

# THE BATTLE IN SEATTLE: FREE TRADE, LABOR RIGHTS, AND SOCIETAL VALUES

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## 1. INTRODUCTION

On November 30, 1999, representatives of 135 countries in the World Trade Organization ("WTO") met in Seattle to agree on an agenda for the next round of negotiations. They were greeted by 30,000 to 40,000 protesters, primarily from labor, environmental, and human rights organizations who, for a time, blocked their entry into the meeting hall. The root of their protest was that the WTO, in developing its rules and procedures for promoting free trade, had not given adequate, or any, consideration to labor rights, environmental problems, or human rights.

On December 1, President Clinton, when addressing the representatives, revived a long-standing contentious issue within the WTO: whether free trade should be tied to labor, environmental, and human rights. President Clinton declared:

I believe the W.T.O. must make sure that open trade does indeed lift living standards, respects core labor standards that are essential not only to worker rights, but to human rights. That's why this year the United States has proposed that the W.T.O. create a working group on trade and labor.<sup>1</sup>

He further inflamed the issue by making an unplanned statement to a newspaper that the trade group should at some point use sanctions to enforce core labor rights around the world.<sup>2</sup> Clinton's

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<sup>1</sup> *Clinton's Plea: 'Open the Meetings'*, N.Y. TIMES, Dec. 1, 1999, at A1.

<sup>2</sup> Steven Greenhouse & Joseph Kahn, *U.S. Effort to Add Labor Standards to Agenda Fails*, N.Y. TIMES, Dec. 3, 1999, at A1.

statement provoked an adamant response from developing countries, which saw any tying of trade to labor or environmental rights as disguised protectionism by developed countries to keep out exports from developing countries and stymie their development. A Pakistani representative threatened, "We will block consensus on every issue if the United States proposal goes ahead,"<sup>3</sup> and the Egyptian representative warned, "If you start using trade as a lever to implement non-trade issues, that will be the end of the multilateral trading system . . ."<sup>4</sup> All efforts to compromise on, or temporarily bury, the contentious trade issue and move on to problems of copyright, agricultural subsidies, investments, genetically modified foods, and dumping failed. After four days, the conference adjourned with no results, not even a press statement, leaving all of the troublesome pending problems untouched.<sup>5</sup>

The newspapers, in reporting the Battle in Seattle, focused on the demonstrations in the streets, which were but a symptom of the underlying division in the meeting hall. Thomas Friedman, in a *New York Times* editorial column entitled, *Senseless in Seattle*, dismissed the protestors as a "Noah's ark of flat-earth advocates, protectionist trade unions and yuppies."<sup>6</sup> *The Economist* described them as a "furious rag-bag of anti-globalisation protestors"<sup>7</sup> and "militant dunces parad[ing] their ignorance through the streets of Seattle."<sup>8</sup> Such dismissive commentaries ignored or denied the fundamental issue involved.

Seattle was no surprise; it was only the eruption of issues long suppressed.<sup>9</sup> In the original GATT negotiations in 1948, the United States had sought to include some reference to labor rights, but because of opposition it was dropped.<sup>10</sup> It was again raised informally in the Tokyo Round in 1978, but it received no support ex-

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See Joseph Kahn & David E. Sanger, *Impasse on Trade Delivers Stinging Blow to Clinton*, N.Y. TIMES, Dec. 4, 1999, at A1.

<sup>6</sup> Thomas L. Friedman, *Senseless in Seattle*, N.Y. TIMES, Dec. 1, 1999, at A23.

<sup>7</sup> *The New Trade War*, ECONOMIST, Dec. 4, 1999, at 25.

<sup>8</sup> *Clueless in Seattle*, ECONOMIST, Dec. 4, 1999, at 17.

<sup>9</sup> For a history of the linkage of trade to human rights and labor rights, see Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause*, (GATT, ILO, NAFTA, U.S. Laws) in 2 FAIR TRADE AND HARMONIZATION 177 (Jagdish Bhagwati & Robert E. Hudec eds., 1997).

<sup>10</sup> See Peter S. Watson, *The Framework for the New Trade Agenda*, 25 LAW & POL'Y. INT'L BUS. 1237, 1253 (1994).

cept from the Nordic countries, and the United States made no formal proposal.<sup>11</sup> In the 1994 Uruguay Round, the United States proposed a study committee on the relation of free trade to basic labor rights, but the developing countries opposed it, arguing that the trade organization was not the proper organization to deal with labor rights, which, they maintained, should be left to the competent body, the International Labor Organization ("ILO").<sup>12</sup> The ILO had more than 170 conventions on labor rights, but no enforcement powers. It could investigate and make findings and recommendations, but it had no sanctions other than "jaw boning", which many violators regularly ignored.<sup>13</sup> This weakness of the ILO was well known and recognized by the developing countries, and the effect of leaving the labor rights issue to the ILO was to reject any protection of labor rights. The issue was again raised by the United States in the Singapore ministerial conference in 1996, but was again shunted to the ILO, which was called "the competent body to deal with labor standards", even though its only competence was to issue statements.<sup>14</sup>

## 2. BASIC LABOR RIGHTS AND FREE TRADE AGREEMENTS

Tying free trade to the recognition of basic labor rights has long been an articulated policy of the United States, reflected in the General System of Preferences of 1971,<sup>15</sup> the Caribbean Basin Re-

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<sup>11</sup> See *id.* at 1253.

<sup>12</sup> See *id.* at 1254; R. Michael Gadbaw & Michael T. Medwig, *Multinational Enterprises and International Labor Standards: Which Way for Development and Jobs?*, in HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE 141 (Lance A. Compa & Stephen F. Diamond eds., 1996).

<sup>13</sup> Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNAT'L L. 659, 680-84 (1998). For a different perspective on the role of the ILO, see Christopher R. Coxson, *The 1998 ILO Declaration on Fundamental Rights at Work: Promoting Labor Law Reforms Through the ILO as an Alternative to Trade Sanctions*, 17 DICK. J. INT'L L. 469 (1999).

<sup>14</sup> Ministers of Singapore addressed the question of core labor standards and reaffirmed their commitment to observance of internationally recognized standards. They also recognized the competence of the ILO to set and deal with these standards, while voting that economic growth and development fostered by increased trade and trade liberalization contribute to the promotion of such standards. The Ministers rejected the use of labor standards for protectionist purposes, recognizing that the comparative advantage of countries, particularly low wage developing countries, should not be put in jeopardy. See WTO, 1997 ANNUAL REPORT 5 (1997) [hereinafter WTO REPORT].

<sup>15</sup> Trade Act of 1974, 19 U.S.C. § 2101 (1994).

covery Act of 1983,<sup>16</sup> and the Overseas Investment Corporation Amendment of 1985,<sup>17</sup> in which trade benefits were given on the countries' recognition of minimum labor standards. In 1992, candidate Clinton insisted that NAFTA include a labor side agreement.<sup>18</sup> When negotiated, the side agreement listed eleven labor principles, which included the core labor standards.<sup>19</sup> In the year preceding Seattle, President Clinton in at least three speeches insisted that trade be tied to labor rights so as "to put a human face on the global economy."<sup>20</sup> The United States was not alone. It was supported by some, though not all, European countries, the European Parliament, and the World Confederation of Trade Unions, which represented 213 union federations in 143 countries.<sup>21</sup> One year prior to Seattle, a mass demonstration protesting the WTO's refusal to protect the environment, labor rights, or human rights had paralyzed the offices of the WTO in Geneva.<sup>22</sup>

The Battle in Seattle in the streets did not cause the trade talks to collapse in the meeting hall. The demonstrations were the product of a long-standing basic cleavage between the developed and developing countries on whether trade should be left free from all restraints or whether that freedom should be conditional on ad-

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<sup>16</sup> Caribbean Basin Economic Recovery Act of 1983, 19 U.S.C. §§ 2701-2707 (1994).

<sup>17</sup> Foreign Assistance Act of 1969, 22 U.S.C. §§ 2192-2200 (1994). The labor rights protected in these three statutes did not include protection against discrimination, but included the right to "acceptable conditions of work and regard to minimum wages, hours and acceptable conditions of safety." Gadbow & Medwig, *supra* note 12, at 144. These statutes had limited effectiveness because of their vague standards and lack of enforcement. See Alston, *Labor Rights Provisions in U.S. Trade Law: "Aggressive Unilateralism"*, in COMPA & DIAMOND, *supra* note 12, at 71.

