

IX. Collective Bargaining Under International Law: U.S. Obligations and U.S. Practice

Core Labour Standards and the U.S. Experience: Freedom of Association and the Right to Bargain

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Introduction

Globalization has led to significant changes in the world of work, resulting in fundamental effects on the forms and patterns of work and a growing population of precarious and nonregular workers. Globalization has also given rise to widening income inequality, with the rich becoming richer and the poor becoming poorer. Negative effects such as these have been observed in developing but also in the advanced market economies, including the United States, the world's largest economy, where labour law protection has long been criticized as inadequate. The present global economic crisis has created adverse effects on jobs, further worsening the employment prospects of the poorest and most vulnerable groups in most countries.

As globalization intensifies competition, many national governments have sought to change the context of labour relations, work arrangements, and dispute resolution mechanisms, most notably at the individual rather than the familiar collective level. In the process, union membership and representation have been declining worldwide. These changes have accelerated the perception of workers' rights as fundamental human rights as exists in national, regional, and international instruments. At the international level, the concept of "core international labour standards" has emerged over the past decade and has been reflected broadly in the work of the International Labour Organization (ILO) and other international organizations, the activities of nongovernmental organizations (NGOs), and codes of conduct in the private sector. Among the set of core labour standards, those relating to freedom of association and the right to bargain collectively—Conventions 87 and 98—are among the most important fundamental rights. These two conventions enable workers and their organizations to have their voices heard in the workplace. Indeed, these rights constitute a core ILO value, and they are enabling rights that make it possible to promote democracy, sound labour market governance, and decent working conditions.

In the face of the current global jobs crisis and its impact on the poorest and most vulnerable groups, the ILO's Global Jobs Pact,¹ adopted at the 98th Session of the International Labour Conference in June 2009, recalls that respecting fundamental principles and rights at work is critical to economic recovery and development in the postcrisis world. The Global Jobs Pact affirms that "international labour standards create a basis for and support rights at work and contribute to building a culture of social dialogue particularly useful in times of crisis", and that in order to prevent a downward spiral in labour conditions and build the recovery, it is especially important to recognize that "respect for fundamental principles and rights at work is critical for human dignity. It is also critical for recovery and development."

The aim of this paper is, first, to give an overview of the development of core labour standards, highlighting reflections on the impact of the 1998 ILO Declaration on Fundamental Principles and Rights at Work. This declaration identifies a set of ILO conventions as core labour standards and reviews a variety of

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approaches in their implementation, such as in international human rights law and private self-regulation. Second, the paper considers one of the ILO's core values, namely freedom of association and the right to collective bargaining, and presents how ILO's technical cooperation programme, such as the Better Factories Cambodia, has created positive synergies in improving core labour standards. Third, we briefly examine U.S. approaches and contributions to the promotion of core labour standards in member states, with particular reference to freedom of association and the right to bargain collectively, and contrast these with U.S. attitude to adopting and applying these standards at home. The paper concludes by presenting how such synergies also contribute to global economic recovery, drawing from the findings of the Better Factories Cambodia.

The ILO's Core Labour Standards

Reflections on the Impact of the ILO's 1998 Declaration

The ILO conventions, which cover a broad range of subjects concerning work, employment, social protection, social policy, and related human rights, have long served as instruments to regulate the domestic labour and employment laws in member states upon their ratification. While the ratification of ILO conventions creates binding obligations, including giving effect to the standards domestically, ILO recommendations provide guidance for action by governments and employers' and workers' organizations but are not intended to create obligations. Despite the fact that over 180 conventions have been adopted, their enforceability has been limited, since many of them are ratified by very few countries.

After the end of the Cold War, the United Nations (UN) organized a series of global summit meetings. The World Summit on Social Development (Copenhagen, 1995), for example, identified four categories of core labour standards and reaffirmed their basic human rights status. A year later, the first World Trade Organization (WTO) Ministerial Conference (Singapore, 1996) renewed states' commitment to observing internationally recognized core labour standards, and the ILO was mandated as the competent body to set and deal with these standards. With the social dimension of globalization high on the agenda of the international community at the end of the 20th century, the need for another instrument giving greater focus to the goal of having social progress and economic growth move hand in hand led to the adoption in 1998 of the ILO Declaration on Fundamental Principles and Rights at Work (FPRW) and its follow-up.² The 1998 declaration was adopted as a promotional instrument to encourage efforts by the member states to respect a set of core values that lie at the heart of the ILO's mandate, and since its adoption it has attracted public attention to the ILO's core labour standards.³

The declaration identifies a set of eight "core" conventions and commits member states to respect and promote the principles and rights in four categories, whether or not they have ratified the relevant conventions, namely:

1. Freedom of association and the effective recognition of the right to collective bargaining (C87, C98)
2. Elimination of forced or compulsory labour (C29, C105)
3. Abolition of child labour (C138, C182)
4. Elimination of discrimination in respect of employment and occupation (C100, C111)

The declaration's follow-up provides three ways to help countries, employers, and workers achieve the full realization of the declaration's objectives. First, there is an Annual Review composed of reports from countries that have not yet ratified (<http://www.ilo.org/declaration/follow-up/annualreview/annualreports/lang--en/index.htm>) one or more of the ILO conventions that directly relate to the specific principles and rights stated in the declaration.⁴ Second, a Global Report (<http://www.ilo.org/declaration/follow-up/globalreports/lang--en/index.htm>) submitted each year provides a dynamic global picture of the current situation of the principles and rights expressed in the declaration. The global report is an objective view of the global and regional trends on the issues relevant to the declaration and serves to highlight areas that require greater attention. It also serves as a basis for determining priorities for technical cooperation. Third, technical cooperation projects (<http://www.ilo.org/declaration/follow-up/tcprojects/lang--en/>

