


2002

International Labor Standards in the WTO's New World Order: Towards Development-Based Standard Setting

Carlin Meyer

New York Law School, carlin.meyer@nyls.edu

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_articles_chapters

 Part of the [International Law Commons](#), [International Trade Law Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Guild Practitioner, Vol. 59, Issue 1 (Winter 2002), pp. 21-30

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

CARLIN MEYER

**INTERNATIONAL LABOR STANDARDS
IN THE WTO'S "NEW WORLD ORDER":
TOWARDS "DEVELOPMENT-BASED"
STANDARD SETTING**

An Overview

The original hope which undergirded the creation of the International Labor Organization (ILO), that of taking labor competition off the table by leveling the playing field as to labor standards, is no longer viable. A combination of changed economic realities and a divergence of interest between citizens of developed and developing nations has made a new paradigm necessary. These changed economic conditions include: instant communications and rapid transportation, rapidly changing technologies, falling trade barriers, blurring of economic nationalities (as well as of workplace roles and requirements), and the enormous gap between the richest and poorest nations, which did not exist to nearly the same degree in the late 19th century when discussions which led to the formation of the ILO began.

Under the old paradigm, the ILO has adopted 193 labor conventions and another 191 non-binding recommendations which address numerous workplace issues, but these standards have been ratified by relatively few ILO-member nations (the U.S., for example, has ratified only 14). The ILO has addressed so-called "developmental standards"—those related to minimum wage, overtime, and health and safety, which attempt to create an international labor standards floor.

Rather, the ILO should focus on so-called "core" or "fundamental" standards such as freedom of association (that is, the right to form unions and other workers' associations), the abolition of forced labor and the abolition of the worst forms of child labor, and prohibitions on discrimination.¹ This new mission will focus ILO resources more effectively, not only because they will be deployed more narrowly, but, more importantly, because they will be used to address those issues on which there is relative international consensus—on what might be termed "the basic human rights of labor," as opposed to those over which there is what is sometimes termed a North–South split.

At the present time, 70% of the ILO's 175 members have ratified (and hence agreed to abide by) only 25% (45 or fewer) of all ILO-adopted conventions. By contrast, the adoption of the 1999 Convention on the Worst Forms of Child Labor (a core standard) is an example of the ILO at its best, not only because of its strong factual grounding, but primarily because of the interna-

Carlin Meyer is a professor at New York Law School. This article is drawn from Prof. Meyer's critique of *A New Paradigm for International Labor Standards* by Edward Potter. The author thanks Camille Broussard of New York Law School for her excellent research assistance in preparing these comments.

tional consensus developed and revealed in the three-year process from the decision to address the issue, to the adoption of the Convention. As a result, unlike many other conventions, Convention #182 was ratified by 72 countries in a mere 21 months.

Given the resistance by developing nations to the imposition of labor standards (because of their view that such standards are protectionist) it makes little sense to address contentious “developmental” (or what might be termed “economic issues”) within the framework of the ILO or, for that matter, the World Trade Organization (WTO). Instead, the ILO should abandon its many non-consensus conventions and recommendations and use the tools of public shaming and the threat of withdrawal of ILO technical assistance or even, in the worst cases, ILO or WTO membership, to achieve compliance with core (non-developmental) labor norms. Improving labor standards beyond the “core” values, by contrast, should be left to economic development, which will continue to be spurred on by robust free trade.

In summary, the ILO’s effort to level the playing field so that labor standards are maintained at a humane level may no longer be necessary, because free market competition among nations exploiting their comparative advantages will raise those standards. In addition, such standard-setting is futile because of our inability to gain consensus on those standards. This is particularly evident in the resistance of developing nations with some of the lowest standards to impingement on the comparative advantage their poverty (and hence low labor costs) gives them in global competition. Rather, the ILO should concentrate on protecting the most basic rights against the most egregious violations.

