

BOOK REVIEW

TRADE, EMPLOYMENT AND LABOUR STANDARDS: THE OECD STUDY AND RECENT DEVELOPMENTS IN THE TRADE AND LABOR STANDARDS DEBATE

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One of the most controversial issues in global economic governance is the connection between international trade and labor standards. During the past few years, these issues have been addressed in the International Labour Organization (ILO),¹ the Organisation for Economic Co-operation and Development (OECD),² and, most recently, at the first Ministerial Conference of the World Trade Organization (WTO).³ These discussions have been heated at times because the debate involves sensitive issues of human rights, freedom to trade, and national sovereignty.

In 1996, two important events happened regarding trade and labor standards. First, the OECD completed a research project analyzing the relationship between trade and labor standards. This resulted in the publication of a book entitled *Trade, Employment, and Labour Standards: A Study of Core Workers' Rights and International Trade*.⁴ Second, the WTO included a short

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1. Treaty of Versailles, June 28, 1919, 225 Consol. T.S. 188, pt. XIII, 112 B.F.S.P. 1, *amended on several occasions and current revision reprinted in* ILO, CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANIZATION AND STANDING ORDERS OF THE INTERNATIONAL LABOUR CONFERENCE 5-24 (1980) [hereinafter ILO CONSTITUTION]. It is important to note that the Treaty of Versailles and the current ILO Constitution are different documents. The ILO has adopted 177 conventions that are open for ratification by all ILO member governments. Opinions differ as to the ILO's impact. Compare Nicolas Valticos, *The ILO: A Retrospective and Future View*, 135 INT'L LAB. REV. 473, 475 (1996) (stating that ILO conventions have received about 6300 ratifications and have had a wide influence on international law) with Thomas Schoenbaum, *Remarks, Panel on International Trade and Social Welfare: The New Agenda*, 17 COMP. LAB. L. 338, 347-51 (1996) (stating that the ILO has been irrelevant and that few ILO conventions have been adopted or implemented).

2. Convention on the Organisation for Economic Co-operation and Development, Dec. 14, 1960, 12 U.S.T. 1728.

3. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994).

4. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE (1996) [hereinafter OECD STUDY]; Mary Jane Bolle, *Workers Rights and U.S. Trade*

paragraph on labor in its Ministerial Declaration.⁵ This article discusses these developments and places them in the context of the ongoing debate. The first segment of this article reviews the new OECD Study. In general, the book is useful and worth reading. But its quality is uneven and many important issues are left out.

The second segment of this article looks at what happened to trade and labor standards following the OECD Study. This includes a discussion of the occurrences of both the OECD Ministerial in May 1996, and the WTO Ministerial in December 1996, and their corresponding impact on trade and labor standards. Finally the article looks ahead to offer a new strategy for those seeking to use trade measures to promote worker rights.

The issue of trade and labor standards has several facets which implicate: (1) the employment effects of trade between industrial and developing countries; (2) the social effects of such trade; (3) the economic effects of labor laws; and (4) the respective roles of the ILO, the WTO, and the OECD. All four considerations are addressed herein.

I. REVIEW OF THE OECD STUDY

In May 1994, the OECD Secretariat was asked to undertake a comprehensive study regarding the connection between trade, employment, and labor standards.⁶ Many observers were pleased that the OECD initiated this project because it was hoped that a careful study might illuminate key issues and help build international consensus on better policies. The OECD, which is known as the think-tank of the rich nations,⁷ has a well-deserved reputation for thoughtful, analytical work. Two OECD directorates worked jointly in carrying out the study — the directorate on Trade and the directorate on Employment, Labour and Social Affairs.⁸ The OECD Secretariat completed its study in May 1996, at which time it sparked attention in the press.⁹ The OECD Study was published in September 1996, along with a brief Joint Report by the OECD's Committees on Trade and on Employment, Labour, and Social Affairs.¹⁰

Policy: WTO Singapore Ministerial and Fast Track Extension, Cong. Res. Service Rep. 97-272E, at 5-13, (Feb. 24, 1997).

5. Singapore Ministerial Declaration, 36 I.L.M. 220 (1997) (adopted on Dec. 13, 1996).

6. OECD STUDY, *supra* note 4, at 10.

7. See Tim Shorrock, *South Korea Joins Club of the Rich*, J. COM., Oct. 25, 1996, at 1A (when countries become members of the OECD, the media portrays them as having entered the "Rich Man's Club").

8. OECD STUDY, *supra* note 4, at 3-10. The OECD Committee on International Investment and Multinational Enterprises assisted in drafting the section in the report on investment. *Id.* at 113.

9. See *OECD Meeting to Review Report on Links Between Trade & Labor*, 13 INT'L TRADE REP. (BNA) 799 (1996); Guy de Jonquieres, *Doubts over Link Between Labour Rights and Trade*, FIN. TIMES, May 21, 1996, at 4; *The OECD: Punch-up in Paris*, ECONOMIST, May 25, 1996, at 80; *Social Dumping*, J. COM., May 31, 1996, at 6A.

10. OECD STUDY, *supra* note 4, at 9-19.

The OECD Study contains three parts. Part I discusses the concept of "core labor standards" and analyzes adherence to them in both OECD and non-OECD countries. Part II discusses possible links between core labor standards and trade, foreign direct investment, economic development, and employment. Part III examines mechanisms to promote core labor standards. Each part will be discussed in turn.

A. Core Labor Standards

The OECD Study states that labor standards are "norms and rules that govern working conditions and industrial relations."¹¹ They exist at the national level in the form of laws and government regulations and at the international level in the form of treaties.¹² Unlike national laws, which provide for enforcement by punishing violators, existing ILO standards impose no sanctions on governments that fail to enforce them.¹³

1. Core Standards

Since a large number of labor standards exist, the OECD Study suggests that attention be focused on "core" standards.¹⁴ The OECD Secretariat views the following standards as core:¹⁵

- (1) Freedom of association and the right of collective bargaining;
- (2) Prohibition of forced labor;
- (3) Prohibition of discrimination in employment; and
- (4) Prohibition of exploitative forms of child labor.

The OECD Secretariat gives two reasons for selecting these standards as "core." First, these standards embody basic human rights identified in the Declaration of the World Social Summit.¹⁶ The Secretariat also states that these four core rights "are well-established elements of international jurisprudence concerning human rights."¹⁷ The second reason is that these standards provide a framework for the establishment of better working conditions.¹⁸

The next section of the OECD Study discusses the content of these core standards. For the first three, the Secretariat believes that existing ILO conventions prescribe these core standards adequately.¹⁹ In particular, the Sec-

11. OECD STUDY, *supra* note 4, at 25.

12. *Id.*

13. *Id.*; See generally ILO CONSTITUTION, *supra* note 1, arts. 30-34 (discussing possible action by ILO Governing Body in response to failure of an ILO member to implement recommendations of the Commission of Inquiry or the International Court of Justice).

14. OECD STUDY, *supra* note 4, at 27.

15. *Id.* at 26.

16. *Id.*; UNITED NATIONS, WORLD SUMMIT FOR SOCIAL DEVELOPMENT: THE COPENHAGEN DECLARATION AND PROGRAMME FOR ACTION, Commitment 3(i), 16-17 (1995).

17. OECD STUDY, *supra* note 4, at 27. It is unclear whether the OECD views these rights as part of customary international law.

18. *Id.* at 26-31.

19. *Id.* at 33-36.

retariat points to the Freedom of Association and Protection of the Right to Organise Convention (No. 87),²⁰ the Right to Organise and Bargain Collectively Convention (No. 98),²¹ the Forced or Compulsory Labour Convention (No. 29),²² the Abolition of Forced Labour Convention (No. 105),²³ and the Discrimination in respect of Employment and Occupation Convention (No. 111).²⁴

With respect to the fourth core standard, the OECD Study considered the most recent ILO Convention regarding child labor, Minimum Age for Admission to Employment (No. 138).²⁵ Under Convention No. 138, the parties agree to set a minimum age for employment not less than the age of completion of compulsory schooling and not less than fifteen years.²⁶ "Light work," however, may be permitted for children between ages thirteen to fifteen if such work is not likely to be harmful to their health and development and does not prevent their attendance at school.²⁷ This Convention also contains flexibility for countries that are "insufficiently developed."²⁸ Such countries may set a minimum age of fourteen years and allow light work for children between ages twelve and fourteen.²⁹ Government regulations may exempt family and small scale businesses that produce items for local consumption, where such endeavors do not require the hiring of regular workers that are above the set minimum age.³⁰ Thus, for developing countries, the only infrangible prohibition against child labor in Convention No. 138 pertains to children under twelve years of age working outside of a family enterprise.

Despite its limited applicability, the OECD Secretariat is unwilling to accept Convention No. 138 as a core labor standard.³¹ The Secretariat argues that the Convention prohibits some child labor that is "consistent with observance of human rights,"³² and that only forty-six countries have ratified the

20. *Id.*; Convention Concerning Freedom of Association and Protection of the Right to Organise, No. 87, July 9, 1948, 68 U.N.T.S. 17 [hereinafter Freedom of Association].

21. OECD STUDY, *supra* note 4, at 33-36; Convention Concerning the Application of the Principles of the Right to Organise and Bargain Collectively, No. 98, July 1, 1949, 96 U.N.T.S. 257 [hereinafter Right to Organise and Bargain Collectively].

22. OECD STUDY, *supra* note 4, at 33-36; Convention Concerning Forced or Compulsory Labour, No. 29, June 28, 1930, 134 B.F.S.P. 449.

23. OECD STUDY, *supra* note 4, at 33-36; Convention Concerning the Abolition of Forced Labour, No. 105, June 25, 1957, 320 U.N.T.S. 291.

24. OECD STUDY, *supra* note 4, at 33-36; Convention Concerning Discrimination in Respect of Employment and Occupation, No. 111, June 25, 1958, 362 U.N.T.S. 31.

25. OECD STUDY, *supra* note 4, at 32-33; Convention concerning Minimum Age for Admission to Employment, No. 138, June 26, 1973, 1015 U.N.T.S. 297 [hereinafter Minimum Age].

26. Minimum Age, *supra* note 25, art. 2.3.

27. *Id.* art. 7.1.

28. *Id.* art. 2.4.

29. *Id.* art. 7.4.

30. *Id.* art. 5.3.

31. OECD STUDY, *supra* note 4, at 35-37.

32. *Id.* at 36-37.

Convention.³³ Most importantly the Secretariat says that the Convention aims at the wrong target, that is, "work" by children, rather than the "exploitation" of children.³⁴ The OECD Study does not, however, explain how to distinguish between good work and bad exploitation. Instead, the Secretariat includes in the OECD Study criteria developed by the U.N. Children's Fund (UNICEF), which characterizes exploitation as "children who work too young, too long hours, for too little pay, in hazardous conditions or under slave-like arrangements."³⁵ It is difficult to comprehend how compliance with such vague criteria could be objectively assessed or verified.

The OECD Secretariat also points to the U.N. Convention on the Rights of the Child (UNCRC) as justifying the need for a focus on exploitation.³⁶ UNCRC Article 32 provides that "State Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development."³⁷ Nevertheless, the Convention does not further elaborate on the meaning of economic exploitation. Moreover, exploitation is not the sole focus of Article 32.

Exploitation is a term which connotes taking unjust advantage of another for one's own advantage.³⁸ Although voluntary transactions can be exploitative, involuntary transactions are more likely to be so. The logic of prohibiting child labor is that below a certain age, a child cannot meaningfully give consent to work for an employer. Any work extracted may be presumed involuntary. Thus, child labor would be wrong even if a child is paid exactly what she is worth, and even if a parent argues that the child is not exploited. The drafters of ILO Convention No. 138 were not unconcerned about child exploitation. It seems reasonable to infer that they viewed work

33. *Id.* at 35-37. As of January 16, 1997, ratifications had risen to 50 countries. Fax from André Zemger, Chief, *Application of Standards Branch, International Labour Standards Department*, to Steve Charnovitz, (Jan. 16, 1997) (on file with author).

