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Bridging the Divide: An Alternative Approach to International Labor Rights After the Battle of Seattle

Stephen F. Diamond*

ABSTRACT

The massive protest by labor, human rights, and environmental activists at the Ministerial Conference of the World Trade Organization in Seattle in late 1999 was a singular event in global trade politics. It represented a major setback for the proponents of free trade and for the "globalization" process itself. It reflected, and has now influenced, the contours of American domestic politics as well. At the heart of the Seattle events was a new coalition between trade unions, led by the American AFL-CIO, and a wide range of protest groups and non-governmental organizations. This new coalition represents a potent force but also remains divided on important issues. This article explores one of these key issues – international labor rights. It suggests that the current strategy advocating an international labor rights regime must be changed if the new coalition is to move its agenda forward. It suggests an alternative approach to labor issues in light of the current structure of the global economy.

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I. INTRODUCTION

The demonstrations in Seattle against the World Trade Organization ("WTO") in late 1999 tore a major hole in what Günter Grass recently called the "certificate of infallibility" carried by the global capitalist system since its triumph over Stalinism in the early nineties.[1] The Seattle protests were followed by similar demonstrations in Davos, Switzerland at meetings of the elite privately-organized World Economic Forum; in Washington, D.C. at the spring 2000 meetings of the International Monetary Fund ("IMF") and World Bank; and in Genoa at the meeting of the G-8. Meanwhile, the summer 2000 trial of French farmers' union activist Jose Bove for his part in the physical destruction of a McDonald's restaurant construction site was greeted by a celebratory rally on its opening day attended by more than fifteen thousand demonstrators in a small town in rural southern France.[2]

Back in the United States, the protests against the IMF and World Bank were followed by a bitter political battle led by the AFL-CIO, America's central labor body. The battle targeted the granting of Permanent Normal Trading Relations ("PNTR") by the United States to the People's Republic of China, a crucial step in accession by China to the WTO. Just as the smoke from this battle cleared, radical consumer activist and trade union supporter Ralph Nader emerged as a candidate for president of the United States as the nominee of the Green Party. Nader quickly secured the backing of two independent labor unions (the thirty thousand member California Nurses Association and the somewhat larger United Electrical Workers) and the interest of two major affiliates of the AFL-CIO (the United Auto Workers and the International Brotherhood of Teamsters). Nader had been a major figure in the Seattle events.

These developments are part of an emerging movement against global capitalism or at least against those "globalizing" dimensions of capitalism, with little or no precedent in recent political history.[3] Even the usually staid

1. Gunter Grass & Pierre Bourdieu, *A Literature From Below*, THE NATION, July 2, 2000, at 26. "Since the Communist hierarchies fell apart, capitalism has come to believe that it can do anything, that it has escaped all control. Its polar opposite has defaulted. The rare remaining responsible capitalists who call for prudence do so because they realize that they have lost their sense of direction, that the neoliberal system is now repeating the errors of Communism by creating its own dogma, its own certificate of infallibility."
Id. at 26.

2. John Lloyd, *The Trial of Jose Bove*, FIN. TIMES, July 1, 2000, at 9.

3. The concept "globalization" remains controversial and difficult to pinpoint. For the purposes of this article I consider globalization to represent the expansion of cross-border flows of capital in both its fictitious and physical forms (i.e., investment and trade) that has been so marked in the last

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Financial Times paid close attention to these events, noting their resemblance to the early anti-abolitionist movement of the 19th century.[4] At the heart of this new movement is a nascent coalition of forces that includes trade unions, environmental activists, human rights groups, and a range of non-governmental organizations concerned about the impact of international capitalism on developing countries. The movement forced a radical departure from the planned agenda of the governments, multinational corporations, and international institutions assembled in Seattle for what was thought would be the start of a new round of trade negotiations within the new WTO framework. At the center of this alternative agenda has been a push by some for the institutionalization of enforceable labor standards within the evolving WTO administrative apparatus. In one of the many moments of high drama in Seattle, the evening before his arrival in that city for the WTO meetings, United States President Bill Clinton granted an exclusive interview to the Washington correspondent of the major Seattle newspaper.[5] In that interview, Clinton stated his support for the incorporation of core labor standards into trade agreements tied to potential trade sanctions against violators of the standards.[6] This position was a major step beyond the official position of his administration that had until then supported only the establishment of a WTO Working Group to study the question of labor standards and trade agreements.[7] His comments came at the end of a day of massive civil disobedience actions that had effectively

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twenty years. In addition to the increase in flows, the ability to locate first class production facilities in low cost areas around the globe, a process facilitated by financial and technological developments, gives a new significance to capital mobility and threatens long-standing social and economic arrangements together with the political and institutional frameworks that accompanied those arrangements. For a generally favorable view of the impact of globalization, see THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION (2000). For critical views from the left, see PETER GOWAN, THE GLOBAL GAMBLE: WASHINGTON'S FAUSTIAN BID FOR WORLD DOMINANCE (1999) and WILLIAM GREIDER, ONE WORLD READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM (1998). For a critical assessment from the right, see JOHN GRAY, FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM (1998).

4. Max Wilkinson, *The changing face of protest: Idealists or subversives?*, FIN. TIMES, July 31, 1999, at 12.

5. Michael Paulson, *Clinton Says He Will Support Trade Sanctions for Worker Abuse*, SEATTLE POST-INTELLIGENCER, Dec. 1, 1999, at A1.

6. *Id.*

7. D. Pruzin, *United States Submits Proposal for WTO Working Group on Labor*, DAILY LABOR REP., Nov. 2, 1999, 211 DLR A-4. Only a few weeks before, United States Trade Representative Charlene Barshefsky explained that the "U.S. proposal did not cover the enforcement of labor rights with trade sanctions." David Jessup, *Update on WTO Labor Working Group*, NEW ECONOMY INFORMATION SERVICE, *at* http:// www.newecon.org (November 5, 1999) (last visited Dec. 8, 2001). They are "not on the table," she stated in a November 1, 1999 press conference. *Id.* The United States-proposed WTO working group is "very limited" and "quite focused" on analyzing such issues as job growth and trade, or the relationship between market opening and living standards, she said. *Id.* In a statement issued by the United States Government in advance of the Seattle meeting, it stated that "[t]he objective of the Working Group in the first two years will be to produce a report on its discussions for consideration by WTO Members at the Fourth Ministerial Conference." *Id.*

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prevented the opening session of the WTO Conference from taking place. Early in the morning that day, some five to ten thousand "direct action" and other demonstrators had physically, though peacefully, blockaded the entrances to the hall where the opening ceremonies had been scheduled to take place. Nearby, the AFL-CIO, joined by trade union representatives from around the world, led a rally and march of as many as forty thousand workers and students through the streets of Seattle. The confluence of labor and civil disobedience activists made it physically and politically impossible to convene the opening session. The Seattle police, backed by federal agencies and the State of Washington's National Guard, made an initial morning assault on the demonstrators with pepper spray, rubber bullets, and wooden clubs, but they then backed off using nightfall to impose a curfew with a threat to arrest anyone caught on foot in the downtown Seattle area after 7 p.m. Under the circumstances, Clinton's remarks that evening had an electrifying effect, seen by organized labor as an important concession, but by delegates to the WTO as a confusing and frustrating move made for domestic political reasons. At the very least, however, the comments made clear to all observers the significance of labor rights in the ongoing debate over the nature of the new global economy.

Despite the apparent unity of the Seattle demonstrators, however, the question of labor standards and their enforcement is the source of an important divide in the new movement. This divide began to widen in the months after the Seattle events. In the PNTR/China debate, for example, key figures in the Seattle actions broke with the U.S. labor movement over its approach to labor rights issues.[8] In addition, other important activists began to change their approach to the institutionalization of labor rights in the WTO framework. This article will explore this emerging divide, attempt to provide an explanation for it, and argue that the original position presented by organized labor in Seattle, while occasionally clouded by the constraints of American labor politics, remains consistent with principles of international law and represents an important contribution to the new movement. Nonetheless, this chapter will suggest that the "international labor rights" ("ILR") strategy of organized labor represents an incomplete response to the emerging stage of global capitalism. The ILR strategy alone

8. See for example the divergent view presented in a recent issue of *New Labor Forum* by, on the one hand, the heads of two of the country's most important labor education centers attacking the AFL-CIO for its anti-PNTR campaign, and, on the other, a defense of the campaign by two leading in-house AFL-CIO intellectuals. Kent Wong & Elaine Bernard, *Labor's Mistaken Anti-China Campaign*, NEW LABOR FORUM, (Fall/Winter 2000), at 19; Mark Levinson & Thea Lee, *Why Labor Made the Right Decision*, NEW LABOR FORUM (Fall/Winter 2000), *at* http://www.qc.edu/newlaborforum/ (last visited Dec. 8, 2001).

