



INTERNATIONAL ORGANISATION OF EMPLOYERS
ORGANISATION INTERNATIONALE DES EMPLOYEURS
ORGANIZACIÓN INTERNACIONAL DE EMPLEADORES

INTERNATIONAL LABOUR AND SOCIAL POLICY REVIEW

2009



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PREFACE

This is the third edition of the IOE's *International Labour and Social Policy Review* a publication which was first launched in June 2007.

The original purpose of the *Review* was to act as a vehicle for policy and technical contributions by IOE members - national employers' organizations. This year however we have decided to change that unique business focus and position the *Review* as a broader publication, with a mixture of articles also coming from outside business circles. Consequently, we have invited contributions beyond the traditional employer constituency, including the heads of four international organizations.

William L. Swing, Director General of the International Organisation of Migration gives an overview of where and how business fits in the debates on migration and mobility. Pascal Lamy, Director General of the World Trade Organization provides a current synopsis of the global trade picture and the importance of resisting protectionist impulses. Navanethem Pillay, UN High Commissioner for Human Rights, gives a summary of the business and human rights debate, and finally the Director-General of the International Labour Organization, Juan Somavia outlines why the ILO is more relevant than ever for business.

From the trade union movement we asked Jim Baker, Coordinator, Council of Global Unions to provide an outline from a trade union perspective of the current travails of the global economy and the possible consequences for global policy dialogue and industrial relations. Similarly, Jenni Myles, Director of Employee Engagement & HR of G4S plc, gives her impressions and experiences of global dialogue and how it might be shaped going forward.

Peter Anderson, Chief Executive of the Australian Chamber of Commerce and Industry asks in his article, what the private sector should expect from its representative organizations, particularly in a time of crisis. Stefan Jan Marculewicz, Principal, Miles & Stockbridge P.C. provides an analysis of the proposed *Employee Free Choice Act* of 2009 which if passed would significantly change the industrial relations landscape in the United States.

Finally, Nobuo Tateisi, Chairman of the Japan Business Federation's committee on international labour affairs, gives an overview of current economic and social conditions in Japan and how the crisis is affecting them.

We asked contributors to provide us with articles that were pertinent in terms of the current economic crisis; that asked questions; and above all that were frank and honest in their delivery. We have not been disappointed and I feel the mixture and balance of articles in this year's *Review* make this a very rich and exciting publication.

Finally, I warmly thank all our contributors for taking the time to contribute to this the 2009 *Review*.

Antonio PEÑALOSA
Secretary-General



ABOUT THE IOE

The IOE is a membership organization that promotes the interests of employers and their organizations from all over the world at the international level through representation, information and advice.

The IOE provides leadership for the business community in all areas of social and labour policy and proactively participates in international policy development that seeks to create a framework that underpins enterprise creation and development.

It provides an international forum that brings together national employers' organizations and their members from around the world and facilitates the exchange and transfer of information, experience and good practice amongst the business community globally.

The IOE was founded in 1920 and today represents 148 national members in 141 countries.



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WHAT THE PRIVATE SECTOR EXPECTS FROM ITS REPRESENTATIVE ORGANISATIONS

Peter ANDERSON - Chief Executive

Australian Chamber of Commerce and Industry

Each day employers get on with business, employ people, lift living standards and contribute to communities. What is less visible is the work of employer organisations and the support they provide employers. Employer organisations have been in existence for more than a century, and can be found in almost all nations of the world. Yet there is little understanding outside of the employer movement about what employer organisations do and the rich history they have developed in their service provision. Understanding what the private sector expects of its employer organisations provides an insight to their future relevance and effectiveness.

Employer organisations are institutions established to bring together individual and often disparate private sector interests around common purposes and for collective action.

As such, the principles of freedom of association and collective organisation, which are upheld as fundamental labour standards in the forums of the International Labour Organisation (ILO) and in its statutes and practices, are vitally important to the private sector. They are not the sole domain of organised labour.

The culture and operation of employer organisations is not identical to that of organised labour. Members of employer organisations directly compete in the marketplace against each other, more so than members of trade unions (though competition amongst employees is still a feature of labour markets riddled by unemployment or underemployment). Moreover, employer organisations tend to apply pragmatic approaches to the interface between politics and industrial advocacy. Where democratic political structures exist, they usually work with governments of the day to advance the cause of private sector interests, and tend to be less activist than organised labour in seeking social change or the removal of governments of a particular persuasion.

Notwithstanding differences in working methods between employer organisations and trade unions, the application of freedom of association principles is similar. The right to voluntarily and freely establish and determine rules and structures, the right to operate independently from the influence of the state or external interests, the right to be recognised and consulted on industrial and economic matters, and the associated rights of free speech, expression and thought are applications of the freedom of association principles that employer organisations value co-jointly with the ILO, organised labour and many world governments.



THE ROLE OF EMPLOYER ORGANISATIONS

Employer organisations make a very real contribution to a healthy and outward looking society, both institutionally and through the voice and vigour they give to the private sector, and the dynamism that accompanies entrepreneurship.

Many employer organisations were formed for defensive purposes, as a response to the organisation of labour in the second half of the 19th century. Industrial unrest, and the regulatory and policy responses by governments to issues such as industrial safety, wages and working conditions established the need for a collective voice (and in some cases common action) by private businesses and governments. However, it would be wrong to think that employer organisations exclusively fulfil a defensive role. Employer organisations are now critical links between governments, unions and the private sector on a range of business and public policy issues. They also deliver programmes and services that add value to the quantity and quality of employment, and add to productivity and living standards.

It is no coincidence that in the 150 years following the formation of employer organisations we have seen a wide embrace of the economic and social benefits that accrue from employment. There is also a widespread recognition of the contribution made by the private sector to the order of society and the functioning of stable labour and product markets.

Increasingly employer organisations have also come to be a repository of knowledge, advice and learning. This has enabled employer organisations to materially contribute to human resource programmes that lift workforce skills, and to policies that espouse freedom in labour movement, responsible and fair employment practices, good corporate governance, and attention to corporate social responsibilities.

Employer organisations need to practise what they preach when it comes to freedom of association. Freedom to associate includes the freedom to not associate, based on individual choice and conscience. Membership of employer organisations is voluntary. While the case for membership is strong and needs to be strongly promoted, coercion is as unsuited to employer organisations as it is (or should be) to organised labour.

Given this, and recognising that employer organisations are fundamentally service providers, the first imperative of employer organisations is to win the hearts and minds of employers, so that strong, stable and representative bodies can be created and sustained.

Much attention needs to be given to capacity building of employer organisations. While this is true even in the case of long established and well-resourced organisations, it is imperative in smaller nations or those with narrow economic bases or unhelpful government or regulatory systems.



In such cases, regional support between employer organisations with a view to capacity building is highly desirable. The International Organisation of Employers (IOE) works effectively to promote such initiatives, as does the International Labour Organisation through its Employers Bureau, ACT/EMP. The task should not be left alone to these international bodies. There is scope for regional and sub-regional capacity building initiatives.

By way of example, the Australian Chamber of Commerce recently participated in two such initiatives. In 2005 a member of the ACCI General Council was commissioned to provide capacity building support to the employer's organisation in Laos. His report drew attention to the building blocks of structure, governance and membership promotion that underpin the subsequent provision of business services. At the same time a strong collaborative network was established between ACCI and Business New Zealand to assist employer organisations in the smaller economies of the Pacific islands. This led to formal and informal information sharing on training, membership services and economic conditions.

RESPONDING TO EMPLOYER NEEDS

In order to win the hearts and minds of employers, and provide relevant services, employer organisations need to ask the question posed by this article – what does the private sector expect from its representative organisations?

This is not just a question for newly formed, or to be formed, employer organisations as they strive to secure a critical mass of membership. It is also relevant to established organisations, which face the need to retain and build membership. Indeed, it is arguably more important for established employer organisations, given the risk that as time goes by creative energies diminish and past achievements become a source of comfort that can lead to complacency. Healthy businesses will seek to continuously improve, to assess competitive forces, market positioning, and the relevance of customer and client needs. Like member businesses, employer organisations must move with the times, and modernise.

The Australian Chamber of Commerce and Industry undertook such an examination of operations in the second half of 2008. A case example of this work is presented at the conclusion of this article.



BEING RELEVANT

The most fundamental expectation from the business community is that its employer organisations are relevant. Relevance means providing services that meet current needs and cater for circumstances as they exist and unfold.

Relevance requires adaptability to changing business, economic, industrial and social environments. The pace of change in developed and developing economies, driven in part by globalisation and technology, is far reaching. The environment in which business organisations operate is fast moving, more complex and less certain.

The global economy affects business conditions like never before. At any given moment decisions by governments can be affected by events on the other side of the world as much as by events around the corner. The financial crisis that gripped the global economy in September 2008 and is still buffeting nations is a dramatic illustration of how business environments and labour markets can change in a short space of time, requiring resource and service re-allocation by employer organisations.

Economic and political change affects societies, not just economies. Social change affects workforce participation and attitudes to work. Communities expect more from businesses and business leaders, and corporate conduct is under closer scrutiny. The services provided by employer organisations also need to be tailored around these considerations.

These challenges carry both risk and opportunity for employer organisations. Regulation and compliance is increasing, as is competition. Mistakes in business management carry heavier risks. Running a business without access to good advice from employer organisations is high risk. Even knowing what is going on in national affairs or knowing where to find out is beyond many in business. In these environments employer organisations can communicate a potent message to industry about the benefits of membership, provided their services are relevant and of high quality.

BEING PURPOSEFUL

Employer organisations need to know what they stand for, and clearly express their core values and beliefs. Without employers and the broader community knowing what an organisation stands for they are unlikely to join it, listen to its views or give it respect and recognition.

Although some members of employer organisations may be publicly funded employers in the community, health, education or charitable sectors, most employer organisations are established for purposes that support employers generally and with specific emphasis on employers in the private sector.



This has led most employer organisations to develop statements of purpose that set out their objectives, such as the promotion, advancement and protection of employers, particularly in the private sector.

Statements of purpose often draw on the constitutional objectives of an organisation, but may also expand upon them or express them in more contemporary terms. 'Support for entrepreneurship, private investment and employment' is an example of a simple statement of purpose.

Statements of purpose have dual purposes. Firstly, they act as a point of reference for members, prospective members and external stakeholders to understand the nature of the employer organisation and the common causes around which it provides services and undertakes representation and advocacy. Secondly, they assist executives and staff with internal planning, work or training programmes and the prioritising of resources. Like many other businesses, the day-to-day work pressure in an employer organisation can inevitably lead staff (especially newer or less experienced employees) to question what has been achieved, or the relevance of a particular task. Statements of purpose can act as touchstones against which activities can be tracked as being relevant to the overarching goals of the organisation. This can have the effect of lifting morale, productivity and internal collaboration.

All organisations have values, but not all identify or list them. In addition to statements of purpose setting out core beliefs and objectives (i.e. why the organisation exists), many employer organisations have adopted statements of values describing the attributes by which the organisation will conduct its affairs (i.e. how the organisation intends to go about achieving its goals).

The culture of an organisation can be defined as the sum total of its values and the way they are implemented. Value statements often reflect both the aspiration, and the actuality. The value or values that underpin a positive or a negative culture are imprecise, but nonetheless real. They often reflect the unstated mood and feel of an organisation, and its leadership. For example, it does not take long to work in an organisation or to be a client of a business to determine if it has a positive 'service-based' culture, or conversely a negative 'just do the minimum necessary' culture. Examples of positive values often reflected by employer organisations include 'creativity', 'professionalism', 'inclusiveness', 'persistence', 'excellence' and 'independence'. There are many more.

Given that values and cultures are a reflection of the collective ethic of officers, executives and staff, it is highly desirable that statements of values be developed through an inclusive process, such as workshops and team meetings. Experience in a number of employer organisations, and businesses more generally, suggests that the development of statements of values can be an enriching and bonding experience amongst executives and staff if undertaken in a forward-looking and non judgmental manner. The implementation of agreed organisational values can create coherence and direction for those involved in its leadership, operational activities, and service delivery.



BEING MEMBER DRIVEN

For employer organisations to be true to their purposes and relevant, they must be member driven. An organisation cannot be a credible voice of employers without knowing and advocating what member employers believe, and without meeting the actual needs of employers at a given point in time.

Being member driven has both internal and external elements. An employer organisation is member driven if it has governance and organisational structures that provide for meaningful consultation with and feedback from employers in the development of policy, strategy and work priorities. This internal element should operate both prior to the delivery of services by an employer organisation (i.e. consultation in planning) and after the delivery of services (i.e. feedback on the effectiveness of services).

The external element of being member-driven involves the employer organisation communicating to external stakeholders those matters that members have collectively agreed on through internal member consultation and feedback. In practical terms, this means that the employer organisation is truly the voice of its employer members and the bridge to external stakeholders. External stakeholders include unions, governments or the broader community.

In both these internal and external processes it is important that employer organisations do not exist for the purpose of one individual office-bearer or the commercial interest of a single member. Rather, the collective nature of employer organisations means that they must operate in the service of members at large. Often this requires governance and consultative structures in employer organisations to be robust, inclusive and fair. Employer organisations must ensure that powerful or loud voices in their membership are reflective of majority views, if they are to be given influence. Office-bearers and executives must always be aware that members are commercial organisations competing against each other, and not put the organisation in a position of conflict of interest by associating with the views of one member or a group of members against the interests of other members. These are not always easy matters to resolve. The values of executives and senior officers can sometimes be tested in ensuring that the organisation remains truly member-driven and professional in this broad collegiate sense.

When an employer organisation is truly member-driven the benefits can be significant. Firstly, the standing and goodwill of the organisation is enhanced, making it more likely that external stakeholders such as governments will listen and take action as advocated by the organisation. Secondly, the advocacy and representation work of the organisation is made easier because members are more motivated to be involved and express third-party support for the work of the employer organisation. This too can increase the chance of successful outcomes being achieved. Thirdly, there are membership benefits. Existing members are more likely to maintain membership if their views influence strategies or outcomes. Non-member employers in the industry



or region are more likely to join if they believe their involvement would be valued and able to make a difference.

BEING SERVICE ORIENTED

An employer organisation is a service provider. While some employer organisations trade and sell goods (such as publications), the principal activities of employer organisations involve representation, advocacy, training, networking and policy development. Each of these activities is labour intensive, and involves the application of knowledge, learning, and the building of personal relationships with members, stakeholders and decision-makers.

The application of intellectual capital requires an employer organisation to have high-calibre executives and staff. The personal attributes of executives and staff, together with the organisation's values, make an enormous difference to the credibility and relevance of the services provided, and ultimately their effectiveness. Employer organisations which best perform are those where there is a judicious mix of balancing attributes; for example, where experience is mixed with new creative thinking; where there is a combination of leadership and listening; where there is both enthusiasm and order; where adaptability and flexibility is tempered by consistency in message; and where knowledge and research combines with instinct and inventiveness.

The building of personal relationships remains a key to effective service delivery. Personal relationships developed in a professional context are based on trust and credibility. Establishing trust involves honesty in advocating member views and, equally important, demonstrating respect for the views of others even where they differ from the views of the employer organisation. Credibility is based on advocacy and representation that is soundly grounded in up-to-date knowledge of what is happening in industry, in evidence-based research, and maintaining a persistence and consistency over time in expressing the views of the employer organisation.

The services provided by employer organisations need to be constantly evaluated, and prioritised. This should be done in an organised way, ideally through annual planning involving members, elected office-bearers and staff.

There are many pressures on employer organisations to provide more and more services, as the needs of members increase, and the industrial, economic and regulatory environments in which employers operate become more complex. One challenge for employer organisations is to not stretch service provision so far that the organisation is unable to effectively deliver on its plans. Planned services need to be tailored to available resources. Where resources are limited or not available, services need to be cut back. Like governments, an employer organisation loses credibility if it promises but fails to deliver on its promises. Conversely, when new or increased resources become available, any expansion of services needs to be carefully planned, with realistic expectations established up front of time frames for their delivery or longevity.



Services delivered by employer organisations should be quality assessed in a structured way. At all times employer organisations need to recognise that since the resources of members are being expended, members are entitled to know that the quality and relevance of services are evaluated. The way that employer organisations evaluate services will differ depending on the services themselves, and the resources and capacities of the organisation. In some cases direct feedback sessions will be held with staff members or contractors delivering services. In other cases member feedback will be sought, sometimes through member meetings, at other times through written or electronic surveys. Such feedback is invaluable, as it can make the future delivery of services more relevant and effective, thus adding to member support for the employer organisation and effectiveness in achieving its purpose.

OFFERING VALUE FOR MONEY

Most employer organisations are not-for-profit bodies constituted by members who join on a voluntary basis. While some organisations have built up assets over time that produce income, most of the operating revenues of employer organisations are funds paid by employers, whether through direct member subscriptions, or monies received for specific services such as training programmes, representation services, specialised advice or the sale of publications.

This means that employer organisations are under ongoing pressure to ensure that the services provided represent value for money for members and clients.

Identifying value for money involves proper management of the financial affairs of organisations. It also involves an assessment of services provided, and their relevance and effectiveness.

Proper management of financial affairs is fundamental to the sustainability, credibility and membership levels of an employer organisation. Businesses will not have confidence in an employers' organisation that does not use monies wisely, or account for funds transparently. Budgets need to be prepared on at least an annual basis, and performance against budgets tracked throughout the year. Monies received and expended need to be accounted for in a transparent manner, and utilised or invested according to established work or financial plans. Accounts should be independently audited. Senior elected office-bearers of an organisation, including the President and Treasurer should be actively involved in this process and, where necessary, protocols for expenditure or investment of funds should be established by boards or management committees. Executives should not place themselves in a position where important financial decisions are made unilaterally and without the checks and balances that arise from involvement of senior office-bearers. Decisions on the level of subscriptions or the cost of services are best made in a collaborative manner. Members are more likely to pay subscriptions if they or their elected representatives have direct input into the amount or the cost of specific services.



Assessing value for money of member subscriptions is a more difficult task, but nonetheless important. While the value to a business of some specific services (such as a training programme) can be assessed in the short term, the value of advocacy, policy development and representation services of employer organisations requires medium and long term perspectives. This is because advocacy, policy development and representation are directed at third parties and external decision makers. Effectiveness in this area does not equate to immediate lobbying success. Professional, well researched and presented views may not be adopted by decision makers because of considerations beyond the control of the employer organisation – such as weight given to other factors or the views of other interests. In these circumstances the value for money in service delivery is reflected in work being performed with skill and expertise, and according to the values and purposes of the employer organisation.

Some employer organisations receive funding from governments or public institutions for specific programmes or purposes. Partnerships with governments and public authorities can be useful, especially where governments use employer organisations as the bridge to deliver a service to industry that would otherwise be provided by governments themselves. It is important, however, that when such arrangements exist the independence of employer organisations is not compromised, neither in terms of financial standing nor policy voice. Officers and executives of employer organisations need to ensure that at all times working relationships with governments are such that governments neither influence, control nor interfere in the affairs of employer organisations. Doing otherwise would breach the freedom of association of employer organisations, and erode their capacity to meet the purposes for which they are established.

In some countries the application of this principle is more difficult than others, especially where the resources of the private sector are limited, or governments act in a totalitarian or controlling manner. In these circumstances employer organisations need to seek out and be provided with support from employer bodies in other nations and secure the collective support of employer organisations world wide, as represented by the International Organisation of Employers.

CONCLUSION

Employer organisations are unique bodies performing a vital service for their members, and in the interests of industry more generally. The quality of the relationship between employer organisations and employers is paramount, and mutually reinforcing to both interests.

Effective employer organisations build the strength and capacity of employers in a region, country or industry sector. In turn, strong and capable employers build a more effective and successful employer organisation.



The circumstances of employer organisations differ markedly in the nations and regions of the world, and between developed and developing economies, and between those organisations that operate on an economy-wide basis, or those that are industry specific or regionally specific. Thus, the principles discussed in this article are of a general nature, and their implementation will depend on circumstances and capacities, both of the organisations and the individuals serving those organisations. Penetration of employer organisations into industry where there is a high level of activity in the informal economy is particularly difficult.

In an overall sense, employer organisations around the world are facing new and competitive pressures but also deliver services that are diverse, relevant and clearly needed. The strengths of employer organisations are their independence, their established standing, their respected and representative voice, and the capacity of that collective voice to be stronger and more effective than its members operating individually. While there can be no room for complacency, these strengths place employer organisations in an excellent position to meet the challenges of serving the employer community into the 21st century. This will only occur however if a conducive environment is created for the free and independent operation of employer organisations, and if employer organisations themselves implement strategic and operational goals to assess and respond to the needs of the employer community as economic and social circumstances rapidly evolve.

Case Example of Internal Review of Employer Organisation - Australia

Between July and December 2008 Australia's peak council of employer organisations, the Australian Chamber of Commerce and Industry (ACCI), conducted a structured review of its operations against business needs.

Doing so was healthy for ACCI's governance, and also for the organisation. It required the organisation to stand back from its busy day-to-day work, identify its strengths and weaknesses, listen to its members and position itself for future activities.

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CASE EXAMPLE OF INTERNAL REVIEW OF EMPLOYER ORGANISATION - AUSTRALIA

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The ACCI Board set terms of reference in July 2008, to be completed by December 2008. This enabled the review to be focussed and time specific.

ACCI used senior internal expertise and an independent external consultant to conduct the review.

The review occurred at the same time as the organisation needed to continue provision of all of its core services.

A time line for conducting the review was developed once the terms of reference were adopted.

Over August, September and October 2008 the review was conducted in three ways:

- ▶ an examination of operations, services and resources;
- ▶ individual discussions with staff, elected officers and members; and
- ▶ collective workshops of staff, elected officers and members.

These discussions and workshops were facilitated by the independent consultant, to enable views to be freely and openly expressed.

A draft report was prepared and presented in November 2008, and discussed in a final round of workshops.

Following further input, a final report was adopted by the ACCI Board in December 2008. ACCI members were immediately briefed on the report and outcomes discussed at a general meeting.

The outcome of the review saw the development of two documents:

- ▶ A three-year Strategic Framework 2009-2012. That Framework set out updated statements of ACCI's Purpose, Goals, Strategies and Values. It also identified the services to be provided over this period, and how those services are intended to benefit both businesses and member organisations; and
- ▶ A more detailed Operations Plan. That Plan made multiple specific recommendations about the structure and operations of ACCI, with a view to their implementation across the three year period of the Strategic Framework.



On completion of the review, ACCI members commented favourably on the openness of process and how the conduct of the review helped forge stronger internal relationships within the ACCI member network. Members developed a greater understanding of the capacities and multiple pressures on the employer organisation, and the organisation received valuable feedback about the effectiveness of its services. The review also reinforced some existing values and practices, and created a unity of purpose and approach, with all members being able to associate with future strategic directions, goals and governance.

