreements negotiated between countries and especially in this context between the United States and individual partners, such as Jordan, Chile, Singapore and Australia; (c) regional or sub-regional agreements, such as the North American Free Trade Agreement (NAFTA) and the proposed US–Central America Free trade Agreement (CAFTA); and (d) multilateral initiatives which focus on voluntary codes of conduct. Each of these areas is potentially vast and the analysis that follows can only provide a brief snapshot of complex developments with a particular focus on the ways in which their approach to labour rights is consistent with, or has been directly influenced by, the 1998 Declaration.

While Canada¹⁶⁹ and the European Union¹⁷⁰ have both adopted strategies for the

¹⁶⁸ *Ibid.*

¹⁶⁹ Weiss, 'Two Steps Forward, One Step Back — Or Vice Versa: Labor Rights under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond', 37 *U. San Francisco L. Rev.* (2003) 689, at 712–713.

¹⁷⁰ Cole, 'Labor Standards and the Generalized System of Preferences: The European Labor Incentives', 25 *Mich. J. Int'l L.* (2003) 179; and Novitz, *supra* note 161.

inclusion of labour rights in trade-related arrangements, the United States has led the way internationally, and its practice — in relation to unilateral, bilateral and regional agreements — remains by far the most important. Thus, although a comprehensive picture would necessitate a careful analysis of the experience of those other states and groupings, such an undertaking is far beyond the scope of a single article. Thus the following analysis focuses only on US approaches.

The importance of US practice in this respect has been emphasized by a recent analysis which argues that the promotion of respect for labour standards around the world is best undertaken by making use of a coalition consisting of the ILO, the United States Trade Representative (USTR), and NGOs. The ILO is said to provide the brains, although primarily through its technical assistance programmes, while trade unions and human rights NGOs provide the ‘eyes and ears’ which then enable the USTR to supply the ‘teeth’ which would otherwise be missing.¹⁷¹ The authors claim that in each of six country case studies that they examine ‘ILO conventions provided the terms of reference for discussions among the USTR, NGOs, trade unions and governments’. This assertion appears to be based mainly on the regular use of the phrase ‘internationally recognized workers’ rights’ in US legislation, but it is sufficient to lead the authors to conclude that the “teeth” of US trade policy could not bite if the ILO did not provide the standards and the credible monitoring of their observance’.¹⁷² In reality, the US does not rely on ILO standards properly so termed. It very occasionally makes reference to specific conventions, most notably No. 182 on Child Labour which it has ratified. But for the most part the actual standards are neither invoked nor relied upon. Their aura is invoked, as is the ILO in general, and ILO experts might be called upon as part of the process, but the ILO’s detailed standards are utterly marginal in these exercises in the overseas enforcement of US legislation.¹⁷³

The emphasis placed on labour unions in the above-mentioned analysis also needs to be scrutinized. The main union actor referred to in the article is the AFL-CIO. But while US labour unions are often seen as the great proponents of multilateralism in this area, the bottom line of their position focuses essentially on the imposition of sanctions by the United States, either unilaterally or pursuant to bilateral agreements. The AFL-CIO insists that all trade agreements ‘must include enforceable protections for the ILO core labor standards’, but does not foresee enforcement through the ILO since its ‘efforts to remedy even the most blatant violations of workers’ rights [have been] isolated and ineffective’.¹⁷⁴ While its nominally preferred solution is the incorporation of ‘enforceable provisions’ for CLS into the rules of the WTO, it is clear

¹⁷¹ Douglas, Ferguson and Klett, ‘An Effective Confluence of Forces in Support of Workers’ Rights: ILO Standards, US Trade Laws, Unions, and NGOs’, 26 *Hum. Rts. Q.* (2004) 273, at 299.

¹⁷² *Ibid.*, at 298–299.

¹⁷³ According to the OECD ‘the GSP workers’ rights are based on the ILO conventions but do not replicate them’. OECD, *supra* note 157, at 57, para. 119. But if this characterization of the relationship were to imply that the detailed content of each of the rights, as spelled out in the relevant ILO conventions, is thereby a part of the standard reflected in the GSP, it would be incorrect.

¹⁷⁴ AFL-CIO, *supra* note 73.

that this has no support from the Bush Administration and virtually no prospect of being acceptable to WTO Members. As a result, unilateral action is the default option.

Nonetheless, the fact that such importance is attached by commentators to the interaction between the ILO system and the US approach to the 'enforcement' of labour standards through its own bilateral and other arrangements serves to underscore the importance of examining the role played by the Declaration in this regard.

A Unilateral Approaches to the Promotion of CLS

The significance of unilateral measures taken by the United States is highlighted by a recent review of labour rights achievements in the context of the US Generalized System of Preferences, which concluded that its willingness to act unilaterally, 'most pointedly in the GSP context, has driven a process of bilateral, regional, and multilateral action to promote workers' rights in trade that goes far beyond the GSP program'.¹⁷⁵ Seen in this light it is indeed possible to argue that the 1984 GSP Renewal Act, which first promulgated the notion of a core of 'internationally recognized workers' rights', contained the seeds of the system of CLS and the consequent transformation of the international labour rights regime. This unilateral approach was, and still is, characterized by an idiosyncratic selection of standards almost entirely detached from any international treaty moorings, a purely national system of evaluation of other countries' records, and the unfettered authority of the US Government to impose sanctions if it so decides, driven to a very significant extent by its own political and economic self-interest.¹⁷⁶

The 1984 legislation was refined and extended by a series of amendments and the adoption of more narrowly focused complementary schemes,¹⁷⁷ designed to link respect for labour rights to eligibility for investment, trade and development assistance.¹⁷⁸ They include statutory provisions banning the importation of goods made with convict, forced, or indentured labour, including child labour,¹⁷⁹ an Executive Order banning government agencies from purchasing such products,¹⁸⁰ and provisions seeking to ensure that those benefiting from the assistance provided by the US Overseas Private Investment Corporation, or the international financial institutions (including the World Bank and the International Monetary Fund) respect 'internationally recognized worker rights'.¹⁸¹ In addition, the Generalized System of

¹⁷⁵ Compa and Vogt, 'Labor Rights in the Generalized System of Preferences: A 20-Year Review', 22 *Comparative Labor Law and Policy Journal* (2001) 199, at 200.

¹⁷⁶ *Ibid.*, at 237, acknowledge that '[t]he most troubling aspect of the GSP labor rights system has been the inconsistent application of the law based on geopolitical and foreign policy concerns of successive administrations, all sensitive to the economic interests of US multinational corporations'.

¹⁷⁷ For a chronological list see *ibid.*, at 205–206.

¹⁷⁸ For a detailed survey of these provisions see Cleveland, 'Norm Internalization and US Economic Sanctions', 26 *Yale J Int'l L* (2001) 1, at 92–102.

¹⁷⁹ US Tariff Act of 1930, sec. 307, 19 USC. § 1307 (1994), as amended by Trade and Development Act of 2000, Pub. L. No. 106–200, § 411, 114 Stat. 251 (2000).

¹⁸⁰ Executive Order No. 13,126; 64 Fed. Reg. 32,383 (1999).

¹⁸¹ See 22 USC. § 2191(a)(1) (2000); and 22 USC. § 262p-4p(a)(1) (2000).

Preferences and related programmes make the enjoyment of tariff benefits dependent on compliance with ‘internationally recognized worker rights’.¹⁸² Although the GSP Program affects only ‘a small portion of total US trade’, the labour rights practices of some 42 different countries have been scrutinized under the legislation.¹⁸³

But the details of the provisions and the way in which they have been applied are not the focus of the present analysis. Rather, what is significant is the way in which workers’ rights are defined. The reference to international recognition might suggest a broad range of rights but in fact this is not the case. While some of the relevant legislative and other provisions contain no definition, most now do spell out that the list of relevant rights consists of the right of association, the right to organize and bargain collectively, the prohibition of child and forced labour and, most significantly, any failure to provide standards for minimum wages, hours and safety.¹⁸⁴ But the components of this latter category, which embraces maximum hours, basic assurances of safety and health in the workplace, and the payment of minimum subsistence wages, find no reflection in the CLS concept now being propagated.

The GSP definition of workers’ rights was strongly criticized by the present writer within a few years of its adoption for being aggressively unilateralist as a result of applying US rather than international standards, despite invoking the mantle of internationalism.¹⁸⁵ But this flaw has not prevented the approach from being propagated extensively within the framework of the bilateral and regional free trade agreements currently being adopted by the United States.

