

INTERNATIONAL LABOR RIGHTS A CATEGORICAL IMPERATIVE?

par Kamil AHMED*

Les normes du travail constituent un sujet fort controversé en Droit international économique, en particulier à cause de la dichotomie entre les pays développés et les pays en voie de développement. Les premiers protègent les normes du travail de manière exhaustive, alors que ces derniers ne partagent que rarement cette vision. Depuis sa création, l'Organisation internationale du travail a substantiellement amélioré les normes et les droits fondamentaux du travail. Malheureusement, elle n'est pas l'organisme idéal pour une application de ces conventions, puisqu'elle n'est pas pourvue de mécanismes de mise en application de règles. Jusqu'à ce jour, l'Organisation mondiale du commerce n'a pas non plus réussi à protéger les droits fondamentaux du travail, et une entente complète entre les pays développés et les pays en voie de développement demeure toujours incertaine, du moins à court ou moyen terme. Cependant, depuis peu, nous assistons à la naissance d'une nouvelle forme de réglementation dite souple : les Codes corporatifs de conduite. Grâce à eux, nous en sommes maintenant aux premiers balbutiements d'une ère nouvelle, où les multinationales ont certaines obligations en Droit international. L'avantage des Codes corporatifs qui retient l'attention est certainement leur grande flexibilité : ils ont à la fois une portée transnationale et internationale et sont facilement adaptables à leur contexte d'application. Le présent article expose comment l'action combinée des conventions de l'Organisation internationale du travail, des règles de l'Organisation mondiale de commerce et des Codes corporatifs de conduite peuvent améliorer la protection des normes et droits fondamentaux du travail, dans un contexte où les mécanismes de mise en application de règles font encore défaut.

Labor standards are a contentious issue in International Trade Law and particularly reflect the dichotomy between developed and underdeveloped states. The first tend to protect labor rights extensively and the latter rarely do so. Since its inception, the International Labor Organization has significantly bettered the protection of labor rights, but this is not the best forum to uniquely pursue given its lack of enforcement mechanisms. The World Trade Organization until now has also failed to protect international labor rights and a comprehensive agreement to this effect is improbable, at least in the short to mid-term. A new form of soft-regulation has however developed : the Corporate Code of Conduct. Presently, we are at the genesis of an era where multi-national corporations are beginning to possess obligations at International Law. The advantage of Corporate Codes of Conduct is that they are flexible, transnational and as international and adaptable as a corporation can be. This paper argues that the combined application of International Labor Organization conventions, World Trade Organization rules and Corporate Codes of Conduct can significantly improve the protection of labor rights, despite a general lack of rule enforcement mechanisms.

*. J.D./M.B.A. 3rd year, Faculty of Law/Rotman School Management, University of Toronto; LL.B. (Sherbrooke); B.A. (Hon's) (Poli. Sci.) (Concordia).

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LIST OF ABBREVIATIONS

CCCs	Corporate Codes of Conduct
CLS	Core Labor Standards
EU	European Union
GATT	General Agreement on Tariffs and Trade
IEL	International Economic Law
IGO	Inter-Governmental Organization
IHRs	International Human Rights
IHRL	International Human Rights Law
ILO	International Labor Organization
ILRs	International Labor Rights
IMF	International Monetary Fund
ITL	International Trade Law
LDCs	Less Developed Countries
MAI	Multilateral Agreement on Investment
MDCs	More Developed Countries
MTS	Multilateral Trading System
MNCs	Multi-National Corporations
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
OECD	Organization for Economic Cooperation and Development
SLS	Substantive Labor Standards
TPRM	Trade Policy Review Mechanism
UK	United Kingdom
UN	United Nations
US	United States of America
WTO	World Trade Organization

INTRODUCTION

When the MTS was created in 1948, 23 pioneering countries cut one another's export tariffs under the GATT¹. ITR was thereafter entrenched, yet the MTS has since changed immensely. The world has become an interconnected community at social, political, ideological and economic levels. This phenomenon is often called globalization and unprecedented trade development is its most visible sign². States generally recognize the beneficial economic impact derived from reduced trade barriers in its aggregate sum, which leads them to accept setbacks in certain areas of their economies to allow others to flourish. Autarky is therefore the exception and open economies the norm in 2004.

ITR is in flux and experts agree that labor standards are a contentious issue reflecting the dichotomy between MDCs and LDCs³. The first tend to protect labor rights extensively. This substantially augments production costs and diminishes their competitiveness against the latter. In fact, LDCs seek to maintain their ability to export goods at low prices and poorly paid labor is integral to this economic policy⁴. Unfortunately, poorly protected labor rights lead to rampant abuses, which is why in certain circumstances, and justifiably so, they have been characterized as IHRs.

Three mechanisms working in tandem can better protect labor rights than the *status quo* does : the ILO, WTO and CCCs. First, the ILO has advanced the status of labor rights significantly since it was founded in 1919, but not nearly enough. It must nonetheless continue to apply pressure in international fora, complemented by other mechanisms. Second, WTO member-States have been unable to conclude a substantive agreement whereby a minimum set of labor entitlements are prescribed and duly enforced. Such an agreement must

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1. *General Agreement on Tariffs and Trade* (30 October 1947) 58 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948).
 2. «Trade Winds», online : *The Economist* (6 November 1997) <http://www.economist.com/displayStory.cfm?Story_ID=105723> (date accessed : 25 February 2003).
 3. «Fifty years on», online : *The Economist* (14 May 1998) <http://www.economist.com/displayStory.cfm?Story_ID=128462> (date accessed : 25 February 2003) [hereinafter 50 years on].
 4. *Ibid.*

undoubtedly be the normative goal of IHRL, yet the Seattle conference and subsequent events demonstrate practical difficulties. WTO rules could nonetheless be modified to remedy this challenging reality upon the existence of sufficient political will. Third, a private form of regulation has emerged; the CCC. This code can better protect labor rights, until a substantive WTO agreement is concluded. It is not a «cure» to the world's labor right abuses, but nonetheless has potential for beneficial impact. Even marginal improvements are welcome, as a «step-by-step» approach often achieves more than an «all or nothing» approach. In fact, gradual developments will likely lead to a more comprehensive solution in the long-term, which is a possibility certainly worth exploring. CCCs can make a material difference when properly drafted and even more importantly, implemented⁵. We will be examining these closely, by studying whether CCCs constitute a viable interim solution in theory and in practice. Despite this, a substantive WTO agreement is what ITL must ultimately strive for, coupled with ILO conventions and corporate cooperation. The question is whether this is not only possible, but probable as well?

I. Definition and scope of «labor standards»

A universally acceptable definition of «labor standards» is next to impossible because social, cultural, political, ideological and economic differences often lead to irreconcilable constructions. Despite these differences, it is generally accepted that a distinction between CLS and SLS is justified⁶.

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5. B. Hepple, «A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct» 20 : 345 *Comp. Labor law & Pol'y Journal* 347 at 350 [hereinafter *Hepple #1*].
 6. M. Busse, «Do Labour Standards Affect Comparative Advantage? Evidence for Labour-Intensive Goods» (November 2001), Center for International Economic Studies, online : <<http://www.cid.harvard.edu/cidtrade/issues/laborpaper.html>> (date accessed : 1 March 2003) at 6-7 [hereinafter *Busse*].

A. Core labor standards

CLS *inter alia* refer to «... important human rights and include basic union rights, freedom from forced labour, equal opportunity in employment, and the abolition of child labour.»⁷ CLS are protected by IHRL, which includes treaties such as the *UN Charter*⁸ and *Universal Declaration of Human Rights*⁹. «Efforts to make adherence to core labour standards compulsory have become more persistent as the impediments to international trade have been dismantled and as capital markets have become increasingly liberalized ...»¹⁰ Unfortunately, IHRL has struggled and continues to struggle with the omnipresent issue of legitimacy and in corollary, enforcement. CLS nonetheless receive quasi-universal recognition. «This can be seen from the fact that more than 130 countries have ratified three United Nations acts on core labour standards»¹¹. Furthermore, the foreign policies of certain States, such as the US, have adopted foreign policies making them reluctant to conclude trade and investment agreements with States failing to respect CLS. The US has enacted legislation to this effect because CLS are exogenous considerations having endogenous consequences within its labor policy¹². It is however quite possible that this

7. *Ibid.* at 6.

8. *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945, No. 7.

9. *Universal Declaration of Human Rights*, G.A. Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71; A. Singh & A. Zammit, «The Global Labor Standards Controversy : Critical Issues for Developing Countries» (October 2000), South Centre, online : <<http://www.cid.harvard.edu/cidtrade/issues/laborpaper.html>> (date accessed : 8 March 2003) at 2 [hereinafter *Singh*].

10. *Singh, ibid.* at 3.

11. *Busse, supra* note 6 at 7. These three UN treaties are : (1) The *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No.46 (entered into force 3 January 1976, accession by Canada 19 May 1976); (2) The *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976); (3) The *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. No. 3 (entered into force 2 September 1990, accession by Canada, 13 December 1991).

12. J. Levinson, «Certifying International Workers Rights : A Practical Alternative» (June 1999), Economic Policy Institute, online: <<http://www.cid.harvard.edu/cidtrade/issues/laborpaper.html>> (date accessed : 2 March 2003) at 4 [hereinafter *Levinson*]. Examples of these are : «the Omnibus Trade and Competitiveness Act (1974 as amended, particularly Section 3.01); the General System of Preferences (GSP); and the Caribbean Basin Initiative (CBI). The legislation governing the Overseas Private Investment Corporation, or OPIC,

legislation infringes ITL.