In presenting the results of the review to members, the ACCI President said:

“ACCI’s Strategic Framework for 2009–2012 is an initiative for the progressive modernisation of ACCI. It marks out the strategic themes and directions to enable ACCI to consolidate and develop our activities and better serve Chambers and Industry Associations, and through that member network, the private sector.

It is also important to recognise that the secretariat will only be able to implement those recommendations that introduce new or different approaches in the context of maintaining our core business and services. We all therefore need to be realistic about what ACCI can do now and into the future.

The environment in which we operate is changing, but the need to do what we have been doing has not. We have the leadership and now the strategic principles around which we can collectively provide direction to meet those challenges.”

The ACCI Strategic Framework 2009-2012 is available from the Australian Chamber of Commerce and Industry or via the ACCI web site www.acci.asn.au.

* * *



GLOBAL POLICY DIALOGUE AND INDUSTRIAL RELATIONS: A TRADE UNION VIEW

Jim BAKER, Coordinator - Council of Global Unions¹

There is a broad political consensus that the deep financial and economic crisis that began in late 2007 raises a number of specific issues related to regulation of financial markets, as well as of the adequacy and capacity of inter-governmental organisations to cope with global economic relations. Of course, the de-regulation of financial markets that led to this situation also benefited from a similar global consensus across the political spectrum.

It would be a mistake, however, to believe that a little minor tinkering with the rules governing banks will solve the fundamental problems of the global economy. A return to “business as usual” will be a failure and will ensure that major crises will reoccur. It would be unrealistic to examine the current crisis in isolation or out of context. The consequences of the crisis are accentuating the already pronounced injustices in our societies. It is the many, with their jobs and their taxes, paying the price for the greed of a few. And, they have received no “golden handshakes”.

Everyday, in the press, we see references to the Great Depression. The economy is not the same as it was in the 1930's. However, there are many things in common. Leaders at that time realised that failed banks were not the only problem. They understood that the purpose of recovery was not to restore the very conditions that led to the Depression in the first place. President Franklin D. Roosevelt, in this inaugural address of 1933, dealt with the combination of business failure and the need to restore the value of government and the values of public service or as Roosevelt put it, “values more noble than mere monetary profit”. The President said:

“Recognition of the falsity of material wealth as the standard of success goes hand in hand with the abandonment of the false belief that public office and high political position are to be valued only by the standards of pride of place and personal profit; and there must be an end to a conduct in banking and in business which too often has given to a sacred trust the likeness of callous and selfish wrongdoing. Small wonder that confidence languishes, for it thrives only on honesty, on honor, on the sacredness of obligations, on faithful protection, on unselfish performance; without them it cannot live.”

¹ The Council of Global Unions is a loose, co-ordinating structure that brings together Global Union Federations, which represent trade unions grouped by sector and occupation, with the International Trade Union Confederation (ITUC) and the Trade Union Advisory Committee to the OECD (TUAC), which represent trade union national centres. www.global-unions.org.



The effects of this crisis have worsened inequality in the world. They have also enlarged gaps within most of our nations. Although it is visible to the naked eye, this growing inequality was recently documented by both the ILO and the OECD. It is the consequence of a combination of the evolution of government policies designed to produce, often on a competitive basis, a “good business climate” and compensation policies with rapidly growing incomes at the top and a lag in wages at the bottom.

All of this was “aided and abetted” by a phenomenal growth of precarious employment. “Just in time” workers, treated like commodities, have been the first, although sometimes hidden, victims of the current crisis. This rampant growth in injustice has a particularly savage impact on those who were already struggling with inequality, for example, women, ethnic and religious minorities, and migrant workers. Inequality has become so pronounced in large numbers of countries that it not only challenges the very notion of a decent society, but it has become a persistent, systemic obstacle to sustainable growth, prosperity and progress.

Unfortunately, the prescription of many employers and economists for this malady is to increase even further the number of “disposable” workers and make it easier and cheaper to fire those who still have some protections left. Leaving aside the obvious vicious cycle effect of reducing wages further leading to lower consumption in a severe recession, it is striking that the prescription is always the same, in good times and bad – shifting risk off of business and onto workers and the public. In the face of this tired, discredited approach and in defiance of what has become economic orthodoxy, one could even argue that injustice played an important role in creating the crisis and that higher, not lower wages might be part of the solution. Or must one replace failed policies with new ones guaranteed to also fail?

It would be a mistake to assume that tracking down those who have acted irresponsibly and making sure that they pay a price at the hands of public authorities, their shareholders or in the case of criminal conduct, prosecutors, however necessary and appropriate that might be, provides the solution. Can even the most convinced conspiracy theorists imagine, for example, that a tiny cabal of evil somewhere was responsible for the global domino effects of sub-prime mortgages?

In an astounding leap of faith in “free markets” and in total disregard of experience, the global economy has largely been left on “automatic pilot” right up to its current hard landing. Global markets need global rules just like national markets need rules, not just periodic bailouts. Rules, as well as practices like industrial relations, are based on the idea that there are actors at work and not just anonymous forces. In no way does that deny the fact that individual enterprises are often in very real, market situations where their options are limited. But, collective solutions require real actors, with names and faces, to begin to discuss common problems. Among the most important, but also most qualified of those players, because of experience in discussing and negotiating and finding solutions are employers and trade unions.



To have such a discussion, requires us to remove our ideological blinders; to talk with each other rather than talking past each other. It is fashionable to speak of “rigidity” and “flexibility”, but maybe we should start by applying those terms to the way that we think rather than to the economy or the “labour market”.

Let’s go back to the end of the Cold War. The free and independent trade union movement saw the events of 1989 as an important victory of democracy over dictatorship. We saw it as a victory of freedom over oppression and arbitrary rule. And, we recognised that the key to making it happen was the struggle of people of great courage, people like the trade unionists who formed Solidarnosc in Poland.

Some in the business community saw the changes as a victory of capitalism over communism even though capitalists, enlightened or otherwise, were, at best, bystanders during this struggle. It was not produced by investment, even socially responsible investment. It was not produced by corporate social responsibility. It was produced by people fighting for decades for their rights. It is true that living standards stagnated under that system that, after initial strong growth, failed to generate wealth in its last decades, but it was not market forces that produced the changes in the system. It would, in fact, be easier to argue that capitalists helped prolong and “launder” the power of the elite Communist nomenklatura through massive, unregulated privatisations. One of the effects of “market forces” in too many transition countries has been mafias, opaqueness, and bad governance.

But, the point of this argument is not the meaning of the end of the Cold War, but rather that we seemed to have abandoned that particular dogma without having abandoned dogma, so the lessons learned were limited. Among the lessons that we should have learned is that dogma is something quite different from principles. Our global debate must be free without applying narrow, ideological litmus tests that put far too much discussion off limits. And, we can build it around some areas of agreement.

There is the re-emergence, for example, of a feeling that government plays a vital role and that rule of law and governance are vital prerequisites to having a society that functions. Many would even add democracy and human rights to that list. All of this is directly related to the health of enterprises and their ability to function. It is also central to the rights of workers to form trade unions and engage in collective bargaining. A serious discussion on those important issues would not fit comfortably or usefully in the simple notion that “private is good and public is bad” or the contrary. Even sacrosanct notions like “free trade” should be subject to rigorous debate based on real practice rather than theology.

There are, in fact, a whole series of words or phrases that, particularly at the global level, have chilled the debate because they limit and inhibit it. In this connection, one of the phrases of George Orwell is worth quoting, “...if thought corrupts language, language can also corrupt thought”.



So what are some common sense parameters that will help facilitate, free up or, if you prefer, give a shot of liquidity to this debate? There are, undoubtedly many, but among them are:

1. Respect of rights and the rule of law and governance, the process by which decisions are made, are not only moral issues. They are also fundamental to having a rational way to organise societies that work. And, there is no nation in history that has fully respected human rights, including allowing workers to form unions free from fear and intimidation, or cleaned up its environment, without an important role for law and government.
2. National governance without democracy is hollow and limited in its reach and impact and impossible to control and “verify”. More than transparency is needed. And, as important as they are, it means, in addition to free elections, a vibrant, genuine civil society. There must be independent, countervailing forces, including, in particular, free trade unions and employer organisations.
3. Global markets, with or without a crisis, need global rules. And, they require some degree of institutional coherence and authority to develop such rules and give them effect.
4. Success requires a combination of binding rules and voluntary action. “Voluntary” does not necessarily mean “unilateral”. And, it requires representative actors and agents of change. In fact, the only voluntary action that really contributes to governance in the sense of a process of decision making is if there is some form of agreement between independent, private parties who share both conflicting and common interests, principally trade unions and employers.

And all of these questions can be best considered through dialogue. And, one area of potential progress for such dialogue, in part because we live in the same world of the workplace, is various forms of social dialogue between trade unions, employers and their respective organisations.

GOVERNANCE

Good governance is a process that must go far beyond the protection of property rights and the possibility of repatriating profits. Efforts to carve out a few select areas of rule of law in a sea of uncertainty and arbitrariness are bound to fail. They are not viable in the long run for business or for anybody else. Such narrow concerns can only be adequately addressed in the context of honest government that functions. And, ultimately, protecting commercial relations will be difficult in the absence of civil and political liberty.



Courts should work for everybody. Administrations should be capable of efficiently ensuring that business development can proceed, just as they should be able to guarantee that labour inspection functions and that environmental legislation is applied.

Individual businesses cannot change the environment in which they operate on their own. Similarly, trade unions without allies are not capable of doing so, particularly in countries where the lack of decent governance jeopardises their very existence. What can be done to facilitate dialogue to address such a basic prerequisite for a society to function?

What should be the role of business? Too much emphasis has been placed on how social responsibility will somehow fill the good governance gap. Although some positive things can and should be done, business cannot replace the State nor does it have the legitimacy to do so. But, what more could be done by business to close the governance gap? What can businesses do collectively that they cannot do on their own? Businesses are not part of civil society. They pursue their own interests and often, particularly in hard times, to the exclusion of broader considerations. But, employer associations are part of civil society and can make a difference, including through often privileged relations with their trade union counterpart organisations. To what degree are multinational enterprises investing in building strong and credible employer organisations in the countries in which they operate in order to do the hard work of change and reform?

Trade unions are often forced to devote all of their energies to keeping their heads above water - to survival strategies. There is, however, recognition by trade unionists everywhere that governance is a threshold issue. The recent general strikes in Guinea, supported by the international trade union movement, were about governance and democracy. Better known examples would be the struggle against apartheid and for democracy and human rights by the South African trade unions and the fight for democracy as part of their fight to exist by Solidarnosc in Poland. The connection of rule of law with governance with free trade unionism may be more obvious for trade unionists than for entrepreneurs, but it is essential to a sustainable, "good business climate". In fact, it should be a core element of what "doing business" is all about.

Are there things that the international trade union movement and organised employers at the global level could do together to encourage trade union and employer collaboration at the national level to improve the rule of law and improve governance? Are there efforts that could be made, not just with the respective affiliates of the International Trade Union Confederation (ITUC) and the International Organisation of Employers (IOE) but with Global Union Federations representing trade unions by sector and occupation, and major enterprises or business sectors that have a particular impact in certain countries?



DEMOCRACY

Any business-labour dialogue about democracy should begin with an understanding that there is, by virtue of their very nature, much less ambiguity about democracy among trade unions than among businesses. It is nearly impossible for free trade unions to exist without some degree of democracy. And, when a minimum of democracy exists, in the “half free” countries, that freedom often only grants the “right to struggle”, to try to make countries more democratic in addition to defending workers on the job. In some countries, like Zimbabwe, for example, it is foolish to believe that trade unions can effectively represent workers on the ground in the face of the meltdown of democracy, governance and the economy unless they can first use their power to help restore democracy.

But, leaving aside for a moment the opportunities to turn a profit in authoritarian and totalitarian countries as well as the pressures on companies and, in some cases, on their associations to cave into governments, democracy is in the interest of business. Real stability combined with creativity and innovation as well as all the other requirements for many modern companies is easier to obtain under democracy than the stability that is found in the peace of a graveyard. So, a labour-management discussion about the extension and strengthening of democracy, even if it needs to take place behind closed doors, should not be excluded.

It is striking how many companies are willing to talk about human rights and trade union rights and protecting the environment while avoiding a discussion of democracy itself. Do they really believe that, creating an environment within the four walls of a facility where nobody is tortured, where workers are not fired for union activity and where toxic wastes are not dumped will be even possible, much less sustainable?

This is also an area where, for the reasons mentioned above, global dialogue might be useful, not in order to look at democracy in the abstract, but to compare notes. And, more importantly, to look at ways that joint action might make a difference. There are useful precedents at national level but also in the ILO, where trade unions and employers often take the same positions on freedom of association, one of the essential criteria for democracy. And, it is often the case that where both trade unions and employers’ organisations are free, they have the same problems with repressive governments.



GLOBAL RULES

Until quite recently, any discussion about “global governance” involving intergovernmental organisations much less policy coherence among them would inspire fear and loathing in the employer community. But, one can hope that times have changed. People across the entire political spectrum have agreed that this is a global crisis and that purely national solutions are not sufficient. At the institutional level, the International Monetary Fund, World Bank, the ILO, and the OECD are all arguing that co-ordinated action must be taken and are all seeking ways in which greater coherence and effectiveness can be found at the international, institutional level.

The global trade union movement is participating in that discussion and beyond the fora where our views have always been welcome. We are having serious discussions with the international financial institutions based on a thaw in those relations in recent years, the G-20 offers more opportunities, and the dialogue has expanded with the OECD where we have long benefited from the consultative status of The Trade Union Advisory Committee to the OECD (TUAC), something provided to the Business and Industry Advisory Committee (BIAC) as well.

Shouldn't we find a way to have discussions on these same issues between employers and trade unions at the global level, something that takes place almost routinely in many countries? Are there practical contributions that we could make, together, to ensuring that emerging global rules and their implementation are designed in a way that they actually work and take on board the common concerns of the social partners?

With a little reflection, we might even be able to agree that the economic and the social development can only really be separated in the mind, something that, in fact, requires years of advanced study. There are linkages between trade and investment and workers rights and the environment, and development. Shouting that they do not exist does not make them go away. Aren't there things that we should be doing, together, to try to make a transition to a greener economy in the context of the crisis? Don't the three pillars of sustainable development make even more sense in these times? We are certainly worried about what will happen in many of the same industries. And, we might wish to explore how new, greener jobs can be developed that help save the planet, but are also good and secure jobs. And, to see how we can be creative and comprehensive in our approach so as to do the least damage possible to existing enterprises as well as ensuring that transition takes place in a fair manner where the rights of workers are fully protected now and in the future.

As in so many other areas, sectoral dialogue is critical to making progress. Unlike trade unions, which have had global sectoral structures for over a century, there is limited capacity on the employer side. Where it does not exist, can such capacity and dialogue be generated?



Does the new ILO Declaration on Social Justice and a Fair Globalisation help us to enhance coherence in the ILO? Can that also help to increase policy coherence in the world of international organisations?

All of the issues related to global rules also raise the question of what space should be left and what practices should be encouraged in terms of private action. Just as national governments are asked to promote collective bargaining, but not to control it, we should jointly examine if there are parts of a new globalisation where we believe that voluntary agreement would make sense and would offer advantages in terms of effectiveness, efficiency, and flexibility.

VOLUNTARY ACTION

During the last generation, global social dialogue has been growing between Global Union Federations and major multinational companies. Many companies recognise GUFs as their global counterparts and do not hesitate to contact them on a regular basis. Some of this social dialogue has taken the form of International Framework Agreements, also called Global Framework Agreements. Twenty years ago, there were two such agreements. Now, there are more than sixty.

Some social dialogue, including agreements, came out of conflicts. In other cases, it came from a common view that having ways to communicate throughout a company's operation could help to resolve problems before they got out of hand just as it had done in the home country. But, regardless of origin, such agreements reflect a realistic approach based on the idea that there will inevitably be differences. They do not exist to establish virtue or as simple proclamations, but rather in order to use a good relationship in a productive manner and extend it to countries where it is missing.

With the exception of one agreement, which covers wages, hours, and working conditions, between the International Transport Workers' Federation (ITF) and a group of ship owners/ship managers (IMEC), "global industrial relations" might be too strong a term. They are agreements that are essentially frameworks intended to pull together management and labour throughout companies and facilitate organising and collective bargaining agreements at national level.

Each agreement has its own history and each company, on both sides of the table has its own culture. That makes it difficult to generalise. However, there appear to have been some changes in approach over this generation of agreements. Procedures have become relatively more important, with regular reviews common. Mechanisms for handling complaints are evolving although none yet provides for mediation.

Another change in approach is in the area of freedom of association and collective bargaining. Problems on the meanings of agreements in these areas have arisen in



several cases, primarily stemming from problems with their application in the United States. GUFs assumed that freedom of association meant allowing workers to decide whether or not they wish to have union representation without any interference from employers. Some employers or their US managers seemed to feel that it meant that they were obliged to try to persuade workers not to form unions. Many of the recent agreements stress non-interference.

The next step may well be to obtain from companies a commitment to encourage good industrial relations. The International Textile, Leather, and Garment Workers' Federation (ITLGWF) has an agreement that is applied through encouraging "mature industrial relations" in supplier firms. Other agreements and discussions are going in the direction of affirmatively supporting industrial relations. Agreements should promote rights. That is better than being "neutral" about them.

Another developing area that goes beyond a limited set of common principles is trade union access to workers and facilitation of trade union work inside a company. Discussions are also taking place, and agreements reached on restructuring. The employment relationship is on the table, with one modest commitment to privilege direct employment. One agreement sets up an extensive, joint effort to improve the respect of health and safety throughout the company. Such joint initiatives and others may also feature in new agreements and practices, formal or informal.

Although growing numbers of companies have become willing to speak with trade unions at global level, work organisation has changed so much that they often have less direct control over production done in their name. Whether or not there is a framework agreement, the connection between talking and delivering is no longer as direct and clear as it once was. As with the Global Union textile agreement, however, there is, nevertheless, a qualitative difference between dealing with the supply chain through a framework agreement or other co-operation versus developing systems of monitoring and assurance. It is possible to be more "hands on" in order to get results rather than simply requiring the use of checklists. If workers have some power and an agreement, it is possible to guarantee respect for rights rather than simply hope for compliance. That is another, practical advantage of democracy.

Global social dialogue is developing quickly. But, it is not an alternative to global rules. Experience shows, however, that it can make an important contribution. Just as is true for collective bargaining at the national level, space should be made for voluntary action in the form of agreements between legitimate "partners". Agreements and other forms of trade union recognition produce better results because engagement by workers in their own lives and jobs is always more efficient than "taking care" of them through "noblesse oblige" and from a lofty altitude. They can contribute to a fairer globalisation in a flexible and company and industry specific way.



In that same inaugural address of 1933, President Roosevelt said, “These dark days will be worth all they cost us if they teach us that our true destiny is not to be ministered unto but to minister to ourselves and to our fellow men.” In all of the areas described and more, trade unions and employers can make a difference - can help to shape the world. Through dialogue that helps to develop ideas and processes, and through the evolution of global industrial relations, we can both contribute to and be part of a new global economic architecture that is more just and, therefore, more sustainable.

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THE WTO AND THE FINANCIAL CRISIS

Pascal LAMY, Director-General

World Trade Organization

What started as a financial crisis has now transformed into the first global economic crisis in human history. It is affecting all countries, many which had already been hard hit by the recent surges on food and oil prices. Global GDP will decline this year for the first time since World War II. World trade, which has underpinned rising prosperity for half a century and which has helped raise millions out of poverty in the last 20 years will register its largest contraction in 80 years. We risk throwing overboard the huge efforts made by the international community to reduce world poverty and attain the UN Millennium Development Goals.

It is precisely now that the international community must work together to tackle the multidimensional nature of the current crisis. We must strengthen global cooperation and coherence in actions. The WTO has its role to play in contributing to finding responses to the crisis.

KEEP TRADE OPEN

In these very difficult times, domestic pressure for protectionist measures is strong and leaders can be tempted by isolationist reactions which offer the mirage of short term solutions. One country's exports and another country's imports. Hence the adoption of protectionist measures by one country will trigger similar moves from other countries. We have seen similar downward spirals in the past, in particular at the end of the 20's when the protectionist measures adopted through the passage of the Smoot and Hawley Act in the US, raising tariffs on a massive amount of imports, led to similar measures in Europe, plunging the entire world into a recession. Resisting protectionism and avoiding an aggravation of the current crisis is, therefore, an imperative today.

The need to fight protectionism brings us to the WTO, as a unique multilateral organisation where countries agree to further open up trade while adopting accompanying rules to ensure a level playing field. Trade opening and reducing trade barriers, have been, are and will remain, essential to promote growth and development, to improve standards of living and to tackle poverty reduction. Opening markets to foreign products and services provides diverse sources of gain through increased efficiency, the realization of economies of scale, greater product variety and higher productivity. For all these reasons, opening up trade has the potential to boost national incomes and bring wealth and economic benefits.



At the heart of the WTO rules - such as the basic prohibition on using measures that favour local content to the detriment of foreign content, i.e. non-discrimination - lie efforts to avoid the inevitable boomerang effect of isolationist and protectionist measures. Blocking foreign imports today means that your exports will be blocked by others tomorrow. Protectionism and inward-looking policies are precisely what the world does not need today. It is therefore welcome that G-20 leaders as well as leaders of ASEAN or APEC have recently committed to refrain from adopting protectionist measures and have undertaken to do whatever is necessary to promote global trade and investment to underpin prosperity.

The WTO, in addition to being the place where trade rules are negotiated among all 153 Members with equal voting power, i.e. one member, one vote, provides a forum for regular discussion and peer-review of the way in which Members apply trade rules. Through notifications, dialogue and monitoring, Members ensure that national trade policies are in accordance with WTO rules and obligations. Through dialogue and discussion many differences can be addressed without necessitating recourse to dispute settlement.

The WTO Trade Policy Review Mechanism has been used to monitor Members' trade policy changes in reaction to the crisis. Two reports of trade measures adopted by WTO Members in the context of the crisis have been issued so far (http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm). Using information provided by the Members themselves as well as other available information, the reports details the numerous measures taken by Members, whether in the form of increases in tariffs or non tariff measures or in agriculture subsidies, as well as other form such as bailout or subsidy packages.

From the measures taken so far there do not seem to be indications of an imminent descent into high intensity protectionism, involving widespread resort to trade restriction and retaliation. The reports nevertheless stress the importance of remaining vigilant and avoiding nationalistic responses to the crisis, which would just shift problems to neighbours and risk them bouncing back. The danger today is of an incremental build-up of restrictions that could slowly strangle trade and undercut the effectiveness of policies to boost world demand and restore sustained growth globally.

These reports are not intended to pass judgment about whether these measures are or not WTO compatible. In today's economic turmoil, the WTO's mechanism of trade policy review provides WTO Members with a forum for dialogue on how best to use their trade policies to help the recovery, while allowing a thorough scrutiny of any trade-distorting measures. Members' actions in today's crisis are thus kept under regular review and therefore subject to peer pressure.



