Core Labor Rights and Labor Market Flexibility: Two Paths Entwined?

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I. INTRODUCTION

This paper places a specific issue, the possible use of the Permanent Court of Arbitration ("PCA") as a forum for the resolution of transnational labor disputes, within the context of current efforts to enhance labor protection in the global economy through the recognition of core labor rights. It juxtaposes those efforts with the simultaneous effort of the international financial and economic organizations to promote labor market flexibility. In doing so, it aims to describe how core labor rights and labor market flexibility are destined to interact in the context of labor disputes, and to suggest why distributive justice for workers remains a pressing, and elusive, goal as a consequence.

It is fitting to consider the question of transnational labor disputes at the Peace Palace, for it draws to mind something which, while central to the consciousness of those who forged the international institutions at the end of the World War II, is often eclipsed, if not totally forgotten, today. This is the connection between economic justice and peace and security. We have had periodic reminders in recent years that economic crises and change can be profoundly destabilizing to workers and to societies as a whole. Debt crises in Latin America and sub-Saharan Africa, the financial crisis in East Asia, the transition to markets in Central and Eastern Europe have all worsened the position of workers, sometimes dramatically. While apocalyptic scenarios are neither the only nor even the most probable future, the recent mass demon-

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strations in Italy over proposed labor law reforms serve as sharp reminders that much is at stake in the justice of the solutions that are devised.²

Any role of the PCA will unfold in the context of an evolving debate over not simply the content of labor regulation but over its form and the route for its achievement. There remains major uncertainty and disagreement over whether solutions are best sought through “hard” or “soft” law and other voluntary initiatives; by establishing broad frameworks of rights or by ensuring specific regulatory entitlements; by devolving power to unions at the local level or, eschewing collective bargaining altogether, simply by encouraging greater cooperation and innovation between firms and workers; by relying on the use of state power and international institutions or by actively seeking solutions outside of them.

What complicates the task is a considerable disagreement about not simply the solutions to transnational labor disputes, but about the nature of the problem to be solved. Part of the uncertainty relates to the fact that economic transformation has generated not one but many different labor problems and dilemmas, all of which cry out for immediate attention. Despite possible synergies among them, the solutions to these different problems may pull in different directions.

Underneath many of these uncertainties and disagreements lie vastly different perspectives on the import of the global economic transformation for workers. It is not difficult to locate widespread references to the fact that the “social dimension” of globalization now demands attention,³ and that ensuring

greater protection for workers must form a central part of this task. However, beyond this point much of the agreement dissolves. For some, the pre-eminent problem is the continuation of truly egregious labor practices, such as child labor or violence against union organizers. Others take the task to be ensuring that labor markets become flexible and competitive, operating more efficiently so as to ensure the continued, or greater, generation of jobs. For others, the primary task is to ensure that workers retain a measure of protection and security throughout the transformation of work and the processes of global economic integration. For yet others, the task is one of ensuring inclusion in the new economy. And elsewhere, the fate of workers is inseparable from the general direction of development, such that decisions about trade, fiscal and monetary policy must, at least in part, be regarded as decisions about the status, entitlements, influence and power of workers. There are doubtless other ways to articulate the problems and their solutions. Although it may seem unnecessary to rehearse these differences, these optics deeply affect what counts or what is recognizable as a labor issue in the first place. Indeed, these differences suggest that the scope of the global labor agenda itself — what constitutes the problem to be solved — is itself contested in significant ways. And they certainly suggest that the solutions are likely to be contested.

The appearance of the Declaration on Fundamental Principles and Rights at Work (“ILO Declaration”) from the International Labour Organization (“ILO”) in 1998 marked a turning point in this fractious debate, as the

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4. ILO, YOUR VOICE AT WORK (Geneva 2000).
6. A classic instance is low wages, a phenomenon explained in radically different ways by different institutions. For some, low wages simply reflect marginal productivity of workers and low levels of economic development in particular locales. For others, low wages are a marker of worker disempowerment in the global economy and a threat to social development and cohesion.
INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT

Declaration emerged as the centrepiece of international efforts to remedy the plight of vulnerable workers in the global economy. The ILO Declaration enumerates four “core” worker rights: (1) freedom of association and the effective recognition of the right to collective bargaining; (2) protection against forced labor; (3) the elimination of child labor; and (4) freedom from discrimination. It also articulates respect for these rights as a matter of respect for workers’ human rights. Since its appearance, debate around the status of workers in the context of transnational production has increasingly been framed in terms of the protection of these “core labor rights.” It is widely reported that there is now general agreement about the status of core labor rights as human rights, as well as agreement that their promotion should form the basis of improved worker protection in the global economy.

In the eyes of many, this emerging consensus around core labor rights represents welcome progress in a field fraught with conflict and disagreement. Although they are not entirely without controversy, core labor rights now attract growing support, even explicit endorsement, from a variety of quarters: not simply non-governmental organizations (“NGOs”) and labor activists, but international institutions such as the World Bank, the Organization for Economic Cooperation and Development (“OECD”), and even large multinational corporations now increasingly nod in their direction. In short, core labor rights are exceptional, if not unique, in their capacity to appeal to those on different sides of the debate over the regulation of labor in the global economy.

Yet, despite the ILO Declaration and the apparent consensus it reflects over worker protection, the generation of global labor norms has not in fact become a more seamless and harmonious project. Just below the surface considerable conflict remains. As is well known, prospects to include labor protection within the international trade regime have been significantly undercut by lingering

10. A number of large corporations have committed to the promotion of core labor rights through their adherence to the UN Global Compact, discussed in Part IV infra.
concerns about protectionism on the part of developing states.\textsuperscript{11} However, it would be a mistake to attribute the roadblocks to worker entitlements within the international economic architecture solely to resistance on the part of the developing states to schemes that may entrench the advantages of those who are already winners. The role of unions, the benefits of collective bargaining, and the value of labor standards remain deeply controversial in other influential quarters as well. Notwithstanding the support of some for core labor rights, corporations have made clear their resistance to binding legal obligations with respect to workers’ rights;\textsuperscript{12} their capacity to prevail in that resistance is itself a mark of their power in the global economy. Efforts to strengthen the position of workers often also meet resistance within the international financial institutions, as their primary concerns about labor market regulation run in another direction, toward securing greater labor market flexibility.\textsuperscript{13} These concerns have not been resolved by the appearance of the ILO Declaration.

Part of the explanation lies in the fact that core labor rights are only half the story. There are in fact two labor agendas simultaneously in play on the international plane: core labor rights and labor market flexibility. They represent quite distinct normative visions with respect to the structure and operation of labor markets and the location of authority and control in the workplace. They are attached to different projects – human rights in the case of core labor rights, and the promotion of economic development in the case of labor market flexibility – and they empower workers and employers in quite different ways. They also appear to have quite different regulatory and institutional implications. However, the two agendas cover overlapping terrain: both concern the rights and powers of the two parties centrally involved in production: workers and employers. For this reason, labor market flexibility should be understood as a countervailing labor agenda, one that potentially affects the reach of core labor rights but has independent general importance for the position and prospects of workers in the global economy.

\textsuperscript{11}. In the WTO Singapore Ministerial Declaration of September, 1996, states decisively rejected the use of the proposed social clause for protectionist reasons and held that the ILO, not the World Trade Organization (“WTO”), was the proper institution to deal with labor issues. See WTO, Singapore Ministerial Declaration, Doc. WT/MIN(96)/DEC, reprinted in 36 I.L.M. p. 218, at p. 221 (1997). This resistance to the possible use of labor standards is reiterated in the ILO Declaration, supra note 7, art. 5.

\textsuperscript{12}. This is the genesis of the UN Global Compact, discussed in Part IV, infra.

\textsuperscript{13}. Stiglitz, supra note 1.
The promotion of labor market flexibility is part of a larger project which places the protection of investor property and contract rights at the center of the legal and institutional efforts to promote economic growth. Labor market regulation and specific workplace standards are regarded with skepticism or hostility as potential impediments to that process (and often as the source of perverse distributive results among workers too). Rather than in the regulation of labor standards or with laws compelling employers to engage in collective bargaining, the labor market flexibility agenda identifies workers’ main interest with the continued generation of jobs and growth.

Labor market flexibility often remains invisible, even unidentified, as directly relevant to the question of workers’ rights; instead, it is simply part of the notion of “good governance” advanced by the international economic organizations.14 But precisely because it is associated with the idea of good governance, labor market flexibility norms are increasingly promoted and reflected in legal and institutional structures at the national and international level. For workers, labor market flexibility manifests as an absence or a regulatory gap: the need for greater flexibility in the heightened competition of the new economy is often advanced as an argument to exclude, dismantle or weaken particular worker protection laws. Respect for core labor rights, by contrast, remains principally a “promotional” task, one with uncertain, if any, institutional implications.

Because of the coexistence of two global labor agendas, no probing assessment of either the possibilities or the limits of core labor rights is possible without attention to the efforts to further labor market flexibility. While core labor rights constitute the framework in which questions of worker protection are now typically discussed, labor market flexibility norms increasingly constitute the legal and institutional background against which core labor rights are to operate. The promotion of labor market flexibility creates entitlements and generates expectations among corporations, employers and investors. Thus, it is deeply implicated in the creation and reinforcement of emerging workplace norms, the rights of workers, and the status of workers in the global economy. It empowers the very actors that core labor rights seek

to target, and often to restrain, in the search for better labor standards. It also helps produce the issues and disputes that core labor rights are now called upon to remedy.

The two projects, one to advance employer flexibility and the other to enhance employee security, do not always or inevitably work at cross-purposes. However, there are manifest tensions between them at the present time. Considering the two labor agendas in tandem is one way to bring such tensions to the surface. It also permits a better appreciation of the extent to which core labor rights are likely to be responsive to the range of labor issues in the global economy than is available where core labor rights are considered in isolation.

There are reasons to believe that the two agendas are destined to intersect in the context of labor disputes in any event. Conflicts between employers' property and contract rights, and workers' collective bargaining rights and discrimination claims are not new; rather, they have been the hallmark of labor disputes over the past century. The mere fact that such disputes now cross national boundaries and often involve parties in different jurisdictions does not necessarily change their character, nor does it even change the nature of the legal claims that will be advanced. Workers are still fired for engaging in union organizing and seeking rights to protect their jobs. Employers still seek regulatory environments that allow them to exercise their managerial power in an unfettered way and often invoke property and contract rights in order to prevent such organizing or render it less effective. One thing that has changed is the name: now workers' arguments are framed as the protection of core labor rights, while those of employers are couched in terms of necessary labor market flexibility. Whether there are other differences likely to make a difference is one of the subjects of this paper.

To that end, this paper explores the simultaneous pursuit of core labor rights and labor market flexibility with a view to considering how norms of the latter might intersect with respect to core labor rights. Part II sets the context and describes two ways of articulating the dilemma of labor: as human rights and as distributive justice. Part III describes the commitment to labor market flexibility among the international financial organizations and the regulatory and policy stances with which it is associated. Part IV contrasts “soft” approaches to the protection of workers and the promotion of labor standards with the “hard” entitlements of other actors and interests in the global economy. Part V briefly outlines the logic behind the promotion of core labor rights and traces its difference from previous transformative agendas for labor.
Part VI begins to explore the issues and countervailing legal claims associated with labor market flexibility that seem likely to surface when core labor rights are considered in the context of labor disputes. It considers freedom of association and the right to effective recognition of collective bargaining in particular, suggesting that the history of such disputes in North America under the Wagner Act labor relations regimes indicates much about the legal frame in which the encounter between these two agendas may play out.