It is highly unlikely that free trade, as currently pursued, and markets unfettered by international labor regulation beyond ensuring against the worst forms of child, forced labor, and discrimination, and the protection of associational rights, will lead to improved labor conditions without the intervention of public, governmental-type bodies like the ILO.²

Changing International Economic Structures

Until the mid-1900s, national economic status and standards of living depended largely on the abundance of natural resources, availability of capital and labor, and culture. This is hardly an uncontroversial view. As Noam Chomsky, and others, point out, the most important historical factor that separates industrialized from developing nations has been whether the nation or region was colonized by a European power.³ British “development” of its textile industry resulted from the deliberate destruction of the more advanced cotton textile industries of India and Egypt, rather than the possession of natural resources or abundant capital. Most industrial nations achieved their success not *only* via colonial exploitation of the labor and resources of others, but from protectionism—freely employing high tariffs and protected colonial

markets to foster the development of domestic industry. Not until the mid-18th century, when its industries were strong and it had virtually destroyed competition from many quarters, did Britain turn to liberalized trade policies, and the story has been similar elsewhere.⁴

The so-called economic miracles of Japan, Taiwan and other later-developing nations were not the product of unfettered free markets, but rather depended heavily on the central role of state management.⁵ Since many of today's developing nations have extremely weak national governments, and others are being pressed by the International Monetary Fund, the World Bank and the World Trade Organization to reduce or eliminate centralized state management in favor of free market liberalism, it is hardly a given that free trade will lead to development and thereby improved labor standards.⁶ Moreover, there is little evidence that free market exploitation of comparative advantage will lead to improved development and hence better labor standards for all. To date, it has often meant selective improvement for some, and all too often for the very few.

What have been termed heterodox, or "non-neoclassical," economists have demonstrated that while productivity growth from trade "opens up the *possibility* of paying higher wages" without necessarily negatively impacting the competitiveness of a product or the profitability of investment, the two are not inevitably linked. Rather, improvements in labor standards are dependent on such factors as bargaining power, income distribution, and governmental action.⁷ Other researchers have suggested that due to technology differences between developing nations and their richer trade partners, the benefits of liberalization fall less to improvements in minimum labor standards such as wages, and more to profits.⁸

The ILO is a tripartite system in which organized labor, employers and government have a voice in determining what are the appropriate conditions under which goods and services are produced. (It may be that more voices, such as those of NGOs or others who represent unorganized labor, women, immigrants, and the informal sector should be present also, but that is a separate issue.) The WTO treaties, by contrast, are typically negotiated with governmental and business representatives at the table, but not labor. And, increasingly, trade treaties emphasize this bipartite representation by providing that firms, in addition to governments, may directly challenge treaty violations.⁹ Yet, ultimately, trade treaties will be strong determinants of labor conditions, by setting the terms of competition among nations and therefore affecting the bargaining power of workers and the ability of governments to maintain labor standards. The WTO, which is dominated or at least perceived to be dominated by the industrial powers, may not be the forum through which the linkage of trade and labor issues should be addressed. But trade sanctions must be available to redress labor violations, if decent working conditions

and living standards are to be maintained. One way that might occur is by permitting the ILO to levy trade sanctions, upon referral of a matter to it by the WTO or any other body implementing or enforcing a trade agreement, or perhaps even upon its independent determination that minimum labor standards are not being maintained.

A Proposal for a New Role for the ILO

Thus, changed circumstances have not led to a situation in which global efforts to establish basic, minimum standards of economic justice are unnecessary. The ILO's founding premise that "universal and lasting peace" can only be achieved by removing "injustice, hardship and privation" remains salient today. This is especially true because, as Potter's paper points out, the gap between rich and poor nations, and I would add, rich and poor individuals *within* nations, is enormous and apparently growing. In my view, international standard-setting is important not only because the market will not, by itself, guarantee development and will not ensure that its benefits are fairly distributed, but because unjust and uneven distribution is producing and contributing to widespread armed conflict. Despite media presentation of global conflict as predominately ethnic or religious in nature, the evidence is strong that, at least initially, distributional issues have been at the heart of conflicts from Rwanda to the former Eastern Bloc countries to Asia and beyond.