[index.htm](#)) are designed to address identifiable needs in relation to the declaration and to strengthen local capacities, thereby translating principles into practice.⁵

The declaration is one social response by the ILO regarding how to govern the social dimension of globalization, and it indeed affirms the human rights status of a core set of rights and clearly states that these core labour standards are universal and that they apply to all people in all states, regardless of the level of economic development. The declaration was followed in 2004 by the report of the World Commission on the Social Dimension of Globalization.⁶ The core labour standards also serve as one of the four pillars of decent work on which the ILO's current activities are constructed,⁷ and they are further endorsed in the ILO's recent Declaration on Social Justice for a Fair Globalization, adopted in 2008.⁸

The promotional efforts of the ILO to make the instrument more universal and better understood, together with technical assistance offered under its follow-up, have also contributed to motivating countries to ratify the core conventions and implement them; indeed, the increase in the level of ratification of these core conventions has been significant. For example, with respect to freedom of association (C87) and the right to collective bargaining (C98), 150 out of the total 183 member states had ratified the former, while 160 countries had ratified the latter, by 3 November 2009.⁹ Another noteworthy observable impact has been the considerable increase in external donor contributions to ILO technical cooperation on promoting core labour standards.

The need to respect these labour standards has indeed been highlighted by the global economic crisis (hereafter, "the crisis"). Thus, the 2009 ILO Global Jobs Pact (GJP) sets out "promoting core labour standards" as one of the principles that support economic and jobs recovery and development, as will be shown later.

Multidimensional Approaches to Promoting Core Labour Standards

Since the adoption of the 1998 declaration, the eight core labour standards have been widely cited outside the ILO and promoted through multidimensional approaches by several actors, including international and regional organizations and policy makers, as well as private organizations, including enterprises, NGOs, monitoring/verifying bodies, and litigants. In this regard, the declaration has clearly had a promotional impact globally, and the identification of core labour standards can be considered one of the most significant developments in the protection of workers' rights.

Core Labour Standards as Human Rights

One factor which has served as a driver of such multidimensional support is the evolution of international human rights since the end of the Cold War, which has seen the recognition of human rights as "universal" and "indivisible" rights, consistent with the Vienna Declaration in 1993.¹⁰

The Universal Declaration of Human Rights (UDHR), which the UN General Assembly unanimously adopted in 1948, is an important precedent for treating civil, political, and social rights as human rights in a uniform manner, but the instrument is not legally binding. Due to the Cold War context, however, "individual" civil and political rights and "collective" social, economic, and cultural rights had long been dealt with separately, as reflected in two separate UN Covenants that contain legally binding obligations: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted in 1966. In the European context the European Convention on Human Rights (ECHR, 1950) may be contrasted with the European Social Charter (ESC, 1961).¹¹

However, given the growing official recognition regarding integration of the parallel tracks in international human rights after the Cold War, such integration has not been fully reflected in practice,¹² while the ILO never made this distinction in the human rights community.¹³ Instead of treating the two tracks in an integrated manner, core labour standards have come to be recognized and caught public attention as a set of core workers' human rights in the international community, despite a number of criticisms posed by academics, such as over the exclusion of other workers' rights, the review mechanism, and the selection of core labour standards.¹⁴

Workers' rights can also be found in other regional human rights instruments. In the Americas, the American Declaration of the Rights and Duties of Man (ADRDM) was adopted in 1948, but it is not legally

binding either. The American Convention on Human Rights (ACHR), which was adopted in 1969, contains legal obligations and was supplemented by a protocol relating to economic, social, and cultural rights in 1988. In Africa, the African Charter on Human and Peoples' Rights (ACHPR) was adopted in 1981.

Linking Core Labour Standards to International Trade

In order to regulate unfair labour competition and promote social justice, efforts to link core labour standards to the world trade system have also been promoted. A growing number of bilateral and multilateral trade agreements as well as regional economic integration arrangements make explicit references to international labour standards.

The advanced economies are allowed to offer tariff preferences to beneficiary states under a generalized system of preferences (GSP). Thus the United States and the European Union (EU) operate trade schemes that offer incentives for developing economies to access markets at reduced tariffs, conditional on compliance with certain labour standards. Under the EU's GSP, developing countries that ensure respect for core labour standards in line with the ILO's core conventions are eligible for additional trade preferences.¹⁵ For example, while the EU withdrew GSP benefits in 2007 from Belarus because of its violation of C87 and C98, it granted GSP benefits to El Salvador upon its ratification of the same conventions.¹⁶

In Latin America, Argentina, Brazil, Paraguay, and Uruguay have made commitments to the Social and Labour Declaration of the Common Market of the Southern Cone (MERCOSUR), which was signed in 1998. In 2006, the Bolivarian Republic of Venezuela also became an associate member. The Social and Labour Declaration of MERCOSUR proclaims support for the ILO's 1998 declaration and reaffirms the commitment to respect, promote, and implement the rights and obligations set out in the core conventions.¹⁷