At the G-20 meeting in London participants agreed to notify promptly the WTO of any protectionist measures. They also called on the WTO, together with other international bodies, to continue to monitor and report publicly on governments' adherence to these commitments on a quarterly basis. I hope that this commitment will not only guarantee further transparency over the measures taken by States in reaction to the crisis but it should also reinforce the value and importance of coordination between international organisations in trying to assist States in tackling the economic crisis.

KEEP OPENING TRADE

Trade has become another casualty of the economic crisis, with WTO forecasting a 9% contraction in trade for 2009. This drop risks stalling one of the remaining engines of world growth, in particular for emerging economies, whose growth is very much linked to trade. This would hamper efforts by these countries to lift people out of poverty. As countries fight to keep trade open, it is also important that they keep opening trade.

Much progress was accomplished in 2008 in the WTO Doha Development Round. But as the financial crisis and subsequent sharp downturn in global economic prospects loomed in the horizon, WTO Members failed to reach consensus on the basic blueprint for a deal on agriculture and industry (so-called modalities) at the end of 2008. Despite significant progress in the negotiations, the political commitment of the G20 leaders to conclude a deal last November proved insufficient to unlock the compromises needed in these two areas of the Doha negotiations, which would have opened the door to the conclusion of the Doha Round on around twenty topics on the agenda.

Yet in this deteriorating economic context nothing is more important than providing greater transparency, stability and predictability to global trade through the conclusion of the Doha Round. A more open trade environment can play an important part in the economic recovery. Trade must be part of the response to the economic crisis and the Doha Round offers the best global stimulus package.

The Doha Round offers greater market opening for agriculture and industrial products. Current proposals on the table on agriculture and industry would lead to savings in tariffs in the order of more than \$ 150 billion. Current tariffs ceilings could be halved



and subsidies reduced between 80% and 70%. Greater opening would also happen in services such as energy, environment, distribution and logistics. This would mean an additional boost for a sector which today represents two thirds of our economies.

But the conclusion of the Doha Round would also mean more and better rules to regulate multilateral trade. More rules because the Round could give birth to new agreements in new areas which respond to today's needs. This is the case for an agreement curbing fishery subsidies which contribute to the depletion of our oceans. Or an agreement to open trade in clean technology, in environmental goods and services which could help countries curb emissions. Or an agreement to facilitate trade by cutting customs red tape. Better rules because the Round could deliver greater fairness in the existing rules by addressing distortions which today penalise developing countries, such as harmful agriculture subsidies or tariffs which penalise developing countries moving into higher value-added products.

Moreover, and arguably more importantly, concluding the Doha Round would also reduce the risk of governments turning to higher trade restrictions, given the new ceilings on tariffs and subsidies that would result. It is therefore crucial that work continues in Geneva building on the many hours of work and many compromises found during the last several years of negotiations.

OILING THE WHEELS OF TRADE: TRADE FINANCE

One of the reasons for the collapse of world trade is insufficient trade credit financing. The global market for trade finance (credit and insurance) was estimated to represent approximately 80% of 2008 trade flows, valued at \$15 trillion. The World Bank estimates that a fall in the supply of trade finance has contributed some 10% to 15% of the decrease in world trade since the second half of 2008.

Trade finance is generally considered a very secure, short-term and self-liquidating form of finance. Nevertheless, the reluctance of many lenders to finance short term credits confirm that trade finance markets have not been immune to the present crisis. Indeed, the financial crisis has placed great stress on the global market for trade finance. As liquidity and credit in global financial markets has dried up, and the economic slowdown triggered a general reassessment of credit risk, trade-finance facilities from private banks has become more difficult to access for many emerging market economies and the cost of credit for financing trade transactions has risen sharply, even tripling in some cases. Financial conditions faced by weaker developing countries have deteriorated even more sharply.

The WTO has led efforts to promote solutions to the difficulties in availability and affordability of trade finance. In cooperation with other multilateral and regional organizations, such as the World Bank, Regional Development Banks or Ex-IM banks,



the WTO has been helping to mobilize various actors to shoulder some of the risk from the private sector and to encourage co-financing between the providers of trade finance. Action has taken place along two tracks: on the one hand, there has been focus on finding collective short-term solutions, notably by mobilizing government-backed export credit agencies and international financial institutions, through their private sector branches, operating mostly on commercial terms. On the other hand, work has also taken place to develop technical measures allowing for better interaction between private and public sector players in the short and medium-term, all of which aim at removing the obstacles to risk co-sharing and co-financing by various institutions.

As a result regional development banks and the World Bank IFC have roughly doubled the capacity limits under their trade finance facilitation programmes, from around US\$4 billion to US\$8 billion, thereby financing potentially some US\$30 billion of trade involving small countries and small transactions. Export credit agencies have also stepped in with programmes for increased guarantees, short-term lending of working capital and credit guarantees aimed at small and medium-scale enterprises. A few of them have also opened liquidity windows. Central banks in countries with large foreign exchange reserves – and/or which for one reason or another are facing a shortage of liquidity in dollars (due to falls in remittances, export receipts, and the depreciation of the local currency against the dollar) – have been supplying dollars to local banks and importers through repurchase agreements or auctions of borrowed dollars.

Leaders of the G20 meeting in London signalled the importance they attach to this issue when they underlined their readiness to ensure availability of at least \$250 billion over the next two years to support trade finance through our export credit and investment agencies and through the MDBs. They also undertook to also ask regulators to make use of available flexibility in capital requirements for trade finance.

This is an area which will require attention over the coming months to ensure the oil is there to keep the wheels of trade turning.

AID FOR TRADE: HELPING THE POOREST COUNTRIES

The economic crisis is having a severe toll on developing countries, with consequences we have just started to see. The World Bank reports that sovereign debt issuance by high-income countries is set to increase dramatically, crowding out many developing country issuers. Many institutions that have provided financial intermediation for developing country clients have virtually disappeared. Developing countries are likely to face higher spreads, and lower capital flows than over the past 7-8 years, leading to weaker investment and slower growth in the future. With the crisis we have seen a decrease in remittances, in FDI and in tourism that are key to the economies of many developing countries.



In this very difficult context for developing countries, it is imperative that development assistance, and among it Aid for Trade, be maintained. Supply-side constraints faced by developing countries may be exacerbated if investment in economic infrastructure, production capacity and building competitiveness is not sustained. Continued effective Aid for Trade can provide a short term stimulus and help ensure long term growth and integration prospects. Therefore, maintaining additional, predictable and sustainable financing remains fundamental to fulfilling the Aid-for-Trade mandate, particularly against the background of the current crisis.

The WTO will host the Second Global Aid-for-Trade Review in July 2009 in Geneva. The gathering of major donors, whether bilateral or multilateral institutions, development banks and aid recipients will provide a timely opportunity to review the progress in mainstreaming trade in development strategies and also to ensure that Aid-for-Trade promises are kept. That the donor community does not shy away from helping those in need especially now that they will find a great stimulus in Aid for Trade.

The breadth of the current financial and economic crisis in today's globalized world requires multilateral collaboration and cooperation to a level never required before. Open trade is a necessary component to ensure growth which in turn is key to boosting the recovery of our economies.

But, as I have said several times, trade alone will not be sufficient to ensure that trade benefits are shared among all people nor will open markets alone suffice to recover from the flaws of our financial and economic systems. We need to better discipline and regulate those economic spheres and stimulate economic recovery. The G-20 brings hope of collective political commitment from leaders to resist protectionist pressures and lay the foundations for a better regulated financial sector. It also brings hope of commitment to concluding the WTO Doha Round, the low-hanging fruit of global action awaiting the leaders. I trust they will be able to take up this challenge.

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ELIMINATION OF THE SECRET BALLOT UNION ELECTION AND COMPULSORY ARBITRATION UNDER THE EMPLOYEE FREE CHOICE ACT: A VIOLATION OF FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LABOR LAW

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I. INTRODUCTION

On March 10, 2009, Representative George Miller (D-California) and Senator Edward Kennedy (D-Massachusetts) introduced the Employee Free Choice Act of 2009 (“EFCA”) as H.R. 1409 and S. 560 respectively¹. EFCA, if enacted as introduced, will make significant changes to core aspects of American labor law that will result in a legislative scheme that violates principles of international labor law. First, EFCA will effectively supplant the secret ballot election for determining union representation with a procedure through which representation will be determined solely through the submission of authorization cards². Second, EFCA will create a compulsory arbitration process that either party can unilaterally invoke to set initial terms of a labor contract³. Both changes defy established principles of international labor law which prefer secret ballot representation elections and eschew compulsory arbitration schemes in favor of voluntary collective bargaining. In its inevitable debate on reforms to the NLRA, Congress should give due consideration to these international concerns before enacting legislation that disregards them.

This article will first describe the current legal framework under the NLRA for secret ballot elections and collective bargaining. Second, it will explain how Sections 2 and 3 of EFCA propose to modify the NLRA. Third, it will show where the United States has incorporated the international principles of freedom of association into its laws, and has sought to promote them abroad. Fourth, it will describe how under the principles of international labor law, the secret ballot representation election is the preferred method to determine a union’s representativeness, and how Section 2 of EFCA violates these principles. Finally, it will show how compulsory arbitration schemes to set terms of a collective bargaining agreement violate principles of international labor law, and how Section 3, which imposes such a scheme, does the same.

¹ H.R. 1409, 111th Cong., 1st Sess. (2009). S. 560, 111th Cong., 1st Sess. (2009). As the two bills are identical, all subsequent citations to this bill will be to the House version.

² H.R. 1409, 111th Cong., 1st Sess., § 2 (2009).

³ *Id.* § 3.

II. THE CURRENT LEGAL FRAMEWORK

A. SECTION 7 RIGHTS AND SELECTION OF AN EXCLUSIVE BARGAINING REPRESENTATIVE

The National Labor Relations Act⁴ was enacted in 1935 to establish an orderly mechanism to permit employees to organize and bargain collectively, while at the same time avoiding economic disruption and industrial unrest⁵. The NLRA's coverage is limited to employees and employers in the private sector⁶. At the heart of the NLRA are Section 7 rights. Section 7 of the NLRA states,

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities⁷.

Under Section 7, employees have the right to engage in union activities and an equal right to refrain from such activities⁸. Employees exercising either right are protected equally under the law⁹.

B. THE ELECTION PROCESS AND CERTIFICATION UNDER THE NLRA

Under the NLRA employees can have only one bargaining representative which "shall be the exclusive representative of all the employees in such unit"¹⁰. In order for employees who wish to designate a union to bargain on their behalf to compel an employer to recognize and bargain with their union¹¹, the employees or the union

4 The NLRA is codified at 29 U.S.C. §§ 151-169 (2008). The original NLRA was known as the Wagner Act and was subsequently amended by the Labor Management Relations Act of 1947 (the Taft-Hartley Act) and codified at 29 U.S.C. §§ 141-144, 167, 172-187.

5 See 29 U.S.C. § 151 (2008).

6 Id. § 151(2), (6)-(7). The NLRA covers most private sector enterprises where the operations of the enterprises affect commerce and are covered under the commerce clause of the United States Constitution. *NLRB v. Fainblatt*, 306 U.S. 601, 606-607 (1939). For a thorough description of the scope of enterprises within the jurisdiction of the NLRA, see National Labor Relations Board, *An Outline of Law and Procedure in Representation Cases* (2005)

7 29 U.S.C. § 157.

8 Id.

9 Id. § 158(a)(3), (b)(1)(A).

10 Id. § 159(a)(Emphasis added).

11 An employer may voluntarily forego an NLRB certification election and recognize a union as the exclusive representative of employees through other means of verification of the union's majority status. See *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974); *Kroger Co.*, 219 NLRB 388 (1975) (inclusion of an after acquired stores clause in a collective bargaining agreement waives the employer's right to insist on an NLRB election); *Strucksnes Const. Co.*, 165 NLRB 1062 (1967) (allowing an employer to poll employees to determine union representation, provided certain safeguards are met).



must notify the National Labor Relations Board (“NLRB”) by filing a petition¹². If the person or union can provide evidence¹³ that at least 30 percent of the employees in the bargaining unit have designated it as their representative, the NLRB will process the petition¹⁴. The NLRB will establish the scope of the bargaining unit and set a secret ballot election¹⁵.

Where more than one union seeks to represent employees, there exist procedures to enable employees to select only one union as their exclusive representative¹⁶. Depending on the extent of support they can demonstrate, intervening unions can participate in the election process in a complete or abbreviated way, and have their name placed on the ballot¹⁷.

The Board conducts the secret-ballot election in accordance with pre-established criteria designed to ensure the decision is made in the secrecy of the voting booth¹⁸. The Board’s oversight of the secret ballot election ensures it is conducted in a fair, consistent, and orderly manner, free of unfair labor practices and coercion¹⁹. Consistent with Section 7 of the Act, “the purpose of the secret ballot election is to provide the employees a free and uncoerced opportunity to select or reject a

12 Id. § 159; 29 C.F.R. § 101.17 (2008).

13 “Such evidence is usually in the form of cards, which must be dated, authorizing the labor organization to represent the employees or authorizing the petitioner to file.” 29 C.F.R. § 101.17 (2008).

14 Id. § 101.18(a); see also *Esso Standard Oil Co.*, 124 NLRB 1383 (1959).

15 There exists a procedure to determine the scope of the bargaining unit of employees eligible for representation if that is in dispute, as well as a procedure to set an election upon the consent of the parties. See, 29 U.S.C. § 159(b), 29 C.F.R. §§ 101.19 (consent agreement for an election), 101.20 (procedure for formal hearing) (2008). The law governing the appropriateness of a bargaining unit is comprehensive, and election petitions often result in a stipulated agreement for the conduct of prompt election. See N.L.R.B. An Outline of Law and Procedure in Representation Cases, Office of the General Counsel (July 2005).

16 29 C.F.R. §§ 102.60–102.72; see also, National Labor Relations Board Case Handling Manual (Part 2) Representation Proceedings ¶¶ 11020-11042 (2007).

17 29 C.F.R. §§ 102.60–102.72; see also, National Labor Relations Board Case Handling Manual (Part 2) Representation Proceedings ¶¶ 11020-11042 (2007).

18 “The actual polling is always conducted and supervised by Board agents. Appropriate representatives of each party may assist them and observe the election. As for the mechanics of the election, the ballot is given to each eligible voter by the Board’s agents. The ballots are marked in the secrecy of a voting booth.” 29 C.F.R. 101.19(c); see also, *Breman Steel Co.*, 115 NLRB 247 (1956); 29 C.F.R. §§ 101.19(a)(2), 102.69(a); National Labor Relations Board Case Handling Manual (Part 2) Representation Proceedings ¶ 11310 (2007).

19 29 U.S.C. § 159; *NLRB v. Sanitary Laundry*, 441 F.2d 1368 (10th Cir. 1971). Secret ballot elections, conducted by the NLRB are conducted under “laboratory conditions” which are “conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.” *General Shoe Corp.*, 77 NLRB 124 (1948). Elections are to be held in an atmosphere “conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasonable choice.” *Sewell Manufacturing Co.*, 138 NLRB 66, 70 (1962), supplemented, 140 NLRB 220 (1962).



bargaining representative²⁰. The NLRB has placed numerous safeguards upon the process to ensure that employees exercise this choice in a manner that is free from coercion²¹.

If a majority of employees who vote, designate a union as their representative, then, absent objectionable conduct²², the designated union becomes certified by the NLRB as the employees' exclusive bargaining representative²³. Certified unions enjoy representative status for one year following certification and any petition to change the representative status during that year will be barred²⁴. After the end of that year, the employees may designate a competing union as their representative, or choose to have no union represent them at all²⁵.

20 John E. Higgins, Jr., *The Developing Labor Law*, 2678 (5th Ed. 2006)(emphasis added).

21 The safeguards of the election procedure are numerous. Examples include the following: providing accurate and complete voter eligibility lists, *Excelsior Underwear*, 156 NLRB 1236 (1966); significantly limiting conduct by employers during the 24 hours immediately preceding the election, *Peerless Plywood Co.*, 107 NLRB 427 (1954); requiring that notices of the secret ballot election be posted for a specific number of days, (29 C.F.R. § 103.20 (2008)) and contain, among other things, a sample ballot, a designation of the date, time and location of the election, and a description of who is eligible, *National Labor Relations Board Case Handling Manual (Part 2) Representation Proceedings* ¶¶ 11314-11315 (2007) ; regulation of conduct in and around the polls during the election, *Pea Ridge Iron Ore Co.*, 335 NLRB 161 (2001)(polling times), *Yerges Van Liners*, 162 NLRB 1259 (1967)(ensuring that the election procedure give all eligible employees the right to vote); allowing the parties to designate observers to witness the election process, 29 C.F.R. § 102.69(a); regulating the behavior of the NLRB agent who conducts the election, *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967); ensuring the ballot box is protected from tamper, *S.S. Kresge Co.*, 121 NLRB 374 (1958); ensuring and preserving the secrecy of the ballot so as not to disclose the identity of the voter, *Avante At Boca Raton, Inc.*, 323 NLRB 555 (1997); and ensuring that ballots be in languages other than English where voters do not speak English, *Kraft, Inc.*, 273 NLRB 1484 (1985).

22 29 C.F.R. § 102.69.

23 *Id.* § 102.69(b).

24 *General Box Co.*, 82 NLRB 878 (1949); *Chelsea Industries*, 331 NLRB 1648 (2000), enforced, 285 F.3d 1073 (D.C. Cir. 2002).

25 29 U.S.C. § 159(c)(3).

C. THE DUTY TO BARGAIN, THE RIGHT TO STRIKE AND THE FMCS

Once certified, a labor union enjoys the exclusive right to represent the employees with respect to “rates of pay, wages, hours of employment, or other conditions of employment”²⁶. The NLRA requires a union and employer to bargain in good faith, but does not require them to reach agreement²⁷. U.S. labor law has long tolerated use of economic pressure by unions and employers to persuade the other to reach agreement or make concessions.

*Collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth... The presence of economic weapons in reserve, and their actual exercise on occasion by the parties is part and parcel of the system... The truth of the matter is... the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one’s terms—exist side by side*²⁸.

Mandatory good-faith bargaining combined with the availability of strikes²⁹ and lockouts³⁰ are thus central to collective bargaining in the American workplace, and the government generally has no power to enjoin use of these weapons unless they represent a threat to national health or safety³¹.

To facilitate a resolution to labor disputes in bargaining, Congress created the Federal Mediation and Conciliation Service (“FMCS”) to provide facilitators to help resolve labor disputes³². The suggestions and findings of FMCS facilitators do not have the force of law, and a party’s refusal to agree with or conform its conduct to an FMCS-

26 *Id.* § 159(a). Once a union is certified, it becomes “the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.” *Id.* § 158(d).

27 The parties must bargain collectively, but the NLRA makes it clear that the obligation to engage in collective bargaining “does not compel either party to agree to a proposal or require the making of a concession...” *Id.* “[The NLRA]... does not require that the parties agree; but it does require that they negotiate in good faith with the view of reaching an agreement if possible...” *NLRB v. Swift Adhesives*, 110 F.2d 632, 637 (4th Cir. 1940), see also *Atlas Mills*, 3 NLRB 10 (1937) (parties must bargain with a bona fide intent to reach an agreement).

28 *Insurance Agents v. NLRB*, 361 U.S. 477, 488-89 (1960)

29 29 U.S.C. §§ 152(3), 157

30 See, e.g., *NLRB v. Greensburg Coca-Cola Bottling Co.*, 40 F.3d 669 (3d Cir. 1994)

31 29 U.S.C. § 178

32 29 U.S.C. § 172(a).



proposed solution is not a violation of the NLRA³³. Even with this limited authority, however, the FMCS provides a valuable service through which it encourages parties to reach agreements on their own.

III. THE EMPLOYEE FREE CHOICE ACT

A. EFFECTIVE ELIMINATION OF THE SECRET BALLOT ELECTION

The first section of EFCA relevant to this discussion is Section 2, titled “Streamlining Union Certification.”³⁴ The section would amend Section 9(c) of the NLRA to require the NLRB to certify a union as the representative of employees upon the presentation of valid authorizations from a majority of employees in the unit designating the union as their exclusive representative. Section 2 provides:

(a) In General – Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) is amended by adding at the end the following:

‘(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

‘(7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining representative in the manner described in paragraph (6). Such guidelines and procedures shall include –

‘(A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and

‘(B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives³⁵.’

Under existing law, unless an employer has either (1) committed serious unfair labor

³³ Id. § 173(c)

³⁴ H.R. 1409, 111th Cong., 1st Sess. § 2 (2009)

³⁵ Id



practices³⁶, or (2) voluntarily agreed to recognize a union through some private verification of majority status, it can always insist upon a secret ballot election conducted by the NLRB³⁷. Section 2 of EFCA would effectively eliminate the long enjoyed ability of employees to participate in a secret ballot election³⁸.

B. COMPULSORY FIRST CONTRACT MEDIATION AND ARBITRATION UNDER SECTION 3 OF EFCA AND LIMITS ON THE RIGHT TO STRIKE

Section 3 of EFCA creates a procedure for binding mediation and arbitration when a newly certified labor union and an employer cannot reach agreement on a first contract³⁹. The relevant language proposed under EFCA seeks to amend Section 8(d) of the NLRA⁴⁰ by adding the following section (h):

(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) [29 U.S.C. § 158(d), described supra] shall be modified as follows:

(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify

36 Where unfair labor practices are egregious, the NLRB can choose to forego an election altogether and certify a union as the exclusive bargaining representative of employees based upon authorization cards alone through what is known as a Gissel bargaining order. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)

37 *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974)

38 Government supervised designation of a labor union as the exclusive bargaining representative of employees in a bargaining unit without an NLRB election was abandoned shortly after passage of the Wagner Act. Under the original Wagner Act, the “card check,” or the verification of union support through checking authorization cards against an employee list, was frequently used in lieu of a secret ballot election to determine whether a union represented a majority of the workers in a bargaining unit and from which a union could be certified by the NLRB. John E. Higgins, Jr., *The Developing Labor Law*, 734-35 (5th ed. 2006) (emphasis added). In 1939, the card check was abandoned under the Wagner Act in favor of the secret ballot election. *Id.* at 735. The concept of recognition by card check has been controversial because it enables an employer and a union to agree to eliminate the rights of workers to a secret ballot election. Recently, the NLRB attempted to resolve this issue in the case, *Dana Corp.*, 351 NLRB No. 28 (2007). There, the NLRB created a procedure pursuant to which employees in a bargaining unit for which a labor union was voluntarily recognized by an employer were (1) informed of their rights to seek a secret ballot election and (2) given a period of time following the voluntary recognition to file for a secret ballot election in accordance with the NLRB procedure if they so desired. *Id.*

39 H.R. 1409, 110th Cong., 1st Sess. § 3 (2009)

40 29 U.S.C. § 158(d)

the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties⁴¹.