II. STATING THE PROBLEM: CORE LABOR RIGHTS AND DISTRIBUTIVE JUSTICE

As has been well described by numerous commentators, the vertical disintegration of production and the rise of the network society represent profound changes in the organization of work in industrialized societies and the global economy writ large. One of the results is the presence of national regulatory structures that are increasingly maladapted to the organization of work and production. The institutional solutions crafted at the end of World War II are proving to be dysfunctional or simply irrelevant to emerging forms of work in a variety of ways. While these arrangements have not been displaced—indeed, many continue to function surprisingly well—few remain confident about their viability in the future or their capacity to serve as models for developing countries.

At the same time, the globalization of production has eroded borders between the developed and developing worlds, linking economies and markets at various stages of economic development and recreating distinctions between the first world and the third world within national boundaries. External constraints and forces have become newly significant to national policy in a wide variety of areas; they have also weakened the capacity of states to

determine independently the level of protection they will provide to workers. The varied histories, institutions and political differences among states are likely to impede any simple race to the bottom.\(^{20}\) However, existing labor institutions and standards at the national level are under downward pressure, and there is a discernible trend toward the creation of subordinated flexibility\(^{21}\) —a shift of risks and costs from employers to individual workers. These effects have been exacerbated in many places by reductions in transfers and protections provided by the state. As a result, there are increasing numbers of workers subject simply to the logic of commodities.

Experience with financial crises, transitions to markets and “structural adjustment” over the last two decades also discloses that workers tend to bear a disproportionate share of the costs and risks associated with global economic integration.\(^{22}\) In times of crisis, foreign creditors may be bailed out, while workers, consumers and citizens repay loans.\(^{23}\) The policies introduced to respond to such crises, such as higher interest rates and intensified fiscal austerity, typically induce or prolong economic contractions; these increase unemployment and poverty, sometimes to dramatic levels. Although it is clearly possible to identify winners as well as losers among workers in the new economy, the aggregate result of global economic integration so far has been a pronounced shift in both resources and power from workers to the holders of capital.\(^{24}\)

In the face of all these changes, one way to understand the goal is the elimination of “inhuman” labor conditions and the protection of workers’ dignity through the promotion of fundamental rights. There is a growing trend toward envisioning the task of international labor law as a question of improving the ethical conduct of corporations towards their workers. Moreover, this goal is increasingly pursued outside the realm of hard law and enforceable

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23. This critique was leveled at the IMF in the wake of the East Asian financial crisis of 1997–1998. For discussion, see JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DIS-CONTENTS (Norton, New York 2002).

24. For a comprehensive sociological study detailing the forces at work producing these effects, see CASTELLS, *supra* note 17.
rights and without involving in any substantial way the international institutions that regulate the other dimensions of global economic activity. This is the vision that informs the ILO Declaration. The Declaration signals the removal of labor issues from the trade regime to the ILO; it repeats the prohibition in the WTO Singapore Ministerial Declaration on the use of labor standards for protectionist purposes;\(^\text{25}\) and it is expressly understood to be promotional in nature, and to this end has been repeatedly distinguished from the other activities of the ILO.\(^\text{26}\)

At the present time, attention remains focused on the elimination of gross abuses such as forced labor and child labor, and on the protection of rights such as freedom of association. Yet, however important such goals are, securing workers’ dignity through “fundamental rights” may be only partly responsive to the changing position of workers in the global economy. There is a plausible argument to be made that the problem underlying labor disputes, and indeed the general position of workers in the global economy, is better understood as a distributive one. Even in the face of economic growth, workers often capture few of the gains. In the North, this manifests as a shift in the composition of income from wages to profits, declining real wages, impaired income and job security and, in some places, less favorable working conditions as well.\(^\text{27}\) In the South, workers are arguably failing to benefit to the degree commensurate with their contribution to production; sometimes they are subject to what can only be called outright exploitation. In any event, whatever improvements they experience over local alternatives pale entirely in comparison to the gains of those who relocate production to take advantage of opportunities to reduce wage costs.\(^\text{28}\) In short, there is a manifest disparity in the distribution of costs and benefits as between the parties involved in global production.

\(^\text{25}\) Singapore Ministerial Declaration, \textit{supra} note 11.
\(^\text{26}\) ILO, \textit{Your Voice at Work}, \textit{supra} note 4.
\(^\text{27}\) In a number of jurisdictions, labor or employment rules have been altered to permit or require employees to work longer hours; this may be accompanied by rules permitting employers to “average” overtime rates over a period of time, a shift which redistributes income from employees to employers. \textit{See, e.g.,} Employment Standards Act, 2000, S.O., c.41 [Can.].
\(^\text{28}\) For a structural analysis of the failure of developing countries to enjoy significant benefits merely from inclusion in the circuits of global production, \textit{see} UN Conference on Trade and Development (“UNCTAD”), Trade and Development Report 2002 (UN, Geneva 2002).
This redistribution of resources and power is commonly identified as a function of globalization *simpliciter*. A variety of factors underlie the current state of affairs, of which the following are said to be particularly important. Improvements in information, technology and transportation have facilitated transactions, greatly enabling global production and enhancing the mobility of capital. Labor, by contrast, remains relatively immobile, bounded within the nation state. More of the costs of social and physical infrastructure necessary to support economic activity and development, as well as a wide variety of other public goods, are imposed upon labor, due to capital’s resulting power to resist taxation through exit or the threat of exit. In this narrative, both states and workers are constrained to respond to a set of circumstances that are neither of their choosing nor of their making.

Yet, in practice, policy and regulatory decisions at the national and international level are equally important. Global economic integration is a project as much as a fact, and not all states have responded in the same way to these “global” pressures. The varied institutional decisions that are made to manage and promote the global economy can have profound effects on the position of different groups, as well as on the general level of social inequality. The disadvantage that many workers now experience arises not merely out of the processes of integration, automation and innovation that characterize the new economy, but because the direction of policy and institutional reform has, so far, been uncongenial to the protection of workers’ interests. Some disadvantage is attributable to the implicit and explicit


"deregulation" of national labor markets by states. For example, some states have simply cut labor standards or carved out production zones free of regulation, producing the degraded working conditions that core labor rights are now called upon to remedy. Some (although by no means all or even most) of the disadvantage may be connected to trade liberalization, the center-piece of the international economic institution project in recent years. And some of it can be attributed to the failure to enshrine entitlements for workers elsewhere within the regulatory regimes governing economic activity and transactions, whether national or international. The lack of entitlements for workers, in turn, arises out of a variety of factors, including: the absence of labor at the negotiating table when questions of economic regulation are under consideration; the pre-eminence of efficiency over distributive concerns; and a concomitant hostility toward labor market regulation among those who are influential in the design of market institutions.

However, despite the neglect of entitlements for workers, it is becoming more and more evident that an important part of the path to distributive justice for workers lies within markets; remedial strategies such as taxation and income transfers are clearly inadequate to the problem, and in some cases they may be entirely unavailable. As Guy Standing has put it, we must now find a "work-based strategy for distributive justice." Pressure to reduce taxes has created a "fiscal crisis" of the regulatory state, as a result, the state is less able to provide for those who cannot adequately meet their needs through the market. There is a growing consensus that levels of participation in the labor market must increase. In industrialized states, this is thought necessary in order for systems of social protection to continue to function at all, as well as

33. For discussion, see Standing, supra note 21.
35. After initial skepticism, there is now acknowledgment even among mainstream economists that trade liberalization often generates significant employment effects, at least in the short term, such as increased wage inequality and sectoral unemployment. See, e.g., David Dollar & Paul Collier, World Bank, Globalization, Growth and Poverty: Building an Inclusive World (New York 2001).
36. Standing, supra note 21, at p. xiii.
37. See Avi-Yonah and Grunberg, supra note 29.
38. Demographic concerns are at work here too; almost all industrialized states have declining birth rates.
to enable societies to remedy the projected shortage of workers. In developing states, this is simply the projected route to development: many states have never been in a position to provide basic income guarantees to their populaces, and large numbers of workers in the informal sector lie beyond the regulatory and protective reach of the state altogether.

Concern with the distributional dimension of globalization and attention to questions of inclusion and the situation of workers is visible across a broad spectrum of analyses. For example, a comprehensive study of the transformation of work by the European Commission ("EC") calls for strategies to ensure solidarity and social cohesion. In a similar vein, the European Employment Strategy is based on the dual agenda of more jobs and better jobs. In the United States, labor scholars such as Willie Forbath are calling for a revival of constitutional concepts that emphasize the place of work, rather than simply entitlements to welfare, as the basis of social citizenship. At the international level, the United Nations Summit for Social Development articulated a wide-ranging agenda to respond to the social deficit associated with globalization; the position of workers was there a central concern. Indeed, intimations of a wider labor agenda that incorporates distributional considerations are reflected in the ILO Declaration itself. Among the objectives identified in the Preamble to the Declaration is to "enable the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate."

However, in North America and other jurisdictions (such as the United Kingdom) most captured by the neoliberal economic vision, regulatory and policy reform has not been directed at solving the disempowerment of workers. States have not yet recast their regulations and social protection schemes so


43. See Copenhagen Declaration, supra note 3, Commitment 3.

44. ILO Declaration, supra note 7.
that they are more responsive to the varied risks associated with work of the new economy. Neither have they successfully tackled, nor in some cases even addressed, the complex task of ensuring that citizens have access to the resources needed to thrive in the new economy. Instead, reforms have largely been directed at responding to employers' demands for greater flexibility in the management of labor resources and for lower rates of taxation in the face of global competition.45 Developing and transitioning states are under similar pressure to liberalize labor laws. However, such states are subject to additional inducements, as the receipt of funds for debt relief or other crucial economic projects may be conditional on the assessment that they are pursuing practices that comport with current conventions about good economic governance; this includes conforming with the logic of "deregulation" in respect of labor markets.46

It is at the very least unclear that economic development and social welfare are more directly linked to the fortunes of corporations and investors than to those of workers. Nor is improving the position of workers within labor markets simply a matter of responding to the "special interests" of workers - even assuming that those interests could be safely separated from the welfare of societies as a whole. There are many costs, or "externalities," to poor labor standards and inadequate income for workers; low or declining returns to work represents not only a common problem, but a threat to the entire project of economic and social development.47 However, so far, the agenda of labor market flexibility for employers has prevailed over the project to reground the security of workers, equip individuals to meet the demands of the new, "knowledge-based" economy,48 and reconstruct the bases of social cohesion and solidarity.

