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## PRIVATE ORDERING AND INSTITUTIONAL CHOICE: DEFINING THE ROLE OF MULTINATIONAL CORPORATIONS IN PROMOTING GLOBAL LABOR STANDARDS

ANNETTE BURKEEN\*

### I. INTRODUCTION

Increased economic globalization has resulted in many U.S. multinational corporations either establishing manufacturing operations in less economically developed countries or purchasing products from suppliers who have done so.<sup>1</sup> U.S. companies are leveraging lower labor and regulatory costs in developing countries to maintain a competitive edge in the world market.<sup>2</sup> Multinational corporations purchase consumer

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1. Wal-Mart, for example, does not own, operate, or manage any factories. It conducts all of its business, including production of its private label products, through suppliers. WAL-MART, 2005 REPORT ON ETHICAL SOURCING 5 (2006), available at [http://walmartstores.com/Files/os\\_ethical\\_source.pdf](http://walmartstores.com/Files/os_ethical_source.pdf) [hereinafter WAL-MART, ETHICAL SOURCING]. See also Roman Terrill, *What Does "Globalization" Mean?*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 217, 218 (1999).

Globalization is also tied to accelerated economic integration through private cross-border financial flows. Whether it's BMW and Mercedes Benz constructing factories in the southern United States, or U.S. pension fund managers investing billions of dollars in Mexican or Thai stocks, the economies of individual nations are becoming increasingly integrated because of private, cross-border financial flows.

Terrill, *supra*.

2. Globalization of labor markets has been characterized by both the move of capital from developed nations to less developed nations as well as the move of immigrant workers from less developed countries to developed countries. For a more detailed discussion of this cross movement, see Frances Lee Ansley, *Rethinking Law in Globalization of Labor Markets*, 1 U. PA. J. LAB. & EMP.

products—such as clothing, shoes, sporting goods, and children’s toys—from suppliers in developing countries and sell those products to consumers worldwide. Some of these corporations, such as the Walt Disney Company and Nike, have come under fire in the media for reportedly purchasing goods from suppliers who operate sweatshops or utilize child labor in less developed countries.<sup>3</sup>

Sweatshop businesses operate under grossly substandard working conditions, where fifteen-hour work days, low wages, unsanitary work environments, coerced labor, rape, and even death are regular occurrences.<sup>4</sup> Some reports have linked human trafficking<sup>5</sup> and child labor<sup>6</sup> with some sweatshops in countries like Myanmar, China, Jordan, and Oman. The mere mention of the word “sweatshop” conjures images of people, including children, engaged in back-breaking labor under degrading, hazardous conditions for little or no pay. The proliferation of sweatshops jeopardizes the human rights and dignity of millions of workers and fosters a harmful anti-globalization sentiment among workers in both industrialized and developing countries.

L. 369, 370–404 (1998). Whether the employment laws of developed nations, such as the United States, provide sufficient protection to immigrant workers is beyond the scope of this Article.

3. See, e.g., Marc Gunther, *How Companies Fight Sweatshops*, CNNMONEY.COM, May 3, 2006, [http://money.cnn.com/2006/05/03/news/international/pluggedin\\_fortune/](http://money.cnn.com/2006/05/03/news/international/pluggedin_fortune/) (describing the Walt Disney Company’s efforts to identify suppliers operating sweatshops).

4. See generally NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS (Andrew Ross ed., 1997).

5. Charles Kernaghan, Director of the National Labor Committee, recently testified in Congressional hearings that many of the estimated 300,000 guest workers in Jordan are victims of human trafficking, and many are being forced to work in Jordanian factories that supply goods to the U.S. companies. *Modern Day Slavery: Spotlight on the 2006 “Trafficking in Persons Report,” Forced Labor, and Sex Trafficking at the World Cup, Briefing and Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations of the H. Comm. on International Relations*, 109th Cong. 52 (2006) (statement of Charles Kernaghan, Director, National Labor Committee), available at <http://internationalrelations.house.gov/archives/109/28104.PDF>. See also Antonio Juhasz, *Trading on Terror to Profit a Few*, L.A. TIMES, June 26, 2006, at B11. “American companies seeking cheap, easy labor are not likely to meet much opposition from the Omani government. The State Department has reported Oman for human-trafficking and forced labor.” Juhasz, *supra*.

6. The problem of child labor is particularly acute in sub-Saharan Africa, which has the greatest proportion of child labor in the world. INT’L LABOUR OFFICE, *THE END OF CHILD LABOUR: WITHIN REACH, GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK* 64 (2006), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-i-b.pdf>. By the latest United Nations’ estimates, more than 49 million children below age 14 work in sub-Saharan Africa. *Id.* at 8. The U.N. report identifies the “region’s economic plight, . . . social mores, violent conflicts, staggering HIV rates, and population explosion” as major factors. Michael Wines, *African Adds to Miserable Ranks of Child Workers*, N.Y. TIMES, Aug. 24, 2006, at A1. In Zambia alone, AIDS had boosted child labor by up to 30 percent. Wines, *supra*.

Large corporations have reaped tremendous economic benefits from globalization, often at the expense of workers in impoverished nations. Some economists suggest that sweatshops are the “price” of global economic development.<sup>7</sup> However, consumers, advocacy groups, and governmental agencies are pressuring U.S. multinational corporations to leverage their economic relationships with suppliers to improve conditions for workers in developing countries.<sup>8</sup>

#### A. Abstract

Ian R. McNeil’s concept of relational contracting helped to transform our understanding of a contract from a mere exchange of promises to the creation of a relationship.<sup>9</sup> Contracts are “relations among people who have exchanged, are exchanging, or expect to be exchanging in the future—in other words, exchange relations.”<sup>10</sup>

Private ordering builds upon relational contracting theory. A private order is a system of specialized rules and procedures developed and voluntarily adhered to by private actors.<sup>11</sup> In other words, private ordering is private lawmaking. As a community engages in repeated exchange relations, norms—i.e., community expectations on how to behave—develop. These norms are essentially private rules created by private actors. To the extent that a private actor values the exchange relations, the desire to continue the relations serves as an incentive to comply with the community’s norms, even those norms with which the private actor would not otherwise comply. Thus, contracts become self-enforcing by inducing voluntary compliance. “Social and economic sanctions imposed on the party in breach, whether by the aggrieved party or by the economic and social community in which both parties operate, replace legal sanctions.”<sup>12</sup>

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7. See, e.g., Nicholas Kristoff & Sheryl WuDunn, *Two Cheers for Sweatshops*, N.Y. TIMES MAGAZINE, Sept. 24, 2000, at 70.

8. See, e.g., Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002) (arguing that U.S. firms conducting business through foreign suppliers that utilize forced labor violate the Thirteenth Amendment); compare Julia Fisher, Note, *Free Speech to Have Sweatshops? How Kasky v. Nike Might Provide a Useful Tool to Improve Sweatshop Conditions*, 26 B.C. THIRD WORLD L.J. 267 (2006) (arguing that corporate denials of the use of sweatshop suppliers may constitute false advertising and are unprotected by the First Amendment free speech and corporate speech doctrines).

9. Ian R. McNeil, *Relational Contracting Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 878 (2000) (describing his development of relational contract theory).

10. *Id.*

11. Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2338–39 (2004).

12. Ariel Porat, *Enforcing Contracts in Dysfunctional Legal Systems: The Close Relationship*

A key component to the efficacy of private ordering is that the cost of non-compliance must exceed the cost of compliance. The desire to conduct business with U.S. companies provides an incentive for suppliers that operate sweatshops to comply with global labor norms. However, private ordering among multinational corporations and suppliers will have limited impact on sectors of developing countries' economies unaffected by international trade, such as service industries.

Any examination of the role of private ordering is really an inquiry into institutional choice: choosing between public institutions or privately-developed processes. Recent literature on private ordering analyzes the extent to which privately-developed rules are more efficient than publicly-promulgated laws.<sup>13</sup> Stated differently, commentators ask under what circumstances should public law defer to privately-created rules. This inquiry is germane to the issue of labor conditions in factories in developing countries. Two questions are central to the problem of eradicating sweatshops: (1) what role should multinational corporations play in developing and enforcing global labor standards; and (2) to what extent should governments defer to privately-developed labor standards? The question of public versus private ordering has been characterized as "ultimately a problem of second-best."<sup>14</sup> Because neither private nor public ordering tends toward complete efficiency, a system must draw upon both private ordering and public ordering to address effectively global working conditions. The challenge of eliminating sweatshops in a global labor market offers a rich context in which to study the interdependency of private and public ordering.

An important component to this discussion on private ordering is identifying what global labor norms currently exist. The International Labour Organization's<sup>15</sup> (ILO) 1998 Declaration on Fundamental Principles and Rights at Work (the "1998 Declaration") is an influential

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*Between Public and Private Orders*, 98 MICH. L. REV. 2459, 2459 (2000).

13. Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1745 (1995–1996).

14. Katz, *supra* note 13, at 1747. In 1995, the University of Pennsylvania Law Review published a symposium issue on Law, Economics, and Norms, which featured articles by Avery Katz, Robert D. Cooter, and Eric Posner. In commenting on the works of Cooter and Posner, Katz observed that "the comparison between public and private lawmaking depends on questions of incentives, information, and externalities, that neither public nor private institutions are fully efficient in all circumstances, and that choosing between the two kinds of institutions is thus ultimately a problem of the second-best." *Id.*

15. The International Labour Organization, a specialized United Nations agency, formulates international labor standards. The agency seeks to promote social justice and internationally recognized human and labor rights. The ILO fulfills its mission by adopting conventions and recommendations that its members may ratify.

source of global labor norms. The 1998 Declaration articulated four “fundamental” principles that all countries, regardless of their level of development, should respect and promote: (1) “freedom from forced labor,” (2) “nondiscrimination in the workplace,” (3) “the effective abolition of child labor,” and (4) “freedom of association and the right to organize and bargain collectively.”<sup>16</sup> The ILO’s promulgation of these four principles, also described as “core labor standards,” does not end the debate on global labor standards; rather, it merely focuses it. While the ILO standards address some of the most exploitive labor practices, the standards do not address other critical labor issues, such as the need for minimum or living wages, maximum work hours, overtime pay, holiday leave, maternity leave, and occupational safety. Furthermore, the ILO’s core labor standards do not address enforcement issues.

Competing concerns of protectionism, consumerism, human rights, and global wealth maximization have polarized the discussion on global labor norms. Henry H. Drummonds offers a colorful description of the extremities within the debate:

Too often discussions of economic globalization take on a “good girl-bad boy” perspective. From the Left, globalization often means the loss of blue collar production and other jobs in the rustbelts of the American Midwest, East, and elsewhere and the exploitation of children, women, and other workers in places such as Mexico, Indonesia, Vietnam, and China. From the Right, concerns about the impact on workers at home and abroad are seen as reflecting merely parochial interests. From this perspective, at best, opposition to “free trade” reflects ignorance of the wealth maximizing magic of free markets, and Ricardian trade advantage, and the dynamics of economic development in developing nations. At worst, from this perspective, opposition to expanded trade reveals at bottom an indifference to the materially wretched plight of billions of humans on this earth and the inherently unstable monopolization of the world’s resources by the peoples of the developed world.<sup>17</sup>

The perceived loss of U.S. jobs and the shame of benefiting from human exploitation have contributed to a growing American ambivalence,

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16. KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 8–9 (2003).

17. Henry H. Drummonds, *Transnational Small and Emerging Business in a World of Nikes and Microsofts (A Retrospective Article on the 1998 Lewis & Clark Law Forum and the Message of Seattle)*, 4 J. SMALL & EMERGING BUS. L. 249, 252–53 (2000) (internal citations omitted).

even antipathy, toward free trade. Proponents of global labor standards also argue that, absent governmental intervention, globalization disproportionately benefits wealthy nations and income disparities between nations are magnified.<sup>18</sup> Workers in non-industrialized countries remain vulnerable to labor and human rights abuses. Proponents of global labor standards tend to favor an international public order in which sovereign governments create and enforce the global labor standards through trade sanctions.

Conversely, free trade advocates contend that global economic growth will improve working conditions, thus alleviating the need for additional governmental intervention.<sup>19</sup> Such a view suggests that multinational corporations, through their repeated interactions with suppliers, are best suited for developing and enforcing norms impacting wages, hours, and safety conditions.

Evidence suggests that unrestricted private ordering among multinational corporations creates a “race to the bottom.”<sup>20</sup> Globalization, from a critical perspective, has resulted in the restructuring of labor markets to enable U.S. and other multinational corporations to drive down costs by increasing competition among developing nations to provide cheaper labor and lower-cost regulatory schemes.<sup>21</sup> Developing countries able to provide the cheapest labor will attract greater foreign investment.<sup>22</sup> The competition of developing countries for a portion of the economic benefits of globalization creates downward pressure on the wages of unskilled workers worldwide.<sup>23</sup> Market forces alone do not create

18. *Id.*

19. See ELLIOTT & FREEMAN, *supra* note 16, at 9.

20. Surya Deva, *Sustainable Good Governance & Corporations: An Analysis of Asymmetries*, 18 GEO. INT'L ENVTL. L. REV. 707, 714 n.27 (2006) (citing Dinah Shelton, *Challenges to the Future of Civil and Political Rights*, 55 WASH. & LEE L. REV. 669, 684 (1998); Surya Deva, *The Sangam of Foreign Investment, Multinational Corporations and Human Rights: An Indian Perspective for Developing Asia*, SING. J.L. STUD. 305, 313–14 & generally (2004)).

21. See, e.g., Lori G. Kletzer, *Trade and Job Loss in U.S. Manufacturing, 1979–1994*, in THE IMPACT OF INTERNATIONAL TRADE ON WAGES 349–96 (Robert C. Feenstra ed., 2000) “Labor reallocation is a likely implication of a move to freer trade, and there is sizable empirical literature that examines the link between increasing trade and changes in industry net employment and wages.” *Id.*

22. Dinah Shelton discusses this phenomenon in depth.

Economic globalization may undermine national and international human rights protections as states make an effort to remain competitive and to entice investment. The “race to the bottom” is a threat, as countries are pressured to relax their standards for the treatment of workers, denying collective bargaining, minimum wages, and, in some cases, the right to be free from forced labor.

Shelton, *supra* note 20, at 684.

23. See, e.g., CARL DAVIDSON & STEVEN J. MATUSZ, INTERNATIONAL TRADE AND LABOR MARKETS: THEORY, EVIDENCE AND POLICY IMPLICATIONS 22 (2004).

sufficient incentives for multinational corporations to internalize higher labor and regulatory costs. Requiring multinational corporations to use their contracting power to improve labor conditions in developing countries is essentially asking such companies to forego one of the primary economic benefits of globalization.<sup>24</sup>

The critical question becomes when multinational corporations would ever relinquish this benefit. The answer? Only when pressured to do so.