I do not suggest that ILO adoption of minimum labor standards will necessarily result in their ratification or implementation. But the effort helps to keep labor standards on the international agenda and supports those struggling to gain improved labor protections from national governments. It also strengthens the hand of NGOs and others—including corporate officers and ethical investors—who are pressing for corporate codes of conduct that include minimum labor standards. One of the results of the ILO's adoption of a labor convention is that member nations are required to place it before their governing bodies for ratification. Those bodies may choose not to ratify—the United States has ratified only 14 conventions, only two of them "core"—but at least a conversation about ratification is engendered. In the past, these conversations have been contained within the governing bodies and did not become part of national discourse. However, with today's greater internationalist focus and increased interest in these issues among NGOs, trade unions, and others, they are more likely to become broad-based discussions in the future.¹⁰

If labor rights are not included in international trade structures, such conversations will be restricted to "core" issues. While such issues are clearly crucial ones, they are not the only or the most important ones. Why should we accept the premise that what we might term political rights—the right to freedom of association, workplace equality and anti-discrimination, and freedom from slavery or forced labor—are "core" rights, while so-called "economic rights"¹¹

such as the right to a wage sufficient to feed a family and the right to enjoy leisure time sufficient to gain an education or enjoy one's family, are not?¹² A choice between these types of rights cannot be made on the basis of whether international bodies can manage the sorts of detailed measures necessary for enforcement; for both types of labor concerns, the devil is in the details.¹³

An Alternative Paradigm: "Globalization" of Labor Rights

There is an alternative paradigm based on the principle that minimum labor standards should not be the same for industrialized and developing nations.¹⁴ Developing countries should be able to compete internationally with developed nations by using the comparative advantage low labor costs, among other factors. (I should note, however, that it is far from clear that labor costs are the primary factor creating this comparative advantage; economic, political and social stability, as well as educational level, health, and culture, are likely of far greater importance. This, in turn, may partly explain why the vast majority of trade continues to take place between industrialized nations, rather than between developing and industrialized ones.¹⁵) It would be manifestly unfair to require developing nations to meet labor standards appropriate to developed ones. It would also be unjust, both to their own workers and to those of developing nations, to permit industrialized nations which have achieved high levels of development by colonizing now-developing nations, to compete with them by lowering the labor standards their own workers achieved through collective and political action.

Rather, in order to raise labor standards at the bottom, and maintain them at the top, labor standards should be set, by treaty or ILO initiative or both, in accordance with the level of development.¹⁶ Nations should be grouped according to level of development, and standards set appropriate to each grouped level—with the representatives of nations subject to the standards at issue having the predominate determining voices in standard-setting. This would level the playing field among comparable nations, helping to eliminate the incentive to compete by lowering labor standards and encouraging, via the types of incentives described below, the raising of them. This would not only assist in improving labor standards where poverty is widespread, but would also help to prevent lowering of labor standards by industrialized nations seeking to compete with one another.

Establishing differing standards would not be simple, but is not impossible. States adopted variant labor standards in the early development of minimum wage laws in the United States. Local boards successfully set wages that differed within a state as well as by industry.¹⁷ In the early part of the twentieth century, one of the first proposals for the adoption of a national minimum wage aimed, in part, at leveling the wage competition between states and employers that was thought to have contributed to the Great Depression, was based on the state minimum wage laws.¹⁸ The Black-Connery-bill in the early

twentieth century, drew on these local systems in proposing to establish public boards composed of employers, workers and public representatives (not unlike the ILO system) to establish appropriate minimum wages and maximum hours by locality or region. The bill incorporated a requirement that wages be pegged to actual living costs and ensure a living wage, an appropriate basis for ILO “development-based” standard-setting as well.¹⁹

