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Linking Trade and Labor Standards: Prioritizing the Right of Association

Risa L. Lieberwitz†

Comment on Christian Barry's and Sanjay Reddy's *International Trade and Labor Standards: A Proposal for Linkage*

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Introduction

Advocates of linking trade agreements with labor standards (“trade/labor linkage” or “linkage”) often bypass a close examination of the underlying questions of whether linkage is desirable and, if it is desirable, what goals linkage should seek to achieve. Advocates base their support on the view that basic labor standards are required as a matter of human rights, or to prevent countries from gaining a competitive trade advantage because of their poor labor standards.¹ Scarcely any literature, however, explicitly addresses the specific goals to be achieved through linkage. Rather, most of it principally involves critiques of the adequacy of the labor provisions in trade agreements and the absence of effective enforcement processes.²

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1. See Elissa Alben, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410, 1410-16 (2001) (discussing the shift from early discussions of linkage, which focused on assuring fair wages, to current linkage advocacy emphasizing human rights standards); Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CALIF. L. REV. 885, 886-93 (2003); Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 148-66 (1999).

2. See, e.g., Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 FORDHAM INT'L L.J. 386, 417-30 (2006); Marley S. Weiss, *Two Steps Forward, One Step Back - Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F.L. REV. 689 (2003); J. F. Hornbeck, *The U.S.-Central America Free Trade Agreement (CAFTA): Challenges for Sub-Regional Integration*, CRS Report for Congress (June 1, 2004), available at <http://fpc.state.gov/documents/organization/33747.pdf>; Chantell Taylor, *NAFTA, GATT, and the* 39 CORNELL INT'L L.J. 641 (2006)

Opponents of trade/labor linkage, on the other hand, do address the underlying questions, arguing that linkage is not justified either because the goals of expanding free trade and improving labor standards would be more effectively dealt with by separate and independent means,³ or because labor standards are domestic issues that should be handled by the particular sovereign nation.⁴ This difference in focus between those on opposing sides of the trade/labor linkage debate is understandable. Proponents' primary concern is improving labor conditions in countries that are also partners in international trade agreements, while opponents' primary concern is protecting the free movement of capital and goods in international markets. It is in the interest of the opponents of linkage to identify the reasons for maintaining separate channels for protecting trade and labor rights rather than to become involved in debates about appropriate labor standards and the institutional mechanisms for protecting them.

Unlike most proponents of trade/labor linkage, Christian Barry and Sanjay Reddy, in their article *Just Linkage: International Trade and Labor Standards*,⁵ discuss the underlying justifications for linking trade and labor standards, which they define as "the level of the real wages and the quality of working conditions."⁶ Barry and Reddy seek to convince opponents of linkage that their objections are not warranted. They begin with the assumption that those on both sides of the debate share the goal of improving labor conditions to help the worst off.⁷ The authors then attempt to show that linkage would fulfill this goal and would also meet the objections raised by opponents. While this approach attempts to address the foundational question of whether trade and labor rights should be linked, it has two serious limitations. First, since their overwhelming concern is convincing opponents to accept linkage, Barry and Reddy describe an overly narrow goal of linkage that would be acceptable to the least com-

Current Trade System: A Dangerous Double Standard for Workers' Rights, 28 DENV. J. INT'L. L. & POL'Y 401 (2000).

3. For a thorough discussion of arguments against trade/labor linkage, see Christian Barry & Sanjay G. Reddy, *Just Linkage: International Trade and Labor Standards*, 39 CORNELL INT'L L. J. 545 (2006). See also Keith E. Maskus, *Should Core Labor Standards Be Imposed Through International Labor Policy?*, Policy Research Working Paper #1817, at 1-2, World Bank Development Research Group (Aug. 1997), at <http://www.worldbank.org/research/trade/wp1817.html>.

4. Barry & Reddy, *supra* note 3, at 564; see also JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 240-52 (2004).

5. Barry & Reddy, *supra* note 3.

6. *Id.* at 548. Barry and Reddy describe their focus on "basic labor standards," which "refer to a specified level of attainment of labor standards that is deemed *minimally adequate*." *Id.* They further explain that such basic standards "may be conceived in terms of the 'core' labor standards promoted by the ILO," consisting of "freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation." *Id.* For discussion of defining labor standards, see Maskus, *supra* note 3, at 4-8.

7. Barry and Reddy label this "Proposition O," which states: "whether an institutional arrangement for the governance of the global economy should be viewed as superior to another is whether it improves the level of advantage of less advantaged persons in the world to a greater extent. Barry & Reddy, *supra* note 3, at 548.

mon denominator; that is, a goal of improving in any way labor conditions of the most disadvantaged workers.⁸ From there they argue that opponents should accept linkage, because their central interest in free trade would not be compromised by achieving this narrowly defined goal.⁹ A second weakness in Barry and Reddy's approach is that it chiefly focuses on linkage opponents' arguments, which results in an inadequate development of the affirmative justifications for linkage.