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will be unable to close the divisions opening up within the emerging movement. Instead, I suggest that the strategy should be broadened to include specific policies aimed at immediately raising the wages, reducing hours and improving the working conditions of workers in developing countries. Part II of this article describes and critiques the emergence of what has become the standard agenda at the heart of the ILR strategy, the narrower set of "core" labor standards built around the efforts of the International Labor Organization and other institutions. Part III explores how these "core" labor standards became the basis of the push by organized labor for the institution of labor rights within the WTO framework. Part IV examines the divisions that emerged during the Seattle events and after in the debate over China. In conclusion, Part V argues that the labor movement should break with the "core" consensus behind the ILR strategy and offer an alternative program to workers in the developed and developing world who have expressed growing opposition to the new global economy. It is here that I make the link between immediate improvements in the material conditions of developing country workers and the political problems that are faced within the post-Seattle coalition environment.

II. THE CURRENT INTERNATIONAL LABOR RIGHTS FRAMEWORK

A. The International Labor Organization ("ILO")

International labor rights have been a secure, if constrained, part of the global state system since the end of World War I. The ILO retains the dubious honor of being the only surviving institution of the League of Nations era that followed World War I. Since that time, the ILO has become an integrated and leading institution within the United Nations system.[9] It relies on a tripartite structure that includes representatives of government, business, and organized labor. Its focus has been on the development of labor standards that become Conventions to be enshrined in the domestic

9. International Labor Organization, *at* http://www.ilo.org/public/english/about/history.htm (last visited Dec. 8, 2001). The ILO was designed by a Labor Commission established by the Peace Conference that convened in 1919, first in Paris and then at Versailles. *Id.* The Commission was chaired by Samuel Gompers, head of the American Federation of Labor. *Id.* It was seen as a necessary step for humanitarian, political and economic reasons. *Id.* The first of these may be obvious given the poor working conditions that persisted in the new industrial era. *Id.* The second motivation, though, emerged as part of an explicit effort to avoid social unrest, even revolution, through the establishment of a tripartite organization that addressed labor conditions. *Id.* Finally, the economic rationale made explicit a concern still echoed today to avoid the so-called "race to the bottom" whereby certain countries are able to use relatively cheaper labor and minimal health and safety standards to their comparative advantage. *Id.* The Preamble to the Constitution of the ILO, adopted by the Peace Conference, states that "the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries." *Id.* The ILO is now a Specialized Agency of the United Nations. *Id.*

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law of ILO members.[10] The juridical impact of this process has been somewhat less salient than its normative effect. A set of so-called "core" labor standards has emerged over decades of research, debate, and both legal and union activism.[11] These standards are now widely recognized to include the right of association (i.e., the right to form and join trade unions), the right to free choice of employment, the right to equal remuneration for work of equal value, and the right to just and favorable conditions of work, including a prohibition against forced labor, discrimination, and the use of child labor.[12]

B. The Human Rights Regime

Beyond the ILO, support in international law for labor rights can also be found within the wider human rights regime that is now a recognized part of the global system. For many who are active in efforts to strengthen the international human rights regime, the long and widely recognized experience of the ILO is considered a model to emulate and a base upon which to construct that deeper regime. At an intellectual level, it is widely understood that labor rights must be a constituent part of a society that recognizes human rights. As one analyst has written:

10. *Id.* "The ILO's standards take the form of international labor Conventions and Recommendations. The ILO's Conventions are international treaties, subject to ratification by ILO Member States. Its Recommendations are non-binding instruments, typically dealing with the same subjects as Conventions, which set out guidelines that can orient national policy and action. Both forms are intended to have a concrete impact on working conditions and practices in every country of the world." *Id.*

11. HENRY FRUNDT, TRADE CONDITIONS AND LABOR RIGHTS: U.S. INITIATIVES, DOMINICAN AND CENTRAL AMERICAN RESPONSES 41 (Gainesville Univ. Press of Florida 1998). One analyst speaks of a "consensus" around certain core labor rights among business, labor and government. *Id.*

12. *Id.* There are now more than 180 ILO Conventions and more than 185 Recommendations. Formally, the core or "fundamental" ILO Conventions include the following: Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); Right to Organize and Collective Bargaining Convention, 1949 (No. 98); Forced Labor Convention, 1930 (No. 29); Abolition of Forced Labor Convention, 1957 (No. 105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Equal Remuneration Convention, 1951 (No. 100); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labor Convention, 1999 (No. 182). *Id.* There are 174 ILO Member States. None of the above Conventions have received unanimous ratification, though a large majority of states have ratified all of the above but for those related to Child Labor. *Id. See generally,* V. LEARY, *The Paradox of Workers' Rights as Human Rights in* LANCE A. COMPA AND STEPHEN F. DIAMOND, HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE (University of Pennsylvania, 1996) [hereinafter COMPA & DIAMOND] (discussing the relative weaknesses and strengths of these core standards).

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> The basic building blocks of an active and democratic labor movement are the right to organize, the right to bargain collectively, and the right to strike. These rights run parallel to basic political rights found in general social life - the right to assembly, the right to freedom of speech, and the right to petition the government for the redress of grievances.[13]

Thus, no human rights regime is imaginable that does not include basic labor rights; a society that forces its workers to leave their human rights at the door of their employer is not a free and just society.[14] In turn, there is no democratic labor movement that believes that it can fairly represent its members' interests without reliance on basic human rights.[15] Thus, it is no surprise that the major documents of international human rights, such as the Universal Declaration of Human Rights, include references to specific labor rights.[16]

C. Regional Trade Initiatives

The emergence of regional inter-state agreements, usually begun as trade agreements, has offered further opportunity to legitimate labor rights within the global system. The most developed of such efforts is, of course, the European Union ("EU") where a fifty-year effort to build a secure place for labor and social protections in the emerging European institutional environment culminated in the 1992 Maastricht Social Chapter that covers a dozen major areas of labor rights. Efforts to place a similar charter into the North America Free Trade Agreement ("NAFTA") between Canada, the United States and Mexico, however, were a near-complete failure.[17] Instead, a so-called "side agreement" to NAFTA included the establishment of a tri-national Commission for Labor Co-operation that monitors a limited range of labor issues.[18] The nature of NAFTA may once again be brought up for public debate in light of the recent election in Mexico of opposition leader Vicente Fox. In the first few days after his election, Fox had already called

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13. STEPHEN F. DIAMOND, *Labor Rights in the Global Economy: A Case Study of the North American Free Trade Agreement* in COMPA & DIAMOND (1996) [hereinafter Diamond, *Nafta Case Study*].

14. See LEARY, *supra* note 12.

15. *Id.*

16. *Id.*

17. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., H.R. Doc. No. 103-159 (1994).

18. North American Agreement on Labor Cooperation, ("NAALC") (Sept. 14, 1993) 32 I.L.M. 1499 (1993). The NAALC entered into force on January 1, 1994. *See* 19 U.S.C. § 3311(b) (2000) (enabling each member country to monitor enforcement by other member countries of their respective labor laws).

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for reconsideration of NAFTA and the possible development of a European style common market. Despite its current limits, because the provisions stipulated in NAFTA allowed workers organizations in one of the three countries to bring charges on behalf of workers in a second country, a new dynamic was created that allowed some unusual cross-border solidarity efforts to emerge. Thus, among the handful of charges brought since the passage of NAFTA have been those of the International Brotherhood of Teamsters and the United Electrical Workers Union, both American, against Honeywell and General Electric for anti-union efforts in their *maquiladora* plants in northern Mexico. In turn, a Mexican union brought charges against the United States-based operations of Sprint, the long distance telephone company, regarding its treatment of Hispanic workers in its *La Conexión* facility near San Francisco, California.[19] The overall assessment of these efforts, however, is profoundly pessimistic. In the words of one AFL-CIO representative, "We have meetings, we have consultations; but the workers themselves and the redress for their grievances is never really achieved to the point where the workers get something out of this entire process."[20]

The side agreement process may have received a fatal blow this summer when violence erupted at a public seminar on labor rights sponsored by the United States and Mexican Labor Departments held in Tijuana, just across the United States-Mexican border from San Diego, California. The seminar had been organized as a partial remedy on behalf of efforts to organize an independent union at Han Young, an auto parts supplier to Korean conglomerate Hyundai. The leaders of the union were kicked, beaten, and run out of the seminar by supporters of a pro-government union and student group in full view of the representatives of the respective Labor Departments who did nothing to protect the unionists and continued the seminar in their absence.[21]

A series of other United States laws also link labor rights with the international trade regime. The Caribbean Basin Initiative ("CBI") has been in place since 1983.[22] When considering whether to grant eligible countries

19. *See* U.S. Department of Labor, *Public Report of Review of NAO Submission No. 940001 (Honeywell) and NAO Submission No. 940002 (General Electric)* and *Mexico NAO Report on Public Submission 9501 (Sprint)*. For an analysis of the inherent structural tensions in the NAFTA side agreement on labor, see Diamond, *Nafta Case Study*, *supra* note 13.

20. Dave Goodman, *Recent Developments: The North American Agreement on Labor Cooperation: Linking Labor Standards and Rights to Trade Agreements*, 12 AM. U.J. INT'L L. & POL'Y 815, 870 (1997).