Ultimately, the United States opted for a uniform national minimum wage, enacted as the Fair Labor Standards Act, but variant wage and standard setting remains a viable model, especially in a situation in which the differences in level of development are great. Indeed, prevailing wage laws currently still in effect in the United States continue to successfully set public wages by measuring local and regional labor practices.²⁰ While the task of setting prevailing wages among different nations may be more difficult than it is within one nation, trade negotiations among numerous nations have handled issues equally complex and have managed to make progress on many.²¹

Potential Enforcement Models for International Labor Standards

Carrot and stick sanctions should be used to enforce minimum standards. “Shaming” might well be effective between nations at the same level of development and would certainly be more effective than when it is deployed against those in far different economic positions. Providing, or withholding, technical assistance is unlikely to have much impact on wealthy industrialized nations, since they are likely to be those providing the assistance in the first place. Stronger sanctions are needed, and I offer these:

First, nations at the same level of development should be entitled to engage in trade sanctions against one another, as authorized by an ILO determination of “a serious violation,” much in the way the WTO operates with regard to trade practices. As suggested earlier, trade treaties could incorporate a referral system to the ILO, so that ILO investigations could be generated independently or upon referral by trade bodies. Second, sanctions should be directly available against firms that fail to meet, or fail to ensure that their subcontractors and lessees meet, the minimum standards established through some sort of international penalty mechanism (just as corporations are able to receive damages under NAFTA and other proposed treaties). The sanctions of international supervision (ILO/WTO expulsion) or creation of another “outcast” status should be available as well. The strongest sanctions should be reserved for industrialized nations (and multinational corporations operating within them) that *lower* existing labor standards. Sanctions proceedings should be able to be commenced by all parties to the ILO—labor, employers, and governments—as they now are.²²

At the same time, the industrialized nations should offer not merely technical assistance, but should also make funds available to assist developing nations seeking to improve labor standards. These funds could be augmented

by fines levied against firms and nations who lower or fail to meet labor standards. For instance, studies suggest that child labor decreases with the establishment of good schools. Funds should be deployed to assist nations taking significant steps to reduce child labor to construct, establish or improve schools.²³ Funds could be made available to children banned from workplaces due to heightened child labor standards, to pay for schooling and to compensate for lost family income. In addition, international awards should be given to the companies with the best employment practices, and the nations with the best records of compliance, as determined by the ILO.²⁴ There are surely other incentives and sanctions worth exploring.

Finally, the scope of ILO standard setting in relation to women in the global economy should be re-examined. Despite vast changes in the position of women, especially in industrialized nations, much of women's labor throughout the globe occurs in the informal sector left relatively untouched by labor standards and enforcement. Within industrialized nations and in the unpaid and, therefore, undervalued work of producing and caretaking the workforce at all its stages of life, ILO standard-setting has had little impact. One of the most important roles the ILO can play in the near future is to begin to develop norms appropriate to these types and sectors of work. What obligation do nations and firms have to make it possible for women to engage in paid work despite child, elder and home care responsibilities? Should wages compensate not simply for goods-and-services-producing labor, but for the labor required to produce the worker? Should these costs and others be factored into the costs of production, and should firms be required to adopt accounting practices that reflect them? The twenty-first century ILO needs to confront these and other contemporary issues.

Conclusion

International governmental bodies such as the ILO are essential to ensuring that those who provide the goods and services we all depend on are able to live decent lives. Ensuring that all nations guarantee core rights, such as the right to form unions and bargain collectively, is essential to achieving long lasting economic justice for workers. This should be an ILO enforcement priority, just as U.S. ratification of those conventions (which has yet to occur) should be a priority at home. But, in addition, the ILO must reformulate and continue its role of ensuring that labor competition does not deprive workers, including those outside formal and paid employment, of a decent standard of living.