<sup>18</sup> William Jefferson Clinton, *Expanding Trade and Creating American Jobs*, J. ENV'T'L L. 682, 685 (1993).

<sup>19</sup> North American Agreement on Labor Cooperation ("NAACL"), Sept. 13, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499, annex I.

<sup>20</sup> William Jefferson Clinton, Remarks by the President at the University of Chicago Convocation Ceremonies, June 12, 1999, available at <http://www.news.uchicago.edu/releases/99/990612.clinton-speech.shtml>. See ILO, CONFERENCES AT GENEVA (1999); IMF/WORLD BANK, ANNUAL MEETING (1999); Steve Charnovitz, *The Globalization of Economic Human Rights*, 25 BROOK. J. INT'L L. 113 (1999).

<sup>21</sup> See Cappuyns, *supra* note 13, at 667; ICFTU, *International Trade Has to Take Account of Labour Standards, Says World Union*, at <http://www.icflcu.org.english/pr/1999/eprol118-990617-dd.html> (June 17, 1997).

<sup>22</sup> See Elizabeth Olson, *Target Practice in Geneva on the Global Trade Body*, N.Y. TIMES, May 16, 1998, at D1.

herence to basic labor rights.<sup>23</sup> More specifically, the protests invoked the question of whether a member country could restrict imports produced in violation of basic labor rights.<sup>24</sup> President Clinton's declarations concerning tying free trade to basic labor rights would almost certainly have caused the talks to collapse had there been no demonstrations, once it became clear that the United States and others were no longer willing to suppress the issue. Although the demonstration in the streets included human rights advocates and environmentalists in addition to workers and union members, the dispute in the hall was about labor rights.

But what, specifically, was the issue? Clinton's proposal was simply to create a working group to study and discuss the possible application of some "core" labor standards in achieving free trade. Although the working group was only to study and discuss the question, developing countries feared that the study would ultimately result in the WTO adopting and enforcing workers' rights. Protection of workers' rights would provide a guise for developed countries to deprive developing countries of their competitive advantage of low labor costs by excluding exports produced in violation of those rights, thereby stifling their ability to develop industries and raise living standards.

The proposal, however, was narrowly limited. It was to consider only "core" labor standards, which are defined in the ILO Declaration of Fundamental Principles and Rights of Work as: (1) freedom of association and effective recognition of the right to bargain collectively; (2) elimination of all forms of forced labor; (3) effective abolition of child labor; and (4) elimination of discrimination in employment and occupation.<sup>25</sup> These "core" labor rights have been designated by the ILO as the four fundamental rights that all members of the ILO are obligated "to respect, promote and realize in good faith," regardless of whether the member has rati-

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<sup>23</sup> See generally Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253 (1988) (discussing legislation regulating U.S. trade and other economic relations); Cappuyns, *supra* note 13.

<sup>24</sup> Violations of WTO trading rules may be sanctioned by fines or damages, or by allowing other countries to impose retaliatory trade measures. In case of violations of core labor rights, the most likely sanction would be to allow an importing country to impose duties on or bar goods produced in violation of those rights.

<sup>25</sup> *Report of the Committee on the Declaration of Principles, International Labor Conference*, 86th Sess. (1998) (adopted), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-decl.htm>.

fied relevant ILO conventions.<sup>26</sup> In short, President Clinton's proposal was to study whether free trade should be conditioned on the observance of rights that the United States, along with 180 other countries, is obligated to uphold by virtue of its membership in the ILO.

It is crucial to recognize three characteristics of these core labor rights. First, these rights do not focus on low wages. Forced labor is prohibited not because goods produced under such conditions compete unfairly, but because it denies workers their freedom. Child labor is prohibited not because it is cheap but because children's growth and development should not be stunted by wage work. Even if a child were paid the same wage as her father, allowing her to enter the labor market would violate this standard. The operative principle is that children should be shielded from the burdens of wage labor. Prohibition of discrimination reaches beyond wage costs to protect workers' equal right to work and the right to equal treatment on the job, as a part of their basic human right to be treated equally. The right to free association and collective bargaining is protected as a human right regardless of whether the union is able to bargain for a living wage.

There is no suggestion that there should be a global minimum wage or that a right to a "fair wage" or even a "living wage" is a core labor right. There is general acceptance that the differential in wages due to the availability of cheap labor serves as a legitimate comparative advantage in international trade and that low wage countries should not be deprived of this advantage. It should be noted that the European Union over a period of forty years has established uniform standards on a multitude of labor rights,<sup>27</sup> but it

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<sup>26</sup> See Coxson, *supra* note 13, at 470-71 (stating that members of the ILO must adhere to four fundamental principles of labor and employment law).

<sup>27</sup> See, e.g., Council Directive 75/117/EEC on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 1975 O.J. (L 45) 19; Council Directive 75/129/EEC on the Approximation of the Laws of Member States for Collective Redundancies, 1975 O.J. (L 48) 28; Council Directive 77/187/EEC on the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses, 1977 O.J. (L 61) 26; Council Directive 94/45/EC on the Establishment of a European Works Council, 1994 O.J. (L 254) 64; Council Directive 96/34/EC on the Framework Agreement on Parental Leave, 1996 O.J. (L 145) 4; Council Directive 91/383/EEC Supplementing the Measures to Encourage Improvements in the Safety and Health at Work of Workers with a Fixed-Duration Employment Relationship or a Temporary Employment Relationship, 1991 O.J. (L 206) 19.

has not even considered establishing a community-wide minimum wage. The comparative advantage of the differential in wage rates is preserved.

Second, these core labor rights are, at most, minimal. They encompass only seven of the ILO Conventions, all seven of which are almost universally accepted.<sup>28</sup> One hundred twenty-seven countries have ratified ILO Convention No. 87 on Freedom of Association and the Right to Organize; 145 have ratified Convention No. 98 on the Right to Bargain collectively; 141 countries have ratified Convention No. 111 on Discrimination; 151 countries have ratified Convention No. 29 on Forced Labor; and 84 countries have ratified Convention No. 138 on Child Labor.<sup>29</sup> It is ironic that Egypt, Brazil, Indonesia and Pakistan, which were among those most vocal in opposing the Clinton proposal—particularly his statement concerning sanctions—have ratified conventions on all of these subjects, with the exception of Pakistan's failure to ratify a convention on child labor.<sup>30</sup> They expressed outrage that Clinton would suggest that they should be required to observe the conventions that they had ratified.

Observance of these core labor rights would have minimal impact on labor costs.<sup>31</sup> To be sure, prohibiting forced labor or child labor may reduce the supply of labor and thereby increase the wage level, reducing a country's competitive advantage. The effect on wages, however, would not measurably reduce an underdeveloped country's comparative advantage in labor costs over developed countries. In any case, the competitive advantage gained by slavery or child labor is not an advantage to be shielded by free trade. The same is true of any advantage gained by discrimination.

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<sup>28</sup> These conventions include the following: *Convention Concerning Freedom of Association and Protection of the Right to Organize*, ILO Convention No. 87 (1948); *Convention Concerning the Application of the Principles of the Right to Organize and Bargain Collectively*, ILO Convention No. 98 (1949); *Convention Concerning the Abolition of Forced Labor*, ILO Convention No. 105 (1957); *Convention Concerning Minimum Age for Admission to Employment*, ILO Convention No. 138 (1973); *Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, ILO Convention No. 100 (1951); and *Convention Concerning Discrimination in Respect of Employment and Occupation*, ILO Convention No. 111 (1958).

<sup>29</sup> See ILO, DATABASE ON INTERNATIONAL STANDARDS, at <http://ilolex.ilo.ch:1567/public/english/50normes/infleg/iloeng/index.htm> (last visited Mar. 6, 2001) (providing a tool for visitors to find ratification information by convention).

<sup>30</sup> *Id.*

<sup>31</sup> Christopher L. Erickson & Daniel J.B. Mitchell, *Labor Standards and Trade Agreements*, 19 COMP. LAB. L. & POL'Y J., 145, 171, 182 (1993).

Observance of the right to organize and bargain collectively may ultimately have more impact on wage rates, but none of the countries objecting to enforcing core labor rights claimed that they were entitled to a comparative advantage gained by prohibiting workers from joining unions.