45. See, e.g., Ontario Employment Standards Act, 2000, S.O. c.41 [Can.].
48. Knowledge is consistently identified as key to thriving in the new economy. For a representative discussion, see WORLD DEVELOPMENT REPORT 1999–2000: KNOWLEDGE FOR DEVELOPMENT (World Bank, New York 1999).
A similar phenomenon marks international regulatory and institutional efforts. At the end of World War II, the industrialized states pursued a project of establishing economic activity within institutions – both national and international – to ensure the requisite foundation for social cohesion and solidarity.\textsuperscript{49} Distributive justice was a recognized public good,\textsuperscript{50} and ensuring it was understood to be an important dimension of the design of international institutions. Entitlements for workers were part of the envisioned structure of the Bretton Woods institutions, even if, as a consequence of the stillbirth of the International Trade Organization, they were never achieved.\textsuperscript{51}

Yet, paradoxically, there is amnesia about such aspirations. Even though the project of devising new international institutions and rules more responsive to a globally integrated economy is proceeding apace, efforts to respond to the needs of workers are taking place largely outside the context of institutional and legal reform. Despite agreement that the route to income security for workers in the new economy is through participation in work,\textsuperscript{52} securing distributive justice for workers through work has not yet materialized as an important objective, something to be incorporated into the global economic architecture as a whole.

The normative case for pursuing greater economic growth through open trade and relatively deregulated markets depends, at least in part, on how any gains are distributed. It is also well recognized that the political fortunes of open trade and other market reforms rise and fall in significant measure on how those who are inevitably displaced or disadvantaged fare in the process. This is the reason why open economies have traditionally had high, rather than low,


\textsuperscript{52} STANDING, \textit{supra} note 21. This is also a major thesis of those who favor a “deregulated” labor market. See \textit{World Development Report 1995: Workers in an Integrating World} (World Bank, Oxford University Press 1995).
levels of taxation and public expenditures.\textsuperscript{53} And it is also the reason why safety nets, however minimal, were originally added to the structural adjustment programs fashioned in the wake of the debt crises in the developing world.\textsuperscript{54}

The international financial institutions are resistant to reliance upon the traditional mechanisms – labor market regulation, institutionalized collective bargaining schemes, progressive taxation, universal social programs and other broadly-based social protection schemes – by which distributive objectives have traditionally been achieved in market-based societies. Nor have they proposed any alternatives; indeed, it is unclear the extent to which they recognize a need to respond to such concerns. But there is a further issue. Whatever degree of reliance is placed on unions as civil society actors to enhance the dignity of workers, solve the diminution of worker power and even alter the distribution of economic gains, it would seem unwise to ignore the larger institutional and regulatory context in which unions are to function. This is, to put it simply, a context in which corporations, investors and employers have been remarkably successful at ensuring that their interests are inscribed in the new law and institutions of the global economy. These rules empower such actors in material ways; indeed, they help constitute the power that is often attributed to them simply as a function of globalization. Labor, by contrast, still waits for its turn, uncertain if any gains can be achieved at this level at all. In order to assess the promise of core labor rights, they need to be read with and against these other regulatory and policy initiatives. If negative distributional effects for workers can be attributed not simply to globalization but to the current regulatory and policy environment, then the question is whether such distributive considerations are, or should be, factored into the rules and institutions that structure production and exchange.

III. LABOR MARKET FLEXIBILITY

"The activities of [the international financial] institutions shape the context and environment in which the ILO functions at the national level. They are powerful determinants of the pattern of global


\textsuperscript{54} ADJUSTMENT AND SOCIAL SECTOR RESTRUCTURING (J. Vivien ed., UNRISD, Geneva 1995).
adjustment and of economic and social development. They have an influence on social institutions, employment policy, labor market regulation, social security, and labor law."

As this observation suggests, the diminished presence of labor rights in the structure of global economic rules is not accidental, nor is it attributable only to concerns about protectionism. Instead, it reflects the institutionalization of the agenda of labor market flexibility. The important question is how efforts to strengthen the observance and enforcement of core labor rights will be constrained by the commitment to labor market flexibility; and whether core labor rights, on their own, can be expected to redress the disadvantage that workers experience as a result of the institutionalization of labor flexibility norms.

The International Monetary Fund ("IMF"), the World Bank, and the OECD have been among the major architects of economic reform at both the national and international levels. An important plank of their market reform and global economic integration initiatives has been the commitment to further economic growth through relatively deregulated markets, in the belief that economic development and progress is best furthered by unfettered market forces. Regulatory "interventions" are assumed to be value-subtracting to the economy as a whole unless they demonstrate further efficiency. For this reason, the OECD proposes that members subject all regulatory initiatives to a cost-benefit analysis, and to provide opportunities to all affected constituencies to propose alternatives to regulations in their stead. Although there is now official recognition of the importance of the "social" side of development inside the World Bank, efficiency continues to dominate the "economic" or "regulatory"

57. Wolfensohn, supra note 3.
side of the agenda and arguably profoundly influences the shape of the social side too.

The basic position of the international economic organizations concerning labor market institutions is similar to its basic position on regulation in general: in order to promote growth in the current economic context, restrictions on employers' actions and burdensome or expensive rules, including labor and employment regulations, must be eliminated. In addition, there are calls for policies and regulatory strategies to suppress wage growth or lower real wages in order to attract investment and create more jobs or control inflation. Those jurisdictions that currently have extensive protections for workers are advised to eliminate them, lest their future prospects for growth be harmed. For example, in a comparison between European and American labor markets, the IMF attributes the comparatively better job-generating performance of the United States during the 1990s in generating jobs to the institutional and regulatory differences between the two regions. In the IMF's view, it is excessive rigidities in the European labor market that principally impair that region's economic performance. The proposed solution is a combined series of strategies to reform labor and employment rules and institutions, based on: the decentralization of collective bargaining, the lowering of protective regulations, and restrictions on access to income-replacement schemes such as unemployment benefits in order to maintain downward pressure on wages.

At a normative level, the international financial and economic institutions figure the question of labor regulation in the global economy as a matter of better harmonizing workers' interests with those of their employers. This represents a significant shift in both regulatory goals and the analysis of the employment relationship that underpins them. Labor law has classically

58. John Williamson has described the Washington Consensus (a list of policy and regulatory objectives that commanded widespread assent among the economists and the financial and development institutions) as "essentially contemptuous of equity concerns." See John Williamson, 
Democracy and the "Washington Consensus," 21

ch. 4, Chronic Unemployment in the Euro Area: Causes and Cures, available at

60. IMF, World Bank, OECD & European Bank for Reconstruction and Development, II


62. WORLD DEVELOPMENT REPORT 1995, supra note 52.
reflected the fact that labor and capital are, in part, antagonists in the context of production; as much as they must cooperate, they are also in conflict over the distribution of gains from productive activity.\footnote{This is the heart of the “industrial pluralist” position that informs North American labor relations jurisprudence. Under the Wagner Act model, employers and employees are understood to have a fundamental conflict of interest; the rules governing collective bargaining are structured to reflect it, and it stands in contrast to the “unitary” view of the employment relationship that informs the adjudication of contracts of employment under the common law.} Collective bargaining laws, for example, may compel employers to recognize workers’ choice of bargaining agent and to bargain collectively with workers. This is something they often prefer to avoid, not out of any objection to workers’ freedom of association in the abstract, but because the aggregation of workers’ power typically results in a reduction of income and restraints on the employer’s unilateral power to govern the enterprise. However, the conflictual element of the relationship is now muted; workers, for their part, are encouraged to adopt an entrepreneurial approach to work.

At the policy level, this has been translated into an idealized regulatory regime in which workers’ interests are subsumed under those of their employers. Despite the fact that the most powerful actors within the IMF, the World Bank and the regional development banks, and the executive directors from the United States, have since 1994 been required by law to use their “voice and vote” to endorse respect for internationally recognized labor rights,\footnote{Jerome Levinson, \textit{Certifying International Worker Rights: A Practical Alternative}, 20 COMP. LAB. L. & POL’y J. p. 401 (1999).} states are encouraged, and in some cases induced, by these institutions to provide “investment-friendly” environments, which includes instituting policies of labor market flexibility such as those described above.\footnote{Stiglitz, \textit{supra} note 13.} Although imperative for greater labor market flexibility, and favoring regulation and policies that grant workers greater entitlements and control at work,\footnote{See recently enacted United Kingdom Employment Act 2002, c.22, entitling workers to some degree of flexibility in working hours, \textit{available at} http://www.hmso.gov.uk/acts/acts2002/20020022.htm (visited March 2003).} these regulations have to date overwhelmingly been invoked to free the hand of employers.\footnote{STANDING, \textit{supra} note 21.}
The international economic institutions assess the capacity of unions and labor market rules to promote growth and efficient market outcomes largely through the optic of neoclassical economic theory. The conclusion toward which this economic theory impels is that labor regulations will introduce rigidities destined to impair the most efficient allocation of labor. The basic assumption animating the labor market flexibility agenda, then, is that labor market regulation is inefficient. Notwithstanding the countervailing arguments discussed below, this view often extends to collective bargaining too. In the standard view, unions often function as monopolies, and collective bargaining tends to protect insiders at the expense of outsiders.

The OECD’s influential 1996 study concluded that there was no evidence of any negative effects of freedom of association on the comparative advantage of developing states in a regime of open trade. This conclusion was confirmed in a follow-up study in 2000, although that report cautioned that the same could not be said about labor standards beyond the core. This should not, however, be mistaken for a radical shift in the orientation of the international economic institutions toward labor market regulation; still less does it reflect a new belief that unions and collective bargaining are actually beneficial to development and should therefore be protected and promoted by institutional mechanisms. Rather, the OECD remains equivocal about the value of unions and collective bargaining: while core labor standards can support economic development if properly implemented, the economic effects of freedom of association and the right to collective bargaining are variable, as such rights can also introduce market distortions.

Similar reticence about the value of unions and collective bargaining continues to be reflected by the World Bank, even though it also cautiously endorses core labor rights. Echoing the view expressed in the 1996 OECD report, the World Bank finds the research on the effects of collective bargaining to be unclear; collective bargaining may not, in fact, contribute to economic development. Falling back on the legal restrictions contained in its Articles of Agreement (which require that only economic objectives be

68. Stiglitz, supra note 1.
70. 2000 OECD Study, supra note 9.
considered in lending decisions),\textsuperscript{72} the World Bank takes the position that it cannot therefore unequivocally support collective bargaining.\textsuperscript{73} In other words, it cannot automatically promote core labor rights in its policies without determining whether such rights will in fact further economic growth.

The promotion of labor market flexibility and the equivocation around the value of unions and collective bargaining indicate three things. The first is simply that support for core labor rights is qualified in important ways and is in any event subordinated to the requirement that core labor rights promote economic growth. Within the international financial and economic institutions, freedom of association and collective bargaining are only promoted to the extent that they can be conclusively linked to growth; they are not regarded as "ends in themselves." The second is that the legislation of labor standards and the promotion of collective bargaining continue to be regarded with suspicion; indeed, cutbacks in protective legislation and the decentralization of bargaining rather than increased entitlements for workers are on the agenda for reform. Third, although the effect of global economic integration is to weaken the position and bargaining power of workers in general \emph{vis-à-vis} employers and corporations as a whole, ensuring greater resources and power to workers in labor markets does not yet figure as a goal to be reflected in the design of economic institutions. Indeed, the suppression of workers' wage demands continues to be an important plank of economic reform policies, on the theory that it is necessary in order to attract investment.