NOTES

1. The ILO has traditionally treated the principles of freedom of association, prohibition of forced labor, and equality of opportunity and treatment as the most fundamental, although the matter has been disputed within the ILO, and Edward Potter's paper, appropriately, I think, treats prohibition of the worst forms of child labor as

- a “core” subject. See LAMMY BETTEN, *INTERNATIONAL LABOUR LAW: SELECTED ISSUES* (1993) at 66-67.
2. Notably, the markets which would thereby be freed from international labor “regulation” in order to foster competition based on “comparative advantage” would continue to be regulated so as to promote the development of industries by creating secure financial markets, supporting the creation and consolidation of multinational corporate structures, and, of course, promoting so-called free trade.
 3. Noam Chomsky, *Free Trade and Free Market: Pretense and Practice*, in *THE CULTURES OF GLOBALIZATION* (Fredric Jameson and Masao Miyoshi, eds. 1998) at 359-361.
 4. *Id.*
 5. The belief that protectionism impedes growth is treated by economic historian Paul Bairoch as one of the greatest myths concerning economic development. See Noam Chomsky, *supra* note 3, at 360, citing Paul Bairoch, *ECONOMICS AND WORLD HISTORY* (1993).
 6. The World Trade Organization is included with the IMF and World Bank because its treaty terms eliminate the possibility of governmental intervention to direct and support the growth of national industries, as well as prevent state intervention to direct the national economy in numerous other ways.
 7. Jim Stanford, *Openness and equity: regulating labor market outcomes in a globalized economy*, in *GLOBALIZATION AND PROGRESSIVE ECONOMIC POLICY* (Dean Baker, Gerald Epstein and Robert Pollin, eds., 1998) at 245, 251-2.
 8. Mehiene Larudee, *Integration and income distribution under the North American Free Trade Agreement: the Experience of Mexico*, in *GLOBALIZATION AND PROGRESSIVE ECONOMIC POLICY* (Dean Baker, Gerald Epstein and Robert Pollin, eds., 1998) at 273.
 9. See e.g. NAFTA’s Chapter 11; Section B, Articles 1116 & 1117 of the proposed Multi-lateral Agreement on Investment, and the proposed Free Trade of the Americas Agreement (FTAA), whose proposed provisions, although secret, are believed to include and expand upon NAFTA’s Chapter 11 (see Maude Barlow, *The Free Trade Area of the Americas: The Threat to Social Programs, Environmental Sustainability and Social Justice, A Special Report by the International Forum on Globalization*, 1 INTNATL. FORUM ON GLOBALIZATION, 2001).
 10. The Seattle, Washington, and Quebec City demonstrations against the terms by which world trade are being negotiated, and the exclusion of labor and environmental concerns from those terms, indicate and have helped to foster an increased level of public interest in these issues.
 11. Although political and economic are convenient categories, placing them in binary opposition or even categorical separation is not unproblematic, given the integral relationship between the two.
 12. Potter’s paper waivers between defining “core” rights as ones on which there is international consensus, and ones that are “basic,” “human” rights. Perhaps these two categories overlap for the most part. But I believe that when pressed, there is as much disagreement on the practical nature (when implementation is attempted) of those rights we deem “fundamental” as there is on how to define a “living wage” or “decent working conditions.” There may be more consensus on the articulation of human or political rights, but there is just as much, if not more, dis-

agreement as to their *practical meaning* as there is on articulating economic rights. (See *e.g. infra* note 21).