There are a number of other important and widely recognized labor rights that are not protected by the "core" labor rights: the right to a safe and healthful place of work, limits on the hours of work, rights to periods of rest, and protection against abusive treatment. None of these involve wage rates, and though some of them might entail labor costs, they would not deny any developing country the comparative advantage they obtain by offering cheap labor.

Third, the four core labor rights are more than labor rights; they are recognized internationally as human rights. The core rights go beyond those belonging to individuals as workers; they belong to individuals as human beings. Accordingly, the core rights have become recognized as human rights. They are articulated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and a number of other human rights conventions.<sup>32</sup> To bar imports because they have been produced in violation of these rights is not an economic regulation but a social regulation. The enforcement mechanism is economic, but the interests protected are human rights. This significantly shifts the focus of the free trade debate. The issue is not simply one of economic efficiency—whether free trade will promote economic growth—but one of humanitarian concern, whether free trade serves to promote or deny basic human values.

### 3. DEVELOPING NATIONS' OPPOSITION TO CORE LABOR RIGHTS

When one focuses on the narrowness of the proposal to consider recognition of core labor rights as a condition of free trade and the minimal economic impact they would have on developing countries, one cannot help asking the question, what is all the fuss about? Why are developing countries so adamant in opposing even the creation of a working group to study the problem? Empirical studies show that observance of the core labor rights would not significantly reduce the comparative advantage they gain by

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<sup>32</sup> See Coxson, *supra* note 13, at 474-75.



providing cheap labor.<sup>33</sup> In 1992, it cost Nike \$5.60 to produce a pair of shoes in Indonesia which sold for \$45.00 to \$80.00 in the United States.<sup>34</sup> Any increase in cost from observing core labor rights would not measurably reduce Indonesia's cost advantage in producing shoes.

The developing countries expressed fears that these core labor rights would be used by the developed countries as a guise for protectionism, but they never articulated how they thought this might be done. If an importing country could bar all imports from an exporting country on the claim of violation of one of the core labor rights, then such a claim obviously could be used as a pretext for protectionism; but if only specific imports could be barred on proof that they were produced in violation of these rights, the ability to use the core labor rights for protectionist purposes would seem to be minimized. The developing countries also expressed the fear that enforcement of core labor rights was but a camel's nose in the tent and that other rights would be added that would significantly reduce their comparative advantage. The WTO, however, operates on the principle of consensus; presumably, developing countries could have blocked any such enlargements. The developed countries declared a willingness to include an express prohibition against using these rights for protectionism, and to negotiate details as to application and enforcement. The developing countries flatly refused to even discuss the subject.

The fears of the developing countries, however, were real, and not wholly groundless. They feared that the economically powerful countries, particularly the United States and the European Union, despite their protestations of good intentions, would, under political pressure from industry and unions, find ways to use labor rights to engage in protectionism. At the time of the Battle in Seat-

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<sup>33</sup> Citing an OECD study, Professor Hepple states:

Empirical research . . . indicates that there is no correlation between aggregate real wage growth and the level of observance of core [labor] rights. . . . Host states which observe core [labor] standards are not significantly worse in attracting FDI [foreign direct investments] than those which systematically abuse these standards. On the contrary, raising [labor] standards may raise productivity and so encourage FDI.

Bob Hepple, *A Race to the Top: International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347, 349 (1999).

<sup>34</sup> Jennifer L. Johnson, Note, *Private-Public Convergence: How the Private Actor Can Shape Public International Labor Standards*, 24 BROOK. J. INT'L L. 291, 330 n.83 (1998).

tle, the United States had 300 dumping duties, quotas on textiles and other products, plus "voluntary" export restraints by exporting countries.<sup>35</sup> The European Union countries had major trade distorting subsidies on agricultural products that they insisted on retaining.<sup>36</sup> There were doubts whether these economically powerful countries would, in fact, fully comply with WTO principles.<sup>37</sup> The rule of consensus would not ensure that developed countries would refrain from pressing for additional labor, environmental, and human rights. The developing countries would have no real choice but to consent. Consensus would be more a form than a reality.

There was also a legitimate fear on the part of developing countries that if they were to prohibit child labor, allow unions and collective bargaining to thrive, or recognize other labor rights, investors would move their capital to countries not recognizing such rights. That fear deters developing countries from reaching bilateral agreements on labor rights. But the WTO can make such standards equally applicable to all by requiring developed countries that condition imports on observance of core labor rights to apply those conditions on imports equally to all countries whether they are members of the WTO or not. Every country would thus be protected against a race to the bottom. But developing countries continue to lack confidence that developed countries will apply the standards with an even hand.<sup>38</sup>

Another reason given by the developing countries for their opposition was that enforcing these core labor rights would invade their sovereignty.<sup>39</sup> Conditioning free trade on recognition of labor

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<sup>35</sup> See Robert Kuttner, *Managed Trade and Economic Sovereignty*, in U.S. TRADE POLICY AND GLOBAL GROWTH 3 (Robert A. Blecker ed., 1996); Robert E. Scott & Thea M. Lee, *The Costs of Trade Protection Reconsidered: U.S. Steel, Textiles, and Apparel*, in U.S. TRADE POLICY AND GLOBAL GROWTH 108, *supra*; JAMES BOVARD, *THE FAIR TRADE FRAUD* (1991).

<sup>36</sup> *The Real Losers*, *ECONOMIST*, Dec. 11, 1999, at 15.

<sup>37</sup> Two months after Seattle, President Clinton, on the urging of the steel industry and steel unions, imposed punitive tariffs on imports of wire rod and steel pipe, raising the price of steel imports that exceed a quota pegged at 1998 import levels. Joseph Kahn, *Clinton Imposes Tariffs on Steel Imports That Exceed Quota*, *N.Y. TIMES*, Feb. 12, 2000, at C2.

<sup>38</sup> Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 *LAW & POLY INT'L BUS.* 165, 167 (1993).

<sup>39</sup> See generally Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 *AM. U. J. INT'L L. & POL'Y* 117 (1993) (discussing the issue of sovereignty in light of two case studies).

rights means, in effect, that an importing country may inquire into and indirectly regulate labor conditions in an exporting country. Exporting countries would be told that they must protect unionization and collective bargaining; they would be told how old their children must be to perform particular jobs, and that regardless of cultural values, fathers could not be given preference as their family's primary breadwinner. In short, a government would be limited in regulating the work of its own citizens and structuring its own labor market, and exporting employers would be required to observe standards set by a foreign country.

Enforcement of core labor rights does encroach on sovereignty, but only in the very limited degree of requiring countries to protect fundamental rights, which by their membership in the ILO and their ratification of ILO conventions and international covenants, they have agreed to protect. More importantly, invasions of sovereignty are a staple of the WTO. Members are presently required to observe certain protection of intellectual property rights established by the WTO of both foreign and domestic works and to provide enforcement procedures sufficient "to permit effective action against any act of infringement."<sup>40</sup> This will require member countries, especially developing countries, to make substantial changes in their national standards and enforcement practices. The WTO has thereby established international intellectual rights that member countries are bound to observe and enforce; members failing to observe and enforce those rights are subject to trade sanctions.<sup>41</sup>

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<sup>40</sup> Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 381 (1998), quoting Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31 (1994), 33 I.L.M. 1197 (1994), art. 41(2)(1); see also KEITH E. MASKUS, REGULATORY STANDARDS IN THE WTO: COMPARING INTELLECTUAL PROPERTY RIGHTS WITH COMPETITION POLICY, ENVIRONMENTAL PROTECTION, AND CORE LABOR STANDARDS (Inst. for Int'l Econ., Working Paper No. 00-1, 2000), available at <http://www.iie.com/catalog/WP/2000/00-1.htm> (last visited Feb. 6, 2001); Graeme Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 513-521 (2000); Jane C. Ginsburg, *International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code*, 47 J. COPYRIGHT SOC. USA 265 (2000).

<sup>41</sup> This led a spokesman for the International Confederation of Trade Unions to remark: "[t]he WTO's credibility is undermined when it ensures Mickey Mouse has more rights than workers who make the toys because it covers trademarks but not labor standards." Cappuyns, *supra* note 13, at 677.