34. OECD STUDY, *supra* note 4, at 35-36. See also TRIPARTITE WORKING PARTY ON LABOUR STANDARDS, REPORT ON LABOUR STANDARDS IN THE ASIA-PACIFIC REGION 66-67 (1996) (stating that ILO Convention No. 138 does not sufficiently distinguish between innocuous and exploitative child labor).

35. OECD STUDY, *supra* note 4, at 37.

36. *Id.* at 37-39; *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/736 (1989) [hereinafter UNCRC]. Although concern about child exploitation has been a key component of international soft law for a long time, the attitude toward child labor has evolved. SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PREPARATOIRES" 19 (1992). In 1924, the League of Nations Assembly approved the Declaration of Geneva which stated that "[T]he child must be put in a position to earn a livelihood and must be protected against every form of exploitation." *Id.* at 641. In 1948, the U.N. General Assembly approved the Declaration of the Rights of the Child which stated that "[T]he child must receive a training which will enable it, at the right time, to earn a livelihood, and must be protected against every form of exploitation." *Id.* at 641-42.

37. UNCRC, *supra* note 36, art. 32.1.

38. BLACK'S LAW DICTIONARY 579 (6th ed. 1990).

by children under twelve away from home as *per se* exploitation.³⁹ One could suggest that more difficult economic circumstances exist now than when the Convention was written in 1973, and that as a result, the permissible work age should be lowered to ten or eleven years of age. The OECD Secretariat does not, however, advance this contention.

The OECD Study finds it commendable that the U.N. Convention on the Rights of the Child does *not* specify a minimum age for employment.⁴⁰ Nevertheless, the Convention does in fact direct parties to provide for a national minimum age (or ages).⁴¹ Thus, the ILO and U.N. Conventions are not inconsistent regarding the utility of a minimum age. Rather, what distinguishes these two conventions is their conclusion regarding whether a minimum age condition of employment should be uniform among developing countries. The OECD Secretariat does not explain why it considers non-uniformity a virtue.⁴² It seems to presume that the differences between developing countries are greater than the differences within countries.

For over a century, governments have recognized the value of an international minimum age for child labor.⁴³ The first intergovernmental conference to consider a minimum age requirement took place in 1890.⁴⁴ That conference suggested a minimum age of ten years for industrial work in "Southern" countries, provided that the child had completed primary education.⁴⁵ The first ILO convention setting a minimum age for child labor was approved in 1919.⁴⁶ The OECD Study fails to inform the reader that every ILO convention has been approved by at least two-thirds of the delegates to an ILO conference and that these delegates include representatives of governments, employers, and workers.⁴⁷ This inclusive drafting process accords a special validity to ILO conventions.

39. See *International Action: Standards Need Reinforcing*, WORLD OF WORK: THE MAGAZINE OF THE ILO June-July 1996, at 18 (stating that poverty is not an excuse for child labor and that all child labor is an unacceptable infringement of fundamental human rights). See also Bonnie Erbe, *Child Labor: A Face of Reality*, J. COM., Mar. 5, 1997, at 7A (reporting on the recent ILO-sponsored conference on child labor).

40. OECD STUDY, *supra* note 4, at 39.

41. UNCRC, *supra* note 36, art. 32.2(a).

42. See INTERNATIONAL LABOUR ORGANIZATION, CHILD LABOUR: TARGETING THE INTOLERABLE 36 (1996). After all, there are only a few ages below 12 that children can work. *Id.* The lowest statutory minimum, eight years old, is found in Lebanon. *Id.*

43. See generally *The International Labour Office and the Protection of Children*, 3 INT'L LAB. REV. 3-4 (1921) (reviewing the historical development of protection for children against exploitation through the labor market).

44. U.S. WAR LABOR POLICIES BOARD, REP. ON INTERNATIONAL LABOR STANDARDS 10-11 (1919).

45. *Id.* at 11.

46. Convention Fixing the Minimum Age for Admission of Children to Industrial Employment, No. 5, Nov. 28, 1919, 134 B.F.S.P. 383. This convention set a minimum age of 12 years in India and Japan and 14 years in other countries. *Id.* arts. 2, 5, 6. See also RAYMOND LESLIE BUELL, INTERNATIONAL RELATIONS 157-58 (1925) (noting danger that exceptions for India and Japan could be exploited by foreign capitalists residing there).

47. ILO CONSTITUTION, *supra* note 1, arts. 7, 19.2.

2. Observance of Core Labor Standards

After laying out four core standards, the OECD Study examines the extent to which these standards are observed. It examines ninety-one countries, leaving out the former Soviet Union, Eastern Europe, most of Africa, and parts of the Middle-East.⁴⁸ The assessments are based on published sources, not independent OECD inspections.⁴⁹ The Secretariat finds conformity with ILO Conventions in twenty-two out of twenty-four OECD countries with regard to the freedom of association.⁵⁰ In non-OECD countries, the Secretariat finds conformity in only nine of sixty-seven countries.⁵¹ The Secretariat concludes that "there are wide cross-country differences."⁵² The Secretariat's statistics on collective bargaining reveal adequate protection in twenty out of twenty-four OECD countries.⁵³ It is noteworthy that the United States is not one of the twenty countries offering such protection.⁵⁴ In non-OECD countries, the Secretariat finds adequate protection in only fifteen of sixty-seven countries.⁵⁵ Remarkably, the OECD Study presents minimal data with respect to forced labor. In OECD countries, the study notes that there have been several complaints to the ILO regarding work by prisoners, but the Secretariat dismisses these complaints as "relatively minor."⁵⁶ In non-OECD countries, the Secretariat notes serious problems in China, India, Pakistan, and Brazil regarding compelled labor.⁵⁷ The OECD Study presents little data on non-discrimination policies; nevertheless, it takes note of widespread complaints about sex discrimination in OECD countries.⁵⁸ For non-OECD countries, the Secretariat points to discrimination in India on the basis of social origin and problems in Brazil regarding female employees.⁵⁹ The Secretariat provides little information on the exploitation of children but rather discusses national legislative implementation of the ILO Convention No. 138.⁶⁰ It finds that almost all OECD countries act in compliance with this convention's requirements and that almost all non-OECD countries act in contravention.⁶¹ Furthermore, the Secretariat observes that the real problem is deficiencies in implementation of

48. OECD STUDY, *supra* note 4, at 57-61.

49. *Id.* at 61 (listing published sources the OECD relied on for analysis).

50. *Id.* at 60-61. The OECD countries not examined were Luxembourg, the Czech Republic, and Hungary. *Id.*

51. *Id.* at 57-59.

52. *Id.* at 48.

53. *Id.* at 68-69.

54. *Id.* at 69.

55. *Id.* at 66-68.

56. *Id.* at 47.

57. *Id.*

58. *Id.* at 47-48.

59. *Id.* at 48.

60. *Id.* at 33-37.

61. *Id.* at 46.

this ILO Convention and not in the laws enacted thereunder.⁶² The Secretariat presents no evidence in support of this proposition.

3. Summary of the OECD Study - Part I

Part I of the OECD Study defines core labor standards and conducts a limited examination of government performance. The Secretariat declares that information on the degree of enforcement of core labor standards is "sparse and incomplete."⁶³ No estimates are presented of the value of annual trade in products made in violation of core labor standards.⁶⁴ This omission is startling in an economic analysis regarding trade and labor standards. Perhaps the OECD should have devoted more resources during this two-year project to its collection of information.

In addition to its failure to collect requisite data, the OECD also fails to take advantage of an opportunity to study several key issues. The study is silent with respect to: (1) how strong the correlation is between ratification of, and compliance with, ILO conventions; (2) what the labor records reveal of the countries most vociferously opposing a WTO role in reviewing labor standards; and (3) whether there is correlation between non-compliance with multilateral conventions on labor standards and non-compliance with other multilateral conventions (e.g., environmental standards).

Another topic that received insufficient attention is export processing zones (EPZs). The Secretariat reports that special restrictions persist on the right to organize in EPZs in Bangladesh, Jamaica, Mauritius, Pakistan, Panama, and Sri Lanka.⁶⁵ It also reports that EPZs in Bangladesh, Honduras, Jamaica, Panama, Sri Lanka, and Turkey inhibit collective bargaining.⁶⁶ Yet, there is no analysis or presentation of any case studies to buttress these statements.⁶⁷ Given that EPZs are, by definition, trade-related, it is unclear why this issue received so little attention. The Secretariat says that the significance of such EPZ practices is difficult to assess.⁶⁸ This may be true but if the issue were an easy one, there would have been no need to enlist the analytical expertise of the OECD.

B. Links to Trade, Investment, Development & Employment

Part II of the OECD Study begins by examining core labor standards from an economic perspective.⁶⁹ The study then examines the link between core labor standards and trade flows, trade liberalization, investment, devel-

62. *Id.*

63. OECD STUDY, *supra* note 4, at 48.

64. See generally OECD STUDY, *supra* note 4, at 48. The Secretariat reports strong evidence of child labor exploitation in a few export-oriented industries in some countries. *Id.* at 46.

65. *Id.* at 41, 85, 99-100.

66. *Id.* at 42, 100, 123.

67. For example, it would be interesting to know if there are any cases where governments use EPZs to get around costly social legislation that is politically difficult to correct.

68. OECD STUDY, *supra* note 4, at 100.

69. *Id.* at 77.

opment, and employment. The book presents both theory and empirical findings.

1. Economics of Core Labor Standards

The Secretariat commences its discussion regarding the Economics of Labor Standards with a puzzling statement: "The debate over possible links between labour standards and trade has been hampered by the lack of solid analytical underpinnings."⁷⁰ While it is unquestionable that more analysis is needed, the Secretariat does not draw upon the key analytical contributions of Herbert Feis,⁷¹ Bertil Ohlin,⁷² and Göte Hansson.⁷³ Indeed, these analyses are not even listed in the reference section at the end of the OECD Study which may reflect a neglect of these research contributions.⁷⁴

Hoping to supply analytical underpinnings, the Secretariat poses the question of whether free markets can lead to efficient outcomes without core labor standards.⁷⁵ The Secretariat answers that real world markets will not lead to efficient outcomes in the presence of forced labor, child labor exploitation, discrimination, or a lack of freedom to associate.⁷⁶ Although the Secretariat's response is not surprising, the narrowness of the OECD team's inquiry is. There can be other reasons why a society might want to pursue labor standards that have little to do with market efficiency.⁷⁷

The next topic in the OECD Study is whether government policies to promote core labor standards will increase efficiency.⁷⁸ The Secretariat asks "whether freedom of association and the right to collective bargaining are the most appropriate forms of intervention"⁷⁹ The question itself reveals confusion. Government intervention may be needed to protect collective bargaining.⁸⁰ Yet government intervention is not needed to protect *freedom*

70. OECD STUDY, *supra* note 4, at 77.

71. See generally Herbert Feis, *International Labour Legislation in the Light of Economic Theory*, 15 INT'L LAB. REV. 491 (1927) (analyzing how labor standards operate in a competitive international economy).

72. See generally BERTIL OHLIN ET AL., INTERNATIONAL LABOUR OFFICE, SOCIAL ASPECTS OF EUROPEAN ECONOMIC CO-OPERATION (1956) (analyzing the need for harmonization).

73. See generally GÖTE HANSSON, SOCIAL CLAUSES AND INTERNATIONAL TRADE: AN ECONOMIC ANALYSIS OF LABOUR STANDARDS IN TRADE POLICY (1983) (reviewing the connection between international trade and labor regulations).