This change would make such a procedure a part of private sector labor relations for first time⁴², irrespective of the industry⁴³. Either party may invoke the procedure unilaterally, and there is no mechanism to permit a party to decline to participate⁴⁴.

C. SECTION 3 OF EFCA AND LIMITS ON THE RIGHT OF EMPLOYEES TO STRIKE

Section 3 of EFCA does not expressly prohibit the right to strike by a newly certified labor union, but the compulsory mediation and arbitration provision it details effectively does so. First, it imposes the “loss of status” provision of Section 8(d) upon employees after a party give notice to the FMCS to commence the mediation and arbitration procedure of Section 3. Under Section 8(d) of the NLRA, “any employee who engages in a strike within any notice period ... shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act.”⁴⁵ Known as the “loss-of-status” provision, this language means

⁴¹ H.R. 1409, 110th Cong., 1st Sess. § 3 (2009)

⁴² Compulsory arbitration to settle the terms of a contract is not uncommon in public sector labor legislation in the United States where employees do not enjoy the right to strike. Elkouri & Elkouri, *How Arbitration Works*, 1348, 1371-91 (Alan Miles Rubin ed., BNA Books, 6th ed. 2003)(1952)(citing many of the pieces of public sector labor legislation that provide for interest arbitration). This type of arbitration procedure is also an available procedure under the Railway Labor Act, which is the statute that governs labor relations in the railroad and airline industries, but in order for the parties to participate in such a process, they both must agree to do so. 45 U.S.C. §§ 151 et seq. (2008)

⁴³ There is no language in EFCA to limit the industry or sector in which this compulsory provision is applicable. H.R. 1409, 110th Cong., 1st Sess. § 3 (2009)

⁴⁴ *Id*

⁴⁵ 29 U.S.C. § 158(d)(emphasis added)



that a strike that violates Section 8(d) is illegal⁴⁶, may be enjoined⁴⁷, and any employee who participates loses all protections available under the Act⁴⁸.

Section 8(d) contains several “notice periods” during which an employee can lose the protections of the Act. They are designed to “give mediation its intended statutory period in which to work.”⁴⁹ First, under Section 8(d)(1), a party wishing to terminate or modify a collective bargaining agreement must notify the other party 60 days beforehand, and under Section 8(d)(4) cannot engage in a strike during that period⁵⁰. Second, under Section 8(d)(3), the initiating party must also notify the FMCS within 30 days after issuance of the notice under 8(d)(1)⁵¹. Third, for employees of a health care institution, a newly certified labor organization cannot engage in any strike, picketing or other refusal to work until at least 30 days after notice of the dispute is given to the FMCS⁵². Each notice period starts when notice is given and ends when the requisite number of days pass. Each can also be extended as the result of a failure of a party to provide notice⁵³.

Section 3 of EFCA creates a new notice period under Section 8(d). It starts when one party unilaterally notifies the FMCS after ninety (90) days of bargaining without agreement⁵⁴. However, unlike the other notice periods of Section 8(d), the one created by EFCA does not end after a predetermined number of days. The notice period lasts until the parties have come to terms on a first contract, or two (2) years have passed since the arbitration panel has rendered its decision to settle the dispute⁵⁵. The ultimate duration of this notice period is unknown as it is designed to allow the compulsory mediation and arbitration provision to work on a time frame controlled

46 *Id.* at 519 (finding a strike called by a union that had not given the proper notice to the FMCS under Section 8(d)(3) of the Act to be unlawful, rendering the employer’s termination of the striking workers not violative of the Act)

47 *Id.*

48 The NLRB has consistently held that employers do not violate the law when they terminate employees who strike in violation of Section 8(d). *Id.*, see also, *Boghosian Raisin Packing Co.*, 342 NLRB No. 32 (2004) (holding that an employer did not violate the Act when it terminated 42 employees for engaging in a strike where the union has erroneously failed to file the 8(d)(3) notice with the FMCS)

49 *Fort Smith Chair Co.*, 143 NLRB 514, 519 (1963)

50 29 U.S.C. § 158(d)(1)-(4)

51 *Id.* § 158(d)(3)

52 *Id.* § 158(d)(4)(B)

53 “The waiting period must be extended to include a full 30 days after the filing of such notices in order to give mediation its intended statutory period in which to work.” *Fort Smith Chair Co.*, 143 NLRB 514, 519 (1963), see also *Boghosian Raisin Packing Co.*, 342 NLRB No. 32 (2004).

54 H.R. 1409, 110th Cong., 1st Sess. § 3(h)(2) (2009)

55 *Id.* § 3(h)(2)-(3)



by the FMCS⁵⁶. During that entire notice period, employees who strike risk losing their jobs with no recourse to the protections of the NLRA.

Section 3 of EFCA also prevents workers from striking to change the terms of employment submitted to and decided by the arbitrator. Federal labor policy in the United States favors arbitration as the preferred means to resolve labor disputes⁵⁷, and considers “arbitration... [to be] the substitute for industrial strife.⁵⁸” “[A] contractual commitment to submit disagreements to final and binding arbitration gives rise to an implied obligation not to strike over such disputes.⁵⁹” The availability of arbitration to settle labor disputes over terms of an initial contract carries with it an implied undertaking not to strike⁶⁰. Because Section 3 of EFCA imposes upon the parties a statutory obligation to submit their labor dispute to arbitration rather than a contractual one, it presents an even more compelling mandate that workers not strike while the process is ongoing.

56 It is interesting to note that only the FMCS has the authority to engage the arbitration mechanism under Section 3 of EFCA. Id. § 3(h)(3). Neither party to the labor dispute can invoke the process.

57 “Final adjustment by a method of agreed to by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.” 29 U.S.C. § 173(d).

58 *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

59 *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 382 (1974)(citing *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962)).

60 Id., see also *Goya Foods, Inc.*, 238 NLRB 1465, 1467 (1978)(holding that a no strike clause of a collective bargaining agreement extended beyond the expiration of the collective bargaining agreement where the arbitration duty was also extended).



IV. FREEDOM OF ASSOCIATION – A CORE PRINCIPLE OF INTERNATIONAL LABOR LAW

A. THE ILO AND ITS SUPERVISORY MECHANISMS

Freedom of association and the right to collective bargaining is one of the most fundamental principles of international labor law. Article 20 of the United Nations' Universal Declaration of Human Rights provides that "everyone has the right to freedom of peaceful assembly and association."⁶¹ The International Labor Organization ("ILO"), the United Nations agency with jurisdiction over international labor standards, is charged with furthering this principle on the international level⁶².

Two ILO Conventions⁶³ address freedom of association and the right to collective bargaining⁶⁴. Convention 87, Freedom of Association and Protection of the Right to Organise, was adopted in 1948⁶⁵, and focuses on the rights of workers to form and join labor organizations freely⁶⁶. Article II of Convention 87 provides that "workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization."⁶⁷ Convention 98, Right to Organise and Collective Bargaining Convention, was adopted in 1949⁶⁸, and relates to protections of workers who seek representation and the right to engage in collective bargaining⁶⁹. Article IV of Convention 98 provides that "measures appropriate to national conditions shall be taken, where necessary to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements."⁷⁰

61 U.N. Universal Declaration of Human Rights art. 20 (1948).

62 The ILO Constitution mentions the freedom of association in its preamble. In relevant part, it states: "And whereas conditions of labor exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required; as, for example, by ... recognition of the principle of freedom of association ..." U.N. ILO Const. pmb1.

63 ILO Conventions apply only to member nations that have ratified them. Article 20 of the ILO Constitution governs the registration of Conventions by the ILO with the United Nations. The text reads, "[a]ny Convention so ratified shall be communicated by the Director-General of the International Labour Office to the Secretary-General of the United Nations for registration in accordance with the provisions of article 102 of the Charter of the United Nations but shall only be binding upon the Members which ratify it." ILO Const. art. XX.

64 A Convention is an instrument of the ILO created by the ILO Convention and ratified by member nations. U.N. ILO Const. art. XIX.

65 U.N. ILO, Convention No. 87 (1948).

66 Id.

67 Id., at art. II.

68 U.N. ILO, Convention No. 98 (1949).

69 Id.

70 Id. at art. IV.



In addition to Conventions, the international commitment to freedom of association as a core principle of international labor law appears in other ILO instruments. The most important of which is the 1998 Declaration on Fundamental Principles and Rights at Work (“1998 Declaration”)⁷¹. The 1998 Declaration was adopted as a means to guide every member of the ILO in its respect for labor rights solely by virtue of membership in the ILO, irrespective of whether a nation has ratified a specific convention or not⁷². The 1998 Declaration sets forth four core principles of international labor law, the first of which is “freedom of association and the effective recognition of the right to collective bargaining.”⁷³

Finally, because the ILO considers freedom of association so central to its mission, in 1950 it established a separate Committee on Freedom of Association (“CFA” or “Committee”) “for the purpose of examining complaints about violations of freedom of association, whether or not the country concerned had ratified the relevant conventions.”⁷⁴ Complaints may be brought against any member state by employers’ or workers’ organizations when they believe the principles of freedom of association are not being respected⁷⁵. Such cases can be brought irrespective of whether the member nation has ratified either Convention 87 or 98⁷⁶. During its existence, the CFA has examined thousands of cases, and has developed a substantial body of decisions upon which it relies when examining new cases⁷⁷.

B. COMMITMENT OF THE UNITED STATES TO THE INTERNATIONAL PRINCIPLE OF FREEDOM OF ASSOCIATION

The United States deems freedom of association a cornerstone principle of its laws. At home, it is at the heart of the U.S. Constitution and labor law⁷⁸. Abroad, the United States promotes freedom of association through international trade legislation, and has frequently included reference to the principles of freedom of association and “relied

71 U.N. ILO, Declaration on Fundamental Principles and Rights at Work (1998).

72 *Id.*

73 *Id.* The other three areas include the elimination of forced labor, the abolition of child labor and the elimination of discrimination in employment and occupation. *Id.*

74 U.N. ILO, Declaration on Fundamental Principles and Rights at Work (1998). Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 Digest, Annex I, at 231.

75 *Id.* at 235.

76 *Id.* at 8.

77 *Id.*, see also, <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1>.

78 The freedom of speech and of assembly have been guaranteed in the United States through the Bill of Rights. U.S. Const. amend. I. In the labor context, freedom of association has long been a core aspect of the law. It is the policy of the United States to encourage “the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 29 U.S.C. § 151.



on ILO guidance in formulating the labor rights clauses in these instruments.”⁷⁹ There are also numerous pieces of legislation, and agreements to which the United States is a party, that reference promotion of freedom of association and the rights to collective bargaining.⁸⁰

Notwithstanding its commitment to the principles of freedom of association, the United States is one of a very small number⁸¹ of ILO member nations that has not ratified Conventions 87 or 98.⁸² Apart from the technical reasons why Conventions 87 and 98 would require a wholesale revision of the NLRA,⁸³ ratification would “pose a genuine constitutional dilemma in the United States.” In order for the United States⁸⁴ to ratify the two Conventions, there would have to be legislative action by the federal government and the 50 states, as well as the District of Columbia⁸⁵. The Tenth Amendment prohibits the federal government from mandating how a state organizes its affairs, and therefore ratification of Conventions 87 and 98 “would clearly amount to an unconstitutional interference into the manner in which state and local governments organize their personnel policies to deliver services to the public”⁸⁶ because both Conventions apply to public and private sectors.⁸⁷ There are also many other aspects of labor relations regulated by state law.⁸⁸

79 See, Complaint of the AFL-CIO to the ILO Committee on Freedom of Association concerning employees classified as “supervisors” under the National Labor Relations Act at 11. See also, U.N. ILO/CFA, 349th Rep., Case No. 2524, United States, ¶¶ 794-858 (2006).

80 Examples include the following: Congressional report on legislation governing U.S. participation in international financial institutions (R. Conf. Rep. 4426, 103rd Cong. § 1621(a) (2d Sess. 1994)); Legislation governing the Generalized System of Preferences (19 U.S.C. §§ 2461 et seq. (2008)); Legislation forming the Overseas Private Investment Corporation (22 U.S.C. §§ 2191 et seq. (2008)); Legislation establishing the Caribbean Basin Initiative (19 U.S.C. §§ 2702 et seq. (2008)); Section 301 of the Trade Act of 1988 (Id. §§ 2411 et seq.); Appropriations for economic development grants through the Agency for International Development (22 U.S.C. §§ 2151 et seq. (2008)); The laws governing U.S. participation in international lending institutions (Id. §§ 1621 et seq.); Bilateral free trade agreements with numerous countries (See, e.g., Israel Free Trade Agreement, September 1, 1985, 24 ILM 653); The North American Free Trade Agreement (NAFTA North American Free Trade Agreement, December 8, 11, 14, and 17, 1992, 32 ILM 289; 19 U.S.C. § 3471); and The Central American Free Trade Agreement. Dominican Republic-Central America-United States Free Trade Agreement, August 5, 2004, 43 ILM 514; 19 U.S.C. § 4001.

81 For an up to date listing of countries that have ratified ILO Conventions 87 and 98, please see, <http://www.ilo.org/ilolex/english/docs/declworld.htm>.

82 For the definitive authority on why the United States cannot ratify either convention, see, Edward E. Potter, *Freedom of Association, The Right to Organize and Collective Bargaining – The Impact on U.S. Laws and Practices of Ratification of ILO Conventions, No. 87 and No. 98* (Washington: Labor Policy Assn.)(1984).

83 *Id.* at pp. 5-63.

84 *Id.* at p. 70.

85 *Id.* at p. 65.

86 *Id.* at p. 65.

87 *Id.* at pp. 67-68.

88 *Id.* at p. 66.

C. THE UNITED STATES AND THE ILO COMMITTEE ON FREEDOM OF ASSOCIATION

Even if a country has not ratified Conventions 87 and 98, the ILO, through the Committee on Freedom of Association, still examines that nation's labor laws and practice as part of the ILO's mandate to "provide guidelines and offer... technical assistance to bring the laws into compliance with the principles of freedom of association."⁸⁹ The United States presents no exception, and has had its laws examined by the CFA.

The complaints filed against the United States have been diverse. They range from complaints about the decision of President Ronald Reagan to terminate the employment of federal air traffic controllers represented by the Professional Air Traffic Controllers' Organization ("PATCO") for engaging in an illegal strike⁹⁰, to actions of the United States in the Panama Canal Zone.⁹¹ More recently, the AFL-CIO has used the CFA as a means to challenge decisions of the National Labor Relations Board with which it did not agree.⁹²

Some case examinations have resulted in conclusions and recommendations that the law or practice subject to the complaint is consistent with the principles of freedom of association.⁹³ Other case examinations have resulted in a criticism of U.S. law or practice.⁹⁴

89 Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 Digest, ¶ 11 (2006).

90 U.N. ILOCF, 211th Rep., Case No. 1074, United States (1981).

91 U.N. ILOCF, 6th Rep., Case No. 42, United States (1953).

92 See, U.N. ILOCF, 350th Rep., Case No. 2608, United States (2007)(NLRB decision on graduate teaching and research assistants); U.N. ILOCF, 349th Rep., Case No. 2524, United States (2006)(NLRB decision on the definition of supervisor); U.N. ILOCF, 332d Rep., Case No. 2227, United States (2002)(United States Supreme Court decision regarding remedies available to undocumented workers under the National Labor Relations Act).

93 U.N. ILOCF, 211th Rep., Case No. 1074, United States (1981)(concluding that the U.S. government acted appropriately in terminating striking air traffic controllers and using controllers from the military); U.N. ILOCF, 349th Rep., Case No. 2524, United States (2006) (concluding that the exclusion of certain classifications of employees under the NLRA can be done provided that exclusion is limited to workers who genuinely represent the interests of employers).

94 U.N. ILOCF, 350th Rep., Case No. 2608, United States (2007)(concluding that the NLRB decision excluding graduate teaching and research assistants did not comport with the principles of freedom of association); U.N. ILOCF, 344th Rep., Case No. 2460, United States (2005)(concluding that the law in the State of North Carolina that prohibits the state or any subdivision thereof from entering into any collective bargaining agreement was contrary to the principles of freedom of association, and should be repealed).



V. THE RIGHT TO A SECRET BALLOT ELECTION TO DETERMINE UNION REPRESENTATION STATUS AS AN INTERNATIONAL LABOR PRINCIPLE

A. UNDER PRINCIPLES OF INTERNATIONAL LABOR LAW, THE SECRET BALLOT ELECTION IS THE APPROPRIATE AND DESIRABLE WAY TO DETERMINE A UNION'S REPRESENTATIVE STATUS BECAUSE IT BEST SERVES TO PROTECT THE EMPLOYEE'S RIGHT TO FREEDOM OF ASSOCIATION WITHOUT FEAR OF REPRISAL

One of the most important concepts in international labor law is that “workers... shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.”⁹⁵ Consistent with the ILO’s commitment to enable workers to select a union of their own choosing, the Committee, acting in its supervisory capacity, has long sought to enable workers to designate a collective bargaining representative through “objective verification.”⁹⁶ The need for an objective verification of a claim of union support applies “in all cases,” and is equally applicable in the public and private sectors.⁹⁷

Through work of the Committee, the ILO has long expressed a belief that an “objective verification” is best achieved through a poll conducted by the authorities.⁹⁸ Within the context of the ILO’s strong belief that “anti-union discrimination is one of the most serious violations of freedom of association,”⁹⁹ such polling must occur

95 U.N. ILO, Convention No. 87, at art. 2 (1949).

96 “The Committee has emphasized the importance that it attaches to the fact that workers and employers should in practice be able to establish and join organizations of their own choosing in full freedom.” Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 Digest, ¶ 309 (2006). The Committee has stated that “collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining, the Committee has considered that the competent authorities should, in all cases, have the power to proceed to an objective verification of any claim by a union that it represents the majority of workers in an undertaking, provided that such a claim appears to be plausible and that if the union concerned is found to be the majority union, the authorities should take appropriate conciliatory measures to obtain the employer’s recognition of that union for collective bargaining purposes.” U.N. ILOCF, 309th Rep., Case No. 1852, United Kingdom, ¶ 337 (1995)(emphasis added).

97 The Committee has written that “competent authorities should, in all cases, have the power to proceed to an objective verification of any claim by a union that it represents the majority of the workers in an undertaking, provided that such a claim appears to be plausible.” U.N. ILOCF, 332nd Rep., Case No. 2250, Argentina, ¶ 281 (2003) (emphasis added).

98 U.N. ILOCF, 145th Rep., Case No. 776, Jamaica, ¶¶ 44-46 (1973); U.N. ILOCF, 187th Rep., Case No. 796, Bahamas, ¶ 173 (1974); U.N. ILOCF, 190th Rep., Case No. 882, United Kingdom, ¶ 291 (1977); U.N. ILOCF, 241st Rep., Case No. 1330, Guyana, ¶ 844 (1985).

99 Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 Digest, ¶¶ 769-774 (2006).



without revelation of the identities of the individuals involved.¹⁰⁰ The Committee has treated protection of data regarding union membership “a fundamental aspect of human rights,”¹⁰¹ and has called the secret ballot election “an especially appropriate” and desirable way to allow workers to exercise their right to be represented by a labor union of their own choosing¹⁰². The Committee has encouraged use of a secret ballot election for workers to determine their bargaining representative even in situations where unions seeking to represent workers have rejected such a proposal.¹⁰³ In a case examined in 2001 involving Madagascar¹⁰⁴, the Committee recommended the government amend its law “to allow the representativity of trade unions to be determined without making it a requirement that members’ names be communicated to the authorities.”¹⁰⁵ The Committee reasoned that its recommended amendment would allow the determination of the most representative worker organization to be achieved through objective criteria “so as to avoid any possibility of bias or abuse.”¹⁰⁶

100 In a case examined by the Committee in 1994 involving India and its public sector workers, the Committee made a very strong statement with respect to its general belief in the need for guarantees of secrecy in the process of verifying the representativeness of labor unions. U.N. ILOCF, 302d Rep., Case No. 1817, India, ¶ 325 (1994). “The Committee believes that such a determination of ascertaining or verifying the representative character of trade unions can best be made when strong guarantees of secrecy and impartiality are offered.” *Id.*

101 U.N. ILOCF, 320th Rep., Case No. 2040, Spain, ¶ 669 (1999).

102 U.N. ILOCF, 333rd Rep., Case No. 2153, Algeria, ¶ 207 (2001). “[T]he determination of the most representative trade union by secret ballot is not only an acceptable but a desirable way to ensure that workers exercise their right to choose the organization which shall represent them in collective bargaining.” U.N. ILOCF, 348th Rep., Case No. 2512, India, ¶ 904 (2006). The Committee’s commitment to the secret ballot election also appears in the context of internal union elections where the ILO has long held that legislative requirements that such elections be conducted by secret ballot are consistent with the principles of freedom of association, even though the ILO believes that trade unions should generally be left to establish their own internal structures. U.N. ILOCF, 256th Rep., Case No. 1414, Israel, ¶ 126 (1987). Outside of the context of labor, the United Nations has included the secret ballot election as one of the fundamental rights of prisoners of war in the selection of their representatives. “In all places where there are prisoners of war, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners’ representatives entrusted with representing them before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them.” U.N. Geneva Convention Relative to the Treatment of Prisoners of War part III, sec. 6, chap. 1, art. 78 (1950).

103 U.N. ILOCF, 270th Rep., Case No. 1513, Malta, ¶ 434, 438 (1989).

104 In the case of Madagascar, the process of determining representativity of labor unions created by the decree in question and which the Committee sought to have the government amend applied to both the public and private sectors. U.N. ILOCF, 327th Rep., Case No. 2132, Madagascar, ¶ 653 (2001) (citing Section 1(3) of Decree No. 2000-291 of 31 May 2000).

105 U.N. ILOCF, 327th Rep., Case No. 2132, Madagascar, ¶ 663 (2001) (emphasis added).

106 *Id.* ¶ 661.



The Committee has also strongly expressed a preference for secret ballot representation elections as a means of protecting the rights of workers to select their own labor unions in a case involving Algeria.¹⁰⁷ There, the Committee found the requirement that a union submit to the government a list of members and a copy of their membership card as part of the process of determining whether a union represents workers for purposes of collective bargaining ran contrary to the principles of freedom of association.¹⁰⁸ The Committee found the procedure to pose a problem because of the “risk of reprisals and anti-union discrimination inherent in this type of requirement.”¹⁰⁹ The Committee requested the government “take the necessary steps to ensure that decisions enabling the determination of the representativeness of organizations are taken without the identities of their members being revealed,”¹¹⁰ and strongly advocated use of secret ballot elections as a means of ensuring true freedom of association. It wrote “both the Committee and the Committee of Experts on the Application of Conventions and Recommendations have found that a secret ballot is an especially appropriate method for this purpose.”¹¹¹

107 U.N. ILOCF, 336th Rep., Case No. 2153, Algeria, ¶¶ 145-178 (2001). The case of Algeria was one examined by the Committee over several years. In the complaint, the complainant raised concerns about the procedure used to determine the representativeness of the labor union with respect to the employer. U.N. ILOCF, 333rd Rep., Case No. 2153, Algeria, ¶ 207 (2001). The Committee wrote that “[t]he Committee therefore requests the Government to take legislative or other steps so as to allow the determination of the representativeness of organizations on the basis of objective and pre-established criteria without revealing the identity of their members, for instance, by organizing ballots.” Id. ¶ 207, 215.