Norms, whether private or codified, can impose such pressure. Cass Sunstein defines norms simply as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done.”<sup>25</sup> He observed that “[g]ood social norms solve collective action problems, by encouraging people to do useful things that they would not do without the relevant norms . . .”; further, when norms are inadequate or start to disintegrate, society can encounter difficulties and even collapse.<sup>26</sup>

The widespread existence of sweatshops suggests that weak labor norms exist in the global labor market. The ILO’s 1998 Declaration reflects a consensus among nations on some foundational principles, but it does not resolve collective action problems beyond the core labor standards. The inadequacy of labor norms has contributed to widening wealth disparities between nations and to potential instability in developing countries. Stronger labor norms may encourage multinational corporations and suppliers to improve the working conditions of factory workers worldwide.

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24. Donald L. Kohn, Vice-Chairman of the Federal Reserve Board, noted:

The opening up of China and India, in particular, represents a potentially huge increase in the global supply of mainly lower-skilled workers. And it is clear that the low cost of production in these and other emerging economies has led to a geographic shift in production toward them; from a U.S. perspective, the ratio of imported goods to domestically produced goods has risen noticeably in recent years.

Donald L. Kohn, Vice-Chairman, Fed. Reserve Bd., Remarks at the European Economics and Financial Centre Seminar, House of Commons, London, England (July 6, 2006), *available at* <http://www.federalreserve.gov/BOARDDOCS/SPEECHES/2006/20060706/default.htm>.

25. Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996); *see also* Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996) (“A norm can be understood as a rule that distinguishes desirable and undesirable behavior and gives a third party the authority to punish a person who engages in the undesirable behavior. Thus, a norm constrains attempts by people to satisfy their preferences.”). In discussing norms generally, Cass Sunstein observed:

There are norms about littering, dating, smoking, singing, when to stand, when to sit, when to show anger, when, how and with whom to express affection, when to talk, when to listen, when to discuss personal matters, when to use contractions . . . [i]n fact, there are social norms about every aspect of human behavior.

Sunstein, *supra*, at 914.

26. Sunstein, *supra* note 25, at 914.



The debate about global labor standards centers on who should define the norms and who should enforce them. In resolving these questions, we should heed Sunstein's caution that some people may reject norms because the source of the norm lacks legitimacy.<sup>27</sup> Since multinational corporations derive their legitimacy from obtaining economically-efficient results, labor norms *created* by efficiency-driven corporations are viewed suspiciously.

### *B. Goals of this Article*

This Article examines how private ordering among multinational corporations and suppliers can eliminate sweatshop conditions in less developed countries. Accordingly, this Article focuses on labor conditions in industries impacted by international trade—i.e., those industries influenced by the contractual decisions of multinational corporations.

Many commentators approach private ordering as an either/or proposition—that is, either private ordering or public ordering is preferred. This Article seeks to deemphasize this dichotomy because it masks the opportunity to examine the interdependence of private and public orders in the context of globalization's impact on labor standards.<sup>28</sup>

Part II of this Article explains why multinational corporations lack legitimacy in creating global labor norms. While theories of relational contracting and private ordering shed light on the question of how to improve working conditions in developing countries, unrestricted private ordering among multinational corporations will not yield efficient labor norms. U.S. businesses have not created labor norms that address the international community's distributive goals, and U.S. businesses are not likely to do so spontaneously. The norms created spontaneously by multinational corporations through unrestricted contracting are detrimental to workers worldwide and to global wealth maximization. Further, economic disparities among nations and a lack of coordination impose hurdles to the legitimacy and capability of multinational corporations as the sole creator of norms. Therefore, public law is necessary to identify fundamental labor rights of laborers. For example, the ILO's Decent Work Initiative is a promising source for global norms.

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27. *Id.* at 918–19.

28. Porat, *supra* note 12, at 2460. “In the real world, one cannot draw a distinct line between countries where a public order operates and countries where a private one obtains—both orders tend to function in every country, in varying degrees. . . . [N]o public order is ever perfect to the point of making private order redundant.” *Id.*

Part III acknowledges that public law serves the important expressive function of validating the need to protect human rights in the context of free trade and globalization. However, a purely public order has limited capability to enforce norms because of the inefficiencies in public institutions in a global marketplace. Public ordering may correct wholesale failures to respect fundamental labor rights by the governments of developing countries, but it is inadequate to address direct violations by private suppliers.

Part III also argues that multinational corporations should play a significant role in the enforcement of global labor norms. Advocates of global labor standards have suggested various enforcement mechanisms that may be characterized roughly as either private ordering, such as product labeling, preferred supplier programs, and corporate codes of conduct, or public ordering, such as including labor provisions in trade agreements.

Part IV concludes that the strengths and deficiencies in private and public ordering in the context of globalization and labor standards complement each other. Thus, an effective model for achieving and enforcing global labor standards must incorporate both public and private ordering.

## II. MULTINATIONAL CORPORATIONS AS SOURCES OF NORMS: QUESTIONS OF LEGITIMACY

The emergence of global labor norms has resulted largely from the efforts of the ILO, but only after unrestricted private ordering has failed to improve working conditions in developing countries.

Part II.A provides a brief description of private ordering theory. The question of private versus public ordering should be examined in the context of the desired goal: promulgating global labor norms. Because no evidence exists supporting the belief that private ordering will result in complete efficiency, permitting private ordering should not be the goal in and of itself. It is merely a potential means to achieving an objective.

Part II.B examines the impact of unrestricted private ordering on working conditions worldwide. Contrary to classical economics, market conditions and economic growth have not led to an optimal distribution of resources.

Part II.C discusses the ILO's core labor standards. The limited impact of the core standards on the existence of sweatshops is due, in part, to the narrow scope of the standards. Part II.D explains why private ordering among multinational corporations cannot produce good norms for non-

core labor issues. Finally, Part II.E examines the ILO's response to the failure of private ordering to increase wages, provide safe and sanitary work environments, and provide reasonable work hours for millions of laborers.

#### A. *Private Ordering and Institutional Choice*

Private ordering is susceptible to multiple interpretations; thus, a brief description of the relationship of "private ordering" to "public ordering" is prudent. "Private ordering" defies precise definition, in part, because various levels of governmental participation may occur. Much of the literature on private ordering focuses primarily on two questions. First, are the rules established by private groups likely to be efficient, either on an absolute scale or compared to regulations promulgated by the State? Second, to what extent should the State defer to existing private rules?<sup>29</sup>

According to Steven Schwarcz, "[p]rivate ordering can be viewed as part of a broad spectrum within which rulemaking is classified by the amount of governmental participation involved."<sup>30</sup> Models of private ordering range from systems in which private actors create and enforce rules without governmental sanctions (i.e., unrestricted private ordering) to systems in which private actors create rules that are enforced by the State.<sup>31</sup>

Common to each model is the role of the private actor as primary rulemaker. Therefore, "private ordering" is a system of rules and procedures that private actors develop.<sup>32</sup> In this sense, private ordering is conceptualized as an extra-legal process, an alternative means of producing socially desirable behavior outside the traditional legal order.

Private ordering frequently occurs through relational contracting, which recognizes that the possibility of repeat business may create self-enforcing mechanisms.<sup>33</sup> Contracting becomes a vehicle for creating and

29. See Katz, *supra* note 13, at 1746.

30. Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 324 (2002). Schwarcz identifies four models of ordering: (1) rules created and enforced by ruling governments, (2) rules created by private actors but enforced by governments, (3) rules created and enforced by private actors via governmental delegation, and (4) rules designed and adopted by private actors without governmental participation. *Id.* The first model constitutes public ordering. The last category constitutes private ordering. The remaining categories are a combination of private and public ordering.

31. *Id.*

32. Richman, *supra* note 11, at 2338–39.

33. See John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2424 (2000) ("Players may refrain from squeezing the last cent out of

imposing restrictions. Repeated interactions promote cooperation. Parties are more willing to conform to the norm because of the “threat of retaliation and consequent loss of business.”<sup>34</sup> Relational contracting enables the creation and enforcement of rules without governmental sanctions to the extent it provides sufficient economic incentives for compliance.

Private ordering arises, either spontaneously or through organized contracting, when the legal system does not provide a satisfactory means of resolving disputes. Private ordering may arise from family customs, religious doctrine, or business practices.<sup>35</sup>

Christopher Woodruff and John McMillan studied when relational contracting, communal norms, trade associations, or market intermediaries replace the traditional legal order.<sup>36</sup> They observed: “If the legal system functioned perfectly, contracts would never need to be self-enforcing. A frictionless legal system would always work at least as well as relational contracting.”<sup>37</sup> They conclude that private ordering either substitutes for the public order or supplements it, and that private ordering is more likely to “substitute” for public ordering when public institutions are dysfunctional, that is, when a country lacks a functioning judicial system, trained judges and lawyers, or when corruption is rampant.<sup>38</sup>

Private ordering also occurs in sophisticated legal systems when “the transaction costs of appealing to the legal system exceed the transaction costs of using relational contracting.”<sup>39</sup> Relational contracting may offer lower transaction costs in three distinct ways.

First, private actors have greater ability to monitor the conduct of other participants.<sup>40</sup> A governmental agency’s mechanism for information gathering is centralized. Private actors provide decentralized information gathering within their industry and, through their dealings, have greater opportunities to observe the practices of other private actors.

Second, private actors can make more nuanced decisions than judicial systems.<sup>41</sup> Courts are usually limited to “binary decision[s] . . . of liability

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the current deal because they wish to do business in the future, either with this particular trading partner or with others who could learn of [the players’] behavior.”)

34. *Id.*

35. Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Rules*, 82 CORNELL L. REV. 1123, 1124 (1997).

36. McMillan & Woodruff, *supra* note 33, at 2421.

37. *Id.* at 2425.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

or no liability.”<sup>42</sup> However, private actors may opt for solutions other than monetary damages or may require other actors to engage in a rehabilitative program designed to bring the participant into compliance with the norm.

Third, private actors can consider information that cannot be introduced in court such as impressions about business trends, judgments of quality of goods sold, and predictions of firm behavior over time based on probabilistic patterns.<sup>43</sup>

Even in a well-developed legal system, private actors may rely on relational contracting to reduce investigation and enforcement transactional costs.<sup>44</sup> Relational contracting allows private actors to avoid nonrecoverable attorneys’ fees, litigation costs, and the uncertainty of jury verdicts. Resolution of disputes occurs within a commercially practical time while the judicial process, including appeals, may take years.

As Avery Katz notes, the debate about private versus public ordering is essentially “a variation on the basic framework of transaction-cost economics.”<sup>45</sup> The theory of private ordering traces its roots to “Adam Smith’s famous argument that the market would lead, as an invisible hand, to the optimal allocation of all resources to their highest and best use.”<sup>46</sup> At the heart of private ordering is the assumption that the market will influence the development of optimal labor norms and enforcement mechanisms.

Opponents of private ordering raise concerns similar to those proffered by critics of Adam Smith’s *laissez-faire* approach.<sup>47</sup> The preferability of private ordering depends on market assumptions that do not hold in practice.<sup>48</sup> As a result, market forces do not result in optimal resource allocation.

Ronald Coase expanded the discussion by demonstrating that state allocation of resources also falls short of optimal efficiency.<sup>49</sup> Since neither private nor public ordering will obtain complete efficiency, neither institution is inherently preferable over the other.

The question of private versus public ordering is really one of institutional choice, i.e., in which institutional setting are transaction costs

42. *Id.*

43. *Id.*

44. Katz, *supra* note 13, at 1752.

45. *Id.* at 1753.

46. *Id.* (citing ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 577 (Edwin Cannan ed., 1976) (1776)).

47. *Id.* (citing A.C. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1932)).

48. *Id.* at 1753–54 (discussing Pigou’s theory of market failure).

49. *Id.* at 1754–55.

less? The relevant institution may be an unrestricted private order, a purely public order, or a system with private order and public order components.

This “private order” versus “public order” debate is limited in two senses. First, the debate is merely of a jurisdictional character.<sup>50</sup> It focuses upon which institution—the court, the legislature, or the community—is best able to establish a norm; however, it does not answer the question of what the norm should be.<sup>51</sup> This jurisdictional debate places the cart before the horse. It implicitly assumes that once the jurisdictional question is answered, the best rule will naturally follow.<sup>52</sup> Second, the inquiry presents a stark dichotomy that oversimplifies the dynamic relationship between public law and private norms.

In his groundbreaking work on private ordering, Robert C. Ellickson conceded that under some circumstances, public-created rules will be preferable to privately-created norms. First, spontaneously-created norms may not promote corrective or distributive goals.<sup>53</sup> Second, certain norms that maximize the welfare of persons within a group may have a detrimental effect on those outside the group.<sup>54</sup> Lastly, publicly-created laws may be necessary to establish the set of fundamental rights within a society.<sup>55</sup> Therefore, dysfunctionality may affect both private and public orders, making it necessary for private and public orders to supplement each other.

### *B. Globalization and Labor Reallocation: The Failure of Unrestricted Private Ordering among Multinational Corporations*

Broadly stated, globalization is the “historical process which transforms the spatial organization of social relations and transactions, generating transcontinental or interregional networks of activity, interaction, and the exercise of power.”<sup>56</sup> From this perspective,

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50. Katz, *supra* note 13, at 1747–48.

51. *Id.*

52. *See id.*

53. ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 283–84 (1991). *See also* Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1720–22 (1996) (explaining that human emotions, such as jealousy, envy, and spite, may render privately-created norms inefficient).

54. ELICKSON, *supra* note 53, at 283–84. *See also* McMillan & Woodruff, *supra* note 33, at 2423 (“It sometimes harms efficiency by excluding new entrants from trading or by achieving price collusion. Private ordering also can cause or perpetuate racial or gender discrimination.”).

55. ELICKSON, *supra* note 53, at 284 (noting that private ordering “predicts nothing about the nature of a society’s foundational entitlements”).

56. David Held & Anthony McGraw, *The End of the Old Order? Globalization and the Prospects for World Order*, 24 REV. INT’L STUD. 219, 220 (1998). *See also* Alastair J. Walling, *Early*

globalization is a continual process of cultural, economic, social, and political integration that is fueled by increased interactions among people in previously distant regions.<sup>57</sup>

Ben S. Bernanke, Chairman of the Federal Reserve Board, describes globalization as a “process [that] has been going on for thousands of years.”<sup>58</sup> Globalization is not a new phenomenon and, to some extent, it is a natural progression as populations increase and technologies advance.<sup>59</sup>

Other scholars define globalization as “both a journey and a destination: it signifies a historical process of becoming, as well as an economic and cultural result; that is, arrival in a globalized state.”<sup>60</sup> To this end, globalization necessarily entails a restructuring of all political and social systems.<sup>61</sup>

Others equate globalization with international law—the regulations and conditions that influence international relations.<sup>62</sup> These definitions describe globalization as a process, either self-compelled or guided. Implicit in each view is a recognition that globalization entails increased contact and interdependence.<sup>63</sup> This Article focuses on one aspect of globalization, namely, the increased economic interdependence of the international community.<sup>64</sup>

*to Bed, Early to Rise, Work Like Hell and Globalize*, 13 KAN. J.L. & PUB. POL’Y 161, 161 (2003–2004) (adopting Robert Keohane and Joseph Nye’s distinction between globalism and globalization).