In 1994 the United States, Canada, and Mexico signed the North American Agreement on Labor Cooperation (NAALC) as a side agreement of the North American Free Trade Agreement (NAFTA), concluded in 1992. The NAALC lists 11 labour standards to be complied with by member states, subject to their domestic law.¹⁸ Since the conclusion of NAALC, the United States has included labour provisions in all bilateral and regional free trade agreements (FTAs) it has negotiated. Examples include agreements with Chile, Jordan, Morocco, and Singapore. Indeed, FTAs were given new impetus following the signing by the U.S. Congress of the Trade Act of 2002, which included "the authorization to promote trade." More recently, the New Trade Policy for America (agreed to by the U.S. Congress and the Bush Administration in May 2007) states that specific labour provisions are to be included in FTAs, covering an obligation to strive to ensure in the domestic legislation the labour principles as outlined in the ILO declaration and internationally recognized labour rights, as well as an obligation to effectively enforce domestic labour laws containing internationally recognized workers' rights.¹⁹

There has been ongoing debate about whether these labour standards should be enforceable under a dispute settlement mechanism.²⁰ Some recent agreements also provide for dispute resolution mechanisms as well as funds and parallel labour cooperation. Indeed, a growing number of bilateral free trade agreements—particularly those signed by Canada, the United States, and the European Union—contain social and labour provisions along those lines.²¹

One sophisticated example of linking bilateral trade agreement to market rewards conditional to systematically and publicly monitored increasing compliance with labour standards, with the involvement of the ILO, is ILO's technical cooperation projects: Better Factories Cambodia. This issue is explored below.

Private Voluntary Initiatives to Promote Core Labour Standards

Codes of Conduct and Other Private Self-Regulatory Initiatives

Expanding activities of multinationals that operate globally beyond national borders have contributed to the development of corporate codes of conduct, primarily in response to growing expectations on the part of the international community that they meet corporate social responsibilities (CSR). A shift in power away from national governments to businesses, NGOs, and cross-border/transnational groups, for example, is also underpinning the development of core labour standards, and such nonstate actors have actively contributed to their promotion.

Leading international instruments providing guidelines for the behaviour of multinationals are the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the MNE Declaration) and the OECD Guidelines for Multinational Enterprises, both of which were established in the 1970s and have served as nonbinding international instruments. Then, in the late 1980s, trade unions and NGOs began to pressure large and brand-name enterprises over their labour standards. Widely used campaigns included boycotts against such companies as Nike, Reebok, and Adidas, whose production was criticized as being based on "cheap labour" or "sweat shops." Facing the threat of damage to their brand image from such public pressures, a number of enterprises developed their own codes of conduct. The lack of effective international tools imposing legally binding obligations on multinationals to comply with international labour standards thus brought about a dramatic rise in private self-regulatory initiatives for the purposes of assessing and improving the multinationals' labour practices in the 1990s.

The trend toward wider acceptance of the centrality and universality of the ILO's core labour standards has also underpinned the increase in various kinds of regulatory initiatives, including codes of conduct that multinationals adopt for their own operations, but also those that are developed by a variety of actors, such as trade unions, NGOs, and businesses, at national, regional and global levels, and in each case involving bipartite and tripartite commitments. At the same time, different self-regulatory private initiatives have emerged in order to monitor corporate compliance with these codes of conduct. Some undertake external monitoring or auditing, while others provide verification or labeling. Law firms have also started providing preventive legal services and developing risk-management tools. In the United States, for example, some management-oriented law firms known to their detractors as union busters have changed their business strategies over time due to the decline in union density and now tend more toward dispute avoidance by providing training programmes and other compliance products and by drafting risk prevention policies for their clients.²²

New Developments in International Tools

These various private initiatives have in turn stimulated renewed action among international organizations. The ILO and the OECD have revised their guidelines. The ILO's MNE Declaration²³ was revised in March 2000 to include in its annex a cross-reference to the 1998 declaration.²⁴ The revised guidelines oblige the parties—governments, workers, employers, and MNEs—to "contribute to the realization" of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (<http://ilo-mirror.library.cornell.edu/public/english/standards/decl/declaration/index.htm>). On the other hand, the OECD Guidelines for Multinational Enterprises were revised in 2000 to establish a specific procedure that allows for complaints to be brought where companies are not following the guidelines. The revised guidelines also committed adhering countries to establishing a national contact point (NCP) to promote the guidelines and manage the complaints relating to companies registered in or operating within their borders. Where the NCP considers that a company has breached the guidelines, it will issue a statement on the nature of the breach and make recommendations to the company on how it could bring its practices in line with the guidelines in the future.²⁵

The UN also established the UN Global Compact (GC) in 2000 as both a policy platform and a practical framework for companies that are committed to sustainability and responsible business practices. The GC asks companies to embrace, support, and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption. The GC's labour principles are derived from the ILO's 1998 declaration.²⁶ However, while the GC is not legally binding but rather a voluntary instrument, the number of participants has grown to 6,700, including over 5,200 businesses in 130 countries around the world as of 30 June 2009.