21. David Bacon, *Labor agreement's final blow: Strikers beaten at NAFTA hearing*, S.F. BAY GUARDIAN, July 26, 2000.

22. Caribbean Basin Economic Recovery Act of 1983, 22 I.L.M. 1381, 1383 (1983).

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duty-free treatment for their exports into the huge United States market, it requires the President of the United States to take into account "the degree to which workers in such country are afforded reasonable workplace conditions and enjoy the right to organize and bargain collectively."[23] The CBI was later amended to make it mandatory for the President to deny a country duty-free status if "such country has not or is not taking steps to afford internationally recognized rights to workers in the country."[24] A wider application of this approach is found in the United States Generalized System of Preferences ("GSP"). The GSP program sets conditions for the granting of duty-free status for more than three thousand products that are exported to the United States by more than 140 countries.[25] Amendments made to GSP in 1984 prohibit the designation of any country as eligible for GSP benefits if that country is not "taking steps to afford internationally recognized worker rights to its workers (including those in export processing zones)."[26] The recognized international worker rights for both CBI and GSP are nearly identical to the core ILO standards described above: freedom of association; the right to organize and bargain collectively; a prohibition of any form of forced or compulsory labor; the establishment of a minimum age for the employment of children; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[27]

Two other United States initiatives are relevant to the discussion here. In 1988, the United States Congress enacted the Omnibus Trade Act of 1988 that included a provision that made a multilateral agreement to link worker rights and trade a principal United States negotiating objective in the then current round of GATT multilateral trade negotiations.[28] Finally, in December, 1994, the Congress directed the President in its Implementing Bill for GATT to seek the establishment in GATT and in its successor institution, the WTO, of a working party to:

23. *Id.*

24. 19 U.S.C. § 2702 (2000); *see also* FRUNDT, *supra* note 11, (discussing a valuable study of the impact of labor rights provisions in the CBI).

25. Trade Act of 1974, 19 U.S.C. § 2461 (1999).

26. Trade and Tariff Act of 1984, United States, 24 INT'L LEGAL MATERIALS 823 (1984).

27. Trade Act of 1974, 19 U.S.C. § 2467 (1999).

28. Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §§ 2901-10013 (1988).

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> (1) explore the linkage between international trade and internationally recognized worker rights . . . taking into account differences in the level of development among countries; (2) examine the effects on international trade of the systematic denial of such rights; (3) consider ways to address such effects; and(4) develop methods to co-ordinate the work program of the working party with the International Labor Organization.[29]

These two initiatives explain the statutory basis of the position that the United States took towards the WTO and labor rights in Seattle. Each of these was strongly lobbied for by the American trade union movement and numerous human rights and other non-governmental organizations. Absent such pressure, given the changing role of collective bargaining and trade unionism in American economic life and the disappearance of the need to push "free" trade unions as an alternative to Communism, it is likely that the official United States position in global trade talks would have been very different. In addition, the defeat of labor objectives in NAFTA created a deep fissure within the American Democratic Party between its working class base and its New Democrat pro-business wing.[30] The Clinton Administration needed some way to indicate its support for labor goals, however ineffectual.

D. Independent Labor Rights Efforts

In addition to the ILO, the human rights movement, and regional initiatives, a range of other activities to promote international labor standards have gained ground in recent years. These include efforts to obligate multinational companies to adhere to codes of conduct,[31] trade union pressure on the OECD countries to obligate businesses to respect human rights and "contribute" to the elimination of child labor and forced labor,[32] and suits in American courts under the Alien Tort Statute which allows

29. Uruguay Round Trade Agreements, Working Party on Worker Rights, 19 U.S.C. § 3551 (2000).

30. *See generally*, JOHN R. MACARTHUR JR., THE SELLING OF "FREE TRADE": NAFTA, WASHINGTON, AND THE SUBVERSION OF AMERICAN DEMOCRACY (2000).

31. *See* L. Compa & T. Darricarrere Hinchliffe, *Private Labor Rights Enforcement Through Corporate Codes of Conduct*, *in* COMPA & DIAMOND, *supra* note 12.

32. *See Industrial Countries Agree to New Guidelines on Multinational Business*, FIN. TIMES, June 27, 2000; *see also* OECD Guidelines on Multinational Enterprise *at* http://www.oecd.org/daf/investment/guidelines (last visited Dec. 8, 2001).

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recovery for injuries that are the result of violations of international law.[33] At the January 2000 World Economic Forum in Davos, Switzerland, United Nations Secretary-General Kofi Annan announced a nine point program to develop a Global Compact among business, labor and government in support of human rights, labor standards, and environmental protection.[34]

Similar efforts are underway at the initiative of labor organizations. In the wake of the Seattle events, the AFL-CIO announced a four point Campaign for Global Fairness that calls for an education program among its members on the nature of the new global economy, stronger human rights and labor standards, cross-border organizing to help unions in developing countries, and the adoption of the International Confederation of Free Trade Unions ("ICFTU") Code of Practice by multinational corporations.[35] At the spring, 2000 World Congress of the ICFTU, a unanimous resolution was passed by union leaders from 145 countries calling for enforceable labor standards in the WTO among a set of measures as part of the launching of an effort to secure fairness in the global economy. Support for the resolution was expressed by trade unionists from Brazil, Malaysia, China, and India. "Guarding workers' rights is not protectionism," stated Amanda Villatoro, Secretary of Politics and Education for the *Organizacion Regional InterAmerican de Trabajadores* in Brazil.[36] "The global economy needs fair rules that protect workers' interests as much as corporate profits. Huge companies constantly call for law to protect intellectual property rights, but are opposed to laws to protect working men and women. That is just wrong."[37]

This effort by the international trade union movement was followed by an attempt to raise similar issues at the meeting of the G-8 in Genoa. Though lost in the haze of tear gas, the Trade Union Advisory Committee ("TUAC") to the Organization of Economic Cooperation and Development ("OECD") presented a statement in conjunction with union representatives from Russia and several developing nations on the question of globalization, debt relief, and labor rights. John Sweeney, President of the AFL-CIO and

33. 28 U.S.C. § 1350 (2000). "[A] court applying the [Alien Tort Statute] must determine 'whether there is an applicable norm of international law, whether it is recognized by the United States, what its status is, and whether it has been violated.'" Burma v. Unocal, Inc., 176 F.R.D. 329, 345 (C.D. Cal. 1997) (quoting *In re* Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 502 (9th Cir. 1992)); *see also* John Doe I v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).

34. *See generally*, The Global Compact, *at* http://www.unglobalcompact.com (last visited Dec. 8, 2001).

35. *See* http://www.aflcio.org/publ/estatements/feb2000/globaires.htm (last visited Dec. 8, 2001).

36. *Union Leaders From 145 Different Countries Seek Enforceable Labor Standards in Trade Pacts*, 70 DAILY LABOR REP. (BNA), April 11, 2000, at A-1.

37. *Id.*; *see also* Press Release, AFL-CIO, Union Leaders from 145 Developing and Industrial Countries Launch New Campaign Calling for Enforceable Workers Rights in Trade Agreements and International Economic Institutions (April 7, 2000) (on file with author).

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TUAC, introduced the Global Unions Statement to Italian Prime Minister Silvio Berlusconi. In his opening remarks, Sweeney warned of the "growing crisis of democracy" and of a "global system that remains opaque, remote and unaccountable .... [A] system increasingly viewed as an illegitimate imposition by powerful private interests that undermines the common good."[38] Calling for reforms he said: "People across the world are calling for a new internationalism, one that protects the common good, not the private interests. One that protects global concerns and holds corporations accountable not one that frees up global corporations and lays waste to the environment."[39] Included in his statement was a call for the promotion of core labor standards.[40]

One of the most promising developments has been the emergence on American university campuses of a movement against sweatshops. These groups have forced dozens of colleges and universities to commit to not marketing products such as college sweatshirts that are made with sweatshop labor. The pressure from students has been so successful that even in the face of the loss of major financial support from multinationals like Nike, universities have been unwilling to back away from commitments to the pro-worker activists.[41] Although each of these efforts may produce modest results on the ground in Third World countries, they are, nonetheless, indicative of the change in the political climate so openly evidenced by the Seattle events. They also indicate the potential outlines of a new broader political perspective on the global economy that could take on greater significance in the near future.

E. Constraints

A major stumbling block in the international labor rights framework, however, is the lack of enforceability. In and of themselves, ILO Conventions do not have the force of law.[42] Unless mirrored by Member

38. John J. Sweeney, President of TUAC, Comments to G-8 Heads of State (July 19, 2001) *at* http://www.aflcio.org/publ/speech2001/sp0719.htm (last visited Dec. 8, 2001).

39. *Id.*

40. *See id.*

41. *E.g., Nike Terminates Contract With Brown University After University Seeks Compliance With Code*, 64 DAILY LABOR REP. (BNA), April 3, 2000, at A-2; *see also. e.g., Nike, University of Michigan End Apparel Licensing Relationship*, 84 DAILY LABOR REP. (BNA), May 1, 2000, at A-6.