74. OECD STUDY, *supra* note 4, at 239-48.

75. *Id.* at 77.

76. *Id.* at 79-81, 218-22, 230.

77. See Drusilla K. Brown et al., *International Labor Standards and Trade: A Theoretical Analysis*, in 1 FAIR TRADE AND HARMONIZATION 270 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

78. OECD STUDY, *supra* note 4, at 80.

79. *Id.* at 81.

80. See Freedom of Association, *supra* note 20, art. 11; Right to Organise and Bargain Collectively, *supra* note 21, arts. 1-3.

of association. Most of what a government needs to do is to maintain a hands off policy.⁸¹

The efficiency effects of collective bargaining receive some attention. The Secretariat agrees that collective bargaining can redress imbalances in labor markets among employers and workers.⁸² Yet, it also finds that collective bargaining can cause distortion by raising wages above market rates.⁸³ The Secretariat suggests that trade liberalization might be more effective than collective bargaining in correcting labor market imbalances.⁸⁴ The Secretariat fails to substantiate this claim, however, or to provide examples from particular countries where trade liberalization policies are effective in improving labor markets.

With regard to other core standards, the OECD Study states that government intervention can improve market outcomes. For example, the study asserts that prohibition is the appropriate response to forced labor.⁸⁵ It also states that the ILO Convention No. 111 can stimulate greater labor market participation⁸⁶ and that eliminating exploitative child labor will benefit society overall, (even though it hurts unscrupulous employers).⁸⁷ Finally, the Secretariat explains that higher standards can serve as an incentive for employers to raise productivity via investment in human and physical capital.⁸⁸

2. Reasons for Disrespect of Core Standards

Having shown that core labor standards enhance economic efficiency, the obvious question is why standards are not better observed in practice. The OECD Study considers five possible answers. The first is that core labor standards are public goods.⁸⁹ This answer is not persuasive. The "public goodness" of labor conditions shows why unregulated employers might act in an individually advantageous yet socially disadvantageous way. Although the characterization of labor standards as "public goods" can explain the need for governmental action, it does not explain why the level of government-proscribed labor standards are too low.⁹⁰

81. Freedom of Association, *supra* note 20, art. 3(2) (stating that the public authorities shall refrain from interference that would impede with the right of freedom of association). Of course, the government needs to supply a legal system to prevent individuals from interfering in associations by others.

82. OECD STUDY, *supra* note 4, 80-81, 87.

83. *Id.* at 81-82, 87-88, 222-23, 230.

84. *Id.* at 81.

85. *Id.* at 80, 82, 221. In the Secretariat's view, prison labor may be okay to the extent that it has social rehabilitation purposes. *Id.*

86. *Id.* at 80, 218-20, 230.

87. *Id.* at 80.

88. *Id.* at 113. See also J.H. RICHARDSON, ECONOMIC DISARMAMENT: A STUDY IN INTERNATIONAL COOPERATION 126 (1931) (pointing out that international labor standards will reduce the waste of human effort in backward countries).

89. OECD STUDY, *supra* note 4, at 83-84.

90. *Id.* at 83 (explaining that governmental regulation or direct governmental action may be necessary in order to ensure an optimal level of production of the public good).

A second answer is that government policy is determined by a minority that does not act in the best interests of the public at large.⁹¹ In other words, those in control may directly benefit from forced labor, child labor, discrimination, and clamps on unions. This is a persuasive hypothesis, but the Secretariat confines it to just a single paragraph.⁹² More importantly, the Secretariat presents no empirical data to test the validity of this hypothesis. For example, the OECD team could have examined whether non-democratic governments are more likely to interfere with unions than democratic governments.⁹³

A third answer is that policies cannot easily shape core labor standards.⁹⁴ The Secretariat attributes this proposition to two economists, Jagdish Bhagwati and T.N. Srinivasan.⁹⁵ Yet in the papers cited by the Secretariat, neither author argues that governments are incapable of protecting unions, refraining from forced labor, mandating non-discrimination, or preventing exploitative child labor.⁹⁶

A fourth answer is that governments might have rejected the core labor standards as inappropriate to their specific institutional and historical frameworks.⁹⁷ For example, the Secretariat suggests that a government might limit strikes because they will lead to social disorder and constrain economic growth.⁹⁸ A government might also restrict unions in EPZs as part of a strategy to boost exports.⁹⁹ The Secretariat admits that countries might strategize in this manner, but suggests that any gains would be erased in the long-run.¹⁰⁰ No corroborative case studies are presented to buttress this supposition.

A fifth answer is that governments agree with the core labor standards, but simply lack the financial or legal resources to enforce their law.¹⁰¹ The OECD Secretariat may be correct with regard to labor abuses in the private sector (e.g., the exploitation of child labor). However, the lack of resources fails to explain violations of the core standards of freedom of association and

91. *Id.* at 84 (noting that these minorities have more political power than the majority population).

92. OECD STUDY *supra* note 4, at 84.

93. *Id.* The OECD Study suggests that an increase in freedom of association during the past 15 years in 17 listed countries is reflective of a fundamental move toward democracy. *Id.* at 70, 86.

94. *Id.* at 85.

95. *Id.*

96. *Id.* at 239, 246. Jagdish Bhagwati, *Policy Perspectives and Future Directions*, in INTERNATIONAL LABOR STANDARDS AND GLOBAL ECONOMIC INTEGRATION: PROCEEDINGS OF A SYMPOSIUM 57-62 (1994); T.N. Srinivasan, *International Labor Standards Once Again!*, in INTERNATIONAL LABOR STANDARDS AND GLOBAL ECONOMIC INTEGRATION: PROCEEDINGS OF A SYMPOSIUM 34, 34-39 (1994).

97. OECD STUDY, *supra* note 4, at 85, 97, 152.

98. *Id.* at 85.

99. *Id.*

100. *Id.* at 105.

101. *Id.* at 152. This point appears in Part III of the OECD Study, but is discussed here for cogency.

forced labor. Denying associational rights or imposing forced labor require government action and hence resource use. Therefore, lack of resources cannot explain why governments would arrest and prosecute trade union leaders.

The OECD devotes little attention to another answer as to why labor standards are not better observed. In 1919, the Treaty of Versailles declared that "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries."¹⁰² In line with this reasoning, a sixth answer would be that some developing countries want to raise their labor standards, but fear competition with less virtuous competitors.¹⁰³ As discussed below, the OECD Study reports that such fears are irrational because trade is not swayed by labor standards.¹⁰⁴ The Secretariat also points out that a country enjoys the benefits of its labor standards regardless of what labor standards exist elsewhere.¹⁰⁵ Nevertheless, this response is inadequate, as it fails to refute the hypothesis that governments may perceive a competitiveness obstacle to higher labor standards.¹⁰⁶ Unfortunately, the Secretariat neglects this important issue of political economy.¹⁰⁷

3. Core Standards and Trade Flows

This section of the book examines the linkage between core labor standards and trade.¹⁰⁸ The first topic is whether there are differences in the trade performance of countries with varying degrees of association and col-

102. Treaty of Versailles, *supra* note 1, at pt. XIII pmbi. See Steve Charnovitz, *Environmental and Labour Standards in Trade*, 15 *WORLD ECON.* 335, 339-40 (1992) (discussing political background for this provision).

103. See INTERNATIONAL LABOUR OFFICE, THE INTERNATIONAL LABOUR ORGANISATION: THE FIRST DECADE 273-75 (George Allen & Unwin, Ltd., 1st ed. 1931) (discussing practice by some governments of ratifying ILO conventions contingent on ratification by rival countries); see also Katherine van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 *MICH. J. INT'L L.* 987, 992-94 (1995) (discussing labor race to the bottom theory).

104. See *infra* notes 111, 123 and accompanying text.

105. OECD STUDY, *supra* note 4, at 90, 230.

106. See *id.* at 90. The same obstacle exists in trade politics. For example, at the WTO Ministerial in 1996, an Information Technology Agreement was approved, contingent on its ratification by countries representing 90% of the world's production of goods. See Richard W. Stevenson, *U.S. and Europe Agree on Freeing Technology Trade*, *N.Y. TIMES*, Dec. 12, 1996, at A1 (explaining that the Information Technology Agreement could liberalize the trade of information by incorporating most of the world's big trading nations). One might argue that the trade liberalization was good for each signatory, *regardless* of whether other signatories joined. However, real world politicians do not act with the crisp rationality of an economics textbook.

107. See PAUL PERIGORD, THE INTERNATIONAL LABOR ORGANIZATION: A STUDY OF LABOR AND CAPITAL IN COOPERATION 41-44 (1926) (recognizing that international legislation may be needed to maintain labor standards in high-standard countries); Robert Howse, *The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment*, 16 *INT'L REV. L. & ECON.* 61 (1996) (explaining that trade measures can promote cooperative solutions).

108. OECD STUDY, *supra* note 4, at 88-105.

lective bargaining rights enforcement.¹⁰⁹ Trade performance is measured by the change in the percentage of a country's share of exports in world markets over the period from 1980-1990.¹¹⁰ The Secretariat reports that "little relationship has been found between changes in export market shares and these core standards."¹¹¹ Yet the data show that countries with deficiencies in core labor standards do enjoy better export performance in manufacturing.¹¹² Using data provided within the OECD Study, a former official at the United States Department of Labor found a weak negative correlation (-.27) between freedom of association and export performance.¹¹³ The negative correlation means that the less freedom of association, the greater the relative share of exports.¹¹⁴ The Secretariat suggests that developing countries as a group might be expected to increase their export shares.¹¹⁵ This could explain the observed relationship, but does not justify a mischaracterization of it. Next the Secretariat analyzes the individual export performance of six countries in which labor standards have improved.¹¹⁶ In three countries, export performance went down; in two countries it went up; in one it stayed the same.¹¹⁷ The Secretariat concludes that no pattern exists.¹¹⁸

Another hypothesis examined is that differences in the enforcement of labor standards affect sectoral trade performance.¹¹⁹ The OECD Study acknowledges that a few countries, for example, Morocco (textiles), Korea (autos), and Malaysia (electronics), do repress unions in industries with international comparative advantage.¹²⁰ Without offering any evidence, the Secretariat declares that such gains are likely to be short-lived.¹²¹ The Secre-

109. *Id.* at 90.

110. *Id.* at 93.

111. OECD STUDY, *supra* note 4, at 92 (focusing on total trade and manufacturing trade, arguing that low standards may not be an explanation for changes in trade performance).

112. *Id.* at 92-93, 132-33. The Secretariat divides the 91 countries into four groups based on the extent to which they comply with freedom of association. *Id.* at 43. Group one has no limitation on freedom of association. *Id.* at 133. Group one's share of exports went up 2.6%. *Id.* Group two has some limitations. *Id.* at 133. Group two's share of exports went up 5.1%. *Id.* Group three has significant limitations. *Id.* at 133. Group three's share of exports went up 44.1%. *Id.* Group four has little or no freedom of association. *Id.* at 133. Group four's share of exports went up 45.3%. *Id.*

113. Letter from Jack Buchanek, former office director at Bureau of International Labor Affairs/U.S. Department of Labor, to Steve Charnovitz (Feb. 5, 1997) (on file with author). This correlation was calculated by scaling all of the countries according to the severity of violations of freedom of association. *Id.*

114. Letter from Jack Buchanek, *supra* note 113, at 1.

115. OECD STUDY, *supra* note 4, at 92, 94, 105.

116. *Id.* at 92, 94.

117. *Id.* at 91-92, 94-95, 131.

118. *Id.* at 96, 105, 131.

119. *Id.* at 98.