13. Moreover, it is far from clear what a consensus concerning "core" standards means. For instance, Convention 87 concerning the right of association and protection of the right to organize has been ratified by 134 of the 170 ILO members. But it is probably a better—although hardly fully—protected right in the United States, which has not ratified it, than in many of the 134 countries that have, *e.g.* Myanmar. Moreover, even as to those core conventions which have been ratified, there is disagreement about their scope. ILO Convention 29 prohibits forced labor, but exempts labor performed pursuant to a criminal conviction, provided it is performed under the control of a public authority and those performing it are not placed at the disposal of private individuals or companies. The U.S. Federal Prison Industries (FPI), also known as Unicor, employs 18,000 inmates making 150 products, with sales of \$500 million in 1995. While the bulk of sales are to the Federal government, and are thus beyond Convention 29's reach, there is evidence that a growing number of large corporations have begun to "lease" the labor of inmates working in private prisons. The U.S. has not ratified Convention 29, but it did, in 1991, ratify Convention 105, The Abolition of Forced Labor Convention of 1957. Article 1(b) of that convention prohibits the mobilization and use of forced labor for economic development, and it is likewise arguably violated by the private leasing of prison labor. Indeed, it may be violated by the degree of *public* use of prison labor in the U.S., since that use frees up \$500 million in tax dollars which can then be spent on economic development (such as public funding of private development of weapons systems, biological research, energy production, and the like.)
 And there is a great deal of disagreement about the precise contours of the "core" freedom to associate, a right of little use in improving labor standards if it does not include the disputed rights to organize and strike. Although Convention 87 has been ratified by 134 countries (not including the United States), there is disagreement about whether Article 3 of that Convention, concerning the right of organizations to undertake actions to defend their own and their members' interests includes the right to strike, and employer members of the ILO have challenged such an interpretation. See LAMY BETTEN, *supra* note 1.
14. These suggestions draw heavily on the work of Kaushik Basu, Professor of International Studies at Cornell University and a former World Bank official. I am greatly indebted to Professor Basu, but the views here, and any errors or naivete they may embody, are entirely my own. See *e.g.* Kaushik Basu, *International Labor Standards and Child Labor*, 42 CHALLENGE 80-92 (Sept/Oct 1999); Kaushik Basu, *Child Labor: Cause, Consequence and Cure*, with Remarks on *International Labor Standards*, 37 JOURN. ECON. LIT. 1083 (1999).
15. Dividing the world between developing and industrialized is not, perhaps, adequate or helpful, certainly in terms of the paradigm here described. There are vast differences between the so-called developing nations in their degree of development and industrialization, as well as in other respects. Because my paradigm requires grouping them according to level of development (which is not adequately described by reference to GNP or GDP), new terminology and methods of measurement will be required. Ultimately, of course, such determinations will be political ones (aided by semi-objective measurements), with groups of nations determining themselves to be at roughly similar levels of development for standard-setting purposes.

16. For want of a better label, I will call this system "development-based standard setting."
17. Oregon, for example, had one wage for Portland, and a lower wage for rural Oregon; New York had different minimum wages according to the nature of the industry as well as other factors.
18. I am indebted to my colleague, Seth Harris, for bringing the Black-Connelly bill, as well as some of the other examples described here, to my attention.
19. See, discussion of the living wage movement in the U.S. in this issue at p. 44.
20. The Human Development Enterprise Index, an experiment within the ILO to measure levels of enterprise development, might also serve as a partial model. See Guy Standing, *Human Development* (commenting on Archon Fund, Dara O'Rourke, and Charles Sabel, *Realizing Labor Standards*) in *BOSTON REVIEW*, v. 26, No.1, Feb/Mar. 2001, at 17-18.
21. I agree with Potter's paper that unilateral trade sanctions taken by industrialized nations to enforce labor standards for developing nations has a high potential to backfire, as did the Harkin bill mentioned in the paper. But pacts between and among, or labor standards established for, nations at a similar level of development, are far more likely to achieve their intended effects, than to produce unintended consequences.
22. If those parties are expanded to include NGOs and others, they, too, should be able to commence proceedings, which would be carefully screened just as they are now.
23. See Basu, *supra* note 14. Improved schooling would likely have the added benefit of improving national comparative advantage, thereby increasing trade.
24. As Potter points out, the ILO systems of accountability are quite sophisticated, and hence could, with more teeth, be quite effective.

* * * * *

**The National Lawyers Guild
YEAR 2002 ANNUAL
NATIONAL REFERRAL DIRECTORY**

*is now available and may be ordered
through your subscription agent
or direct from*

**The National Lawyers Guild National Office
126 University Pl., 5th Floor, N.Y., NY 10003**

*Price \$35.00 to individuals,
\$50.00 to libraries and institutions.*