It is important to emphasize that these arguments are highly contested. There is no necessary or automatic contradiction between the goals of greater growth and the higher labor standards or entitlements that protect the interests of workers. As both the empirical literature on unions\textsuperscript{74} and labor market analyses conducted within the framework of institutional economics disclose,\textsuperscript{75}

\begin{itemize}
  \item \textsuperscript{74} See, e.g., the classic study by \textsc{Richard Freeman \& James Medoff}, \textit{What Do Unions Do?} (Basic Books, New York 1984).
\end{itemize}
the conclusion that labor standards and collective bargaining are antithetical to growth, or even to the efficient operation of the workplace, may be completely unfounded. It is well-known that labor markets do not operate like other markets. They possess myriad features – from information disparities between employers and employees76 to workers’ unique control over the intensity of their work effort,77 to the presence of overarching social norms concerning fairness at work78 – that cause them to function at variance from standard market models. The limits of the “entrepreneurial” model for workers are similarly well-documented: in the face of the disparity of bargaining power between workers and employers, workers can be expected routinely to bear much of the risk associated with economic activity. So, too, are the merits of the use of “voice” rather than exit within the workplace; employers stand to lose as well as employees when there is no institutionalized, non-threatening means for workers to convey information to employers.79 In short, it is unsafe to assume that labor regulation is necessarily inefficient – even within the terms that efficiency is conventionally understood, that is: contributing to the well-functioning of markets. For such reasons, the ILO constantly stresses the benefits that may accrue to employers through collective bargaining.80 Numerous contemporary examples in Europe also confirm that there may be synergies between higher labor standards and economic development. Conversely, the commitment to labor market flexibility may actually undermine, rather than assist, the processes of growth.

However, these analyses have so far had little purchase within the international financial institutions. The view that currently informs policy and regulatory recommendations is that greater entitlements for workers impede more pressing objectives. To summarize, the agenda of labor market flexibility represents a competing normative and regulatory project. To the extent that it is institutionalized, what it permits and what it protects, and what it excludes

76. Stiglitz, supra note 23.
or limits, must be understood as a "real" regulatory regime for workers. However, even where it is incompletely realized, the agenda remains significant: it both helps produce the current vulnerability and disadvantage of workers in the global economy, and it constitutes part of the normative context in which that vulnerability and disadvantage stand to be addressed. At best, the promotion of flexibility gives tacit encouragement to corporations and states to seek efficiency gains by reducing employment protections, job security, wages and working conditions. At worst, it induces states to provide regulatory environments that systematically favor the interests of employers, investors, and corporations over those of workers.

IV. REGULATORY TRENDS: SOFT AND HARD

Responses to the regulatory gap concerning labor protection in the global economy can be captured by two trends. The first is toward broad normative frameworks that have "global" or international reach. This trend is exemplified by the ILO Declaration. The Declaration seeks to place respect for core labor rights at the foundation of improved labor practices and to promote improved corporate practice towards workers through the diffusion and acceptance of these rights. The other is the trend toward context-specific solutions. A wide variety of initiatives falls under this category, including corporate codes of conduct and voluntary standards,81 and "ratcheting" labor standards upward through monitoring,82 consumer labeling, and efforts to diffuse "best practice" in the area of labor protection—the best known example of which is the United Nations "Global Compact."83 These trends are not entirely distinct; indeed there is considerable overlap and congruence between them. The Global Compact, for example, uses the rights articulated in the ILO Declaration to

frame the goals of corporations concerning the treatment of their workers. However, both strategies could be classified as “soft”: they seek to rely on promotion, persuasion, negotiation, technical assistance, reputation and sometimes even competition, rather than regulation and enforcement to achieve improvements in the situation of workers.

Increasingly marginal to the question of labor protection is the middle territory located between the universal rights of the ILO Declaration and the practices emerging from voluntary initiatives in particular contexts. These are the rules – implemented and enforced either through national or international institutions – setting the terms under which productive activity occurs. Distributive justice for workers has always been achieved primarily through national rules and institutions; for example, efforts at establishing global labor norms through the ILO Conventions have primarily been directed at securing changes in national policies, rules and institutions. However, in light of conflicts over the direction of reform, many current proposals seek simply to avoid regulatory solutions altogether.

There is an argument that core labor rights are the beginning rather than the end of securing greater labor standards: the floor rather than the ceiling to worker protections. They do not promise to be everything; rather, they provide the basis upon which protection for workers in a globally integrated economy can be reconstructed in more context-sensitive ways. In the view of some, distributional considerations such as wages and working conditions can and should be dealt with at the local level by trade unions; the best way to obtain improvements in working conditions and economic gains for workers being through the process of collective bargaining.

Labor law has always been generated outside the state as well as directly through state laws and institutions, and collective bargaining law, especially where bargaining is decentralized, is explicitly designed to give the parties directly affected wide latitude to set the terms governing work. However, parties bargain in the shadow of the law: as the North American experience discloses, the legal framework in which bargaining occurs can be profoundly significant to the outcomes, even to the degree to which unionization takes root

at all. What is new and different about the current era is the attempt to generate improved labor practices while national labor standards and institutions are being simultaneously undermined. It is not simply that soft solutions are being sought in preference to regulatory solutions; instead, existing institutions and regulations are being altered in ways that materially empower employers and arguably row against the objectives underlying soft strategies such as the ILO Declaration, for instance, fostering collective bargaining and eliminating workplace discrimination.

However, soft law approaches do not prevail everywhere in the global economy. Nor is state regulation and rule enforcement avoided as a general matter. It is worth recalling that hard constraints are the rule in economic regulation, notably with respect to trade, intellectual property, and investment rights. Indeed, membership in international organizations such as the WTO, or access to funds from the international financial institutions, may effectively be contingent upon the implementation of quite specific rules and policies at the national level. Even participation in economic communities such as the EU is predicated on the acceptance of hard constraints on fiscal policy. Yet, while international institutions, industrialized states and corporations have insisted upon the necessity of new rules and institutions to regulate the global economy, this enthusiasm for enforceable legal protections has not extended to labor rights. Priority has been given to protecting property and contract rights; in some cases, decisions under international agreements have gone as far as to insure investors' income streams against the future regulatory and legislative actions of states. Thus far, efforts to build hard law has overwhelmingly

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86. For example, it is a condition of WTO membership that states agree to protect intellectual property for a period of 20 years. See WTO, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 33, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. p. 81 (1994).
87. EU Members’ use of fiscal policy is limited by the financial penalties associated with running a deficit in excess of 3%, set out in the Stability and Growth Pact. See IMF, International Financial Contagion, supra note 59. Although this pact constrains government spending in a variety of directions, one of its effects is to limit the capacity of states to engage in demand-side management of the economy and mitigate the harshness of business cycles on workers and consumers.
strengthened the hand of employers *vis-à-vis* both states and workers, but nothing has been successfully negotiated regarding labor issues. The result might be described as a double agenda within the context of global economic regulation: enforceable rights for investors and employers, and promotional instruments for the interests of other social groups and "soft" values such as human rights, the environment and labor protection.

The assumption behind the use of soft strategies is that, in many instances, they will be more effective than hard law and enforcement at transforming the practices of states and private actors, such as corporations. On one reading, rules are persuasive when they are broadly congruent with practices and shared understandings, and of limited utility (if not counterproductive) when they are not.\(^89\) The ILO, for example, has long followed a strategy of persuasion, advocacy, and technical support to further the cause of higher labor standards, eschewing the route of enforcement. However, the preference for soft approaches is also linked to a deep skepticism about the efficacy of regulation and the role of the state, at least where it does not demonstrably improve the efficient operation of markets.\(^90\) It may also reflect resistance to the reallocation of the existing or "normal" entitlements and obligations among the affected constituencies.\(^91\) As a result, the question of entitlements and protection for labor has been increasingly separated from the regulatory debates throughout the global economy.

In the face of hard initiatives elsewhere in the international economic regime, the reliance on soft strategies to address the "social dimension" of globalization – including labor protections – raises a number of questions. Do the various soft law initiatives simply reflect the necessity of a margin of flexibility and discretion in light of the varied contexts in which rights and standards are implemented? Or does reliance upon voluntary initiatives mark an effort to limit workers' entitlements in the global economy?

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90. For discussion, see KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM (Kluwer Law International 2002).
Is the turn to soft approaches a pragmatic response to the difficulties of law-making in a world of complex interests and demands? Or does the preference for soft law for labor in the face of hard law for investors mark a hierarchy of interests and values in which those of workers have been distinctly subordinated? Will soft law constrain the actions of corporations in the global economy? Or does it simply reflect the power of corporations in the global economy to limit the scope of demands that run counter to their interests?

At the end of the day, the real question is not whether the mechanisms are hard or soft. Both international law and labor law routinely rely on instruments short of hard law, such as declarations, fact-finding, mediation, conciliation and negotiation, to constrain the behavior of the parties involved. Rather, the question is how well core labor rights can be expected to function as a vehicle for resolving labor disputes and delivering distributive justice for workers. How much can we expect from core labor rights in light of other institutional developments currently underway? If norms can build practice, as the proponents of such strategies propose, what are the prospects that soft law will lead to real gains for workers, especially in “deregulated” labor market regimes?

The ILO has long taken the position that institutions and enforcement are crucial to the realization of labor rights and standards. Even after the Declaration, which is repeatedly characterized as a promotional instrument, the ILO has continued to advert to the importance of institutions, if in a somewhat muted voice. Corporations, for their part, have made it clear that they will resist attempts to entrench enforceable rights and standards; they prefer voluntary efforts to raise labor standards such as the Global Compact, described below. While this is not surprising, what is remarkable is the extent to which this approach has been endorsed not simply by the international financial institutions, but elsewhere at the international level as well.

The embracing of voluntary approaches by international institutions is best exemplified by the UN Global Compact, an initiative announced in 1999 by

92. “For voice regulation to be an effective means of promoting efficiency and addressing equity and distributional issues, labor market institutions need to be strong, representative and responsive. The development of these institutions and mechanisms of voice must therefore be underpinned by freedom of association and reinforced by mechanisms of conflict resolution . . . .”

ILO, YOUR VOICE AT WORK, supra note 4. See also ILO, Decent Work, supra note 80.
UN Secretary-General, Kofi Annan, and promoted by the International Chamber of Commerce ("ICC"). The Global Compact requires corporations who become signatories to it to adhere to nine principles in the areas of human rights, labor and the environment – four of which mirror the rights in the ILO Declaration. However, the Compact is not a regulatory instrument, or a corporate code of conduct, nor is it even intended as a device by which to hold corporations accountable for their actions. Rather, it is promoted as a "platform for learning," a means to disseminate best practices in the areas of human rights, labor standards and the environment. The requirements placed on the corporations who sign letters of intent are almost nil; they are merely "invited to share examples of corporate practices on the Global Compact web portal." No general assessment of their commitment to the nine principles of the Global Compact is envisioned.

As an institutional project endorsed by the UN, the Global Compact is somewhat unusual, perhaps even unique. In any event, it raises a number of questions. For example, how will the emergence of strategies such as the Global Compact affect other efforts, national and international, to address the role of corporations in raising labor standards? Will mechanisms that place compliance entirely in the hands of corporations undercut efforts to induce corporations to submit labor disputes to resolution by third parties? Will it authorize resistance to more stringent regulatory efforts? To reflect on these questions, it seems important to recall the history of core labor rights, the claims made in their name, and to consider how core labor rights might intersect with hard regulatory and institutional reforms elsewhere.