42. As Leary has pointed out, "norms" "are binding in international law either through international agreement or as customary international law." FRUNDT, *supra* note 11, at 31. Thus, even in the absence of ratification by some individual state, it is conceivable that a widely accepted norm, such as freedom of association, is enforceable as customary international law. It remains hotly debated, though, whether even such "core" standards have achieved that status. *See* P. Alston,

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States in the form of domestic legislation or unless considered to be self-executing, the ILO Conventions do not form the basis of a cause of action in any jurisdiction.[43] The ILO does, however, maintain its own monitoring process which allows both Member States and business or labor organizations to file a complaint or make a representation that a Member State is in violation of a Convention which that State has ratified.[44] This process can trigger an ILO inquiry that can lead to recommendations or a finding of a violation of the applicable Convention.[45] The process is a long and complex one, however, with no sanction available, other than moral condemnation, against the violating State. It is this process that has given rise to the concept of the "Campaign of Shame": the suggestion that the public scrutiny triggered by an ILO investigation can cause such acute embarrassment to a Member State that it may be forced to comply with the Convention. As an example, it was with some fanfare in the summer of 2000 that the ILO announced an "unprecedented resolution under the never-before invoked Article 33 of the ILO Constitution" against the dictatorship in Myanmar (Burma).[46] After years of receiving and investigating complaints of the use of forced labor by the ten-year old military dictatorship in that country, the ILO "called upon Myanmar to 'take concrete action' to implement the recommendations of a 1998 Commission of Inquiry, which found that resort to forced labor in the country was 'widespread and systematic.'"[47]

Labor Rights Provisions in U.S. Trade Law: 'Aggressive Unilateralism'?, *in* COMPA & DIAMOND, *supra* note 12.

43. Self-executing treaties, once ratified, do not require the further step of legislation implementing the requirements of the treaty into domestic law. Warren v. United States, 340 U.S. 523, 526 (1951). Thus, in one of the rare instances where the ILO is even mentioned in American jurisprudence, an ILO Convention on maritime health and safety was found to be "operative by virtue of the general maritime law and . . . no Act of Congress is necessary to give [these provisions of the Convention] force." *Id.* This was an example of the self-execution of portions of an ILO Convention into American law. Unfortunately, the United States has ratified only two of the eight Conventions that make up the "core" standards: No. 105 on Abolition of Forced Labor and the recently enacted No. 182 on Worst Forms of Child Labor. The latter was signed into law by President Clinton during the WTO meetings in Seattle.

44. *See* Const. of the Int. Labor Org., June 28, 1919, Art. 24, *available at* http://www.ilo.org/public/english/about/iloconst/htm (last visited Dec. 8, 2001) (allowing a national or international labor or employees organization to make "representations" that a Member State has failed to apply an ILO Convention it had previously ratified); *see also id.* at Art. 26 (allowing formal complaints against a Member State and providing a separate mechanism to supervise the Conventions on the freedom of association).

45. *See id.*

46. *See id.* at Art. 33 (providing that the ILO may take "such action as it may deem wise and expedient to secure compliance" with the recommendations of a Commission of Inquiry or the findings of the International Court of Justice). The International Court of Justice can hear the appeal by a Member State from a Commission of Inquiry finding, but it cannot take any independent enforcement action. It serves as a last-gap defense step for a Member State found in violation.

47. Press Release, International Labor Conference Adopts Resolution Targeting Forced Labor in Myanmar (Burma) (June 4, 2000) (on file with author). Sanctions had already been imposed by the

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But what would the Burmese military have to look forward to if it continues its abusive labor practices? The ILO would review the case at following year's annual International Labor Conference, it would recommend to ILO constituents that they review their relations with Burma and take appropriate measures, etc.[48] And yet:

> [T]his is the first time in the ILO's eighty-one-year history that the Conference has had recourse to measures under Article 33, a procedure that is designed to be invoked only in the event of a country failing to carry out the recommendations of an ILO Commission of Inquiry, which is itself a procedure reserved for grave and persistent violations of international labor standards.[49]

Thus, in the face of this most grave and unprecedented behavior the Member State need only fear yet more reviews, recommendations, and conference talk.[50] Indeed, a year later the issue was the subject of a Special Sitting at the annual ILO Conference in Geneva, where union representatives pointed out that very little had changed as a result of the Article 33 step.[51]

Nonetheless, this process can, on occasion, lead to substantive change. During the early years of the Sandinista government in Nicaragua, for example, it was ILO pressure, in part, that led to the lifting of restrictions on independent union organization.[52] Perhaps of greater significance, however, is an understanding of the research and investigative material gathered by the ILO process that underlies its limited legal powers. This research is

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European Union and the United States. Council Regulation (EC) No. 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanman. Prohibiting New Investment in Burma, Exec. Order No. 13047, 62 FR 28301, 1997.

48. Const. of the Inter. Labor Org., *supra* note 44.

49. *Id.*

50. Some have argued that the step taken by the ILO to ask its constituents to raise the Burma issue with *other* international agencies is an unusual step with some additional teeth. *Labor calls for Burmese (Myanmar) sanctions: ILO alleges forced labor, divided on timeline for action*, REUTERS, June 12, 2000. However, the point here is that these remain normative recommendations not legal duties. And, of course, there is nothing in the ILO Constitution nor the governing documents of other international institutions that obligates any further action, despite the clear finding of a violation of the ILO Convention on forced labor.

51. International Labor Conference, Special sitting concerning the application by Myanmar of the Forced Labour Convention, 1930 (No. 29), in application of the resolution adopted by the International Labour Conference at its 88th (2000) Session, 89th Sess., pt. 3 *at* http://www.ilo.org/public/english/standards/relm/ilc/ilc89/pdf/pr-19-3.pdf (last visited Dec. 8, 2001).

52. Stephen F. Diamond, Class and Power in Revolutionary Nicaragua: The Rise and Decline of the Sandinista Movement, (1990) (unpublished doctoral dissertation, University of London, United Kingdom) (on file with author).

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substantive, detailed, and objective. It can be of tremendous value to other actors in situations like Burma. Democracy activists, union organizers, and human rights lawyers can rely on this material for their own forms of intervention.[53]

This is one of the fundamental values of the ILO and one well worth preserving. The ILO is able to place credible and experienced monitors in conflict-laden environments and produce sober and objective accounts of actual events.[54] The norms that it applies are the result of years of discussion and analysis by all relevant actors and thus when invoked are rarely subject to attack. This points not only to the ILO's significance as an international body but also to its inherent limitations. It is not a prosecutorial entity. It has no financial or other incentives at hand to enforce its norms. But when it acts, its word (and its word is, in the end, its only form of action) has weight, perhaps precisely because of its juridical weakness.

The tension in the ILO regime is caught effectively in the following comment by British Labor MP, and former international union official, Denis MacShane:

> But all these instruments that purport to declare international labor rights, and in particular, the ILO group of conventions, cut little ice with employers or unions. Indeed, they are not known to many workers precisely because they are just that - fine resolutions, helpful benchmarks and useful sources for moral condemnation. They remain a negation of law because they have no means of enforcement. I have drafted too many complaints to the ILO myself to undervalue the usefulness of having some court to hear labor complaints, nor do I dismiss the cumulative effect on a country's civil servants or leaders of coming under ILO criticism. The arguments of ASEAN (Association of South East Asian Nations) labor ministers for a derogation from ILO standards is an example of how the ILO does stand for something. Anything that is criticized with such passion by anti-labor spokespersons must be useful.[55]

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53. The ILO decision on Burma made immediate headlines in Asia and became the basis of a shareholders' intervention against a multinational mining company with operations in Burma. Editorial, *Laboring over Burma Relations*, BANGKOK POST, June 26, 2000, *available at* 2000 UK 23460539.

54. This author was able to make significant use of ILO monitoring efforts during his doctoral research on labor rights under the Sandinista regime in Nicaragua during the 1980s. *See* Diamond, *supra* note 52, at 283-331 (describing the period that relies on ILO monitoring).

55. Denis MacShane, *Human Rights and Labor Rights: A European Perspective,* COMPA & DIAMOND, *supra* note 12, at 54.

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It is this apparent paradox in the ILO process that strengthens the case made by those in favor of using the WTO as a locus for enforcing the core labor standards developed so painstakingly by the ILO and its constituents.

A second major constraint on the existing labor rights regime is in the very notion of a "core" set of labor standards. This core has emerged as an accommodation to the politics of the new global economy. The core standards steer carefully away from promoting substantive improvements in wages, hours, and working conditions. Only the undeniably inhumane practices of forced labor or child labor are sanctioned. However, there is little argument heard for even those minimal standards that are taken for granted within the developed economies of Europe and North America. Thus, there is no active push to add a reduction in working hours or a genuinely adequate minimum wage to the core, though these concepts have been a part of developed country industrial relations for many decades. In fact, many developing countries do have statutes that require a minimum wage and maximum hours. Alas, these are largely paper standards with little or no respect for their actual enforcement, and the alleged pressures of "industrial catch-up" are used by political actors in those regimes to justify the repression of efforts by independent unions to enforce those laws that do exist. Where an argument about the "demands" of national development fails, batons, tear gas, prison, and bullets are not far behind.[56] In fact, as I will argue below, there is a credible argument that the push for significant improvements in wages, hours and working conditions, which can only be done effectively by independent and democratic trade unions, can be a crucial variable in progressive economic development. The separation of the core standards from substantive standards does have a logic that is related to the achievement of substantive gains.[57] It is also consistent with traditional arguments in law about the importance of process as a check on the abuse of power. The compromise that organized labor has been willing to live with in the emerging debate about labor rights in the global economy rests on this distinction. It suggests that a kind of two step evolution can take place, whereby nations can first allow the right to organize and engage in collective

56. It is worth recalling one classic example, the repression of the Democracy Movement in China in June 1989. The repression came about only after it became clear that the initial efforts by students were impacting a broad range of workers, culminating in a march in Beijing of more than one million people. Efforts during that period to form autonomous and democratic unions were brutally suppressed. Leaders of that effort were jailed or forced into hiding and exile. Dozens of those jailed union activists remain in prison today. *See generally,* Anita Chang & Jonathan Unger, *China After Tiananmen: It's a Whole New Class Struggle*, THE NATION, Jan. 22, 1990, at 79; *see also* various issues of the CHINA LABOR BULLETIN, Hong Kong.