CLS have international significance partly because of today's unprecedented transnational economy. They can be analogized to the canary in the coal-mine : «[t]he status of workers' rights in a country are a bellwether for the status of human rights in general»¹³. CLS speak to what is fundamentally human and is directly related to dignity. The occupation of people is intimately related to their individual identity, as there is something inherent of the nature of human capacity to engage in productive capacity. Protection of CLS in principle ensures against a race to the bottom¹⁴, as it limits and delineates the decision-making of corporate actors. Leary in fact believes labor rights are attached to social rights more broadly and operate to mitigate potentially adverse consequences associated with greater economic integration.¹⁵ Labor rights can also be seen as testing the justice of such integration and ensuring its just development.

B. Substantial labor standards

Certain rights are intimately associated with a person's occupation, yet are not part of IHRL¹⁶. In Canada and the US, *Occupational Health and Safety*

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- contains similar worker rights provisions.»
13. V. A. Leary, «The Paradox of Workers' Rights as Human Right» in P. Macklem, *Class materials of International Human Rights Law*, v. 2. (Toronto, Fall 2002) 407 at 407 [hereinafter *Leary*].
 14. This expression refers to States each lowering their labor standards in order to gain an advantage over competing States that will also do the same, until labor rights receive no protection at all. Economists believe that «a race *all the way* to the bottom is unlikely to occur in fairly competitive markets even if countries are large enough to affect one another.» D.K. Brown, «International Trade and Core Labor Standards : A Survey of Recent Literature» (January 2001) Tufts University, online : <<http://www.cid.harvard.edu/cidtrade/issues/laborpaper.html>> (date accessed : 5 March 2003) at 33 [hereinafter *Brown #1*]. For such studies, see : R. A. Lawrence, *Single World Divided Nations? International Trade and OECD Labor Markets* (Paris : OECD Development Centre, 1996); T.N. Srinivasan, «International Trade and Labor Standards from an Economic Perspective» in P. van Dijk and G. Faber, eds., *Challenges in the New World Trade Organization* (Amsterdam : Kluwer Law International 1996) 219; A. Krueger, «Observations on International Labor Standards and Trade», National Bureau of Economic Research Working Paper 5632 (1996).
 15. *Leary*, *supra* note 13 at 407.
 16. *Singh*, *supra* note 9 at 4.

Acts often protect these labor rights, which are entitlements beyond the «core» threshold and are meant to better safeguard the future and prosperity of workers. «These other labour standards [also known as SLR], sometimes called “acceptable conditions of work”, are highly controversial»¹⁷. Critics argue that MDCs have the financial resources to protect SLR, where as LDCs do not. Some believe that unequal resources demonstrate the *de facto* illegitimacy of the ILO, among other organizations¹⁸. If these arguments were accepted, then International Law in its entirety would be illegitimate as well, which is not yet the case in 2004, notwithstanding common legitimacy concerns.

II. Comparative Advantage/Disadvantage?

Little consensus exists amongst critics whether better-protected labor rights equate to a comparative advantage or disadvantage. Much of this debate ultimately stems from the very definition of labor rights and more importantly, the economic situations of States. Panagariya argues that «[d]eep down, this is essentially the age-old pauper labor argument that labor unions have repeatedly used to seek protection for labor-intensive industries in developed countries»¹⁹.

A. The dichotomy between MDCs and LDCs

Generally speaking, MDCs protect CLS and SLS far better than LDCs, which increases their variable costs, thus increasing total production costs. LDCs protect labor standards quite poorly which accordingly enables them to streamline variable costs. Fixed costs for LDCs are also reduced because labor constitutes a substitute for certain types of capital expenditures. The savings in variable and fixed costs make LDCs more competitive on price than MDCs. Competitiveness is ultimately contingent on the price elasticity of demand, whereby some industries are far more elastic than others. This said, competitive prices help LDCs counter the better technology of MDCs, though a clear

17. *Busse, supra* note 6 at 7.

18. S. Cooney, «Testing Times for the ILO : Institutional Reform for the New International Economy» 20 :347 *Comp. Labor law & Pol’y Journal* 365 at 373 [hereinafter *Cooney*].

19. A. Panagariya, «Trade-Labor Link : A Post-Seattle Analysis» (June 2000), University of Maryland-College Park, online : <<http://www.cid.harvard.edu/cidtrade/issues/laborpaper.html>> (date accessed : 15 March 2003) at 7 [hereinafter *Panagariya*].

imbalance is nonetheless apparent in favor of the latter. Developed States therefore want their underdeveloped counterparts to protect labor rights more extensively, which would make the former lose their competitive advantage. Such calls for the increased protection of labor rights superficially appear as «humane», but manifestly undermine the ability of LDCs to compete globally given their lack of technology and inadequate resources generally²⁰. Not surprisingly, wage inequality between developing and developed countries has been steadily increasing over the past twenty years²¹. This wage divide will continue to exist until LDCs protect labor rights more extensively than they presently do.

IHRs have immense economic value, though not intrinsically so. For example, CLS proscribe child labor, yet this type of labor is inexpensive and substantially facilitates the streamlining of costs in the immediate future. «Since the employment of children accounts for over ten per cent of the workforce in some developing countries, the quantitative effect of child labour can be quite substantial»²². Unfortunately, most LDCs fail to consider the long-term detrimental economic consequences of child labor and its effect on the GDP. Human capital is in fact central to the productivity function in macroeconomics²³. «Although education, training, and experience are less tangible than lathes, bulldozers, and buildings, human capital is like physical capital in many ways. Like physical capital, human capital raises a nation's ability to produce goods and services»²⁴. A lack of education in society indisputably leads to a poorly skilled workforce having reduced productivity,

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20. P. Epifani & G. A. Gancia, «The Skill Bias of World Trade» (March 2002), Institute for International Economic Studies, online : <<http://www.cid.harvard.edu/cidtrade/issues/laborpaper.html>> (date accessed : 20 March 2002) at 2 [hereinafter *Epifani & Gancia*]; T. Harcourt, «What About the Workers? Globalisation and Labour Markets» (2002), Australian Trade Commission, online : <<http://www.cid.harvard.edu/cidtrade/issues/laborpaper.html>> (date accessed : 18 March 2003) at 1.
21. *Epifani & Gancia, ibid.* at 2.
22. *Busse, supra* note 6 at 13 [footnote omitted].
23. Other relevant inputs are the quantity of labor, physical capital, natural resources and technological knowledge. See N. G. Mankiw *et al.*, *Principles of Macroeconomics*, Brief 2nd Canadian ed. (Toronto : Nelson, 2002) at 133-136.
24. *Ibid.* at 134.

and their progeny will likely face similar dire circumstances²⁵.

Furthermore, dependency theory is an analytical framework well used in international relations²⁶. Dependency theorists argue that MDCs developed as a result of inexpensive labor and raw materials from LDCs, and would in fact argue that such exploitation continues on two fronts which are very relevant to our discussion. «The first is within individual businesses, where owners exploit and profit from the labor of their workers. In many respects, this level of analysis is similar and in some cases identical to Marxist interpretations»²⁷. The second is that exploitation occurred and continues between developed and developing States²⁸. This debate is important to keep in mind, as is its counterargument; modernization theory²⁹. Economic studies of whether LDCs are at a comparative disadvantage to MDCs will now be analyzed.

25. Busse, *supra* note 6 at 13.

26. For a discussion of dependency theory, see generally : C. Furtado, *Development and Underdevelopment* (Berkeley : University of California Press, 1964); I. Wallerstein, *The Modern World System : Capitalist Agriculture and the Origins of the European World Economy in the Sixteenth Century* (New York : Academic Press, 1976); A.G. Frank, *Capitalism and Underdevelopment in Latin America* (New York : Monthly Review Press, 1967); L.A. Travis, ed., *Rekindling Development : Multinational Firms and World Debt* (South Bend, IN : University of Notre Dame Press, 1989); C. Colclough & J. Manor, eds., *States or Markets? Neo-Liberalism and the Development Policy Debate* (New York : Oxford University Press, 1991); S. Haggard, *Pathways from the Periphery : The Politics of Growth in the Newly Industrialized Countries* (Ithaca : Cornell University Press, 1990).

27. D.S. Papp, *Contemporary International Relations*, 5th ed. (Boston : Allyn and Bacon, 1997) at 482-83 [hereinafter *Papp*].

28. *Ibid.* at 483.

29. For a discussion of modernization theory, see generally : A.Y. So, *Social Change and Development : Modernization, Dependency and World-System Theories* (Newbury Park, CA : Sage Publications, 1990); J. Langer, *Theories of Development* (New York : Holt, Rinehart and Winston, 1969); M.O. Attir, B. Holzner & Z. Suda, eds, *Modernization Theory, Research, and Realities* (Boulder : Westview, 1981); B.L. Billet, *Modernization Theory and Economic Development : Discontent in the Developing World* (Westport, CO : Praeger, 1993).

B. Economic Studies

Any study of comparative advantage must be taken lightly as there is «... little consistent evidence [and interpretations deriving therefrom] concerning the impact of labor standards and civil liberties on economic performance»³⁰. Economists are split on this issue which results from the use of differing analytical models. Indeed, externalities such as technology and consumer preferences require economic analysis, which is beyond the scope of this paper.