120. *Id.*

121. *Id.* at 105.

tariat also examines whether union repression might play a role in the price of textile exports, but the Secretariat is unable to detect a correlation.¹²²

Having concluded that the enforcement of labor standards does not shape trade performance, the Secretariat infers that developing countries have no economic reason to fear core labor standards.¹²³ Indeed, the Secretariat suggests that observing core standards might strengthen long-term economic performance.¹²⁴ To date, this proposition has not transformed the cultural mind set in developing countries.¹²⁵ For example, at the WTO Ministerial Conference, trade ministers from Macau and Uganda declared that the introduction of labor standards would have a negative impact on economic development in low-income countries.¹²⁶

If developing countries are suspicious of the OECD's advice, they may have reason to be cautious. This advice seems inconsistent with the OECD Study's findings for manufacturing and for specific sectors in some countries.¹²⁷ In addition, there may also be a more fundamental analytical flaw; the Secretariat does not benchmark its results for labor standards to a similar analysis of other international standards, such as intellectual property rights.¹²⁸ Perhaps the OECD's macro model is inadequate to recognize the relationships between domestic standards and trade.

4. Core Standards and Trade Liberalization

This section considers links between labor standards and the process of trade liberalization.¹²⁹ One hypothesis is that trade liberalization enhances freedom of association and collective bargaining rights.¹³⁰ To test this proposition, the Secretariat examines thirty-eight countries which commenced trade liberalization during the 1980–1994 period and had labor rights deficiencies in 1980.¹³¹ Of those thirty-eight countries, six showed an improve-

122. *Id.* at 101-04, 136-38; Bolle, *supra* note 4, at 5-13. *But see* Dani Rodrik, *Labor Standards in International Trade: Do They Matter and What Do We Do About Them?*, in *EMERGING AGENDA FOR GLOBAL TRADE: HIGH STAKES FOR DEVELOPING COUNTRIES* 37, 52-54 (Robert Z. Lawrence et al. eds., 1996) (finding a correlation between low labor standards and comparative advantage in textile and clothing exports).

123. OECD STUDY, *supra* note 4, at 105, 124.

124. *Id.* at 105.

125. *See Earth Negotiations Bulletin* 4 (Dec. 11, 1996) <<http://www.iisd.ca/linkages>>.

126. *Id.*

127. *See supra* notes 112, 117 and accompanying text.

128. *See generally* Keith E. Maskus & Denise Eby Konan, *Trade-Related Intellectual Property Rights: Issue and Exploratory Results*, in *ANALYTICAL AND NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM* 439 (Alan Deardorff & Robert M. Stern eds., 1994) (finding a tenuous link between IPR, trade, and welfare).

129. OECD STUDY, *supra* note 4, at 106-07.

130. *Id.*

131. *Id.* at 109-10, 139-40, 236-38. The Secretariat started with 44 countries, but claimed that it could not locate information about associational rights in six of them — Benin, Burundi, Côte d'Ivoire, El Salvador, Malawi, and Nepal. *Id.* at 110, 141. Moreover, the Secretariat declares: "[s]uch a striking absence of information is interpreted in itself as disrespect for freedom

ment in labor rights and seventeen showed a "weak improvement."¹³² In the remaining fifteen countries, there was either no improvement in labor rights, or an improvement *before* the trade liberalization.¹³³ In no case was trade liberalization followed by a worsening of labor rights.¹³⁴ As a result of these data, the Secretariat finds a positive relationship between trade liberalization and improvements in core standards,¹³⁵ although it admits that no causality can be inferred.¹³⁶

Another hypothesis is that respect for freedom of association does not hinder trade reforms.¹³⁷ To test this, the Secretariat divides the thirty-eight countries into three groups: some limitations on freedom of association (twelve countries), significant limitations (twenty-two countries), and heavy limitations (four countries).¹³⁸ The twelve countries with the most open trade regimes can be grouped as having some labor limitations (seven countries) or significant labor limitations (five countries).¹³⁹ The seventeen countries with a moderately restrictive trade regime can be grouped as having some labor limitations (four countries), significant limitations (twelve countries), or heavy limitations (one country).¹⁴⁰ The nine countries with a restrictive trade regime can be grouped as having some labor limitations (one country), significant limitations (five countries), or heavy limitations (three countries).¹⁴¹ The Secretariat concludes that an increased respect for freedom of association does not jeopardize trade reforms.¹⁴²

5. Core Standards and Investment

This section considers the relationship between labor standards and investment.¹⁴³ The Secretariat notes at the outset that the vast majority of financial flows originating in OECD countries flow to other OECD countries, where core labor standards are generally respected.¹⁴⁴ For the remaining financial outflows, the Secretariat concedes that "a number" of the

of association norms." *Id.* It is not clear why ignorance (or laziness) on the part of OECD bureaucrats in Paris should constitute evidence of disrespect by those six governments.

132. *Id.* at 110, 141, 233-36.

133. *Id.* at 141.

134. OECD STUDY, *supra* note 4, at 112.

135. *Id.* at 151.

136. *Id.* at 151-52. The relationship between trade liberalization and social development involves a broader set of interactions which include economic growth and the establishment of democratic institutions. *Id.* at 152. Thus, trade liberalization is not sufficient to increase core labor standards. *Id.*

137. *Id.* at 107-08.

138. *Id.* at 142-43.

139. *Id.* at 142.

140. *Id.*

141. *Id.* at 143. The Secretariat misreports these numbers. Compare OECD STUDY, *supra* note 4, at 112 with OECD STUDY, *supra* note 4, Table 14, at 143.

142. *Id.* at 112.

143. *Id.* at 113-20.

144. *Id.* at 118.

primary non-OECD destinations have "tarnished" records on labor rights.¹⁴⁵ The Secretariat also notes that some governments perceive that restricting labor rights would help to attract investment.¹⁴⁶ A related issue is whether inward investment by multinational corporations raises labor standards in developing countries. Unfortunately the OECD Study does not examine this issue in depth, although it notes that there are published accounts of child labor violations by subcontractors of multinationals.¹⁴⁷ It also suggests that multinationals "do not contribute to the improvement of the practical situation of unions."¹⁴⁸ Nevertheless, the Secretariat concludes that there is "no definitive evidence" that investment flows are attracted by restrictive labor regimes.¹⁴⁹

Many important issues regarding investment are omitted. The OECD Secretariat does not study the extent to which corporations use domestic labor standards in operating foreign plants. Nor does the Secretariat analyze whether governments should apply core labor standards being enforced domestically to their own corporations operating in other countries.¹⁵⁰

The superficiality of this section is profoundly troubling, given the centrality of the investment issue. Although the Secretariat had many months to collect and analyze data, it reports that there is a lack of empirical evidence on the direct relationship between foreign direct investment and core labor standards.¹⁵¹ One explanation for the Secretariat's silence may be that the OECD began crafting a new multilateral agreement on investment in May 1995.¹⁵² Since the draft agreement does not currently include any binding

145. *Id.* at 118–19 (explaining that in some countries freedom of association rights are partially non-existent or restricted to varying degrees).

146. *Id.* at 119–20, 123.

147. OECD STUDY, *supra* note 4, at 122.

148. *Id.* at 123.

149. *Id.* at 119. It is interesting to note that a recent study found a similar conclusion for investment and environmental standards. See Arik Levinson, *Environmental Regulations and Industry Location: International and Domestic Evidence*, in 1 FAIR TRADE AND HARMONIZATION 450 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (concluding that international and domestic studies of industry location show that environmental regulations do not deter investment or affect choosing a site).

150. See Jagdish Bhagwati, *American Rules, Mexican Jobs*, N.Y. TIMES, Mar. 24, 1993, at A21 (suggesting that the U.S. government require U.S. corporations operating abroad to follow specified federal labor and environmental standards); Sherwood Ross, *Coping with a Multitude of Laws*, J. COM., Jan. 3, 1997, at 7A (explaining that human resource officials of U.S. companies abroad are expected to comply with U.S. laws). See generally Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123, 124 (1996) (explaining that U.S. corporations operating in foreign countries are not obliged to abide by United States labor laws and arguing that the United States government should enforce labor standards extraterritorially in foreign countries).

151. OECD STUDY, *supra* note 4, at 123.

152. OECD, *Multilateral Agreement on Investment: Progress Report*, OECD Doc. DAFFE/MAI(96)14/FINAL, May 1996. The agreement is open to all OECD members, the European Communities members, and to accession by non-OECD members. *Id.* at 2. The agree-

commitments to labor standards, it may be that the OECD staff thought it inadvisable to explore the linkage between labor rights and investment.

6. Core Standards and Economic Development

The Secretariat considers the linkage between labor standards and economic development.¹⁵³ Empirical findings are presented on the relationship between freedom of association and gross domestic product (GDP). The Secretariat divides ninety-one countries into four groups according to the severity of violations and then does a scatterplot using GDP per capita.¹⁵⁴ This apparently yields a weak positive correlation; however, the Study does not reveal the coefficient.¹⁵⁵ The Secretariat also examines seventeen countries where freedom of association has improved during the past fifteen years.¹⁵⁶ The Secretariat finds that GDP growth rates increased in six countries after the improvement in freedom of association, decreased in eight countries, and remained consistent in three countries.¹⁵⁷ No further analysis is reported. Despite the fact that labor standards may be an important factor in economic development, the OECD Study barely scratches the surface on this issue.¹⁵⁸

7. Effect of Labor Standards on Trade and Employment

The last section considers the employment and wage impact of trade between industrial and developing countries.¹⁵⁹ Consistent with other recent studies, the Secretariat concludes that trade is not the major determinant in causing the high unemployment, the stagnating wages, or the rising inequality present in some OECD countries.¹⁶⁰ Although this conclusion seems correct, the Secretariat elides the fact that particular individuals can lose their jobs as a result of imports produced under less than core labor standards.¹⁶¹

ment seeks to consolidate existing investment instruments and to create new disciplines, in order to provide a comprehensive framework for international investment. *Id.*

153. OECD STUDY, *supra* note 4, at 75. The discussion appears in Part I, but is included here because the issue is included in the book's chapter title for Part II. *Id.* at 75.

154. *Id.* at 43-44; *see supra* note 112 and accompanying text.

155. OECD STUDY, *supra* note 4, at 44, 86 (explaining that the weak positive association between the level of per capita GDP and the observance of freedom of association imply nothing about causality).

156. *Id.* at 70, 86 (recognizing that this reflects a trend towards democracy in these countries).

157. *Id.* at 87.

158. *See generally* GUY CAIRE, FREEDOM OF ASSOCIATION AND ECONOMIC DEVELOPMENT (1977); WERNER SENGENDERGER & DUNCAN CAMPBELL EDS., CREATING ECONOMIC OPPORTUNITIES (1994) (discussing the role of labor standards in industrial restructuring); Steve Charnovitz, *Fair Labor Standards and International Trade*, 20 J. WORLD TRADE L. 61, 70-72 (Jan.-Feb. 1986) (discussing the connection between labor standards and economic development).

159. OECD STUDY, *supra* note 4, at 124.

160. *Id.* at 124-30; *Martin Wolf, Trade Is Not To Blame*, FIN. TIMES, Dec. 10, 1996, at 20 (reporting on a recent study by Robert Z. Lawrence, who finds that trade does not pauperise workers as a group or whole countries).

161. OECD STUDY, *supra* note 4, at 124.

This problem was the impetus for crafting the provision in the Charter of the International Trade Organization of 1948 which states that, "the Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade. . . ."¹⁶² Addressing those difficulties is a central aspect of the "trade and labor standards" debate.