57. *See* COMPA & DIAMOND, *supra* note 12.

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bargaining, and then allow those processes to produce the substantive result appropriate for each nation's stage of development. It was on this basis, for example, that one legal scholar criticized the relatively weak side agreements to NAFTA, yet advocated labor's participation in that process.[58] However, it is increasingly clear that this approach does not work. In fact, in the new global economy, generating the confidence and skills for organizing among the unorganized, whether in the Mexican *maquila* zone, or the Export Processing Zones of Asia, or among the huge numbers of low paid and abused workers in the United States who are without union representation, requires substantive argument about material economic and social progress.

III. FROM BERLIN TO SEATTLE: THE EMERGENCE OF THE INTERNATIONAL LABOR RIGHTS STRATEGY

The patchwork structure and normative orientation of existing labor rights provisions led advocates of an international labor rights regime to shift their attention in the 1990s to the newly established WTO. These activists took seriously the comments of the first Director-General of the WTO, Renato Ruggiero, when he suggested that the WTO was "writing the economic constitution of a single global economy."[59] If that were literally true, it was thought, then social protections should be, to borrow the words of one of the architects of the post-World War II global system, "present at the creation."[60] Although there was some nominal support by the United States for labor rights as part of GATT in the Bush Administration, it was only with the election of Bill Clinton in 1992 that the issue took on genuine salience.

Clinton represented the so-called New Democrat wing of the Democratic Party and, as such, would be expected to find ways to move the party away from its traditional base in organized labor. That, in fact, was the overall direction of the Clinton presidency. Clinton won office by campaigning against a Republican Administration that had been unable, despite foreign policy successes, to push the economy forward. A decade or more of debt built up from the efforts of the Reagan Administration to outspend the Soviet bloc in new weapons systems proved to be a serious

58. *Id.*

59. "We are no longer writing the rules of interaction among separate national economies. We are writing the constitution of a single global economy." Press Release, WTO Director-General to the United Nations Conference on Trade and Development ("UNCTAD") Trade and Development Board, TAD/INF/2687 (Oct. 8, 1996).

60. The title of Dean Acheson's autobiography is PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT (1987), a reference to the famed diplomat's central role in the post-World War II era establishment of the Bretton Woods institutions, including the International Monetary Fund, the World Bank and the proposed International Trade Organization. The latter was rejected by an isolationist American Congress and thus the somewhat weaker GATT emerged. The WTO is seen by some as a continuation of the original post-war vision.

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drag on the economic recovery from the crisis of the late 70s and early 80s. Only Wall Street prospered in a binge of leveraged buy-outs and junk bond offerings. Thus, President Bush could take partial credit for overseeing the collapse of the Berlin Wall, but could do nothing about the 1992 Clinton campaign's successful attempt to portray domestic economic problems as, in part, the result of that very same foreign policy. Clinton adviser James Carville famously crowed, "It's the economy, stupid!" and that mantra helped sweep Clinton and Gore into office.[61] Under those circumstances, Clinton understood that he had won office on an appeal to American workers, yet he fully intended to press ahead with support for measures to enhance the global operations of American corporations, even if it meant an open battle with organized labor.[62] What emerged was a particular sleight of hand. In international forums, Clinton was more than happy to have his Trade Representative or Labor Secretary call for the linkage of labor rights to trade agreements at this or that international conference, but when it mattered these calls amounted to little more than empty promises. The trade deals would get done, with or without labor rights, mostly without, of course. Hence NAFTA and the conclusion of the Uruguay Round of GATT that gave birth to the WTO, each with only nominal consideration of labor rights concerns. American labor leaders found themselves in an increasingly difficult situation. They had helped elect Clinton - some forty percent of the delegates to the quadrennial convention of the American Democratic Party are labor union representatives. Organized labor was pleased when Clinton nominated Robert Reich, a long-time personal friend and advisor, as his Labor Secretary. However, Reich's efforts to push a moderately pro-worker agenda in the Clinton Administration were quickly killed in the face of the pro-Wall Street advice of the far more powerful economic advisor and later Treasury Secretary, Robert Rubin. Reich was effectively silent during the NAFTA campaign.[63] A continuing decline in union membership hampered the ability of the AFL-CIO to put serious pressure on the Clinton Administration. When Reich left the Administration in 1996, Clinton

61. MACARTHUR, *supra* note 30, at 155.

62. "The political problem is that our [Democratic Party] base hates [NAFTA]," stated Tom Nides, chief of staff to Clinton's first United States Trade Representative Mickey Kantor, and that was a base of people "who believe they helped you get elected. You have a President who kind of ran against Washington . . . and then you're trying to pass a major piece of legislation that your base - . . . labor unions, Midwestern Democrats, industrial Democrats, the majority of African-American members [of Congress], women - were opposed to. That's a pretty significant challenge." *Id.* at 176.

63. *Id.* at 231-32.

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replaced him with a figure with as many ties to business as to labor, despite the objections of the AFL-CIO and pro-labor congressional representatives.[64]

The end of the Cold War had also meant that the traditional role for labor in United States foreign policy had disappeared overnight. For nearly fifty years, American trade unions had been considered a constituent part of American foreign affairs. The labor movement was seen as a crucial counterweight to the emergence of more radical alternatives in Europe and the developing world. This was, in a sense, a continuation of the original purposes behind the ILO.[65] Thus, the international promotion of the "benefits" of American-style collective bargaining became an accepted norm of United States foreign policy. Labor officers were placed in American embassies around the world, ready and willing to aid non-Communist labor organizations.[66] This effort was very much a mixed bag, with a great deal of evidence that these organizations often served as front groups for covert CIA activity, and much more often providing political cover for moderate groups that would favor pro-American political efforts in the subject country.[67] At home, labor very much felt that it had a "seat at the table" of the major decision-making institutions of the country. The fall of the Berlin Wall signaled the definitive end of this era. In the words of one left-wing critic of American labor:

> With the breakup of the Soviet bloc, and the consequent unraveling of its international labor arm ... the U.S. labor institutes [government financed arms of the AFL-CIO that operate abroad] are facing an evaporating enemy. The concept of promoting "free" (i.e. anticommunist and pro-U.S.) unions is rapidly becoming outdated and irrelevant.[68]

America now unabashedly stood for globalization, portrayed as the inevitable spread of the Anglo-American capitalist model with an emphasis on shareholder value, a market for corporate control, and efficient markets for capital as the centerpieces of economic development.[69] There would

64. Deborah Billings, *Reich says Clinton may name new labor secretary as early as December 13*, 240 DAILY LABOR REP., Dec. 13, 1996, at D4.

65. MACARTHUR, *supra* note 30.

66. A very much-weakened version of the same approach continues today in the form of the Advisory Committee on Labor Diplomacy, housed in the Bureau of Democracy, Human Rights and Labor in the Department of State. The Committee is chaired by Tom Donahue, the former head of the AFL-CIO.

67. BETH SIMS, WORKERS OF THE WORLD UNDERMINED: AMERICAN LABOR'S ROLE IN FOREIGN POLICY (1992).

68. *Id.* at 97.

69. In a 1998 speech at the Moscow University of International Relations, President Clinton delivered a particularly blatant encomium on this theme to his Russian audience. *See* The White House, Office of the Press Secretary, Remarks to the Next Generation of Russian Leaders (Sept. 1, 1998) ("no nation, rich or poor, democratic or authoritarian, can escape the fundamental economic

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appear to be no place in that framework for a vigorous labor movement.[70] In this new era, the Cold War legacy of the AFL-CIO has come back to haunt them. Third world governments adroitly exploit the explicit alliance between American labor and United States foreign policy, even though there is now far more to divide these two forces than to unite them. As international economist Thea Lee stated:

> Why is there so much resistance among the developing countries to this issue [of linking trade and labor rights]? There are some good reasons. The first is that the U.S. Government and the U.S. labor movement have not, in the past decades, covered themselves with glory when it comes to trade *vis-à-vis* our southern partners. I think that the U.S. labor movement . . . certainly has a history of virulent anti-Communist interventions in the south, which has not always made us friends.[71]

These views have been echoed by the AFL-CIO's Secretary-Treasurer, Richard Trumka: "For too many years, ideology has been the chief export of the AFL-CIO when it comes to international affairs. We've changed that and now the chief export and import of the department [of International Affairs] will be a far more precious and relevant commodity, one called 'international solidarity.'"[72] It is in this context that the "international labor

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imperatives of the global market").