Van Beers conducted a study where the relationship between exports and CLS of 18 OECD States was analyzed³¹. «... [H]e used a combined index of standards that includes employment protection rights, fixed term contracts, working time, minimum wages, and employees' representation rights»³². Van Beers concluded that stricter labor standards equate to decreased exports of capital and labor-intensive goods of skilled labor. It is therefore financially expedient, says Van Beers, for underdeveloped States to not protect labor rights³³.

Mah conducted a study where exports, labor standards and ILO convention ratifications by 45 LDCs were compared and contrasted³⁴. The freedom of association, protection against discrimination in the workplace, right to collective bargaining and abolition of forced labor was included in his list of labor rights. Like Van Beers, Mah concluded that a negative relationship exists between exports and higher labor standards³⁵. The foregoing studies concluded that LDCs have a comparative advantage primarily for unskilled labor-intensive goods³⁶. In corollary, MDCs are comparatively disadvantaged, though other factors tend to balance this out.

30. *Brown #1, supra* note 14 at 28.

31. C. Van Beers, «Labour Standards and Trade Flows of OECD Countries» (1998) 21 : 1 *World Economy* 57.

32. *Busse, supra* note 6 at 9.

33. *Ibid.*; *Brown #1, supra* note 14 at 26.

34. J.S. Mah, «Core Labour Standards and Export Performance in Developing Countries» (1997) 20 : 6 *World Economy* 773; *Brown #1, supra* note 14.

35. *Busse, supra* note 6 at 9; *Brown #1, supra* note 14.

36. *Busse, supra* note 6 at 14.

III. Recent developments

The academic debate of labor rights in an ITL context is not a new phenomenon. «In 1890, for example, the United States banned the entry of foreign goods manufactured by convict labour»³⁷. Similarly, the British government in 1897 banned goods produced from «... any foreign prison, gaol, house of correction or penitentiary»³⁸. These concerns have come to the fore far more recently, specifically during the Uruguay Round of GATT where France and the US initiated discussions on it, to no avail. Similar results arose from the WTO conferences held in Singapore and Seattle in 1996 and 1999 respectively³⁹.

A. Singapore Conference

At the first Ministerial meeting of this conference in December 1996⁴⁰, «... the Clinton Administration claimed that its objective with regard to labor standards was only to signal U.S. workers that competition from low-wage countries would not be intensified due to the denial of basic human rights»⁴¹. It did not officially advocate the use of trade sanctions to punish States failing to comply with CLS, but rather attempted to demonstrate the compatibility of these rights with WTO rules⁴². American objectives were not met.

37. *Ibid.* at 5.

38. S. Charnovitz, «The Influence of International Labour Standards on the World Trading Regime : A Historical Overview» (1987) 126 : 5 Int'l. Labour R. 565 at 569-70; *Ibid.* at 5.

39. *Busse, supra* note 6 at 5.

40. *Levinson, supra* note 12 at 3.

41. D. K. Brown, «International Labor Standards in the World Trade Organization and the International Labor Organization» (December 1999), Tufts University, online : <<http://www.cid.harvard.edu/cidtrade/issues/laborpaper.html>> (date accessed : 18 March 2003) at 3 [hereinafter *Brown #2*].

42. *Ibid.* at 3.

B. Seattle Conference

The «official» American position changed immensely between the Singapore and Seattle conferences. On the one hand, it attempted to establish a relationship between the WTO and ILO. On the other hand and more importantly, the US asserted that it would seek trade sanctions against any State transgressing CLS⁴³. The first was far easier to establish than the latter, which the LDCs rejected.

The Clinton administration pushed its ILRs agenda at the Singapore and Seattle conferences. However, the Bush (II) administration has not continued this foreign policy and America is no longer leading the charge to firmly entrench labor rights in the WTO⁴⁴. Having now assumed this leadership role, the EU proposed the issue at the 2001 Doha conference. LDCs discarded this proposal on the basis «... that rich nations will seek to justify protectionist measures against foreign competition by alleging their rivals abuse [of] workers' rights»⁴⁵.

IV. Protection Mechanism of ILRs

A. Labor Standards in the ILO

Since 1919, the ILO has in principle protected ILRs against a race to the bottom by advocating against corporate competition on the basis of labor⁴⁶. Leary believes the ILO has been far more effective «... in comparison with the work of the UN Human Rights Commission»⁴⁷. Unfortunately, the ILO has insufficient enforcement mechanisms and legitimacy issues to aptly protect ILRs by itself⁴⁸.

43. *Ibid.*

44. *Busse, supra* note 6 at 5.

45. *Ibid.*

46. *Leary, supra* note 13 at 408.

47. *Ibid.*

48. J. Murray, «Corporate Code of Conduct and Labour Standards» in R. Kyloh, ed., *Mastering the Challenge of Globalization* (1998); *Cooney, supra* note 18 at 376.

i. Structural issues

The ILO has a tripartite structure. States, employer and employee representatives are involved in the production of labor right norms⁴⁹. This participatory dimension is different from other NGOs and some authors in fact argue the ILO is at the forefront of demonstrating that international actors other than States are also relevant in International Law. Though this may be true, developing States are pressuring to divide monitoring mechanisms of ILRs between the ILO and WTO, which significantly dilutes the ability of either entity to make any material difference. «Therefore, it is unlikely that the allocation of the labor monitoring task to the ILO...»⁵⁰ has improved overall enforcement of ILRs, or that it can do so in the foreseeable future without substantially revamping its structure.

ii. Steps taken by the ILO to protect ILRs in a nutshell

The ILO protects CLS and SLS in primarily 8 conventions⁵¹. These are controversial, as is the ILO's very *raison d'être*. «Even though there is widespread agreement on the principles of these conventions, only 63 countries have ratified all eight,»⁵² while States not having ratified these conventions pledged their «best effort» to promote ILRs⁵³. We clearly see that SLS are particularly difficult to enforce, as they are not desired by most if not all LDCs⁵⁴. The ILO has nonetheless made invaluable contributions to workers' rights throughout the world since 1919⁵⁵. Something is ultimately better than nothing, but the ILO simply cannot have the effect a substantive WTO agreement with trade sanctions could have, unless its structure is dramatically revamped. This said, the ILO probably has the strongest enforcement mechanisms of all IGOs

49. *Cooney, supra* note 18 at 370.

50. *Brown #2, supra* note 41 at 8.

51. *Busse, supra* note 6 at 7.

52. *Ibid.*

53. World Trade Organization, «Trade and Labour Standards Subject of Intense Debate», online: <http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm> (date accessed : 2 March 2003) [hereinafter *WTO #1*].

54. *Leary, supra* note 13 at 410.

55. *Busse, supra* note 6 at 7-8. See Table 1 for ratification figures.

and cannot be easily discarded⁵⁶.

The ILO has taken two noteworthy steps since the 1996 Singapore conference towards protecting ILRs in ITL. First, it adopted the *Declaration on Fundamental Principles and Rights at Work* and its follow-ups in 1998. «Under this declaration, ILO member governments endorsed some basic principles [also known as CLS] which are included in the core ILO Conventions»⁵⁷. Hepper describes this as the most significant development towards the push to CCCs, which will be examined later⁵⁸. Second, the ILO banned the most severe forms of child labor in 1999, which is defined as «... all forms of slavery, child prostitution and pornography, the use of children to traffic in drugs and work which is likely to harm the health, safety or morals of children»⁵⁹. At the WTO ministerial Conference in 1996, Ministers asserted :

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour 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. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration⁶⁰.

56. *Leary, supra* note 13 at 412.

57. *WTO#1, supra* note 53. «These conventions are the fundamental workplace rights including : freedom of association and recognition of the right to collective bargaining; elimination of all forms of forced labour; the effective abolition of child labour and the elimination of discrimination in hiring and employment practices.»

58. *Hepper #1, supra* note 5 at 355.

59. *WTO#1, supra* note 53.

60. *Ibid.*

iii. Criticism

Cooney argues that the ILO is a tired organization lacking legitimacy⁶¹. He believes it archaic because the nature of the global economy has changed; yet its model of regulation founded on industrial capitalism has not⁶². He argues that it is well adapted to address the production of goods in assembly lines where competing interests are clearly identifiable, but is unfit to address the flexible and transnational nature of today's economy and its largest actor, the MNC. Massive increases in women in the workforce, part-time informal work and transnational corporations abandoning traditional assembly line production challenge the ILO's very existence⁶³.

Cooney contends that the ILO is poorly structured and is replete with representational deficits. The organization is tilted in favor of the north and has real trouble in giving representational space to the LDCs. Moreover, it has a plethora of compliance concerns⁶⁴, but to be fair to the ILO, these concerns apply to every IHRs body. «Neither the ILO nor any other international body, with the exception of the UN Security Council, has enforcement powers in the sense that one may speak of enforcement in a national legal system»⁶⁵.

The US has never seen the ILO as an entity in which it can pursue its objectives. «Indeed, the United States withdrew from the ILO on three separate occasions : 1919-34, 1938-44 and 1977- 80»⁶⁶. Certain authors argue that the US' threat to withdraw from the ILO and to shift labor standards to the WTO forces the organization to adopt labor policies in its favor⁶⁷. These pressure tactics have translated to some success, such as the *Declaration on Fundamental Principles and Rights at Work*⁶⁸ which goes so far as to obligate «... members who have

61. Cooney, *supra* note 18 at 367.

62. *Ibid.*

63. *Ibid.* at 369.