The other unilateral method of achieving transnational enforcement of labour standards is through the use of the Alien Tort Claims Act. A great deal has recently been written about this approach and it is of limited relevance in the present context.¹⁸⁶ Nevertheless, commentators are increasingly arguing that it can reasonably be extended to embrace all of the CLS, since the violation of each of the four standards is claimed to breach the law of nations and thus to provide the basis for a

¹⁸² 19 USC § 2462 (c)(7) (2000). Cleveland notes that the other relevant tariff regimes include the Caribbean Basin Economic Recovery Act of 1994, the Andean Trade Preference Act of 2000, and the Trade and Development Act of 2000 (relating to Sub-Saharan Africa). Cleveland, ‘Why International Labor Standards?’, in R. Flanagan and W. Gould (eds), *International Labor Standards: Globalization, Trade, and Public Policy* (2003) 129.

¹⁸³ Compa and Vogt, *supra* note 175, at 204 and 209.

¹⁸⁴ See e.g. Section 301 of the Trade Act of 1974, as amended (19 USC § 2411). Compliance with these standards in countries around the world is reported on every year by the US Department of State, *Country Reports on Human Rights Practices 2003* (2004), Appendix B: Reporting on Worker Rights, available at <http://www.state.gov/g/drl/rls/hrrpt/2003/29638.htm>.

¹⁸⁵ Alston, ‘Labour Rights Provisions in US Trade Law: “Aggressive Unilateralism”?’, 15 *Hum. Rts Q.* (1993) 1.

¹⁸⁶ Compa, ‘Pursuing International Labour Rights in US Courts’, 57 *Industrial Relations* (2002) 49, at 55. Wishnie, ‘Immigrant Workers and the Domestic Enforcement of International Labor Rights’, 4 *U. Pa. J. Lab. & Emp. L.* (2002) 529, at 533.

claim in US courts against US-based corporations and others with a link to the United States.¹⁸⁷

B *CLS in Bilateral and Regional Free Trade Agreements*¹⁸⁸

It is analytically useful for present purposes to identify three phases in the evolution over the past decade of free trade agreements which are linked to labour standards initiatives. They are: the initial attempt reflected in the 1993 NAFTA; the approach reflected in the US–Jordan agreement of 2001, and subsequently treated as the benchmark for other bilateral arrangements; and the proposals for the next generation of regional agreements, in particular the CAFTA and the Free Trade Area of the Americas (FTAA).

1 *The NAFTA Experience*

The NAFTA was negotiated between the United States, Canada and Mexico before the ILO embarked upon its CLS phase. When free trade became an important issue in the Clinton–Bush 1992 election campaign in the US, Clinton promised to negotiate side agreements on labour and the environment.¹⁸⁹ The resulting labour side agreement, which was an important element in winning support for the NAFTA in Congress in 1993, is known as the North American Agreement on Labor Cooperation (NAALC).¹⁹⁰ Both NAFTA and NAALC entered into force in January 1994. The NAALC goes well beyond the CLS, and recognizes a range of rights which were subsequently to be excluded from the 1998 Declaration.

Under the side agreement each state must ensure that its laws provide for 'high labor standards',¹⁹¹ undertake to promote compliance with that law and to effectively enforce it,¹⁹² and to ensure access to 'fair, equitable, and transparent' enforcement mechanisms for interested parties.¹⁹³ The three states must enforce their own laws in relation to 11 different areas of labour law. These are referred to as 'guiding principles' and, far from there being any pretence that they reflect international standards, the Agreement explains that they reflect 'broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces'.¹⁹⁴ The reinforcement of

¹⁸⁷ Adams Lien, 'Employer Beware? Enforcing Transnational Labor Standards in the United States under the Alien Tort Claims Act', 6 *J. Small & Emerging Bus. L.* (2002) 311; and Pagnattaro, 'Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act', 37 *Vand. J. Transnat'l L.* (2004) 203.

¹⁸⁸ For a general survey of these different agreements see R. Freeman and K. Elliott, *Can Labor Standards Improve under Globalization?* (2003) Ch. 4, at 73.

¹⁸⁹ For an analysis of these debates see Andrias, 'Gender, Work, and the NAFTA Labor Side Agreement', 37 *U. San Francisco L. Rev.* (2003) 521, at 538–543.

¹⁹⁰ For the text of NAALC see <http://www.naalc.org/english/agreement.shtml>.

¹⁹¹ *Ibid.*, Art. 2.

¹⁹² *Ibid.*, Art. 3.

¹⁹³ *Ibid.*, Art. 5.

¹⁹⁴ *Ibid.*, Annex 1.

domestic sovereignty in the labour law area was thus the leitmotif, rather than the introduction of any international benchmark.

The possibility of NAALC-based implementation measures depends on which of three tiers the right in question falls into. At the lowest level (tier 3) — which embraces (1) freedom of association and the right to organize, (2) the right to bargain collectively, and (3) the right to strike — no independent review procedures are available. At the second level — covering (4) prohibition of forced labour, (5) compensation in cases of occupational injuries and illnesses, (6) protection of migrant labour, (7) elimination of employment discrimination, and (8) equal pay for men and women — complaints which allege a ‘pattern of practice’ of non-compliance could result in the appointment of an ‘Evaluation Committee of Experts’ who can issue non-binding recommendations to resolve the problem. In the first tier — covering (9) labour protections for children and young persons, (10) minimum employment standards, including minimum wage, and (11) prevention of occupational injuries and illnesses — a ‘persistent pattern’ of violations which are not resolved by an expert committee can lead to the appointment of an arbitral panel and the imposition of sanctions. General failures to promote and enforce high labour standards and to provide complainants with access to fair domestic labour tribunals cannot, however, be considered on their own by either the expert or arbitral panels.

Although the NAALC has been welcomed by most observers as an important step towards the recognition of labour rights in the context of free trade agreements, the basic institutional design has been challenged from the outset. Human rights and labour rights groups have been especially critical of the failure to provide significant sanctions (a failure which is all the more obvious in light of NAFTA’s strong Chapter 11 provisions for the protection of investments), the reliance upon governmental institutions to take the initiative, the failure to spell out the measures that need to be taken once clear problems were identified, the absence of any reference to international standards which might have necessitated changes in domestic laws which infringed such standards, and leaving the design of the complaints mechanisms which were established (the National Administrative Offices (NAO)) entirely to the individual states. But although these NAO’s could initiate investigations and investigations on their own initiative none of the three has ever taken such a step.¹⁹⁵

An in-depth review undertaken in April 2001 by Human Rights Watch concluded that ‘[i]nstead of exploiting [its] potential, the NAFTA countries have ensured the accord’s ineffectiveness in protecting workers’ rights.’¹⁹⁶ In addition to the ineffectiveness of most of the provisions, the report went on to identify five serious problems which have undermined the complaints procedures:

important issues that have come to light through cases have gone unaddressed by the governments; petitioners’ concerns have been ignored; some case reports have been devoid of findings of fact; interpretation of the NAALC’s obligations has been minimal; and agreements

¹⁹⁵ Weiss, *supra* note 169, at 749.

¹⁹⁶ Human Rights Watch, *Trading Away Rights: The Unfulfilled Promise of NAFTA’s Labor Side Agreement*, April 2001, at 1.

between governments to address concerns arising in NAALC cases have, by design, provided little or no possibility of resolving the problems identified by petitioners.¹⁹⁷

A 2002 report by the Congressional Research Service concluded that the NAALC had 'mitigated the effects of trade expansion from NAFTA very little so far, because most compliance is voluntary'.¹⁹⁸ By the end of 2003, Human Rights Watch reported that, of 25 complaints which had been filed, not one had 'resulted in fines or sanctions. At most, the complaints have led to high-level consultations between governments, as well as local-level public meetings aimed at raising awareness about violations and discussing possible solutions.'¹⁹⁹ And a 2004 report which focused primarily on health and safety cases was equally damning. While acknowledging that the accord had had some 'sunshine effects' in the early years in terms of encouraging the airing of problems, it had nevertheless 'failed to protect workers' rights to safe jobs and is in danger of fading into oblivion'.²⁰⁰ The problems were attributed to limitations inherent in the terms of the original agreement, a lack of political will to address the problems that have come to light and a refusal to include workers and their advocates in discussions to improve workplace conditions. These problems are said to have led prospective complainants to abandon the process: 'They are disillusioned and frustrated by the weak outcomes of ministerial consultations and the governments' refusal to further pursue even the best-documented cases'.²⁰¹

In addition to these recent studies, there have been a great number of other analyses of the NAALC and very few of them have reached conclusions which could be considered to be especially encouraging.²⁰² Andrias concluded that 'the NAALC is flawed as an instrument for protecting the rights of women workers' and, as a result, has been 'virtually ignored' by American women's rights groups.²⁰³ But perhaps most damning is the assessment of Marley Weiss who was Chairperson of the National Advisory Committee to the US National Administrative Office for the NAFTA Labor Side Agreement from 1994–2001 who has criticized the Agreement on various scores. In terms of procedures followed she notes that it 'fails to meet its own articulated standards regarding domestic labor law: of transparency, access for private actors to appropriate tribunals to redress violations, due process, and effective enforcement'. She concludes in relation to the standards that while they appear 'simple and clear', they are in fact 'extremely difficult to interpret and apply'. And she considers the dispute settlement procedures as being in breach of 'rudimentary

¹⁹⁷ *Ibid.*, at 3.