70. This possibility has been recognized for some time by the international labor movement, since, of course, it is a development that affects labor organizations in all countries. A report issued by the Executive Board of the International Confederation of Free Trade Unions in 1993 stated that "the current threat to [trade union] rights stands out as an unprecedented attack upon" organized labor, "unprecedented in its extent, in the variety of forms in which it appears, and in the persuasive nature of its ideological underpinnings and legitimation (sic)." "Viewed globally," the ICFTU continues, "the offensive is aimed at putting a definitive end to trade unionism." International Confederation of Free Trade Unions, "Trade Union Rights Under Threat," Report of the Executive Board, Brussels, ICFTU (Dec. 1-3, 1993).

71. Thea Lee, *Presentation by Thea Lee, Economic Policy Institute*, 12 AM. U. J. INT'L L. & POL'Y 857 (1997).

72. Richard Trumka, Speech at Labor and the Global Economy Conference (Nov. 21, 1996) *available at* http://www.aflcio.org/publ/speech1996/sp1121.htm (last visited Dec. 8, 2001). This approach is now reflected in the emphasis on solidarity in AFL-CIO campaigns such as the newly launched Campaign for Global Fairness. Thus, in announcing this Campaign in February 2000, President Sweeney promised the Federation "will escalate [its] efforts to stand with [its] sisters and brothers around the globe . . . to support a broader development agenda that can create equitable, sustainable, and democratic economic growth." John J. Sweeney, Remarks at Press Conference on Campaign for Global Fairness (Feb. 16, 2000), *available at* http://www.aflcio.org/publ/press2000/pr012161.htm (last visited Dec. 8, 2001). A genuine effort to re-orient the AFL-CIO's international policy appears to be underway under the leadership of the Federation's first post-Cold War president, John Sweeney. Speaking at a Trades Union Congress meeting in London in 1996,

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rights" strategy to link such rights with the trade regime emerged. It has met great resistance from developing nations at the WTO.[73] The initial agreement that established the WTO as the successor to GATT was silent on labor issues. A joint United States-European push for the establishment of a formal Working Party on the issue was successfully rebuffed when the signing ceremony took place in Marrakech, Morocco, in April 1994.[74] This occurred in the face of threats from the United States to refuse to sign the agreement.[75] As noted above, the President was under a statutory mandate to lobby for a Working Party but lobbying pressure continued, despite opposition from the developing world, and American Congressional Republicans and business groups. In December 1996, the first Ministerial Conference of the new WTO took place in Singapore.[76] There, despite aggressive opposition from the ASEAN alliance, including New Zealand and Australia[77], the final Ministerial Declaration did secure a "Commitment" from WTO members "to the observance of internationally recognized core

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Sweeney called for the international labor movement "to engage in a seamless garment of activism." He has carried out a reorganization of the Federation's international bodies, combining them into the newly formed American Center for International Labor Solidarity. The Federation's International Affairs Committee recommended that the Center "be funded without government supervision, foreign or domestic." Currently, the Center receives most of its financial backing from the United States Agency for International Development and the National Endowment for Democracy. James B. Parks, *International focus shifts to organizing and solidarity, available at* http://www.aflcio.org/publ/newsonline/96aug23/eciod.htm (Dec. 23, 1996) (last visited Dec. 8, 2001).

73. Many developing countries were still stung by the decline in power, once the WTO had been established, of such UN institutions as UNCTAD and the Center on Transnational Corporations. UNCTAD operates on a one country, one vote structure, while the WTO operates on "consensus," which has, until Seattle, effectively rested control of the organization in the major economic powers. Walden Bello, *Time to Lead, Time to Challenge the WTO, in* KEVIN DANAHER & ROGER BURBACH, GLOBALIZE THIS! THE BATTLE AGAINST THE WORLD TRADE ORGANIZATION AND CORPORATE RULE (2000).

74. A WTO Working Party is the second lowest organizational form in the WTO hierarchy. Only Working Groups are lower than Parties. Above them stand Committees, Councils, Plurilaterals, and then the Ministerial level General Council (which also serves as the Trade Policy Review Body and the final level of appeal for dispute settlement). Only the Ministerial Conference stands over the General Council. *See* http://www.wto.org (last visited Dec. 8, 2001).

75. *U.S. May Refuse to Sign GATT Accord Over Labor Rights Issues, Official Says*, 1994 DAILY LABOR REP. 65, Apr. 6, 1994, at D10.

76. Opposition was so intense, that at one point the director general of the ILO was formally "disinvited" from the WTO meetings. His mere presence was thought to lend credibility to the concept of a link between labor issues and trade. John Parry, *ILO Director Michael Hansenne "Disinvited" From World Trade Organization Meeting*, 234 DAILY LABOR REP. A-1, Dec. 5, 1996, at D7.

77. The Australian position has been the subject of heated debate. The Opposition Labor Party has been facing increasing pressure from its trade union base to impose "social tariffs" as a means of combating imports made with cheap, non-union labor. *See* Brad Norington, *Free Trade Stand Puts Beazley at War with Unions*, SYDNEY MORNING HERALD, June 28, 2000, at 1, *available at* http://www.smh.com.au; Paul Robinson (last visited Dec. 8, 2001); *Unions attack Beazely on tariffs*, THE AGE, June 28, 2000, *available at* http://www.theage.com.au (last visited Dec. 8, 2001); and S. Long and C. Martin, *Union leaders Unveil New Agenda*, FIN. REV., June 26, 2000.

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labor standards."[78] However, the ILO was recognized as "the competent body to set and deal with these standards." The commitment does "affirm [the Member States] support for its work in promoting them." However, it offers two important "outs": "[W]e reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question." Thus, we have a highly contradictory statement that leaves little resolved.[79]

These final "outs" are direct attacks on the effort to achieve a globally recognized international labor rights regime. "Protectionist purposes" are nowhere defined, though they are obviously aimed, in part, at the kinds of efforts undertaken by organized labor to protect their members' jobs. This would seem to contradict the longstanding principle in American labor law that unions must "fairly represent" the interests of their members.[80] In fact, the whole edifice of American collective bargaining is built upon an adversarial argument between labor and management. Thus, no self-respecting union leader in the American garment, auto, or steel industry, much less one who intends to remain a union leader, has any alternative but to "protect" his or her members' interests, arguably in any arena in which those interests are at stake. Perhaps more significantly for the development of consistent principles in international law, it seems contradictory to attempt to exempt the use of low wages as a "comparative advantage," when it is the very reverse principle that undergirded the founding of the ILO.[81]

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78. Singapore Ministerial Declaration, Dec. 13, 1996, ¶ 4, *reprinted in* 36 INT'L LEGAL MATERIALS 218, 221 (Jan. 1997) (reproduced from World Trade Organization Doc. WT/MIN(96)/DEC/).

79. The tensions that the language causes are reflected in the record of discussions held by WTO Member States in the form of its Trade Policy Review Body. There, the EU and the United States regularly query certain Member States about their compliance with core labor standards. Just as regularly, the target State will bat such questions away with the standard comment that the ILO, not the WTO, is the appropriate forum for such a discussion. Occasionally another Member State, usually from the developing world, will come to the rescue. *See, e.g.*, Press Release, World Trade Organization, Trade Policy Reviews: First Press Release - Bangladesh (May 1, 2000), *available at* http://www.wto.org/english/tratop_e/tpr_e/tp132_e.htm (last visited Dec. 8, 2001) (where India comes to the rescue of Bangladesh after a verbal assault from the European Union).

80. Vaca v. Sipes, 386 U.S. 171, 177 (1967). "Under this doctrine, the [union's] statutory authority to represent all members . . . includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* (quoting Humphrey v. Moore, 375 U.S. 335, 342 (1963)).

81. *See* Wong & Bernard, *supra* note 8; Levinson & Lee, *supra* note 8. Unfortunately, the source of the wording used by the WTO is the ILO itself. Its 1998 Declaration on Fundamental Principles and Rights at Work uses identical language on the comparative advantage question. Declaration on Fundamental Principles and Rights at Work, International Labor Conference, 86th Sess. (June 1998),

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There is perhaps one saving grace in the Commitment: in theory, the concept of labor rights, other than that related to some kind of global minimum wage, has now been legitimized within one of the world's leading international economic institutions by every Member State. Thus, the arguments of free trade economists against such linkage should be silenced once and for all. All that should be left is the question of the appropriate institutional means of enforcement. In the words of the ICFTU, "[t]he challenge before the international trading community now is to devise procedures to pressure the minority of countries which violate core labor standards to live up to their commitment."[82]

IV. THE "BATTLE OF SEATTLE" AND BEYOND

Under these ambiguous legal circumstances, it should not have been a huge surprise that conflict would rein in Seattle. In fact, in the weeks leading up to the planned Ministerial Conference, the press was filled with reports not only of the planned demonstrations but also of the inability of Member States to even fix an agenda for the conference. Of course, none of the participants, including Member States, NGOs or the trade union movement, could have anticipated the unusual events that actually unfolded. Certainly the Member States were quite unprepared to deal with the independent actions launched outside the official meeting rooms, in both the streets but also in a myriad of seminars, conferences, rallies, and debates that turned downtown Seattle into a massive week-long teach-in on the international economy.