64. Brown #2, *supra* note 41 at 7.

65. Leary, *supra* note 13 at 415.

66. Brown #2, *supra* note 41 at 22.

67. *Ibid.*

68. *Ibid.* at 22; R. Senser, «Workers of the World, Globalize» (1999), Human Rights for Workers, online : <<http://www.cid.harvard.edu/cidtrade/issues/laborpaper.html>> (date accessed : 20 March 2003).

not ratified the relevant conventions»⁶⁹ to respect CLS. Again, these developments must be distinguished from a positive and normative approach as few effective enforcement mechanisms exist.

The US has extensive influence in both the ILO and WTO, despite that this has translated to the better «theoretical» protection of ILRs. LDCs often question the ILO's political legitimacy because it is seen as the US' *alter ego*. This is particularly thorny because «[m]eaningful labor standards ... must be flexible and responsive to individual country conditions»⁷⁰. Bhagwati argues that the American position on ILRs is unsustainable. First, the US' record is not scot-free. «Bhagwati cites the brutal treatment of migrant labor, inadequate and corrupt enforcement of U.S. labor law, wearing apparel sweatshops that employ female immigrant labor for low wages and long hours and the air traffic controller *union-busting* by the Reagan Administration»⁷¹. Second, the protection of labor rights should not be achieved via threats and coercion⁷².

Despite the foregoing failures and criticisms, the international community has for the most part agreed that ILRs are within the ILO's expertise which is founded on «... the social dimension of globalisation»⁷³. Given this reality, CLS and SLS will likely continue to be on the agenda of certain MDCs for some time. The ILO has advanced ILRs significantly and must continue its work with assistance from the WTO and CCCs. In fact, «developing countries who ratify ILO conventions with regard to worker rights are more similar to their trade partners in terms of the characteristics that determine trade than are developing countries that do not ratify ILO conventions»⁷⁴.

69. *Brown #2, ibid.*

70. *Ibid.* at 11.

71. *Brown #1, supra* note 14 at 41.

72. *Ibid.*

73. World Trade Organization, «WTO Ministerial Declaration, Doha, Qatar»(14 November, 2001), online : <<http://www-svca.wto-ministerial.org>> (date accessed : 22 March 2003) [hereinafter *WTO #2*]; *Busse, supra* note 6 at 5.

74. *Brown #1, supra* note 14 at 27.

B. International Economic Law

The WTO enables the study of the intersection between ILRs and IEL. Until now, the WTO has not protected ILRs, as was previously discussed in the brief historical overview. The issue is whether IEL can adequately protect ILRs in its formulation of trade liberalization initiatives? Some authors believe that «... a realization increasingly shared throughout the world that the world economy, and world institutions, can be a better guarantee of rights and of prosperity than some governments»⁷⁵.

The IMF's position is its power to evaluate a State's protection of ILRs when formulating monetary policies and loans to countries⁷⁶. Labor rights proponents argue that the WTO should have agreed in Seattle to amend its rules requiring States to respect CLS, or face trade sanctions. Substantial debate exists whether trade sanctions would better protect labor rights, as many States indeed have enacted legislation in this regard. Effective implementation is rather the issue requiring redress. In most countries, «there are also laws against child labor but their enforcement remains beyond the means and ability of the government. It is unlikely that trade sanctions can significantly change this reality»⁷⁷. The idea of trade sanctions suffered significant setback in Seattle, yet other possibilities exist. WTO rules do not require modification *per se*, but GATT 1994⁷⁸ and other ITL agreements can be read and constructed in light of CLS. This must not however be viewed as a disguised form of protectionism, which would render any such agreement *ab initio* nugatory. The current WTO framework will now be discussed.

75. H. James, «From Grandmotherliness to Governance : The Evolution of IMF Conditionality» (Finance and Development : 1998) in P. Macklem, *Class materials of International Human Rights Law*, v. 2. (Toronto, Fall 2002) at 479.

76. *Ibid.*

77. *Panagariya*, *supra* note 19 at 8.

78. *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 U.N.T.S. 3 (entered into force 1 January 1995) [hereinafter *GATT 1994*].

C. Why the current WTO framework fails to protect CLS

GATT 1994 must be modified to entrench market barriers restricting access to States failing to comply with CLS. There are no such prospects in the short-term, and unfortunately in the longer term as well. We will now discuss certain GATT 1994 provisions from a positive and normative perspective.

i. Anti-dumping

Article VI of GATT 1994 states that exports are subject to anti-dumping duties where goods are exported at sub-regular prices and the domestic consumers of an importing State suffer material injury. «It has been argued that selling products produced under sub-par working conditions constitutes *social dumping*»⁷⁹. Anti-dumping measures can only be applied in two situations, which are currently deemed unrelated to CLS. First, where there is price discrimination and the retail price of goods are higher in one State than in another. Second, where goods are sold below their production costs⁸⁰. Labor rights and anti-dumping duties can co-exist, but not as a matter of cause and effect but rather as the former being an indirect consequence of the latter⁸¹.

ii. Countervailing duties

Certain experts argue that CLS violations amounting to export subsidies should be subject to countervailing duties when an importing State suffers material injury. Article XVI of GATT 1994 would however require amendment were this contention accepted, as breaching CLS is currently not tantamount to such subsidizing⁸². Countervailing duties can only be applied where governments or public entities provide subsidies in «the form of ... financial

79. *Brown #2, supra* note 41 at 4. Social dumping «... refers to costs that are for their part depressed below a “natural” level by means of “social oppression” facilitating unfair pricing strategies against foreign competitors.» Quoted in : *Hepple, supra* note 5 at 347.

80. *Brown #2, ibid.* at 4.

81. *Ibid.* For a similar position, see T.N. Srinivasan, «International Trade and Labor Standards from an Economic Perspective» in P. van Dijck and G. Faber, eds., *Challenges in the New World Trade Organization* (Amsterdam : Kluwer Law International, 1996) 219.

82. *Brown #2, supra* note 41 at 5.

contribution[s]... [amounting to] an income support or a price support»⁸³ made to specific corporations and not to a country in general. «Therefore, poor labor standards that exist country-wide could not be considered specific to a subset of firms»⁸⁴.

iii. General Exception Provisions

GATT Article XX lists certain free trade exemptions, of which CLS are excluded. Their inclusion was in fact rejected during the Havana Charter's negotiations⁸⁵. Brown and Maskus argue that «... trade barriers are almost never the optimal intervention where labor standards are concerned and frequently have adverse consequences»⁸⁶. Article XX could arguably be amended to include minimal labor standards as a free trade exemption.

iv. Nullification and Impairment Provisions

Article XXIII of GATT affirms that member-States can apply for dispute resolution when other members engage in activities nullifying GATT obligations or materially impairing them⁸⁷. CLS are not within the ambit of this provision however, though they should be. An American attempt to do so was in fact specifically rejected in 1953⁸⁸.

v. Opt-out Provisions

GATT provides for opt-out provisions at Article XXXV, where WTO members can refuse to extend certain privileges to incoming members for whatever reason, including the failure to respect CLS, or even SLS⁸⁹. As of

83. *Ibid.*

84. *Ibid.*

85. *Ibid.*

86. *Brown #1, supra* note 14 at 40; See K. Maskus, «Should Core Labor Standards be Imposed Through International Trade Policy?» (1997) World Bank Policy Research Working Paper No. 1817.

87. *Brown #2, supra* note 41 at 5-6. Despite the foregoing, member-States are encouraged to reach a mutually acceptable solution.

88. *Ibid.* at 6.

89. *Ibid.*

February 5, 2003, the WTO had 145 members and the number of States that will eventually join is quite limited for opt-out provisions to have any significant effect in the large scheme of things⁹⁰. China's accession to WTO membership would have been an opportune moment to use this clause, given its history of rampant CLS violations⁹¹. A substantive WTO agreement must exceptionally make opt-out provisions retroactive with regard to CLS uniquely. Article XXXV could not receive general retroactive application because of the obvious chaos and disagreement ensuing therefrom.

vi. Trade Policy Review Mechanism

Labor rights can in principle be discussed during «... deliberations on export zones in the framework of the ...»⁹² TPRM. Similarly to opt-out provisions, TPRMs cannot receive retroactive application that effectively preclude the protection of ILRs. Moreover, LDCs are against discussing labor rights in this context⁹³. They rather argue that better labor standards arise from economic prosperity. «They say that if the issue of» CLS «became enforceable under WTO rules, any sanctions imposed against countries with lower labour standards would merely perpetuate poverty and delay improvements in workplace standards»⁹⁴. LDCs may very well have a point on this, as anything imposed from the top-down is difficult to maintain, as opposed to grassroots developments being generally more stable. CLS discussions could of course take part in TPRMs if LDCs so agreed.

90. World Trade Organization, «The Organization Members and Observers», online : <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (date accessed : 30 March 2003).

91. R.E. Scott, «China Can Wait : WTO Accession Must Include Enforceable Labor Rights» (May 1999), Economic Policy Institute, online : <<http://www.cid.harvard.edu/cidtrade/issues/laborpaper.html>> (date accessed : 20 March 2003).

92. *Brown #2*, *supra* note 41 at 6.

93. *Ibid.*

94. *WTO#1*, *supra* note 53.

vii. WTO Structure

«... [T]he WTO is ... a multi-task agency controlled by multiple principals»⁹⁵. Its primary role is to monitor the compliance of members with ITL. It is not particularly keen to address contentious issues the likes of ILRs because of imminent conflict between member-States which ultimately damages its all-important legitimacy. «The agency may have reservations concerning the enforcement of labor standards because they are not obviously related to the original mission of fostering free international trade»⁹⁶. Nonetheless, they are tangentially related and require address. Unlike NAFTA⁹⁷, GATT 1994 currently has no mechanism for handling investor complaints, as only States can institute legal action. Similarly, the WTO can only authorize the imposition of trade sanctions on States. It is currently antithetical to ITL for corporations themselves to face trade sanctions. Imposing trade sanctions on States who then sanction corporations is an extremely complicated endeavor, given that MNCs have global operations⁹⁸. Apportioning State liability would be ridiculous because of the intrinsic complexity of this process.