A developing country's regulation of capital investments is circumscribed by the WTO,<sup>42</sup> and payment of subsidies to promote trade and investments comes within its reach. To illustrate its reach into a country's sovereignty the WTO, acting on a complaint by the European Union, ordered the United States to amend its tax code to close a loophole exploited by U.S. transnational enterprises; the tax break, according to the WTO panel, amounted to a subsidy in violation of the World Trade Agreement.<sup>43</sup> To obtain help from the International Monetary Fund and the World Bank, countries must submit to severe controls over their tax and fiscal policies.<sup>44</sup> When developing countries protest that they should not be required to observe core labor rights in order to enjoy the benefits of free access to world markets—and that such requirements would intolerably infringe upon their sovereignty—their claims ring hollow.

It must be recognized that the opposition of developing countries is encouraged and supported by investors from developed countries who produce for export.<sup>45</sup> They see any limitation on free trade as a threat to their profits. They have the same fear of the camel's nose in the tent as they do with any encroachment on the sovereignty of the market.

On the other side, why have the developed countries, and particularly the United States, been so insistent on tying free trade to core labor rights? Among the groups most active and effective in

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<sup>42</sup> At the Singapore meeting where the WTO rejected the proposal to create a working group on labor and trade, it named a working group on investment and trade. See WTO REPORT, *supra* note 14, at 116.

<sup>43</sup> See WTO Report of Appellate Body, United States—Tax Treatment for “Foreign Sales Corporations”, WT/DIS 108/AB/R (Feb. 24, 2000). In response to the Appellate Body's report on Foreign Sales Corporations, the U.S. Congress amended the Internal Revenue Code. See FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Pub. Law No. 10C-519 (H.R. 4986), 114 Stat. 2423. The European Union stated that in its view, the United States had still failed to comply and sought permission to levy trade sanctions worth more than \$4 billion. Paul Meller, *Europeans Seek \$4 Billion in Trade Sanctions Against U.S.*, N.Y. TIMES, Nov. 18, 2000, at C1.

<sup>44</sup> Dani Rodrik, *Governing the Global Economy: Does One Architectural Style Fit All?*, BROOKINGS TRADE FORUM, 105 (1999); Nicole Wendt, *The ABC's of the Global Economy: 50th Anniversary of the World Bank and the IMF Prompts Criticism*, 9 TRANSNAT'L L. & CONTEMP. PROB. 149 (1999); DOLLARS AND SENSE, Mar./Apr. 2000, at 26-27.

<sup>45</sup> In the 1990s, thirty percent of U.S. corporate profits came from investments overseas, including many made from the operation of subsidiaries abroad. Wendt, *supra* note 44, at 26.

marshaling the demonstrations in Seattle was the AFL-CIO.<sup>46</sup> But what was in it for the AFL-CIO? Tying free trade to core labor rights would provide U.S. workers no significant protection from cheap labor in the developing countries, and John Sweeney, President of the AFL-CIO, did not press President Clinton for any more than this shadowy symbolic gesture. From an economic viewpoint, Clinton's proposal and the protestors' insistence made little sense. One might cynically suspect that President Clinton and union leaders were playing a shell game, pretending for political reasons to try to protect workers' jobs from cheap labor abroad.<sup>47</sup>

There may be more credible non-economic explanations. Unions and others may have general and legitimate concern for the welfare of workers beyond our borders. Certainly, it was altruistic motivations that energized the human rights and environmental groups to mobilize for the Battle in Seattle. Protection of labor rights is seen by many as a moral issue, requiring a response beyond the bounds of economic self-interest. Unions have traditionally been concerned with social values beyond the welfare of their members; they exhibit a sense of solidarity with other workers. It is this solidarity which gives many boycotts, domestic and international, effectiveness. Unions' historic concern for workers other than their members is sometimes forgotten and often obscured by the unions' collective bargaining, but it has been manifested in various ways, including concern for workers in other countries. Longshoremen have refused to unload goods from communist countries; unions supported the boycott of South Africa to protest apartheid;<sup>48</sup> and U.S. unions have been the leading supporters of Mexican workers seeking to exercise their right to be represented by unions of their own choosing.<sup>49</sup> As a nation, we assume an obligation to provide moral leadership, and so may legitimately as-

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<sup>46</sup> See *Protestors Try to Halt Trade Talks: WTO Meeting in Seattle*, FIN. TIMES (London), Dec. 1, 1999, at 1.

<sup>47</sup> Such cynicism may be overdrawn. The AFL-CIO praised a trade treaty with Jordan to eliminate tariffs that commit Jordan to comply with its obligations under the ILO to safeguard workers' rights. "This is a basic and important step forward in making globalization work for working families," declared John Sweeney, President of the AFL-CIO. Joseph Kahn, *Labor Praises New Trade Pact with Jordan*, N.Y. TIMES, Oct. 25, 2000, at C1. Republicans expressed skepticism or flat opposition to this tying of trade to labor rights. *Id.*

<sup>48</sup> Thomas Friedman, *Africa: Aid or Harm?*, N.Y. TIMES, Mar. 28, 2000, at A23.

<sup>49</sup> Sam Dillon, *U.S. Labor Leader Seeks Union Support in Mexico*, N.Y. TIMES, Jun. 23, 1998, at A1.

sume an obligation to promote human rights wherever they may be.

President Clinton's insistence on tying free trade to labor or human rights on moral and social grounds, however, has a discordant note. We have ratified none of the ILO conventions that constitute the core labor rights, and we do not fully comply with them.<sup>50</sup> We guarantee neither freedom of association nor the right to bargain collectively as prescribed in Convention No. 87 and No. 98, for we provide no protection for agricultural workers or supervisors under the National Labor Relations Act, and the federal government allows its employees only a truncated, nearly meaningless form of collective bargaining,<sup>51</sup> and nearly half of the states deny their public employees the right to bargain collectively. Nor do we effectively enforce the laws enacted to protect those rights.<sup>52</sup> Our protection against discrimination is incomplete because we do not require equal pay for work of equal worth as required by Convention No. 100, which was ratified by 143 countries.<sup>53</sup> Our moral sensitivity seems especially dull where trade with China is involved. The proposed trade treaty with China, in more than 200 pages, never mentions labor rights, although China is one of the worst offenders of core labor rights.<sup>54</sup> One result of that treaty will be the entry of China into the WTO, where it could veto any tying of free trade to labor rights. Our government's position in the WTO is vulnerable to the charge of hypocrisy.

There is another possible explanation for the dispute over tying free trade to core labor rights, one that is not clearly articulated by either developed or developing countries. The first core labor right—and the one considered the most fundamental—is the right to associate freely, to organize and bargain collectively. Unions are

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<sup>50</sup> See Coxson, *supra* note 13, at 471.

<sup>51</sup> See UNFAIR ADVANTAGE, WORKERS' FREEDOM OF ASSOCIATION UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS, HUM. RTS. WATCH (2000) [hereinafter UNFAIR ADVANTAGE]; James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 EMP. RTS. & EMPLOYEE POL'Y J. 65, 87-88 (1999).

<sup>52</sup> See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1774-86 (1983); see also UNFAIR ADVANTAGE, *supra* note 51, ch. V.

<sup>53</sup> Breen Creighton, *The ILO and the Protection of Fundamental Human Rights in Australia*, 22 MELB. U. L. REV. 239, 250-51 (1998).

<sup>54</sup> See *id.* at 254 (naming Asia as one of the areas "where abusive child labour is perceived to be most widespread").

understandably reluctant to emphasize this right, because doing so would appear self-serving; moreover, the right to organize and bargain collectively does not resonate as a human right in the U.S. political arena. This right may be supported by U.S. unions out of a sense of solidarity with other unions without any expectation of economic return. American unions have historically supported unions in other countries both financially and organizationally. The large contribution of U.S. unions to the reconstruction of European unions and the reestablishment of collective bargaining in Europe after World War II is but one example.<sup>55</sup> But U.S. unions may also have a less altruistic motive: they may hope that the organization of unions in developing countries will give workers more bargaining power and enable them to push up wages, thereby reducing their comparative advantage. They may also hope that unions in other countries will support them in disputes with U.S. employers.

For the same reason, the developing countries may resist enforcement of the rights of freedom of association and collective bargaining. They may see unionization and collective bargaining as potentially reducing their competitive advantage in international trade. The calculations of both would seem questionable, for the unions in most developing countries are now, and will be for the foreseeable future, too economically weak to compel large wage increases. Moreover, they are not likely to bargain away all of their competitive advantage, making exports unprofitable and destroying their jobs, even if they become strong enough to do so.