IV. THE LOGIC OF CORE LABOR RIGHTS

Given the enormous hopes that are now reposed in core labor rights as the principal solution to the problem of justice for workers in the global economy, it is worth recalling that core labor rights emerged in response to the failure of the international economic institutions to address the concerns of labor, the weakness or absence of labor rights within international trade and investment agreements, and the resistance that efforts to legislate or enforce labor standards of any kind have engendered, particularly among developing states. This history remains pertinent. Core labor rights are designed to manage a problem which is usually articulated as the failure to address the question of labor protection in the global economic architecture. But they are designed to do so by providing a solution which avoids the controversies that have plagued the debate around labor standards to this day.

Much of the appeal of core labor rights lies in the fact that they are represented as both normatively desirable – if not unassailable – and unthreatening to economic interests. These representations are crucial: they are what enable core labor rights to serve as a point of agreement among those who otherwise disagree as to the appropriate goals and purposes of labor market regulation. A number of claims and assumptions underlie the appeal of core labor rights. Foremost among them is that “core” rights can be sharply differentiated from the labor standards that are the source of so much controversy. According to proponents, a small subset of worker entitlements is both fundamental to the project of protecting workers, and fundamentally different from other labor regulations and standards. For example, core labor rights are rights to be respected and protected, as opposed to “interventions” or interferences with the operation of markets. Second, core labor rights represent the limited number of worker rights that are properly understood as human rights. As such, they must be respected by all parties quite apart from any collateral effects they produce or instrumental defenses that might be advanced in their name.\(^\text{96}\) To put it another way, they are ends in themselves, as well as means by which to reach other desired ends.\(^\text{97}\) Just as important, however, is the argument that core labor rights can be safely respected by all states because they do not trench on the territory of comparative advantage; unlike labor standards, core labor rights generate no adverse economic effects

\(^{96}\) See, e.g., 1996 OECD Study, supra note 9.

\(^{97}\) This is essentially the argument in AMARTYA SEN, DEVELOPMENT AS FREEDOM (Anchor Books, New York 1999).
and therefore cannot be legitimately resisted on protectionist grounds. Finally, core labor rights have no necessary regulatory implications; they may be respected by states at all levels of economic development. Thus, the link with human rights provides the normative grounding to the claim that core labor rights should be universally respected, while the distinction between core labor rights and other labor standards allays concerns around the economic effects of core labor rights.

As is evident, the case for core labor rights is marked by categorizations and distinctions; as much as core labor rights are promoted in positive terms, they are defended in terms of what they are not. However, the twin efforts to gain certainty and avoid conflict and controversy through reliance upon core labor rights remain vulnerable on a number of points, as can be briefly summarized as follows. First, core labor rights are neither conceptually nor operationally distinct from other labor rights, regulations, or standards. Efforts to distinguish core labor rights from other rules and entitlements depend upon dichotomies – such as intervention versus non-intervention by the state, or rights to process versus substance – that have long been called into question as reliable or functional tools, even with respect to private law. Such distinctions rest on the unsustainable idea that there is in fact an “unregulated” or “deregulated” market for labor, just as there is a natural market structured by private law property and contract rights, in which controversial policy

98. This was one of the principal conclusions of the 1996 OECD Study, supra note 9; it was substantially confirmed 4 years later in the 2000 OECD Study, supra note 9.


100. Thus, terminological variation in the field is not surprising. The OECD, e.g., refers to core labor “standards” (rather than “rights”), although it is minimum wages or working conditions, typically referred to as substantive standards, that engender the most controversy in labor debates. See 1996 OECD Study, supra note 9.

determinations are absent and state power is exercised in an entirely neutral way. In any event, respect for core labor rights may effectively require the presence of other rules and entitlements, some of which are the very standards that engender controversy. There is considerable evidence, for example, that remedies for systemic workplace or labor market discrimination require more than simply formal anti-discrimination norms. Similarly, real access to collective bargaining has often required the introduction of new institutions and collateral rules. Second, there is accordingly no simple or uncontroversial way to distinguish “core” from “non-core” labor rights or standards, and it is therefore not surprising that other rights and principles have also been identified as fundamental to workers’ dignity and essential to redressing workers’ disadvantage in an era of transnational economic activity. Among them are labor standards such as minimum wage protection and health and safety standards. Even after the appearance of the ILO Declaration, a range of principles and rights continues to be enshrined in regional and bilateral trade agreements, suggesting that the debate over what constitute the most important labor rights remains unsettled. Third, some, if not all, non-core labor rights can also lay claim to being human rights; many are either clearly reflected or can be plausibly located in existing international human rights treaties and norms. Conversely, the status of some of the core rights as human rights

103. See, e.g., North American Agreement on Labor Cooperation between the Governments of Canada, the United Mexican States and the United States of America, 32 I.L.M. p. 1499 (1993) [hereinafter NAALC] (labor “side agreement” to NAFTA, supra note 88). NAALC commits the parties to promote eleven different labor principles. Moreover, there are three principles subject to the highest level of scrutiny for which sanctions are at least theoretically available in case of violations concerning child labor, minimum wage technical labor standards, and occupational safety and health. Thus the NAALC is both over- and under-inclusive with respect to the priorities identified in the ILO Declaration. Freedom of association and the right to collective bargaining are not included, while minimum wages and occupational health and safety are.
105. E.g., art. 7 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") recognizes the "right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
remains controversial. This is not an insignificant barrier to the project of improving labor standards through reliance upon human rights: freedom of association and collective bargaining have been identified as key to the project of improving labor standards – but of all the core rights, they remain the most contentious.\footnote{106}{The ILO acknowledges this. See ILO, YOUR VOICE AT WORK, supra note 4, at p. 2.}

Fourth, as many would intuit and as the history of collective bargaining confirms, core labor rights do have economic implications at the distributional level which can be expected to engender concern among corporations and states over competitiveness, as well as conflict and resistance among the parties to the employment relationship. Norms and institutions are perceived as costs of, as well as impediments to, flexibility and competitiveness.\footnote{107}{ILO, YOUR VOICE AT WORK, supra note 4, at p. 9.}

This is because all labor “rights,” “standards” and “regulations” share a crucially important trait for the purposes of present debates: they serve to (re)allocate resources and power to and among workers. Fifth, respect for core labor rights may implicate not simply the activities of those engaged in transnational economic activity, but also the regulatory and institutional projects pursued by states and international institutions in non-trivial ways. Finally, sixth, core labor rights are stated at an extremely high level of generality;\footnote{108}{“General propositions do not decide concrete cases.” Lochner v. New York, 198 U.S. p. 45 (1905) (Holmes J., dissenting).} enormous conflict, conflict which echoes the disputes over labor standards, should be expected over their content and application in particular contexts.

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provision of the present Covenant:

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”

All these observations suggest that the present consensus over core labor rights is, at best, unstable. Some imagine core labor rights as the starting point, a platform from which to launch a broader project to improve the status of workers. Freedom of association plays a signal role in this trajectory, as it provides the formal protection that unions require to seek further gains for their members. However, for others, the endorsement of core labor rights is actively entertained because it represents an alternative to labor market regulation; core labor rights also mark the limit of worker interests and the extent of the claims that must be recognized in the workplace. From this perspective, higher labor standards represent the constitutive outside of core labor rights, what is avoided or rejected as "core" rights are endorsed. The risk is that, as core labor rights become the standard or litmus test of good labor practice, other goals and desires may be delegitimated in equal measure, placed in the peripheral, optional or excluded zone. But whatever the eventual outcome, the presence of competing explanations suggests that the contentious issues that core labor rights either leave open or purport to resolve are destined to reappear, and that many of the battles over labor regulation will be restaged at the point at which respect for core labor rights is in issue. Equally important, however, is the effect of the arguments for core labor rights on the understanding of the problem of labor in the global economy. Although the rights they enshrine are old rather than new, as a strategy for labor protection, core labor rights represent a new moment, not simply at the level of solutions but in the manner in which the dilemma of labor itself is conceived.

Core labor rights universalize and shrink the agenda for labor. Because it is distributive issues that are the source of so much controversy among the affected constituencies, both the design and the effect of core labor rights are to bracket or exclude distributive issues. This represents a fundamental break from the traditional aims of the labor movement. Labor regulation has always been concerned with limiting the degree to which workers are subject to market

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109. The rights identified in the ILO Declaration already fall within the binding norms of the international human rights covenants, whatever the efficacy with which those norms are enforced. E.g., the norm against discrimination at work is subsumed within art. 3 of the ICESCR, supra note 105; freedom of association is guaranteed under art. 8 of the ICESCR and art. 22 of the International Covenant of Civil and Political Rights ("ICCPR"), entry into force Mar. 23, 1976, U.N. Doc. A/6316 (1966), 999 U.N.T.S. p. 171. Art. 8 of the ICCPR entrenches the norm against forced labor; art. 10 of the ICESCR limits the use of child labor.
forces. At least since the time of Adam Smith, labor contracts concluded under the norms of commercial contracting (that is, under the presumption that parties bargain as equals to mutually beneficial outcomes) have been understood to be profoundly disadvantageous to workers (and sometimes threatening to employers too). Rights and protections for workers were introduced early on to modify labor contracts and limit the operation of market forces, not only to prevent the outright degradation of workers but also to redress the characteristic imbalance in power between employers and workers and ensure that workers retain a greater share of the gains of productive activity than they otherwise would. Yet, in distinguishing core rights from labor standards, core labor rights differentiate workers' rights from their economic interests. Although questions of distributive justice have always been at the heart of the project of labor regulation, workers are required to jettison such objectives, except to the extent that those can be furthered through freedom of association and collective bargaining.

At one level, core labor rights represent a turn to ethics — an attempt to transform the question of labor protection into a question of morality concerning the treatment of workers. While the moral dimension of labor rights and the discourse of dignity have never been absent from debates over international labor standards — arguably both have been and remain central — what is distinctive now is how much weight ethical norms shorn of institutional backing are expected to carry. Historically, arguments from human rights have been arguments in favor of labor standards and other labor market institutions. Now, paradoxically, they seem to be leading in the opposite direction. So conceived, worker protection becomes a matter of the dignity of the individual worker and of the “good” or “bad” behavior of the corporation employing him or her, and the problem becomes one of respect rather than resources and power.

110. This lies behind the idea that “labor is not a commodity,” enshrined in the ILO Constitution and the Declaration concerning the Aims and Purpose of the International Labour Organization, adopted at the 26th Session of the ILO, Philadelphia, May 10, 1944 (“Declaration of Philadelphia”), available at http://www.ilo.org.