From the foregoing, we see that current GATT rules do not allow for the substantive protection of ILRs. Nonetheless, a WTO agreement would comprise the following general guidelines (other than those already mentioned) in the improbable eventuality that current circumstances fundamentally changed and an agreement was concluded.

D. General Guidelines for a potential WTO agreement

Like all ITL agreements, it would be a highly complex process for the WTO to substantively protect labor rights. Nonetheless, Brown argues that :

There is no reason in principle why the culture of the WTO could not set

95. *Brown #2, supra* note 41 at 14.

96. *Ibid.*

97. *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994, No. 2, 32 I.L.M. 289 (entered into force 1 January 1994).

98. See Figure 4.1 demonstrating the complexity of corporate organizational structures.

different standards and enforcement mechanisms for trade and labor standards. The problem, however, is that the United States, in particular, cannot credibly pre-commit not to try to interpret poor labor practices in terms of the trade discipline equivalent. If the United States were to succeed, the harsh and rigid rules governing international trade would be applied inappropriately to labor standards⁹⁹.

It is imperative for any agreement to not be viewed as a market barrier tantamount to protectionism and in breach of ITL. Any measure protecting CLS must therefore use the least restrictive means, which revolves around proportionality. Similarly, the enacting State must treat those adversely affected by its measures equally, all the while considering real differences and modifying its trade policy accordingly. Differences would be adjudicated in a process founded on procedural fairness and natural justice.

A link can be made between the WTO and CCCs. A procedure could exist whereby States are deemed innocent until corporations are proven in violation of their CCCs. This ensures uniformity, all the while having some form of targeted soft-regulation. Presumably, a semi-public procedure enabling NGOs and investors to make allegations would exist, leading to a hearing and decision upon demonstration of probable cause. Before a decision is rendered, an opportunity for a corporation to negotiate an effective remedy is necessary. Moreover, a State could not unilaterally impose a market barrier. It would rather have the duty to negotiate with States detrimentally affected by its measures. A transition period would be necessary such that those affected have sufficient time to adjust their labor infringing trade practices. Similarly, a State imposing CLS for the production of certain goods must offer technical assistance to facilitate compliance.

Under current WTO rules, intrinsically alike products fabricated differently cannot receive dissimilar treatment. To do otherwise, so the rules hold, constitutes protectionism. An argument can be made where no deviation from CLS is tolerated, as these constitute baseline production costs that cannot be streamlined. More importantly, this distinction would not be subject to anti-

99. *Brown #1, supra* note 14 at 39.

dumping duties. This was the issue in the *Tuna* case¹⁰⁰, where a distinction was drawn between the product itself and its production process. Unfortunately, the WTO appellate body rejected this argument and makes no distinction between products fabricated by free and slave labor, which is inherently disturbing from a normative perspective. Had this argument been accepted, CLS protection *would have* been significantly transformed. The WTO appellate body makes a fragile distinction in several ways and scholarship is questioning it. «Would have» is clearly the key term in *Tuna*. A potential WTO agreement should adopt the position rejected by the WTO appellate body.

The WTO appellate body rejected another interesting argument in the *Shrimp Turtles* case¹⁰¹; it was argued that a member-State could discriminate against another State's products based on its regulatory framework. US law conditioned market access for shrimp from certain jurisdictions, where shrimp fishermen could sue corporations producing technology trapping sea turtles in nets. Such regulation was held inconsistent with GATT obligations. The decision spells out circumstances where a State could make such regulatory distinctions, which represents the politicization of labor rights and trade agreements. From a legal perspective, these issues are quite open and are not as closed as the debate in Seattle depicted. This is particularly so because *stare decisis* does not apply in ITL. The WTO dispute settlement body could easily adjudicate the same issues raised by *Tuna* and *Shrimp Turtles* differently, in support of CLS. In fact, «... WTO law continues the evolution toward a process governed by rules driven by real treaty obligations»¹⁰².

These general guidelines require member-States to enact domestic legislation that conditions market access on the respect of CLS. Within this same

100. *United States of America—Restrictions on Imports of Tuna (Complaint by Mexico)*, GATT DS21/R, Report of the Panel, 3 September 1991; *United States of America—Restrictions on Imports of Tuna (Complaint by European Community)*, GATT DS29/R, Report of the Panel, June 1994.

101. *United States of America—Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India, Pakistan, Thailand)*, Report of the Panel, WT/DS58/R, 15 May 1998; *United States of America—Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India, Pakistan, Thailand)*, Appellate Body Report WT/DS58/AB/R, adopted 6 November 1998 [hereinafter *Shrimp Turtles*].

102. *Brown #2*, *supra* note 41 at 12.

conception, we can also imagine a framework where domestic law obliges MNCs producing or selling goods respectively within or from a particular State to meet WTO standards. This is quite relevant in the context of CCCs. This proposal, which is quite similar to *Shrimp Turtles*, is where the future of the trade labor debate is going. The CCC will now be analyzed.

E. The Corporate Code of Conduct

Presently, we are at the genesis of an era where MNCs are beginning to possess obligations at International Law. They comprise some of the world's largest economies and in corollary, have the proportionate influence accompanying this¹⁰³. The regulation of MNCs therefore has potential to ameliorate CLS. CCCs are forms of private regulation adhered to by corporations throughout their worldwide operations. Their emergence is due to several reasons¹⁰⁴. First, they «... are a response to public pressure from consumers, investors, trade unions, and NGOs»¹⁰⁵. Being intrinsically transnational in nature, CCCs flexibly follow and regulate corporations wherever they produce goods. Their emergence demonstrates the privatization of regulation, where there is a «... retreat from public international labor law, embodied above all in the Convention and Recommendations of the ILO ...»¹⁰⁶

Second, many managers believe better labor standards are actually profitable, despite that they seem *prima facie* more expensive. Benefits include increased employee morale, fewer accidents and sick leave, lower employee turnovers and better product quality¹⁰⁷. It is well known in organizational behavior that happy workers are more efficient workers. Examples such as the Hawthorne Studies indicate improved employee performance with increased management presence and support¹⁰⁸. Increased employee productivity can

103. See Table 4.1.

104. *Heppe #1*, *supra* note 5 at 355.

105. *Ibid.*

106. *Ibid.* at 353.

107. *Ibid.* at 355.

108. S.L. McShane, *Canadian Organizational Behaviour*, 5th ed. (Toronto : McGraw Hill-Ryerson, 2004) at 4; F.J. Roethlisberger & W.J. Dickson, *Management and the Worker : An Account of a Research Program Conducted by the Western Electric Company*, (Chicago : Hawthorne Works, 1939); K.E. Klare, «The Labor-Management Cooperation Debate : A

augment consumer confidence in a company and its products, which consequently increases sales¹⁰⁹. Of course, everything is a question of degree. At some point, better working conditions become unprofitable.

Third, CCCs «... can be used to strengthen the power of central management»¹¹⁰. This enables corporate headquarters to dictate to subcontractors which labor standards must be peremptorily respected and is part of the «... monitoring process which leads to better product quality»¹¹¹. Such increased power benefits contractors by standardizing practices, as it protects against a race to the bottom that creates unfair competition and violates CLS¹¹².

Fourth, the *Declaration on Fundamental Principles and Rights at Work* is a voluntary document having follow-up procedures, but without sanctions¹¹³. Signatory States recognize the implementation difficulties and recognize at paragraph five that : «[L]abour standards should not be used for protectionist purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition the comparative advantage of any country should in no way be called into question by the Declaration and its follow-up.»

Fifth, the emergence of CCCs demonstrates the failure of the public realm. They surfaced as a result of a historical process of privatization that arose from the success of capitalism. The traditional domestic rationale was the distrust States had of self-regulating corporations, which eventually led to State responses. The question is whether privatizing regulation will bring us back to where we started, which is akin to the «fox in the henhouse» analogy. This issue can however be addressed when CCCs, domestic legislation, international standards, ILO conventions and hopefully eventual WTO labor standards complement one another. This paper does not argue that CCCs should or can

Workplace Democracy Perspective» (1988) 23 Harv. C.R.-C.L. L. Rev. 39 at 63.

109. *Hepple #1, supra note 5* at 355.

110. *Ibid.*

111. *Ibid.*

112. *Ibid.*; G. Van Lient, «Codes of Conduct and International Sub-Contracting : A Private Road Towards Ensuring Minimum Labour Standards in Export Industries» (1999) (unpublished paper, Conference on Multinational Enterprises and Social Challenges in the 21st century).