108 Id. ¶ 166.

109 Id.

110 Id. (Emphasis added).

111 Id. Although the case of Algeria involved public sector workers, the Committee’s strong statement in favor of the secret ballot for determining the representativeness of a labor union evidences the value the ILO places on the preservation and protection of the secret nature of an individual worker’s decision to support a labor union or not, since revelation of that decision creates the very real risk of anti-union reprisals and discrimination against union supporters. The general application of this concept is further evidenced by the Committee’s inclusion of the principle in its Digest without distinction as to its application to the public or private sector. Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 Digest, ¶ 351 (2006). There the Committee has written “the determination to ascertain or verify the representative character of trade unions can best be ensured when strong guarantees of secrecy and impartiality are offered.” Id.

B. WHERE ONLY ONE UNION MAY BE CERTIFIED BY LAW AS THE EXCLUSIVE REPRESENTATIVE OF A GROUP OF WORKERS, THE ILO REQUIRES THAT EXCLUSIVE REPRESENTATIVE BE CHOSEN BY A MAJORITY VOTE TO SAFEGUARD THE PRINCIPLE OF FREEDOM OF ASSOCIATION

The Committee has also examined legal frameworks, such as that created by the NLRA¹¹², where only one labor union may be certified as a representative of a particular group of workers, and has consistently recommended the process of selecting a labor union include a vote to safeguard of the principles of freedom of association.¹¹³ A law that does not authorize the establishment of more than one union in an enterprise does not comply with ILO Convention 87.¹¹⁴ Notwithstanding, the Committee has written that:

in many countries the legislation confers the exclusive right to bargain for a specific category of workers upon the organisation which represents a certain proportion or a relative or absolute majority of the workers, and whose representativity is generally determined either on the basis of the number of members (checking membership lists), or by secret ballot (checking number of votes) ... Where systems provide for the most representative trade union to have preferential or exclusive bargaining rights, it is important that the determination of the trade union in question should be based on objective and pre-established criteria, so as to avoid any opportunity for partiality or abuse.¹¹⁵

Although the Committee will not criticize a national system of designating representativeness where only one labor union is certified as the exclusive bargaining agent of a group of employees,¹¹⁶ where such a system exists, it must include certain safeguards to conform it to principles of international labor law.¹¹⁷ Central to these

112 29 U.S.C. § 159(a). Moreover, it is illegal under the National Labor Relations Act for an employer to recognize and bargain with a labor organization that does not represent a majority of the workers in the bargaining unit. 29 U.S.C. § 158(a)(2).

113 U.N. ILOCF, 265th Rep., Case No. 1386, Peru, ¶ 277 (1986); U.N. ILOCF, 259th Rep., Case No. 1385, New Zealand, ¶ 541 (1986); U.N. ILOCF, 248th Rep., Case No. 1380, Malaysia, ¶ 377 (1986); U.N. ILOCF, 241st Rep., Case No. 1330, Guyana, ¶ 844 (1985).

114 U.N. ILO, Convention No. 87, art. 2 (1949); see also, U.N. ILOCF, 337th Rep., Case No. 2327, Bangladesh, ¶ 198 (2004).

115 U.N. ILOCF, 265th Rep., Case No. 1386, Peru, ¶ 276 (1986) (citations omitted).

116 U.N. ILOCF, 259th Rep., Case No. 1385, New Zealand, ¶ 541 (1986).

117 The four safeguards include the following: "a) the certification be made by an independent body; b) the representative organization be chosen by a majority vote of the employees in the unit concerned; c) the right of an organisation which fails to secure a sufficiently large number of votes to ask for a new election after a stipulated period; [and] d) the right of any organisation other than the certified organisation to demand a new election after a reasonable period has elapsed." U.N. ILOCF, 256th Rep., Case No. 1386, Peru, ¶ 277 (1986). See also, U.N. ILOCF, 259th Rep., Case No. 1385 New Zealand, ¶ 541 (1986); U.N. ILOCF, 248th Rep., Case No. 1380, Malaysia, ¶ 377 (1986); U.N. ILOCF, 241st Rep., Case No. 1330, Guyana, ¶ 844 (1985).



safeguards is a system where the representative organization must “be chosen by a majority vote of the employees in the unit concerned.”¹¹⁸ Where “the authorities have the power to hold polls for determining the majority union which is to represent the workers for the purposes of collective bargaining..., such polls should always be held where there are doubts as to which union the workers wish to represent them.”¹¹⁹ As has been amply described supra, polling by secret ballot is the ILO’s preferred method of determining a union’s representative status.

C. THE UNITED STATES HAS PROMOTED USE OF THE SECRET BALLOT ELECTION ABROAD AS BEING CONSISTENT WITH PRINCIPLES OF INTERNATIONAL LABOR LAW

In 2001, several members of the United States Congress wrote a letter to the government of the State of Puebla, Mexico in which they equated the conduct of secret ballot elections in all union representation elections to compliance with international labor standards.¹²⁰ The text of the letter read as follows,

As members of the Congress of the United States who are deeply concerned with international labor standards and the role of labor rights in international trade agreements, we are writing to encourage you to use the secret ballot in all union recognition elections.

We understand that the secret ballot is allowed for, but not required by, Mexican labor law. However, we feel that the secret ballot is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose.

We respect Mexico as an important neighbor and trading partner, and we feel that the increased use of the secret ballot in union recognition elections will help bring real democracy to the Mexican workplace.¹²¹

While not annotated, the letter’s contents accurately reflected principles outlined by the ILO with respect to the international labor standard that guarantees workers the right to freedom of association. Of particular note was the authors’ conclusion that the secret ballot election ensured that workers could exercise their right to select a labor union of their own choosing without intimidation.¹²²

118 U.N. ILOCF, 256th Rep., Case No. 1386, Peru, ¶ 277 (1986)(emphasis added).

119 U.N. ILOCF, 329th Rep., Case No. 2175, Morocco, ¶ 696 (2002)(emphasis added); see also, U.N. ILOCF, 187th Rep., Case No. 796, Bahamas, ¶ 173 (1974).

120 H.R. Rep. 110-23, 110th Cong. § 55 (1st Sess. 2007). The signers of this letter included Rep. George Miller, and the following co-sponsors of the EFCA bill introduced in the House and Senate on March 10, 2009: Rep. Marcy Kaptur, Sen. Bernard Sanders, Rep. Bob Filner, Rep. Barney Frank, Rep. Joe Baca, Rep. Zoe Lofgren, Rep. Dennis J. Kucinich, Rep. Fortney Peter Stark, rep. Barbara Lee, Rep. James P. McGovern, and Rep. Lloyd Doggett.

121 Id.

122 Id.



VI. SECTION 2 OF EFCA VIOLATES THE PRINCIPLE OF FREEDOM OF ASSOCIATION BY ELIMINATING THE SECRET BALLOT ELECTION

By replacing the secret ballot election with a mandatory card check procedure, Section 2 of EFCA will deprive workers of their right to a secret ballot election and will violate the principles of international labor law. Nothing is more central to the principle of freedom of association than the right of workers to be free of the risk of reprisals for engaging in union activities. A mechanism that ensures the secrecy of their decision eliminates that risk and is not only an international labor right, but, as the ILO has stated, a human right.¹²³

Additionally, under a system such as that prescribed by the NLRA, where only one labor union may be certified by the government as having exclusive representation rights for a group of workers, the system must include the safeguard of a vote to determine which union the workers wish to have. This is particularly the case where the government administering the system is capable of conducting such votes which is certainly the case here in the United States, where the NLRB has been conducting secret ballot union elections for over half a century.

The card check process of Section 2 of EFCA removes the safeguards established by the NLRB to ensure employees make their decision on representation in secret and private way without the risk of reprisal. EFCA contains nothing to ensure such safeguards are preserved because with authorization cards, the decision by the employee is made only in the presence of the union or its supporters. Within such a setting, the employees' identities and sentiments are necessarily disclosed, and therefore subject the individual employee to the risk of coercion and reprisal that the principles of international labor law eschew. A change in the law of the United States that creates and encourages such an environment not only does not enhance the international principles of freedom of association, but will infringe upon them.

123 U.N. ILOCFCA, 320th Rep., Case No. 2040, Spain, ¶ 669 (1999).

VII. THE IMPOSITION OF A COMPULSORY ARBITRATION MECHANISM TO RESOLVE A LABOR DISPUTE VIOLATES PRINCIPLES OF INTERNATIONAL LABOR LAW BECAUSE IT LIMITS VOLUNTARY COLLECTIVE BARGAINING, AND THE RIGHT TO STRIKE

A. THE ILO'S VIEW ON COMPULSORY MEDIATION AND ARBITRATION TO SETTLE LABOR DISPUTES

The right of workers to strike is viewed by the ILO as an essential means of workers and labor unions to defend their social and economic interests, and is “an intrinsic corollary to the right to organize.”¹²⁴ Compulsory mediation and arbitration laws to settle labor disputes undermine the right of workers to strike, and fail to promote voluntary collective bargaining.¹²⁵ In the mind of the ILO, the only place where “compulsory arbitration to end a collective labor dispute and a strike is acceptable... [is where] it is at the request of both parties involved in a dispute, or if the strike in question may be restricted, even banned, i.e., in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population.”¹²⁶ The Committee has examined numerous cases and concluded that restrictions on the right to strike in the public service are permissible.¹²⁷ Similarly, the Committee has defined what constitute essential services for purposes of limitations on the right to strike.¹²⁸

The right of either party to a labor dispute to unilaterally disengage from the bargaining table and initiate compulsory arbitration does not further the international principles of freedom of association. Such a provision “does not promote voluntary collective bargaining, since one of the parties may undermine collective bargaining by unilaterally entrusting the settlement of the dispute to the labour authority, thereby suspending

124 Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the governing Body of the ILO, 2006 Digest ¶¶ 520-523.

125 The Committee has written that “it is difficult to reconcile arbitration imposed by the authorities at their own initiative with the right to strike and the principle of the voluntary nature of negotiation.” U.N. ILOCF, 349th Rep., Case No. 2545, Norway, ¶ 1156 (2007). See also U.N. ILOCF, 333d Rep., Case No. 2281, Mauritius, ¶ 631 (2003); Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 Digest ¶ 566, at 117.

126 U.N. ILOCF, 333d Rep., Case No. 2281, Mauritius, ¶ 631 (2003); See also, U.N. ILOCF, 307th Rep., Case No. 1890, India, ¶ 372 (1996)

127 Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 Digest, ¶¶ 572-580 (2006).

128 Essential services range from workers in the hospital sector, to members of the police and armed forces, to water supply workers. See, Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 Digest, ¶¶ 581-594 (2006).

the right to strike.”¹²⁹ The belief espoused by the ILO that compulsory arbitration limits voluntary collective bargaining is not a new concept. Many commentators have criticized the process for the same reason.¹³⁰

The Committee has only examined one case in the United States involving a procedure for compulsory arbitration.¹³¹ It concluded that the actions complained of did not violate the principles of freedom of association because the compulsory arbitration mechanism covered workers in the public service¹³². More important, however, was the Committee’s special note of the voluntary nature of the arbitration process under the law it examined.¹³³

In cases where the Committee has determined that a compulsory mediation and arbitration mechanism limited the right to strike and did not meet the criteria necessary for an applicable exception, it has consistently concluded that a nation’s laws requiring the compulsory arbitration procedure do not conform to the international principles of freedom of association and should be changed.¹³⁴ Indeed, even in situations where such legislation is contemplated but not yet in place, the Committee

129 U.N. ILOCF, 265th Rep., Case Nos. 1478 and 1484, Peru, ¶ 547 (1989). See also, U.N. ILOCF, 295th Rep., Case No. 1718, Philippines, ¶ 296 (1993).

130 “It is generally believed that the best labor-management contracts are those that are negotiated through collective bargaining without outside assistance.” Elkouri & Elkouri, *How Arbitration Works*, 1348 (Alan Miles Rubin ed., BNA Books, 6th ed. 2003)(1952). Commentators frequently criticize such compulsory arbitration, commonly referred to as “interest arbitration”, as not promoting the voluntary nature of collective bargaining, because it enables a party to readily disengage from the bargaining table and have someone else decide the terms of their contract. Interest arbitration damages the collective bargaining process because it creates what is known as the “narcotic effect.” It is called the narcotic effect because the availability of such a process creates a dependence by either or both parties to a collective bargaining relationship on an arbitrator to resolve disputes that the parties truly should work out themselves through meaningful negotiations. Gary E. Bolton & Elena Katok, *Reinterpreting Arbitration’s Narcotic Effect: An Experimental Study of Learning in Repeated Bargaining*, 25 *Games and Econ. Behav.* 1, 2 (1996). Evidence suggests that when the parties have the ability to resort to interest arbitration to resolve disputes that cannot be fully negotiated, there is a lessened likelihood that the parties will reach a settlement on their own. *Id.* (citing Currie, J. and McConnell, S., *Collective Bargaining in the Public Sector: The Effect of Legal Structure on Dispute Costs and Wages*, 81 *Amer. Econ. Rev.* 693-718 (1991) and R.A. Lester, *Labor Arbitration in State and Local Government*, Princeton University, Industrial Relations Section (1984)). As such, there is a belief that when available, interest arbitration is overused. *Id.*

131 The case involved the brief incarceration of a union leader for engaging in a strike against a public sector employer in violation of New Jersey State law that prohibited public sector strikes and provided for compulsory arbitration. U.N. ILOCF, 127th Rep., Case No. 627, United States, ¶ 56 (1970).

132 *Id.* ¶ 51.

133 The Committee’s special note of the issue demonstrates the ILO’s commitment to the belief that the principles of freedom of association are best served where legislation allows the parties to insist on voluntary collective bargaining to resolve a dispute over compulsory submission of the dispute for resolution by arbitration. *Id.* ¶ 57.

134 U.N. ILOCF, 333d Rep., Case No. 2281, Mauritius, ¶¶ 639-641 (2003); U.N. ILOCF, 295th Rep., Case No. 1718, Philippines, ¶ 296 (1993).



has recommended the government avoid enacting it.¹³⁵ Finally, the Committee's concern for the protection of voluntary collective bargaining and the right to strike is so strong that even in the situation where there is ambiguity in the law regarding whether parties can invoke the compulsory arbitration mechanism to settle a labor dispute, if that ambiguity is susceptible to an interpretation inconsistent with the exceptions, the Committee has sought clarification in the law in order to conform it to acceptable notions.¹³⁶

VIII. SECTION 3 OF EFCA VIOLATES PRINCIPLES OF INTERNATIONAL LABOR LAW BECAUSE IT ALLOWS FOR A UNILATERALLY INVOKED COMPULSORY ARBITRATION MECHANISM THAT LIMITS THE VOLUNTARY NATURE OF COLLECTIVE BARGAINING AND ELIMINATES THE RIGHT TO STRIKE IN FIRST CONTRACT SITUATIONS

The compulsory arbitration scheme proposed under Section 3 of EFCA interferes with voluntary collective bargaining in first contracts by replacing the right to strike with a compulsory arbitration scheme pursuant to which the government will initiate, control and determine the resolution of labor disputes. Not only will the notice period created by Section 3 of EFCA remove the benefits and protections available to employees under the NLRA if they choose to strike, but policy implications associated with the statutory arbitration scheme will enable the parties to successfully eliminate the threat of the work stoppage as a means to leverage a position at the bargaining table.

EFCA also limits the voluntary nature of collective bargaining in accordance with international labor standards because the compulsory arbitration procedures of Section 3 may be invoked unilaterally. To give either party the power to unilaterally disengage from the bargaining table and force the other to submit to a resolution of their labor dispute by arbitration, creates an incentive not to reach agreement. Worse, parties who do not wish to participate in what can often be difficult collective bargaining negotiations, can simply remove themselves from the process and let the FMCS arbitration panel resolve the dispute. Such a result does not further voluntary collective bargaining in accordance with principles of international labor law or common sense.

135 U.N. ILOCF, 349th Rep., Case No. 2545, Norway, ¶ 1156 (2007).

136 U.N. ILOCF, 302d Rep., Case Nos. 1845, Peru, ¶ 513, 518 (1995).



Finally, because the compulsory arbitration scheme of Section 3 applies to all employers within the jurisdiction of the NLRA, it also violates the principles of international labor law. The ILO is very specific with respect to the private sector industries in which a compulsory arbitration scheme may apply to supplant voluntary collective bargaining and the right to strike. Section 3 of EFCA contains no such limitation, and does not limit the restriction on strikes to only those employers in the public sector or that perform essential services.

IX. CONCLUSION

If enacted as introduced, with card check and compulsory arbitration for first contracts, EFCA will violate well established principles of international labor law that give workers the right to engage in free association and voluntary collective bargaining. While proponents of EFCA may seek to amend the law with a genuine belief that it will enhance an employee's Section 7 rights to form, join and assist labor unions, the addition of these two provisions to the NLRA will in fact limit those rights. Indeed, international scrutiny of Sections 2 and 3 of EFCA may well result in a recommendation that the United States modify its laws to make them conform to established international labor law principles. The United States has been a strong proponent of such principles at home and in its own dealings with other nations. Accordingly, the United States Congress should take care to avoid changes to the NLRA that so clearly contradict fundamental principles of international labor law.

* * *



“WE’RE NOT IN KANSAS ANYMORE”: THE CHALLENGE FOR GLOBAL LABOUR RELATIONS

Jenni MYLES, Director of Employee Engagement & HR, G4S plc

Whether you call it ‘industrial relations’, ‘social dialogue’, or plain old ‘collective bargaining’, the laden terms used to describe the formal relations between companies and unions always get a strong, if unconscious, response from an audience. Everyone has a view.

Despite the divergence of these views, shaped by unique social, political and economic experiences, the one thing they have in common is how deeply they are entrenched. It is rare to meet a business person or union official who has changed their mind on the values or aims of their opposite numbers.

So over time, organisations and individuals in every country have come to understand their respective positions and fallen into patterns of behaviour somewhere on the scale of cooperation. These habits may be shaken up from time to time but on the whole are accepted and understood. And so it would continue. But there are two macro developments that can change the dynamics of this ingrained thinking: firstly, the new momentum of the global union movement, where a cohesive strategy for international labour relations is gaining traction after years of theory and speculation; and secondly, the spectre of global recession, already affecting the lives of ordinary people around the world.

The concurrence of these unrelated but significant developments means that the familiar landscape has gone – as Dorothy pointed out to Toto, “We’re not in Kansas anymore”. Instead, this new environment creates an opportunity to think expansively, challenge ingrained thinking and create new, productive connections between companies and unions.

THE CHALLENGE

The recent progress of international labour has been aided by the increasing power of the Global Union Federations (GUFs). While the ultimate success of their efforts to position themselves as the counterpart of multinational businesses is untested, there is evidence that they are gaining influence, with a notable number of highly regarded multinational corporations signing International Framework Agreements (IFAs) in the last year or so.

The tactics used to reach these agreements can be brutal, and the legacy of corporate campaigns and other top-down organising methods will create serious obstacles to realising the benefits of the agreements themselves. Nevertheless, where common ground outweighs differences and agreement is reached, this new layer of dialogue between the multinational HQ and union federation has the potential to remodel



local management-union relationships as entity-wide labour relations policies and processes are updated. Naturally, whether these changes emerge will depend on how the IFA is implemented by both company and union.

Likewise, the practical and political fall-out from the current economic disorder will be long-lasting for business and unions. As companies freeze recruitment and discretionary spend, unions shift focus from increasing pay to protecting jobs, and although the relative bargaining power of those still in work reduces, they count themselves lucky.

So while governments around the world are focused on maintaining the good in market economics, their introduction of tax-payer funded safety nets and direct involvement in ‘bailed-out’ enterprises are just the predecessors of more stringent regulation and greater business caution. No matter how quickly the ‘green shoots of recovery’ appear, this downturn will change society’s attitude to risk for a generation.

It is unfortunate timing for the GUFs that the first signs of a global labour movement have been swiftly followed by the first signs of a global recession, one effect of which could be for local unions to hurriedly draw back, protecting their own members ahead of global solidarity. However impressive their strategy, the GUFs rely on the practical support of their affiliates and if their interests diverge now, the global movement will take years to re-group.

For that reason, in an effort to maintain their recently won influence, the GUFs will work especially hard to prove their strategy right and show that they can help the grass roots during difficult times. One approach could be to claim “I told you so” and take a political stance, pushing for greater regulation, lower investor returns and so on. There are many unionists who cannot resist calling for an end to any form of free market and believe their moment has come.

But this standpoint is incompatible with the GUFs’ undertaking to be a constructive business partner once an IFA is in place, and jeopardises the mutual benefits of these emerging relationships. Better to remember that union growth in an individualistic world will be strongest where employers see value in listening to the collective voice of their people, and trust the union to fairly champion employees’ views while understanding the need for investor returns. Multinationals that believe the GUFs will play a positive role will facilitate freedom of association and, crucially, provide openings for unions to recruit.

So the challenge is clear. To protect the delicate beginnings of global labour relationships while surviving the biggest downturn for a generation, the GUFs and multinational companies must find new ways of cooperating to protect employees’ interests and deliver sustainable commercial returns – so that the good guys survive the bad times.



THE OBSTACLES

There are several hurdles to overcome if this challenge is to be met.

CULTURAL COLLISIONS

Taking a single approach to labour relations is hardest where pre-existing local relationships touch the extremes. Moreover, in the absence of consistent government adoption of basic international conventions, multinational employers and GUFs may seem arrogant or naïve in attempting to apply global standards of their own.

But whereas governments must work largely within national boundaries, global commercial interests have persuaded many businesses to develop their cultural intelligence and take on unexpected roles in raising international standards. Indeed, diversity is increasingly valued by leading employers and the dreaded 'culture clash' of the past is recast as an opportunity to learn and make better decisions within the framework of the organisation's shared values. Thus, companies define the policies and processes which will make a tangible contribution to delivery of their strategy – beyond 'motherhood and apple pie' – but preserve valuable space for local differences provided they meet the organisation's core standards.

While business has a track record of delivering results across borders, the global union movement has just begun collaborating on specific, practical objectives and has much to learn. For example, where the GUFs or their enthusiastic affiliates have pushed a union model from one part of the world into another – most commonly by switching the 'talk, talk, talk then fight' model from Europe and the 'fight, fight, fight then talk' model of the US – the resulting flinch from business is dramatic but short-lived. The GUFs would achieve more positive and sustainable results by demonstrating greater cultural intelligence early in their dealings with multinational employers, and using their energies to deliver the right solution for that organisation and its people.