57. See Held & McGraw, *supra* note 56, at 220 (“Globalization is about connections between different regions of the world—from the cultural to the criminal, the financial to the environmental—and the ways in which they increase over time.”).

58. Ben S. Bernanke, Chairman, Fed. Reserve Bd., Remarks at the Federal Reserve Bank of Kansas City’s Thirtieth Annual Economic Symposium in Jackson Hole, Wyoming (Aug. 25, 2006).

59. See *id.* Chairman Bernanke concludes, based on a brief review of the history of global economic integration, that major factors impacting globalization include: (1) new technologies that reduce the costs of transportation and communication; (2) national policy choices embracing free trade and free capital flows; and (3) social dislocation and social resistance that may result when economies become more open. See *id.*

60. Marjorie Ferguson, *The Mythology About Globalization*, 7 EUR. J. COMM. 69, 70 (1992).

61. *Id.*

62. David Bederman, *Globalization, International Law and United States Foreign Policy*, 50 EMORY L.J. 717, 718 (2001). Bederman argues:

By “globalization,” I am referring to more than the phenomenon of global capital movements, market expansions, enforced free trade disciplines, and western cultural penetrations. Rather, I regard globalization as a set of conditions that are influencing international relations in not only the realms of economics and commerce, but also in transportation and communication, culture and ideas, and politics and security. In short, the permissible realm of international legal regulation is the ambit of globalization.

*Id.*

63. See Surakiart Sathirathai, *Renewing Our Global Value: A Multilateralism for Peace, Prosperity and Freedom*, 19 HARV. HUM. RTS. J. 1, 13 (2006) (noting the Cold War’s negative impact on global economic integration).

64. Globalization is characterized by “the declining significance of national borders, brought

The process of economic globalization has progressed more rapidly than the restructuring of the public institutions that regulate it. U.S. trade policies promote economic globalization by removing legal barriers to economic integration. Trade agreements remove or reduce tariffs and quotas so that capital and goods may flow more freely across national borders.<sup>65</sup> U.S. free trade policy has spurred economic interdependence more quickly than it has addressed the impact of economic integration on labor practices in developing nations. Missing from many free trade agreements are labor provisions prohibiting exploitive labor practices.<sup>66</sup>

Prior to the ILO's 1998 Declaration, a strong consensus on labor standards was lacking. While the United Nations has addressed labor rights and child labor within the context of human rights,<sup>67</sup> the lack of specificity in the U.N. proclamations has hindered their efficacy in eliminating sweatshops.<sup>68</sup>

The ILO has focused on human and labor rights since its inception in 1919. As of June 2006, the ILO has promulgated 187 conventions and 190

about by increased trade, the spread of information technology, cross-border financial flows, and cultural transfers." Roman Terrill, *What Does "Globalization" Mean?*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 217, 217–18 (1999); see also Jackie Smith, *Economic Globalization & Labor Rights: Towards Global Solidarity?*, 20 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 873, 873–74 (2006). In her remarks at the University of Notre Dame's symposium on the Future of Labor Unions, Dr. Smith linked economic globalization with increased political instability and economic vulnerability in developing nations. Smith, *supra*.

65. See, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 *I.L.M.* 289 (1993). See also Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 21, 1994, 33 *I.L.M.* 1144 (1994).

66. See, e.g., Harry Reid, Letter to the Editor, *Yes to More Free Trade, But No to Forced Labor*, *WALL ST. J.*, Jul. 15, 2006, at A9 (stating that President George W. Bush had removed from the U.S.-Oman Free Trade Agreement a "no forced labor" clause that was unanimously approved by the Senate Finance Committee); but compare Free Trade Agreement, U.S.-Bahr., art. 15, Sept. 15, 2004, 44 *I.L.M.* 544 (2005), available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Bahrain\\_FTA/final\\_texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html) (reaffirming United States' and Bahrain's commitment to ILO core labor standards). The World Trade Organization has resisted including a "labor" clause. See Gary Quinlivan & Antony Davies, *Ethical Development and the Social Impact of Globalization*, 20 *INT'L J. WORLD PEACE* 39 (2003) (noting the 1999 violent protests in Seattle against the WTO for favoring multinational corporations at the expense of laborers).

67. T.N. Srinivasan, *Trade and Human Rights*, in *CONSTITUENT INTERESTS IN U.S. TRADE POLICIES* 225, 228–29 (Alan V. Deardorff & Robert M. Stern eds., 1998) (noting that article 55 of the U.N. Charter advocates nondiscrimination). The U.N.'s Universal Declaration of Human Rights includes "economic, social and cultural rights (right to join and form trade unions, right to work, right to equal pay for equal work, right to education) . . . [and] the right to decent living standards" within its definition of human rights. *Id.* at 229.

68. The United Nations had passed the Convention on the Rights of the Child; however, the lack of specificity in the Convention hindered its effectiveness in eliminating child labor. See Bernard Schlemmer, *General Introduction*, in *THE EXPLOITED CHILD* 1–2 (Bernard Schlemmer ed., 2000) The Convention "may well address the problem of child labour, but it gives no clear idea as to either *who* should be regarded as a child, working or otherwise, or *what* should be regarded as the work to which he or she must not be subjected." *Id.* (emphasis in original).



recommendations pertaining to the rights of workers.<sup>69</sup> These conventions propose norms relating to forced labor,<sup>70</sup> child labor,<sup>71</sup> maternity leave,<sup>72</sup> forty-hour work weeks,<sup>73</sup> paid holidays,<sup>74</sup> the right to associate,<sup>75</sup> the right to bargain collectively,<sup>76</sup> equal pay,<sup>77</sup> social security,<sup>78</sup> minimum wage,<sup>79</sup> minimum age,<sup>80</sup> and occupational health and safety.<sup>81</sup> Many ILO members, including the United States, have adopted few, if any, of these conventions.<sup>82</sup> As of 1995, the United States has ratified only twelve

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69. The conventions are international treaties, subject to ratification by the member states. The recommendations are non-binding instruments, often dealing with the same subject as the conventions, that set out guidelines orienting national policy and action.

70. ILO Convention Concerning Forced or Compulsory Labour, Convention No. 29, *adopted* June 28, 1930, 39 U.N.T.S. 56; ILO Convention Concerning the Abolition of Forced Labour, Convention No. 105, *adopted* June 25, 1957, 320 U.N.T.S. 292.

71. ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Convention No. 182, *adopted* June 17, 1999, 38 I.L.M. 1207.

72. ILO Convention Concerning the Revision of the Maternity Protection Convention, Convention No. 183, *adopted* June 15, 2000, 40 I.L.M. 2.

73. ILO Convention Concerning Reduction of Hours of Work to Forty a Week, Convention No. 47, *adopted* June 22, 1935, 241 U.N.T.S. 304.

74. ILO Convention Concerning Annual Holidays with Pay, Convention No. 132, *adopted* June 24, 1970, 883 U.N.T.S. 98.

75. ILO Convention Concerning Freedom of Association and Protection of the Right to Organize, Convention No. 87, *adopted* July 9, 1948, 68 U.N.T.S. 18.

76. ILO Convention Concerning the Promotion of Collective Bargaining, Convention No. 154, *adopted* June 19, 1981, 1331 U.N.T.S. 268.

77. ILO Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, Convention No. 100, *adopted* June 29, 1951, U.N.T.S. 303.

78. ILO Convention Concerning Minimum Standards of Social Security, Convention No. 102, *adopted* June 28, 1952, 210 U.N.T.S. 132.

79. ILO Convention Concerning Minimum Wage Fixing, with special reference to developing countries, Convention No. 131, *adopted* June 22, 1970, 825 U.N.T.S. 78.

80. ILO Convention Concerning Minimum Age for Admission to Employment, Convention No. 138, *adopted* June 26, 1973, 1015 U.N.T.S. 298.

81. ILO Convention Concerning the Promotional Framework for Occupational Safety and Health, Convention No. 187, *adopted* June 15, 2006, *available at* <http://www.ilo.org/ilolex/english/convdisp1.htm>.

82. Although the United States was active in the ILO in its beginning, its participation in the ILO has wavered. *See generally* Stephen I. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48 (1989). The past two decades has witnessed a resurgence of U.S. interest and support of the ILO. *Id.* at 71. The United States was involved at the ILO's inception, but did not become an official member of the ILO until 1934. *Id.* at 66. The United States withdrew its membership in 1977 due to conflicts regarding the perceived socialist agenda of the ILO, failure of the ILO to address human rights violations by the Soviet Union, and the strength of the ILO's tripartite structure. *Id.* at 68–69. However, the United States rejoined in 1980. *Id.* at 66. *See also* Edward C. Lorenz, *The Search for Constitutional Protection of Labor Standards, 1924–1941: From Interstate Compacts to International Treaties*, 23 SEATTLE U. L. REV. 569, 569 (2000). “American involvement in the ILO began as an effort to overcome Supreme Court opposition to national labor standards. With domestic judicial opposition to standards gone after World War II, American’s remarkable early leadership diminished when domestic attacks on the ILO undermined American defense of universal labor rights.” Lorenz, *supra*.

conventions.<sup>83</sup> The failure of countries to ratify many of these conventions signals that the principles and rights embodied within them have not become global norms.

By not including labor standards in trade agreements, U.S. trade policy implicitly assumes that multinational corporations, suppliers, and workers will establish global labor norms through relational contracting. In this sense, U.S. trade policies utilize unrestricted private ordering as a primary vehicle for eliminating sweatshops. Multinational corporations have the *potential* to impact the labor conditions in developing countries. However, as discussed below, unequal bargaining power and economic disparities between nations pose significant barriers to spontaneous private ordering.

Those opposed to linking labor standards and trade sanctions argue that free trade will promote wealth maximization and a corresponding improvement in global labor standards. Free trade has acted as a catalyst for rapid economic growth,<sup>84</sup> but whether free trade has achieved its purported objectives is more questionable.

Economic globalization accounts for a significant portion of the United States' economic growth. Within the past decade, the liberalization of trade has increased the United States' gross domestic product by nearly 40%.<sup>85</sup> Exported goods and services accounted for 10.4% of the United States' GDP in 2005 and for 20% of overall growth in the U.S. economy.<sup>86</sup>

Despite economic growth, the failure of U.S. trade policy to address global labor standards has raised questions about whether U.S. companies have fully realized the benefits of increased economic integration and whether improved labor standards will materialize without governmental intervention. A key component of U.S. economic policy is to open foreign markets to U.S. products and services.<sup>87</sup> The philosophy of U.S. trade

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83. The U.S. history of ratification was "the worst record of any major industrial nation." Srinivasan, *supra* note 67, at 228 (quoting Steve Charnovitz, *Promoting Higher Labor Standards*, WASH. Q., Summer 1995, at 167, 178). Charnovitz explains the United States' reluctance to ratify the conventions. "First, because U.S. treaties are the 'supreme law of the land,' ratifying an ILO convention could supersede federal and state labor laws if provisions of the convention can be enforced in domestic courts. Second, many Americans are reluctant to have U.S. policy reviewed by an international organization." *Id.*

84. DAVIDSON & MATUSZ, *supra* note 23, at 17. "One of the most widely accepted propositions in economic analysis is that, for each nation participating in international commerce, the aggregate gains from trade almost surely exceeds the aggregate costs." *Id.*

85. Press Release, Office of the U.S. Trade Representative, Trade Delivers Growth, Jobs, Prosperity, and Security at Home (July 2005), *available at* [http://www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2006/asset\\_upload\\_file451\\_9646.pdf](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2006/asset_upload_file451_9646.pdf) (last visited Jan. 22, 2007).

86. *Id.*

87. For a description of President George W. Bush's international trade policy, see <http://www.whitehouse.gov/infocus/internationaltrade/>.

policy centers on removing trade barriers to allow U.S. businesses to reach the world's potential customers for U.S. products, 95% of whom live outside the United States.<sup>88</sup>

To achieve this goal, the United States has entered into bilateral, regional, and global trade agreements with several countries. For example, U.S. agreements with Peru eliminated trade barriers and opened a market of 28 million consumers to U.S. companies.<sup>89</sup> In 2005, the exports of U.S. goods to Peru reached \$2.3 billion.<sup>90</sup> Assistant U.S. Trade Representative Everett Eissenstat testified before Congress: “[A]ccording to the International Trade Commission, our industrial and agricultural exports to Peru are expected to increase annually by as much as \$1.1 billion once the [trade agreement] is fully implemented.”<sup>91</sup>

Despite the growth in U.S. exports, the U.S. trade deficit persists and continues to grow. For example, in Vietnam, two-way trade grew from \$1 billion in 2000 to \$7.8 billion in 2006.<sup>92</sup> Deputy U.S. Trade Representative Karan Bhatia reports: “[O]ver that same period, U.S. exports to Vietnam increased 150% to \$1.2 billion, making Vietnam among the fastest growing Asian markets for U.S. goods.”<sup>93</sup> Although two-way trade grew overall, Vietnamese imports outnumbered American exports by a ratio of approximately six to one.

The rapid economic growth resulting from U.S. free trade policies has not been without a price. Globalization has been criticized, perhaps unfairly, as being “the product of a concerted effort of a number of powerful actors on the global scene to ensure not only that globalization continues as a process, but that it does so to their advantage.”<sup>94</sup> As one critic noted, “[T]he result of general free trade would not be a universal republic, but, on the contrary, a universal subjection of the less advanced nations to the supremacy of the predominant manufacturing, commercial, and naval power . . . .’ Globalism is thus the product of unilateral parochialism.”<sup>95</sup>

88. *Id.*

89. *U.S.-Peru Trade Promotion Agreement: Hearing Before the H. Comm. on Ways & Means, 109th Cong.* (2006) (statement of Everett Eissenstat, Assistant U.S. Trade Rep.).

90. *Id.*

91. *Id.*

92. *Authorizing the Extension of Nondiscriminatory Treatment (Normal Trade Relations Treatment) to the Products of Vietnam: Hearing on S. 3485 Before the S. Finance Comm., 109th Cong.* (2006) (statement of Karan K. Bhatia, Deputy of U.S. Trade Rep.).

93. *Id.*

94. Rex Honey, *An Introduction to the Symposium: Interrogating the Globalization Project*, 12 *TRANSNAT'L L. & CONTEMP. PROBS.* 1, 1 (2002).