Since the breakdown in late 1999, however, it has become clear that among those demonstrators concerned about the labor rights issue were two distinct camps with very different agendas. Each had its own reasons for criticizing the WTO. For the AFL-CIO and its supporters among students and intellectuals, Seattle represented an opportunity to express growing frustration with the pace and structure of the international labor rights regime. Their official call was for the implementation of the well-established United States position in favor of a Working Party on Worker Rights. They were backed in this effort by the ICFTU, which scheduled its annual Executive Board meeting in Seattle at the same time as the WTO in order to press the case. Thus, the AFL-CIO could legitimately argue that its demands had the backing of labor leaders from more than one hundred countries. Many of these leaders came from developing countries and some

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available at http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm (last visited Dec. 8, 2001).

82. International Confederation of Free Trade Unions, A New Strategy for Trade and Development, Nov. 1999, at 3.

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appeared as speakers at the huge public rally the AFL-CIO organized on Tuesday, November 30.

The AFL-CIO was also openly angry with the Clinton Administration for its surprise announcement just weeks before Seattle that it had reached agreement with the People's Republic of China on its accession to the WTO. This came as a shock to labor. The AFL-CIO thought that the question of China's entry into the WTO was "off the table" until after the 2000 presidential elections and, as a result, felt relatively confident in its decision to endorse Vice-President Al Gore in his campaign to succeed Clinton.[83] China made clear, however, that labor rights were a "deal breaker" for them. In addition, because the WTO operates by consensus, it was certain that unless the AFL-CIO could defeat China's bid through domestic political action in the United States, ILR strategy would have reached a dead end.

Many of the thousands of rank and file trade unionists from across North America and the world who paid their own way to Seattle might have thought that among the many other thousands of anti-WTO activists they met *en route* and in the streets, they would find unqualified support in their efforts to secure the core labor standards that had been at the heart of the international system for nearly a century. In fact, the two major forces within the non-labor protest groups were firmly anti-globalization but also either anti-labor rights or quite ambiguous about the labor rights strategy.

The unambiguously anti-ILR protest groups were largely part of the United States-based International Forum on Globalization ("IFG"). The IFG includes a wide array of NGOs from both the developed and developing world, but no representatives from trade unions. The inner workings of the IFG are not known to the outside world, but the positions of many of its affiliates can be readily discerned.[84] One of the most active is the Third

83. The Auto Workers, the Teamsters, and the Steelworkers each withheld a decision on the endorsement, despite pressure from the AFL-CIO leadership. The Steelworkers subsequently endorsed Gore, but that was before Seattle and before the China announcement. They later expressed some doubts about their decision. The Auto Workers first stated that they were considering an endorsement of Ralph Nader, but later backed Gore. The Teamsters leader Jimmy Hoffa, Jr., appeared publicly with Ralph Nader and, while stopping short of an endorsement, issued a call that Nader be included in the publicly televised debates with the major presidential candidates, Gore and George W. Bush. After the major party conventions, the Teamsters announced their support for Gore.

84. One clear hint about the IFG perspective comes in a preliminary report on the WTO prepared by a Task Force that it sponsors. The preliminary report was issued in advance of the Seattle events and the final report, promised for June 2000, has yet to be released. Participants on the task force include Walden Bello (Focus on the Global South), John Cavanagh (Institute for Policy Studies), Martin Khor (Third World Network), and Lori Wallach (Public Citizen). No representatives from the trade union movement are part of the Task Force. The preliminary report calls for "respect" for international labor rights but when it comes to enforceable standards it includes only a prohibition on

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World Network ("TWN"), led by Martin Khor, and based in Malaysia, an authoritarian regime where unions face significant constraints in representing their members and organizing unorganized workers.[85] Malaysia, for example, not only has not ratified the ILO Conventions on Forced Labor it has, along with its sister authoritarian state of Singapore, affirmatively denounced them.[86] Both Singapore and Malaysia have come to the defense of the Burmese military dictatorship in international forums. Yet it is from Malaysia, that the TWN publishes its magazine *Third World Resurgence*, in which one can find a kind of glee that the Seattle events fell apart, not because of what that meant for the advancement of human rights, but because it meant that the push for labor and environmental protections coming from the "North" had been *defeated.* Thus, Chakravarthi Raghavan writes in a post-Seattle issue of the magazine:

> The Seattle meeting ended in failure when [among other factors] developing nations *refused to be cowed* - by some of the street protests and by the U.S. administration - and said "no" to labor and environmental standards being linked to trade rights and obligations and open to "sanctions." (emphasis added)[87]

Raghavan goes on to suggest, absurdly, that the AFL-CIO rally and march was actually stage managed by the Clinton Administration:

> U.S. media reports indicated that the Clinton White House had given support to a controlled "street protest" by organized labor and some of the "environment" groups in order to "persuade" the conference to accept U.S. "demands" for labor and environment standards at the WTO, but lost control when other movements of civil society staged their own protests, and delegates refused to yield.

In fact, the Clinton statement to the Seattle press in favor of enforceable labor rights apparently took even his senior staff by complete surprise and threw them into great confusion. This kind of politics has led another well-known intellectual in this camp, Walden Bello, to call for an attempt by nations of the "South" to revive the powers of UNCTAD, precisely because

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forced labor. There is no mention of incorporating labor rights in the WTO. *Beyond the WTO: Alternatives to Economic Globalization*, PRELIM. REP. BY TASK FORCE OF THE INTERNATIONAL FORUM ON GLOBALIZATION (Nov. 26, 1999).

85. 1999 Country Rep. on Human Rights Practices, Malaysia, Bureau of Democracy, Human Rights and Labor (February 25, 2000).

86. Ratifications of the Fundamental Human Rights Conventions by country in Asia & Pacific, ILOLEX, July 9, 2000, *at* http://ilolex.ilo.ch:1567/public/english/docs/declAS.htm (last visited Dec. 8, 2001).

87. 112/113 *Third World Resurgence*, Dec. 99-Jan. 2000.

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UNCTAD can be controlled by Third World governments and is already on record against a linkage between labor standards and trade.[88]

It may not be a major surprise to see a revival of neo-Third Worldism among longstanding advocates of exhausted national liberation strategies like Khor and Bello, but their apparent influence through the IFG on debate in the United States did cause what even these activists will surely come to realize was an "unintended consequence." The AFL-CIO stood almost alone in the effort to prevent the granting of PNTR to China. This was not because of a racist or nationalist prejudice against China or Chinese citizens, though in the heat of debate, there were mild echoes of this viewpoint among a small minority in organized labor. Rather American labor had no illusions about the Clinton-Gore global strategy and the crucial role that China plays in that strategy. That was why they had fought so hard earlier in 1999 to prevent an accession agreement with China. The AFL-CIO understood that the surest route to an established labor rights regime in the WTO was to win that regime prior to China's accession and then condition China's accession on acceptance of that regime. However, instead of joining in this campaign, several key American-based NGOs moved in a different direction, towards the neo-Third Worldism of the IFG, Khor, and Bello.

A key defector, for example, was the Global Trade Watch group affiliated with the Ralph Nader-founded organization, Public Citizen. Its well-known leader is trade activist and lawyer, Lori Wallach. Wallach had been a crucial player in previous campaigns to defeat the Multilateral Agreement on Investments and United States Presidential "fast track" authority that vests significant power in the executive branch of the government on trade legislation. But soon after Seattle, Wallach began a campaign to win support for a statement on the WTO that made an explicit commitment to pursue labor rights protection *outside* of the WTO. An open letter, "'WTO - Shrink or Sink!' The Turn Around Agenda," was placed on the Public Citizen website with a call for signatories.[89] Among those to sign? Third World Network from Malaysia. Publicly, Global Trade Watch opposed PNTR, and Joan Claybrook, the head of its parent entity, Public Citizen, spoke at an AFL-CIO rally on Capitol Hill. But nowhere was there to be seen the kind of vigorous campaign that had earned Wallach a cover photo in the very establishment journal *Foreign Policy* immediately after the

88. *Supra* note 29. *See also* N. Thaitawat, *UNCTAD Conference - Hopes world trade tensions will ease at Bangkok meeting*, BANGKOK POST, Dec. 11, 1999.

89. *Available at* http://www.citizen.org/pctrade/gattwto/ShrinkSink/shrinksink.htm (last visited Dec. 8, 2001).

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Seattle events.[90] The approach of Public Citizen and Global Trade Watch soon became the norm in the NGO milieu during the China debate. The San Francisco-based Global Exchange, for example, a key force in the organization of the civil disobedience actions in Seattle, debated entering the anti-PNTR campaign internally and then decided against it. However, they, too, made a facial effort to oppose PNTR on their website. When their co-founder Kevin Danaher was asked why they had not entered the campaign, he stated that he was opposed to the very existence of the WTO and therefore did not want to oppose or support the membership of a particular state.[91] He could not explain, however, how he expected to dismantle the WTO unless he entered such campaigns. Finally, as one more example, the left-leaning Institute for Policy Studies in Washington, D.C. issued a highly qualified statement in opposition to PNTR, noting that the communist regime in China deserved credit for its many social and economic achievements over the past several decades that are now under attack by the WTO and globalization.[92] The statement did not mention the massacre of democracy activists on Tiananmen Square in 1989 nor the strike wave among Chinese workers that has taken place in recent months.[93]

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90. The Spring 2000 issue cover of FOREIGN POLICY asked "Why is This Woman Smiling?" next to a photo of Wallach. The answer: "Because she just beat up the WTO in Seattle, that's why." The editorial board of FOREIGN POLICY includes such mainstream pro-free trade figures as C. Fred Bergsten, Donald F. McHenry, and Joseph S. Nye and is published by the Carnegie Endowment for International Peace in Washington, D.C.