DECENTRALISED DECISION MAKING

A common challenge for any organisation is to establish the most effective structure to deliver their objectives. One recurrent dilemma is the choice between centralised or decentralised – considering factors such as location of expertise, control required, maturity of the organisation, and the need to be fluid – and for labour relations this has particular implications.

Thus, the idea of taking a global approach seems ridiculous to some. For example, where the parent organisation is purely a holding company and business units have complete autonomy over strategy and operation, a universal labour relations model



would be wholly impractical. Conversely, companies with centralised authority and resources, where subsidiaries simply implement policy, could easily adopt a global approach. The reality though, is that most multinationals operate somewhere between these two.

Union structures also have implications, and too often the national officers hide behind their regional branches, claiming they cannot control the actions of local officials – their own employees. This is simply not true. If a union is minded to control (or at least strongly influence) the actions of their branches, they can. As seen in the US during 2008, the centralisation of unions can cause tough internal battles, but determined leaders still make it happen to get the results they want.

The same can be said of the GUFs, who too willingly devolve accountability to local unions. The affiliate structure offers a theoretical defence – clearly these federations have no substance without local partners – but a few pragmatic steps would ensure agreements are respected on the ground. Thus, as a minimum, continued affiliation should be conditional on full adherence to the terms of the GUF's IFAs.

The conclusion must be that centralisation/decentralisation is a red herring for business and for unions. While the decision-making structure will affect which type of agreement is workable, the key question in these early days for global labour relations is whether the parties want to control or influence their local contacts, rather than whether they can.

LEGACY OF CONFLICT

Whereas corporate campaigns in the US are a long-standing tactic of organised labour, their use in a global context is a recent phenomenon and it is too early to say what residue they will leave. Ironically, these tactics rarely have a significant impact on business results, but it is unarguable that managers directly touched by the campaign are left deeply cynical about unions, often more determined than ever not to concede anything. So even if the global organisation can see beyond the current conflict and judges that there is a net benefit in working with the GUF, the practical implementation of any agreement will be much harder because of the antagonism left behind by these campaigns.

One must therefore question why the GUFs seem to be relying on this tactic, and worry that it is because they do not believe they can deliver on their promise of mutual gain. Because if they can, particularly at this uncertain time when companies are inclined to consider any opportunity for competitive advantage, this is the GUFs' perfect opening to convince instead of threaten, and show the best businesses how they can help create value for their organisation as well as their people.



INGRAINED THINKING

But the biggest obstacle to overcome is the ingrained thinking of managers and unions, who cannot seem to draw away from their established behaviour patterns. Some of the reasons for this are obvious because they explain all resistance to change – comfort and familiarity, any transition is hard, perceived threats and so on. More deeply rooted causes include underlying personalities (some people just thrive on conflict), and the direct links to personal values: views on unions or business are intrinsically linked to political beliefs and an individual's sense of what is fair.

Such intense personal values are tough and durable, and suggestions on how to change them are not for here. Instead, it is time for managers and unions to move on, stop mimicking past quarrels and endlessly attempting to persuade one another of the merits of their respective positions, and take a new look at the one thing they have in common – the employees. The potential open mindedness of business and unions arising from the global economic downturn provides the right moment in time to break old rituals. And the GUF leaders must use this moment to convince unions that collaborating will ensure their members have a secure and successful future.

THE OPPORTUNITY

The best way to advance global labour relations is therefore for the GUFs to lead the union movement into a new way of thinking which protects their members' interests by working more cooperatively with employers, and for those employers to recognise the validity of their employees' collective voice. To fully achieve this, three conditions will need to be present at both global and local levels – mutual accountability, mutual respect and mutual gain.

MUTUAL ACCOUNTABILITY

Multinationals with IFAs must ensure their performance in practice matches the promise on paper – they are answerable for their local businesses no matter how decentralised the organisation.

But for the reasons described above, the GUFs must also accept accountability for the actions of their affiliates. While loyalty to local contacts is natural and admirable, distance often disguises underperformance and the GUFs need to probe what is really happening rather than taking one-sided accounts at face value. IFAs are not dressed-up management complaint lines.

**MUTUAL RESPECT**

Numerous unions and managers only see the bad in each other, and are foolishly dismissive of any possible contribution the other party can make. Thus, the upside to globalisation is seldom mentioned in union circles and generalisations about the ‘race to the bottom’ tarnish the reputation of good companies. In contrast to such simplistic assumptions, for many multinationals the business case for raising local standards, creating employment, and building transferable skills in the workforce is obvious, and the presence of such companies will always benefit the local community. Where businesses go further and undertake discretionary Corporate Social Responsibility activities to build their brand or forge local relationships, this positive role in sustainable development should be nourished, not ignored.

Similarly, not enough companies value the role that unions can play in managing change within their business. Controversial, complex and critical changes are better handled after consultation with those affected – whether as employees or as service providers – and in practice this communication often has to happen through respected representatives of those employees. Unions can therefore legitimately act as the employees’ collective voice, provided they are genuinely representative. If employees are happy to represent themselves, they should be free to do so, but Freedom of Association is a fundamental human right which employers must respect, and a good union has a positive role to play in this context.

MUTUAL GAIN

Unfortunately, there is much to be learned about true gain-sharing. In reality, the payback for unions from formalising local or global relationships normally outweighs the benefits to business, hence the latter’s reluctance.

For example, most second-generation IFAs contain terms on routes to union recognition and access for recruitment, as well as a legitimised role for the GUF. Likewise local unions gaining recognition (via IFAs or otherwise) achieve negotiating rights, access to facilities and the satisfaction of improved status for union officials.

For companies, the payback is less evident. From a central perspective, the endorsement of the group’s ethical reputation and standardisation of global labour practices proffer long-term returns, but the impact on local business units will be mixed. Those with positive experiences point to the introduction of operational efficiencies and new working practices, or joint initiatives on training, communications and health & safety as concrete examples of shared benefits. However, at this point in time numerous unions around the world are unwilling to, or incapable of, delivering such benefits, and the GUF’s leadership will be vital to change these attitudes and pass on the necessary skills.



Finally, the elephant in the room: pay.

At its most simplistic, all unions’ first objective is to maximise earnings, whereas companies want to pay rates close to the market norm. As distributive negotiations unavoidably produce winners and losers, most hard-bargained pay deals end unsatisfactorily for one side. Yet over the long term wage deals should never be entirely comfortable for either side, or the deal is almost certainly unsustainable for the other.

However, in these times when job security and profits are reducing simultaneously, employees’ and employers’ interdependence becomes clearer. To achieve a win-win on pay, all parties must be prepared to enter more complex negotiations and even trade-off the unthinkable in order to create new value. Absolute flexibility from employees? Ten-year indexed deals? Binding commitments to ‘jaw jaw’, not ‘war war’? The scenarios may be nerve-racking, but the possibilities are vast, and the GUFs must steer their affiliates to expand their thinking and enable genuine gain-sharing to occur.

CONCLUSION

Global labour relationships are at a decisive juncture. Having concluded IFAs with dozens of multinationals, the GUFs must now implement these agreements to ensure they deliver for the grass roots, for their affiliates and for those businesses that were prepared to go first. Because if the mutual gain promised is not forthcoming, others will not follow. And gradually everyone will fall back into the old patterns, determined never to change again.

* * *



THE G4S EXPERIENCE

G4S was formed in 2004 after the merger of Group 4 and Securicor – two of the dominant and well-regarded players in the traditional security industry. Since then, G4S has grown to become the leading international security solutions group and second largest multinational employer in the world, with almost 600,000 employees helping businesses and governments in around 115 countries ‘secure their world’.

G4S specialises in assessing current and future risks and developing secure solutions to minimise their impact. Its employees protect the safety and security of their customers, colleagues and the general public, often playing critical roles in society, for example:

- ▶ Protecting national infrastructure, including prisons, airports and cash circulation;
- ▶ Providing overseas government logistics and close-protection in hostile environments;
- ▶ Contributing expertise in fields ranging from event security to youth justice.

In the four years following its creation, G4S was subject to a corporate campaign by UNI, the GUF for the security industry. Arising initially from a dispute in the US regarding union recognition, the campaign soon expanded to incorporate UNI’s wish for an IFA with this leading, labour-intensive business. The campaign was one of the first to go global, linking unions from more than 20 countries and calling the reputation of G4S into question with customers, media, governments, regulators, investors and employees across the world.

G4S robustly refuted all of UNI’s accusations and provided strong evidence that it was a leading global employer throughout the campaign. In particular, the company pointed to its employee relations credentials as the most unionised business on the UK stock exchange with a tradition of constructive social dialogue across developed and developing markets.

The group’s passion for employee engagement and history of investing in local communities made UNI’s sweeping allegations particularly galling, and the campaign tactics severely inflamed the situation. The relative decentralisation of the newly-formed G4S provided a further psychological and practical barrier to meaningful dialogue. Instead the company got better at refuting the allegations and the initial blast from the campaign gradually turned into white noise.

The tipping point arose in late 2007 when the GMB union, with whom G4S had dealt constructively for over 40 years, offered to act as go-between in this delicate atmosphere. Their shared history, cultural understanding and mutual respect enabled



the GMB to play a crucial mediating role in the year of negotiations that followed. Thus, in December 2008 UNI, the GMB and G4S finally signed an IFA – or “Ethical Employment Partnership” – setting out how they would work together to raise standards both within G4S and in the wider industry.

The IFA is unique in a number of ways. For UNI and its affiliates, it provides practical support to facilitate freedom of association and offers specific commitments on recognition of legitimate and representative unions. G4S benefits from tailored mechanisms to protect its business performance and ensure a stable operating environment, while leading the way on employee engagement. Importantly, the collective gain from raising industry-wide standards is valued equally by G4S and UNI.

It is very early days for the new relationship between G4S and UNI, but the mood had already started to improve behind the scenes long before the IFA became public. A phased roll-out has been agreed as both organisations will face challenges in implementing the agreement, not least because of the legacy of past conflict. And the global downturn adds uncertainty and complexity for every stakeholder. The ability of UNI and G4S to work creatively through the anticipated challenges will therefore stretch the ingrained thinking of all parties to ensure the potential mutual benefits are realised.

It’s not Kansas.

* * *





THE CORPORATE RESPONSIBILITY TO RESPECT: A HUMAN RIGHTS MILESTONE

Navanethem PILLAY,

United Nations High Commissioner for Human Rights

In June 2008, the lead UN intergovernmental human rights body, the Human Rights Council, adopted a resolution in which it stated that:

“transnational corporations and other business enterprises have a responsibility to respect human rights”¹

This may not seem to be particularly novel, since corporate social responsibility is a concept that has long entered international parlance. Yet this is an innovative position, since States—which bear the primary obligation for the realisation of human rights, recognised for the first time that business must also play its part. After more than a decade of discussion, this simple statement both sets a new and clear benchmark and represents an important milestone in the evolving understanding of human rights in our societies.

An improved understanding of the interplay between business and human rights is of enormous importance for the United Nations as a whole. The private sector is an increasingly vital force in enabling the economic and social development that is so inextricably connected with human rights and security. Companies – sometimes intentionally, but more often inadvertently – can also impede the realisation of human rights, directly or indirectly, as a result of their own actions.

Human rights are basic standards aimed at securing dignity and equality for all. The modern process of human rights standard-setting started in 1948 with the Universal Declaration of Human Rights (UDHR) which listed key human rights and their constituent elements. Over the next sixty years, a large canvass of treaties, and norms have fleshed out the UDHR vision.

Among the legally binding treaties, the two 1966 Covenants: the International Covenant on Civil and Political Rights (ratified by 114 States) and the International Covenant on Economic Social and Cultural Rights (ratified by 110 States) elaborated fundamental human rights standards and set the pace for the steady expansion of human rights law at the international, regional and national levels. The Covenants unequivocally affirmed that all human rights, civil, political, economic, social and cultural are universal, indivisible and interdependent.

The Declaration in its preamble proclaimed that “every individual and every organ of society... shall strive ... to promote respect for these rights and freedoms and to secure their universal and effective recognition and observance”. Whilst it does not specifically mention business, this reference indirectly alludes to the role that a

¹ Human Rights Council Resolution 8/7, 18 June 2008.



variety of participative actors in any given society can play in upholding human rights. According to this interpretation, private enterprise is not exonerated from providing its own contribution. On the other hand, it is a matter of accepted international law that international human rights standards impose direct legal duties only on States, with very few exceptions that impose direct obligations on individuals, notably where the standards form part of international criminal law.

This said, there is increasing recognition that business can have a substantial impact on the enjoyment of human rights. Gaining greater clarity about what to expect from private concerns in this regard is therefore important for all of us. For example, my staff both at headquarters in Geneva and in the field face the challenge of dealing with allegations of corporate abuse of human rights, and of looking for the most fruitful ways to engage with businesses in the course of their work. Yet guidance from human rights instruments and intergovernmental bodies in this regard is still underdeveloped. Such lacuna must be filled.

While not all allegations made against companies for human rights violations may be true or justified, there are sufficiently well-founded examples from around the world of human rights being infringed as a result of corporate activity. Clarity about the baseline expectations of business with regard to human rights is a first important step towards developing appropriate and effective responses to such problems.

The Human Rights Council's recognition cited above may help pave the way to a better understanding of this scantily explored interconnection. The Council's position was largely the result of the work of the Special Representative of the Secretary-General (SRSG) on human rights and transnational corporations and other business enterprises, Professor John Ruggie, the pre-eminent authority in this domain.

The SRSG's mandate had been established three years earlier by the Council's predecessor body, the United Nations Commission on Human Rights. It was a response to deep divisions within the Commission resulting from an earlier initiative – the draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights”.² The appointment of the Special Representative was made to overcome such impasse.

The scope of the SRSG's original mandate was broad. In short, he was asked to identify and clarify standards of corporate responsibility and accountability with respect to human rights; elaborate on States' roles in regulating and adjudicating corporate activities; clarify concepts such as complicity and sphere of influence; develop methodologies for human rights impact assessments and consider State and corporate best practices in relation to protection against corporate-related abuse.³

² E/CN.4/Sub.2/2003/12/Rev.2.

³ The original mandate of the Special Representative was contained in Commission on Human Rights Resolution 2005/69.



In his final report⁴ to the Human Rights Council under the 2005 mandate, the SRSG recognised both the positive and negative impacts that companies can have on human rights. He observed that:

“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.”

The SRSG’s response was to propose a policy framework to guide the understanding of, as well as responses to, the issue of business and human rights. The framework is organized around the three foundational principles of “protect, respect, and remedy”: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for access to effective remedies, including through appropriate judicial and non-judicial mechanisms.

The rationale underpinning the framework holds that the state duty to protect against third-party abuses of human rights is critical because it lies at the very core of the international human rights regime. The corporate responsibility to respect human rights is the basic expectation society has of business. And access to remedy is crucial because even the most concerted efforts cannot prevent all abuse, and victims should be able to seek redress.

It is important to note that the three principles form a complementary whole in that each supports the others in achieving sustainable progress. I shall focus here on the corporate ‘responsibility to respect’, in setting out a variety of ways in which my own office has been helping build understanding of what this means in practice.

The Special Representative emphasized in his report that since companies can affect the entire spectrum of rights, the responsibility to respect applies in relation to all internationally recognized rights. It applies even where laws are absent or not enforced because it is also a social responsibility, recognized as such by virtually every voluntary business initiative, as well as soft law instruments.⁵ Yet it is not simple for businesses – or other organisations – to understand what this array of human rights means for them in their operations.

4 A/HRC/8/5.

5 These include the ILO Tripartite Declaration and OECD Guidelines on Multinational Enterprises, and the United Nations Global Compact



To facilitate such comprehension, my Office has contributed to a publication which clarifies the meaning and implications of all the rights contained in the two main human rights Conventions.⁶ The publication, entitled “Human Rights Translated – A Business Reference Guide” was produced in collaboration with the Castan Centre for Human Rights Law at Monash University, the International Business Leaders Forum, and the UN Global Compact. This publication also contains case studies that are relevant to business as well as a list of suggested practical action that can be undertaken with regard to each right. Furthermore, my Office, together with partners from other parts of the United Nations system, civil society and business, has been working for some time on trying to get human rights integrated into business practice. OHCHR has contributed to a range of publications and tools developed with the aim to increase the understanding of human rights by business and to strengthen the integration of human rights into their core activities.⁷

It is notable that the SRSR defines the integration of human rights across a business as one of the core steps of the due diligence companies must undertake in order to discharge their responsibility to respect human rights. From my perspective, this represents one of the most significant challenges business faces and one on which my Office is well-placed to provide assistance through our partnership work with the Global Compact, NGOs and business-led initiatives.

A prime example of this flows from the active participation of OHCHR – along with the International Labour Organisation and other UN agencies – in the United Nations Global Compact. The Global Compact is a voluntary initiative promoting corporate citizenship based on universal values in the areas of human rights, labour standards, environmental protection and anti-corruption. It does not attempt to take the place of normative approaches to human rights for business, but rather to complement and support existing standards, and to help fill governance gaps where those exist.

Together with the UN Global Compact, OHCHR is involved in producing a series of case studies with analysis on business and human rights, entitled “Embedding Human Rights in Business Practice”. Two volumes have already been produced, and we are hard at work on producing Volume III.

OHCHR has also worked together with the Business Leaders Initiative on Human Rights (BLIHR), which is chaired by my predecessor as UN High Commissioner, Mary Robinson, and with the UN Global Compact, in developing guidance tools on how to integrate human rights into business management. BLIHR is a business-led programme with 14 corporate members designed to help lead and develop the corporate response to human rights. The partnership between some of the world’s largest corporations, OHCHR and the UN Global Compact sends a powerful signal

⁶ The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both dating from 1966.

⁷ See the OHCHR webpage at:
<http://www2.ohchr.org/english/issues/globalization/business/list.htm>.



that human rights is indeed a business issue and that business itself should be directly involved in finding solutions to the challenge of integrating human rights into its core activities and policies.

From our own work and that of many other actors, it is clear that much effort and some progress have been made over the past decade to better understand the nexus between business and human rights and to ensure the enjoyment of human rights in a business context. However, in the words of the SRSG:

*Without in any manner disparaging these steps, our fundamental problem is that there are too few of them, none has reached a scale commensurate with the challenges at hand, there is little cross-learning, and they do not cohere as parts of a more systemic response with cumulative effects.*⁸

The framework proposed by the SRSG was designed to start addressing those deficits. I believe it represents a major step forward. And I believe that the Human Rights Council has done us all a favour by welcoming the framework and inviting its further elaboration, at its meeting in June 2008. Indeed, the Council went further, extending the SRSG's mandate for a further three years and asking him to operationalize the framework.⁹

The SRSG's renewed mandate is expected to result in more operational guidance on how to meet the responsibility to respect as well as the other important elements of the framework. Such guidance would be welcomed by my Office and, I hope, by both business and their stakeholders. We will continue actively to support the SRSG in his essential work and to continue our own separate yet reinforcing efforts to help businesses understand and embrace their own role in advancing human rights around the world.

When the Universal Declaration of Human Rights was adopted, Eleanor Roosevelt – who chaired its drafting committee – noted that human rights begin in the “world of the individual person: the neighbourhood he lives in; the school or college he attends; *the factory, farm or office where he works* (emphasis added). Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.” We all must work to ensure that human rights do not falter at the company gates.

* * *

⁸ Id. Note 4, paragraph 106.

⁹ In relation to the responsibility to respect, the Council requested the Special Representative to: “..elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders;”





CREATING WEALTH AND DECENT WORK: WHY SHOULD BUSINESS BE INTERESTED IN WHAT THE ILO DOES?

*Juan SOMAVIA, Director-General
International Labour Organization*

WHAT THE ILO DOES

The ILO was founded in 1919 with a mandate to promote peace and social justice by pursuing its work centred mission of improving labour conditions. The need for such an organisation emerged in a world characterized by such “injustice, hardship and privation” that peace and harmony were imperilled. To find a balanced way forward, the ILO’s unique governance structure brought together employers, workers and governments. Consequently, from its inception, business has had a seat at the table of the ILO.

The foundation stone for discharging its mission was the formulation of international labour standards, which have shaped national labour laws around the world, and the promotion of sound industrial relations. The Organization has risen to the demands of a changing world. In the face of the experience of the Great Depression and the challenges of reconstruction following World War II, the ILO set a new store on the economic and social policies required to meet its objectives and on its role in promoting them. With the presence of the actors of the real economy within the Organization, it could speak with credibility on policies where full employment, the expansion of international trade, economic growth and global economic and social advancement were mutually supportive. In 1944, the Declaration of Philadelphia, was a landmark in defining the role of the Organization in a new world order.

On the threshold of the 21st century, the Organization distilled its historic mission in the concept of “Decent Work” as a means of identifying priorities, modernizing its approach and defining new ways of working. Decent work is based on the ILO’s founding principle that labour is not a commodity. It elaborated on the founding vision of work as a source of personal dignity, key to the stability of individuals and families, communities and societies. The capacity of democracies to deliver decent work is a key litmus test of legitimacy. Inclusive economic growth that expands opportunities for productive jobs and enterprise development underpins social stability. Putting the Decent work Agenda into practice is achieved through the implementation of its four strategic objectives: productive employment, social protection, social dialogue and rights at work, together with gender equality and development as cross-cutting objectives.

In a comparatively short period of time, a consensus has emerged among ILO constituents, civil society and the international community that productive



employment and decent work is a major avenue towards social justice and a fair globalization and the major route out of poverty. This was formalized by the International Labour Conference in June 2008 when constituents adopted the Declaration on Social Justice for a Fair Globalisation which affirms the role of decent work in the context of globalization. It sets out a vision and a practical programme for promoting social justice through the world of work, stressing the “inseparable, interrelated and mutually supportive” nature of the four strategic objectives.

This Declaration highlights the key role of productive, profitable and sustainable enterprises in achieving sustainable economic development and employment opportunities within the framework of the Decent Work Agenda.

WHAT DECENT WORK MEANS

CREATING JOBS -

an economy that generates opportunities for investment, entrepreneurship, skills development, job creation and sustainable livelihoods;

GUARANTEEING RIGHTS AT WORK –

to obtain recognition and respect for the rights of workers. All workers, and in particular disadvantaged or poor workers, need representation, participation, and good laws that are enforced and work for, not against, their interests;

EXTENDING SOCIAL PROTECTION –

to promote both inclusion and productivity by ensuring that men and women enjoy working conditions which are safe, allow adequate free time and rest, take into account family and social values, provide for adequate compensation in case of lost or reduced income and permit access to adequate healthcare; and

PROMOTING DIALOGUE AND CONFLICT RESOLUTION –

people in poverty understand the need to negotiate and know dialogue is the way to solve problems peacefully. Social dialogue, involving strong and independent workers’ and employers’ organizations, is central to increasing productivity and avoiding disputes at work, and to building cohesive societies.