C. Mechanisms to Promote Core Labor Standards

The last part of the OECD Study considers mechanisms to increase observance of core labor standards.¹⁶³ It explains the mechanisms and processes used by international organizations, governments, and private actors.¹⁶⁴ The Secretariat discusses the ILO, international development programs, the WTO, regional and national government policies, codes of conduct, and labeling.¹⁶⁵

1. ILO Supervision

The Secretariat describes the operation of the ILO supervisory system, its complaint procedure, and its Committee on Freedom of Association.¹⁶⁶ This Committee has the authority to review compliance with ILO Conventions No. 87 and 98, even for countries that have not ratified these conventions.¹⁶⁷ The Secretariat points to three problems with ILO oversight.¹⁶⁸ First, because ILO supervision tends to be complaint driven, disproportionate attention is devoted to countries that are relatively free, rather than toward countries that forestall complaints by forbidding unions.¹⁶⁹ Second, the Committee on Freedom of Association does not distinguish adequately between minor infractions and major violations.¹⁷⁰ Third, the ILO underutilizes publicity as a tool to influence governments.¹⁷¹

With respect to forced labor and non-discrimination, the Secretariat notes that ILO supervision can only occur if governments ratify the relevant

162. See Havana Charter for an International Trade Organization, Mar. 24, 1948, art. 7.1, *not in force*, U.N. Doc. E/Conf. 2/78, reprinted in *ALSO PRESENT AT THE CREATION* (Michael Hart ed., 1995). See also William Diebold, *Reflections on the International Trade Organization*, 14 N. ILL. U. L. REV. 335, 336 (1994) (providing background on the International Trade Organization). The General Agreement on Tariffs and Trade (GATT) and the Havana Charter were drafted at the U.N. Conference on Trade and Employment. *Id.* See generally KENNETH W. DAM, *THE GATT: LAW AND THE INTERNATIONAL ECONOMIC ORGANIZATION* 10-12 (1970).

163. OECD STUDY, *supra* note 4, at 151-204.

164. *Id.*

165. *Id.* at 153.

166. *Id.* at 154-56.

167. See generally FREEDOM OF ASSOCIATION (ILO ed., 4th ed. 1996) (discussing the decisions and principles of the Freedom of Association Committee).

168. OECD STUDY, *supra* note 4, at 158.

169. *Id.* at 158-60.

170. *Id.* at 158.

171. *Id.* at 158, 160 (stating that the special procedure on freedom of association could be more effective if recommendations by the committee were given more publicity because governments are very sensitive about this issue).

conventions.¹⁷² Yet, even when governments have ratified the conventions, they are often late in complying with the reporting requirements.¹⁷³ The Secretariat is therefore correct in its observation that the ILO supervisory process needs improvement. Regarding child labor, the OECD Study proffers little information or insight. It does not examine the ILO's supervision of Convention No. 138, since this convention does not correspond to the Secretariat's concept of an appropriate core labor standard.¹⁷⁴ The Secretariat states that implementation of the U.N. Convention on the Rights of the Child is monitored by the U.N. Committee for the Rights of the Child. Nevertheless, the Secretariat does not offer any assessment of the quality of this implementation.¹⁷⁵

2. International Development Programs

With respect to child labor, the OECD's Development Assistance Committee has found that "integrated strategies" are needed to combat child labor.¹⁷⁶ The OECD Study indicates that these strategies must include poverty alleviation, education, enhanced participation of women, job creation for adults, and greater involvement of civil society.¹⁷⁷ Although the Secretariat gives a brief description of ILO and UNICEF programs that combat child labor, it offers no analysis of the adequacy of their budget levels.¹⁷⁸ It does note, however, that more evaluation of these programs is needed.¹⁷⁹

The Secretariat suggests that a dialogue between donor and developing countries "can help establish an appropriate policy climate for successful programme and project development and implementation, and thus maximize the effects of assistance targeted to support policy change with respect to freedom of association."¹⁸⁰ The Secretariat does not assess the relative efficacy of multilateral versus bilateral dialogues. But it notes that there is potential to expand donor cooperation in bilateral and multilateral dialogues.¹⁸¹ The OECD Study also notes that attention is increasingly being focused on strengthening the legal process and enforcing citizen rights.¹⁸² This section would have been stronger if the OECD had provided an assessment of what techniques work best.

172. *Id.* at 161.

173. *Id.* at 159-60.

174. See OECD STUDY, *supra* note 4, at 161-62 (noting that the objective of the ILO Minimum Age Convention (No. 138) of 1973, along with its companion Recommendation No. 146, is to abolish child labor and stating that no other instrument prohibits the trafficking of children for employment, or prostitution, and any other form of slavery).

175. *Id.* at 162.

176. *Id.* It is unclear why this committee was not involved in conducting the OECD Study.

177. *Id.* at 162-63.

178. *Id.* at 164-65. See UNITED NATIONS CHILDREN'S FUND (UNICEF), THE STATE OF THE WORLD'S CHILDREN 1997 (1997).

179. OECD STUDY, *supra* note 4, at 166.

180. *Id.* at 167.

181. *Id.* at 169.

182. *Id.*

Another mechanism for strengthening core labor standards is conditional lending by international financial institutions.¹⁸³ The only international institution that currently explores conditions linked to labor standards is the European Bank for Reconstruction and Development.¹⁸⁴ The Secretariat seems doubtful about the utility of conditionality since economic development may be strained by limiting some countries' access to international financing.¹⁸⁵

3. World Trade Organization

The Secretariat provides a brief discussion of previous, unsuccessful efforts to put worker rights on the agenda of the international trade regime.¹⁸⁶ This listing begins with the Charter of the International Trade Organization of 1948 which included a commitment on fair labor standards.¹⁸⁷ Although the OECD does not discuss earlier history, it is interesting to note that a linkage between labor standards and trade policy was also considered at the World Economic Conference in 1927. At that Conference, the British Labour Party and Trades Union Congress proposed an international convention in which governments would agree to enforce a boycott of goods produced under conditions less favorable than those laid down in ILO Conventions.¹⁸⁸

The OECD Study also discusses the recent consideration of trade and labor standards in the ILO. In 1994, the ILO set up a Working Party on the Social Dimension of the Liberalisation of World Trade.¹⁸⁹ After considerable controversy within this Working Party, it was agreed that further discussion of using trade sanctions to enforce labor standards would be suspended.¹⁹⁰ Another part of this section summarizes the WTO rules implicated in using trade measures to enforce labor standards.¹⁹¹ Although the Secretariat acknowledges some of the problems with using trade measures, it fails to analyze the economics of joint governmental action to impose trade sanctions.¹⁹²

The OECD Study also notes that proposals have been made for covering EPZ labor practices in the WTO's Trade Policy Review Mechanism (TPRM).¹⁹³ The TPRM produces and publishes periodic assessments of

183. *Id.* at 177.

184. OECD STUDY, *supra* note 4, at 177.

185. *Id.* at 178.

186. *Id.* at 169.

187. *Id.*; Havana Charter for an International Trade Organization, *supra* note 162, art. 7.1.

188. LEAGUE OF NATIONS, REPORT AND PROCEEDINGS OF THE WORLD ECONOMIC CONFERENCE, May 4-23, 1927, at 232.

189. OECD STUDY, *supra* note 4, at 170. The working party continues to operate. *Id.*

190. *Id.* Summary presented by the Chairperson, Ms. Hartwell, ILO, GB.262/WP/SDL/1/2, 262d sess., at 3 (1995) (summarizing that the Working Party should not pursue trade sanctions, and further discussions about the linkage between international trade and social standards through a sanctions-based social clause should be suspended).

191. OECD STUDY, *supra* note 4, at 170-75.

192. *Id.* at 176.

193. *Id.* at 175.

each WTO member country.¹⁹⁴ Discussion of EPZ labor practices is not included in TPRMs due to strong opposition by developing countries.¹⁹⁵

4. Regional and National Policies

The next section discusses regional and bilateral trade policy. First, the Secretariat summarizes the North American Agreement on Labor Cooperation.¹⁹⁶ This Agreement contains a dispute settlement mechanism to review national enforcement of national labor laws.¹⁹⁷ The Secretariat reviews the first five disputes, but concludes that it is too early to judge the Agreement's effectiveness.¹⁹⁸ The OECD Study also discusses the Generalized System of Preferences (GSP), in which industrial countries provide duty-free treatment to certain products from developing countries.¹⁹⁹ The Secretariat describes the labor conditionality in the U.S. GSP program, but does not evaluate its effectiveness.²⁰⁰ The GSP labor conditionality recently enacted by the European Union (EU) is also described.²⁰¹ Following the publication of the OECD Study, the EU announced a termination of GSP benefits to Burma because of forced labor practices.²⁰²

5. Codes of Conduct

This section covers codes of conduct for multinational corporations. The Secretariat gives a brief description of the Guidelines approved by the OECD in 1976, and the ILO in 1977.²⁰³ This description would have been more informative had the Secretariat compared the labor provisions in the guidelines using a side-by-side chart. The greatest weakness of this section,

194. *Id.* at 176.

195. *Id.*

196. North American Agreement on Labor Cooperation, Jan. 1, 1994, Can.-Mex.-U.S., 32 I.L.M. 1499. See Norman Malanowski & Christoph Scherrer, *International Trade Agreements and Social Standards: The North American Experience*, 1996 (unpublished manuscript) (on file with author). See also Preliminary Report to the Ministerial Council on Labor and Industrial Relations Law in Canada, the United States, and Mexico (Commission for Labor Cooperation 1996). Karen Vossler Champion, *Who Pays for Free Trade? The Dilemma of Free Trade and International Labor Standards*, 22 N.C. J. INT'L L. & COM. REG. 181, 224-36 (1996).

197. North American Agreement on Labor Cooperation, *supra* note 196, arts. 27-41; OECD STUDY, *supra* note 4, at 178-81.

198. OECD STUDY, *supra* note 4, at 179, 182-83.

199. *Id.* at 183-86.

200. *Id.*

201. *Id.* at 186-88. The EU GSP established a direct link between trade and core labor standards. *Id.* at 186. The regulation provides special incentives for those countries that adopt and apply core ILO standards. *Id.* at 187.

202. Caroline Southey & Ted Bardacke, *Brussels Urges Lifting of Burma Privileges*, FIN. TIMES, Dec. 19, 1996, at 4 (discussing this action as the first time the EU linked trade and workers' rights).

203. OECD STUDY, *supra* note 4, at 192-96.

however, is that there is no evaluation of whether the OECD Guidelines have improved labor conditions during the twenty years since 1976.²⁰⁴

6. Labeling

The Secretariat states that while social labeling²⁰⁵ can be a useful tool, it can only work when products are exported and purchased directly by consumers.²⁰⁶ Surprisingly, the Secretariat seems to forget that labeling might also be useful within a country. The possibility that social labels could become a trade barrier is noted, but the Secretariat suggests that such labels would cause "a minimum of economic distortions."²⁰⁷ Many economists would agree that social labels are consistent with market forces.²⁰⁸

D. Conclusion Regarding the OECD Study

This is the first study conducted by the OECD Secretariat on the linkage between labor standards and trade. It is most useful in explaining what core labor standards are and in showing that they make economic sense.²⁰⁹ Yet taken as a whole, the OECD Study is disappointing. In some instances, the Secretariat exaggerates faint relationships. Its analysis is weak, and many important issues are omitted or inadequately addressed. The most serious problem, however, is that the OECD Study provides little added-value to the ongoing international debate. This is uncharacteristic of the OECD, which traditionally has produced cutting edge analysis of public policy. Perhaps political pressures within the OECD impeded the normal standard of quality typically shown in OECD work.

The OECD Study has received little challenge, perhaps because its main conclusion provides comfort to both sides of the "trade and labor" debate. If observing core labor standards does not undermine competitiveness, then attaining those standards will not hurt developing countries. If flouting core labor standards does not enhance competitiveness, then there is no connection to trade, and hence no reason to involve the WTO.