91. Interview with author, Nov. 15, 2000.

92. "Tariffs collected on imports have been a major source of the revenues used to support China's social welfare system. WTO membership will reduce these revenues . . . .'China used to be able to say with some validity that while their system did not protect individual liberties, it did provide for social and economic rights better than a free market economy such as the United States. Now, increasingly, the Chinese system combines the worst features of capitalism and socialism.'" S. Anderson, J. Cavanagh, & Bama Athreya, *Don't Strengthen the WTO by Admitting China*, 4 THE PROGRESSIVE RESPONSE, No. 19, May 4, 2000. This is the kind of argument that was so familiar in the Cold War era used by sympathizers with Stalinism to justify the alleged benefits of that system. For another, even more egregiously pro-Chinese regime example, *see* W. Bello & A. Mittal, *Dangerous Liaisons: Progressives, The Right, and the Anti-China Trade Campaign*, 6 FOOD FIRST, No. 1, Institute for Food and Development Policy (2000).

93. To his credit, John Cavanagh and his co-workers at least understood the impact on the WTO of allowing China to accede:

> We do not support the permanent normalization of trade relations with China at this time for the same reasons that we do not support any efforts to strengthen the current trade and investment institutions without explicitly addressing social and environmental concerns. The massive protests in Seattle against the WTO, as well as recent protests against the World Bank and International Monetary Fund in Washington, D.C., have only underscored the widespread public rejection of the trade and investment liberalization agenda.

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V. CONCLUSION: MOVING BEYOND THE CORE

Despite a fierce effort by the American labor movement, the campaign against PNTR for China went down to defeat. Had they won, however, the WTO would have been under significant pressure to take a sizeable step towards the creation of an enforceable labor rights regime. What many of the NGO and pro-Third World activists did not appear to understand was that had the AFL-CIO succeeded, labor rights would have been taken out of the hand of an individual state, the United States, and placed firmly within the hands of a multilateral organization. Thus, if the developing world governments and their sympathizers like Bello and Khor wish to throw the charge of "protectionism" at the labor movement, they must explain how such an institutional arrangement would be consistent with that charge. Certainly they could argue that given the "consensus" nature of decision-making at the WTO the large powers would still be in a position to dominate implementation of such a regime. However, the labor movement is itself sympathetic to calls to reform the decision-making process and make that process transparent and publicly accountable.

The labor movement has often had to go it alone in battles for basic civil liberties. If that is now the case in the battle for an international labor rights regime which, alone, can give workers in the developing *and* developed countries the weapons they need to establish genuinely democratic and equitable societies, it will mean that labor must itself acquire an understanding of the new economic forces that have done so much damage to its members over the last twenty years.[94] A crucial misstep, in my view, in the PNTR debate was to not meet the argument made by proponents in the Clinton Administration and their allies in business, and softly echoed by some NGOs, that China's entry into the WTO would help its democratic evolution and economic development. That would require the articulation of an alternative argument about economic development and a discussion about the internal dynamic of Chinese politics.[95] The raw material for such a

94. I do not mean to endorse a "go it alone" strategy, of course, but only wish to point out that it may be all that is available to labor. This is where the earlier discussion of the Cold War legacy of United States labor plays some role. The AFL-CIO has not completely broken with that past and this provides some fertile ground for the assertion of the neo-Third World camp that United States labor is once again engaging in "aggressive unilateralism," to quote one international legal scholar who has looked at this issue. *See* Alston, *supra* note 41. Of course, the facts make clear that this link with United States foreign policy is all but dead. What remains is for the AFL-CIO to articulate its own foreign policy, independent of funding and other ties to the United States government.

95. There is some effort underway inside the AFL-CIO to articulate such alternatives. *See* T. Palley, *The Case for Core Labor Standards in the International Economy: Theory, Evidence, and a*

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discussion existed. There is a nascent independent labor movement underway in China. Perhaps just as importantly, there is a serious economic argument to be made about the relationship between labor rights and progressive economic change in the developing world. In the literature of the neo-Third Worldists one often finds only a parroting of the arguments made by the Lee Kuan Yews and Mahathirs of the world that developing countries cannot afford labor rights. These analysts seem to think that becoming an export platform for the already developed North is a viable economic strategy. They do not seem to have explored very carefully the crucial role that a battle for increased wages and an eight-hour day played in pushing development *forward* in both Europe and North America. By capturing a larger piece of the economic pie, organized labor not only pushed capital to improve productivity, but higher wage rates and the creation of leisure time enabled the creation of a mass market. One may quarrel with the qualitative value of these achievement from a variety of standpoints, but their power in undermining the neo-Third Worldist strategy of moving forward by taking industrial work out of the American rust belt or the decaying North of England or the German Ruhr Valley seems straightforward. In fact, it is often argued in trade debates that Free Trade is essential to prevent the return of the so-called "beggar-thy-neighbor" policies that led to the Great Depression. Of course, the validity of that historical reference is highly questionable.[96] However, it is important to realize that the global economic program that lies behind today's Free Trade drive is very much built on a similar dynamic:

> Developing countries that wish to improve working and living conditions are the most vulnerable to being undercut in world markets by countries whose governments suppress workers rights. Often the victims are young and unorganized female workers in export processing zones that advertise the absence of trade union rights as incentives to investors. Universal adherence to core labor standards would prevent extreme forms of cut-throat competition and exploitation . . . .[97]

This is how the ICFTU put the case in advance of the Seattle meetings and the subsequent granting of PNTR to China. The race to the top by

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Blueprint for Implementation, REP. SUBMITTED TO THE INTERNATIONAL FINANCIAL ADVISORY COMMISSION OF THE DEPARTMENT OF THE TREASURY BY THE AFL-CIO (Not dated.) To date, however, their approach tends to rely on a form of "global Keynesianism." *See* J. Faux, *Slouching towards Seattle*, 11(2) AMERICAN PROSPECT, December 6, 1999. It is hard to imagine how one expects Keynesianism to be reestablished on an international scale after its dismantling on a national level.

96. *See* MACARTHUR, *supra* note 30.

97. International Confederation of Free Trade Unions, *A New Strategy for Trade and Development*, Nov. 1999 at 3.

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developing country elites is to be accomplished by pushing their workers and peasants to the bottom. As against the draconian and authoritarian forms of state-imposed development underway in east Asia and China, a labor rights-based approach that places significant improvements in wages, hours, and working conditions front and center in a development plan would find a ready and wide audience among Asian workers generally. It would also have helped undermine the "siren song" of "constructive engagement" played here in the United States by Clinton and Gore, so effectively, it seems, that even many of labor's erstwhile allies in Seattle fell for it.

Given the deeply divided opinion among the major actors, potential for success with the current ILR strategy is terribly limited. A shift in political direction to the central question of economic development – income – opens up the possibility of a strong link between the concerns of workers in the advanced economies and those in the developing economies. If conditioned upon significant debt relief and the imposition of controls on capital mobility, a demand for substantial improvement in the material well being of developing country workers could break through the political logjam built up by developing country elites and their allies in the international institutions and advanced economies. Concrete proposals for a living wage and reasonable hours and working conditions point to the potential in globalization for equity and stability, rather than the vast inequalities in wealth and opportunity that persist and grow larger every day.[98] Such an approach is consistent with the actual impact of WTO policy today. The WTO is not, and has never really been, just a trade body.[99] Its policies directly affect economic development. A "wages, hours and working conditions" program should be part of a campaign to reorganize the WTO as a "World Trade and Development Organization." Within such a body the ILR strategy could be used on the ground by labor organizations and the

98. For a milder approach to expanding the "core" to include a wider agenda, see Lance Compa, *Promise and Peril: Core Labor Rights in Global Trade and Investment, in* GEORGE ANDREOPOULOS, ED., INTERNATIONAL HUMAN RIGHTS: A HALF CENTURY AFTER THE UNIVERSAL DECLARATION (2002).

99. Protests that the WTO is not technically equipped to deal with these issues do not make a great deal of sense. Even today the dispute resolution process calls upon the talents of law professors with varying skills and backgrounds. Including some with backgrounds in labor law and economic development would not be particularly difficult. The ILO has a wealth of data and professional resources that could be tapped for such an effort. For an indication of the potential in this approach, see R. Rothstein, *Developing Reasonable Standards For Judging Whether Minimum Wage Levels in Developing Nations are Acceptable*, FINAL REP., Sept. 3, 1996, Economic Policy Institute, Washington, D.C. In the developed countries campaigns for a "living wage" are increasingly supplanting those for just a minimum wage. These take into account regional differences in the cost of living.

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legal system to push for and then enforce wages and working conditions sufficient to provide a reasonable standard of living for workers in developing and developed countries alike. Enforceable monetary and criminal sanctions against both governments and corporations should result from violations of these new norms. The Seattle events and those that have occurred since put the *means* - respect for labor rights enforced by the world's key economic body - for progressive change in the global economy on the table. However, the proponents of such a view must also make the *end* – a better life for the world's billions – just as clear if the potential of Seattle is to become reality.

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