¹⁹⁸ Bolle, Worker Rights and Fast-Track Debate, Congressional Research Service, Library of Congress, 11 January 2002, available at <http://ipc.state.gov/documents/organization/8118.pdf>.

¹⁹⁹ Wilkinson, 'Labor and the FTAA: A Cautionary Tale', available at <http://hrw.org/editorials/2003/ftaa112103.htm>.

²⁰⁰ L. Delp *et al.*, *NAFTA's Labor Side Agreement: Fading into Oblivion? An Assessment of Workplace Health & Safety Cases*, UCLA Center For Labor Research And Education, March 2004, available at <http://www.labor.ucla.edu/publications/nafta.pdf>, p. iv.

²⁰¹ *Ibid.*, p. viii.

²⁰² For an extensive bibliography see Delp, *supra* note 200, at 51–56; and Andrias, *supra* note 189, at 527–528, n. 27–28.

²⁰³ *Ibid.*, at 556.

criteria for transparency and due process'. Her overall conclusion is that '[b]oth in terms of procedures and in terms of remedies, the NAALC seems designed to thwart effective enforcement'.²⁰⁴

This is echoed in another evaluation by a group of German labour lawyers who concluded, on the basis of an empirical study of the NAALC, that it 'has built-in mechanisms that systematically disappoint actors' expectations.²⁰⁵ But this study is perhaps the most interesting of all because of the explanation it offers for the Agreement's various acknowledged failures. In essence, the problem identified by these authors is that the procedures that have been adopted are legal in form, but both the spirit motivating them and the way in which they have been applied is informed by an entirely different rationale or mentality. They are legal in so far as they were inspired by US labour law, rely upon individual cases in order to resolve issues, establish quasi-judicial procedures and even hold out the promise of some legal-style penalties being imposed. But in reality, the agreement is quintessentially not a legal but a political instrument. It involves 'a tense process of intergovernmental, normally bilateral, political bargaining, the success of which depends to a large extent on the willingness to cooperate of those involved'.²⁰⁶ But since the latter are to a large extent governmental agencies which are keen to avoid conflict and are distrustful of one another's intentions (the US worrying about Mexico's ability to exploit low standards, and Mexico worried about the imposition of inappropriate and unwarranted standards when they suit US interests), the legal orientation of the NAALC is counter-productive: it 'introduces a "zero-sum" logic into the largely bilateral process of conflict resolution'.²⁰⁷ Weiss seems to endorse these conclusions when she argues that the reason that none of the complaints have made much impact is that the process is controlled 'by diplomats and political appointees, who are extremely reluctant to take cases to an Evaluation Committee of Experts.

The study points to a very different approach, one which resembles more closely the 'carrots not sticks' theme reflected in current European Union policies on labour standards. This would see the emphasis on respect for labour standards being situated within a broader social and structural policy agenda, and greater mutuality designed to reduce the zero-sum dimension.²⁰⁸

2 *Drawing Lessons from NAFTA*

The challenge for the purposes of the present analysis is to identify lessons to be drawn from this experience. There are several, and it must be conceded that they are not necessarily all compatible with one another. First, the agreement on 11 key labour standards in this context raises serious questions about the justifications invoked for

²⁰⁴ Weiss, *supra* note 169.

²⁰⁵ Dombois, Hornberger, and Winter, 'Transnational Labor Regulation in the NAFTA — A Problem of Institutional Design? The Case of the North American Agreement on Labor Cooperation between the USA, Mexico and Canada', 19 *Int'l J. Comp. Lab. L & Ind. Rel.* (2003) 421, at 433.

²⁰⁶ *Ibid.*, at 431.

²⁰⁷ *Ibid.*, at 438.

²⁰⁸ *Ibid.*

including only four standards among the core group in the 1998 Declaration. This discrepancy is all the more striking given the criticism of the NAALC itself as being unduly restrictive of labour rights already recognized in other international agreements such as the Convention on the Elimination of All Forms of Discrimination against Women.²⁰⁹ Second, the extent to which safety and health issues have been raised in the NAALC context underscores the inappropriateness of excluding them from the CLS list. Third, reliance upon national law and a failure to spell out any relationship to international standards are a recipe for inaction. The NAALC's failure to spell out what is meant by the 'principles' it recognizes, or to require any changes in national laws to meet specific international standards is one of the reasons cited by most commentators for its inefficacy.²¹⁰

Fourth, arrangements which are applied as though their essential purpose is to facilitate dialogue are highly unlikely to be very effective in the absence of a range of additional measures designed to ensure broad-based participation, and to make it worth the while for individuals and non-state actors to invest an effort in the process. Fifth, in so far as an authentic dispute mechanism is to be provided for, there is much to be said for setting up a permanent impartial tribunal which is able to rise above the self-interest of the parties in facilitating trade. Sixth, if consequences are going to attach to violations of the standards set and dialogue proves inadequate to resolve the difference, any system of sanctions needs to be embedded within a broader and more constructive set of arrangements which also includes incentives.

Seventh, the inclusion of labour provisions in an entirely separate arrangement from the principal trade agreement is unlikely, in the absence of an effective and independent monitoring scheme, to lead to the imposition of any sanctions or other measures which would underscore the seriousness of the commitment to labour rights.²¹¹ And eighth, the involvement of non-state actors needs to be made authentic and meaningful if such procedures are to work.²¹² Reliance upon inter-state complaints, or any variation thereon, is a method of enforcement which has proved notoriously unsatisfactory in the human rights field, with important mechanisms under the International Covenant on Civil and Political Rights remaining totally dormant, and comparable procedures under the regional human rights conventions having yielded remarkably few complaints.

3 US–Jordan and Beyond

The second phase of trade and labour linkages is epitomized by the agreement concluded in 2001 between the US and Jordan, a recipe which has since been more or less followed in a range of other bilateral agreements or draft agreements. While drawing heavily upon the NAALC experience, a concerted effort was made to remedy

²⁰⁹ Weiss, *supra* note 169, at 745.

²¹⁰ *Ibid.*, at 550.

²¹¹ Dombois, Hornberger, and Winter, *supra* note 205.

²¹² One author goes much further and concludes that '[o]nly if NAALC and similar agreements include stronger organizational rights will they play a critical role in reestablishing democratic life on a transnational basis ...'. Andrias, *supra* note 189, at 562.

some of the more heavily criticized aspects thereof. In particular, the labour provisions were included in the body of the agreement rather than in a separate side agreement. Of particular importance in the context of the present analysis is the fact that domestic standards are supplemented by international ones, in that both parties must 'strive to ensure' the recognition and protection by domestic law of internationally recognized labour rights. In response to strong criticism by the AFL-CIO and other groups, the labour provisions were also made subject to the same dispute resolution procedures as apply in relation to the trade and environment provisions in the agreement. The impact of the latter was, however, significantly muted by an exchange of letters between the two governments, in which they undertook to resolve any differences without resorting to sanctions. And, finally there is a no-tradeoffs clause which acknowledges that it is 'inappropriate to encourage trade by relaxing domestic labor laws'.

But the Jordan agreement is also regressive in various ways by comparison with the NAALC. Thus the reference to international standards comes at the expense of reducing the 11 categories of the latter to five. The result is to omit any reference to the elimination of employment discrimination (one of the four CLS), to equal pay for men and women, and to the rights of migrant workers. The Jordan agreement's standard of requiring the two governments to 'strive' to meet international labour standards has also been roundly criticized as reflecting a vague and indeterminate standard. Moreover, as has been argued throughout the present article, as long as these international standards remain undefined and not tied to any specific international conventions, the reference seems unlikely to give rise to significant practical ramifications. In addition, in contrast to the NAALC, the Jordan agreement contains no reference to procedural or due process requirements, and there are no separate institutional arrangements beyond the activities that might be jointly undertaken by the two governments. Given the structure of the agreement, and the fact that there are no procedures for the submission of public complaints, Weiss notes that 'no labor rights claims are going to reach the arbitral panel stage, let alone be the subject of sanctions'.²¹³ She concludes that 'despite the ballyhoo . . . [the agreement takes] three steps forward, two steps back, and a few steps sideways, when compared to the NAALC'.²¹⁴ Freeman and Elliott consider the labour language in the agreement to be 'so weak as to exert little upward pressure on labor standards'.²¹⁵ Nevertheless, this recipe has more or less become the model for other agreements entered into by the United States, or currently under negotiation.

The principal change since Jordan, however, is the explicit inclusion of a reference to the ILO's 1998 Declaration. Thus, under Article 17.1 of the Singapore–US Trade Agreement, the 'Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the' 1998 Declaration and its Follow-up. Somewhat confusingly, the article continues by requiring each Party to

²¹³ Weiss, *supra* note 169, at 754.