Finally, the International Organization for Standardization (ISO) is also developing a guidance document on social responsibility. The resulting international instrument, ISO 26000, is scheduled to be adopted in September 2010. In line with the ISO-ILO Memorandum of Understanding (MOU), the Draft International Standard has been developed with ILO inputs. The draft text highlights, among other international instruments, the MNE Declaration, the ILO 1998 declaration, the ILO Declaration on Social Justice for a Fair Globalization, and international labour standards concerning employment promotion and

respect for workers' rights, as well as many broader economic and social development issues identified in the 2007 International Labour Conference conclusions concerning the promotion of sustainable enterprises.²⁷

Concerns over Voluntary Self-regulatory Initiatives and the Role of the ILO

These various attempts contribute to promoting and respecting core labour standards in mutually reinforcing and complementary ways, albeit with limitations and risks of misuse. Thousands of codes of conduct, guidelines, and ethical principles have been adopted, and the monitoring and verification business is booming. This in turn implies expanding business opportunities for certain private actors to "sell labour standards." When they are either misinterpreted or omitted in order to meet enterprises' own risk management needs, the coherence and legitimacy of international labour standards may be endangered. As a World Bank study revealed, there were significant variations in the ways CSR initiatives interpret workers' rights.²⁸ Some address international labour standards, while others cover either narrower or wider workplace issues. With respect to freedom of association and the right to collective bargaining, for example, there are often cases where CSR initiatives marginalize or simply omit these rights.²⁹ Some identify compliance with national legislative regimes that often conflict with the core labour standards.

The processes can involve workers' participation, while codes can also be drafted at management level or by external consultants without workers' involvement. Codes could also cover the individual company's supply chains and, in most cases, they are developed as a risk-prevention measure in order to maintain the company's reputation and avoid negative exposure or scandals. Thus, codes tend to be more effective in high-profile large companies, while the incentives for small and medium-sized enterprises to draft such codes seem to be few. These shortcomings suggest that private self-regulatory initiatives may create confusion rather than advance labour rights.

There has also been growing concern both from companies and civil society over the efficacy of code implementation systems, in particular the quality of the assessments conducted and the role they play in promoting the principles that global companies espouse in their CSR policies.³⁰ Such concerns include misinterpretation of core labour standards, duplication of audits, inconsistencies that exist between the assessment protocols, lack of transparency, and availability of credible information on social audits, as well as shortcomings in the methodology used in social audits, which are often undertaken without consultation with workers and their representative organizations, thus excluding them from the process of improving the workers' working conditions.³¹

These concerns pose further issues regarding how to effectively coordinate the roles of private self-regulation with public labour inspection, which most often has weak capacity. The ILO Labour Inspection Convention (C81) adopted in 1947 envisaged in its Article 5 that "the competent authority shall make appropriate arrangements to promote: effective co-operation between the inspection services and other government services and public or private institutions engaged in similar activities." The governing body of the ILO in 2006 reaffirmed that "private self-regulatory initiatives can be an important complement to public regulation and inspection, but not an alternative" as envisaged in C81.³² The ILO is internationally recognized as having legitimacy and experience in interpreting and implementing international labour standards, while voluntary forms of self-regulation, including codes of conduct and CSR initiatives, often lack such capacities. The challenge for the ILO, therefore, is how to promote effective cooperation among them in order to ensure that they are developed and assessed with the effective participation of workers. The role of the ILO lies in collaboration with the other existing relevant international organizations, including the OECD and the UN, to encourage and cooperate with private regulatory initiatives so as to ensure that these codes incorporate the existing ILO standards in a coherent and consistent manner.

The ILO's Better Factory Cambodia technical cooperation demonstrates a successful example of how effective cooperation between private regulatory initiatives and the ILO can lead to better compliance with labour standards. The methodology and approach taken under Better Factory Cambodia were bridged into a global programme named Better Work, launched in 2006. The following section presents an overview of ILO technical assistance and technical cooperation to give effect to the declaration, followed by a detailed description of Better Factory Cambodia and Better Work.

The ILO's Technical Assistance: Freedom of Association and the Right to Bargain Collectively

Overview of the ILO's Technical Cooperation Related to the Declaration

Technical cooperation constitutes one of the three follow-up activities to give effect to the declaration by strengthening local capacities to implement core labour standards. ILO's technical assistance in this respect comprises advocacy, awareness raising, training, advisory services, and technical cooperation projects for institutional development and capacity building. Technical cooperation projects in respect of freedom of association and the right to collective bargaining aim at ensuring results through the following six interrelated instruments of change:³³

1. Labour law reform
2. Building capacity of labour administrations
3. Strengthening employers' and workers' organizations
4. Developing tripartism and institution building
5. Dispute prevention and settlement
6. Advocacy and information

Technical assistance and cooperation projects promoting these rights are implemented by different units in the ILO, including these:³⁴

1. Programme for the Promotion of the Declaration (abbreviated hereafter DECLARATION)
2. International Labour Standards Department (NORMES)
3. Industrial and Employment Relations Department (DIALOGUE)
4. Labour Administration and Inspection Programme (LAB/ADMIN)
5. Bureau for Workers' Activities (ACTRAV)
6. Bureau for Employers' Activities (ACTEMP)
7. Sectoral Activities Branch (SECTOR)
8. Multinational Enterprises Programme (MULTI)
9. Regional Offices of the ILO (RO)
10. International Training Centre of the ILO in Turin (TURIN)

Since the establishment of the DECLARATION, funding from donor states to implement projects regarding freedom of association and the right to collective bargaining has amounted to about US\$58 million. However, there has been a gradual decline in expenditure by DECLARATION on projects in this area, from a peak of about US\$10 million in 2003 down to some US\$2.5 million in 2007, while total extrabudgetary approvals for all ILO technical cooperation projects reached a peak of US\$243 million in 2006. Funds available for technical cooperation in this area have long been significantly limited as compared to the funding for the elimination of child labour or forced labour, despite the high demand from tripartite partners for related capacity-building activities.³⁵ However, since the launch of Better Work by the ILO in partnership with the International Financial Corporation (IFC) of the World Bank Group, the funding for this programme has increased.