95. Eisuke Suzuki, *The Fallacy of Globalism and the Protection of National Economies*, 26

The concerns raised by critics of globalization are not without foundation. When the ILO promulgated the 1998 Declaration, it recognized that economic growth alone would not effectively address international concerns regarding labor conditions in developing countries.<sup>96</sup>

Public policy concerns regarding child labor arose as early as the Industrial Revolution.<sup>97</sup> The impact of globalization on exploitive child labor practices has been pronounced.<sup>98</sup> It is not unusual to hear of thirteen-year-olds working thirteen-hour days making handbags while getting paid \$24 per month, or working eighty-hour weeks to make sweaters while getting paid only pennies per hour.<sup>99</sup>

Further, despite optimistic forecasts that economic growth would maximize global wealth, evidence suggests that unrestricted private ordering, free trade without labor standards, has had a negative impact on economic disparities between nations.<sup>100</sup> The International Labour Organization reported that, in 1960, the GDP per capita of the twenty richest nations was eighteen times higher than the GDP of the twenty

YALE J. INT'L L. 319, 321–22 (2001) (quoting FRIEDRICH LIST, *THE NATIONAL SYSTEM OF POLITICAL ECONOMY* 112 (Samson S. Lloyd trans., Angustus M. Kelley 1966) (1841)).

96. ILO Declaration on Fundamental Principles and Rights at Work—About Me Declaration, <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE>.

97. INT'L LABOUR OFFICE, *supra* note 6, at 1.

98. Dexter Samida, *Protecting the Innocent or Protecting Special Interests? Child Labor, Globalization and the WTO*, 33 DENV. J. INT'L L. & POL'Y 411, 411–21 (2005) (considering the link between international trade and child labor). *See also* Saida Toor, *Child Labor in Pakistan: Coming of Age in the New World Order*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 203–04 (2001); Christopher M. Kern, *Child Labor: The International Law and Corporate Impact*, 27 SYRACUSE J. INT'L L. & COM. 177 (2000) (discussing the negative impact of child labor and the need for international law to restrain child labor abuses); Christopher L. Erickson & Daniel J.B. Mitchell, *Labor Standards & Trade Agreements, U.S. Experience*, 19 COMP. LAB. L. & POL'Y J. 145 (1998).

99. *See* Timothy A. Glut, *Changing the Approach to Ending Child Labor: An International Solution to an International Problem*, 28 VAND. J. TRANSNAT'L L. 1203, 1203 (1995) (arguing that a connection exists between the acute increase in child labor and globalization).

100. The ILO explained the need for global labor standards.

By the beginning of the 1990s, it was clear that the world had changed. Globalization, the information technology revolution, the end of the Cold War, and the emergence of a universal market economy for the first time since 1914 provided the impetus for a global debate on core labour standards—both within and beyond the International Labour Organization.

Debate intensified as it became apparent that economic growth alone was not enough. When the processes commonly called globalization first emerged, it was widely assumed that internationalization, technological change, the market economy and democratization would provide the essential ingredients for growth, employment and well being. This proved not to be the case everywhere.

ILO Declaration on Fundamental Principles and Rights at Work—Background, [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static\\_jump?var\\_language=EN&var\\_pagename=DECLARATIONBACKGROUND](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONBACKGROUND).

poorest nations.<sup>101</sup> By 1995, it had grown to thirty-seven times higher.<sup>102</sup> Despite the global economic growth, the number of people living on less than one dollar per day remained mostly constant during the 1990s.<sup>103</sup> Globalization disproportionately benefits highly skilled workers over unskilled workers.<sup>104</sup> Globalization's promise of wealth maximization has not been realized by all workers.

Global economic growth alone has failed to close the economic gap between nations. In fact, in the absence of strong global norms, rapid economic growth has exacerbated the disparities. As discussed below, the ILO's work to eliminate child labor and forced labor suggests that governmental participation in articulating the relevant norms is necessary. Deference to privately-created norms is justified when those norms derive from an efficient incentive structure.<sup>105</sup> Norms must result from open competition between alternatives and must not impose costs on nonmembers of the community.<sup>106</sup> In developing countries, the relevant community consists of multinational corporations and their suppliers. Documentation of child labor, forced labor, and increased wealth disparities evidence that tremendous costs are imposed on nonmembers of the community, the workers in the globalized labor market.

101. *Id.*

102. *Id.*

103. *Id.*

104. Robert C. Feenstra, *Introduction to THE IMPACT OF INTERNATIONAL TRADE ON WAGES* 1 (Robert C. Feenstra ed., 2000). In the United States,

[t]he share of income received by the lowest quintile (20 percent) of households fell from 4.4 percent in 1977 to 3.8 percent in 1987 to 3.6 percent in 1997, while the share of income received by the highest quintile of households has risen from 43.6 to 46.2 to 49.4 percent over the same period.

*Id.* Since the early 1980s,

the United States experienced a fall in the wages of the lowest-skilled workers, measured either in real terms or relative to wages of high-skilled workers; a fall in the relative employment of less-skilled workers; and, as a result of both of these, an increase in the share of total labor income going to high-skilled workers.

*Id.* at 1–2.

105. Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1694–96 (1996).

106. *Id.*

*C. The ILO's Core Labor Standards: Coordinating Implementation of Labor Norms*

The ILO's approach to global labor standards offers an opportunity to examine the process for creating and enforcing norms through a non-dichotomized approach. The literature on private ordering and social norms usually characterizes norms as either private or public. Scant attention is given to norms developed through a cooperative process involving both government and private actors. The ILO utilizes a cooperative process whereby governments, employers, and workers participate in the formation of global labor norms.

The ILO accomplishes its mission through three main bodies, each of which encompasses the ILO's tripartite structure. Workers and employers participate as equal partners with governments in the work of the ILO's governing body.<sup>107</sup> The tripartite structure encourages consultation and collaboration between private industry and sovereign governments in resolving global labor problems. As a result, the norms that emanate from the ILO are not perfectly categorized as either public or private norms.

The member states of the ILO, as sovereign nations, are not obliged to ratify the conventions. To the extent that there is meaningful participation by worker and employer representatives, the norms, if ratified, become public norms created by public and non-government actors.

The idea for the ILO originated with Robert Owen and Daniel Legrand, two industrialists who were concerned about the impact of industrialization on workers.<sup>108</sup> Owen observed:

In the manufacturing districts it is common for parents to send their children of both sexes at seven or eight years of age, in winter as well as summer, at six o'clock in the morning, sometimes of course in the dark, and occasionally amidst frost and snow, to enter the manufactories, which are often heated to a high temperature, and contain an atmosphere far from being the most favourable to human life, and in which all those employed in them very frequently continue until twelve o'clock at noon, when an hour is allowed for

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107. The ILO's governing body consists of fifty-six individuals: twenty-eight government representatives, fourteen employer representatives, and fourteen worker representatives. ILO CONST. art. 7, § 1. *available at* <http://www.ilo.org/public/english/about/iloconst.htm>.

108. ILO, About the ILO, <http://www.ilo.org/public/english/about/history.htm>.

dinner, after which they return to remain, in a majority of cases, till eight o'clock at night.<sup>109</sup>

Owen's views on reducing work hours and child labor were incorporated into the ILO's Constitution.<sup>110</sup> The Preamble to the ILO Constitution recognizes that "an improvement of [working] conditions is urgently required; as for example, by the regulation of the hours of work including the establishment of a maximum working day and the week . . . the protection of children, young persons and women . . ."<sup>111</sup>

Despite the ILO's historical mission to promote labor standards, the ILO had limited success in garnishing support for global labor standards prior to 1998. In an effort to build consensus around labor rights, the ILO reduced the more than 180 conventions and 190 recommendations to four primary principles. The ILO identified "core labor standards"—pertaining to forced labor,<sup>112</sup> freedom to associate,<sup>113</sup> freedom to organize and bargain collectively,<sup>114</sup> equal pay,<sup>115</sup> discrimination,<sup>116</sup> minimum age,<sup>117</sup> and child labor<sup>118</sup>—in its 1998 Declaration. The 1998 Declaration proceeds on the assumption that "maintain[ing] the link between social progress and economic growth" requires a guarantee of fundamental labor

109. ROBERT OWEN, OBSERVATIONS OF THE EFFECT OF THE MANUFACTURING SYSTEM (1815).

110. About the ILO, *supra* note 108.

111. ILO CONST. pmbli., available at <http://www.ilo.org/public/english/about/iloconst.htm> (last visited Oct. 3, 2007).

112. ILO Convention Concerning Forced or Compulsory Labour, *supra* note 70; ILO Convention Concerning the Abolition of Forced Labour, *supra* note 70. These conventions require the suppression of forced or compulsory labor, with limited exceptions for military service and emergencies.

113. ILO Convention Concerning Freedom of Association and Protection of the Right to Organize, *supra* note 75. This convention establishes the rights of all workers and employers to form and join organizations of their own choosing without prior authorization and lays down a series of guarantees for the free functioning of organizations without interference by the public authorities.

114. ILO Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, Convention No. 98, adopted July 1, 1949, 96 U.N.T.C. 258. This convention provides for protection against anti-union discrimination.

115. ILO Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, *supra* note 77 (calling for equal pay and benefits for men and women for work of equal value).

116. ILO Convention Concerning Discrimination in Respect of Employment and Occupation, Convention No. 111, adopted June 25, 1958, 362 U.N.T.S. 32 (calling for a national policy to eliminate discrimination in access to employment, training and working conditions, on the grounds of race, color, sex, religion, political opinion, national extraction, or social origin).

117. ILO Convention Concerning Minimum Age for Admission to Employment, June 26, 1973, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>. The Convention establishes a minimum age that shall not be less than the age of completion of compulsory schooling.

118. ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *supra* note 71 (calling for immediate measures to eliminate the worst forms of child labor, including slave labor, forced recruitment in armed services, and the use of children in prostitution and pornography).

rights.<sup>119</sup> The “core” labor standards represent the irreducible minimum in human rights protection afforded to workers worldwide.

These global norms are the product of a concerted effort by the international community.<sup>120</sup> The 1998 Declaration commits all ILO member states, regardless of the country’s level of development, to respect the core labor principles, even if such states have not ratified the specific conventions.<sup>121</sup>

Following issuance of the 1998 Declaration, the ILO documented progress in the elimination of child and forced labor. In 2000, approximately 186 million children aged five to fourteen were considered child laborers as defined by the ILO.<sup>122</sup> Furthermore, about 8.4 million of those children were victims of child trafficking, forced and bonded labor, armed conflict, prostitution and pornography, and other illicit activities.<sup>123</sup> By 2004, the number of child laborers dropped 11% globally while the number of children working in hazardous work decreased by 26%.<sup>124</sup>

Despite some improvements in the problem of child labor, the ILO’s core labor standards appear insufficient to eliminate exploitative and dangerous working conditions in developing countries. Globalization has been linked to forced labor.<sup>125</sup> The National Labor Committee (NLC), a

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119. International Labor Conference, 86th Session, June 2–18, 1998, *ILO Declaration on Fundamental Principles and Rights at Work*, ¶ 5, iloex Doc. 261998, available at <http://www.ilo.org/public/english/standards/realm/ilc/ilc86/com-dtxt.htm> [hereinafter International Labor Conference].

120. Michel Hansenne, then acting ILO Director-General, stated that the ILO “had taken up the challenge presented to it by the international community. It has established a social minimum at the global level to respond to the realities of globalization . . . .” *ILO Declaration on Fundamental Principles and Rights at Work—Background*, *supra* note 100. See also Laurence R. Helfner, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649 (2006).

121. International Labor Conference, *supra* note 119, § 2.

122. The ILO defines “child labour” as employing children younger than fourteen years of age. ILO conventions adopted in 1973 permit member states to define the minimum age for their country, provided that the minimum age “shall not be less than the age of completion of compulsory schooling and, in any case, not less than fifteen.” *ILO Convention Concerning Minimum Age for Admission to Employment*, *supra* note 117, art. II, § 3. The Convention recognizes that the minimum age may be lowered to fourteen years of age for members “whose economy and educational facilities are insufficiently developed.” *Id.* § 4. For statistics, see INT’L PROGRAMME ON THE ELIMINATION OF CHILD LABOUR, INT’L LABOUR ORG., EVERY CHILD COUNTS: NEW GLOBAL ESTIMATES ON CHILD LABOUR 20 (2002).

123. INT’L PROGRAMME ON THE ELIMINATION OF CHILD LABOUR, *supra* note 122, at 25.

124. END OF CHILD LABOUR, *supra* note 97, at xi. The ILO defines “hazardous work” as “any activity or occupation that, by its nature or type, has or leads to adverse effects on the child’s safety, health (physical or mental), and moral development.” *Id.* at 6. “Hazards could also derive from excessive workload, physical conditions of work, and/or work intensity in terms of the duration or hours of work even where the activity or occupation is known to be non-hazardous or ‘safe.’” *Id.* The list of such activities is determined on the national level. *Id.*

125. Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon—An Examination of*



human rights advocacy group, investigates exploitive labor practices utilized by American companies or their suppliers producing goods in developing countries.<sup>126</sup>

In March 2006, the NLC published a 168-page report documenting the use of sweatshops to create brand-name apparel, such as Gloria Vanderbilt, Liz Claiborne, Perry Ellis and Bill Blass, as well as apparel destined for sale in American stores, such as Wal-Mart, K-Mart, Kohl's, Target, Victoria's Secret, and J.C. Penney.<sup>127</sup> The report documents numerous human rights abuses in several factories in "Qualifying Industrial Zones" in Jordan. According to the report, Bangladeshi workers at the Al Shahaed Apparel & Textile factory were stripped of their passports, routinely worked thirty-eight to forty-eight hour shifts, and were beaten and tortured.<sup>128</sup> According to the NLC's findings, these workers were paid only two cents per hour while sewing clothing for Wal-Mart and K-Mart.<sup>129</sup> The Bangladeshi workers had paid "a contractor" as much as \$3,000 to purchase three-year contracts to work in Jordan.<sup>130</sup>

Other Jordanian factories, such as the Western factory and Al Safa, were accused of engaging in similar exploitive practices.<sup>131</sup> The NLC report found that the Western factory, which produced clothing for Wal-Mart, failed to pay workers who regularly worked twenty-hour shifts.<sup>132</sup>

Similar reports of exploitation emerge from Oman, with whom the United States has a free trade agreement.<sup>133</sup> The NLC has alleged that an

*Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 95 (2002). Ramasastry argues that "[multinational corporations] should be held liable either civilly or criminally for their complicity in certain types of egregious human rights violations . . ." *Id.* See also A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 PENN ST. INT'L L. REV. 809, 810–11 (2005).