204. *Id.* at 197 (noting that further study is needed in order to assess whether the guidelines have had any impact on the observance of core labor standards by multinational enterprises in developing countries).

205. OECD STUDY, *supra* note 4, at 200-01. Social labelling is based on the principle that consumers should have facts on whether products were created under socially desirable standards. *Id.* at 201.

206. See generally Claire I. Gaudiani, *Fighting Child Labor*, J. COM. July 19, 1996, at 6A (discussing the principle of labeling); Elizabeth Razzi, *Did Child Labor Make that Toy?*, 50 KIP-LINGER'S PERSONAL FIN. MAG., Dec. 1996, at 46 (discussing the growing appeal of labeling to U.S. consumers).

207. OECD STUDY, *supra* note 4, at 202.

208. See, e.g., Richard B. Freeman, *International Labor Standards and World Trade: Friends or Foes?*, in THE WORLD TRADING SYSTEM: CHALLENGES AHEAD 87, 87-97 (Jeffrey J. Schott ed., 1996).

209. OECD STUDY, *supra* note 4, at 25-82.

II. RECENT DEVELOPMENTS AND NEW DIRECTIONS

The second segment of this article discusses recent developments in the OECD and the WTO. The provision on labor in the Singapore Ministerial Declaration will be closely examined. The closing section of the article makes two recommendations for advocates in using trade policies to promote labor rights.

A. OECD Developments

Following the completion of the Secretariat's study, the OECD Committees on Trade and on Employment, Labour, and Social Affairs approved a Joint Report in May 1996.²¹⁰ The Joint Report summarizes the Secretariat's study; however, it adds a different spin in two key areas. First, the Joint Report states that "core labor standards cannot be considered primarily as a means to improve market efficiency, because these core labor standards are the fundamental rights of the workers."²¹¹ This is a useful critique of the Secretariat's efficiency-oriented analysis. Second, the Joint Report states that "relatively few countries systematically deny core labour standards."²¹² This proposition, however, is inconsistent with the findings of the Secretariat which, pointed to widespread denial.²¹³ The Joint Report also suggests new steps that the ILO could take to promote core labor standards,²¹⁴ including (1) devote more attention to countries where union rights are not protected,²¹⁵ (2) seek more publicity of ILO recommendations,²¹⁶ and (3) prepare more up-to-date information on the enforcement of labor standards.²¹⁷

Curiously, while the Joint Report makes suggestions for the ILO to do more, the Joint Report makes no suggestions for future OECD work. One useful future project for the OECD Secretariat would be to evaluate the OECD Guidelines for Multinationals. Another project would be an analysis of whether provisions on core labor standards should be incorporated into the agreement on investment now being negotiated within the OECD. The Joint Report is incomplete because it failed either to propose follow-up within the OECD or to explain why other institutions are more suitable.

In October 1996, after a long negotiation, the OECD invited Korea to become its twenty-ninth member.²¹⁸ Because trade unions' freedoms are in-

210. OECD COMMITTEES ON TRADE, EMPLOYMENT, LABOUR AND SOCIAL AFFAIRS, JOINT REPORT ON TRADE, EMPLOYMENT AND LABOUR STANDARDS, *reprinted in* OECD, TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE 9-22 (1996).

211. OECD STUDY, *supra* note 4, at 12.

212. *Id.* at 14.

213. See *supra* notes 51, 55, 57 and accompanying text. The Secretariat looked at only half of the world's nations. The unexamined nations may have more denials of worker's rights.

214. OECD STUDY, *supra* note 4, at 15.

215. *Id.*

216. *Id.*

217. *Id.* at 15.

218. Shorrock, *supra* note 7, at 1A.

fringed in Korea,²¹⁹ the OECD requested that the Korean government undertake reforms.²²⁰ The Korean government initially agreed to allow the outlawed Confederation of Trade Unions to commence operations next year, but then reneged on this commitment.²²¹ The situation remains fluid as this article goes to press.²²²

B. WTO and Labor Standards

In the preparatory meetings for the WTO Ministerial conference in Singapore, a few trade ministers²²³ pressed for the inclusion of labor rights on the agenda.²²⁴ Only some members of the Group of Seven²²⁵ (G-7) supported this course when the issue was discussed in June 1996. Consequently, the G-7 could only agree that "there is a will to address the question of the relationship between trade and internationally recognized core labor standards."²²⁶ Although the Clinton Administration sparked the initiative in 1994, it failed to follow through in recruiting allies.²²⁷ One reason the U.S. initiative fared so poorly is that many foreign government officials and other

219. See generally KOREA AND THE OECD: THE SOCIAL DIMENSION OF ECONOMIC INTEGRATION (John Evans ed., 1996) (discussing the Republic of Korea's application for membership in the OECD, and the seminar held by TUAC on "the social dimensions of economic integration," which gave the Korean trade union movement an opportunity to have a more extensive dialogue with the TUAC-OECD on the social aspects of global economic integration).

220. Robin Bulman, *Korea Expected to Adopt Labor Reform Measures*, J. COM., Oct. 17, 1996, at 5A.

221. John Burton, *Seoul Eases Union Laws but Weakens Job Security*, FIN. TIMES, Dec. 4, 1996, at 4; Magda Kowalcuk, *South-Korea-Labor: For Workers, OECD is a Blessing in Disguise*, Inter-Press Service, Dec. 19, 1996, available in LEXIS, News Library, INPRES File. See also John Burton, *OECD in Unprecedented Attack on Seoul Labour Law*, FIN. TIMES, Jan. 24, 1997, at 16 (reporting a recent rebuke of Korean government by OECD); John Burton, *Seoul Threatens to Expel Foreign Trade Union Groups*, FIN. TIMES, Jan. 14, 1997, at 1 (reporting threat by Korean government against visiting OECD delegates); Jeffrey Sachs, *Korea Realistic in Changing Labour Laws*, FIN. TIMES, Jan. 28, 1997, at 16 (criticizing OECD for seeking to prescribe labor reforms to Korea).

222. John Burton, *South Korean MPs Approve Watered-Down Labour Law*, FIN. TIMES, Mar. 11, 1997 at 4.

223. *Norwegian Paper on Trade and Labor*, INSIDE U.S. TRADE, (An Inside Washington Publication, Washington D.C.) Aug. 9, 1996, at 5-6 (the United States, the European Commission, Canada, and Norway were the main governments that pressed for the inclusion of labor rights on the agenda at the WTO Ministerial Conference in Singapore).

224. *Marathon Talks on Labor Fail, Leaving Unresolved Issues for Singapore*, 13 Int'l Trade Rep. (BNA) 1849 (Dec. 4, 1996).

225. *Secretary-General Attends "Group of Seven" Summit in Lyon*, Federal News Service, July 1, 1996, available in LEXIS, News Library, FEDNEW file. The "Group of Seven" countries are France, Germany, United Kingdom, Italy, Canada, Japan, and United States. *Id.*

226. LYON SUMMIT, ECONOMIC COMMUNIQUE, MAKING A SUCCESS OF GLOBALIZATION FOR THE BENEFIT OF ALL, para. 24 (1996). The "will" expressed by the group vanished in Singapore.

227. *Employers' Group Opposes U.S. Attempt to Link Workers' Rights and Trade*, 13 Int'l Trade Rep. (BNA) 934 (June 5, 1996). See also Helene Cooper, *Clinton is Criticized for Backtracking on Labor-Rights Issues in Other Nations*, WALL ST. J., Oct. 18, 1996, at A20.

observers viewed this initiative as having protectionist motives.²²⁸ The Clinton Administration's repeated anti-trade actions probably reinforced these concerns.²²⁹

The Clinton Administration's initial goal for the Singapore conference was to establish a WTO working party on Trade and Core Labor Standards.²³⁰ Later, the goal was reduced to a declaration that the WTO would "explore ways of enhancing cooperating with the ILO."²³¹ Both goals were fiercely resisted by developing countries, which stated that "the subject of labour standards should not be brought into the WTO in any form."²³² At the opening of the conference, the acting U.S. Trade Representative declared that the U.S. government hoped to gain "an agreement that the WTO should, in cooperation with the ILO, examine in greater detail the important nexus between trade and labor standards."²³³

The labor language in the WTO Ministerial Declaration is, however, a pale reflection of what was initially sought by the U.S. government.²³⁴ The Declaration states:

228. Vir Singh, *Trade and Labor Prove Intractable*, EARTH TIMES, Dec. 16-31, 1996, at 9; Kaushik Basu, *The Poor Need Child Labor*, N.Y. TIMES, Nov. 29, 1994, at A25; T.N. Srinivasan, Trade and Human Rights, Paper Presented at the Conference on Representation of Constituent Interests in the Design and Implementation of U.S. Trade Policies, Dec. 1996, at 34 (on file with author).

229. See ANNE O. KRUEGER, *AMERICAN TRADE POLICY: A TRAGEDY IN THE MAKING* (1995) (discussing the upsurge of U.S. trade protectionism which hurts the United States in the global market). See also Bhushan Bahree, *U.S. Is Pulling out of Maritime Trade Talks*, WALL ST. J., May 24, 1996, at A2 (discussing the United State's pulling out of maritime trade talks); Everett Briggs, *Saving NAFTA from Ourselves*, WASH. TIMES, May 7, 1996, at A13 (criticizing Clinton's Administration for failing to carry out NAFTA commitments); Aviva Freudmann & John Maggs, *Canada Agrees to Tax Softwood Exports to US*, J. COM., Apr. 3, 1996, at 1A (discussing Canadian action to avert new U.S. tariffs on lumber); *Hypocrisy and Child Labor*, J. COM., July 29, 1996, at 6A (pointing out that Clinton Administration is delaying textile liberalization); John Maggs & Kevin Hall, *Clinton Moves to Restrict Mexican Broom Imports*, J. COM., Dec. 3, 1996, at 2A (discussing U.S. plan to restrict the import of Mexican brooms because it supposedly hurts U.S. broommakers); *Trade Fictions*, J. COM., Oct. 18, 1996, at 6A (noting that 59 trade agreements negotiated by the Clinton Administration were aimed at restricting trade).

230. *U.S. Paper on Trade and Labor*, INSIDE U.S. TRADE, (An Inside Washington Publication, Washington D.C.) Aug. 9, 1996, at 5.

231. *U.S. Softens Line on WTO Labor Work but Strong Opposition Remains*, INSIDE U.S. TRADE, (An Inside Washington Publication) Nov. 15, 1996, at 1.

232. Gary G. Yerkey, *Developing Countries Block U.S. Plan to Include Labor Issue in Work Agenda*, 13 Int'l Trade Rep. (BNA) 1925 (1996); *Fourteen Developing Countries Reject Inclusion of Labor in WTO*, INSIDE U.S. TRADE, (An Inside Washington Publication, Washington D.C.) Oct. 4, 1996, at 11-13.

233. Charlene Barshefsky, *Outlines Declaration at Singapore WTO Ministerial*, (Dec. 9, 1996) (on file with Office of the U.S. Trade Representative) Press Release No. 96-94. See also Helene Cooper, *White House Seeks to Link Labor Rights, World Trade to Gain Union Support*, WALL ST. J., Dec. 10, 1994, at A24.

234. Frances Williams, *WTO Refuses to Link Trade Measures to Labour Rights*, FIN. TIMES, Dec. 13, 1996, at 4. See also *WTO: Ministers Agree to do Nothing on Labour Standards*, European Information Service, Dec. 14, 1996, available in LEXIS, News Library, EURRPT File.