112. For a classic discussion, see KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (Boston 1957).

113. THE TURN TO ETHICS (Marjorie Garber et al. eds., Routledge, New York 2000).

114. For a general discussion of the turn to ethics as a refusal of political engagement, see Chantal Mouffe, Which Ethics for Democracy, in id. p. 85.
Recasting the dilemma as a moral or ethical question may be an effort to avoid or transcend the political difficulties of legal and institutional transformation. Whether workers ultimately benefit, however, remains, however, an open question. Workers gain a certain amount of moral currency in the debate over labor standards through the recognition of core labor rights. But attention to the structural issues which enable and indeed encourage continual downward pressure on wages and working conditions is displaced. At the same time, labor loses its place at the bargaining table, no longer recognized as a legitimate and important interlocutor in debates over global economic integration or a necessary participant in the design of institutions that regulate it. From the marginalization or exclusion of labor from the institution-building processes comes the absence of entitlements for workers, along with predictable costs and losses to workers’ overall position and resources.

As questions of interests and representation, structure and power are displaced by ethics, the quest for adequate protection for workers in the global economy becomes almost completely separated from the question of economic regulation. Elevated to the level of moral claims, and stripped of their political and institutional underpinnings, core labor rights coexist comfortably with the idea that rights for workers need not be enforceable entitlements, nor need labor be consulted in the design of market institutions. Rather, labor issues can be safely consigned to different institutions, housed under different regimes and subject to different logics and justifications. Viewed from this vantage point, it is not surprising then that the turn toward core labor rights should be accompanied by a rejection of regulatory- in favor of “voluntary” solutions, or that civil society rather than the administrative and legal apparatus of the state should now be called upon to play a greater role in the promotion of better labor practices. However, in the process, it becomes less and less possible to speak openly of advancing workers interests as such; now they are “special interests,” protecting “insiders” at the expense of others. Moreover, workers’ rights become regarded (fallaciously) as unique in this respect, as if legal entitlements for other groups did not also have distributive effects.

115. The question is not whether core labor rights are human rights, nor whether rights for workers have a moral or ethical dimension; they clearly do. Rather, the issue is the effect of the move to human rights.
116. For a classic articulation of this position, see IMF, International Financial Contagion, supra note 59.
What may be less obvious is that, as core labor rights are placed in the domain of the merely ethical and other labor standards are excluded from the regulatory regime, the background legal norms that remain undergo a similar process of sanitization. Trade and investment rules, property and contract rights, intellectual property, security and corporations laws are evacuated of their distributive content and impact as well. Although it is here that much of the power of investors, employers, creditors and corporations in the global economy can be located, their significance to the position of workers (as well as to other constituencies) recedes into the background. No longer recognized as protecting particular interests, such rules and rights appear neutral and uncontentious, as merely technical matters of general benefit to all.

However, there is nothing inherently “ethical” – as opposed to “regulatory” – about labor issues. To reiterate, like property and contract rights, they concern the allocation of power and resources among the parties engaged in production and exchange. Nor is there any necessary opposition between ethical concerns and regulatory or institutional arrangements; indeed, there are entirely mainstream, well-established arguments that they should be aligned, especially where distributive concerns are at issue. Whatever the benefits of such a strategy, the separation of workers’ rights from the other rules governing economic activity and the reclassification of such rights as matters of human rights rather than questions of institutions and market design renders the paradox and problems of applying different rules, institutions and logics less evident. While the situation is distinctly advantageous for employers, it poses a correlative disadvantage to workers.

V. CORE LABOR RIGHTS AND THE ADJUDICATION OF LABOR DISPUTES

As has long been observed, little is either entailed or excluded in the way of concrete outcomes from the recognition of rights in the abstract. Rights, as such, are not a guarantee of either legal or social transformation: it is only at the level of practice, typically in the context of a specific dispute, that their uses are determined. In practice, core labor rights may provide a basis for

117. E.g., the “difference principle” holds that institutional arrangements should be made to benefit the least well-off. See JOHN RAWLS, A THEORY OF JUSTICE (Harvard Belknap, Cambridge 1971).
greater protection for workers. But depending on how they are conceptualized and operationalized, they may also pose little, if any, threat to the *status quo*.

Principles and rights such as freedom of association and non-discrimination are not self-defining or self-executing; the wide range of institutional arrangements, particularly in industrialized states, testifies to the variety of choices and decisions that can be made about their ambit and the manner in which they can be realized. The norms articulated in the ILO Declaration, the UN Global Compact and the various codes of conduct generated by the international institutions\(^{119}\) are stated at a very high level of generality. What respect for them does or does not entail in particular circumstances is not something that is self-evident from their recognition in the abstract. To put it another way, they are not “facts,” but rather decisions about their scope and the purposes for which they will be used.

Core labor rights will not be considered in a vacuum; rather, they are destined to be situated in the larger legal and institutional context in which global economic activity now occurs, and subject to the emerging norms concerning workplace governance. As described, there are conflicting ideological and regulatory trends at work. On the one hand, the ILO Declaration reflects broad recognition of a set of core rights for workers. On the other hand, legal norms, rules and institutions at the national and international level are shifting in the direction of providing greater protection to property and contract rights for investors and employers and reducing the regulatory protections for workers. Thus, transnational labor disputes stand to be resolved in the shadow of norms that enhance investor and employer interests and place significantly increased costs and risks on workers.

Rather than being the solution to labor’s disempowerment and disenfranchisement in the global economic context, core labor rights are better understood as one of the discursive fields in which efforts to promote workers’ rights now take place.\(^{120}\) However, because of the presence of the agenda of flexibility, core labor rights do not constitute the exclusive international labor field, nor do they occupy or “own” the field which they do constitute. Core labor rights and labor market flexibility provide the parties with competing sets

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of rhetorical tools. These agendas will structure the arguments and provide the language in which contemporary distributive struggles in the workplace are framed. Each has resonance within broader contemporary debates, namely human rights and development, and each has therefore a certain persuasive power. However, neither of them necessarily resolves the question of entitlements for workers and employers in the context of disputes. If anything, the co-existence of these two agendas is likely to contribute to the creation of labor disputes, as they establish competing normative structures for governing the workplace that pull in quite different directions. They also establish contending rights claims that will be available in the context of disputes. Further still, each generates arguments and authorities that may be deployed within the framework of the other.

What should be emphasized here is that there is no settled agreement about the legal content of either of these baseline norms, how they are to coexist, or even whether they have commensurate legal status. Nor is there agreement about how to classify or characterize workplace issues, as matters of workers' rights or as necessary workplace flexibility. Rather, core labor rights and labor market flexibility are overlapping discourses covering similar terrain. Both are concerned with the extent of each party's powers and protection in the workplace, and with the allocation of costs and risks among them in the context of production. Just as norms and rules instituting policies of labor market flexibility are at the same time decisions about the extent of workers' entitlements, so workers' rights claims simultaneously seek to trench on, and curtail, the entitlements of employers.

Labor disputes are the site at which these two agendas will most clearly intersect; where these competing visions stand to be realized, traded off or ignored. They are also the point at which core labor rights must be considered as norms and entitlements, and measured against the force of other norms and entitlements. As long as core labor rights are considered in isolation, this moment can be deferred endlessly, and even avoided altogether. However, it is in the encounter with other entitlements and norms that their capacity to affect the bargaining power – and, ultimately, the allocation of resources and power in the workplace – is either demonstrated or defeated. How this process unfolds will determine whether core labor rights remain merely ethical

121. This problem has been analyzed elsewhere in the international context; see Daniel K. Tarullo, Beyond Normalcy in the Regulation of International Trade, 100 HARV. L. REV. p. 547 (1987).
aspirations that ratify the current distribution of power among workers and firms, or whether they will provide a basis upon which to challenge the current allocation of resources and power among employers and workers. Such decisions will also reflect on the credibility of any institutions involved in the resolution of transnational labor disputes.

An additional consideration makes the dispute resolution process unusually significant. Unlike commercial contracts, labor contracts are frequently oral rather than written. They are almost always incomplete; important terms inevitably remain unarticulated, as it is in the nature of a long-term contractual relationship that all of the details cannot be specified in advance. In addition, the contract of employment is known in its essence as a relationship of subordination. For both of these reasons, contract performance tends to be dynamic and open-ended, with a large measure of discretion reposed in the employer to direct employees and determine what performance of the contract entails over time. There may be no contract term that speaks directly to the issue underlying the dispute; there may not even be a contract of employment or a collective agreement at all. As a result, courts, tribunals, adjudicators and arbitrators have been unusually involved in the construction and application of workplace norms. Imagining how disputes arise and how they will play out, however, suggests the importance of institutions and contractual entitlements; it also suggests why labor market flexibility might be described as the “actually existing” labor law of the global economy. And it also highlights the complexities of attempting to improve the position of workers through core labor rights while an agenda of labor market flexibility is simultaneously in operation.

Arguments couched in terms of respect for property rights and contractual freedom will predictably be advanced by employers to either counter or limit the reach of core labor rights. To the extent that norms of labor market flexibility are reflected in the rules of the jurisdiction where the dispute arises, employers may attempt to rely on them directly in defense of their actions. The entrenchment of such rights and the absence of laws compelling employers to bargain with unions may even affect their recognition of the existence of an

122. This remains the case in an era of globalization. See Supiot Report, supra note 32.
123. Doctrines such as reasonable notice and constructive dismissal in the common law of employment in the Anglo-American world are aimed at setting the boundaries of the employer’s authority in the workplace and determining the cost of its exercise.
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outstanding issue, and therefore also their willingness to engage in the process of dispute resolution in the first place.

In the absence of enforceable rights for labor within the set of rules governing economic activity, an institutionalized regime of labor market flexibility organized around property, contract, investment protections and corporations law effectively becomes the law of the workplace. The resulting regulatory regime is not neutral vis-à-vis the parties involved; the presence of contractual and property entitlements backed by the state endows employers with specific entitlements to direct and control the workforce. In most cases, it also allows them effectively to set the terms of the employment contract and extract most of the economic benefit from the relationship. Labor rights and regulated workplace standards were forged out of workers’ dismal fate in the encounter with the property and contract rights of their employers and with the willingness of the courts to stand behind the interests of the latter. Moreover, in the absence of a fairly elaborate administrative machinery, robust enforcement efforts, and a detailed legal code and jurisprudence giving more specificity and content to what are quite general norms, workers’ associational rights, even if recognized, often prove to be illusory. There is ample evidence that labor institutions continue to matter in the context of global economic integration, especially for distributive purposes. The institutional arrangements governing work vary significantly in market-based societies, and they generate identifiably different consequences for workers.

At the same time, it is worth recalling that the visions and values embodied in the core labor rights and labor market flexibility agendas are not new, nor is the conflict between employer property and contract rights and worker’s associational rights: they reflect many of the classic tensions and struggles between workers and employers in the context of production. There is a great deal of intelligence, much of which emanates from the labor relations jurisprudence under the Wagner Act in North America, about the different ways in which entitlements can be structured in the workplace and their effect

124. There is, however, nothing inherent in contract or property law that compels courts to ignore competing claims, values and interests; nor are rules external to property and contract law the only devices available to further them. See GEOFFREY ENGLAND, INDIVIDUAL EMPLOYMENT LAW (Irwin Law, Toronto 2000).
125. For an attempt to analyze the impact of national labor market institutions on equality, see Bakker, supra note 31.
126. Supra note 15.
upon workers’ ability to bargain collectively and achieve various transformative objectives, whether they are greater material gains or more, say, in the governance of the workplace. This jurisprudence also makes clear the importance of decisions made within particular entitlements such as collective bargaining rights. At minimum, it is clear that the varying choices concerning the scope and character of such entitlements can vastly affect the overall direction of labor relations and the relative balance of power between workers and their employers. It is equally clear that early decisions on these questions are often fateful.