Contemporary forms of slavery flourish in most states as monetary gain and expendable labor bring profit both to slaveholders and corrupt government officials . . . Although international and domestic law universally condemns slavery and forced labor, the prevalence of so-called new forms of slavery calls into question the ability of existing international conventions not only to prevent slavery and the slave trade, but also facilitate the permanent liberation of the enslaved.

Rassam, *supra*.

126. National Labor Committee Mission Statement, <http://www.nlcnet.org/aboutus.php>.

127. NAT'L LABOR COMM., U.S.-JORDAN FREE TRADE AGREEMENT DESCENDS INTO HUMAN TRAFFICKING & INVOLUNTARY SERVITUDE 11–18 (Mar. 2006).

128. *Id.* at 3.

129. *Id.*

130. *Id.* at 5. See also Steven Greenhouse & Michael Barbaro, *An Ugly Side of Free Trade: Sweatshops in Jordan*, N.Y. TIMES, May 3, 2006, at C2.

131. NAT'L LABOR COMM., *supra* note 127, at 5.

132. *Id.* at 11–18.

133. U.S. Trade Representative Rob Portman and Oman's Minister of Commerce signed the U.S.-

estimated 300,000 guest workers in Oman are victims of human trafficking and forced labor in Omani factories that supply goods to U.S. companies.<sup>134</sup> The U.S. State Department has identified Oman as a destination country for victims of human trafficking.<sup>135</sup>

Dangerous working conditions exist in such factories. In February 2006, a fire tore through a textile factory in Bangladesh. More than 1,000 people were working in the three-story building when the fire began at 7:20 p.m.<sup>136</sup> The main exit to the building was illegally locked.<sup>137</sup> The initial reports indicated that at least fifty-one people died; however, NLC's investigation concluded that the final death toll was eighty-four.<sup>138</sup> According to the NLC report, the textile workers were being paid \$0.10 to \$0.14 per hour while working ten to fourteen hours per day, seven days per week.<sup>139</sup>

Other NLC investigations revealed that Chinese laborers worked 15–19.5 hours per day at the Huangwu No. 2 Factory, which manufactures toys for Wal-Mart and Dollar General. NLC investigators alleged: “Workers must complete one operation every three seconds, repeating the same furious motion 10,000 times a day. The constant repetition wears off their skin, leaving them with sore, blistered and bleeding hands and fingers.”<sup>140</sup> Workers were paid between \$0.43 to \$3.45 per day and were routinely not paid for overtime.<sup>141</sup> The workers were required to maintain an intense work pace that caused some to faint from exhaustion.<sup>142</sup> During peak seasons, the Huangwu factory ignored national holidays and denied maternity leave.<sup>143</sup>

Oman Free Trade Agreement on January 19, 2006. See Press Release, Office of the U.S Trade Representative, U.S. and Oman Sign Free Trade Agreement (Jan. 19, 2006). The Senate and House passed the U.S.-Oman FTA on June 29, 2006 and July 20, 2006, respectively. See Press Release, Susan C. Schwab, Office of the U.S. Trade Representative, Statement on House Passage of U.S.-Oman Free Trade Agreement (July 20, 2006); Press Release, Susan C. Schwab, Office of the U.S. Trade Representative, Statement on Senate Passage of U.S.-Oman Free Trade Agreement (June 29, 2006).

134. *Human Trafficking & Involuntary Servitude Under the U.S.—Jordan Free Trade Agreement: Hearing Before the Subcomm. on Africa, Global Human Rights, and International Operations of the H. Comm. on International Relations*, 109th Cong. (2006).

135. U.S. STATE DEP'T, *TRAFFICKING IN PERSONS REPORT*, 196–98 (2006).

136. *51 Die in Fire at Mill in Bangladesh*, ALBANY TIMES UNION, Feb. 24, 2006, at A7.

137. *Id.*

138. *Id.*

139. Nat'l Labor Comm., *Factory Fire in Bangladesh Kills 84 Workers Producing for American Companies*, available at <http://www.nlcnet.org/live/article.php?id=112>.

140. Nat'l Labor Comm. & China Labor Watch, *Blood & Exhaustion: Behind Bargain Toys Made in China for Wal-Mart and Dollar General* (Dec. 21, 2005), at 1, <http://www.chinalaborwatch.org/upload/Huangwu.pdf>.

141. *Id.* at 4–5.

142. *Id.* at 5.

143. *Id.* at 6.

The purpose of this Article is not to document every instance of abuse in sweatshops, but to demonstrate that the abuses are widespread and occur despite the promulgation of the ILO's core labor standards. To some extent, the ILO standards end any debate as to whether universal labor standards extend beyond a ban on forced labor. However, the core labor standards are limited in their reach.<sup>144</sup> The 1998 Declaration does not address other key labor concerns, such as livable wages, work hours, overtime pay, sick leave, maternity leave, medical benefits, and safety conditions. Strong communal norms on these labor issues do not exist. The 1998 Declaration's limited scope renders it ineffective for eliminating sweatshops, which may exist even in the absence of child or forced labor. As discussed below, private actors must overcome significant coordination problems to implement non-core labor standards.

#### *D. Private Ordering and Non-Core Labor Standards*

This Article uses the term "non-core labor standards" to describe any labor standard that does not fall within the scope of the ILO's 1998 Declaration. While the ILO's core labor standards provide a necessary first step towards the elimination of sweatshops, they fail to address additional labor concerns, such as the need for a living wage, maternity leave, maximum work week, holiday leave, and occupational health and safety. The absence of clear global norms on these issues has left a void that private ordering has not filled and is incapable of filling.

The failure of relational contracting to produce a spontaneous private order incorporating these standards may be explained by analogy to the classic prisoner's dilemma.

[T]wo prisoners are separately interrogated by the authorities, who attempt to extract confessions from each implicating the other. If both are silent, each will go free. If both confess, each will get a moderate sentence. If one confesses and the other does not, the former will get a light sentence and the latter a heavy sentence. Accordingly, both prisoners would be best off if each remains silent, but each fears the other will confess. To avoid the danger of

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144. Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights*, 16 EUR. J. INT'L L. 439 (2005) (responding to Philip Alston's critique of the 1998 Declaration as curtailing workers' rights).

the heavy sentence (that would follow from the other's confession), each confesses and incurs a moderate sentence.<sup>145</sup>

The prisoner's dilemma scenario demonstrates that a rational, self-interested actor will confess because it forecloses the worst result (heavy sentence) and makes possible the best result (freedom).<sup>146</sup> Thus, by acting rationally, both parties create a situation that is worse (a moderate sentence) than it would be if the prisoners had acted irrationally and remained silent.

Globalization presents multinational corporations with a challenge analogous to the challenge presented by the prisoner's dilemma. Non-core labor standards will benefit workers in both developed and developing countries, multinational corporations, and the governments of developing countries. Workers in developing countries will receive higher wages and safer work environments. Multinational corporations could benefit by the expansion of markets for goods in these developing countries. As wages increase, workers in developing countries are in a better position to purchase the products produced for the multinational corporations. Workers in more developed countries will benefit because improved labor standards globally will slow the efflux of jobs from developed countries. Furthermore, as U.S.-based companies find new markets, U.S. workers will benefit by the corresponding increase in jobs.

U.S. multinational corporations jeopardize their competitive position if they act either first or unilaterally to improve labor conditions. Global labor standards, such as a minimum wage or medical benefits, impact the corporation's production costs.<sup>147</sup> Multinational corporations seek suppliers in developing countries who impose lower costs. The cost of these non-core labor standards depends on the country's economic development. Wealthy countries can afford higher minimum wages, shorter working hours, and greater investment in workplace safety.<sup>148</sup>

Multinational corporations' focus on driving down labor costs has the effect of pitting one poor country against another in competition for corporate investment dollars.<sup>149</sup> Some countries have been accused of

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145. Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2058 n.84 (1993).

146. See generally KENNETH A. SHEPSLE & MARK S. BONCHAK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR AND INSTITUTIONS 201-19 (1997) (describing the prisoner's dilemma in further detail).

147. ELLIOTT & FREEMAN, *supra* note 16, at 10.

148. *Id.* at 13.

149. Claude Meillassoux, *The Economy and Child Labour: An Overview*, in THE EXPLOITED CHILD 47 (Bernard Schlemmer ed., 2000).

ignoring violations of local labor laws in order to attract foreign investment.<sup>150</sup> As regulatory and labor costs increase in a particular country, companies may relocate their production facilities or seek suppliers in countries offering less costly labor to maintain their competitive advantage. This global competition for private investment hinders the economic development of poorer countries by limiting their ability to acquire capital.<sup>151</sup> Thus, rational, self-interested actors will likely choose to remain financially competitive by seeking out cheap labor; but, in doing so, the corporations will worsen global working conditions and hinder global economic growth.

Avery Katz's observation that "some social norms are not valuable until a critical mass of people uses them" is relevant here.<sup>152</sup> He explained, "[E]ven if a newly created norm would be more efficient than the status quo, there may be no way for a decentralized community to coordinate its implementation."<sup>153</sup> Non-core labor norms will promote a more efficient allocation of resources; however, the full value of global labor norms will not be realized unless implementation of the norms is coordinated. Just as the ILO created the core labor standards, the ILO could serve as a useful vehicle for the creation and coordination of non-core legal standards.

Another (less often raised) practice enters the framework to weaken the so-called developing countries: "foreign investment." Often presented as desirable "aid," these investments are the fruit of relocation policies whose aim it is to find the least expensive labour force possible around the world, even it means having quickly to shift investments from one region to another because of local labour prices.

*Id.*

150. *Id.* at 47–48. "Some countries, such as so-called 'popular' China, cater to this [competition for foreign investment dollars] by creating 'special zones' where particularly cheap workers are delivered to foreign firms, children included . . ." *Id.*

151. Dr. Meillassoux observed:

Foreign investments increase the dependence of the [developing] countries into which they are channeled by not allowing capital to be amassed in the places where the commodities are produced and the work is done (which is why these countries are always appealing to the international financial authorities for assistance) . . . [A] country's economic progress depends on its ability to accumulate, make use of and manage capital: i.e., its ability to constitute and reconstitute its human and material bases so that the nation can have its best configuration for development. Unable to keep the profits from capital, these countries are kept in a position of constant dependence upon foreign banks and funding agencies.

*Id.* at 47–48.

152. Katz, *supra* note 13, at 1750. "Each person who decides whether to follow a norm, therefore, imposes a positive externality on all who use it . . . Some norms, such as traffic laws, may become valuable only if they can attain the allegiance of a majority of the population." *Id.*

153. *Id.*

### *E. The ILO's Decent Work Initiative*

The ILO historically articulated its objectives in human rights terms. However, under its Decent Work Initiative, the ILO rephrases its objective as assisting developing countries realize the benefits of the economic growth attributable to globalization. The initiative includes social protections for laborers and workplace rights.<sup>154</sup> Juan Somavia, acting ILO Director-General, described the Decent Work Initiative as follows:

Decent work means productive work in which rights are protected, which generates an adequate income with adequate social protection. It also means sufficient work in the sense that all should have full access to income-earning opportunities. Decent work marks the high road to economic and social development, a road in which employment, income and social protection can be achieved without compromising workers' rights and social standards.<sup>155</sup>

The concept of decent work moves beyond the core labor standards towards broader principles of fairness. The Decent Work Initiative encompasses more than the human rights notion that all people should be free from forced labor by incorporating distributional goals. The focus of the decent work agenda is to guide globalization so that workers can fairly reap the benefits of globalization in their daily lives.

Whereas the 1998 Declaration identified the irreducible minimum in labor rights, the Decent Work Initiative more ambitiously charts a path towards the maximization of labor rights. The ILO's Decent Work Initiative is a potential source of global labor norms that include both core and non-core standards and, thus, can more fully address the problem of sweatshop conditions in developing countries.

### III. ENFORCEMENT MECHANISMS: EXTENDING THE PUBLIC-PRIVATE COLLABORATION

Since the ILO issued its 1998 Declaration, it has documented a downward trend in child labor worldwide.<sup>156</sup> However, insufficient wages, long hours, and unsafe working conditions still persist. This is due, in significant part, to the ILO's lack of an efficient enforcement program.

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154. The Director-General, *Report of the Director-General: Decent Work, delivered to the 87th Session of the International Labour Conference*, Geneva, Switz. (June 1999).

155. *Id.*

156. INT'L LABOUR OFFICE, *supra* note 6.

Some commentators propose additional measures to implement the ILO's core labor standards, ranging from private order initiatives, such as corporate codes of conduct and the promotion of consumer awareness, to public order programs, such as the inclusion of labor provisions in U.S. trade agreements or World Trade Organization (WTO) agreements.<sup>157</sup> These initiatives may be characterized as international public ordering, national public ordering, or private ordering.

Part III.A discusses the limitations of an international public order. The refusal of the WTO to address labor issues and the ILO's weak compliance program create a dysfunctional international public order that should be supplemented by private order initiatives. While many commentators concede that the ILO's enforcement program is weak, they lack unanimity on whether private order or national public order is needed to enforce global labor norms.<sup>158</sup>

Part III.B identifies some of the inefficiencies inherent in a national public order from the perspective of the United States. Opportunities for protectionism inherent in the constitutional separation-of-powers principle and the high stakes nature of trade sanctions limit the efficiency of American public institutions in addressing global labor standards.

Part III.C examines private order initiatives, such as corporate codes of conduct and consumer awareness programs, to explain how such initiatives may supplement the public order. While governmental institutions and private groups may each suffer inefficiencies, the inefficiencies are of distinct kinds. As the discussion below suggests, private order may complement public order enforcement mechanisms.

The proposed inclusion of labor standards in global, regional, and bilateral trade agreements implicitly favors a "public order" enforcement regime. As discussed in Part II, publicly promulgated labor norms, as embodied in the ILO's Decent Work concept, are necessary. However, it is helpful to distinguish the creation of norms from their enforcement. Public ordering, whether international or national, may be useful to address egregious failures of developing countries to enforce their local labor laws.

157. Thomas J. Manley & Luis Lauredo, *International Labor Standards in Free Trade Agreements of the Americas*, 18 EMORY INT'L L. REV. 85 (2004). See also Marisa Anne Pagnatarro, *The Helping Hand in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. INT'L L. 845 (2004).

158. The U.S. State Department implicitly recognizes the need for more effective enforcement measures. The International Labor Affairs Office within the State Department administers a \$4 million anti-sweatshop initiative that "fund[s] the development of and research into approaches and mechanisms to combat sweatshop conditions in overseas factories that produce goods for the U.S. market." U.S. Department of State, <http://www.state.gov/drl/lbr/> (last visited Oct. 6, 2007).

However, private ordering, working in tandem with public ordering, will be more efficient in identifying violations and enforcing norms against individual employers.

#### A. *The Dysfunctionality of the International Public Order*

On an international level, commentators and advocacy groups have focused primarily on two organizations as potential enforcers of global labor norms: the WTO and the ILO. The WTO has flatly refused to assume responsibility for global labor norms, and as discussed above, the ILO's core labor standards do not extend to many of the conditions, such as long hours and low pay, that are associated with sweatshops.