²¹⁴ *Ibid.*, at 718.

²¹⁵ Freeman and Elliott, *supra* note 188, at 94.

'strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 17.7 are recognized and protected by domestic law'.²¹⁶ The latter provision then reflects the standard US GSP list of rights, thus omitting discrimination, but adding 'acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health'. The only specific convention to which reference is made is Convention No. 182 on the Worst Forms of Child Labour (Article 17.5). The Agreement also sets up a US–Singapore Labour Cooperation Mechanism, many of whose activities seem to focus on advancement of 'understanding of, respect for, and effective implementation of the principles reflected in the' 1998 Declaration.²¹⁷

But despite the almost profligate number of references to the 1998 Declaration the nub of the matter is dealt with in the second paragraph of Article 17.1, which states:

Recognizing the right of each Party to establish its own labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in Article 17.7 and shall strive to improve those standards in that light.

Sovereignty rules! The terms of the proposed US–Central American Free Trade Agreement (CAFTA), negotiated between the United States, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua and notified to Congress in February 2004,²¹⁸ contains the same reference to the 1998 Declaration and also makes it the major focus of a Labor Cooperation and Capacity Building Mechanism.²¹⁹

The US–Australia Free Trade Agreement, concluded in 2004, but not yet ratified by the US Congress contains virtually identical language except that the Australians inserted a reference to the 'principles' of the 1998 Declaration, and added that they would strive to improve standards 'consistent with high quality and high productivity workplaces',²²⁰ the latter presumably being intended to introduce an element of moderating support for labour standards if productivity might be threatened as a result.

The Australian Agreement is worth examining in some detail because it provides an excellent illustration of the extent to which repeated affirmations of the importance of the 1998 ILO Declaration can apparently coexist with a failure to comply with ILO convention standards. The most detailed critique of the Agreement to date has come from the Labor Advisory Committee for Trade Negotiations and Trade Policy, which is

²¹⁶ <http://www.ustr.gov/new/fta/singapore.htm>.

²¹⁷ *Ibid.*, Annex 17A.

²¹⁸ <http://www.ustr.gov/new/fta/cafta/text/>. For a detailed critique see Human Rights Watch, *CAFTA's Weak Labor Rights Protections: Why the Present Accord Should be Opposed*, March 2004; and Lawyers Committee for Human Rights, *Labor Standards and the Central American Free Trade Agreement*, 19 November 2002.

²¹⁹ *Ibid.*, Annex 16.5.

²²⁰ For the text see <http://www.ustr.gov/new/fta/Australia/text/text18.pdf>.

one of the specialist committees mandated to give their views to the USTR in order to facilitate a balanced assessment of the agreement.²²¹

In its report²²² the Committee argued that the agreement falls short of the Jordan standard because only one labour-related obligation — that each government must enforce its own labour laws — is enforceable through the dispute settlement arrangements. And even this provision contains a strong qualification, which is expressed in the negative, to the effect that '[a] Party shall not fail to effectively enforce its labour laws . . . in a manner affecting trade between the Parties'.²²³ This leaves open the door to argue that a particular labour law practice does indeed violate domestic laws, but it has no effect on international trade, and thus must be considered outside the realm of the agreement. In addition, all other labour rights commitments, such as those relating to the Declaration but which are not part of federal labour law, are exempted from the dispute arrangements. In the view of the Committee, they are 'thus completely unenforceable'.²²⁴ The Committee is also highly critical of the fact that trade sanctions have been replaced in the post-Jordan agreements by straightforward capped fines of very limited magnitude which will 'have little if any deterrence effect'.²²⁵

The report goes on to note that restricting the obligations to compliance with domestic law is particularly problematic in relation to Australia's freedom of association and collective bargaining laws which have 'been criticized repeatedly by the ILO, the US State Department, and the International Confederation of Free Trade Unions (ICFTU)'.²²⁶ The report also notes that both child labour and forced labour are matters dealt with at the state, not the federal, level in Australia. There are no federal laws dealing with those issues. But the Free Trade Agreement only requires Australia to enforce its federal laws, not its state laws, thus 'making the agreement's provisions on these topics completely hollow'. Moreover, Australia has not ratified either of the two ILO core conventions on child labour (No. 138 and No. 182), which correspond to the relevant principle in the Declaration, despite the relative speed with which it generally enters into international treaty obligations which are of interest to it.

C *Multilateral Initiatives and Voluntary Codes*

Considerable attention is now being paid to several multilateral initiatives, such as the 1976 OECD Guidelines for Multinational Enterprises and the ILO's 1977 Tripartite

²²¹ In relation to a subsequent proposal for a US-Dominican Republic Free Trade Agreement, the Office of the USTR noted that reports from 32 trade advisory committees had been received and that, '[a]s it has with every other recent free trade agreement including the US-Australia FTA, the Labor Advisory Committee opposed the pact and urged Congress to reject it, alleging deficiencies in local labor laws'. 'Trade Advisory Groups Support Adding Dominican Republic to CAFTA', 23 April 2004.

²²² The US-Australia Free Trade Agreement, Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC), 12 March 2004, available at <http://www.ustr.gov/new/fta/Australia/advisor/lac.pdf>.

²²³ *Ibid.*, Article 18.2, para. 1(a).

²²⁴ *Ibid.*, at 5.

²²⁵ *Ibid.*, at 9.

²²⁶ *Ibid.*, at 6.

Declaration on Principles concerning Multinational Enterprises and Social Policy, both of which were revised in 2000, and the UN's Global Compact of 1999. In addition, there is now a vast number of voluntary codes of conduct adopted by corporations or trade groups.²²⁷ Many of these include references to labour standards and both the ILO and the OECD instruments now refer explicitly to the 1998 ILO Declaration. Much has been written on these initiatives and there are only two aspects which merit specific attention in the present context.

The first is that the model used is very similar to that subsequently followed by the 1998 Declaration: non-binding instruments, general and determinedly soft standards, promotional means of enforcement, and ambivalence at best on the part of outside evaluators. Oxfam International, for example, has called upon the OECD to provide for 'more effective investigatory, monitoring, and reporting mechanisms through which companies can be held accountable'.²²⁸ Virginia Leary has said of the ILO Principles that the 'timidity of the ILO twenty-two years ago when the Declaration was adopted was perhaps understandable, but is less so today. . . . At a minimum, the ILO might reconsider the manner in which the [periodic report on implementation] is written to make it more readable, more understandable and more focused on issues.'²²⁹ According to Hepple, the ILO Principles have been disappointing and ineffective, while the OECD Guidelines 'have proved to be rich in principle, but weak in enforcement.'²³⁰ But, whatever their shortcomings, Leary has suggested that the problem does not lie in the non-binding nature of the relevant instruments, arguing that while 'form and function are important in the development of international labor standards, . . . the function and not the form remains primary.'²³¹ While she may well be correct that function is what counts, the functions performed by the ILO, OECD and UN promotional instruments have been the subject of a great deal of criticism and relatively little praise outside of institutional or corporate commentaries.²³²

The second aspect is that relatively few of the codes of conduct adopted by corporations contain references to core labour standards, and some 'even contain language that could be interpreted as undermining international labour standards'.²³³ For the most part these voluntary codes do precisely what the 1998 Declaration enables them to do, which is to affirm the importance of a standard such

²²⁷ For a survey of all of these initiatives see OECD, *supra* note 157, Part III.

²²⁸ Oxfam International, *Rigged Rules and Double Standards: Trade, Globalisation and the Fight against Poverty* (2002), at 205.

²²⁹ Leary, 'Form Follows Function — or Does It? Formulations of International Labor Standards: Treaties, Codes, Soft Law, Trade Agreements', in R. Flanagan and W. Gould (eds), *International Labor Standards: Globalization, Trade, and Public Policy* (2003).

²³⁰ Hepple, 'Enforcement: The Law and Politics of Cooperation and Compliance', in B. Hepple (ed.), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (2002), at 240–241.

²³¹ Leary, *supra*, note 229.

²³² See generally P. Alston (ed.), *Non-State Actors and Human Rights* (forthcoming 2005).

²³³ Information Note on Corporate Social Responsibility and International Labour Standards, ILO Doc. GB.286/WP/SDG/4(Rev.), March 2003, para. 6.

as freedom of association, but to attribute whatever content they choose to the principle, without any particular regard to ILO standards.²³⁴

The UN's much-touted Global Compact provides a good illustration of this approach. It consists of nine principles dealing with human rights, labour and the environment, to which businesses are urged to commit themselves. Those dealing with labour (Principles 3–6) reflect the four CLS, which is unsurprising since the explanation of their origins is that they 'are derived from: the Universal Declaration of Human Rights, the ILO 1998 Declaration, and the Rio Declaration on Environment and Development'.²³⁵ There is an immediate but unacknowledged admission of selectivity here, because the Universal Declaration contains several important labour rights which find no place at all in the Global Compact. The explanation is that the labour 'Principles' (a word whose use was probably inspired by the precedent set by the ILO Declaration) 'draw on' the 1998 Declaration which 'represents a universal consensus among those concerned with labour issues that the principles need to be promoted and protected world-wide', unlike, it would appear, the Universal Declaration!