Some developing countries may have a greater and more realistic fear of enforcing this core labor right for political reasons. Unions provide a major base for popular organization, and they regularly focus on political concerns as well as economic concerns. In developing countries, their political function may be more important than their economic function. They will, therefore, constitute a challenge to entrenched power of political leaders and insist on increased recognition of democratic rights.<sup>56</sup> Indeed, one of the reasons freedom of association and the right to bargain collectively are incorporated in various covenants of human rights is because these rights serve broader social and political values. Political

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<sup>55</sup> ROY GORDON, *AMERICAN LABOR AND EUROPEAN POLITICS* 69-70, 116-22 (1976); ARCHIE ROBINSON, *GEORGE MEANY AND HIS TIMES* 133-37 (1981).

<sup>56</sup> Virginia Leary, *The Paradox of Workers' Rights as Human Rights*, in *COMPAS & DIAMOND*, *supra* note 12, at 22-24.

leaders in developing countries may be understandably reluctant to articulate this fear, for it would repudiate their claimed adherence to ILO conventions and betray their democratic pretensions.

When one examines the specific issue that President Clinton put on the table—the one that caused such division as to break up the meeting—the reaction seems grossly disproportionate to the proposal. Enforcement of the core labor rights would not deprive developing countries of their comparative advantage and would hardly shield workers in developed countries from cheap labor. At most, it would have a minimal impact on the flow of trade. For developing countries, a small slice of sovereignty is at stake, but with regard to investments and protection of intellectual rights, these countries have already surrendered whole loaves of sovereignty to the WTO and other international organs. For developed countries, the important moral and social values at stake might explain the insistence in the Seattle streets on core labor rights, but it is not, politically speaking, obvious that those values were sufficiently compelling to explain putting the WTO and its free trade accomplishments at risk. We have not balked at trading with, or even financially supporting, regimes with far more egregious violations of human rights than the core labor rights. For the developing countries, the WTO offers the greatest promise of providing open markets so they can exploit their comparative advantage.

We seem to be left with the unsatisfying answer that the dispute is largely between irreconcilable symbols, sovereignty on the one side and morality on the other, that are asserted more as explanations of convenience than commitment. I would like to explore the possibility that the cleavage is at a much different, though perhaps no less symbolic, level.

In developing countries, the dominant objective is economic development. This requires capital investment to employ the abundant labor; capital can be attracted by the prospects of profits in the export market; and profits depend on how cheaply the goods can be produced. Because the emphasis is on economic development, success is measured in economic terms instead of in social terms, with the rationale that increased production and increased exports will provide for social welfare by raising the standard of living. The framework for policy is the economists'



framework, which measures all policies by economic efficiency;<sup>57</sup> and for the economist, the free market is the inviolable engine of efficiency. In international trade, the mantra of economists is that anything that interferes with free trade interferes with the efficient allocation of resources. Seldom do they quantify or ask how much free trade interferes with and impedes development. Any interference is sufficient reason to reject any restrictions on free trade.<sup>58</sup>

This logic is embraced and promoted by transnational corporations that invest in developing countries to produce goods for export back to their home country. They object to any restriction on how or what they produce and therefore oppose any tying of their labor practices in production to their freedom to export their products.<sup>59</sup> The political leaders in developing countries, seeking to attract investments by transnational corporations, embrace the free trade mantra and see even the smallest restriction on free trade as an evil threatening their development.

This single-minded pursuit of economic efficiency ignores any non-economic values that may be involved.<sup>60</sup> Just as the free trade economists never ask how much a restriction interferes with efficiency, they never ask the other half of the question, what other values does the restriction serve? In concrete terms, how much efficiency would be lost by recognition of the four core labor rights,

<sup>57</sup> See, e.g., MASKUS, *supra* note 40. In evaluating which areas are appropriate for WTO regulations, he looks only to economic considerations. Because core labor rights have a very limited economic impact, he places regulating those rights at the bottom of priorities.

<sup>58</sup> See ANNE O. KRUEGER, *TRADE POLICIES AND DEVELOPING NATIONS* 74-85 (1995).

<sup>59</sup> See *Employers' Group Opposes U.S. Attempt to Link Workers' Rights and Trade*, 13 Int'l Trade Rep. (BNA) No. 13, at 23 (June 5, 1996).

<sup>60</sup> Frank Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51, 65 (1999).

[T]here is a marked tendency for other values besides efficiency and welfare to be viewed as outside the scope of trade law. . . . From the viewpoint of Efficiency Model adherents, advocates of non-trade values and issues are seen as trying to complicate the trade law system with what are at best extraneous concerns, such as human rights or environmental protection, and what may be at worst simply disguised protectionism.

*Id.* At the 1999 WTO meeting in Geneva, the so-called High Level Symposium on Trade and Development, the greatest applause arrived when T.N. Srinivasan called for vigorously divorcing all "non issues" from trade negotiations; the obvious implication is that the WTO should not even look at issues relating to labor and the environment. FRED BERGSTEN, *DISCUSSION*, BROOKINGS TRADE FORUM, 195 (1997).

and how much would such recognition further human rights? There is no attempt to measure and balance; free trade becomes a doctrinal principle, not a variable value.

Free trade enthusiasts echo the laissez-faire disciples of the 19th century, but with a more sophisticated scripture and a more devoted worship of the market.<sup>61</sup> Any limitation on the free market violates the economists' First Commandment: Thou shalt have no gods before me. The free market will provide for all. In the Panglossian observation of an unnamed trade official, "there is no need for an active international labor standards policy . . . because a well functioning market will ensure development of appropriate standards consistent with the desires of the participants in the market."

Some highly regarded economists argue that the observation of labor standards will hurt those whom the regulations are intended to help. Using an often repeated example, they argue that if child labor is prohibited in a developing country it will deprive poor countries of desperately needed income, and the children not working will be on the streets as beggars, prostitutes, or street criminals.<sup>62</sup> That logic, however, is factually flawed. Similar arguments were made against child labor laws in England and the United States a hundred years ago<sup>63</sup> but have long since been discarded. Experience indicates that their arguments are equally flawed now for developing countries. The Rugmark program has reduced child labor in the Indian carpet industry,<sup>64</sup> and Nike has eliminated children in stitching soccer balls in Pakistan.<sup>65</sup> The jobs are now held by the fathers and mothers, more children are in school, and we still buy the rugs and soccer balls.

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<sup>61</sup> See KRUEGER, *supra* note 58, at 74-85.

<sup>62</sup> See Nancy Birdsall, *Life Is Unfair: Inequality in the World*, FOREIGN POL'Y, Summer 1998, at 87-88; Mark Warner, *Globalization and Human Rights: An Economic Model*, 25 BROOK. J. INT'L L. 99, 104 (1999); *The Standard Question*, ECONOMIST, Jan. 15, 2000, at 79. Paul Krugman has been quoted as saying, "A policy of good jobs in principle, but no jobs in practice might assuage our consciences but is no favor to its beneficiaries." Erickson & Mitchell, *supra* note 31, at 153.

<sup>63</sup> See *Lochner v. New York*, 198 U.S. 45, 71 (1905) (Harlan, J., dissenting) (citing the Eighteenth Annual Report by the New York Bureau of Statistics of Labor).

<sup>64</sup> See Janet Hilowitz, *Social Labeling to Combat Child Labor: Some Considerations*, 136 INT'L LAB. REV. 215, 224 (1997).

<sup>65</sup> Press Release, President William Jefferson Clinton, Remarks to the ILO Conference in Geneva, Switz. (June 16, 1999) (citing soccer ball industry's change of policy in Pakistan).

We have long recognized that the “invisible hand” does not see those who are hurt by the market and that limitations are necessary to protect social values that the market ignores. We have enacted a network of labor laws that place limitations on market forces in order to protect workers’ health, safety, the right to associate, the right to equal treatment, and a wide range of other social values. Those who oppose any conditioning of free trade on recognition of the most fundamental labor rights proceed from an uncompromising *laissez-faire*<sup>66</sup> premise that the international market should be left completely free of labor regulations, a premise that has been rejected by every industrial country in promoting its internal economy.