Furthermore, even if the WTO addressed labor standards or the ILO's Decent Work agenda gained broader support among its members, such an international public order relies too heavily on trade sanctions against the governments of member states to effectively address the violations of individual employers. To this extent, the international public order proposed by linking labor standards and trade sanctions will continue to be dysfunctional and should be supplemented by private order.

##### 1. *Questions of Legitimacy*

Cass Sunstein observed that some people may reject a norm because the source of the norm lacks legitimacy.<sup>159</sup> This observation is particularly relevant to the WTO's refusal to include labor standards in WTO agreements. In 1996, the First Ministerial Conference of the WTO was presented with a proposal to link labor standards to trade sanctions.<sup>160</sup> The WTO declined to do so; instead, it opted to acknowledge the ILO's authority to develop labor standards.<sup>161</sup> The WTO's refusal to assume responsibility for labor standards triggered protests and riots in Seattle, the host of the 1999 WTO conference.<sup>162</sup> The WTO has since come under

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159. Sunstein, *supra* note 25, at 914.

160. David Holley, *WTO's Small Step Forward on Worker's Rights*, L.A. TIMES, Dec. 14, 1996, at D1.

161. World Trade Organization, Singapore Ministerial Declaration of 13 December 1996, ¶4, WT/Min(96)/DEC/2, 36 I.L.M. 218, 221 (1997), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/singapore\\_declaration96\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf). "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards and we affirm our support for its work in promoting them." *Id.*

162. ALEXANDER COCKBURN & JEFFREY ST. CLAIR, *FIVE DAYS THAT SHOOK THE WORLD: SEATTLE & BEYOND* (2000) (describing personal accounts of the 1999 protests in Seattle).



attack for protecting capital, such as intellectual property rights, but not the rights and safety of workers.

The United States was a primary proponent of linking labor standards with trade sanctions in 1999.<sup>163</sup> The governments of many less developed countries opposed the proposal on the ground that such labor standards were motivated by protectionism and intended to stem the flow of foreign investment and jobs into less developed countries.<sup>164</sup> The industrialized countries that pushed for the linking of labor standards and trade sanctions lacked legitimacy among developing countries. Some leaders of poorer countries raised the concern that labor standards were designed to bolster workers in industrialized countries at the expense of workers in developing countries.

Some advocates of linking labor standards and trade sanctions suggest that labor standards need not lead to protectionist abuse. For example, Elliott and Freeman argue that the WTO should amend its agreements “to include a provision allowing countries to retaliate against trade-related and egregious violations of the core labor standards.”<sup>165</sup> “To minimize the risks of protectionism, any revision of Article XX(e) should focus on *egregious and narrowly defined* violations of standards—based on ILO supervisory evidence, and subject to WTO review, just as actions under Article XX currently are.”<sup>166</sup> Elliott and Freeman’s proposal seeks to achieve legitimacy by narrowing the categories of sanctionable conduct and elevating the standard by which labor violations are determined. As formulated, the proposal would limit the WTO’s effectiveness in addressing “non-egregious” violations.

Even if an international organization, such as the WTO, were to impose trade sanctions for violations of ILO labor standards, the dysfunctionality of the system would still require private ordering to supplement the international public order. The ILO’s difficulty in using trade sanctions to coerce compliance with labor standards demonstrates this point.

163. Steven Greenhouse & Joseph Kahn, *U.S. Effort to Add Labor Standards to Agenda Fails: Trade Group Stalls Bid*, N.Y. TIMES, Dec. 3, 1999, at A1.

164. See Christopher L. Erickson & Daniel J.B. Mitchell, *The American Experience with Labor Standards & Trade Agreements*, 3 J. SMALL & EMERGING BUS. L. 41, 42–43 (1999). See also Juli Stensland, *Internationalizing the North American Agreement on Labor Cooperation*, 4 MINN. J. GLOBAL TRADE 141, 149 (1995).

165. ELLIOTT & FREEMAN, *supra* note 16, at 89.

166. *Id.* (emphasis added).

## 2. Trade Sanctions: An All-or-Nothing Approach

Trade sanctions, by their nature, are harsh penalties that should be used sparingly to avoid concerns that a country is engaging in protectionism. The ILO has limited tools to encourage compliance with ILO's labor standards.<sup>167</sup> Its compliance program relies heavily on technical support and services. The ILO monitors compliance with ILO conventions by requiring member countries to submit periodic reports to the ILO concerning the progress they are making toward compliance.<sup>168</sup> The ILO also makes "direct requests" for information to countries with a history of noncompliance.<sup>169</sup> The ILO gathers and disseminates information on compliance and non-compliance with the conventions. The ILO primarily uses shame and reputational incentives to encourage compliance.

The limited effectiveness of the ILO's compliance program is exemplified by the enforcement challenges presented by the widespread use of forced labor in Myanmar.<sup>170</sup> The ILO's "softer managerial approaches and shaming strategies" were ineffective against Myanmar's military government.<sup>171</sup> Although the ILO's Constitution permits the ILO to pursue "such actions as it may deem wise and expedient to secure compliance,"<sup>172</sup> the ILO was reluctant to impose trade sanctions.<sup>173</sup> In 2000, the ILO issued a resolution asking its member states to consider trade sanctions against Myanmar.<sup>174</sup> The ILO's compliance resolution prompted Myanmar to consider some labor reforms.<sup>175</sup> However, this cooperation was short lived. Labor rights violations in Myanmar increased between 2003 and 2005, and Myanmar has threatened to withdraw from the ILO.<sup>176</sup>

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167. Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and the Innovations of the ILO*, 59 VAND. L. REV. 649, 711 (2006). "The goal of the ratification campaign and the Declaration was to create, on paper at least, a common core of legal standards applicable to the entire ILO membership. Promoting compliance with these commitments presented a far more difficult task." *Id.*

168. Schlossberg, *supra* note 82, at 51.

169. *Id.* at 51–52.

170. Helfer, *supra* note 167, at 711–13.

171. *Id.* at 711–12.

172. ILO CONST. art. 33, 62 Stat. 3485, 15 U.N.T.S. 35, available at <http://www.ilo.org/public/english/about/iloconst.htm> (last visited Oct. 3, 2007).

173. Helfer, *supra* note 167, at 712. "In practice . . . trade sanctions remained politically and legally out of bounds since the ILO's founding." *Id.*

174. *Id.*

175. *Id.* at 712–13.

176. *Id.* at 713.

The Myanmar situation demonstrates the difficulty with utilizing governmental trade sanctions as an enforcement mechanism. Such an approach, which has limited impact on states, has even less direct impact on non-governmental suppliers. Trade sanctions are tailored to address the failures of governments to take effective measures to protect labor rights. Trade sanctions may be warranted if the government actively participates in the labor rights violations or if the government fails to take any actions to address rampant violations by private actors. However, trade sanctions may be viewed as heavy-handed if states are making a good faith, but ineffective, attempt to address labor rights.<sup>177</sup>

Trade sanctions, at best, indirectly pressure sweatshop operators to improve working conditions by shaming governments into adopting laws more protective of labor rights. Furthermore, it is conceivable, as the Myanmar situation demonstrates, that a country threatened with sanctions might not respond by raising labor standards, but instead choose to forego the benefits of international trade. The threat of trade sanctions may potentially result in economic isolation, which could be even more harmful to the workers whom the norms are designed to protect.

*B. Dysfunctionalitv of National Public Order: The United States' Perspective*

Another formulation of the public order is to include "labor provisions" in U.S. bilateral or regional trade agreements; thus, creating a national public order. A national public order suffers from some of the same legitimacy issues as an international public order. Aggressive unilateral U.S. action may be perceived as protectionism. Furthermore, from the U.S. perspective, the doctrine of separation of powers, inter-branch political struggles, and U.S. interdependence with the global economy create inefficiencies in the national public order. The linking of labor standards and trade sanctions in U.S. trade agreements is an important step; however, as discussed more fully below, the nature of U.S. foreign policy interests and U.S. public institutions will limit the effectiveness of trade sanctions as an enforcement vehicle for labor standards.

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177. For example, the ILO's recent report on child labor stated that the struggle to end child labor in Africa is complicated by the number of children orphaned by the AIDS epidemic. INT'L LABOUR OFFICE, *supra* note 6, at 60-65.

1. *Separation of Powers, Protectionism, and Influence on Trade Policies*

The inclusion of labor provisions in trade agreements raises the initial question of which branch of government has the authority to impose trade sanctions. The U.S. Constitution does not expressly designate which branch of government has the power to terminate trade agreements. The Constitution's silence as to the process for terminating treaties<sup>178</sup> and even whether a free trade agreement is a treaty<sup>179</sup> has generated substantial commentary.<sup>180</sup> The "separation of powers" principle, evident in the Constitution, awards Congress a prominent, although not well-defined, position in modern day foreign affairs.

The U.S. Constitution does not designate a preeminent policymaker in foreign affairs. The separation of powers principle, which is woven throughout the U.S. Constitution, is evident in the constitutional allocation of foreign affairs powers. Specific powers affecting foreign affairs are allocated to both the executive and legislative branches. The Constitution designates the President as the commander-in-chief of the armed forces<sup>181</sup> and empowers the President to make treaties,<sup>182</sup> appoint ambassadors<sup>183</sup> with the advice and consent of the Senate, and receive ambassadors and other public ministers.<sup>184</sup> The Constitution also imposes broad powers on the legislative branch: the power to impose tariffs and duties,<sup>185</sup> the power to regulate foreign commerce,<sup>186</sup> the power of the Senate to advice and consent in the treaty process,<sup>187</sup> the power to declare war,<sup>188</sup> the power

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178. See, e.g., *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2001).

179. See, e.g., *Made in the USA Foundation v. U.S.*, 242 F.3d 1300, 1311–20 (11th Cir. 2001) (considering whether NAFTA is a treaty requiring two-thirds approval of the Senate).

180. See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 265 (2001) (arguing that the Executive Power includes authority to terminate treaties unilaterally). Compare Raoul Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577 (1980); Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1 (1979).

181. U.S. CONST. art. II, § 2, cl. 1.

182. U.S. CONST. art. II, § 2, cl. 2.

183. *Id.*

184. U.S. CONST. art. II, § 2, cl. 3.

185. U.S. CONST. art. I, § 8, cl. 1.

186. U.S. CONST. art. I, § 8, cl. 3.

187. U.S. CONST. art. II, § 2, cl. 2.

188. U.S. CONST. art. I, § 8, cl. 11.

over naturalization,<sup>189</sup> and the power to organize and fund military forces for the nation.<sup>190</sup> As Edward Corwin observed:

What the Constitution does, and *all that it does*, is to confer upon the president certain powers capable of affecting our foreign relations, and certain other powers of the same general nature upon the Senate, and still other powers upon Congress; but which of these organs shall have the decisive and final voice in determining the course of the American nation is left for events to resolve.<sup>191</sup>

Corwin characterized the Constitution's silence on this point as "an invitation to struggle for the privilege of directing American foreign policy."<sup>192</sup>

In recent decades, the roles of the President, Senate, and Congress in foreign affairs, while never perfectly defined, have become even more intertwined as the use of economic sanctions rather than military force has gained prominence as a foreign policy tool. The risks associated with nuclear war made military force less attractive as a means of protecting U.S. interests.<sup>193</sup>

Commentators have questioned the extent of the President's power to use economic sanctions as a diplomatic tool to the exclusion of the Senate or Congress.<sup>194</sup> For example, the Bush administration's trade policies blur the line between foreign trade and national security.<sup>195</sup> Rob Portman, U.S. Trade Representative, clarifies this point in his statement upon the signing of the U.S.-Bahrain Free Trade Agreement: "The promotion of peaceful commerce with the [Middle East] region and among Middle East states

189. U.S. CONST. art. I, § 8, cl. 4.

190. U.S. CONST. art. I, § 8, cl. 12.

191. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984* 201 (N.Y. Univ. Press 1984) (emphasis added).

192. *Id.*

193. Justin D. Stalls, *Economic Sanctions*, 11 U. MIAMI INT'L & COMP. L. REV. 115, 116 (2003) (discussing the expanded use of economic sanctions as a tool for diplomacy). See also GARY C. HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* (1985) (examining the use of economic sanctions to achieve a broad range of policy goals, such as U.N. sanctions against the Taliban regime in Afghanistan in 1999).

194. Lawrence M. Reich, *Foreign Policy and Foreign Commerce?: WTO Accessions and the U.S. Separation of Powers*, 86 GEO. L.J. 751, 753 (1998) (discussing the separation of powers issue in the context of foreign affairs).

195. See George W. Bush, President of the United States, Remarks on Signing Bill to Strengthen Trade Between the United States and Ukraine (Mar. 23, 2006) (transcript available at <http://www.whitehouse.gov/news/releases/2006/03/20060323-1.htm>).

will help end the political turmoil and economic stagnation that has for too long limited the opportunities for people in that region.”<sup>196</sup>

The lack of clarity regarding the constitutional allocation of treaty power subjects decisions regarding trade sanctions to the political interests of individual states. The decisions of the President and members of Congress are influenced by a desire to get reelected.<sup>197</sup> The inclination of modern presidents toward trade liberalization are due, in part, to their representation of national interests.<sup>198</sup> Presidents emphasize the overall health of the U.S. economy.<sup>199</sup> Members of Congress, on the other hand, “are sensitive to particular industry groups who are affected economically in a favorable or unfavorable manner by changes in international trading conditions and who can significantly influence the election prospects of a member of Congress by bloc-voting and the funding of political ads.”<sup>200</sup>

An example of congresspersons’ susceptibility to local protectionist interests is a bill introduced to repeal permanent normal trade relations with China.<sup>201</sup> When introducing the bill in the U.S. House of Representatives, Vermont Representative Bernard Sanders argued that his state lost twenty percent of its manufacturing jobs to China between 2002 and 2006.<sup>202</sup> He argued that “[t]rade is a good thing, but it must be based on principles that are fair to American workers. The U.S. Congress can no

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196. Rob Portman, U.S. Trade Representative, Remarks on Signing Implementing Legislation to the U.S.-Bahrain Free Trade Agreement (Jan. 11, 2006).

197. Robert E. Baldwin, *U.S. Trade Policies: The Role of the Executive Branch*, in CONSTITUENT INTERESTS AND U.S. TRADE POLICIES 65 (Alan V. Deardorff & Robert M. Stein eds., 1998). “In the simplest economic models, elected public officials, the suppliers of particular trade policies, are motivated by a desire to be returned to office (or gain public office, if not already elected) and, consequently, are responsive to the lobbying demands on the various pressure groups.” *Id.*

198. *Id.* at 69. “Representing a much broader constituency than individual members of Congress, Presidents give greater weight in their trade policy decisions to the general standard-of-living benefits of trade liberalization . . . and less weight to the concerns of particular industry groups.” *Id.* See generally DELIA B. CONTI, RECONCILING FREE TRADE, FAIR TRADE, AND INTERDEPENDENCE—THE RHETORIC OF PRESIDENTIAL ECONOMIC LEADERSHIP (1998), for a detailed discussion of presidential trade policy.