The argument is not that this jurisprudence could or should be reflexively applied to the labor disputes that spring up in the context of transnational production. Au contraire, norms developed in North America in the context of Fordist, nationally-bounded production may be singularly inappropriate elsewhere. They may simply be unresponsive to the problems that arise in global production, and to the plight of many vulnerable workers in particular. Many have been deeply criticized in any event for impeding collective bargaining or otherwise subverting the goal of worker empowerment. In addition, the Wagner Act model both presumes and relies upon an elaborate administrative and enforcement regime – precisely what is resisted in current institutional reforms.

127. Here, comparisons between the United States and Canada are particularly illuminating. Both countries have the same basic legislative scheme governing labor relations, but there are significant differences in some of the details, different interpretations of similar or identical provisions, and arguably different approaches to enforcement as well. The effect of these differences is significant, as suggested by the different rates of unionization. For a discussion of the effect of employer tactics on unionization rates, see Paul Weiler, Promises to Keep: Securing Workers’ Rights to Self-Organization under the NLRA, 96 HARV. L. REV. p. 1769 (1983); PAUL WEILER, GOVERNING THE WORKPLACE (Harvard, Cambridge 1990).

128. The classic consideration of this issue is Karl Klare, The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941, 62 MINN. L. REV. p. 265 (1978). See also Canadian constitutional jurisprudence on freedom of association; the Supreme Court of Canada held early on that freedom of association, a protected entitlement under the Charter of Rights and Freedoms (Canada’s bill of rights) does not protect the activities for which workers typically associate; hence, neither collective bargaining nor the right to strike have constitutional protection in Canada. See Reference Re. Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. p. 313.
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Nonetheless, even independently of the question of labor market institutions, this jurisprudence remains highly instructive. Its utility lies in two places. First, it indicates the legal and rhetorical structure that competing rights claims are likely to take, particularly where, as in the United States, bargaining is decentralized, unions must struggle for recognition in the face of employer resistance, and employers operate under norms of relatively unfettered contractual power. Indeed, the jurisprudence generated in the wake of the Wagner Act provides a virtual roadmap of the legal form in which particular issues may play out. Second, it suggests something about the normative framework in which significant numbers of influential transnational actors are likely to be operating. For this reason, it may influence the boundaries and the content ultimately given to core legal rights, and by extension, the scope of property and contract rights in the workplace.

While other legal traditions and influences are certain to be in play as well, there are a number of reasons to suppose that American labor and employment norms will be unusually significant. First, a large number of corporations operating transnationally are based in the United States. As the ILO has noted, the activities of multinational corporations are the conduit by which new modes of production are diffused. 129 Not only production processes but also work practices are exported when corporations take their operations abroad. 130 However, those practices do not develop in a legal vacuum. Structuring these work practices and embedded in the interactions of employers and workers are employment and labor relations norms: corporations carry with them, either unconsciously or explicitly, a set of expectations concerning their entitlements vis-à-vis their workers when they operate abroad, that are at least partly attributable to the legal framework that generated them. 131

129. ILO, YOUR VOICE AT WORK, supra note 4.
130. The ILO identifies transnational corporations ("TNCs") as the "main vehicles for transfers of... new work practices in the global economy." See ILO Director-General, Reducing the Decent Work Deficit, supra note 55.
131. This is evident in the unfair labor practice and duty to bargain jurisprudence in Ontario generated by the local affiliates of U.S. multinationals. See, e.g., Wal-Mart Canada, Inc., [1997] O.L.R.D. No. 207; United Steelworkers of America and Radio Shack, [1980] 1 Can. L.R.B.R. p. 99 (O.L.R.B.). But as the labor disputes that emerge in Mexican maquiladoras and in special economic zones all over the world disclose, employers may also seek to avoid the collective bargaining and other labor norms that bind them at home when they move abroad. Indeed, this may be a significant part of the motivation behind the relocation of production.
Second, to the extent that collective bargaining takes root in places where it is now weak or absent, it will almost certainly track the Anglo-American model of decentralized bargaining. The alternatives—bargaining at the sectoral or national level—are unlikely to emerge in the near future, as they entail considerable consensus about the contribution such negotiations make to economic growth and other desired social and political ends—precisely what is missing at the moment. They also require public resources and institutions to support them, and these are also increasingly scarce commodities. In addition, decentralized bargaining raises characteristic issues concerning union recognition and bargaining unit determination that are likely to make the voluminous North American jurisprudence on these issues very pertinent.

Third, because the unions, NGOs and other civil society groups agitating for greater labor protections in the global economy are themselves disproportionately American, and because outside publicity, support or involvement is sometimes key to whether labor disputes appear to warrant attention or even materialize as disputes at all, American workplace and industrial relations norms may unconsciously serve as the benchmark by which behavior contravening workers’ rights is identified in the first place. Even the jurisdiction of the foundations and entities funding labor protection or wider legal reform efforts may be influential; apart from the ILO, so far, they too have been overwhelmingly American in origin.

For all these reasons, American collective bargaining norms are likely to influence the interpretation of core labor rights. As a cautionary note, it seems important to observe that, although resistance to labor standards is typically attributed to the developing countries, lack of respect for even core rights such

132. For an analysis of the role of NGOs in international legal transformation, see MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (Cornell 1998).

133. This is not to ignore the important work identifying norm contraventions within the United States. See Human Rights Watch, supra note 85.

134. For example, the U.S. Department of Labor is the funding partner of a number of ILO “technical cooperation” projects to strengthen labor relations. Among the goals identified in the East Africa project is to “ensure that revised legislation is in line with the requirements of a dynamic market and private sector-led economy.” Project description available at http://www.ilo.org/public/english/standards/decl/technical/country/overview4.htm (visited April 2003). And, as noted by KECK & SIKKINK, supra note 132, during the period 1973 to 1993 the Ford Foundation provided funding for almost 50% of the human rights projects in America.
as workers' freedom of association is not restricted to those countries. Rather, interference with the right to organize and resistance to collective bargaining on the part of employers is an entrenched practice in the home of many of the world's multi-national corporations, the United States. There, corporations systematically try to avoid bargaining collectively with their employees, notwithstanding the presence of legal obligations under the National Labor Relations Act compelling them to do so. The low rate of union density, now at nine percent in the private sector, is in part attributable to the entrenched culture of resistance to unions that prevails, as well as to the lax enforcement of unfair labor practice laws. If the employment and labor relations practices that characterize such corporations come to serve as the template for labor relations in the global economy, workers have reason to be concerned.

It is worth reiterating that labor market flexibility is regarded as a regulatory and institutional project, while core labor rights are characterized as goals, values, and ethical or moral commitments; protecting property and contract is a matter of serious institutional design, while core labor rights remain a promotional project. While nothing is certain about the outcome of the encounter between core labor rights and flexibility norms, it seems unlikely that this disparity in their institutional status will fail to register in the case of

135. Human Rights Watch, supra note 85.
136. National Labor Relations Act, 29 U.S.C. § 157. Sec. 7, establishes the right to join a union and the right to engage in collective bargaining and other concerted activities; § 8(a)(1) prohibits an employer from discharging or otherwise discriminating against employees for engaging in union activities.
137. For example, Wal-Mart, the largest private employer in the United States and the largest corporation in the world by some measures, is notoriously and so far successfully anti-union in all its operations. It also appears systematically to violate the basic obligation to pay workers for the time they are required to work. Wal-Mart is currently being investigated by the National Labor Relations Board in connection with its interference with worker's right to bargain. See Union Network International, Once Again in Trouble with the Law: Wal-Mart faces Federal Charges in the United States for more than 45 Separate Incidents of Illegal Conduct, April 24, 2002, available at http://www.union-network.org/UNIsite/Sectors/Commerce/Multinationals/Wal-Mart_faces_45_federal_charges.htm (visited April 2003); and Bonnie Harris, Wal-Mart hit with Labor Suits; Employees in 28 States, including Indiana, Cite Pay, Break, Lock-in Issues, THE INDIANAPOLIS STAR, Aug. 25, 2002. Similar observations have been made about other large U.S. multinational employers such as McDonalds. See ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL (Houghton Mifflin, New York 2001).
138. WEILER, supra note 127; Human Rights Watch, supra note 85.
a dispute. In many jurisdictions, core labor rights have uncertain, or no, legal status. As described above, it is doubtful whether, in the case of a conflict, they are intended to prevail over the “hard” entitlements guaranteed by private law or bilateral or multilateral treaties, especially if, as is not unimaginable, a party invokes impairment of competitive advantage. Notwithstanding the fact that they are cast as universal human rights, it is unsafe to assume that core labor rights will, in constitutional fashion, automatically trump the rights claims of others in the market. Indeed, the opposite may be true: human rights may be adjusted to accommodate market norms. Moreover, where workers assert freedom of association and their right to bargain collectively, employers may advance countervailing property, contract, and expressive rights. Invoking the Universal Declaration of Human Rights or other instruments, they may argue either that their claims constitute human rights too, or that their entitlements merit “constitutional” protection in any event due to the fact that they are enshrined in other international treaties. These are not mere theoretical possibilities; arguments in favor of rights to trade and the recognition of freedom of transaction as a fundamental end of development are already in circulation.

Yet, like workers’ freedom of association and freedom from discrimination, property and contract rights are not self-defining either. Although one could search in vain for much appreciation of this in the policy on legal reform and good governance from the international economic institutions, property and

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139. Art. 5 of the ILO Declaration, supra note 7, states inter alia that “the comparative advantage of any country should in no way be called into question by this Declaration and its followup.”


143. For discussion of this trend, see Schneiderman, supra note 88.


145. See SEN, supra note 97.
contract are complex and multifaceted legal constructs that take a variety of forms in contemporary industrial societies. They are inflected and contained by a multitude of other legal rights. They are also defined internally by a range of competing values and policies; these are reflected in the doctrines and sub-rules limiting their reach and governing their application in particular contexts. And even these doctrines and sub-rules are subject to the inevitable vagaries of adjudication.\footnote{DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION — FIN DE SIECLE (Harvard, Cambridge 1997).} Property rights are routinely disaggregated and allocated among different parties with the result that, as one scholar put it neatly, property rights are the question, not the answer.\footnote{For discussion, see JOSEPH W. SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (Yale University Press 2000).} It should not be forgotten that in many jurisdictions, historically, some forms of security for workers have been recognized \textit{within} the contract of employment; thus, it is possible in principle to pursue various forms of worker protection through the medium of contract rather than merely outside it.\footnote{Simon Deakin, \textit{The Many Futures of the Contract of Employment}, in \textit{LABOUR LAW IN AN ERA OF GLOBALIZATION}, supra note 5, at p. 177.}

Given the emphasis placed on the protection of property and contract rights \textit{simpliciter} at both the institutional and the ideological level, and the correlative absence of entitlements for workers apart from core labor rights, it is worth emphasizing that labor rights, and a host of standards and regulations too, are entirely compatible with market regimes organized around property and contract rights. There are no legal impediments to their recognition: there are only ideological, political and economic arguments about their relative importance and desirability.\footnote{See, e.g., Employment Act, 2002, c.22 [U.K.].} Nor does the presence of contract and property rights imply anything but the extent to which they must reflect the interests of owners and employers to the exclusion of other societal interests, including rights for workers. And, to reiterate, despite the fact that the discourse of labor market flexibility is currently shorthand for greater property and contract rights for employers and investors, flexibility \textit{might} actually imply greater, or different, labor market protections for workers too.