One might thoughtlessly say that how a country regulates its own labor market is that country’s business. Each country should decide what social policies it should recognize and promote for its people. Whether India allows its children to work, Afghanistan prohibits its women from working, or China prohibits unions and collective bargaining—none of this is our concern. We should not condition imports from another country on that country’s choice of labor policy or its labor practices.

But is it none of our concern? Are we not entitled, indeed obligated, to insist on our common humanity? Cannot, indeed, should not, our concern for how workers are treated transcend national boundaries? Certainly, as individuals we may refuse to buy goods produced under conditions that we find morally repugnant, not only to pressure for change, but to avoid participating in, and benefiting from, morally repugnant practices. It seems to me that we, as a nation, can appropriately bar imports produced under conditions that offend our common moral sensibilities, particularly when the world community shares those sensibilities. We can rightly choose to forgo the comparative advantage of free trade in

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<sup>66</sup> Warner, *supra* note 62, at 105. Warner states,

Where . . . international consensus exists, I believe that we all as intelligent fully informed humans, can make the choice to have a lesser degree of global welfare, a lesser degree of the productive and distributive efficiency that gives rise to that global welfare, because there are certain higher values to which we all agree.

*Id.* Despite this genuflection to “higher values”, the economic approach prevailed, for Warner would give a presumption in favor of free markets except in a “narrow class of egregious human rights violations,” such as genocide and apartheid. *Id.* at 110.

cheaper shoes and shirts and rugs produced by child labor rather than support and participate in a labor practice that we have for nearly one hundred years declared socially and morally intolerable. We might remember that this was our response to apartheid, and we might note that the WTO explicitly allows such action in the case of forced labor.<sup>67</sup> As Professor Hepple has said, "The struggle to restrain the unbridled power of 'transnational corporations' is the greatest task of contemporary 'labor' law."<sup>68</sup>

#### 4. THE WTO'S ROLE IN PROMOTING LABOR RIGHTS

Beyond the appropriateness of our individual or national conduct is the appropriateness of action by the WTO. If an international organization is to establish an open global market and enforce international free trade, does it not have an obligation to place limits on that market to protect internationally recognized social and human values?<sup>69</sup> It is the only international structure with the capacity to curb the market forces it has unleashed.

The Battle in Seattle was a battle in the continuing clash of worldviews. On the one side were those who see the world in economic terms. For them, free trade is an inviolable principle that promotes economic development and works for the economic benefit of all. Any regulation limiting that freedom violates that principle and undermines its benefits. On the other side were

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<sup>67</sup> General Agreement on Trade and Tariffs ("GATT"), Oct. 30, 1947, art. XX, 61 Stat. A-3, 55 U.N.T.S. 188, 262 (allowing exemptions from free trade "to protect public morals"). In 1995, the WTO began enforcing the GATT. See WTO, 1 GUIDE TO GATT LAW AND PRACTICE 8 (1995). Article XX(e) allows the banning of imports made by prison labor. See Christopher S. Armstrong, *American Import Controls and Morality in International Trade: An Analysis of Section 307 of the Tariff Act of 1930*, 8 N.Y.U. J. L. INT'L L. & POL. 19 (1975) (discussing the legislative history of GATT and its implications regarding policy considerations).

<sup>68</sup> Hepple, *supra* note 33, at 362.

<sup>69</sup> For a comprehensive analysis of the tension between free trade and social values in the WTO, see Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658 (1996). Professor Howse argues that the provision in GATT that the obligation to provide treatment as favorable to imports as that provided to domestic products should allow a country to exclude products that are produced under standards prohibited by the importing country's laws. Robert Howse, *Making Home for Human Rights at the WTO*, L. QUADRANGLE NOTES, Summer 2000. However, in the Tuna/Dolphin case, it was held that this related only to the physical characteristics of the product, not the manner of their production. *Id.* (citing GATT Dispute Report on United States—Restrictions on Imports of Tuna (June 16, 1994)). Therefore, the United States could not exclude tuna caught in nets that killed dolphins. *Id.*

those who see the world in social and moral terms. They see free trade as needing regulation to protect and promote non-economic values of human rights, the environment, and labor rights. The Battle in Seattle was in essence a battle of principle.

It should be noted that President Clinton's proposal was one of narrowly-limited principle; it was limited to the four core labor rights. There are other commonly recognized labor rights that have claims for protection of the market: the right to a safe and healthy work place, protection from excessive hours of work, protection from abusive treatment, and protection from violence. He did not even mention other human rights or protection of the environment. The opposition to his proposal was laissez-faire absolutism: there should not be even the most minimum limitations on international free trade. With such absolutism, compromise was foreclosed. The parties could not rise above principle to seek a balance between free trade and societal values. There was no ability to even consider engaging in a study to find such a balance.

This perspective fails to consider one of the most energizing motives in this country for such vocal opposition to free trade: U.S. workers' fear that competing goods imported from low wage countries will rob the U.S. workforce of countless jobs. It was largely this fear that mobilized local unions and union members. When imports of manufactured goods were small, this fear was limited, but in the last fifty years, those imports have multiplied and those fears have multiplied.<sup>70</sup> The free movement of capital, made more free and protected by the WTO, has aggravated those fears as U.S. employers have closed plants, moved production to countries with low labor costs, and shipped the products back to this country to compete with products made here.<sup>71</sup> When NAFTA was negotiated, it could not win congressional approval until a labor side agreement was negotiated for the declared purpose of protecting workers from "that giant sucking sound" south of the border.<sup>72</sup> It was this same fear of job losses that led to the defeat of

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<sup>70</sup> See Mark Weisbrot, *Globalization for Whom?*, 31 CORNELL INT'L L.J. 631, 642 (1998).

<sup>71</sup> See *id.* at 633-40.

<sup>72</sup> Mike Morton & Sabra Morton, *Galore v. Sore Sport*, N.Y. TIMES, Nov. 9, 1993, at A1 (quoting Ross Perot); see also Patrick Buchanan, *Giant Sucking Sound: Part II*, INTERNET BRIGADE, June 26, 1998, at <http://www.buchanan.org/pg-98-0626.html> (discussing NAFTA related job losses).

fast track authority for negotiating with Chile and to the strenuous resistance to the China trade treaty.

It is argued that free trade increases exports and provides new jobs; we are regularly given unsubstantiated statements touting the number of new jobs created by exports. But free trade also increases imports with a loss of jobs, and we are not told of the jobs lost. It is quite clear that the number of jobs gained is less than the number of jobs lost. It is estimated that the net loss of jobs to Canada and Mexico since NAFTA has been between 250,000 and 450,000.<sup>73</sup> The reason is obvious. The imports from low wage countries are predominantly labor-intensive, while exports to such countries are predominantly capital-intensive. If there were a dollar balance of imports and exports, the imports would represent more jobs than the exports, resulting in a net job loss. But there is not a dollar balance of trade. The annual trade deficit with Mexico since NAFTA has been between \$14.7 billion and \$15 billion, and with Canada \$18.5 billion.<sup>74</sup> This translates into an increased net deficit of more than 400,000 in jobs. The same pattern applies to other developing countries; on a global basis our annual trade deficit is more than \$250 billion,<sup>75</sup> which translates into a deficit of many more jobs.<sup>76</sup>

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<sup>73</sup> It was estimated by the Economic Policy Institute that after three years, 420,000 jobs had been lost. *The Failed Experiment: NAFTA at Three Years*, PUBLIC CITIZEN, GLOBAL TRADE WATCH, at <http://www.citizen.org/pctrade/nafta/reports/epijoint.htm>. (last visited Jan. 27, 2001). After five years, 215,000 workers were certified as laid off under the U.S. Department of Labor NAFTA Trade Adjustment Assistance Program. See SCHOOL OF REAL LIFE RESULTS REPORT CARDS, PUBLIC CITIZEN GLOBAL TRADE WATCH (Dec. 1998), at <http://www.citizen.org/pctrade/nafta/reports/5years.htm>. Many workers do not even know the assistance program exists and many others do not apply for assistance. See ROBERT A. BLECKER, *The Political Economy of the North American Free Trade Agreement*, in U.S. TRADE POLICY AND GLOBAL GROWTH, *supra* note 35, at 136, 144 (explaining that alternative methods to estimate the outflow of direct foreign investment and to translate investment reductions into job losses result in estimates of joblessness due to NAFTA ranging from 260,000 to 490,000 for the period of 1992 to 2000).