113. *Hepple #1, supra note 5* at 356.

exist unaccompanied. Conventions and domestic legislation are clearly useful from a normative and hopefully positive approach¹¹⁴. «In some cases employers actually prefer to have standards imposed because they constrain the behavior of some of their less scrupulous competitors. In other cases, firms use domestic standards in their foreign operations to avoid the critique that they are shopping for low standard locations ...»¹¹⁵ There have been several failed attempts to create effective regimes that protect ILRs under traditional mechanisms. The MAI, for example, has proved futile¹¹⁶. CCs are fairly recent phenomena and «[r]esearch into the rapidly proliferating number of private corporate codes is [currently] in its infancy»¹¹⁷. The ILO has determined the existence of 12 social labeling programs and 215 CCCs¹¹⁸, the U.K. Department For International Development found 18 U.K. CCCs¹¹⁹, and the OECD ascertained the existence of 182 codes¹²⁰.

i. Transnational flexibility

It is trite law that States can uniquely regulate corporate activities within the confines of their borders. The fact nonetheless remains that domestic

114. *Papp, supra* note 27 at 103.

115. *Brown #1, supra* note 14 at 35. See for further discussion : J. Bhatwari, «Trade Liberalisation and “Fair Trade” Demands : Addressing the Environmental and Labour Standards Issues» (1995) 18 : 6 *World Economy* 745; S. Charnowitz, «Promoting Higher Labor Standards» in B. Roberts, ed., *New Forces in the World Economy*, Washington Quarterly Reader Series (Cambridge and London : MIT Press, 1996) 403.

116. *Hepple #1, supra* note 5 at 356-57; S. Picciotto, «A Critical Assessment of the MAI» in P. Picciotto & R. Mayne, eds., *Regulating International Business : Beyond Liberalization* (New York : St-Martin’s Press, 1999) 82. See generally L. Compa, «The Multilateral Agreement on Investment and International Labor Rights : A Failed Connection» (1998) 31 *Cornell Int’l. L.J.* 683.

117. *Hepple #1, ibid.* at 357.

118. International Labour Organization, Governing Body 273rd Session, *Overview of Global Developments and Office Activities Concerning Corporate Codes of Conduct, Social Labelling and Other Private Sector Initiatives Addressing Labour Issues* (ILO, GB.23/WP/SDL/1, 1998); *Hepple, supra* note 5 at 357.

119. C. Ferguson, *U.K. Department for International Development, Social Development Division, A Review of U.K. Company Codes of Conduct* (1998); *Hepple, supra* note 5 at 357.

120. Organization for Economic Cooperation and Development, Working Party of the Committee, *Codes of Corporate Conduct : An Inventory* (OECD TD/TC/WP (98) 74, 1999); *Hepple, supra* note 5 at 357.

legislation generally lacks the extra-territorial reach which explains its ineffectiveness in a global economy¹²¹. Contrarily, CCCs do not «stop at the border,» so to speak. Robert Bork once observed that certain corporations are so powerful that they «... could ignore American laws, sometimes with impunity»¹²². Corporate practices are extremely complex nowadays, and regulation must adapt to this reality¹²³. Generally speaking, «[l]abor practices in foreign plants are broadly similar to their domestic labor standards»¹²⁴. This partly explains why a well-drafted CCC, supplemented by other regulatory instruments, is useful.

ii. The Ideology of Corporatism

Corporatism as an ideology cannot be ignored. First, numerous States have lax labor standards to lure foreign investment. Second, certain States have *prima facie* stringent and effective rules, which are ignored to promote the investment of MNCs¹²⁵. «Because of their size, MNCs wield impressive economic, political, and social power. It does not matter whether that power is sought or unsought ... it exists ... In an economic sense, multinational corporations can make or break a local economy, and in the cases of smaller States, even a national economy»¹²⁶. One initiative that has attempted to counteract these realities is the NAALC. This has been more of a political tool than a looming sanction and has had modest results. It has raised «... public awareness and political cooperation, strengthening cooperation between labor rights advocates»¹²⁷.

Corporatism is replete with repercussions for ILRs. It is premised on David Ricardo's law of comparative advantage. In its simplest form, the law asserts that it is advisable for States to specialize in the production of goods where they are most competitive. States thereafter trade for goods where they

121. There are certain exceptions, notably in criminal law.

122. *Papp, supra* note 27 at 103.

123. See Figure 4.1.

124. *Brown #1, supra* note 14 at 34-35.

125. *Heppe #1, supra* note 5 at 362.

126. *Papp, supra* note 27 at 98.

127. *Heppe #1, supra* note 5 at 362; L. Compa, «NAFTA's Labour Side Agreement Five Years On : Progress and Prospects for the NAALC» (1999) 7 Cdn. Lab. & Employment L.J. 1.

are uncompetitive¹²⁸. This optimizes overall production and market efficiency by preserving valuable resources. Minimizing costs, which maximizes profitability is obviously integral to the financial objectives of MNCs. They have the ability of massive inter-jurisdictional movement and have become especially successful by moving to low-labor-cost areas¹²⁹. Many States, such as Singapore and Taiwan have had immense economic growth because MNCs have taken advantage of their low labor-costs¹³⁰.

iii. Regulatory precision

CCCs can potentially identify with surgical precision what institutions the likes of the ILO cannot. The CCC is a hyper-delineated regulatory instrument specific to a particular corporation.¹³¹ General regulation meant to encompass all MNCs is less effective because it fails to regulate the specificities of particular industries, number of employees, infrastructures, business organizations, corporate culture, and so forth. The ILO, for example, creates rules to encompass CLS and SLS at a very abstract level throughout the world, which is why it can never, in principle, rival a well-drafted CCC.

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128. A. Blackett, «Mapping the Equilibrium Line : Fundamental Principles and Rights at Work and the Interpretive Universe of the World Trade Organization» (2002) 65 Sask. L. Rev. 369, online : QL (GDB) at para. 8; D.M. McRae, «The Contribution of International Trade Law to the Development of International Law» in *Recueil des Cours : Collected Courses of the Hague Academy of International Law* 1996, vol. 260 (Boston : Martinus Nijhoff, 1997) at 111.
129. *Papp, supra* note 27 at 98.
130. *Ibid.*
131. *Hepple #1, supra* note 5 at 359.

iv. Consumer attention

CCCs provide incentives for corporations to compete for consumer attention, which is certainly one of its most noteworthy advantages. They involve an element of marketing and branding, such that corporations compete for the better code to receive consumer allegiance¹³². This competition is not necessarily applicable in all cases, though its theoretical rationale is significant. «A race to the top» can occur as consumers are more attuned to the type of code being used, in addition to the type of values it enforces¹³³. Corporations seek to create the most visibility for their CCCs and practices ensuing therefrom. Business practices will never be as important as products themselves, but may nevertheless be representative in the long-term of what a corporation stands for, and even more important, what it should stand for. For example, environmentally conscious investors having the choice are more likely to invest in environmentally friendly products than not. Corporations are obviously open to move in new directions to satisfy their consumer bases, which, to expound the obvious, constitutes their market power. CCCs may very well be determinative for certain consumers, resulting in significant sales in their aggregate sum. They are also vital in light of increasingly homogenized consumer tastes because many goods have similar production mechanisms¹³⁴. Better practices in one area can therefore improve an entire industry's production methods, thus leading to cost savings through increased economies of scale.

It is well known in business that an asymmetry of information exists in the market¹³⁵. Corporations accordingly seek to differentiate themselves from competitors by sending signals to consumers¹³⁶. These cost millions and are economically sound decisions. Advertising, celebrity product support,

132. H. Arthurs, «Labour Law Without the State» (1996) 46 U. Toronto L.J. 1 at 45.

133. *Hepple #1*, *supra* note 5 at 350. See M. Barenberg, *Globalization and Labor Law : Legal and Extra-legal Norms Across Multiple Regimes* (Japan/US/EU Joint Research in Labor law : Response to New Challenges in the 21st century, 1998).

134. *Papp*, *supra* note 27 at 100.

135. R.S. Pindyck & D.L. Rubinfeld, *Microeconomics*, 4th ed. (Upper Saddle River, NJ : Prentice Hall, 1998) at 617 [hereinafter *Pindyck & Rubinfeld*].

136. *Ibid.* at 624. Michael Spence first developed this theory : M. Spence, *Market Signaling* (Cambridge, MA : Harvard University Press, 1974).

guarantees, warranties¹³⁷, certifications¹³⁸ and CCCs are examples of such signals. CCCs provide consumers with much needed information and enable them to differentiate lower-level products from higher-level products¹³⁹. A *fortiori*, consumers faced with two products of equal quality will purchase the one whose manufacturer follows a better CCC in light of labor standards, *inter alia*. Of course, the foregoing is contingent on consumers actually knowing which company manufactures a particular product and knowing its labor policy. This is generally not problematic as companies can brand and advertise their products as «child or forced labor free» or «generous wages paid to laborers.» In fact, Freeman provides evidence in his study, where «... product labeling as a strategy to improve working conditions for foreign workers»¹⁴⁰ has worked quite well.

v. Increased responsiveness

A company's power is predicated on consumer support. The ability to earn revenues is materially reduced if it loses this by way of a long-term boycott or reduction in sales¹⁴¹. CCCs have the potential of initiating social change to a certain degree and under specific conditions, as they enhance responsiveness to consumer wishes and consequently have the potential for profit maximization. Corporate behavior can be altered far more quickly through CCCs than traditional forms of regulation. The effectiveness of these codes is dependent on how they procure the attentiveness of corporate actors, whether it is for fear or in response to public pressure. CCCs are most effective when corporations dedicate extensive time to such exogenous considerations.

137. *Ibid.* at 628.

138. D.K. Brown, «Can Consumer Products Labels Deter Foreign Child Exploitation?» (July 1999), Tufts University, online : <<http://www.cid.harvard.edu/cidtrade/issues/laborpaper.html>> (date accessed : 31 March 2003) at 25 [hereinafter *Brown #3*].