With these tensions in mind, what follows are but a few examples to illustrate the manner in which core labor rights may play out in labor disputes. They are among the most clearly visible of the issues that might arise with
respect to disputes around freedom of association and the effective recognition of the right to collective bargaining in a background context of increasing labor market flexibility.\textsuperscript{150} What they illustrate most is the ongoing tensions between the two labor agendas and the enormous range of choices that can be made about their disposition. The resolution of transnational labor disputes, especially in the context of globalized, networked production, raises a host of threshold, boundary-defining issues. These questions are enormously important to the reach of core labor rights and their capacity to redress the social deficit that now exists in international economic regulation. However, many are closely related to strategies of labor market flexibility, as well as to the reorganization of production that characterizes the new economy. Hence, the contest between these two agendas is destined to reappear in quite specific issues. The resolution of concrete doctrinal questions may serve as proxies for the struggle between protection and redistribution for workers on the one hand and flexibility and empowerment for employers on the other; they will also help build and/or weaken these two impulses. However, they also point to the importance of other legal entitlements – ranging from tax policy to citizenship status and immigration law – to effective worker protection and the redistribution of resources and power.

For example, the simple question of who is an employee is of central importance. As the ILO continually observes, the exclusion of large numbers of workers from collective bargaining is a huge problem in the global

\textsuperscript{150} The focus here is on the issues raised by the intersection of freedom of association and the effective recognition of the right to collective bargaining and flexibility norms. However, freedom from workplace discrimination can be equally contentious, depending upon how equality in the workplace and labor markets is conceived. By contrast, freedom from child labor and forced labor seem less likely to be contentious issues in transnational production. The prohibition against forced labor, for example, is not simply part of customary international law; it is also generally recognized as \textit{jus cogens}, a norm from which no derogation is permitted. Child labor, while an ongoing subject of concern and debate, more often concerns local than transnational actors in global production. Both forced and child labor may be less likely to raise direct conflicts with employers’ desires for maximum flexibility and control in the workplace, if only because, with the possible exception of prison labor, they do not constitute part of “normal” practices in model market economies in the industrialized world.
economy. If core labor rights are to serve as the global basis for better workplace practices and enhanced worker power, and if freedom of association is to play its central role in their diffusion, then access to collective bargaining must be extended to large numbers of workers who are now excluded, whether de jure or de facto. For example, migrant workers may, for both legal and practical reasons, be unable either to exert any pressure on their employers or avail themselves of the protection of the law. Domestic workers, agricultural workers, those in the public service and in the professions are often excluded from collective bargaining laws. Workers may also be precluded from bargaining collectively because they are classified as self-employed or independent contractors rather than employees, notwithstanding that, as workers, they may be both relatively impoverished and intensely vulnerable. However, the problem does not stop there: workers in particular sectors, such as service and retail, tend to have less access to collective bargaining. And it is well-known that workers in atypical forms of employment – part-time, casual, and contingent – also fare badly at collective bargaining. These, however, are the sectors and forms of employment characteristic of the new economy that are proliferating in all countries. In many countries, the sum total of workers in all of these categories covers the vast majority of workers.

Assuming that this hurdle can be overcome, what then constitutes the group of employees with whom the employer must bargain? This is a pressing issue where production is fragmented or organized in networks. Emerging transnational forms of production – subcontracting and homework, for example – are attractive to the employer and often damaging to workers precisely because they weaken or sever the employment relationship between the worker and the party holding both the resources and the ultimate control. Hence, equally important to the balance of power between the two agendas is the question of who is the employer. Sometimes firms engaged in transnational production attempt to improve working conditions, only to have them undermined somewhere further out in the production network. But it is also the case that the actions of workers' immediate bosses and employers may matter less than those at the top of the hierarchy; indeed, sometimes they may be only marginally better off than the workers they hire. What matters is who exercises real control over the employment conditions and labor relations, and who gains from the manner in which production is organized. Where effective control is exercised

151. See, e.g., ILO, YOUR VOICE AT WORK, supra note 4; ILO, Review of Annual Reports under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, GB.283/3/1, 283rd Session, Geneva, March 2002.
higher up, much will turn on how far obligations and responsibilities are attached all along the production chain, and on whether they extend to those at the top. In short, rethinking the class of protected workers, the reach of their organizations, and also the types of organizations entitled to represent workers will be a necessary and fundamental task in making core labor rights even remotely responsive to the deficits in governance and the maldistribution of resources to which workers are now subject.

All of these issues raise a distinct set of questions at adjudication. Who are the parties that should have standing in a dispute? Who is an employee? Who is the relevant employer? Which norms and practices should be considered authoritative in answering these questions, and why? Decision-makers face a series of choices — choices which cannot be resolved simply by resort to the idea of either core labor rights or labor market flexibility. The choices that are made will be crucial to the way in which the entitlements operate: they can promote labor market flexibility and legitimize the current arrangements and the distribution of resources they entail, they can enhance the transformative power of core labor rights, they can moderate their intended effects, or they can pursue policies in different contexts and disputes that work at cross-purposes with each other.

Deeply relevant to the capacity of freedom of association to assist workers are the norms that make up the fabric of collective bargaining. In practice, the "effective recognition" of the right to collective bargaining raises an enormous number of discrete legal and practical questions. Because resistance to collective bargaining can be carried on at many points within the process of bargaining itself, attention to the norms which structure the bargaining process is crucial. Countervailing employer rights, such as property and contract rights, are frequently invoked not only to defeat efforts to bargain outright but to justify practices that make collective bargaining more difficult and undercut its effectiveness. For example, employer practices that interfere with union organizing efforts and workers' desire to bargain collectively are among the most frequent sources of labor disputes. As they are in the United States, efforts to undermine collective bargaining through dismissals of union organizers, reprisals against sympathetic employees and exclusion of unions from workplaces appear to be common in transnational production. However,

152. For analysis of the process of adjudication and its effect on the values and interests that are furthered, see KENNEDY, supra note 146.
153. KENNEDY, supra note 146.
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violent resistance to unions and organizing is not the only concern. Interference can take more subtle forms, especially as the more overt forms are curtailed; threats, inducements and promises are also successfully used to keep workplaces union-free.\textsuperscript{154} Some of the largest multinational corporations are especially practiced at the more subtle forms.\textsuperscript{155} However, controlling these practices means policing the nature of communications between employers and workers, as well as among employees at work. In such instances, countervailing rights such as the employer’s property rights and freedom of expression may be invoked both to curtail employee organization and enable employer resistance to organization.\textsuperscript{156}

Effective representation may require compelling employers to grant access to the worksite. This too raises questions of countervailing rights. For example, what deference should be given to the employer’s property rights, especially where they engage issues of workplace organization? Will these rights be carved back so that unions and workers have access to property? What is the nature of the employer’s duty to bargain? How does it differ from normal contractual duties? Will it be understood to require bargaining over specific, “mandatory” subjects such as wages and working conditions? As the experience under the Wagner Act model in Canada illustrates, it is possible to define the duty to bargain in largely formal or procedural terms.\textsuperscript{157} However, doing so often has the effect that workers realize few if any gains and it may effectively defeat the utility of collective bargaining, especially for workers without much independent economic power. How much disclosure of information will be required? Will corporations, for example, be required to give workers notice of plant closures and relocation decisions? Will workers have access to information about labor costs and conditions elsewhere? Or will norms of commercial confidentiality prevail?

What is the extent of sympathetic or secondary action encompassed by freedom of association and effective recognition of the right to bargain? Where

\textsuperscript{155} See, e.g., Wal-Mart Canada, Inc., supra note 131.
\textsuperscript{156} For a classic discussion of the effects of an employer’s communications during an organizing drive, see National Labor Relations Board v. The Fedderbush Co., 121 F.2d p. 954 (1941).
production is vertically disintegrated, and a fortiori where enterprises operate across borders, secondary action in support of workers engaged in labor disputes may be crucial to the success or failure of collective action; especially where they are facing a large employer, the capacity of workers to prevail often varies directly with the size of the group exerting pressure. When production is carried on within networks of legally independent contractors and when the labor itself is subcontracted, workers’ aggregate power is reduced. In North America, there are severe restrictions on the extent of secondary action permitted in the context of a labor dispute in the name of preserving industrial peace and containing the effects of labor disputes. Such restrictions are highly controversial, not simply because they trench on workers’ associational and expressive rights: they are intended to, and do, contain the economic pressure that employees can bring to bear on their employers. Whether action by those who are located at some other node in the production network, but who are ultimately producing for the same corporation, should be classified as “secondary action” is an important and live issue in the new economy precisely because it may determine whether collective action is likely to be effective at all. Although the norms are well entrenched, it is unsafe to assume that the justifications traditionally advanced to limit secondary action are automatically tenable or persuasive in the new economy. Whatever force these norms might have had in the context of nationally bounded Fordist production may be completely dissipated where production itself is decentralized and denationalized.

As these questions suggest, there is a raft of specific questions to be answered and sub-determinations to be made within freedom of association and the “effective right” to collective bargaining. Many raise distributive conflicts, requiring decisions about which party to empower, and by how much. This, however, takes us back into the territory that those promoting labor market flexibility (in the name of efficiency) seek to avoid. For these reasons, it is too early to say what core labor rights will mean for the position of workers in the global economy. The mistake which is to be avoided, however, seems to be to conclude that the mere recognition of core labor rights necessarily represents a tangible improvement in the situation of workers, especially in light of the efforts underway to loosen the regulatory constraints of employers. Canvassing the issues that can be expected to arise in the context of decentralized

bargaining serves as a sharp reminder of the role of detailed rules, administrative structures and robust enforcement in making collective bargaining even minimally effective.

One possibility is that core labor rights will be read in a manner completely compatible with the other legal and economic norms and projects now governing global economic activity. They will read so as not to trench on flexibility norms, or to trench on them in the most minimal way. For example, workers may have the bare right to associate, but no entitlement to anything enhancing the chance that organizing or bargaining might be actually effective in particular circumstances. If this happens, core labor rights may be morally comforting but ultimately unresponsive to the distributional dilemma that global economic integration and the policies of labor market flexibility produces for workers.

But even if they are not read so narrowly, this may still be the case. It seems clear that subjecting workers to the normal contractual terms under which parties bargain in the commercial context has potentially huge ramifications for workers – far more than the recognition of core labor rights could hope to compensate for. A legal regime organized to promote employer flexibility through the strengthening of property and contract rights not only permits employers to exert the market power that they classically hold; it constructs and reinforces that power. While core labor rights may alter or restrain the behavior of employers in some circumstances, unless they operate to alter fundamentally the distribution of legal entitlements, they will be unlikely – even unable – to bear all the weight they are currently expected to carry. All experience to date suggests that, whatever its salutary role, moral persuasion will be inadequate to induce employers to give up the benefits they enjoy from a legal framework that empowers them in such tangible, material ways.