The UN's analysis of what these Principles require of those to whom they are directed follows the tradition of evasion when describing their relationship to the relevant Conventions. It notes that '[t]hese principles are also the subject of ILO Conventions. . . . All countries — whether or not they have ratified the relevant Conventions — have an obligation "to respect, to promote and to realise in good faith" the principles'.²³⁶ But the lack of any linkage soon becomes apparent when the Manual turns to define what the various Principles actually require. In relation to freedom of association, for example, there is no reference at all to any ILO standards, no attempt to encapsulate the jurisprudence of the ILO in this area, and a reassuring note that:

[t]he Global Compact does not suggest that employers change their industrial relations frameworks. However, as organisations such as the International Organisation for Employers have indicated, some "high performance" companies have recognised the value of using dialogue and negotiation to achieve competitive outcomes.²³⁷

The only context in which reference is made to explicit ILO standards is in relation to the child labour conventions.

²³⁴ M. Urminsky (ed.), *Self-Regulation in the Workplace: Codes of Conduct, Social Labeling and Socially Responsible Investment* (2001), cited in *ibid.*, at 3.

²³⁵ 'The Nine Principles', at <http://www.unglobalcompact.org/Portal/?NavigationTarget=/roles/portal-user/aboutTheGC/nf/nf/theNinePrinciples>.

²³⁶ United Nations, *Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles*, at <http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc-html-content/Public-Documents/gcguide.pdf>, at 29.

²³⁷ *Ibid.*, at 31.

D *The Impact of These Developments on the Overall Labour Rights Regime*

The reason for devoting so much space to an analysis of developments relating to bilateral and regional free trade agreements is to demonstrate that while the WTO remains largely impervious to labour rights claims, the broader emerging trade law regime contains very consistent references to labour rights. Those references are increasingly coalescing around the 1998 ILO Declaration and their implementation relies largely, or even exclusively, upon a variety of promotional arrangements put in place which are based entirely on domestic rather than international law. And those arrangements generate only very limited pressure to conform to the international principles which are left essentially undefined.

Supporters of many of the non-ILO-based approaches to promoting labour standards — whether the US or European Union GSP systems, or the corporate codes of conduct — have argued that the old assumptions that once applied to the ILO, its standards, its procedures, and its monitoring mechanisms, are no longer viable in a globalized world and that new decentralized systems involving disparate actors and standards are not just best, but are the only real options available. In many ways, the 1998 Declaration has given a green light to the trend towards decentralization and has encouraged initiatives which marginalize the ILO and its detailed standards. Various examples could be cited in this regard but for present purposes it will suffice to mention three. The first is a proposal made by Anil Verma to effectively ignore ILO standards other than the CLS and to focus instead on a 'regime of process standards'. The starting point would be for '[e]ach government to begin by ratifying ILO core labour standards, but then to go beyond the core standards to set further goals for improvement from year to year'.²³⁸ It seems that the author is not referring to the eight conventions but to the Declaration, but the latter cannot of course be ratified (since it is not a treaty) and does not need to be formally endorsed at the national level since it was adopted by consensus by all ILO Member States. The yearly goals would be set through consultation with the social partners and it would lead to the creation of 'a regime in which nations would be contractually bound to pursue higher standards', although no indication is given of the legal nature, if any, of this contract, and in which the level of the standards 'would be left to a pluralist system within each country'.²³⁹ The result would be to eliminate international standards, although the four core ILO standards would be taken as a starting point.

The second example is the relatively sophisticated work done by Human Rights First (formerly the Lawyers' Committee for Human Rights) to design 'yardsticks' against which to measure countries' progress on workers' rights. In a very detailed analysis of how to determine the content of various rights, almost no reference is made to individual ILO conventions or to the painstaking work done by the ILO Committee of Experts and other ILO bodies in defining the normative content of the various rights.

²³⁸ Verma, 'Global Labour Standards: Can We Get from Here to There?', 19 *Int'l J. Comp. Lab. L. and Ind. Rels* (2003) 515, at 533.

²³⁹ *Ibid.*, at 534.

Reference is, however, made to the Declaration. The analysis then proceeds to ask questions such as ‘how safe is safe?’ in defining workplace safety, ‘how fair is fair?’ in relation to minimum wages, and ‘how free is free?’ in relation to freedom of association.²⁴⁰ The result is a wholesale reinvention of the wheel, as though ILO jurisprudence either did not exist or is entirely irrelevant.

The third and final example is particularly ominous. It involves the convening of a Committee on Monitoring International Labor Standards, composed of American academics and experts drawn from think-tanks, ‘to provide expert, science-based advice on monitoring compliance with international labor standards’.²⁴¹ The Committee is charged with the design of a database on labour standards ‘tailored to the current and anticipated needs’ of the US Department of Labor’s Bureau of International Labor Affairs. Its most challenging and useful task involves the identification of ‘innovative measures to determine compliance with international labour standards on a country-by-country basis’ and the measurement of ‘progress on improved labor legislation and enforcement’. The catch, however, lies in the basic frame of reference for the Committee. It has been asked to ‘examine compliance with the international labor standards in the ILO’s 1998 Declaration . . . , and also acceptable conditions of work, as defined in US trade law’.²⁴²

The Committee includes, but is not confined to, various critics of the concept of labour standards. It has already developed a very active work programme and its unstated brief appears to be to identify a system of monitoring which would enable the US to undertake a more detailed and scientific evaluation of the performance of its trading partners’ labour standards, with little or no reference to the ILO. It is hardly surprising then that a senior ILO official, in her presentation to the committee, cautioned it not to reinvent international labour standards, but to use the definitions of core labour standards contained in the relevant ILO conventions. Saying ‘Let’s use the same definition; let’s create one body of pressure, one voice’, Thomas added that countries that do not want to comply with international labour standards ‘love the confusion of lack of definition and clarity’.²⁴³

In summary then, an important consequence of the Declaration has been to facilitate or validate the efforts of actors external to the ILO who seek to develop alternatives to the ILO’s own monitoring system. Now that the Declaration has endorsed a very limited group of standards, and mandated no particular definition of any of them, it is open to other actors to devise their own means by which to evaluate compliance with the relevant norms as they interpret them.

²⁴⁰ Human Rights First, *Yardsticks for Workers [sic] Rights: Learning from Experience* (2003), at <http://workersrights.humanrightsfirst.org/>, Introduction, at 6.

²⁴¹ The initiative has been generously funded by the National Research Council of the National Academy of Sciences.

²⁴² M. Hilton (ed.), *Monitoring International Labor Standards: Quality of Information, Summary of a Workshop* (2003), at 2.

²⁴³ Constance Thomas, Section Chief of the Equality and Employment Branch in the ILO Department of International Labour Standards. See Thomas, in Hilton, *ibid.*, at 37.

E Follow-up: Monitoring, Promotion, or Window-dressing?

For many decades the ILO system of monitoring or 'supervising' standards was held up as 'the most successful example of appraisal' in the international system as a whole.²⁴⁴ During the debate preceding the adoption of the 1998 Declaration, the US Government stated that it 'would be meaningless without a follow-up mechanism', but not just any follow-up. Rather it needed to be 'credible, meaningful and effective Not succeeding in this area would be unthinkable.'²⁴⁵ The United Kingdom Government agreed that without such a follow-up 'the Declaration would remain "a collection of fine words"'.²⁴⁶ These views were not, however, shared by the great majority of speakers, many of whom insisted on the strictly promotional nature of the exercise, the need to avoid criticism of specific countries, the desirability of all decisions being reached by consensus, and the need to avoid double scrutiny of countries.²⁴⁷ The Follow-up mechanism that finally emerged is much more faithful to that vision of an amiable and toothless promotional tool aiming to mobilize additional resources for developing countries than it is to the US/UK vision.

The arrangements are dealt with in an Annex to the Declaration, which proclaims that the follow-up is 'of a strictly promotional nature'. Two activities were endorsed. They are the preparation of an annual report reviewing the efforts of Member States which are not parties to the fundamental conventions, and a global report which provides a 'dynamic global picture' of the state of implementation of each category of fundamental principles and rights. In order to emphasize that the first exercise has nothing to do with supervision, the existing Committee of Experts was not entrusted with the task of presenting an analytical introduction to the factual reports compiled by the International Labour Office. Instead a new group of seven Expert-Advisers was appointed in 2001 for that purpose.