WHY BUSINESS SHOULD BE INTERESTED IN DECENT WORK: THE PROMOTION OF SUSTAINABLE ENTERPRISES

There can be no rights at work without work itself and the Decent Work Agenda emphasizes the role of enterprise in job creation. Entrepreneurship and enterprise development took centre stage at the International Labour Conference in June 2007 when the International Labour Conference discussed the promotion of sustainable enterprises. The challenge was to take stock of the international debate on the role of the private sector and sustainable enterprise in overall social and economic development; to assess the relevance and implications of recent trends for the implementation of the Decent Work Agenda; to provide an ILO contribution to the debate; and to provide guidance to the Office with respect to its work in this area. The conclusions of this discussion respond directly to the interest of business in what the ILO does.¹

To quote from the conclusions, “sustainable enterprises need sustainable societies: business tends to thrive where societies thrive and vice versa”. This alludes to the external environment in which business operates. And “at the enterprise level...long term viability implies that the management of enterprises should be based on the three pillars of sustainability: economic, social and environmental. This allows enterprises to create wealth and decent work”.

Wealth creation depends on the productive capacities of all parts of society. Business is a principal source of growth, wealth creation, poverty reduction, employment and decent work. The ILO is well placed to contribute to sustainable development through the promotion of decent work because it is in workplaces that the social, economic and environmental dimensions come together inseparably.

AN ENVIRONMENT CONDUCIVE TO SUSTAINABLE ENTERPRISES

Business people know the importance of a conducive enabling environment: they know that good laws, regulations and institutions are necessary for doing business. Where such mechanisms are weak or burdensome, opaque or arbitrary, business people are likely to face obstacles which may increase the costs of doing business, stifle innovation and competition, divert resources from their optimal use or may encourage informal activity. But in the face of good laws, smart regulations and efficient institutions that foster predictable, transparent and efficient enabling environments for business, it becomes easier for all business people to operate within the rule of law and to benefit from the opportunities and protections that the law provides. In short, business needs level playing fields in order to compete on an equal footing.

1 <http://www.ilo.org/dyn/empent/docs/F836599903/ILC96-VI-2007-06-0147-2-En.pdf>



As an advocate for an environment conducive to the promotion of sustainable enterprises, the ILO supports business. One example was through our lead role in the Donor Committee for Enterprise Development which at the end of 2008 launched a widely endorsed guide on good practices in supporting business environment reforms.² This publication draws significantly on the ILO's own work in this field and provides practical guidance to development agencies to improve their support for business environment reforms in developing and transition countries in order to promote economic growth, job creation, poverty reduction and gender equality. It provides generally applicable, practical guidance and underscores the importance of taking stock of social and environmental costs and benefits in decision making and of aligning business incentives with sustainable development objectives. With regard to reforms affecting labour and labour related laws, the guidance underscores the importance of balancing the need to reduce compliance costs with the need to safeguard and, where appropriate, improve protection for workers, including their right to social protection.

The ILO holds that promoting sustainable enterprises is about strengthening the institutions and governance systems which nurture enterprises – strong and efficient markets need strong and effective institutions, including labour market institutions, i.e. labour administrations and representative employers' and workers' organisations. Sustainability also entails confidence in public policies and regulatory frameworks to deliver on the promise of prosperous, stable and equitable societies.

Promoting sustainable enterprises is about strengthening the rule of law, the institutions and governance systems which nurture enterprises, and encouraging them to operate in a sustainable manner. Central to this is an enabling environment which encourages investment, entrepreneurship, workers' rights and the creation, growth and maintenance of sustainable enterprises by balancing the needs and interests of enterprise, including their legitimate quest for profit with the aspiration of society for a path of development that respects the values and principles of decent work, human dignity and environmental sustainability.

The ILO's constituents agreed on 17 pillars of such an environment, the relative importance of which may vary at different stages of development and in different cultural and socio-economic contexts. Some of these interconnected and mutually reinforcing conditions are highlighted below:

ENTREPRENEURIAL CULTURE

Governmental and societal recognition of the key role of enterprises in development and strong support, both public and private, to entrepreneurship, innovation, creativity and the concept of mentorship, particularly for start-ups, small enterprises and targeted groups such as women and youth, are important determinants of a

² www.business-environment.org



conducive business environment. The ILO has developed a practical tool – Know about Business (KAB) – that addresses the challenge of fostering an enterprise culture among young people by creating awareness of entrepreneurship, developing positive attitudes towards self employment and providing practical knowledge about setting up a business to better facilitate the school to work transition. KAB is now widely used in about 45 countries where it is directed towards educators in vocational and technical training institutions, general secondary and higher technical education. In Kenya, for example, it has been sustainably integrated into the national curricula of technical and vocational training institutes.

RULE OF LAW AND SECURE PROPERTY RIGHTS

A formal and effective legal system which guarantees all citizens and enterprises that contracts are honoured and upheld, the rule of law is respected and property rights are secure, is a key condition not only for attracting investment, but also for generating certainty, and nurturing trust and fairness in society. Property is more than simply ownership. Extending property rights can be a tool for empowerment and can facilitate access to credit and capital. They also entail the obligation to comply with the rules and regulations established by society. In this regard, the Office is undertaking innovative research and capacity building work on the “law-growth nexus”, targeting greater awareness of and compliance with labour and labour related laws among micro and small enterprises in Africa.

SOCIAL JUSTICE AND SOCIAL INCLUSION

Inequality and discrimination are incompatible with sustainable enterprise development. Explicit policies for social justice, social inclusion and equality of opportunities for employment are needed. Effective exercise of the right to organize and bargain collectively is also an effective means to ensure fair distribution of productivity gains and adequate remuneration of workers. All too often, large groups in society are disenfranchised or marginalised in economic life and denied the opportunity to, for example, set up and run their own businesses. They may face particular obstacles such as a lack of appropriate skills, contacts or access to credit. In this regard, while supporting a supportive normative and policy environment, the ILO has developed a wide range of tools to support women and men to start up their own businesses, including the Start and Improve Your Business (SIYB) suite of business management training tools. Further success is being achieved with a related set of tools and expanding project portfolio concerned with enhancing economic opportunities for women through entrepreneurship development and gender equality, which has achieved notable impact in Lao PDR among other countries.



SIYB IN CHINA: REACHING SCALE, ACHIEVING IMPACT

In China, over a three year period, the SIYB programme developed over 100 Master Trainers and over 2,400 trainers. This capacity has assisted in reaching and training 760,000 entrepreneurs and created 240,000 businesses in three years. It is estimated that 1.2 million new jobs have been created as a result of the SIYB intervention.

EDUCATION, TRAINING AND LIFELONG LEARNING

Good businesses know that human talent is the single most important productive factor in today's economy. Focusing on the development of a skilled workforce and the expansion of human capabilities through high-quality systems of education, training and lifelong learning is important in helping workers to find good jobs and enterprises to find the skilled workers they need. Research, analysis, policy advisory services and operational programmes are integral elements of the ILO's programme. Skills development policies constitute a core element of the ILO's Global Employment Agenda (GEA), the ILO's policy framework for the employment promotion objective of the Decent Work Agenda. The Human Resources Development Recommendation, 2004 (No. 195), also provides guidance for effective skills and employment policies.

ADEQUATE SOCIAL PROTECTION

Sustainable tax-based or other national models of universal social security that provide citizens with access to key services such as quality health care, unemployment benefits, maternity protection and a basic pension, are key to improving productivity and fostering transitions to the formal economy. They can also serve as vital counter-cyclical measures and facilitate structural change in times of crises and economic downturn. Protecting workers' health and safety at the workplace is also vital for sustainable enterprise development and business knows all too well the burden on workers and their families and the negative impact on productivity of occupational accidents and diseases. We argue that it is in the interests of all, including business, to see social protection not just as a necessary social safety net for times of adversity or during certain stages of a person's life cycle but as a productive investment which serves to underpin and improve the quality of life.

RESPONSIBLE STEWARDSHIP OF THE ENVIRONMENT

Finally, when we discuss an environment conducive to sustainable enterprise we recognise the importance of the natural environment and of promoting green jobs. Green jobs reduce the environmental impact of enterprises and economic sectors, ultimately to levels that are sustainable. Specifically, but not exclusively, this includes jobs that help to protect ecosystems and biodiversity; reduce energy, materials, and water consumption through high-efficiency strategies; de-carbonize the economy;



and minimize or altogether avoid generation of all forms of waste and pollution. We know that in the absence of appropriate regulations and incentives, markets can lead to undesirable environmental outcomes. Tax incentives and regulations, including public procurement procedures, should be used to promote consumption and production patterns that are compatible with the requirements of sustainable development. The current global financial, economic and now jobs crisis presents an opportunity to make the economy more socially and environmentally sustainable: the short term response to the crisis should pave the way for a fairer and greener economic growth model.

BETTER BUSINESS ENVIRONMENTS AND REACHING OUT TO SMALL ENTERPRISES

Business clearly has a vested interest in an environment which is conducive to doing business but a good business environment is not just about reducing the costs of doing business, it is about recognising the centrality of decent work to the pursuit of sustainable paths of development.

The Office has responded to the challenge by developing a unique and comprehensive modular training programme on creating a conducive environment for small enterprise development which is run annually at the ILO Training centre in Turin and now on a customised and demand driven basis in a number of countries. It includes a diagnostic tool for assessing the business environment from a decent work perspective, based on the 17 sustainable enterprise pillars mentioned above.

Small and medium enterprises represent the overwhelming majority of all businesses in any country and contribute significantly to employment. Employers' organisations have a major role to play in reaching out to them, representing them and advocating on their behalf and providing services to meet their needs. With this in mind, the ILO and the International Organization of Employers (IOE) designed an electronic web based toolkit to help employers' organisations to reach out to SMEs. This has proved a popular resource and has helped employers' organisations to broaden their membership base. It is just one tool which the ILO has developed to build the capacity of employers' organisations and to strengthen their advocacy, service delivery and policy making capacities.

RESPONSIBLE AND SUSTAINABLE ENTERPRISE LEVEL PRACTICES

Business has a fundamental and vital interest in what the ILO does, not just because the ILO supports the promotion of environments conducive to sustainable enterprise development but also because the ILO supports governments, social partners and ultimately businesses themselves to foster responsible and sustainable enterprise level practices.



Responsible and sustainable enterprises innovate, adopt appropriate environmentally friendly technologies, develop skills and human resources, and enhance productivity to remain competitive in national and international markets. They should also apply workplace practices based on full respect for fundamental principles and rights at work and international labour standards, and foster good labour–management relations as important means of raising productivity and creating decent work.

Sustainable enterprises engage in social dialogue and good industrial relations, such as collective bargaining and worker information, consultation and participation. These are effective instruments to create win-win situations, as they promote shared values, trust and cooperation, and socially responsible behaviour. Social dialogue includes examples at international level, such as the conclusion of International Framework Agreements between multinational enterprises and global union federations in different industrial sectors. Social dialogue supports the adoption of long-term and socially responsible investment strategies. It can contribute to higher productivity and innovation, health and safety in the workplace, as well as equity, fairness and the development of skills that meet the needs of enterprises and the need of workers for recognized and transferable skills. The ILO is the global leader in brokering knowledge and technical assistance in this field and a good example of this is the Better Work Programme.

BETTER WORK

The Better Work programme is a partnership between the ILO and the World Bank's International Finance Corporation. Launched in August 2006 in order to improve labour practices and competitiveness in global supply chains, Better Work supports enterprises in improving their labour standards based on core ILO labour standards and national labour law. This helps enterprises compete in global markets where many buyers demand compliance with labour standards from their suppliers. It is also predicated on an evolving body of evidence that suggests improving labour standards can help enterprises become more competitive by increasing quality and productivity. In Cambodia, where the Better Work Programme began, over 340,000 workers in around 300 factories are covered and notable improvements both in the quality of the work environment (increased compliance with labour standards and labour law) and improved market performance (increased sales and market share) have been recorded.

Multinational corporations are increasingly concerned about labour standards in their supply chains. According to a World Bank survey exploring 106 multinational companies with net revenues totalling over US\$1.6 trillion, sixty-one percent of those purchasing manufactured goods rated labour standards as a key sourcing criteria.

In the face of weak governance in sourcing countries, buyers have been individually auditing working conditions in their supply chains resulting in costly duplication



of efforts, as many factories sell to multiple buyers. Based on World Bank research in the apparel industry in Vietnam, the current system of multiple buyer audits costs approximately US\$50 per worker per year. Better Work helps consolidate these efforts and conducts a single compliance assessment annually which can be shared with many buyers, along with value-adding advisory services to help factories improve, for approximately US\$2 per year. By reducing costs associated with identifying problems, more funds can be redirected to finding solutions.³

Sustainable enterprises can use Corporate Social Responsibility (CSR) to complement their pursuit of sustainable strategies and outcomes. CSR is a business-driven voluntary initiative and refers to activities that are considered to exceed compliance with the law. CSR cannot substitute for legal regulation, law enforcement and collective bargaining. However, where CSR is transparent and credible and based on genuine partnership, it can provide workers and other stakeholders with further opportunities to engage enterprises on the social and environmental impact of their activities. In this regard, ethical and fair trade initiatives help promote CSR in value chains and the ILO has developed training packages on value chain analysis which social partners and others have found most useful, especially in sectoral approaches to enterprise development.

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) provides guidance on good corporate behaviour and citizenship. As with all major initiatives to promote responsible business, such as the OECD Guidelines for Multinational Enterprises, the UN Global Compact Principles and the IFC Performance Standards on Social and Environmental Sustainability, the MNE Declaration derives its content on labour standards from the ILO Core Conventions. The newly established help desk set up by the Office to provide direct assistance to enterprises and constituents on issues arising from the implementation of the MNE Declaration has proven particularly popular and has been well received by the business community. Furthermore, specific codes of conduct or practice can help business to align their operations with good practices: the ILO Code of Practice on HIV/AIDS and the World of Work is a prime example in this regard.

While most codes and instruments recognize CSR as “voluntary and varied by nature”, it has become increasingly important for businesses, and especially large MNCs, to address the impact of their operations on society, whilst not diverting such enterprises from their “vital role in providing the primary means for wealth creation within society through profitable activity”.¹ In this regard, the table below shows the “business case” arguments for enterprises to take action on the environmental and social impact of their operations. Failure to take action can

³ www.betterwork.org/public/global

⁴ IOE: The role of business within society – Position Paper (Geneva, IOE, 2005), p. 1.





damage their reputation and corporate image, impose additional costs of doing business and reduce their competitiveness. Indeed, there is now substantial evidence to indicate that CSR boosts acceptance of a company's operations and enhances its international reputation, and can also help it to open up fresh market opportunities, strengthen its innovative and competitive edge and create new jobs.

In fact, numerous studies show that responsible business practices – attention to factors other than just maximizing short-term profits – help the bottom line and that responsible firms outperform their competitors.⁵ However, it can be argued, that these differences in financial performance may not necessarily reflect the benefits of social responsibility per se but rather the probability that businesses which are managed in a socially responsible fashion are also likely to be well run: “doing good and doing well” are mutually reinforcing.



⁵ United Nations Environment Programme (UNEP) 2006. Show me the money: Linking environmental, social and governance issues to company value (Geneva, 2006) and www.sustainability-index.com/



The business case for addressing environmental and social factors in enterprise operations

	ENVIRONMENT	WORKERS	COMMUNITIES
Cost savings	Reduce energy costs, cut waste disposal costs, save from recycling	Employees stay longer, reducing recruitment and training costs and other costs associated with staff turnover	Constructive engagement may yield positive externalities from good community relations like lower insurance and security costs
Improving productivity and/or sales	Reduced input and costs increase productivity. Potential to target eco-consumers and benefit from procurement policies which embody environmental principles	Better motivated employees and lower absenteeism. Greater continuity in staffing feeds into better customer service and satisfaction	Possibility of tapping into local knowledge. Community engagement feeds through into improving morale and motivation of staff and may help achieve greater diversity at the workplace. Potential for raising business profile, enhancing brand and reputation and ultimately improving scope for new business opportunities





We know that enterprises need to be viable in order to be sustainable. And the term viable is deliberate as it implies a broader notion than that of profitable which, as we have seen all too often recently, can be very transient and even illusory. But viability does not deny the fact that in vibrant, dynamic economies some enterprises will inevitably contract or fail and there is an ongoing process of entry and exit. The principles and values of decent work provide as much guidance in the case of enterprises which contract or fail as they do in those which succeed and grow. In this regard, active labour market policies and social protection are very important for managing efficient and socially just transitions that take into account national circumstances. At present when the global financial and economic crises are adversely affecting so many businesses around the world, this message is more important than ever.

THE ILO: PROMOTING SUSTAINABLE ENTERPRISES AND HELPING BUSINESS TO DO WELL

There is a clear connection between the interests of business and the business of the ILO.

The present crisis has brought into even greater focus the need to build a new global system based on the pillars of economic, social and environmental sustainability and grounded in a reassertion of universal human values such as those expressed in the ILO's Constitution, and in our Declarations on Fundamental Principles and Rights at Work and on Social Justice for a Fair Globalization.

It is clear that the world is highly interdependent both in terms of sharing success and, as we have seen in recent times, in terms of sharing failure. Decent work is as fundamental and essential in the good times as it is in the current bad times.

This calls for new forms of cooperation between government, business, workers and society. The stakes for business could not be higher.

* * *



WHERE DOES BUSINESS FIT IN THE MIGRATION AND MOBILITY DEBATE?

William L. SWING,

Director General, International Organization for Migration

There is no question that today we live in a globalized, and increasingly globalizing, world, with ever freer movement across borders of goods, capital and services. One key question still to be fully addressed is the role of human mobility in this picture, and, flowing from that, the role of business in the debate on the extent to which, and how, human mobility should be liberalized. In approaching these questions, let's consider three subsidiary matters: First, what kinds of businesses are participants in the global mobility of people and how are they involved? Second, what exactly is the migration debate—that is, what are migration's benefits and drawbacks for societies as a whole and for migrants as individuals? And third, what roles do those businesses play in the movement of people across international borders and what roles can or should business play in the future?

First, a brief word about the current economic downturn before turning to the main focus of this article. The current financial and economic crises risk generating protectionism in trade. The same temptation with respect to human mobility will be damaging in the long run to the interests of businesses, societies and individuals in developed and developing countries alike and needs to be resisted with similar vigour. We cannot turn back the hands of globalization and the increasing integration of economies and labour markets. Even if demand for migrant workers declines in the near term in certain sectors and certain regions, structural factors including profound demographic, skills, wage and opportunity disparities globally indicate that human mobility will remain an integral feature of our world. As just one example, health and other forms of care workers remain in short supply in the industrialized world, with aging and shrinking populations. And young and dynamic populations in much of the developing world will continue to seek opportunities abroad to develop their skills, acquire knowledge and resources, and participate in the global economy. It is of crucial importance to ensure that this matching of supply and demand takes place through safe and legal channels – rather than through unsafe journeys and with the aid of unscrupulous traffickers and smugglers. Consequently, we must all work to ensure that adequate legal channels for migration that correspond to genuine demand remain open and accessible. As a corollary to this, we cannot let migrants become scapegoats of the current crises and therefore must take active measures to combat xenophobia and discrimination. Business is and will continue to be integral to these efforts.



BUSINESS PARTICIPATION IN HUMAN MOBILITY

What businesses are at issue when one speaks about migration? It is not an overstatement to say today that nearly all sectors of business and in nearly all regions of the world affect or are affected by migration in ways large and small. Private sector actors from large multinationals to small family businesses are active in every step of the migration process and benefit from the movement of people to and from countries of origin, transit and destination. Employers and recruiters are the actors who play an obvious migration-related role by providing jobs to individuals who are willing to cross borders to benefit from better opportunities or simply to improve their livelihood prospects. Other private sector players include educational and vocational institutions which provide skills training and education that will enable workers to tap opportunities in the international labour market, as well as related institutions in charge of ensuring the recognition of diplomas and qualifications earned abroad. Travel agencies and transportation services enable people to move, while immigration law firms help workers manoeuvre through bureaucratic requirements. Money transfer organisations and banks provide secure channels for migrant workers to send home remittances, which in turn help relieve poverty and boost economic development in households and communities in origin countries as diverse as Mexico, the Philippines and the United Kingdom. Businesses such as language schools cater to the integration needs of migrants in their host countries, while enterprises such as nostalgia goods retailers and telecommunications companies help migrants stay connected to their home culture and family networks.

Given the increased and integral role of businesses in the migration process, my predecessor as Director General of the International Organization for Migration (IOM) took the initiative to offer a space where key business representatives could engage in direct dialogue on human mobility and pursue initiatives of interest through innovative projects drawing on mobility trends. In 2005, IOM established the Business Advisory Board (BAB) to exchange information, views and analysis on mobility policies and practices (see www.iom.int/partnerships/bab). The BAB (which includes representation from the IOE) has focused its work on the global labour market, including analysis of trends, treatment of workers, forms of integration, fighting corruption and illegal business activities and the social and political impact and use of remittances. Further, the private sector contributed to operational projects of IOM in an amount which increased approximately threefold from just over US\$ 2 million in 2006 to more than US\$ 6 million in 2008. These contributions came from foundations, banks and companies and they have funded such projects as malaria prevention in return migrant communities in Angola; post-Tsunami reconstruction, a training and information campaign in Indonesia; and capacity building for medical and psycho-social care for trafficking in persons in Moldova. These projects provide a snapshot of the eagerness of the private sector to contribute to the improvement of some aspects of human mobility in a philanthropic manner, whether the particular business entity is involved in labour migration issues from a business perspective or not.



THE MIGRATION DEBATE

If it appears that so many businesses stand to benefit from increased mobility, and workers likewise benefit from securing jobs overseas, what exactly is the migration debate about? As is discussed in more detail in IOM's flagship publication *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*, globalization has intensified the movement of capital, goods, services, ideas, and even people across international borders; however, the latter to a far lesser extent. About 3 percent of the world's population today consists of migrants. This means that approximately 200 million people live outside their home country, and about half of them, or 95 million, are engaged in remunerative activity.

While migration creates opportunities it also creates tensions and fears unequally shared amongst different groups in a society (policymakers, employers, workers, civil society, labour organisations). This is reflected in the way migration is managed, with countries trying to find the right balance between facilitation and control of human mobility.

However, much research has showed that gains accrue to host countries and benefits derive from migration for origin countries. Immediate beneficiaries of the international movement of labour are individual migrants themselves, who can take advantage of higher salaries abroad. For instance, real wage gaps are often as high as 10 to 1 between countries of destination and origin. Overseas employment can also provide opportunities for employment and professional development, such as acquisition of skills, knowledge and business contacts. It can provide opportunities for personal development by allowing exposure to new people, cultures and ideas. Destination countries also gain from migration, as they are supplied with a workforce they need, some members of whom are highly educated, eager to meet market demand. Instead of resorting to outsourcing or shipping a job overseas, opening up to foreign labour means that customers who rely on that occupational role remain served, and related enterprises remain in business. Open migration policies allow businesses to attract workers who provide the best fit from a global talent pool, and facilitate better congruence between workers' skills and job opportunities. In other instances, less-skilled migrants accept jobs that native workers simply do not want anymore, as general rises in education levels allow them to pursue better opportunities. Migrant labour contributes to the efficient use of existing capital, land and technology, and spurs economic development. Migrants also pay taxes to host governments, improving the resource base.