<sup>74</sup> SCHOOL OF REAL LIFE RESULTS REPORT CARDS, PUBLIC CITIZEN GLOBAL TRADE WATCH, *supra* note 73.

<sup>75</sup> CATHERINE MANN, *IS THE U.S. TRADE DEFICIT SUSTAINABLE?* (1999). Mann also notes that the deficit on goods was even greater because of a surplus of services. See *id.* at 34-36.

<sup>76</sup> Dale Belman & Thelma Lee, *International Trade and Performance of U.S. Labor Markets*, in U.S. TRADE POLICY AND GLOBAL GROWTH, *supra* note 35, at 61-63; Erickson & Mitchell, *supra* note 31, at 178-79 (arguing that the deficit is the primary cause of the fact).

As a result of their experience in the global market, workers, particularly those in manufacturing industries, know that free trade threatens their job security, that the products they make will be driven out of the market by competing products made by cheap labor abroad, and that their plants may be moved abroad to take advantage of cheap labor. The fear has, for the time being, been only partially dulled by present full employment, but it remains real and justified.<sup>77</sup>

The union movement has for the last fifty years been a strong advocate of free trade, though that has not prevented it from pressing for protection against the consequences of free trade when particular industries suffer from foreign competition, as did the auto industry in the 1980s<sup>78</sup> and the steel industry in the 1990s.<sup>79</sup> Unions are not prepared to repudiate outright their policy of free trade, though because of the NAFTA experience they did block negotiations with Chile for a free trade agreement.<sup>80</sup> Unions accept in principle the economic argument that free trade increases our economic welfare, but they fear its consequences for the workers affected. Torn by this conflict, they have eased it by supporting free trade subject to protection of core labor rights, even though this does little to reduce the reasons to fear. To the extent that opposition to free trade is fueled by fear of job losses, it is a rejection of the economic reasoning of comparative advantage.

From this perspective, the Battle in Seattle was a battle on two fronts. On one front, it was a battle between the worshipers of efficiency and the missionaries of human and social rights. On the other front, it was a battle between those who pursued the claimed economic gains of comparative advantage and those who rejected, at least in part, its economic consequences.

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<sup>77</sup> Economists do not agree whether the trade deficit affects jobs. *See, e.g.,* Robert Scott & Jesse Rothstein, *American Jobs and the Asian Crisis: The Employment Impact of the Coming Rise in the U.S. Trade Deficit*, ECON. POLICY INST., BRIEFING PAPER, (Apr. 14, 1998) (finding that if the U.S. trade deficit increases as predicted, some 1.5 million U.S. manufacturing jobs will be eliminated). *See also* KRUEGER, *supra* note 58, at 48 (pointing out that "trade deficits widen when U.S. economic growth is good and job opportunities abound, and shrinks when an economic slowdown occurs and the unemployment rate rises").

<sup>78</sup> *See* Kuttner, *supra* note 35, at 6.

<sup>79</sup> *See id.* at 26.

<sup>80</sup> Christel Fonzo-Eberhard, *Chilean Trade vs. American Gridlock*, YALE INT'L FORUM ON-LINE, Summer 1996, available at <http://www.yale.edu/iforum/summer1996/grandstandsSum96.htm#Chilean Trade vs. American Gridlock>.

This perspective requires us to examine more carefully the underlying premise of comparative advantage, which is accepted almost universally by economists, and is not directly challenged by those who would impose restrictions on free trade. I am not prepared to question here the general theory that if each country can produce the goods in which it has a comparative advantage and freely exchange them for goods in which another country has a comparative advantage, the overall economic welfare of both countries will benefit. The theory of comparative advantage, however, gives us limited guidance on the question of whether free trade should be tied to certain labor rights, because it focuses only on economic efficiency and excludes consideration of societal values.

First, the theory omits consideration of the distribution of economic gains. Each country may have a net economic gain, but there are inevitably winners and losers in each country. Goods imported into the United States, particularly those from developing countries, are predominantly labor intensive goods that can be produced by lower skilled and unskilled workers: shoes, textiles, clothing, toys, and assembly of cars, household appliances and electronics.<sup>81</sup> As a result, the losers in the United States at the present time are primarily workers in manufacturing industries, particularly those with fewer skills. They are the low wage workers who have the greatest difficulty finding other jobs and generally end up with jobs paying less than the ones they lost due to increased imports. The winners are those hired in the new jobs created by increased exports, which are predominantly in capital-intensive industries. They are predominantly the highly trained workers who are higher paid and in short supply in the present job market. The loss is imposed on those lower in the income scale, namely, minorities and women; the gain is enjoyed by those with more education and higher incomes.<sup>82</sup> The loss has thereby contributed to the growing disparity of wealth and inequality in our society.<sup>83</sup> United States workers sense this reality. Two-thirds of

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<sup>81</sup> See WOODWARD, *infra* note 88.

<sup>82</sup> See Erickson & Mitchell, *supra* note 31, at 177, tbl. 4; Andrew Kohut, *Globalization and the Wage Gap*, N.Y. TIMES, Dec. 3, 1999, at A31 (citing the survey by the Pew Research Center).

<sup>83</sup> See Belman & Lee, *supra* note 76, at 72-78 (demonstrating that there is a body of evidence on hand to demonstrate that international trade has caused wages and employment to decline in the U.S. manufacturing industry and that



those earning more than \$75,000 per year believe that they will be better off as a result of the global economy, while two-thirds of those earning less than \$50,000 believe they will be worse off.<sup>84</sup>

The very process of moving jobs from importing industries to exporting industries is disruptive, particularly for the workers affected. Rodrik has estimated that the disruptive effects of moving production will be five times the net gain. Insofar as we value stability in workers' lives and greater equality, these must be counted as not only economic costs but societal costs of free trade.<sup>85</sup>

There are also winners and losers in the developing countries. Those who obtain jobs in the export industries are the winners; although their wages are low, they often earn more than they would elsewhere. Those who do not obtain jobs are not so much losers as left behind.<sup>86</sup> The losers in many developing countries are those who go to the cities with the expectation of jobs, only to find unemployment, hunger, and squalid living conditions and are often worse off than they were before. As in the United States, the effect is to increase the inequality in society. Studies have shown that in most developing countries, inequality between the bottom forty percent and the top sixty percent has significantly increased with free trade.<sup>87</sup> That inequality must be counted as a social cost of free trade.

There is a third level of inequality—that between developed countries and developing countries. In theory, global integration will bring economic convergence; lowering barriers to international trade should in principle reduce the degree of inequality. Studies indicate, however, that this has not in fact always occurred. Although there has been convergence in Southern Europe and East Asia, there has been increased divergence in other areas. In rela-

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international trade accounts for 10-20% of the increase in wage inequality in the United States in the last decade).

<sup>84</sup> See DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 14-18 (1997); Kohut, *supra* note 82.

<sup>85</sup> In describing the impact of NAFTA, Robert Blecker observed, "significant dislocation can be expected and the wage effects are likely to be negative. In fact, the distributional implications of NAFTA are almost the reverse of what free trade economists claim for trade liberalization." Robert A. Blecker, *The Political Economy of the North American Free Trade Agreement*, in U.S. TRADE POLICY AND GLOBAL GROWTH, *supra* note 35, at 164.

<sup>86</sup> See *id.*

<sup>87</sup> WOODWARD, *infra* note 88.

tive terms, the poor countries have become poorer.<sup>88</sup> The countries that have developed the fastest, Japan, Taiwan, South Korea, Southeast Asia, and China have done so with the most restrictive trade practices.<sup>89</sup>

Second, the theory is incomplete because it does not tell us what differentials in labor costs should count as a legitimate comparative advantage entitling it to protection in a free trade regime. Does the availability of slave labor entitle a country to claim that its comparative advantage gained by such labor should not be denied by restrictions on free trade in the products of slave labor? In its earliest and simplest expression by Ricardo, the reasoning was that where countries had a comparative advantage because of differences in availability of natural resources, then free trade in those resources was mutually beneficial. Where one country has available a supply of cheap labor, this might be viewed as a comparative advantage in a natural resource entitling that country to its benefits. But should the availability of child labor, or the willingness of women to work for less than men, be counted as a legitimate comparative advantage entitling that country to claim its benefits through free access to the international market? Should a country, by prohibiting unions and collective bargaining, be able to claim a comparative advantage entitled to protection? The same problem is posed by other labor conditions that may affect the costs of production—dangerous and unhealthy work, long hours of work, lack of rest periods. Neither Ricardo nor present day economists tell us what should or should not count as a comparative advantage when dealing with the labor factor of production. Economists do not tell us what should or should not count as a comparative advantage, because their theories simply describe how the market works.