Despite the weakness of the resulting mechanism, supporters of the Declaration have consistently presented supervision and follow-up as one of the strengths of the new regime. The ILO's former Legal Adviser noted that the revolution achieved by means of the Declaration would be 'meaningless' if it were not followed up effectively,²⁴⁸ and has predicted that a second phase of ILO reform will focus on improving the supervisory mechanisms.²⁴⁹ The late Senator Daniel Patrick Moynihan extolled the virtues of the Declaration and especially its monitoring mechanism which he described as:

the element that will, if implemented properly, ensure that something will come of all this. For

²⁴⁴ M. McDougal, H. Lasswell and L. Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (1980) 310; and Leary, 'Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, US Laws), in J. Bhagwati and R. Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?—Legal Analysis* (1996) vol. 2, 177, at 195.

²⁴⁵ Report of the Committee, *supra* note 55, para. 101.

²⁴⁶ *Ibid.*, para. 98.

²⁴⁷ E.g. comments by the Government of Japan on behalf of the Asia Pacific group, *ibid.*, para. 90.

²⁴⁸ Maupain, *supra* note 2, at 44.

²⁴⁹ Maupain, 'Le renouveau du débat normative à l'OIT de la fin guerre froide à la mondialisation', paper presented to ILO, International Labour Standards Department, First Seminar, Geneva, May 2002, at 24.

example, the follow-up mechanism will take a look at how China is doing on prison labor, how Pakistan is doing on child labor, how the United States performs with respect to freedom of association. Yes, we will be examined, too. . . . Its monitoring mechanism could evolve into an effective tool for upgrading global compliance with these core labor standards. I have argued that the monitoring system ought to include inspections, an idea that could gain acceptance over time.²⁵⁰

And although the World Commission on the Social Dimensions of Globalization did not address itself specifically to the monitoring arrangements under the Declaration, it did make the point in relation to the Global Compact that ‘for voluntary initiatives to be credible, there is a need for transparency and accountability, requiring good systems of measurement, reporting and monitoring’.²⁵¹

But if an effective and credible monitoring mechanism is the *sine qua non* for a meaningful Declaration then the verdict must be that it has failed. By June 2004 there had been five years of experience with the Follow-up mechanisms. The Annual Reports, which total hundreds of pages and are available on the ILO website,²⁵² are purely descriptive and devoid of significant interest. To the credit of the expert panel, the most damning assessment of these reports is to be found in the ‘Introduction by the ILO Declaration Expert-Advisers to the compilation of annual reports’.²⁵³ In 2003 there was a reporting rate of only 64 per cent of relevant governments, although that was an improvement on previous years.²⁵⁴ The reports are said to provide very limited information, to rarely go beyond descriptions of legislation, to say little about the application of the law, to rely on the non-credible claim that no changes have taken place in the past year, and to be very uneven in the sense that problems are acknowledged in relation to child labour but not the other core rights. The result is that the utility of the report of the Expert-Advisers is greatly reduced. In providing an overview, the report is reminiscent of the worst of United Nations-style reviews of country practices. For example, in describing the challenges mentioned by governments in their reports on freedom of association, the report states:

The Governments of Armenia, China, El Salvador, Islamic Republic of Iran, Jordan, Republic of Korea, Malaysia, Mauritius, Morocco, Myanmar, Oman, Qatar, Thailand, Uganda, and the United Arab Emirates refer to economic, political, social and/or cultural challenges in the realization of the principle and the right. . . . In China, the Government again reports that the lack of capacity of workers’ organizations is the sole difficulty encountered in realizing the principle and right.²⁵⁵

From such formalistic, even ritualistic, raw materials, platitudinous conclusions are bound to follow:

²⁵⁰ Text: Senator Moynihan on ILO’s Labor Standards Declaration (Monitoring mechanism key to new accord), Speech of 23 June 1998, reported at <http://usembassy-australia.state.gov/hyper/WF980625/epf411.htm>.

²⁵¹ *A Fair Globalisation*, *supra* note 148, at 122, para. 554.

²⁵² <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE>.

²⁵³ ILO Doc. GB.289/4, March 2004.

²⁵⁴ *Ibid.*, para. 19.

²⁵⁵ *Ibid.*, para. 48.

The situation is far from heartening. Too many people in these categories [workers in Export Promotion Zones, agriculture, the informal economy, and migrant and domestic workers] are denied this right [to freedom of association and collective bargaining]. In many cases, this means that women are denied this right, since they tend to be the majority in these categories.²⁵⁶

Most tellingly, in a phrase which indicates that a key failing of the NAFTA mechanism is being replicated, the report observes that '[i]t is unacceptable that the number of comments provided by the social partners is so limited'.²⁵⁷ And contributions by international employers' and workers' organizations are said to be 'almost non-existent'.²⁵⁸ There is no more reliable indicator that labour unions, employers and other actors in civil society see no value in the mechanism than their virtual boycott of it.

While the Global Reports by the Director-General are certainly more substantive, they are much more in the form of analyses of the major issues and challenges than a review of the progress made by Member States as a result of a new set of obligations deriving from the Declaration.²⁵⁹

In brief, the follow-up arrangements are, as the UK Government warned, little more than a 'collection of fine words'. The irony is that the mistakes identified in 1994 by the ILO Director-General in relation to the 1976 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy have been repeated, albeit on a grand and expensive scale. He lamented that the Declaration's 'effectiveness . . . is limited to the extent that compliance is entirely voluntary; moreover, it does not provide for a supervisory system, properly speaking, calling only for interpretation machinery which rarely comes into play . . .'. But he also recognized that 'it would be very difficult to modify this system without upsetting the delicate balance on which it is based'.²⁶⁰

In brief, the follow-up has contributed to the 'privatization of enforcement',²⁶¹ since the ILO is essentially engaged in little more than a paper-shuffling exercise and any enforcement of the Declaration will only be undertaken by private actors, whether corporate or workers' groups.

5 Anticipating Criticisms

Before concluding, I will respond to several of the major criticisms that I expect might reasonably be levelled at the thesis presented in this article. They are: (a) that the CLS

²⁵⁶ *Ibid.*, para. 79.

²⁵⁷ *Ibid.*, para. 11.

²⁵⁸ *Ibid.*, para. 17.

²⁵⁹ The 2004 Global Report was: *Organizing for Social Justice: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Report of the Director-General to the 92nd Session of the International Labour Conference, 2004.

²⁶⁰ *Defending Values, Promoting Change*, *supra* note 18, at 65.

²⁶¹ Hepple, *supra* note 230, at 238 and 246.

track is complementary to the standards track and in no way seeks to undermine it; (b) legalistic approaches, such as those in the traditional labour standards regime, are unworkable in most developing countries; (c) the old standards regime was a failure and the new approach is the best alternative on offer; and (d) it is too early to judge the new regime a failure. These responses are likely, of course, to come from different sources and will not necessarily be consistent with one another.

A Complementarity

The first of the counter-arguments consists of a position which would probably be strongly defended by the ILO. It is that the flexibility and voluntarism of the Declaration are complementary to, and in no way a substitute for, the formal supervisory machinery which still exists. Far from being mutually exclusive, the two approaches should be seen as reinforcing one another. Supporters of this view would observe that the old reporting system remains largely intact, the roles of the Committee of Experts and of the Conference Committee have not been undermined in any way, and the principles of monitoring and supervision remain valid. And most importantly, they would point to the fact that the ILO launched, concurrently with its promotion of the Declaration, a major campaign to increase ratifications of the eight core conventions, and this campaign has yielded some impressive results. Convention No. 182, in particular, had achieved 150 ratifications by June 2004, in the course of less than five years and might potentially achieve universal ratification by the ILO's 177 Member States. Moreover, 103 Members have ratified all eight conventions, and an additional 30 have ratified seven of them.²⁶²

There are several responses to this criticism. First, the ratification statistics have to be viewed in perspective. For example, despite impressive numbers of ratifications of Conventions No. 87 and No. 98 on freedom of association and collective bargaining, about half of the world's workers are not protected by the two conventions. This is partly explained by the fact that the non-ratifying states include Brazil, China, India, Mexico and the United States.²⁶³ Second, the ratifications campaign has had the effect of reinforcing the primacy of the overly narrow 'core' issues and of confirming the second-level status of the remaining human rights and labour rights issues.

Third, it would be very difficult to argue that the parallel tracks approach is really taking place in relation to the many corporate and other voluntary codes of conduct, or to the proliferating number of regional and bilateral free trade agreements. To a very large extent, the core standards, or the 'principles' in the Declaration, are the only reference point in these agreements and the other arrangements within the ILO are increasingly irrelevant. States which have signed on to agreements with considerable fanfare and have thereby undertaken to do very little in concrete terms in relation to a limited range of four 'principles', are most unlikely to (continue to) devote much attention to their remaining obligations under other ILO treaties which have been deemed to be non-core or non-fundamental.

²⁶² International Labour Conference, *Provisional Record* 3, 92nd Session, 2004, at 3.