ILO Better Factories Cambodia

One of the innovative examples of an ILO technical cooperation project is Better Factories Cambodia, which operated January 2001 through January 2009.³⁶ Its goal was to improve working conditions in Cambodia's export garment factories through factory monitoring and reporting according to national and international labour standards, as well as capacity-building. Under this project, increased trade and systematically and publicly monitored compliance with labour standards have created positive synergies. The project was established to help the sector make and maintain these improvements. It was managed by the ILO, with support from the Royal Government of Cambodia, the Garment Manufacturers' Association in

Cambodia (GMAC), and trade unions. Its funding came primarily from the U.S. Department of Labor (USDOL), the United States Agency for International Development (USAID), the French Development Agency (AFD), the GMAC, and the Royal Government of Cambodia, as well as international buyers.

The project grew out of the U.S.–Cambodia Textile Agreement (UCTA) of 1999, which provided better market access in exchange for improved working conditions in the garment sector. The ILO's responses included independent, consistent, and transparent labour monitors in all the firms exporting textile and clothing products, direct remedial assistance, and capacity-building for tripartite constituents. What made this project unique was the fact that the ILO played the role of monitoring labour standards at factory sites for the first time, which contributed to maintaining the public legitimacy of labour monitoring. Another factor that contributed to the success of the project was its foundation on the principle of social dialogue.³⁷ The project, together with another ILO project for institutional capacity for dispute resolution, has contributed to both by improving working conditions and establishing a sound system of industrial relations.³⁸ Impact examples include a 28% increase in employment levels, increased unionization from 25 to 30 percent to 43 percent, and improved working conditions.³⁹

In 2004, when the UCTA expired, the Cambodian government, unions, and employers adopted a strategy of turning Better Factories Cambodia into a self-supporting and autonomous local institution, and it was decided that the project should become autonomously operational by the end of 2010, when the ILO's direct management comes to an end.⁴⁰

From Better Factories Cambodia to Better Work

Building on the successful approach and methodology developed in the Better Factories Cambodia project, the ILO launched a global “Better Work” programme in 2007 in partnership with the International Financial Corporation. The aim of Better Work is to improve labour standards and competitiveness in global supply chains, founded on cooperation among its stakeholders, namely governments, employers' associations, trade unions, and key international buyers.⁴¹

The Better Work programme operates at (developing) country level, while global activities are supported by a pool of technical experts from its global team. The latter is responsible for developing and supporting country-level activities, managing impact assessment reporting, knowledge management, coordination, stakeholder engagement, ongoing quality control, resource mobilization, strategic management, and policy advice. Country programmes, on the other hand, combine independent enterprise assessments with enterprise advisory and training services to support practical improvements through workplace cooperation. The key to success depends on the degree of cooperation between the stakeholders. The country programmes are expected to become self-financing within five years.

Better Work country programmes are typically integrated into the United Nations Development Assistance Framework (UNDAF), and their activities are also coordinated with the relevant national Poverty Reduction Strategy Paper (PRSP). For example, Better Work Vietnam is part of the ILO's Decent Work Country Programme (DWCP), which contributes to the One UN plan for the country.

Better Work has received support from both donors and private partners, amounting to US\$12.7 million since February 2007. Donors to the global programme include the Netherlands, Switzerland, Ireland, Japan, and the United States Council Foundation, while donors contributing to country programmes include the largest donor—the United States—Australia, Canada, the European Union, Finland, Ireland, Japan, New Zealand, the Netherlands, Norway, and Sweden, as well as Switzerland, France, Jordan, and Cambodia.

Better Work brings benefits to a range of people and organizations in the following ways: to workers, through better protection of their rights, improved working and living conditions, and increased opportunities for employment; to enterprises, through increased market access resulting from demonstration of their labour standards compliance to international buyers, enhanced reputation, reduced labour turnover and improved productivity competitiveness, and fewer audits; to governments, through export growth as a benefit from trade agreements that reward good labour standards performance, increased employment, a more competitive industry, business-enabling environment reforms, and improved capacity in labour administration; and to international buyers, through credible information on labour standards compliance in supplier factories, support for suppliers taking action to remedy compliance gaps, reduced risk of labour

violations in the supply chain—which can impact brand value—and more competitive suppliers with higher productivity and better-quality products and services.