Migration is a favourable enterprise for many countries of origin as well. It helps to alleviate unemployment by providing an alternative for individuals who may be stuck in slow-growth sectors at home. The most promising aspect of migration, however, is in its potential to spur economic development through remittances and skills transfer from migrants who have been professionally trained or educated abroad. For instance, the World Bank estimates that in 2008, remittances totalled US\$ 375 billion,



of which US\$ 283 billion went to the developing world. Currently banks, employers and governments are trying to make the most of migration through the establishment of leveraging projects such as matching programs, direct deposit schemes in which a portion of a migrant's salary is remitted to an account holder back home, and micro-finance programmes.

Despite its advantages, migration certainly has its critics. For many host country natives, migrants are seen as economic threats who displace locals from jobs because of their willingness to work for low wages. Migrants may take advantage of public services such as education, health care and welfare assistance (although usually they pay for these benefits). Citizens and governments seek to fortify their borders because of national security and public health concerns. As the source of migration flows, origin countries lose out when they have invested the cost of educating and training workers, only to see their nationals employ their expertise abroad.

There are also social downsides related to migration. For instance, exploitation and labour violations occur more regularly than with respect to nationals because migrants often do not have the same rights as local workers, or their rights are not enforced. In some countries, economic benefits gained from irregular migration and the low salaries of irregular migrants (especially in maintaining a degree of competitiveness in some industries in high wage countries) can create a temptation for governments to turn a blind eye to the issue. Migration also often entails at least a temporary separation of families, and may even take a toll on the environment because of higher population density and increased strains on ecosystems. The presence of multinational companies in varied legal jurisdictions also raises concerns about evasion of protective standards by relocating operations to countries where labour is cheap and exploitation is condoned.

What is important to keep in mind is that the outcomes of migration will mainly depend on the policies in place to make the process orderly and beneficial for all stakeholders.

THE ROLE OF BUSINESS

Given the ubiquity of commercial activities relevant to the movement of people across borders, and financial need as the impetus for relocation, it is obvious that business plays a complex and multidimensional role in the migration process. In addition to being the engine of economic development in host and origin countries, the corporate world plays a key role as (1) employer and recruiter of migrant labour, (2) agent in the privatisation of immigration control, (3) analyst of market trends and needs, and (4) stakeholder in communities and the policy process. Governments can engage the private sector in dialogue to promote more transparent practices for seeking, offering and performing work abroad.



First, in their role as employers, businesses have a certain responsibility to promote fairness in the workplace and irrespective of downturns in the economy. While some argue that employers of migrant labour have a social duty to protect working conditions, businesses' self-interest in ensuring humane labour practices and safe workplaces should not be forgotten. Corporate social responsibility is increasingly viewed by executives as a profitable exercise partly because of its impact on a company's reputation among consumers and workers. Further, by providing job-related educational and cultural training, management can depend on employees who are more efficient in their jobs and more communicative among their colleagues in their workplace. Finally, a firm's status as a socially responsible enterprise may enable it to attract and retain key personnel.

Ethical practices might include compensating equal work with equal pay, providing skills training for career development, and ensuring that management teams honour the labour laws of host countries and the standards set forth in employee contracts. Employers seek to develop management practices and build work environments that promote worker health and safety. In addition to such physical amenities, businesses can exert their influence over workplace structures to promote social values such as cultural diversity and societal integration. Some provide pre-departure cultural orientation and language training to facilitate the adaptation of migrant workers into the host society, while at the same time respecting employees' cultural traditions by, for example, allowing them to take days off for holy days or letting workers wear ethnic or religious attire. Given the increasingly multicultural landscape of host societies, promoting workplace diversity and cross-cultural understanding is becoming a management priority.

Since not all staff searches are conducted in-house, the role of private employment agencies or recruiters in the migration process warrants attention. Recruiters, be they temporary placement agencies or other labour providers, find workers for available jobs, thus acting as a broadcaster of employment opportunities and as a head-hunter for qualified personnel. Because of the widespread existence of illegal recruitment strategies, efforts have been made to establish, monitor and enforce ethical procedures for soliciting and contracting employees. For instance, the Colombo Process is a regional dialogue on labour migration among 11 countries of origin in Asia. One project of the Colombo Process is a partnership among recruiters, employers and governments to promote ethical practices in recruitment, and has resulted in the establishment of newly created Association of Asian Recruiters with a commitment to reduce abuse in the recruitment process. Such partnerships work to ensure affordable recruitment fees, to require transparent recruitment practices, and to prevent such abuses as fraud and contract substitution.



Second, immigration and border security operations are increasingly “outsourced” from government to private contractors. In the United States, for instance, private consulting firms have been hired to design technological screening programmes and computer databases to implement the US-VISIT program, which, when fully running, would consist of a digital network of databases, cameras, face and voice-recognition systems and fingerprint readers for all foreigners entering and exiting the country. The involvement of technology firms, security companies and transport services in the management of migration flows means that the private sector works hand in hand with governments to control sovereign borders and promote national security. Both partners are concerned that in the close monitoring of border operations, human dignity and individual privacy rights are respected, and international trade and tourism are sustained. In this context, close supervision and accountability are of paramount importance.

Third, businesses are close to the ground when it comes to identifying labour shortages and assessing the push and pull factors of migration, thus putting them in a good position to contribute to policy analysis and policy-making. Companies invest heavily in financial analysis to identify problems and inefficiencies within their operations in order to craft solutions and greater efficiencies related to project costs, communication streams, management structures, labour and supply chains, and opportunities for growth. Firms are constantly assessing the efficiency of their practices, and inherent in this analysis lie questions about the recruitment and placement of staff, and potential source locations of workers with certain sets of skills and competencies. By publishing and disseminating company annual reports and industry forecasts, the private sector serves as an important information source for identifying demographic trends and market needs related to labour migration to inform policy formulation and adjustment.

Fourth, and finally, business is a key stakeholder in communities and policy processes, and therefore in the migration debate. As is set forth above, private sector activity and international human mobility are inextricable forces. In some respects, the business sector is an amorphous presence that permeates all aspects of globalization. The existence of private business involves real people who play overlapping roles as workers, employers, recruiters and customers. They run the gamut from migrant workers such as farmhands, software engineers, housekeepers, language teachers, construction workers, to these same employees’ co-workers, supervisors and subordinates. The aggregation of all these individuals working toward their respective livelihoods underscores the personal and societal dimensions of business, and makes apparent the private sector’s function as a stakeholder in local communities and macro-level policymaking processes.



The private sector's omnipresence in international labour mobility might encourage governments to engage business in dialogue related to cross-border labour policies. In order to assure coherence between political issues and economic realities, the business perspective can be integrated into policy discussions at the national, regional and international levels, particularly important in an economic downturn, without exerting disproportionate influence over such debates. At the national level, for instance, policies related to issues such as trade, labour and taxes may be enacted with a mind toward stimulating business growth, and promoting market efficiency and fairness. Closely aligned to a business-friendly climate within national borders might be an immigration policy that facilitates labour mobility. Moreover, openness to migration – like openness to trade – will be necessary to stimulate economic recovery.

Bilateral treaties or regional agreements are also important frameworks affecting trends of labour migration. Normally negotiated by governments, such arrangements sometimes incorporate a role for the private sector to inform deliberations between and among countries, not least of which in the deliberations of the tripartite International Labour Organization (ILO). At the same time, states may need to combat any misperceptions of manipulation by special interest groups and less politically influential sectors.

At the global level, private sector contributions to multilateral discussions provide a better understanding of the economic and social conditions necessary to best stimulate growth and realistic migration policies. Although no international convention exists that explicitly sets the ground rules on labour migration, several relevant treaties exist. Important conventions include the ILO's Migration for Employment Convention of 1949, its Migrant Workers (Supplementary Provisions) Convention of 1975, and the United Nations' International Convention on the Rights of Migrant Workers and Members of their Families of 1990. Implementation of these treaties might benefit from stronger private sector participation. In the Philippines, for example, the Special Committee on Overseas Workers Affairs (OWA) monitors compliance with the Migrant Worker Convention. The OWA Board of Trustees includes representatives from government, the private sector and migrant NGOs.

Because of the business sector's multifaceted role in migration, it makes sense for companies to share best practices with one another; to inform governments at local, national and international levels of labour market trends; and to collaborate with trade unions and migrant advocacy organizations to ensure the protection of migrant workers' rights at every step of the migration process. And so, going back to our original question, where exactly does business fit in the migration debate? The answer is: in all its aspects. Through dialogue across educational disciplines and professional sector, stakeholders can share resources, expertise and information while working toward the adaptation of migration laws, policies and programs to labour market forces of supply and demand.



The responsibility of private enterprise regarding the safety and well-being of labour migrants is not an exclusive one. It is unrealistic to expect profit-minded businesses to bear all social costs resulting from labour migration and be more altruistic than what is required by law. Governments provide safety nets in the form of livable wage standards, minimum health and workplace safety requirements, and unemployment benefit programmes. Indeed, all parties benefiting from migration—governments, businesses and migrant workers themselves—are accountable for guaranteeing compliance with labour laws, human rights standards and cross-border policies. Ultimately, migration is a process to be managed, not a problem to be solved. If civil society organisations can partner with businesses to promote the rights of migrants, and if governments can make use of the private sector's resources and innovation in formulating policy, we can achieve efficient migration management with wide-reaching benefits.

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REFORMING LABOUR LEGISLATION IN RESPONSE TO CHANGING JAPANESE ECONOMIC AND SOCIAL CONDITIONS

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I. CHANGING JAPANESE ECONOMIC AND SOCIAL CONDITIONS

MID-TO LONG-TERM ISSUES

▶ (1) **Promotion of employment for youth, women, older workers, etc.**

Due to the rapid decrease in the Japanese birthrate, a serious decline in population is hitting Japanese society ahead of the rest of the world. The working population (15-64 years) that maintains the economy already reached its peak in 1995, and is expected to further decrease on a mid-to long-term basis. Added to this, the age of the working population is also increasing. The percentage of the working population aged 55 and over has increased from 12.8% in 1980 to 22.7% in 2006.

Higher life expectancy presents a significant burden to the overall economy through an increase in social security provisions. Current social security benefits, consisting mainly of an annual pension, medical treatment and nursing, amounts to about ¥89 trillion (23.9% of national income) as of 2006, and, if the current system is maintained benefits will reach ¥116 trillion (25.3% of national income) in 2015, which is expected to exceed economic growth rate. If national tax and social insurance rates are raised to meet the increase in the social security burden, it may have a negative impact on the economic growth of Japan.

As long as the population declines and longevity increases, it is imperative to draw fully on the ability of the young and old of both sexes to maintain and improve the vitality of Japanese society and its economy.

Therefore, the most important priorities are to enhance access to employment for young people and expand working opportunities for women and older workers.



▶ (2) Further improvements in productivity

Globalization presents an opportunity for all open economies to develop and grow as part of an integrated global economy. Japanese economic growth cannot be maintained unless Japan responds to globalization and plays a full role in the global economy.

On the other hand, globalization also means strong competition. Newly emerging economies are increasing their exports with relatively inexpensive labour, and the competitive pressure on Japan is increasing.

Consequently, in order for Japan to achieve continuous economic growth in the future, it is extremely important that productivity be increased. For this, it is vital that each company steps up its efforts to increase productivity. An important issue for Japanese companies in the future will be to extend new investments to pioneering businesses, in addition to promoting innovation and improving productivity.

On the other hand, in order to realize productivity improvements in the overall economy, it is also necessary to have a fluid movement of labour and capital in high value-added fields across companies and sectors of the economy. In order to make this possible, further regulatory reform in a wide range of fields; revision of various systems in the labour market; improvement of financial and capital markets; and reform of the tax and the social security systems, must be undertaken as quickly as possible.

SHORT-TERM ISSUES

Since the unprecedented financial tsunami has affected not only advanced nations but also emerging economies, the world economy is facing a global recession.

The Japanese economy is clearly being affected by the global down-turn. The export industry that leads the economy has been affected by both the downturn in global demand and the impact of the yen's appreciation. Unavoidably, production is being decreased drastically due to the sharp drop in global demand. On the domestic front, as a result of the rapid decrease in corporate earnings, planned investments in equipment by companies will be revised downward. Personal consumption may additionally be slow to increase because of dampened consumer confidence arising from growing anxieties about the future.

Employment related indexes are beginning to reflect the decline as a result of the downturn in industrial production, as well as increases in company bankruptcies.

Therefore, with the united effort of the government, employers and unions, immediate and effective employment measures are required, including the expansion of employment safety nets.



II. REFORMING LABOUR LEGISLATION AND NEW POLICY MEASURES

RESPONSE TO MID-TO LONG-TERM ISSUES: REVISION OF LABOUR LEGISLATION

Japan has already revised and is discussing further revisions to its labour legislation in order to promote the employment of youth, women and older workers, and further improve productivity. The changes are outlined as follows:

▶ (1) Promotion of employment for youth, women and older workers

a. Revision of Employment Measures Law

To enable Japan to support a decreasing population, and capitalize on existing ambitions and capabilities to the full, the revised *Employment Measures Law* was enacted in August 2007 (details of the specific responsibilities of employers followed in October).

The objectives of the above law are two fold:

- a) expansion of employment opportunities for young people;
- b) provision of equal employment opportunity regardless of age.

In respect of the first objective, by improving recruitment methods used to evaluate the capability of the younger generation, the employer is obliged to try to generate employment opportunities. Additionally, the government set out guidelines that employers must follow in recruiting processes.

Regarding the second objective, the conventional recruiting and hiring method was revised, so that an equal opportunity had to be given to every worker, and the employer was obliged to hire employees regardless of age (except for example when certain statutory conditions apply as laid down by the Ministry of Health, Labour and Welfare). In order to recruit and hire employees regardless of age, it is important for employers to determine whether a worker is suitable for the position, according to the individual's capability. Therefore, employers must legally provide a job description as well as criteria related to suitability, qualifications, experience and skills levels.

**b. Revision of the Part-time Workers Act**

As working conditions have diversified in recent years, the number of part-time workers has increased and with it the importance of their role. The number of part-time workers who work less than 35 hours per week reached 13,460,000 in 2007, about 24.9% of total employment. The purpose of the Part-time Workers Act (an Act on Improvement, etc. of Employment Management for Part-time Workers) revised in May 2007, was to bring the treatment of part-time workers into line with existing working conditions.

The main contents of the revisions are: a) prohibition of discriminatory treatment, b) ensuring balanced treatment, and c) promoting full-time working opportunities for part-time staff (if so desired).

In relation to 'job descriptions'; 'systems regarding the treatment of workers and practices in the company' and 'terms of a contract', discriminatory labour conditions were prohibited for part-time workers who do the same job as full-time workers.

The revision of the Part-time Workers Act addresses significant differences in treatment between part-time and regular workers and contributes to the creation of an environment where a part-timer can work with greater confidence and certainty. This has had the net contributory effect of enabling part-time workers to maximise their opportunities in the workplace.

c. Revision of law on employment stability for older workers

Greater mobilization of older workers is essential, not only from the point of view of filling labour shortages, but also in terms of imparting their skills and techniques.

The Law on Employment Stability for Older Workers was revised, and by applying either: a) the introduction of a reinstatement system, b) the extension of the retirement age, or, c) the discontinuation of the regulation of the retirement age, from April 2006 companies are obliged to gradually take measures to secure employment for older workers up to 65 years old in phases (in accordance with the extension of the pensionable age).

According to the 'survey on measures for the promotion of employment for older workers and future issues' by Nippon Keidanren (November 2008), 98.4% of companies have introduced reinstatement systems, such as rehiring. 84.2% have established a 'constant standard' for rehiring, such as the 'health condition' and 'work performance', and most companies have rehired a large majority of applicants. Implementing measures to secure greater employment of older workers according to the law is advancing steadily in Japanese companies.



According to a 1 June 2008 survey by the Ministry of Health, Labour and Welfare, the number of regular employees 60-64 years-old increased from about 780,000 to 1,290,000 (an increase of 64%) and, the number of regular employees over 65 years-old increased from about 270,000 to about 490,000 (an increase of 84%), compared to 2005 (before the employment security measures were adopted by companies).

▶ **(2) Further productivity improvements**

Fewer Japanese businesses have a clear-cut means of calculating working hours because of the expansion of tertiary industries and progress in technological innovations. The type of businesses in which working hours cannot be calculated by conventional methods is also expanding. These companies often can have detailed methods of computing working hours, which rely on the adaptability of the work force.

In response to these issues, a system to achieve flexibility in legislation governing working-hours regulations, such as the discretionary labour system, has been promoted in Japan.

In the debate on what a revised working-hours system should look like, there are conflicting opinions. Some say flexible working hours should be strongly promoted to meet the needs of white-collar workers with higher workplace adaptability. In contrast there are opinions that the flexibility of working hours should be limited to a minimum, or that strict requirements should be imposed to prevent overtaxing workers with exceedingly long hours or unpaid overtime.

There have been strong disagreements over expanding flexibilities in the labour system. Even though regulations were slightly relaxed by the revision of the Labour Standards Law in 2003, the use of the revised system is not yet expedient for both employers and employees and adoption of this revised system has been slow because there are outstanding issues that its introduction difficult. These include: the need to establish a labour-management committee (along with requirements for a resolution in labour-management committees); and for personal consent.

In order to foster greater innovation and creativity in employees, it is important to maintain an infrastructure that enables independent and autonomous working structures so that the employees are able to work productively. Nippon Keidanren has proposed the introduction of such a system.

Employees engaged in areas such as engineering or administration who work in an advanced field of study or creativity, determine the progress of their work and working hours under comprehensive operating directions. The length of their working hours and results are not always directly related. When the job becomes advanced and



autonomous, the distinction between the work undertaken and the self-development that derives from it, become blurred, and it is difficult to determine working hours accurately.

Additionally, there is a need to balance work life responsibilities. With this in mind, Nippon Keidanren has proposed the introduction of a new working hours structure, which enables independent and autonomous time management which would not be influenced by conventional working time structures, and be limited to highly adaptable workers. This new framework would establish a system suitable for an autonomous work structure. It would entail new thinking in respect of the conventional view that wages must be connected to working hours, and also tighten the regulations to prevent overwork and ensure good health.

RESPONSE TO SHORT-TERM ISSUES

▶ (1) Government measures

In response to the growing economic downturn, the Japanese government announced a new economic stimulus package called 'Measures to Counter Difficulties in People's Daily Lives' in October 2008. In order to implement wide-ranging economic targets encompassing employment in small-to-medium-sized companies, stimulating individual consumption, promotion of housing investment, promotion of investment in equipment that is environmentally sound, revitalization of the securities market and stabilization of the financial market, a total of about ¥27 trillion will be injected, including the 'Fixed-sum Stipend' of ¥2 trillion for all households.

In December 2008, the government also announced the 'Emergency Measures to Defend People's Daily Lives' package at a total of ¥37 trillion. In addition to the reduction of taxes for mortgage loans and the acquisition of stock by utilizing the Banks Shareholdings Purchase Corp., these measure consists of: a) an expansion of the employment adjustment subsidy and employment measures to support re-employment of people who are out of work, and b) an increase in local grants for job creation.



▶ **(2) Proposal of Nippon Keidanren**

In response to the deteriorating employment situation, Nippon Keidanren is emphasizing the following points.

a. Early stage economic recovery

Immediate economic recovery is the greatest employment stimulus measure. Speedy and steady implementation of the ‘Measures to Counter Difficulties in People’s Daily Lives’ and ‘Emergency Measures to Defend People’s Daily Lives’ and the creation of opportunities for an economic recovery must be the priority.

b. Expansion of employment safety nets

Economic recovery is the best remedy, however, the employment situation may deteriorate further in the immediate term. It is therefore necessary to expand employment safety nets. Revision of the Employment Insurance Law, which includes an expansion of unemployment benefits, should be enacted at an early stage.

c. Creation of new employment

While there are many companies currently experiencing a sharp decrease in production in the manufacturing industry, the nursing, childcare and agriculture sectors are experiencing labour shortages. Therefore, shifting surplus labour to areas where there are shortages should be examined. It is also necessary to adjust the remuneration system, working environment and other areas to achieve these goals.

When workers are transferred across different industries, human resource development is vital. It is important that the government and private sector realize the importance of substantial vocational training.



▶ **(3) 'Joint Declaration for the stabilization and creation of employment'**

In the current severe employment situation, Nippon Keidanren and Rengo (the Japanese Trade Union Confederation) announced the 'Joint Declaration for the Stabilization and Creation of Employment' on 15 January 2009. It was based on the common view that employers and unions should develop a policy for employment stabilization and the creation of new jobs.

The declaration stipulates that a) employment stabilization and new job creation needs urgent attention by policymakers; b) employers and unions should develop actions for employment stabilization and new job creation, c) additionally discussions and research should be undertaken as required for employment-related problems; d) the government should improve safety nets for workers and implement measures to create new jobs immediately, and e) the long-term employment system has been supporting the growth and development of companies and the economy. Employers and unions should strive to do their utmost for employment stabilization and economic recovery.

This is the first such declaration since the 'Social Agreement on Employment' declaration by Nikkeiren (Japan Federation of Employers' Associations) and Rengo in 2001. In that declaration, employers and unions stated that they should make a maximum effort to concentrate on solving the serious employment situation during the stagnation of the Japanese economy. The current employment situation is severe, and this declaration is a manifestation of the seriousness of the situation. In summary, if employers and unions do not respond jointly, the problem will not be solved.



▶ **(4) Challenges for Japanese companies**

Japan has faced and overcome two economic crises in the past.

The first was during the first oil crisis in 1973, the end of a high-growth period. At this time, Japanese companies aggressively invested in energy savings and thorough streamlining efforts, redeployed employees and implemented temporary transfers of employees within companies. Employees who were employed in structurally depressed industries were transferred to other sectors, and also, by the efforts of employers and unions focusing on sustaining companies, control of inflation was achieved.

The second was a protracted economic slump after the collapse of Japan's 'bubble' economy in 1991. Companies that were overstaffed, restructured their operations by: increasing efforts to prevent lay offs, re-focusing their business operations, selling assets, closing overseas offices, and giving top priority to maintaining and ensuring employment.

Japan overcame the past two crises because industrial relations in Japanese companies had been enhanced, and matured to a point where they focused on the economic situation and the actual conditions facing companies. The current worldwide recession is a third crisis, and the seriousness of this difficult situation easily exceeds the past two crises. In order to weather this storm, it is necessary for employers and unions to again share a sense of crisis and overcome it together, drawing on past experiences and lessons learned. I believe that the pathway to recovery will surely open if we continue to rise to the challenge as we have in the past.

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