²⁶³ *Organizing for Social Justice*, *supra* note 259, at 23, para. 80.

Fourth, as various commentators have correctly observed,²⁶⁴ it is revealing to watch where the money is going in relation to the various labour rights arrangements. Within the ILO the Director-General has regularly made it clear that resources for the supervision of conventions and recommendations are dwindling at the same time as the demands on the system are increasing.²⁶⁵ Instead, the budgetary priority in the Organization clearly favours the Declaration and the soft promotional measures associated with it, notwithstanding formal statements to the contrary. Out of a total annual budget of around \$311m, less than \$20m is spent on the work of the ILO's supervisory bodies.²⁶⁶ Similarly, at the national level in the United States, it has been pointed out that in its 2004 budget request the Bush Administration sought only \$12m for the Department of Labor's international technical assistance programmes in relation to labour rights. Clearly considering this to be inadequate, Congress appropriated a total of \$99.5m, but this still represented a 26 per cent decrease from the previous year. For 2005 the Administration is seeking a total of \$18m, a reduction of 80 per cent.²⁶⁷

B *Legalism does not Work*

Another criticism is that the legalistic approach reflected in the pre-Declaration regime is simply not viable, especially in developing countries that do not have strongly developed governance structures, and that the CLS approach responds to the need for more malleable and adaptable approaches. There is in fact something to be said for these arguments, as acknowledged below.²⁶⁸ But the main response is that arguments such as these serve mainly to highlight one of the great contradictions involved in the emerging international trade and labour regimes. It is that the same governments and commentators who have pushed so hard and so effectively for a soft and flexible approach to labour rights, epitomized by the approach contained in the 1998 Declaration, are increasingly insisting that the other side of the balance sheet — the trade and investment provisions — must, in contrast, be hard and fast and should therefore take the force of enforceable treaty law with sanctions for non-performance.²⁶⁹

²⁶⁴ Elliott, *Labour Standards and the Free Trade Area of the Americas* (2003), WP 03–7 of the Institute for International Economics (Labour rights proponents need to pressure 'governments to adopt concrete, real plans of action for raising labor standards and to provide the financial resources to implement them', at 20.)

²⁶⁵ The success of the ratifications campaign 'has exposed the weaknesses in the ILO's capacity to administer and supervise the application of standards . . . and to provide up-to-date, relevant and timely advice . . .'. 'ILO Program Implementation 2002–03', ILO Doc. GB.289/PFA/10 (March 2004, at ix).

²⁶⁶ *ILO Programme Implementation 2002–03*, Report of the Director-General to the 92nd Session of the International Labour Conference, 2004, at xii and 21.

²⁶⁷ Human Rights Watch, 'US: Budget Proposal Shortchanges Labor Rights', 5 Feb 2004.

²⁶⁸ See *infra* section C.

²⁶⁹ I have suggested in another context that the proposals regularly put forward by Ernst-Ulrich Petersmann would have precisely this consequence, although he contests that characterization. See Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13 *EJIL* (2002) 815; and Petersmann, 'Taking Human Rights, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston', 13 *EJIL* (2002) 845.

The attempt to reach agreement within the OECD on a Multilateral Agreement on Investment (MAI), begun in 1995 and aborted three years later, involved a range of strong provisions designed to protect the rights and interests of foreign private investors in any state which was a party to the agreement. In response to the potentially significant impact of this approach on labour standards issues, several contentious proposals had been put forward. They included a reference to CLS in a non-binding preambular provision (the Declaration had not been adopted at that time and so no reference to it would have been possible), and an Annex containing the OECD Guidelines for Multinational Enterprises, while at the same time reiterating their wholly voluntary status. The only other relevant proposal was a provision calling upon states not to lower existing labour standards in order to attract investment.²⁷⁰ But even these very weak provisions were not able to attain consensus. A careful and informed assessment of these provisions from an environmental law perspective concluded that the voluntary codes relied upon would not have been adequate and that '[i]n order to truly "green" the MAI, or an instrument like it, [it would be necessary] to make binding much of the environmental language and suggestions in the Agreement.²⁷¹

While the abandonment of the MAI negotiations was hailed as a great success by labour rights and environmental activists,²⁷² a comparable initiative resurfaced at the WTO's Fourth Ministerial Meeting in Doha where it was agreed that negotiations would be taken up following the Fifth Ministerial to be held in 2004.²⁷³ If the resulting negotiations succeed in locking in investment guarantees which are reinforced by WTO sanctions but which contain nothing other than hortatory references to the 1998 ILO Declaration or to the concept of CLS in general, the inequality of treatment between labour rights and investment freedoms will be patent and the weaknesses of the CLS strategy will be thrown into stark relief. One possibility, not facilitated by current assumptions as to institutional competences, is that the ILO itself should be called upon to make proposals as to how best to ensure the protection of labour rights in the context of these negotiations. In the absence of such proposals or analyses, the international community perpetuates the bizarre (though perhaps not unintended)

²⁷⁰ Consolidated Text and Commentary, Negotiating Group on the MAI, Directorate for Financial, Fiscal and Enterprise Affairs, Org. for Econ. Cooperation and Dev., OECD Doc. DAFPE/MAI(97)1/REV2 (14 May 1997).

²⁷¹ Wickham, 'Toward a Green Multilateral Investment Framework: NAFTA and the Search for Models', 12 *Georgetown Int'l Env'l L. Rev.* (2000) 617, at 643–644.

²⁷² Egan and Levy, 'International Environmental Politics and the Internationalization of the State: The Cases of Climate Change and the Multilateral Agreement on Investment', in D. Stevis and V. J. Assetto (eds), *The International Political Economy of the Environment: Critical Perspectives*, 12 *IPE Yearbook* (2001) 63; Kobrin, 'The MAI and the Clash of Globalizations', 112 *For. Pol'y* (1998) 97; and Overbeek, 'Neoliberalism and the Regulation of Global Labor Mobility', 581 *Annals* (2002) 74, at 88 (The MAI should be rejected on the grounds that it is an effort to subordinate 'international labor markets to the neoliberal regimes of the WTO').

²⁷³ Doha WTO Ministerial Declaration, WTO Doc. WT/MIN(01)/DEC/1, 20 November 2001, para. 20: 'Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade'

situation of states calling in the ILO for more effective protection of labour rights, while those same states, this time wearing their WTO hats, prevent the ILO from contributing to a WTO debate which could have a dramatic impact upon the same labour rights.

C *The Alternatives to CLS are Worse*

The third response is that there was no alternative in the face of the forces of globalization and the early 1990s crisis of faith in labour standards but to move to a decentralized and voluntarist system. Convention-based labour standards proved to be too rigid in a world rendered infinitely flexible by the flows of capital and technology in a globalizing world. As a result, the argument runs, almost any attention to almost any labour standards is better than an over-ambitious approach which is strong on talk of enforcement but masks irrelevance or ineffectualness.

But if this is really the major argument in favour of the CLS approach, why has the old infrastructure not been discarded? Why is such assiduous lip service paid to the complementary nature of the two approaches? And most important of all, how will the new approach make up for the weaknesses of the old system? If the answer to the latter question is that it will mobilize large numbers of new actors who will work through voluntarist techniques such as self-identified and free-standing codes of conduct, why could these not have been undertaken within the standards framework? The answer to that question can only be that the standards themselves are no longer acceptable, that flexibility and universality demand much more open-ended approaches. But the circle of reasoning has thus been closed, because we are back to the question of why the old approach has not been openly rejected and explicitly replaced.

But this critique also raises another very important issue. Lest the concerns that I have expressed in this article be misunderstood as a plea for a return to the *status quo ante*, I should make it clear that in arguing in favour of a rights-based approach, in calling for the Declaration to be interpreted and applied in line with ILO jurisprudence, and in emphasizing the importance of meaningful monitoring, I am not suggesting a return to the 'old' system of ILO supervision. It is abundantly clear that this system is in need of major reforms, very few of which are really being contemplated at present. It needs to become more flexible. Various forms of decentralization, along with the mobilization of a much broader range of actors, are indispensable. The system needs to be more adaptable and capable of learning lessons from approaches which work and others which do not. Corporate and other codes need to be factored into the overall equation. And many of the anachronistic assumptions, and opaque ways of operating, of the Committee of Experts and the apparatus surrounding it need to be subjected to far-reaching reforms. For reasons of space, a detailed exposition of the type of reforms needed must wait for another day, although various commentators have begun to make useful suggestions in this regard.²⁷⁴

²⁷⁴ See e.g. Freeman and Elliott, *supra* note 188; and C. Rigby (ed.), *Monitoring International Labor Standards: National Legal Frameworks, Summary of a Workshop* (2003).