199. CONTI, *supra* note 198, at 150. President Bill Clinton stated:

This increasing international interdependence is seen by some as a threat to our nation and our values as Americans—but the truth is almost precisely the reverse. It is American values and principles—freedom, determination, market economies—that are ascendant around the globe. It is American companies that are gaining most from rapid growth in international trade. It is American products made by American workers that are in highest demand as the standards of living improve in countries around the world.

*Id.* (quoting BILL CLINTON, BETWEEN HOPE AND HISTORY 176 (1997)).

200. Baldwin, *supra* note 197, at 69.

201. S. 2267, 109th Cong. (2006). See also H.R. 728, 109th Cong. (2006).

202. We Must Repeal PNTR with China, 151 CONG. REC. H497 (daily ed. Feb. 9, 2005) (statement of Rep. Sanders).

longer allow corporate America to sell out the middle class and move our economy abroad.”<sup>203</sup> Similar arguments were made by Senator Byron Dorgan when he introduced a related bill in the U.S. Senate.<sup>204</sup> These arguments suggest the bill is motivated more by a desire to protect American workers than by an interest to improve working conditions globally.

Although congresspersons may have higher susceptibility to protectionist pressure, the President is not immune.<sup>205</sup> Protectionist pressure on the President was evidenced by the United States’ pressure on Mexico not to sell their tomatoes in the United States (with which Mexico had a free trade agreement) at a price lower than 20.68 cents per pound.<sup>206</sup> A senior official in the Clinton administration stated: “This was Mexico’s moment to pay back for the bailout”—referring to the United States’ decision to lend Mexico \$12.5 billion following the peso crisis of December 1994.<sup>207</sup> Another official explained, “The math was pretty simple, Florida had 25 electoral votes, and Mexico doesn’t.”<sup>208</sup> President Clinton’s decision to pressure Mexico on tomato prices was clearly connected to the President’s susceptibility to protectionist pressures.

The separation of powers principle embodied in the U.S. Constitution introduces opportunities for protectionist backlash into the policymaking process. The struggle between the executive and legislative branches for the control over economic sanctions is particularly important to states negatively impacted by globalization. As U.S. businesses relocate their manufacturing facilities or choose suppliers in developing countries over suppliers in the United States, jobs will shift out of the state more quickly

203. *Id.*

204. Trade Deficit, 152 CONG. REC. S1064 (daily ed. Feb. 10, 2006) (statement of Sen. Dorgan). Increasingly, companies are moving their jobs from the United States to China, to India, to Bangladesh, to Indonesia. So the jobs that remain are jobs that have a downward pressure on wages, more and more pressure to get rid of retirement programs, more pressure to strip health care benefits. In my judgment, that is going to head this country toward serious trouble.

*Id.*

205. See CONTI, *supra* note 198, at 134. President Clinton “pursued a largely private campaign” to pass NAFTA. *Id.*

[T]he administration was not sure it wanted to aggressively fight for passage of the legislation. Once again, the Democratic presidential dilemma of fighting for free trade while minimizing opposition from traditional Democratic constituencies was a delicate balancing act. Clinton was especially reluctant to publicly support NAFTA because of the vocal opposition of labor.

*Id.* at 134.

206. Srinivasan, *supra* note 67, at 248 n.1.

207. *Id.*

208. *Id.*

than new jobs are created.<sup>209</sup> This movement of jobs may trigger a protectionist backlash against globalization.<sup>210</sup> Congresspersons, in efforts to protect their constituents, have introduced legislation protecting commerce within their states.

According to traditional presidential rhetoric, free trade would help U.S. workers by opening markets for goods exported by U.S. companies. However, a trade gap exists, in part, because the workers in developing countries are not being paid sufficient wages to purchase U.S.-produced products.<sup>211</sup> Because markets in developing countries are sluggish, U.S. jobs are not being created as quickly as jobs are being lost, and the wages of unskilled workers in the United States are depressed.<sup>212</sup>

Some congresspersons have responded by introducing legislation to protect the U.S. economy.<sup>213</sup> For example, Senators Byron Dorgan and Russ Feingold introduced legislation<sup>214</sup> that “would create a market-based system to cut the trade deficit to zero within 10 years.”<sup>215</sup> The bill authorizes the issuance of certificates to U.S. companies that export goods.<sup>216</sup> The exporter can use the certificate, which authorizes the importation of goods, or sell it to another company—thus, creating a market for the certificates. This certificate program would impose an

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209. DAVIDSON & MATUSZ, *supra* note 23, at 1–2.

[T]he picture that emerges is one of a world in which workers, particularly those near the bottom of the income distribution, cycle between periods of employment and unemployment. Changes in the degree to which the economy is open to trade are bound to affect the transition rates between these states.

*Id.*

210. See Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local “Sanctions” Against Foreign Countries: Affairs of State, States’ Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307 (1999) (discussing Massachusetts law barring state contracts with companies that do business with Myanmar).

211. *Import Certificates Proposed to Shrink Trade Gap*, N.Y. TIMES, Sept. 15, 2006, at C5 [hereinafter *Import Certificates*]. “The United States trade gap reached a record \$717 billion in 2005 and is on track to exceed \$800 billion this year. About a quarter of the deficit is with China alone.” *Id.*

212. See, e.g., Kletzer, *supra* note 21, at 351.

To date, there is an emerging consensus, both theoretical and empirical, that U.S.-developing country trade lowers the employment and wages of U.S. lower-skilled workers . . . . [S]kill differences between the manufacturing and nontraded sectors . . . will release relatively unskilled workers into the nontraded (service) sector, leading to a fall in the relative wage of unskilled workers.

*Id.*

213. See, e.g., S. 872, 109th Cong. (2005) (a bill to amend the tax code to provide for the taxation of income of foreign corporations controlled by U.S. entities, when such income is attributable to imported property). See also S. 196, 109th Cong. (2005). The legislation was designed to close a tax loophole that rewards U.S. companies that move U.S. manufacturing jobs overseas.

214. Balanced Trade Restoration Act of 2006, S. 3899, 109th Cong. (2006).

215. *Import Certificates*, *supra* note 211.

216. *Id.*



overall cap on imported goods by limiting imports to the number of issues certificates—i.e., the monetary value of exports.<sup>217</sup>

The problem with protectionism is its failure to address the working conditions of millions of people living in developing countries. Until labor conditions in China, Bangladesh, Indonesia, and other countries improve, corporations will continue to have an incentive to outsource to suppliers in these countries.

A more strategic approach is to establish labor standards. Such an approach will have the dual effect of addressing the number of human rights concerns for workers in developing countries and of addressing job opportunities for U.S. citizens. When workers in developing countries earn more money and have improved working conditions, they will be able to afford U.S.-made products.

## 2. *Trade Sanctions: High-Stakes Diplomacy*

In an increasingly globalized economy, trade sanctions have become a high-stakes form of diplomacy. The threat of trade sanctions can have severe repercussions not only on the sanctioned country, but also on the United States. The United States has limited ability to terminate or suspend trade agreements without jeopardizing its own access to foreign markets. American trade policies are targeted towards opening foreign markets to U.S. goods. Another country's conduct that would trigger unilateral trade sanctions by the United States would need to be sufficiently severe and pervasive to warrant the United States to cut off trade relations with the other country.

The United States' ambivalence towards using trade sanctions to address violations of labor standards is evident in the language of the trade agreements, as well as the United States' record of rarely resorting to trade sanctions. The labor provisions in U.S. trade agreements are designed to address only wholesale governmental failures to enforce local labor laws. For example, the U.S.-Jordan Free Trade Agreement provides that “[a] party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction . . . .”<sup>218</sup> The “sustained or recurring course of action” language suggests that only complete failure to take any action towards enforcing labor laws will result in a violation of

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217. *Id.*

218. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on Establishment of a Free Trade Area, U.S.-Jordan, art. 6, para. 4(a), Oct. 24, 2000 [hereinafter U.S.-Jordan Free Trade Agreement].

the trade agreement. The labor clause does not require the other country to dedicate resources towards enforcement or investigation: “[E]ach party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities.”<sup>219</sup>

Further evidence of the United States’ reluctance to use trade sanctions aggressively is the rarity with which the United States has terminated trade agreements based on labor standards violations. The United States Generalized System of Preferences (GSP) program provides duty-free access to U.S. markets for specified imports from eligible countries, subject to certain conditions, including the requirement that the country protects or is taking steps to protect the internationally recognized rights of workers.<sup>220</sup>

The legislation authorizing the GSP program was amended to incorporate reference to the ILO’s core labor standards.<sup>221</sup> Recent U.S. bilateral trade agreements have included a “labor” clause.<sup>222</sup> A typical example is as follows:

The Parties reaffirm their obligations as members of the International Labour Organization (“ILO”) and their commitments under the [1998 Declaration]. The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in [the trade agreement] are recognized and protected by domestic law.<sup>223</sup>

The labor provision requires each country to recognize the core labor standards articulated in the ILO’s 1998 Declaration.<sup>224</sup>

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219. *Id.* art. 6, para. 4(b).

220. ELLIOTT & FREEMAN, *supra* note 16, at 75 (citing Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL’Y J. 199–238 (2001)).

221. Prior to this amendment, the United States defined workers’ rights differently from the ILO core labor standards. *Id.* The United States’ list excluded the right to nondiscrimination in the workplace but included “acceptable conditions of work, including minimum wages, hours of work, and occupational health and safety.” *Id.*

222. U.S.-Jordan Free Trade Agreement, *supra* note 218; Agreement Between the Government of the United States of America and the Government of the Kingdom of Bahrain on the Establishment of a Free Trade Area art. 15, U.S.-Bahrain, Sept. 14, 2004; Chile Free Trade Agreement, U.S.-Chile, June 6, 2003; Agreement Between the United States of America and Peru on the Establishment of a Free Trade Area, U.S.-Peru, Apr. 12, 2006.

223. *See, e.g.*, U.S.-Jordan Free Trade Agreement, *supra* note 218, art. 6, para. 1.

224. *Id.*

The United States' GSP program provides for the review of complaints by industry groups and human rights groups that certain countries have violated the labor clause.

Overall, only 13 countries out of the 47 reviewed by any U.S. administration have had their GSP eligibility terminated or suspended. Benefits were restored in 5 of these cases. Most of the cases—Burma, Chile, Liberia, Nicaragua, Romania, Sudan and Syria—also involved foreign policy interests far beyond workers' rights . . . .<sup>225</sup>

According to Elliott and Freeman, the countries that have lost GSP benefits due to labor rights violations tended to be smaller and poorer countries.<sup>226</sup>

The United States' unwillingness to use trade sanctions against larger, more powerful countries, such as China, to address labor violations suggests that a national public order alone will not eliminate sweatshop conditions globally. "Coercive trade sanctions, or the threat thereof, will change the behavior of a foreign government when that government perceives that the costs of the sanctions will be greater than the *perceived* costs of complying with the sanctioner's demands."<sup>227</sup> The GSP program is reasonably effective with respect to poorer countries because they "perceive that defying U.S. demands will have higher costs than complying with them."<sup>228</sup> However, the result of the cost-benefit analysis differs substantially for a country, such as China, where the United States benefits from access to Chinese markets as much as China benefits from access to U.S. markets.<sup>229</sup>

The efficiency of a national public order, from the U.S. perspective, is at its highest when the subject of the sanctions is a country that lacks economic and political significance to the United States. A national public order's efficiency is significantly weakened when the target of the proposed sanctions is a country of greater economic or political significance.

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225. ELLIOTT & FREEMAN, *supra* note 16, at 84.

226. *Id.*

227. *Id.* at 78.

228. *Id.*

229. Srinivasan, *supra* note 67, at 226. "The fact that political and trade relations with China are far more consequential to U.S. foreign policy and business interests than those with Myanmar certainly played a role in the differing U.S. stance in the two cases." *Id.*

### *C. Private Order*

Private ordering schemes have taken the form of consumer awareness programs and corporate codes of conduct. John McMillan and Christopher Woodruff argue that private ordering arises in countries without adequate legal systems.<sup>230</sup> Within the globalized labor market, the legal structures are inadequately developed to create an effective international or national public order. As discussed above, even if the United States incorporates “labor clauses” in its free trade agreements with other nations, the United States’ enforcement mechanism is not as efficient as it would be if supplemented by private ordering.

#### *1. Corporate Codes of Conduct*

Multinational firms, individually and through trade associations, are in a preferred position for gathering information on non-compliance with global labor norms and distributing such information to the community, consumers, and other firms in the industry. Some corporations have issued corporate codes of conduct to their suppliers as a means of addressing labor conditions.

These corporate code programs fall within three general categories: (1) a mere statement of standards, (2) a statement of standards with third-party monitoring for compliance, and (3) a collaborative program for developing models for sustained code compliance. This Article argues that third-party monitoring and collaborative programs are essential to the legitimacy and efficiency of any corporate code program.

Relational contracting is the basis for these corporate code programs. Corporations, either individually or collectively through industry associations, utilize their contractual relationship with suppliers to impose labor norms. These corporate codes vary widely in their substance and enforcement procedures.<sup>231</sup> Some codes of conduct are co-extensive with the ILO labor standards; others include standards regarding compliance with local laws on minimum wage, health and safety standards, and maternity leave.<sup>232</sup> At a minimum, corporate codes use the contractual relationship as a vehicle for articulating expectations regarding how workers should be treated.

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230. McMillan & Woodruff, *supra* note 33, at 2425.

231. See Jorge F. Perez-Lopez, *Promoting International Respect for Worker Rights Through Business Codes of Conduct*, 17 *FORDHAM INT’L L.J.* 1 (1993) (discussing the contents of various corporate codes of conduct).

232. WAL-MART, *ETHICAL SOURCING*, *supra* note 1, at 8.

As a means to enforce labor norms, relational contracting offers lower transaction costs than public ordering in four distinct ways. First, multinational corporations have greater ability to monitor the conduct of suppliers. Public institutions have centralized information gathering. Furthermore, governmental agencies derive their legitimacy from procedural safeguards that promote fairness. However, public institutions function pursuant to procedural safeguards designed to limit government's encroachment on personal freedom. Therefore, these institutions are limited in their ability to monitor factory conditions, inspect internal factory operations, and speak to workers.

Multinational corporations, on the other hand, are not restricted by the procedural safeguards imposed on public institutions. Companies and their suppliers can agree to reporting requirements, scheduled compliance audits, and unannounced inspections.