The U.S. Experience

The U.S. Position on Ratification and Implementation of C87 and C98

The United States is one major country that has ratified neither C87 nor C98, though the former has obtained ratification by 150 and the latter by as many as 160 member states.⁴² Of the eight core conventions identified in the 1998 ILO Declaration, the United States has ratified only C105 and C182. The broad consensus on one principal reason for nonratification is its monistic system of law, under which ratified international treaties become legally binding in domestic law without incorporation. In the United States, where generally treaties are “supreme law of the land,” the administration or Congress may determine that a specific treaty is “non-self-executing.” In this case further legislative or other measures are taken in line with the treaty, which itself becomes unable to be invoked in the courts.⁴³

With specific regard to C87 and C98, the official U.S. position is that its domestic labour laws and practices already ensure freedom of association and the right to collective bargaining, in line with these two conventions and that some elements of U.S. federal and state labour laws conflict with the requirements under the conventions. However, the criticism has been leveled at U.S. labour practices that freedom of association and the right to collective bargaining are denied to large segments of American workers in both the public and private sectors. The ILO’s Committee on Freedom of Association (CFA) has been considering a number of such complaints for years.⁴⁴

C87 provides that “workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorization.” C98 declares that “workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment” and that ‘workers’ and ‘employers’ organisations shall enjoy adequate protection against any acts of interference by each other. . . . Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organize.” It states further that “measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”

The ILO’s 1998 declaration, which incorporates the two conventions, among others, is supported by a follow-up procedure, under which member states that have not ratified one or more of the core conventions are asked each year to report on the status of the relevant rights (annual review). The challenges identified in annual reviews in relation to realizing these core labour standards in the United States include the following:⁴⁵

The National Labor Relations Act (NLRA) excludes many categories of private sector employees from its scope, such as agricultural and domestic workers, supervisors, and independent contractors—

1. At the federal level, in the public sector, approximately 40% of all workers are still denied basic collective bargaining rights, and the statutes outlaw strikes.
2. The law allows employers to replace striking workers permanently.
3. Employers have a legal right to engage in a wide range of anti-union tactics that discourage the exercise of freedom of association.
4. The penalties are too weak to deter employers that have violated labour laws from doing it again.
5. The year 2005 brought a disturbing trend of employers using the bankruptcy system to declare collective bargaining agreements no longer valid.
6. Several restrictions have made it difficult to enforce trade union rights on behalf of undocumented workers.

7. State and local legislation fails to cover in any significant way workers excluded from coverage under the NLRA, and thus there is no statutory protection for the enforcement of their two key collective rights.

The NLRA guarantees the right to collective bargaining, and measures provided under the statute are in line with international labour standards. These rights are recognized also under the first, fifth, and fourteenth amendments to the U.S. Constitution, adopted in 1791, which provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

However, there are two issues arising from U.S. application of these conventions. The first relate to the constitutional issue that inhibits the ratification of C87 and C98, and in effect excludes a large proportion of workers from the benefits of the rights granted by the conventions. The second has to do with the organizational, administrative, or enforcement processes that disallow certain groups of workers from enjoying these rights. For example, as shown in the annual review, the new forms of employment relationship have created millions of contingent or precarious workers (e.g. part-time, temporary, subcontracted workers) whose freedom of association and right to bargain collectively are frustrated under the current labour law.⁴⁶ Also, administrative, organizational or legalistic processes have frustrated the practical application of the legal provisions on a large number of workers. Clearly, while the former might require constitutional reforms, the latter require better practice of employment relations, such that the administrative and legal processes that tend to frustrate the enforcement of the fundamental human rights of the affected workers are removed.

U.S. Promotion of Core Labour Standards Elsewhere

Despite such reluctance to adopt and apply them at home, the United States has been eager to use both public and private means of promoting international labour standards abroad, including its foreign aid contributions, transnational trade agreements, domestic laws, and private initiatives.

Follow-up to the Declaration: The U.S. Contribution⁴⁷

As shown earlier, the ILO’s 1998 declaration promotes technical cooperation activities as one of the follow-ups, though the capacity to carry them out depends critically on the willingness of donor states. For the period 1995 to 2008, three-quarters of the total U.S. contribution to the ILO (US\$380 million) has been allocated to IPEC projects to combat child labour. During the same period, as a reflection of the U.S. government’s support both for the promotion of core labour standards and for links between trade and international labour standards, the ILO has received US\$80.9 million toward projects implemented by the ILO programmes to promote the ILO declaration (DECLARATION) and social dialogue (DIALOGUE). An impact review of these programmes was published in 2007s and was well received by the government and the social partners in the United States, as well as by leading think-tanks, policy makers, and the media. However, U.S. funding to promote the declaration was cut in 2004, though USAID, the U.S. Department of State, and USDOL have since been able to fund one or two DIALOGUE/DECLARATION projects each year. At the same time, U.S. support for the ILO-IFC Better Work Programme is growing.

In other words, the United States has been the single largest donor to ILO extrabudgetary technical cooperation projects overall. The total extrabudgetary contribution it pledged to the organization in the period 1995 to 2008 amounted to US\$508 million, or 23% of total extrabudgetary contributions of US\$2.25 billion.

Apart from the U.S. extrabudgetary contribution to the ILO, core international labour standards are also added under the amendment to the Foreign Assistance Act, which governs funding for economic development grants overseas by USAID.

Incorporation of Workers’ Rights into U.S. Trade Legislation

The importance of core international labour standards and obligations regarding freedom of association and the right to collective bargaining has also been affirmed in U.S. trade legislation. Thus, the

United States identifies a list of five workers' rights in its trade laws as prerequisites for receiving special trade benefits under the GSP:

1. The right to association
2. The right to organize and bargain collectively
3. A prohibition on the use of any form of forced or compulsory labour
4. A minimum age for the employment of children
5. Acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health⁴⁸

The five rights are considered in the U.S. statutory definition of "internationally recognized workers" but have been criticized for not being grounded in the UN or ILO instruments.⁴⁹ Among the four categories of the ILO's core labour standards, nondiscrimination is excluded, while other workers' rights are added. There has also been criticism that the suspension of GSP benefits is used more out of concern for U.S. trade interests than observance of these workers' rights.⁵⁰

Furthermore, the U.S. FTAs, for example, with Jordan, Chile, Singapore, and Morocco, provide that "the Parties reaffirm their obligations as members of the International Labour Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labour principles and the internationally recognized labor rights set forth . . . are recognized and protected by domestic law".⁵¹ They further state that "recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth . . . and shall strive to improve those standards in that light." Labour laws are defined as statutes and regulations, or provisions that are directly related to the same "internationally recognized labour rights" as the five items listed above.