Comparative advantage is measured in terms of the costs of production, with an indifference to how those costs are constituted. If a country can produce cheaper goods by using slave labor, the theory of comparative advantage simply tells us that free trade with a country that permits slave labor will be economically beneficially to both. The free labor country will benefit from the low

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<sup>88</sup> For a description and explanation of this phenomenon, see DAVID WOODWARD, *GLOBALIZATION, UNEVEN DEVELOPMENT AND POVERTY* (U.N. Dev. Prog., Working Paper, 1998).

<sup>89</sup> Jessica Collins & John Miller, *Know-Nothings and Know-it-Alls: What's Wrong with the Hype About Globalization*, *DOLLARS & SENSE*, Sept./Oct. 2000, at 41.

prices of the imported goods made with slave labor. The theory does not tell us whether the rules of international trade should guarantee an open market for slave-made goods. It does not tell us whether an importing free labor country should be allowed to forgo the benefit of a lower price and bar the import of slave-made goods. The theory is similarly unable to tell us whether an importing country should be allowed, for non-economic reasons, to restrict the importation of goods made by child labor or by women paid less than men, produced under dangerous or unhealthful conditions, or by workers required to work intolerable hours without rest. The argument that free trade requires recognition of a country's comparative advantage regardless of the source of that advantage legitimates labor conditions that violate fundamental rights. The argument here is not that comparative advantage should not be considered in determining the rules of international trade, but rather that it should not be the sole consideration. It speaks only to economic benefits, but there are other social and moral values to be considered.

This brings us back to the beginning. The protesters in the Battle in Seattle were not, in the words of the *Economist* "militant dunces parading their ignorance through the streets of Seattle."<sup>90</sup> Fundamental values were at stake. On one side were those who, proceeding from the theory of comparative advantage insisted that international trade should be unrestricted regardless of the source of that advantage. This, it is argued, is essential for economic development and general economic welfare; the value of economic gain is the sole consideration. On the other side were those who insisted that a comparative advantage, when gained by denying fundamental rights, should not be entitled to protection in the international market. Economic development should not be bought at the expense of all other social values.

Although there is a clash of values, a livable compromise is possible. Developing countries can retain their legitimate comparative advantages while recognizing at least minimum fundamental values. As it was pointed out earlier, recognition of the four core labor rights would increase costs minimally, if at all. It was the WTO's adamant refusal to recognize any social values other than the economic that fueled the fervor in the streets of Seattle.

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<sup>90</sup> See *The New Trade War*, *supra* note 7.

There was the second clash, that between those who sought the benefits of free trade based on comparative advantage and those who feared its consequences. Compromise here is more difficult, if not impossible. Introduction of free trade inevitably means loss of jobs in importing industries, and those put out of work can seldom be channeled into the new jobs created by exports. Mobility of capital has doubled this impact of free trade. Domestic plants are closed, production is moved to low wage countries and the products are shipped back. Employees in the closed plants lose their jobs, and some workers in the remaining plants also lose their jobs because of the low cost imports produced by the relocated plants. Most of the displaced workers, even in a period of full employment end up in poorer jobs or unemployed.<sup>91</sup> Clash here is inevitable and we should not denigrate those who protest as "militant dunces." They know they are being hurt by free trade and understandably protest. But to relieve their pain would require denying developing countries of all their comparative advantage in lower labor costs regardless of the source.

Because society as a whole benefits from free trade, then society has an obligation to aid those who bear the pain so that others might enjoy the gains. There is probably no fully adequate answer. At a minimum, those displaced should be aided in making the transition to other jobs. This is the declared purpose of the Trade Act of 1974,<sup>92</sup> which has provision for special assistance for workers whose jobs are adversely affected by competing imports. The primary benefit is extended unemployment compensation. Job training is nominally required, and counseling, job search assistance and relocation allowances are nominally available through state agencies.<sup>93</sup> But only one out of three receiving employment benefits obtain any of these other services. Similar provisions were statutorily made for those displaced as a result of NAFTA<sup>94</sup> with

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<sup>91</sup> See Smith *infra* note 92.

<sup>92</sup> 19 U.S.C. § 2102 (1994); Mary Ann Joseph, *Trade Adjustment Assistance: An Analysis*, 6 CONN. J. INT'L L. 251 (1990); Whitney John Smith, *Trade Adjustment Assistance: An Underdeveloped Alternative to Import Restrictions*, 56 ALB. L. REV. 943 (1993).

<sup>93</sup> Unemployed workers can get two years at approved colleges or vocational training with a monthly stipend of \$245, cost of job seeking, and relocation costs. Only half of those entitled to school or job training and only one in ten got jobs they trained for. Debra Beach, *Restraining Lifeline Fails to Reach Some Jobless*, HOUS. CHRON., Feb. 6 1994, at A1.

<sup>94</sup> 19 U.S.C. § 3203 (1994) (providing for job training).

equally meager substance.<sup>95</sup> These programs point in the right direction, but because of limited benefits, inadequate training programs, and weak administration, they take only mincing steps toward meeting the need.<sup>96</sup> The primary failure results from our unwillingness to appropriate adequate funds. In simplest terms we are unwilling to pay taxes to meet this social obligation. We are anxious to enjoy the benefits of free trade and willing to let low wage workers bear the burden.

## 5. CONCLUSION

Uncompromising insistence that free trade should in no way be conditioned on observance of core labor rights is rooted in the unarticulated premise that recognition of basic human rights is economically inefficient. A developing country that recognizes these rights will discourage investment necessary for development. Capital, which moves freely across national boundaries, will flow to those countries that do not protect such rights. If that premise is factually valid, which is not beyond doubt, or if it is accepted as valid, then every developing country will try to attract potential investors by lowering standards and giving investors a freer hand than other countries competing in seeking investments. All countries will be caught in a race to the bottom; none can economically afford to recognize and protect basic labor rights.

Developing countries can be protected from the race to the bottom only if all are equally subject to pressures to recognize basic labor rights. There is no international agency other than the WTO able to effectively exert pressure for observance of rights on a global basis. For the WTO to disclaim responsibility and say that the task should be left to the "appropriate body"—the powerless ILO—is transparent criticism. There is no likelihood that the ILO can or will be given the ability to do more than make reports and

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<sup>95</sup> The only workers eligible are those who produce a product that is directly affected by NAFTA, effectively excluding service and retail workers and manufacturing workers indirectly affected. Retraining and assistance expenditures have been \$418 for each laid off worker. SCHOOL OF REAL LIFE RESULTS REPORT CARDS, PUBLIC CITIZEN GLOBAL TRADE WATCH, *supra* note 73 (providing calculations based on number of workers certified up to May 1998 and the money spent on workers documented by Journal of Commerce, May 13, 1998).

<sup>96</sup> For a critical analysis of these programs, see Paul T. Decker & Walter Corson, *International Trade and Worker Displacement: Evaluation of the Trade Adjustment Assistance Program*, 48 INDUS. & LAB. REL. REV. 758 (1995).

issue statements that are regularly disregarded by countries violating the conventions they have signed.

The WTO is the one international agency with the ability to exert pressure on all countries to observe these rights. Not by itself directly enforcing these rights, or by requiring the government of any country to enforce these rights, but by not extending its protection to goods produced in violation of these rights, and allowing any member country to burden imports of such products. Article XX of GATT can be simply amended to provide that products produced under conditions violating basic labor rights shall not be protected from duties, quotas, or embargoes that any country chooses to levy. This will not bar such products in international trade for some importing countries may be indifferent to violation of some or all of these rights. But it will enable those countries who do object to violations of these basic rights to bar products of such violations, and thereby pressure producers in the exporting countries to observe these rights.

There would, of course, be practical administrative problems of identifying the particular products that were produced in violation of the basic rights. In addition, over time there would almost inevitably be demands to expand the protected rights beyond the four core labor rights. But it is important, for the future evolution of free trade toward lifting living standards in all countries, to articulate the principle that free trade is not an absolute, and that the freedom of international trade is subject to observance of internationally recognized basic human rights.