1. We renew our commitment to the observance of internationally recognized core labor standards.
2. 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.
3. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards.
4. We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.
5. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.²³⁵

This carefully drafted text needs to be parsed. The usage of the phrase "we" in the first sentence apparently represents the voice of the government ministers acting as national officials, since the WTO, as an institution, has never made a commitment to the observance of core labor standards.²³⁶ The second sentence affirms support for the ILO. Since all WTO members are also ILO members,²³⁷ they presumably already support the ILO. Perhaps a reasonable inference from the second sentence is that the Ministerial did not consider the WTO a competent body capable to set labor standards. The third sentence seems reflective of the findings of the OECD Study. The first clause in the fourth sentence articulates a new policy, since neither the General Agreement on Tariffs and Trade (GATT)²³⁸ nor the WTO has ever rejected the use of labor standards for protectionist purposes.²³⁹ This declaration must be considered in context, however, since the WTO does not reject the use of tariffs for protectionist purposes. Before the Singapore conference, a group of economists urged the WTO to set a target year of 2025 for achieving global free trade.²⁴⁰ Nevertheless, the trade ministers did not seize the opportunity to endorse free trade, even as a thirty year goal.²⁴¹ The willingness of the WTO to reject the use of *labor standards* for protectionist purposes should be contrasted with its unwillingness to reject the use of *tariffs*

235. *Singapore Ministerial Declaration*, *supra* note 5, para. 4 (sentence numbers added by the author to facilitate discussion).

236. *Id.*

237. Michel Hansenne, Director-General, Trade and Labour Standards: Can Common Rules Be Agreed?, International Labor Organization, Mar. 6, 1996, at 8 (on file with author).

238. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 188 [hereinafter GATT]. The GATT was the predecessor organization to the WTO.

239. *Singapore Ministerial Declaration*, *supra* note 5, para. 4.

240. Guy de Jonquieres, *WTO Urged to Set Target Date for Free Trade*, FIN. TIMES, Dec. 6, 1996, at 4.

241. See generally *Singapore Ministerial Declaration*, *supra* note 5 (failing to endorse global free trade).

for protectionist purposes.²⁴² This WTO stance is quite ironic, given that the WTO has jurisdiction over tariffs, but not over labor standards.²⁴³ The second clause in the fourth sentence is novel but highly ambiguous, as it does not clearly state whether all government actions to create comparative advantage in low-wage countries should be beyond question.²⁴⁴ For example, can the use of prison labor for exports be questioned? Although the fifth sentence offers superficial appeal, it loses its force when one takes into account the current low level of ILO–WTO collaboration.²⁴⁵ The barriers which are set up to obstruct collaboration can be seen in an episode that occurred just before the Singapore meeting.²⁴⁶ The WTO General Council chairman had invited the Director-General of the ILO to speak at Singapore, but the chairman withdrew the invitation after he received objections from the developing countries.²⁴⁷ It should also be noted that the fifth sentence is silent on the issue of collaboration between the WTO and the ILO, in their organizational capacities.²⁴⁸ This is unfortunate since greater collaboration between these two organizations is needed.²⁴⁹

The intent of the fifth sentence was underlined in clarifying statements issued by WTO officials.²⁵⁰ At the conclusion of the Ministerial, the conference chairman Yeo Cheow Tong explained: “Some delegations had expressed the concern that this text may lead the WTO to acquire a competence to undertake further work in the relationship between trade and core labour standards. I want to assure these delegations that this text will not permit such a development.”²⁵¹ Shortly thereafter, WTO Director-General, Renato Ruggiero, explained that the language about the ILO only allows the WTO

242. Compare *Singapore Ministerial Declaration*, *supra* note 5, para. 6 (stating a commitment to the rejection of all forms of protectionism), with Jeffrey J. Schott, *Challenges Facing the World Trade Organizations*, in *THE WORLD TRADING SYSTEM: CHALLENGES AHEAD* 18 (1996) (noting that many high tariffs will remain even after the full implementation of the Uruguay Round).

243. Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144, 1148 [hereinafter WTO].

244. See *Malaysia Proposes New Draft of WTO Declaration on Labour Standards*, Agence France Presse, Dec. 10, 1996, available in LEXIS, News Library, AFP File (noting that this language was introduced by Malaysia).

245. Steve Charnovitz, *Promoting Higher Labor Standards*, 18 WASH. Q. 167, 182 (1995).

246. *Labours of Love*, FIN. TIMES, Dec. 6, 1996, at 13.

247. *Id.*

248. *Singapore Ministerial Declaration*, *supra* note 5, para. 4.

249. See International Labour Office, *Future Policy, Programme and Status of the International Labour Organisation*, 26th Sess., at 39 (1944) (noting that failure to achieve proper coordination of international agencies must necessarily cause prejudice to the efficient operation of these bodies).

250. Concluding Remarks by H.E. Mr. Yeo Cheow Tong, Chairman of the Singapore Ministerial Conference, para. 8 (visited Feb. 10, 1997) <<http://www.wto96.org/bispct.html>> [hereinafter Concluding Remarks by H.E. Mr. Yeo Cheow Tong].

251. *Id.* See also *Declaration Bars WTO Mandate on Trade-Labour Link*, Reuters North American News, Dec. 13, 1996, available in LEXIS, News Library, REUNA File.

Secretariat to exchange information on certain issues, such as whether ILO initiatives are consistent with international trade rules.²⁵²

Despite the fuzzy discussion of labor standards in the Ministerial Declaration, the Clinton Administration lauded itself. The U.S. Secretary of Labor claimed the Declaration to be "a real victory."²⁵³ The acting U.S. Trade Representative, Charlene Barshefsky, stated that: "[t]his negotiation was extraordinarily difficult and the convergence of views achieved is no small accomplishment. It establishes a balanced framework for how this issue should be dealt with in the future. The effort made at Singapore will help ensure collaborative efforts between the WTO and the ILO."²⁵⁴ More than two years earlier the U.S. Trade Representative, Mickey Kantor, had announced that the Clinton Administration had overcome international opposition in the GATT to secure an agreement to discuss labor standards.²⁵⁵ This discussion finally occurred in December 1996, but the U.S. government left Singapore empty-handed on worker rights. The WTO refused to set up a committee on trade and labor standards. It did, however, set up working groups on trade and investment and on trade and competition policy.²⁵⁶ This shows that the WTO is willing to explore some new trade issues, but not the trade-labor connection.

III. NEW DIRECTIONS

Traditionally, there have been three motivations for international labor law—commercial concerns, domestic welfare, and altruistic intentions.²⁵⁷ These motivations are interwoven into most proposals for the use of trade policies to promote labor standards. The commercial motivation is to harmonize labor standards to promote fair trade.²⁵⁸ There is weak conceptual support for the commercial motivation and, as the OECD Study points out, the evidence supporting this argument is not strong.²⁵⁹ Another problem is that there is no principled way to distinguish fair trade from unfair trade.²⁶⁰ Furthermore, this motivation appears to be protectionist to countries operating

252. Ruggiero Says Declaration Allows Only Information Swaps with ILO, (visited Feb. 10, 1997) <<http://www.askSam.com>>.

253. *Reich Applauds WTO Draft on Labor*, J. COM., Dec. 16, 1996, at 3A. Robert Reich was the U.S. Secretary of Labor.

254. *United States Praises Sweeping Information Technology Agreement*, WTO Process, Dec. 13, 1996 Press Release No. 96-96 (on file with Office of the U.S. Trade Representative).

255. *Kantor Announces U.S. Has Secured GATT Deal to Discuss Labor Rights*, INSIDE U.S. TRADE, (An Inside Washington Publication, Washington D.C.) Apr. 8, 1994, at S-1.

256. *Singapore Ministerial Declaration*, *supra* note 5, para. 20.

257. Joseph P. Chamberlain, *Legislation in a Changing Economic World*, 166 ANNALS AM. ACAD. POL. & SCI. 30, 30-31 (1933).

258. *Id.* at 30.

259. OECD STUDY, *supra* note 4, at 88-104.

260. Robert E. Hudec, *Differences in National Environmental Standards: The Level-Playing-Field Dimension*, 5 MINN. J. GLOBAL TRADE 1, 7-14, 28 (1996).

under low labor standards. Therefore, advocates of international labor standards should drop this argument.²⁶¹

The domestic welfare motivation seeks to prevent lower foreign standards from undermining domestic standards.²⁶² There is a valid conceptual basis for this motivation. However, the vast diversity in labor standards among countries demonstrates that the fears of the founders of the ILO — that the failure of a nation to adopt humane labor conditions would be an obstacle for other nations— have not generally been borne out.²⁶³ Consequently, this argument should be de-emphasized by advocates of international labor standards.

The altruistic motivation is to raise labor conditions for workers worldwide.²⁶⁴ The altruistic motivation is the most compelling of the three motivations²⁶⁵ since it interweaves labor standards into the larger framework of human rights. In other words, the motivation of altruism is not protection of victims in the importing country, but rather victims in the exporting country. Obviously, emphasizing the human rights of foreign workers will not make this issue less controversial. Yet, it may help to immunize labor advocates from being tarred as protectionists.

Many commentators have argued that a provision on labor standards would fit into the paradigm of the WTO.²⁶⁶ These commentators attempt to perfect the trade regime by adding what has been missing since the failure of the International Trade Organization in 1948.²⁶⁷ The stonewalling at Singapore should force a re-examination of strategy.

261. *But see Prepared Statement by Madeleine K. Albright, Secretary of State-Designate, Before the Senate Foreign Relations Committee*, Federal News Service, Jan. 8, 1997, available in LEXIS, News Library, FEDNEW File. The new U.S. Secretary of State seems to be an adherent to this commercial motivation. At her confirmation hearing, Madeleine Albright declared that:

Experience tells us that there will always be some who will seek to take advantage by denying access to our products, pirating our copyrighting goods or *under-pricing* us through sweatshop labor. That is why our diplomacy will continue to emphasize high standards on working conditions, the environment and labor and business practices. *Id.* (*emphasis added*).

262. Chamberlain, *supra* note 257, at 30.

263. *But see* Richard B. Freeman, *A Hard-Headed Look at Labour Standards*, in *INTERNATIONAL LABOUR STANDARDS AND ECONOMIC INTERDEPENDENCE* 87-88 (Werner Sengenberger & Duncan Campbell eds., 1994); *OECD STUDY*, *supra* note 4, at 124-30.

264. Chamberlain, *supra* note 257, at 31.

265. *See* ALBERT THOMAS, *INTERNATIONAL SOCIAL POLICY* 46 (1948) (noting that the movement for labor legislation was at its origin a noble impulse of human solidarity).

266. *See, e.g.*, *INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS, THE GLOBAL MARKET-TRADE UNIONISM'S GREATEST CHALLENGE* 38-44 (1996) (supporting a social clause in the WTO); CAROLINE LEQUESNE, *REFORMING WORLD TRADE: THE SOCIAL AND ENVIRONMENTAL PRIORITIES* 8-66 (1996) (proposing a joint WTO-ILO working party to draft a social clause).

267. LEQUESNE, *supra* note 266, at 47-58.

The WTO, for three primary reasons, is never going to be a good forum for pursuing the goal of higher labor standards.²⁶⁸ First, the WTO is a specialized organization on trade where trade ministers serve as representatives. Second, the WTO is not, and does not purport to be, a champion of worker rights.²⁶⁹ Third, decision-making in the WTO normally requires a consensus.²⁷⁰

The concept of pursuing labor standards in the WTO is premised on the view that the WTO has enforcement power that the ILO lacks.²⁷¹ In actuality, the reverse is more accurate. As the OECD Study aptly points out, utilizing WTO enforcement requires amendments, reinterpretations, or common understandings of trade rules.²⁷² By contrast, the ILO would not need an amendment in its organic act to improve enforcement of labor rights. The ILO does not currently employ trade controls in its convention, but could do so in the future.²⁷³

Although the competence of the ILO to include trade controls in its conventions is not free from doubt, there are several justifications for it. First, the ILO's organic act does not delimit the scope of ILO conventions.²⁷⁴ This led to an early request to the Permanent Court of International Justice (PCIJ) for an advisory opinion as to the competence of the ILO with respect to agricultural labor.²⁷⁵ The PCIJ, in their 1922 opinion, ruled that the ILO had competence with respect to agricultural labor issues and noted that the terms in the Treaty defining the competence of the ILO "could hardly be

268. Another reason why the WTO is a poor forum is that discussion there entangles the arguments against trade liberalization with the arguments for labor rights. Since many labor groups make both arguments, this leads to skepticism about the true motivation.