In the North American Accord on Labor Cooperation (NAALC),⁵² a side agreement to the North American Free Trade Agreement (NAFTA), on the other hand, "labor law" is defined as laws and regulations, or provisions that are directly related to the following 11 rights to be complied with by member states, subject to their domestic law:

1. Freedom of association and protection of the right to organize
2. The right to bargain collectively
3. The right to strike
4. Prohibition of forced labour
5. Labour protections for children and young persons
6. Minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements
7. Elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each party's domestic laws
8. Equal pay for men and women
9. Prevention of occupational injuries and illnesses
10. Compensation in cases of occupational injuries and illnesses
11. Protection of migrant workers

Though covering a wider range of workers' rights than the ILO core labour standards, the NAALC has also been criticized for weak enforcement and for its symbolic status.⁵³ No reference is made to the ILO's 1998 declaration. Insufficient enforcement, poor implementation capacities, and discrepancies with the ILO standards under the trade legislation resulted partly in a flood of activities on the part of labour and human rights groups and other NGOs.

Finally, the current global economic crisis is a source of hardship to many working men and women. At the same time, it provides a rare opportunity for policy changes in the world of work. Thus, the Global

Jobs Pact stresses that “in order to prevent a downward spiral in labour conditions and build the recovery, it is especially important to recognize that

respect for fundamental principles and rights at work is critical for human dignity. It is also critical for recovery and development. Consequently, it is necessary to increase . . . respect for freedom of association, the right to organize and the effective recognition of the right to collective bargaining as enabling mechanisms to productive social dialogue in times of increased social tension, in both the formal and informal economies.

The ILO is committed to strengthening activities to promote and monitor international labour standards and working to meet this end in the postcrisis world in a more coordinated manner, with the support of its constituents in the United States and other countries. Indeed, ILO Better Factories Cambodia also demonstrates good practice in contributing to effective crisis recovery in conformity with the GJP.

According to the ILO Better Factories Cambodia 23rd Synthesis Report,⁵⁴ published in December 2009, the Ministry of Commerce data for the period between October 31, 2008, and 2009 shows generally high levels of conformity with labour law and international labour standards, despite increased pressure due to the crisis, to which can be attributed 70 factory closures and the shedding of approximately 70,000 jobs. Better Factories Cambodia is working with both employers and unions to ensure that if workers must be laid off, it is done in a responsible manner.

Better Factories Cambodia and several UN agencies also are working to capture the impacts of the crisis on individual workers and develop sound policy responses and measures to help those who are affected by it. For example, in cooperation with the United Nations Development Programme (UNDP), Better Factories Cambodia is overseeing a study that will look at the social and economic impacts of the crisis on a group of 2,000 garment workers, including both employed and unemployed workers. The ILO is also assisting the Ministry of Labour and Vocational Training in the creation of regional job centres to provide vocational training and help unemployed workers find new work.

Conclusion

The ILO Declaration of 1998 on rights at work, and related international treaties on a set of core labour standards represent universally agreed labour rights, with particular reference to freedom of association and the right to bargain collectively. Undoubtedly, the United States has, through its trade policy and technical cooperation, been at the forefront of the promotion and application of these core labour standards in ILO member states. However, the contradiction between U.S. restrictive domestic labour policy on the one hand and its endorsement of core labour standards in member states on the other is noticeably demonstrated by the country’s support for ILO technical cooperation programmes such as Better Factories Cambodia, and then the Better Work. These two projects, and several others, have been implemented with significant support from the United States.

Since the adoption of the 1998 declaration, U.S. contributions to ILO technical assistance in promoting and giving effect to core labour standards have been substantial, and through these the US has enormously contributed to the advancement of labour rights and poverty reduction in those countries. In contrast, millions of Americans suffer from persistent poverty, inequality and an inadequate social safety net without legal rights or their voices even being heard.

The global economic crisis has, in all countries including the United States, hit the poor and vulnerable workers much harder. In the United States, a total of 7.2 million job losses have been reported since the recession began in December 2007. In that country, the pace of job loss is higher than in any recession since the late 1950s. And yet freedom of association and the right to collective bargaining are denied to large segments of American workers in both the public and private sectors. This calls for a rethinking of the orientation of the relevant U.S. legislation, for concrete steps to promote and implement core labour standards at home just as it has actively done abroad, with great success.

Endnotes

¹ *Recovering from the Crisis: A Global Jobs Pact*, June 2009. For the full text, see the ILO website: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_115076.pdf.

² See the ILO website for the full text: <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

³ <http://www.ilo.org/declaration/thedeclaration/background/lang--en/index.htm>.

⁴ <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

⁵ <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

⁶ See the ILO website for the full text: <http://www.ilo.org/public/english/wcsdg/docs/report.pdf>.