139. *Pindyck & Rubinfeld, supra* note 135 at 622.

140. R. Freeman, «A hard-headed look at labor standards, in : International labor standards and global economic integration : Proceedings of a symposium» (U.S. Department of Labor, Bureau of International Labor Affairs : Washington, D.C., 1994) at 2 [hereinafter *Freeman*].

141. *Hepple #1, supra* note 5 at 355.

vi. Potential State assistance?

ILRs would be promoted if States provided financial incentives for MNCs to draft and duly enforce CCCs, which would push corporations to adopt these. Obviously, this issue represents the same dichotomy between MDCs and LDCs as we saw in the aforementioned ILO and WTO contexts. The former States will be more open to do so than the latter because of their respective economic positions. State assistance therefore seems unlikely from LDCs.

The credibility of a CCC depends on two things. On the one hand, how the code is drafted and interpreted and on the other hand, its monitoring and enforcement mechanisms¹⁴².

vii. Drafting and Interpretation

As has already been mentioned, there is no standard-form CCC since it must address a corporation's specificities. One question worth asking is whether «... the code [is] a genuine attempt to change corporate behavior or is it simply a public relations exercise»¹⁴³. It is helpful to look at whether the company unilaterally adopted the CCC, or whether it was negotiated with NGOs or unions in a bargaining process of *quid pro quo*¹⁴⁴.

142. *Ibid.* at 358.

143. *Ibid.*

144. *Ibid.*

viii. Monitoring and Enforcement

This is the main criticism of CCCs, and International Law as a whole. Corporations may have drafted a superb code that is on the vanguard of labor right protection in a specific industry, but really means nothing at all because it is not duly enforced or monitored¹⁴⁵. Workers must have reporting mechanisms readily available against the corporation, presumably through some kind of independent monitor. This person must not be a government official, for fear of collusion between State governments and corporations. Even if an independent monitor is named, the question arises who will monitor the monitors? This thorny issue directly relates to the dichotomy between norm setting and enforcement. For any effective regime, procedural assurances are required and critics argue that these are ultimately ineffective for CCCs. This kind of monitoring will only be effective if the monitor is independent both from the corporation and those who adjudicate the code.

Monitoring mechanisms must include : «... training and incentives encouraging managers to comply (e.g. performance bonuses); ... sanctions on those who do not comply»¹⁴⁶; some form of objective auditable standards with very precise and circumscribed objectives; verifications that an adequate monitoring system exists¹⁴⁷. An OECD study concluded that corporations seldom deal with enforcement issues, «... and of those that did so, almost all stated that in house staff would monitor compliance»¹⁴⁸. Moreover, CCCs rarely have material sanctions. The study concluded that the few CCCs that did mention sanctions referred to «... working with suppliers or business partners to make improvements»¹⁴⁹. CCCs as they stand today are therefore substantively toothless due to lax monitoring and enforcement mechanisms. This has striking semblance to the ILO's criticisms, particularly because CCCs are often well

145. G. Van Lient, «Codes of Conduct and International Sub-Contracting : A Private Road Towards Ensuring Minimum Labour Standards in Export Industries» (1999) (unpublished paper, Conference on Multinational Enterprises and Social Challenges in the 21st century); *Hepple #1, supra note 5* at 359.

146. *Hepple #1, supra note 5*.

147. *Ibid.* at 359-60.

148. *Ibid.* at 359.

149. *Ibid.* at 360.

drafted.

ix. Miscellaneous criticisms

Certain critics argue that CCCs are transitory commitments addressing the flavor of the month, so to speak. Moreover, democratic concerns arise where corporations are consumer regulated as opposed to regulation founded on *demos* and *kratos*. But as was previously mentioned, CCCs render jurisdictional distinctions trite and domestic legislation has until now had minimal success to regulate corporate activity. Furthermore, certain corporations within a specific jurisdiction may be regulated by CCCs where as others will not. This checkerboard regulatory framework may in principle lead to a race to the bottom. Legislation, conventions and public pressure fortunately protect against this. It cannot be emphasized enough that CCCs cannot exist by themselves. The transnational character of CCCs may at times constitute liabilities because they are produced in a certain State and applied throughout the world. It is often argued that CCCs «... tend to export the American conceptions of corporate social responsibility»¹⁵⁰. This further adds to a checkerboard regulatory framework where uniquely Western values are perpetuated, thus further exacerbating north-south and east-west conflicts. However, certain values, including CLS, are deemed universal and must be respected, independent of such distinctions.

x. Viability of Solution

As we saw, CCCs lack enforcement mechanisms like most aspects of International Law. It was nonetheless demonstrated that they have numerous advantages that simply cannot be neglected. The ILO similarly has no coercive component in the strict sense, yet most experts agree that it has nonetheless substantially bettered the status of ILRs over its 95 year existence, without applying over-exacting standards. This paper argues that CCCs must be viewed in the same manner. It is true that the CCC is a form of soft-regulation, but its international effects are manifest. Accordingly, International Law is the forum

150. *Ibid.*; C. McRudden, «Human Rights Codes for Transnational Corporations : What Can the Sullivan and MacBride Principles Tell Us?» (1999) 19 Oxford L. Legal Studies 167 at 175.

in which a solution must be devised and legitimacy and enforcement difficulties are at the core of this debate. To say that CCCs are intrinsically illegitimate is to place the entire state of International Law, with all its achievement, into disrepute. They present a feasible interim solution because they are well adapted to contemporary economic conditions. Clearly some MNCs will follow them and others will not. Although exploitive corporate practices are frustrating, the aim of CCCs as a regulatory instrument must be to better the status of ILRs in general, despite non-compliance setbacks from many MNCs. Again, the ILO functions on this premise and has achieved many accolades.

Ultimately, consumers control MNCs and must be made aware of their practices. NGOs are extremely important in this regard. They generate information that enters the «marketplace of ideas»¹⁵¹ which creates public awareness and enables consumers to take enlightened decisions. A company is only as strong as its consumer base and CCCs present looming threats over MNCs. Freeman «... argues that a market failure exists if western consumers have a private disutility for consuming goods produced under poor or dangerous working conditions. Such a market failure can be remedied if consumers are offered the opportunity to pay a premium for goods produced in a safer and more tolerable work environment»¹⁵². Prevention is fundamental, as opposed to addressing ex post unsalvageable business cataclysms. NGOs must press MNCs for «[c]onsumer product labels [which] provide an appealing method to allow consumers to express their preference for and to pay for tolerable working conditions»¹⁵³.

CONCLUSION

Labor standards are not yet within the purview of the WTO, and will likely not be except perhaps in the very long-term. Simply put, trade sanctions for CLS violations equate to protectionism and the bifurcation between MDCs and LDCs will grow, with nothing to close this rift. States adopt their economic policies because their particular positions so dictate and would diametrically

151. To use Holmes J.'s expression in *Abrams v. United States*, 250 U.S. 616 (1919).

152. *Brown #3*, *supra* note 138 at 2; *Freeman*, *supra* note 140.

153. *Brown #3*, *ibid.* at 2.

alter them in the eventuality that their economic positions changed significantly. This is unadulterated pragmatism, which really reflects the complexity of ITL; States often say not what they mean. MDCs and LDCs wish to do their best with the cards they are dealt, so to speak, and respectively being proponents and opponents of CLS achieves these ends.

Despite the fact that WTO rules do not currently regulate CLS, «... some WTO member governments in Europe and North America believe that the issue must be taken up by the WTO in some form if public confidence in the WTO and the global trading system is to be strengthened»¹⁵⁴. Presumably, having rights within the WTO's ambit would ameliorate CLS and varied SLS worldwide. Certain WTO member-States have suggested and continue to suggest that a task force study the relationship between CLS and trade. This proposal is contentious and has been rejected several times¹⁵⁵. The WTO is not intrinsically well positioned to enforce CLS. «[T]he denial of market access on the basis of allegations of social dumping would be extremely difficult to apply because the GATT requires that any restriction be applied in a manner that would not constitute arbitrary or unjustified discrimination»¹⁵⁶. There must similarly be proportionality between measures used to restrict trade and the end to be achieved¹⁵⁷. Most LDCs currently assert that denying market access for failure to respect CLS cannot pass these tests.

The ILO is not capable of protecting and enforcing ILRs by itself. Its conventions have undoubtedly bettered the protection of CLS, but this has been more on a voluntary basis than anything else, notwithstanding convention ratifications. Many States ratify conventions because of political opportunism, but are truly *mala fides* in their intentions. Similarly, domestic legislation is a barrier to certain activities of MNCs, yet is ultimately negligible in the vast horizon of things. Labor standards do not exist in a vacuum. «Many developing countries do recognize the need for raising labor standards. Child labor in India is a case in point. To begin with, poor parents love their children just as much

154. *WTO#1, supra* note 53.

155. *Ibid.*

156. *Hepple #1, supra* note 5 at 349.

157. B. Hepple, «New Approaches to International Labour Regulation» (1997) 26 *Indus. L.J.* 353 at 361.

as the rich ones. They send their children to work not out of wickedness but sheer economic necessity»¹⁵⁸. It is unfortunate that disparities in wealth exist, yet poverty has been a problem since the first days of humanity.

Given the failures of ITL to protect ILRs, we see that States are poorly positioned to properly regulate MNCs. George Ball once mentioned that they are «... very old-fashioned idea[s] ... badly adapted to our present world»¹⁵⁹. On the other hand, MNCs are «... modern concept[s], designed to meet modern requirements»¹⁶⁰. Something new and different is necessary to address this peculiar but inevitable reality, and CCCs present a viable interim solution; until a substantive WTO agreement is concluded.