269. See, e.g., *WTO Workers to Strike over Pay*, WALL ST. J., June 19, 1996, at A16. *WTO Secretariat Stages One-Day Strike over Link to United Nations*, INSIDE U.S. TRADE, (An Inside Washington Publication, Washington, D.C.) June 21, 1996, at 28.

270. WTO, *supra* note 243, art. IX(1), at 1148.

271. See Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause*, in 2 FAIR TRADE AND HARMONIZATION 177, 177-230 (Jagdish Bhagwati & Robert E. Hudec eds., 1996). See generally Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361 (1995) (discussing the structure, enforcement provisions, and dispute settlement procedures of ILO and GATT-WTO and how they could operate within an international enforcement regime to prevent labor abuses).

272. OECD STUDY, *supra* note 4, at 176. See also Gus Edgren, *Fair Labour Standards and Trade Liberalization*, 118 INT'L LAB. REV. 523, 526 (1979) (stating that the rules governing international trade allow competition at any cost to the workers, no matter how inhumane the methods).

273. See Juan A. de Castro, *Trade and Labour Standards: Using the Wrong Instruments for the Right Cause*, United Nations Conference on Trade And Discussion, No. 99, 15 (May, 1995) (suggesting the possibility of new labor conventions with trade restrictions); Halina Ward, *Common But Differentiated Debates: Environment, Labour and the World Trade Organization*, 45 INT'L & COMP. L. Q. 592, 607, 625-26, 632 (1996) (suggesting the use of trade controls in labor treaties).

274. Treaty of Versailles, *supra* note 1, art. 405.

275. Competence of the International Labor Organization with Respect to Agricultural Labor, Advisory Opinion No. 2, in 1 WORLD COURT REPORTS 122 (Manley O. Hudson ed., 1934).

more comprehensive.”²⁷⁶ In 1926, the PCIJ issued another advisory opinion on the competence of the ILO to regulate the personal work of the employer.²⁷⁷ The PCIJ ruled that the ILO had that competence and further stated that it was inconceivable that the treaty parties intended to prevent the ILO from drafting and proposing measures essential to the goals of humane labor conditions and worker protection.²⁷⁸

Second, the Treaty of Versailles set the agenda for the first ILO conference of 1919, which included the issue of the extension and application of the Phosphorus Match Convention of 1906.²⁷⁹ The PCIJ, in its advisory opinion on the competence of the ILO to regulate the personal work of the employer, noted that the Phosphorus Match Convention “was thus treated as falling within the sphere of labour legislation; and [that] this may be regarded as a contemporaneous practical interpretation made by the High Contracting Parties of the scope of the competence which they had conferred upon the International Labour Organization.”²⁸⁰ What makes the Phosphorus Match Convention significant is that it goes beyond labor conditions. This Convention not only bans the use of phosphorus in making matches, but also bans international trade in matches made with phosphorus.²⁸¹ Thus, by implication, the ILO would have had the power to write a convention banning trade in phosphorus matches.

A third justification for ILO competence derives from the Declaration Concerning the Aims and Purposes of the ILO, which is now part of the ILO treaty.²⁸² The Declaration states that the ILO, “having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate.”²⁸³ One relevant economic factor might be international trade that reinforces a denial of core labor standards.

276. *Id.* at 129.

277. Competence of the International Labor Organization to Regulate, Incidentally, the Personal Work of the Employer, Advisory Opinion No. 13, in 1 WORLD COURT REPORTS 745 (Manley O. Hudson ed., 1934) [hereinafter Competence of the International Labor Organization].

278. *Id.* at 754.

279. Treaty of Versailles, *supra* note 1, pt. XIII annex; Convention Respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches, 203 Consol. T.S. 12, 13. See INTERNATIONAL LABOUR OFFICE, THE INTERNATIONAL LABOUR CODE 1939: A SYSTEMATIC ARRANGEMENT OF THE CONVENTIONS AND RECOMMENDATIONS ADOPTED BY THE INTERNATIONAL LABOUR CONFERENCE 1919-1939, at 192 (1941).

280. Competence of International Labor Organization, *supra* note 277, at 755.

281. Convention Respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches, *supra* note 279, art. I.

282. ILO CONSTITUTION, *supra* note 1, art. 1. This Declaration was adopted in 1944 at the ILO's Conference held at Temple University.

283. *Id.* at annex, para. II(e). See also Mohammed Bedjaoui, *For a 'World Charter of Human Labour and Social Justice'*, in VISIONS OF THE FUTURE OF SOCIAL JUSTICE: ESSAYS ON THE OCCASION OF THE ILO'S 75TH ANNIVERSARY 31 (ILO ed., 1994) (noting that certain principles of international law must be reviewed, recast, and solemnly reaffirmed whenever they constitute common denominators shared by all peoples).

A fourth justification for ILO competence is that a trade measure was considered in the course of drafting the Convention concerning the Abolition of Forced Labor (No. 105).²⁸⁴ The proposed ban on trade "in goods produced by any forced or compulsory labour" was ultimately not adopted because of doubts as to its practicality.²⁸⁵ But there was no suggestion in the ILO Conference proceedings that the ILO lacked competence to enact it.²⁸⁶ More specifically, no speaker argued that the issue should be referred to the GATT.

The idea of a treaty banning trade in prison-made products has a long history, as it was first raised by the British Board of Trade in 1895.²⁸⁷ In 1919, the U.S. delegates to the Labor Commission of the Paris Peace Conference proposed that the Peace Treaty include a ban on international commerce in commodities made using convict labor.²⁸⁸ Nevertheless, this proposal was not incorporated into the Treaty of Versailles.

If the ILO has competence to include trade measures in its conventions, then it could, for example, write a new convention on forced labor that commits parties not to trade in products made in violation of the convention.²⁸⁹ This new convention could target the most egregious practices of coerced labor.²⁹⁰ It might also require ILO approval prior to trade bans.²⁹¹ This type of trade measure is not an economic sanction against a target country, but rather a trade control on "odious" products. This concept is not novel as the environmental regime already employs this technique.²⁹²

284. INTERNATIONAL LABOUR OFFICE, *International Labour Conference Record of Proceedings*, 39th Sess., para. 15-17 at 724 (1956). See Convention Concerning the Abolition of Forced Labor, No. 105, *supra* note 23, at 291.

285. INTERNATIONAL LABOUR OFFICE, INTERNATIONAL LABOUR CONFERENCE, RECORD OF PROCEEDINGS, 40th Sess., 708 (1958).

286. *Id.* at 507, 511, 513-14, 519.

287. *Correspondance Diplomatique Concernant une Règlementsation Internationale de la Vente des Objets Fabriqués dan les Prisons*, 27 Martens Nouveau Recueil (ser. 2) 425.

288. *Proposal Submitted by the Delegates of the United States of America*, in 2 THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION 328 (James T. Shotwell ed., 1934).

289. This author believes a trade ban would be the appropriate instrument because the proper level of commercial production from forced labor is zero.

290. Of course, trade controls should not be the only, or even the primary, instrument in the Convention. Unless universally applied, such trade controls may only divert trade. If universally applied, such trade controls cannot affect products consumed internally. See Wouter Tims, *New Standard in World Trade Agreements: Two Bridges Too Far. A Comment*, in Challenges to the New World Trade Organization 309 (Pitou van Dijk & Gerrit Faber eds., 1996) (noting that trade controls will not reach the bulk of producers who do not export).

291. See Jagdish Bhagwati, *The ILO: The Next Tasks*, in VISIONS OF THE FUTURE OF SOCIAL JUSTICE: ESSAYS ON THE OCCASION OF THE ILO'S 75TH ANNIVERSARY 37, 40 (ILO ed., 1994) (suggesting that the ILO must insist that impartial procedures be used to establish violation of agreed labor rights prior to any possible trade sanction).

292. See, e.g., Agreement on the Conservation of Polar Bears, opened for signature Nov. 15, 1973, 27 U.S.T. 3918, art. V, (entered into force Nov. 1, 1976). This provision requires parties to prohibit the importation of polar bears (or bear parts) taken (i.e., caught) in violation of the conservation rules in the Agreement.

The probability of ILO approval of new trade controls is very small, but the ILO is a better forum than the WTO for three reasons. First, the ILO is a specialized organization on labor, where labor and foreign ministry officials serve as representatives. Second, the ILO is a champion of worker rights.²⁹³ Third, the vote required for new labor standards is two-thirds as compared to the consensus needed for new rules in the WTO.²⁹⁴

How the WTO would react to such action by the ILO is difficult to predict.²⁹⁵ In 1994, world trade ministers set up a Committee on Trade and Environment to examine a series of issues including the relationship between the trading system and trade measures pursuant to multilateral environmental agreements.²⁹⁶ The WTO might respond by setting up a parallel committee on trade and labor. Yet this response was precisely what trade ministers *refused* to do at Singapore.

In summary, those who want to use trade instruments to promote worker rights should rethink their strategy. Instead of striving for a WTO discipline regarding labor, they should strive for an ILO discipline regarding trade.²⁹⁷ As of early 1997, neither the WTO nor the OECD seemed interested in further pursuit of the trade and labor linkage. Thus, the time is right for repatriating the issue to the ILO.²⁹⁸

293. The ILO received the Nobel Peace Prize in 1969.

294. ILO CONSTITUTION, *supra* note 1, art. 19.2.

295. Article XX(e) of the GATT provides an exception for trade measures relating to the products of prison labor, but states nothing about forced labor or bonded labor. See also Richard D. Boltuck & Ronald A. Cass, *Antidumping and Countervailing-Duty Law: The Mirage of Equitable International Competition*, in 2 FAIR TRADE AND HARMONIZATION 400 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (noting that resisting the importation of products of slave labor would be a legitimate stance).

296. WTO Decision on Trade and Environment, 33 I.L.M. 1267 (Apr. 15, 1994).

297. See *G-15 Statement on Singapore*, INSIDE U.S. TRADE, (An Inside Washington Publication, Washington, D.C.) Nov. 15, 1996, para. 35, at 23-24. The G-15 countries are: Algeria, Argentina, Brazil, Chile, Egypt, India, Indonesia, Jamaica, Malaysia, Mexico, Nigeria, Peru, Senegal, Venezuela, and Zimbabwe. *Id.* In early November 1996, the G-15 countries issued a statement about the upcoming WTO meeting. Regarding the issue of labor, the statement declared, "[t]he question of the relationship between trade and internationally recognized core labour standards has recurrently been mentioned as a new issue to be included within the world trade agenda. This issue clearly falls within the mandate and the specific competence of the ILO." *Id.* See also Michael Battye, *WTO Ministers Battle to the End Over Labour Rights*, Reuters Financial Wire, Dec. 12, 1996, available in LEXIS, News Library, REUFIN File; *Malaysia Raps Those Pushing "New" Issues*, SINGAPORE STRAITS TIMES, Dec. 12, 1996, available in LEXIS News Library, STRAIT File.

298. Abraham Katz, *WTO and the Social Clause*, J. COM., Jan. 8, 1997, at 6A (suggesting that the ball is now back in the court of the ILO).

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