⁷ See for example, Reports of the Director-Generals to the 87th and 89th sessions of the ILC: <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm> and <http://www.ilo.org/public/%20english/standards/relm/ilc/ilc89/rep-i-a.htm>.

⁸ See the ILO website at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/%20documents/publication/wcms_099766.pdf.

⁹ See the ILO website at <http://www.ilo.org/ilolex/english/docs/declworld.htm>.

¹⁰ Tonia Novitz and Colin Fenwick, “The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice.” In Colin Fenwick and Tonia Novitz, eds., *Workers’ Human Rights: Legal and Regulatory Perspectives* (forthcoming, Hart Publishing, 2010), p. 4.

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¹⁴ For more details, see op. cit., No. 11, pp. 43–4.

¹⁵ *Freedom of Association in Practice: Lessons Learned—Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Report of the Director-General, ILO, 2008, p. 39.

¹⁶ *Freedom of Association in Practice: Lessons Learned—Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Report of the Director-General, ILO, 2008, p. 39.

¹⁷ *Freedom of Association in Practice: Lessons Learned—Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Report of the Director-General, ILO, 2008, p. 39.

¹⁸ http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005872.asp.

¹⁹ <http://www.cpath.org/sitebuildercontent/sitebuilderfiles/newtradepolicyoutline5-10-07.pdf>.

²⁰ Op. cit., No. 16, p. 40.

²¹ See the ILO website: http://www.ilo.org/global/What_we_do/InternationalLabourStandards/%20InformationResources/fta/lang--en/index.htm.

²² See Susan Bisom-Rapp, 2004, “Exceeding Our Boundaries: Transnational Employment Law Practices and the Export of American Lawyering Styles to the Global Worksite.” *Comparative Labour Law & Policy Journal*, Vol. 25, p. 257.

²³ The full text is available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/%20documents/publication/wcms_094386.pdf.

²⁴ See the ILO website: <http://ilo-mirror.library.cornell.edu/public/english/standards/relm/gb/%20docs/gb279/pdf/gb-12.pdf>.

²⁵ The full text is available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

²⁶ The full text is available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

²⁷ ILO, GB.306/MNE/1.

²⁸ The World Bank Group, 2003, *Company Codes of Conduct and International Standards: An Analytical Comparison*.

²⁹ Op. cit. no. 16, p. 38.

³⁰ Susan Hayter and Corinne Vargha, March 2008, “Strategic Partnerships to Promote Decent in Global Supply Chains,” p. 2. Presented at the IIRA Regional Congress for Africa in Cape Town.

³¹ Susan Hayter and Corinne Vargha, March 2008, “Strategic Partnerships to Promote Decent in Global Supply Chains,” pp. 26. Presented at the IIRA Regional Congress for Africa in Cape Town.

³² ILO, GB.297/ESP/3, 2006.

³³ Op. cit. n 16, p. 63.

³⁴ Op. cit. n 16, p. 63.

³⁵ Op. cit. n 16, p. 63.

³⁶ <http://www.betterfactories.org>.

³⁷ Op. cit. n 31, p. 13.

³⁸ Op. cit. n 31, p. 13.

³⁹ Op. cit. n 16, p. 93.

⁴⁰ Op. cit. n 31, pp. 17–18.

⁴¹ See *Better Work Programme, Stage II: July 2009–June 2012*, available at the Better Work website: <http://www.betterwork.org/public/global>.

⁴² Extracts from the ILO intranet at <http://www.ilo.org/ilolex/english/newratframeE.htm>.

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⁴⁴ See ILO’s LibSynd website at <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?Lang=EN&hdroff=1> and ILO’s Country Baseline under the ILO Declaration Annual Review (2000–2008): United States regarding Freedom of Association and the Effective Recognition of the Right to Collective Bargaining at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/%20publication/wcms_decl_facb_usa.pdf.

⁴⁵ *Ibid.*

⁴⁶ See James A. Gross, ed., *Workers’ Rights as Human Rights*, ILR Press, 2003, p. 32. For the most recent in-depth paper regarding U.S. regulatory challenges in ratifying C87 and C98, see Lance Compa, “Legal Protection of Workers’ Human Rights: Regulatory Changes and Challenges: The United States,” in C. Fenwick and T. Novitz, eds., *Workers’ Human Rights: Legal and Regulatory Perspectives* (forthcoming, Hart Publishing, 2010).

⁴⁷ ILO PARDEV.

⁴⁸ “Developments in the Law: Jobs and Borders.” *Harvard Law Review*, 2005, Vol. 118, No. 7, pp. 8–9.

⁴⁹ Lance Compa, “Legal Protection of Workers’ Human Rights: Regulatory Changes and Challenges: The United States,” in C. Fenwick and T. Novitz, eds., *Workers’ Human Rights: Legal and Regulatory Perspectives* (forthcoming, Hart Publishing), pp. 496–8.

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⁵¹ A list of specific U.S. FTA labour rights and social provisions is available at the ILO website: http://www.ilo.org/global/What_we_do/InternationalLabourStandards/InformationResources/fta/lang--en/WCMS_115531/index.htm#P0_0.

⁵² Full text can also be found at the ILO website: http://www.ilo.org/global/What_we_do/InternationalLabourStandards/InformationResources/fta/lang--en/WCMS_115531/index.htm#P0_0.

⁵³ Op. cit., No. 50, pp. 12–3.

⁵⁴ <http://www.betterfactories.org>.