The advantage of CCCs is that they are as flexible, transnational and as international as a corporation may be. They are highly targeted regulatory instruments aimed at a specific corporation and not States themselves, which is trade promoting. CCCs are obviously problematic in certain regards, most notably in terms of enforcement. Despite the fact that numerous MNCs may not enforce what they say, CLS will nevertheless be materially advanced by those that do follow their CCCs. Consumer pressure is extremely important to keep MNCs in check, as are IGOs and NGOs, *inter alia*.

Michael Moore, WTO Secretary-General once stated that «[i]nstitutions like the WTO are owned by sovereign governments. We don't tell governments what to do. They tell us what to do»¹⁶¹. Accordingly, CLS can be protected only with *sufficient political will*, which is obviously not the current case. Any attempt to protect CLS is seen as disguised protectionism, as can be seen in the *Tuna* and *Shrimp Turtles* cases. The WTO and CCCs need not be mutually exclusive however, and interaction can take place between the two. This would

158. *Panagariya, supra* note 19 at 8.

159. R. J. Barnett & R. E. Muller, *Global Reach : The Power of the Multinational Corporations* (New York : Simon & Schuster, 1974) at 16.

160. *Ibid.* at 19.

161. R. Senser, «Globalization and the WTO : What's at Stake for Canada, and What We Can Do About It» (December 2000), CAW/Quebec Council, online : <<http://www.cid.harvard.edu/cidtrade/issues/laborpaper.html>> (date accessed : 20 March 2003).

be salutary but is contemporarily illusory. However, Rodrik notes that «[f]ree trade among countries with very different domestic practices requires either a willingness to countenance the erosion of domestic structures or the acceptance of a certain degree of harmonization (convergence)»¹⁶². Different ways of thinking may very well lead to a WTO agreement after all, however improbable this may seem today. We can only hope for the sake of human rights.

162. D. Rodrik, *Has Globalization Gone Too Far?* (Washington, D.C. : Institute for International Economics, 1997) at 37.

APPENDIX

Table I: Ratification of ILO Fundamental Labour Standards (as of November 2001)

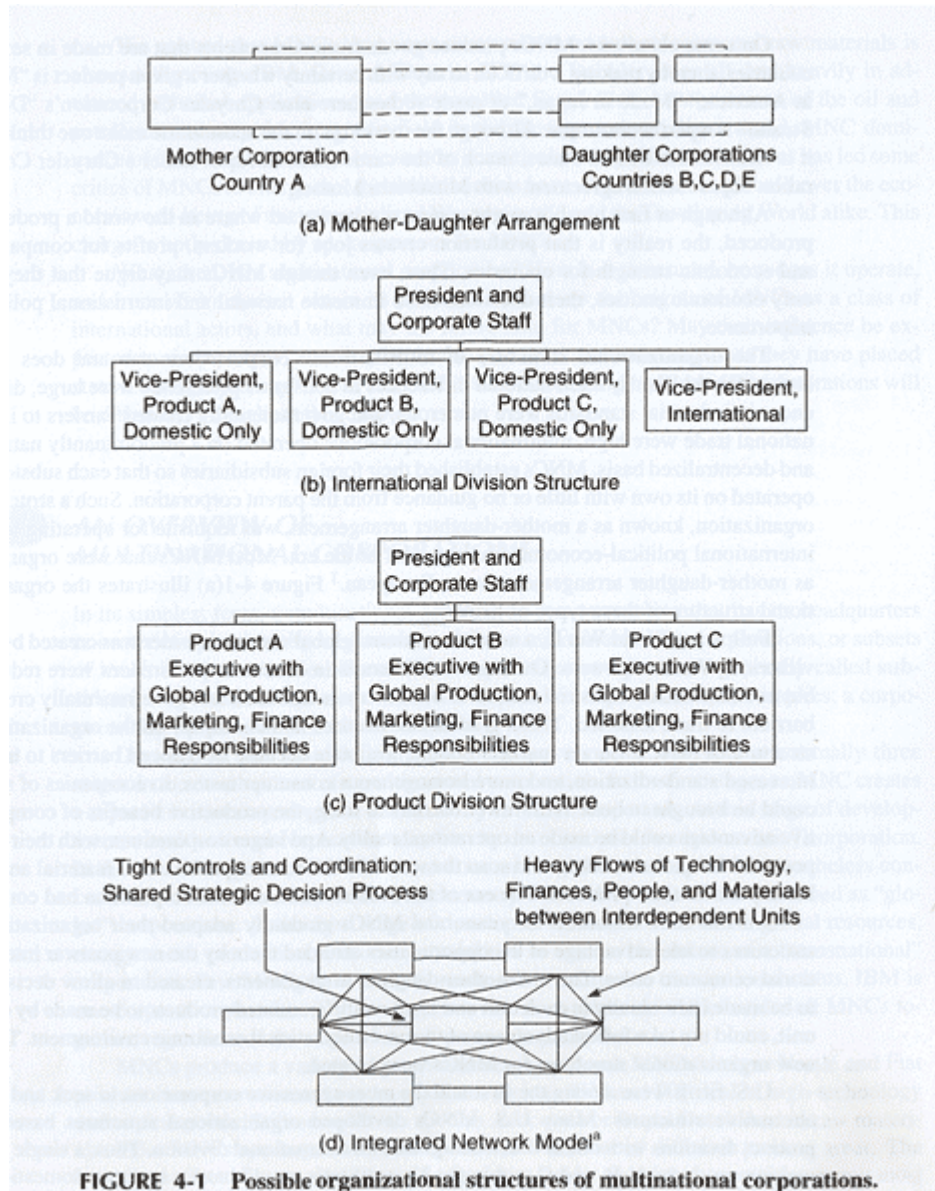
ILO Convention	Number of countries having ratified the convention
<u>Union Rights</u>	
(1) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)	138
(2) Right to Organise and Collective Bargaining Convention, 1949 (No. 98)	150
<u>Forced Labour</u>	
(3) Forced Labour Convention, 1930 (No. 29)	159
(4) Abolition of Forced Labour Convention, 1957 (No. 105)	157
<u>Child Labour</u>	
(5) Minimum Age Convention, 1973 (No. 138)	115
(6) Worst Forms of Child Labour Convention, 1999 (No. 182)	106
<u>Discrimination</u>	
(7) Equal Remuneration Convention, 1951 (No. 100)	154
(8) Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	152

Source: ILO (2001b).

TABLE 4-1 The World's 100 Largest Economic Units, 1994 (\$U.S. Billions)

1. United States	6379	36. General Motors	155	Tomen	70
2. China	2610	37. Sweden	154	70. Israel	66
3. Japan	2549	38. Marubeni	150	71. General Electric	65
4. Germany	1331	39. Switzerland	149	72. United Arab Emirates	64
5. India	1170	40. Malaysia	141	Romania	64
6. France	1050	41. Egypt	139	Daimler-Benz	64
7. UK	980	42. Austria	134	IBM	64
8. Italy	968	43. Ford Motor	128	76. Belarus	61
9. Brazil	785	44. Bangladesh	122	77. Kazakhstan	60
10. Russia	775	45. Hong Kong	119	Mobil	60
11. Mexico	740	46. Exxon	102	79. Nissan Motor	58
12. Canada	618	47. Nissho Iwai	101	80. Hungary	57
13. Indonesia	571	48. Chile	96	81. Nichimen	56
14. Spain	498	49. Denmark	96	Kenematsu	56
15. South Korea	424	50. Nigeria	95	83. Dai-Ichi Mutual Life	55
16. Australia	340	Royal Dutch/Shell		Sears Roebuck	55
17. Thailand	323	Group	95	85. Sri Lanka	54
18. Turkey	312	52. Greece	93	Uzbekistan	54
19. Iran	303	53. Portugal	92	Philip Morris	54
20. Netherlands	263	54. Norway	90	88. New Zealand	53
21. Pakistan	239	55. Algeria	89	89. Chrysler	52
22. Taiwan	224	56. Toyota Motor	88	90. Siemens	51
23. Ukraine	205	57. Wal-Mart Stores	83	British Petroleum	51
24. Saudi Arabia	194	58. Syria	82	92. Tokyo Electric Power	50
25. Colombia	192	59. Finland	81	93. U.S. Postal Service	49
26. Argentina	185	60. Hitachi	76	Volkswagon	49
27. Poland	180	61. Czech Republic	75	Sumitomo Life	
28. Belgium	178	Nippon Life Insurance	75	Insurance	49
29. Mitsubishi	176	AT&T	75	96. Toshiba	48
30. Mitsui	172	64. Vietnam	72	97. Ireland	46
31. South Africa	171	65. Nippon Telegraph		98. Unilever	45
Philippines	171	& Telephone	71	IRI	45
33. Itochu	168	66. Peru	70	100. Ecuador	42
34. Sumitomo	162	Morocco	70	Singapore	42
35. Venezuela	161	Matsushita Electric	70		

Note: Figures for states are gross domestic or gross national products as provided by the U.S. Central Intelligence Agency, *The World Factbook, 1994* (Washington, DC: U.S. Government Printing Office, 1995). Figures for corporations are for the total sales as provided by *Fortune*, August 7, 1995.



Source : C. Bartlett, «Building and Managing the Transnational : The New Organizational Challenge» in M.E. Porter, ed., *Competition in Global Industries* (Boston : Harvard Business School Press, 1986) at 381.