D *It is too Soon to Judge*

The final objection that bears noting in conclusion is one with which I would partly agree. It is that there is a large element of speculation inherent in the analysis put forward here and that it is still too early to predict how the new international regime will fare. But my contention is that despite the consistent reaffirmations of faith in labour standards and of an important role for the ILO, there is an increasingly large number of indicators pointing to a very different reality. In practice, voluntarism is not being reinforced or harnessed, detailed standards are being marginalized, and the very concept of labour rights is being jettisoned in favour of a nebulous concept of principles.

6 Conclusion: A Façade of Labour Rights, or a Reinvanized International Regime?

Despite the enthusiasm which has greeted the emerging international labour rights regime, some of its characteristics have the potential to undermine or even undo much of what has been achieved in this field in the course of the second half of the twentieth century. The regime is increasingly shaped by the 1998 ILO Declaration, and the pre-eminence which it accords to a limited core of four labour standards. In the past six years the Declaration and its standards have been invoked and relied upon in both regional and bilateral free trade agreements, often replacing more extensive lists of rights such as those used in the NAFTA and other older agreements. They have also been incorporated into, or provided the basis for, a wide range of labour-related provisions in soft law instruments such as the UN's Global Compact, the OECD Guidelines, and the ILO MNE Declaration, as well as underpinning the policies of the World Bank, the International Finance Corporation, and innumerable corporate and multi-stakeholder codes of conduct. One result is that in a great many contexts the term 'labour rights' has *de facto* become synonymous with the approach contained in the Declaration.

But the resulting regime has major flaws, and their potential significance is great. This is particularly so when such heavy reliance is placed upon the new regime and when the supposedly parallel regime of labour conventions is being marginalised as a result. The principal concerns identified above include: an excessive reliance on principles rather than rights, a system which invokes principles that are effectively undefined and have been deliberately cut free from their moorings in international law which in turn were based on many years of jurisprudential evolution, an ethos of voluntarism in relation to implementation and enforcement, combined with an unstructured and unaccountable decentralization of responsibility, and a willingness to accept soft 'promotionalism' as the bottom line. Rather than reiterating the grounds for these concerns, this conclusion will focus on the two most problematic dimensions — undefined standards, and promotional monitoring.

The lack of any definable content for the relevant principles is the key issue. Its significance is perhaps best illustrated by reference to recent statements made by some

of the leading actors in this saga. One of these is Edward Potter, Vice-Chairperson of the ILO Committee that drafted the Declaration, and head of the US Employers' delegation. Speaking on behalf of all of the Employers represented in the ILO, Potter has regularly insisted in annual ILO Conference debates that the 'principles' are '[d]ivorced of all the specific legal provisions of the Conventions'.²⁷⁵ They are, therefore, for all practical intents and purposes, undefined. By his reasoning, the non-discrimination 'principle', for example, cannot be defined or even further specified by reference to the many legal clarifications that have been worked out, in painstaking negotiations and on the basis of broad experience over many years. Instead, the principle is reduced to a hollow and hortatory statement of aspiration.

Potter's code word for efforts to invest the principles with some of the established conventional content is 'legalism', of which he accused the ILO in 2002. The following year, however, he congratulated the ILO for producing the 'most . . . non-legalistic' of all of the Global Reports.²⁷⁶ The upshot of this insistence on denuding the principles of any content is ideal, at least from an American perspective. To take the example of Convention No. 100 on non-discrimination, 160 other states are bound by the full force of the Convention and its jurisprudence. The United States, however, which has ratified only two of the eight core conventions, not including No. 100, is bound only by these undefined and supposedly content-free 'principles'.

But this process of eschewing 'legalism' and promoting 'principles' rather than defined labour rights will ultimately undermine both the ILO's and civil society's efforts to promote labour rights at least in so far as they are based upon the Declaration. This is best exemplified by recent comments relating to the principle of freedom of association. Thus, the group of Expert-Advisers appointed by the ILO in relation to the Declaration state in their 2004 report:

Most countries assert general respect for the principle. But when the restrictions are considered (e.g. exclusion of categories of employers and workers, denying the right of organizations to elaborate their own statutes and to international affiliation), it soon becomes apparent that there are so many exceptions that these rapidly empty the principle of its full potential.²⁷⁷

²⁷⁵ In 2003, in a debate on the non-discrimination principle (which is linked to Conventions No. 100 and No. 111), he stated:

The governmental commitment encompasses the scope of these two Conventions without the detailed legal obligations It is clear that Members have no obligations as concerns the specific provisions of the Conventions they have not ratified. Moreover, the Declaration is no wider in scope than the fundamental Conventions themselves.

Under the [non-discrimination] principle, what the Declaration seeks to promote is a policy environment that seeks to eliminate discrimination over a period of time if it cannot be accomplished immediately. Divorced of all the specific legal provisions of the Conventions, this is the central policy objective of the Declaration's non-discrimination principle. (International Labour Conference, *Provisional Record 14*, 91st Session, 2003, at 14/1)...Thus, the principle concerning equal remuneration under the Declaration is not the definition under Convention No. 100, except in those 160 countries that have ratified the Convention. (*Ibid.*, at 14/2).

For a statement almost identical to the one noted above, but made in relation to child labour, see International Labour Conference, *Provisional Record 13*, 90th Session, 2002, at 13/1–13/2.

²⁷⁶ International Labour Conference, *Provisional Record 14*, 91st Session, 2003, at 14/2.

²⁷⁷ ILO Doc. GB.289/4, March 2004, at 17–18, para. 77.

In other words, unless the jurisprudential *acquis* relating to permissible and impermissible restrictions is somehow imported into the standards applied under the rubric of the 'principle', the latter will have no content and will signal no limitations upon governmental actions. This risk is borne out in a recent attempt by proponents of voluntary industry standards to measure compliance with Declaration principles. They note that the definition of the principle of freedom of association is difficult 'to reduce to measurable formulas' and that most monitoring efforts have paid little attention to it:

The problem tends to be most acute where there is most resistance to interpretation of workers' rights in line with international legal standards. Some code-of-conduct standards, for example, call for 'freedom of association' in general terms without specifying the right to form and join trade unions, even though the right to form and join trade unions is explicitly at the heart of the international standard.²⁷⁸

It is hardly surprising then that the term CLS is said to have 'come to mean different things to different individuals and entities'.²⁷⁹ While some commentators have viewed the Declaration as an attempt to articulate 'obligations that are finite and concrete rather than expansive and diffuse',²⁸⁰ the opposite has so far been the case and there is a very real risk that the process of severing all links with established standards, a position advocated so forcefully and openly by Potter and not being resisted with any urgency by other actors,²⁸¹ will serve to undermine the entire regime.

The second especially troubling aspect of the emerging international regime concerns the new implementation arrangements that are being put in place. At the same time, the more traditional mechanisms are neither being seriously reformed, nor adequately funded, to cope with many of the new challenges. At the international level the failed implementation strategies reflected in instruments such as the ILO MNE Principles and the OECD Guidelines have virtually been replicated, and little effort has been made (except by an increasingly hobbled ILO secretariat) to give any substance at all to the much touted Follow-up mechanism. In the context of regional free trade agreements, the labour arrangements pioneered in the NAFTA, which are widely considered to have been a failure, are busily being reproduced in a wide range of new bilateral and regional agreements, and even then in a form which is demonstrably weaker in key respects. On the basis of these developments it is difficult to avoid the conclusion that a façade of labour rights protections is being painstakingly constructed in order to defuse the pressure from those concerned about the erosion of workers' rights as a result of some aspects of globalization. Meanwhile, efforts to strengthen the international trade law regime continue apace.

This imbalance is unsustainable and entirely inconsistent with the rhetorical

²⁷⁸ *Yardsticks for Workers Rights*, *supra* note 240.

²⁷⁹ Panagariya, *supra* note 72, at 11.

²⁸⁰ Thomas, 'Should the World Trade Organization Incorporate Labor and Environmental Standards?', 61 *Wash & Lee L. Rev.* (2004) 347, at 376.

²⁸¹ Immediately after Potter's statement at the 2002 Conference, the head of the Workers' delegations (Mr Brett) congratulated him on a fine speech and said "'Hear, hear" to every comment' that Potter had made. International Labour Conference, *Provisional Record* 13, 90th Session, 2002, at 13/3.

commitment of most governments to ensuring that labour rights are protected in the face of globalization and increasing trade liberalization. If the predictions made above as to the longer-term evolution of the regime are to be proven wrong, a different approach is urgently required. The measures which will need to be taken in the immediate future must address at least some of the specific shortcomings identified. They include: anchoring the principles firmly in the standards developed within the convention regime, bringing the Follow-up mechanism up to scratch in terms of reporting on what is actually occurring in the world, extending monitoring under the Declaration to include an empirical overview of practice under the bilateral and regional mechanisms which have invoked ILO principles and the Declaration itself, and funding the commitment to workers' rights at a level which bespeaks an authentic commitment to the principles and rights. Such measures would all go a very long way towards avoiding what otherwise looks likely to result in the creation of a hollow façade of labour rights.