For example, Wal-Mart, which has enhanced its monitoring efforts, performed 13,600 audits of 7,200 factories in 2005.<sup>233</sup> Wal-Mart also utilizes a "rating system" which determines the frequency of audits. Factories are rated green, yellow, orange, or red, depending on the findings of the audit.<sup>234</sup> Factories with no violations or only minor violations are rated green and are audited annually.<sup>235</sup> Yellow and orange rated factories, which have medium-risk and high-risk violations, respectively are audited more frequently to ensure compliance.<sup>236</sup> Frequent access to the supplier's facilities enables companies to monitor suppliers more effectively.

Second, multinational corporations can consider information that might not be admissible in court, such as hearsay statements or impressionistic evidence. Multinational corporations are not restricted by evidentiary rules and have more flexibility in determining the relevance and reliability of evidence. When investigating a supplier, companies may consider overheard conversations, second-hand reports, and general impressions of managers, workers, and auditors.

Third, multinational corporations have more flexibility in their decision-making process. Judicial decisions usually focus on whether liability exists. Court resources, or the lack thereof, are not well-suited for judicial monitoring of corporations, even pursuant to judicial or consent decrees. In response to a violation of a code of conduct, a multinational

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233. *Id.* at 2.

234. *Id.* at 11.

235. *Id.*

236. *Id.*

corporation can determine, in light of the severity and pervasiveness of the violation, whether to terminate or suspend the supply relationship or to collaborate with the supplier to bring the supplier into compliance.

For example, Wal-Mart reported that in 2005, 141 factories were permanently banned from doing business with Wal-Mart because the suppliers utilized child labor.<sup>237</sup> Another twenty-three factories were suspended for one year for multiple instances of non-compliance.<sup>238</sup> In other instances, Wal-Mart provided training to the managers of suppliers to prevent additional violations.<sup>239</sup>

Finally, multinational corporations respond to violations in a more commercially practical time-frame than the judicial system. Judicial systems may take years to resolve a dispute. Companies, on the other hand, can respond swiftly by terminating or suspending the supply relationship or engage in follow-up inspections within months to ensure that the non-compliant behavior has been corrected. Under Wal-Mart's revised program, a factory that is in violation of Wal-Mart's code of conduct has 120 days to cure the violation.<sup>240</sup> Failure to do so will result in a one-year suspension of the supply relationship.<sup>241</sup>

Relational contracting provides suppliers with an incentive to allow multinational corporations to enter their factories. It also creates opportunities for collaboration. For example, McDonald's Corporation and the Walt Disney Company, in conjunction with a group of faith-based institutional investors, implemented "Project Kaleidoscope," a collaborative project to determine how factory-based compliance with corporate codes of conduct can be improved and sustained over time.<sup>242</sup> Wal-Mart's "Stakeholder Engagement" initiative has a similar objective of reaching out to suppliers, non-governmental organizations, and local governments to improve labor practices and conditions.<sup>243</sup>

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237. *Id.* at 2.

238. *Id.*

239. *Id.* at 8.

240. *Id.* at 11.

241. *Id.*

242. AS YOU SOW FOUNDATION ET AL., PROJECT KALEIDOSCOPE: A COLLABORATIVE PROJECT TO ENCOURAGE SUSTAINED CODE COMPLIANCE, INTERIM REPORT (Jan. 2005), available at [http://www.asyousow.org/human\\_rights/ProjectK.pdf](http://www.asyousow.org/human_rights/ProjectK.pdf). Participants include McDonald's Corporation, the Walt Disney Company, As You Sow Foundation, the Center for Reflection, Education, and Action, Connecticut State Treasurer's Office, Domini Social Investments LLC, General Board of Pension and Health Benefits of the United Methodist Church, Interfaith Center on Corporate Responsibility, and Missionary Oblates of Mary Immaculate. *Id.*

243. WAL-MART, ETHICAL SOURCING, *supra* note 1, at 20.

Despite the benefits of corporate code programs, commentators have questioned their legitimacy.<sup>244</sup> Some criticize the programs as attempts to “distract and confuse conscience-laden consumers, who have demanded that the goods they buy not be made or handled by exploited workers.”<sup>245</sup> These criticisms are due, in part, to perceived weaknesses in the compliance component of some code programs. Code programs that merely articulate “expectations” without rigorous investigation and compliance procedures undermine consumer confidence in these private programs. Corporations with weak enforcement programs receive the public relations benefit without internalizing the increased production costs associated with an effective program. Code programs should utilize third-party monitoring and collaborative compliance programs to address the concerns of legitimacy.

In the context of promoting global labor standards, private ordering offers some benefits that are not available with public ordering. These benefits are contingent upon multinational corporations developing and maintaining effective compliance programs. Merely issuing corporate codes of conduct will not suffice. As discussed below, pressure from either public institutions or non-governmental institutions may motivate multinational corporations to develop more aggressive compliance programs.

## 2. *Public Order: A Means to Encourage Private Ordering?*

Public order can influence the private order by encouraging it, repressing it, or simply remaining indifferent to it.<sup>246</sup> In the context of promoting global labor standards, the public order should encourage private ordering. According to Robert Cooter, “[t]he threat of public enforcement may cause people to conform to norms, fearing that private individuals will seek to enforce the state-supported norm. Although state enforcement must conform to the pre-existing social norms, ‘state

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244. See, e.g., Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiative*, 30 LAW & POL’Y INT’L BUS. 111 (1998) (expressing pessimism regarding the effectiveness of corporate code of conduct programs).

245. See Owen E. Herrnstadt, *Voluntary Corporate Codes of Conduct: What’s Missing?*, 16 LAB. LAW. 349, 350 (2001). “These critics believe that many codes are nothing more than corporate public relations shams and subterfuges for avoiding real efforts to improve workers’ lives.” *Id.*

246. Ariel Porat, *Enforcing Contracts in Dysfunctional Legal Systems: The Close Relationship Between Public and Private Orders*, 98 MICH. L. REV. 2459, 2469 (2000).

enforcement of social norms can increase private cooperation and production.”<sup>247</sup>

Some recent proposals for addressing sweatshop conditions in foreign countries may actually suppress private ordering. For example, Senator Byron Dorgan and Representative Sherrod Brown introduced related bills in the Senate and the House of Representatives, respectively, to address the importation, exportation, and sale of sweatshop goods in the United States.<sup>248</sup> Representative Brown from Ohio argued:

[I]n [many Ohio communities, one knows] that the Federal Government’s trade policies are undermining American manufacturers. . . . [One] knows that our trade policies are encouraging the spread of abusive sweatshop practices.

China is the world’s sweatshop leader, with repressive labor policies resulting in wage suppression of as much as 85 percent. We all know that American workers can compete in a global economy on a level playing field, but no one can compete with prison labor, child labor or sweatshop labor . . . . In my State alone, in Ohio, 42,000 jobs have been lost to China since the year 2001.<sup>249</sup>

In the Decent Working Conditions and Fair Competition Act (DWCFC), the term “sweatshop good” is defined as “any good, ware, article, or merchandise mined, produced, or manufactured wholly in or in part in violation of core labor standards.”<sup>250</sup> The DWCFC attempts to hold corporations legally accountable to the core labor standards articulated in ILO’s 1998 Declaration.<sup>251</sup>

The DWCFC contemplates two enforcement mechanisms: (1) enforcement by the Federal Trade Commission (FTC), and (2) a private right of action. The FTC must investigate any workers’ allegations that the Act was violated.<sup>252</sup> The proposed legislation includes a private right of action, whereby competitors or investors of the retailer have a right to sue

247. Macey, *supra* note 35, at 1133–34.

248. Decent Working Conditions and Fair Competition Act, S. 3485, 109th Cong. (2006).

249. Support the Decent Working Conditions and Fair Competition Act, 109 CONG. REC. H4497 (daily ed. June 22, 2006) (statement of Rep. Brown).

250. Decent Working Conditions and Fair Competition Act, S. 3485, 109th Cong. § 307(a)(2) (2006).

251. The DWCFC defines the “core labor standards” as consisting of the right of association, the right to organize and bargain collectively, a prohibition on the use of forced and compulsory labor, a minimum age for the employment of children and requires acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety. *See id.* §3(a). The right to a nondiscriminatory workplace is not included.

252. *Id.* § 201(c).



for damages.<sup>253</sup> Competitors or investors are entitled to “\$10,000 per violation or the fair market value of the goods, whichever is greater . . .”<sup>254</sup> and may sue for injunctive relief,<sup>255</sup> and, if prevailing, recover the cost of the suit.<sup>256</sup>

The stiff penalties essentially impose costs on sweatshop goods to force the companies to internalize the costs associated with cheap labor. The impact of the DWCFRC, if enacted, would dissuade private corporations from maintaining relationships with overseas suppliers once evidence of any violations come to their attention. Multinational corporations will be dissuaded from collaborating with certain suppliers in order to sustain compliance with global labor standards. To this extent, the proposed DWCFRC will repress private ordering.

### 3. *Consumer Awareness Programs*

Some commentators contend that consumer awareness programs could impose pressure on multinational corporations to require their suppliers to comply with higher labor standards.<sup>257</sup> Consumer activism may be motivated by altruism or purely selfish concerns.<sup>258</sup> To the extent consumers care about the workplace conditions in which goods are produced, consumer awareness could impose pressure on multinational corporations to improve labor standards.<sup>259</sup> For instance, United Students Against Sweatshops (USAS), a non-profit organization, promotes awareness by advocating for preferred supplier programs and product labeling.<sup>260</sup>

A consumer awareness program depends on the willingness of consumers “to pay higher prices for goods demonstrably made under better working conditions.”<sup>261</sup> Concerned consumers may opt not to purchase products from a company that utilizes sweatshop labor.<sup>262</sup> Their

253. *Id.* § 202(a), (c).

254. *Id.* § 202(d)(1).

255. *Id.* § 202(d)(2).

256. *Id.* § 202(d)(3) “The court shall award the cost of the suit, including a reasonable attorney’s fee, to a prevailing plaintiff.” *Id.*

257. *See, e.g.,* Liubicic, *supra* note 244.

258. Srivinasan, *supra* note 67, at 230. Consumers motivated by protectionist concerns may fear a “race to the bottom” for labor standards. For such consumers, “low labor standards anywhere threatened the sustainability of ‘high’ labor standards everywhere.” *Id.*

259. ELLIOTT & FREEMAN, *supra* note 16, at 10.

260. For a detailed description of USAS’s work, see LIZA FEATHERSTONE & UNITED STUDENTS AGAINST SWEATSHOPS, *STUDENTS AGAINST SWEATSHOPS* (Verso 2002).

261. ELLIOTT & FREEMAN, *supra* note 16, at 10.

262. *See* Sonia Gioseffi, *Corporate Accountability: Achieving Internal Self-Governance Through*

refusal to purchase such products could send a message to multinational corporations that they should work to improve labor conditions or risk losing the U.S. market. If the company chooses to retain the market by observing higher labor standards, the costs of the imported goods are likely to increase.<sup>263</sup> Under this approach, consumers and the exporting country share the cost of improving labor standards.<sup>264</sup>

U.S. consumerism potentially undermines the effectiveness of the consumer-based approach. Inexpensive goods enable U.S. consumers to sustain a quality of life comparatively higher than others in the world. Donald L. Kohn, Vice-Chairman of the Federal Reserve Board, noted the connection between increased economic interdependence and low-inflation in the United States:

In the world in which we live, it seems natural to expect, as others have argued, that the greater integration of product and financial markets would have exerted some downward pressure on inflation. I cannot look back at the experience in the United States over the past decade without discerning the imprint of such forces.<sup>265</sup>

U.S. consumerism sends a mixed signal to multinational corporations about the use of private ordering to improve labor conditions. Americans are accustomed to purchasing cheap goods, whether it is a dozen socks for three dollars or the “free” toy in a fast food child’s meal. U.S. consumers consume at disproportionately higher rates than consumers in less developed countries.

Consumer awareness programs are dependent, in part, upon U.S. consumers’ willingness to pay more for what they consume. However, a more compelling explanation for the effectiveness of consumer awareness

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*Sustainability Reports*, 13 CORNELL J.L. & PUB. POL’Y 503, 510 (2004) (describing a study finding that 76% of consumers were willing to pay higher prices to purchase goods not made in a sweatshop).

263. Srinivasan, *supra* note 67, at 231–32.

264. *Id.*

265. Donald L. Kohn, Vice-Chairman, Fed. Reserve Bd., Remarks at the European Economics and Financial Centre Seminar, House of Commons, London, England (July 6, 2006) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2006/20060706/default.htm>).

Nevertheless, the existing research does highlight several channels through which globalization might have helped to hold down domestic inflation in recent years. These channels include the direct and indirect effects on domestic inflation of lower imported prices, a heightened sensitivity of domestic inflation to foreign demand conditions and perhaps less sensitivity to domestic demand conditions, downward pressure on domestic wage growth, and upward pressure on domestic productivity growth.

Donald L. Kohn, Vice-Chairman, Fed. Reserve Bd., Remarks at the Federal Reserve Bank of Boston’s 51st Economic Conference, Chatham, Mass. (June 16, 2006) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2006/20060616/default.htm>).

programs is the fear among U.S. corporations of a protectionist backlash. Corporations may adopt or strengthen their corporate code programs as they sense a groundswell of support for protectionist measures.<sup>266</sup>

#### IV. CONCLUSION

Globalization has proceeded at record speed. As corporations have moved jobs out of the United States in favor of cheaper labor in developing countries, U.S. workers and advocacy groups have raised concerns about protecting the U.S. economy and the human rights of workers abroad.

Multinational corporations have the potential to use their contracting powers to improve the labor conditions of workers. Recent literature on private ordering and norms provides a theoretical framework within which to analyze these issues. In the context of globalization, corporations are not likely to develop rigorous labor standards that could impact the existence of sweatshops. An organization, such as the ILO, could be instrumental in coordinating the creation of standards. However, the ILO lacks an effective enforcement mechanism.

Private ordering among multinational corporations can fill the gaps in international and national public orders. However, companies must be pressured to adopt aggressive monitoring and compliance programs.

International and national public order systems that impose pressure through trade sanctions on developing countries will have limited impact on sweatshop conditions. Trade sanctions, as a diplomatic last resort, may target the most egregious human rights violations. Consumers may provide indirect pressure on multinational corporations to the extent they represent the threat of protectionist backlash.

As multinational corporations sense a groundswell of support for protectionism, the corporations may attempt to act first before the public institutions respond by imposing trade barriers.

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266. Herrstadt, *supra* note 245, at 349. "For many of these corporations, references to bettering the lives of workers is prompted by the market demand of conscience-laden consumers. As competition becomes more fierce, these corporations calculate that they must pacify perceived public demands regarding the treatment of workers." *Id.*