This article responds to Barry and Reddy by addressing the same question of whether trade and labor rights should be linked. Like Barry and Reddy, I am a proponent of trade/labor linkage, but with important differences that are relevant to the above identified limitations in their arguments. First, my proposed justifications of linkage go beyond the goal of merely creating any improvement, however slight, in labor standards; they consider how linkage might promote a broader, long-term goal of building a labor movement that can work to redistribute wealth and power from capital to labor. Secondly, I argue that the means of fulfilling this broader goal depend primarily on workers' collective action, and that any linkage proposals should, therefore, be limited to those that would condition trade rights on the enforcement of workers' right of association, particularly the right to unionize. A broader redistributive goal, coupled with a greater reliance on the right of association as the means of achieving it, would strengthen the justification for linkage while simultaneously meeting the objections raised by opponents of linkage.

Part I of this article presents an overview of the current state of global capitalism, which is necessary for assessing the economic and social context of the linkage debate. This evaluation of the realities of social and economic forces underscores the need for policies that promote the interests of labor and have a genuine potential to confront the strength of global corporate power. A narrow, short-term goal of limited improvements in labor standards for individual workers underestimates both the power of transnational corporations ("TNCs") to continue their global expansion and search for untapped cheap labor, and the corresponding need to build collective labor power that can achieve stable changes in labor conditions. Part II argues that an accurate assessment of the current forces of capitalism supports the conclusion that global corporate power can be effectively confronted only by global collective labor power. Given the current social and political conditions favoring the unrestrained power of global capitalism, a realistic goal of promoting labor rights will also recognize that the expansionist forces of capitalism will continue, largely unchecked, for the foreseeable future. Understood in this context, the narrower goal of improving labor standards, however insignificantly, is inadequate and inherently ineffectual. Such a limited goal, based primarily on an individualized vision of labor standards, is doomed to fail in the face of the power

8. *Id.*

9. *Id.* at 587. Barry and Reddy propose the transfer of subsidies from rich to poor countries to help developing countries defray the costs of raising labor standards. *Id.* at 603.

of TNCs to use their global mobility to resist and avoid improving wages or working conditions. This conclusion should not be seen as discouraging or defeatist, but rather as one that realistically shapes labor's long-term strategies and tactics. The goal of redistributing wealth and power from TNCs to labor is both broader than the simple aim of strengthening labor standards and, ultimately, holds greater potential for securing stable and ongoing rights for workers internationally. This broader goal justifies linking trade rights to workers' right of association, which is essential to building an international labor movement that can improve labor standards and change the power relations between employers and workers.

I. Southward Ho! The Current Economic Global Context

Capitalism, in all its stages, seeks to promote the dual goals of reaping maximum profits and exercising maximal control over markets, labor, and resources.¹⁰ Continued expansion, both nationally and internationally, is integral to achieving these goals.¹¹ In the United States, national westward expansion took place from the 19th century to the mid-20th century, extending strong industrial centers from the Northeast to the Midwest.¹² In the second half of the 20th century, industrial corporations, faced with rising wages and improved benefits for unionized workers, began expanding southward, seeking the competitive advantage of low wages, hostility to unions, and other financial attractions, such as tax breaks, that the southern states offered.¹³ The depth of anti-union practices in the south also attracted corporations from other industrialized countries, such as Japan, to relocate to the southern United States to avoid unionization.¹⁴

In earlier stages of capitalism during the 19th century and first part of the 20th century, international expansion of capital was generally achieved through direct colonial occupation by capitalist states to establish control

10. See MANFRED B. STEGER, *GLOBALIZATION: A VERY SHORT INTRODUCTION* 31-36, 48-51 (2003). While profit maximization is important to employers, retention of power and control over the business and the workforce is equally important. As Justice Holmes stated, "[t]he only prize much cared for by the powerful is power. The prize of the general is not a bigger tent, but command." *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 146 (Richard A. Posner ed., 1992). Identifying the two goals of wealth and power is essential to creating an agenda for labor reform. Redistribution of wealth without redistributing decision-making power may achieve some form of economic fairness but will not ensure workplace democracy. See Risa L. Lieberwitz, *Contingent Labor: Ideology in Practice*, in *FEMINISM CONFRONTS HOMO ECONOMICUS* 324, 325 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

11. *Id.*

12. BARRY BLUESTONE AND BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY* 25-34 (1982).

13. See *id.* at 25-48; Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 *Geo. L.J.* 1757, 1775-82 (1993).

14. See Micheline Maynard, *Toyota Said to Be Considering 4 Southern States for New Plant*, *N.Y. TIMES*, Apr. 15, 2006, at C1; Steve Lohr, *Nissan Uses Japan's Ways In Tennessee*, *N.Y. TIMES*, Apr. 4, 1983, at D11; *No Union Seen In Nissan Plant*, *N.Y. TIMES*, Mar. 30, 1983, at D5.

over resources, cheap labor, and potential markets in pre-industrial countries.¹⁵ In the modern age of globalization, capitalist expansion has been carried out by TNCs through the international trade of commodities, exploitation of natural resources, and outsourcing of manufacturing operations.¹⁶ The flight of TNCs from industrialized countries to the “global south,” beginning in the 1970s, is the same phenomenon that motivated industrial corporations to move from the more heavily unionized Northeast and Midwest of the U.S. to the non-union (and anti-union) South of the U.S.¹⁷ Similar to the role of the state governments in the southern U.S., national governments in the global south have adopted public policies to attract TNCs, including financial subsidies and exemptions from labor legislation in the newly created export processing zones in countries such as China, Mexico, Indonesia, and the Philippines.¹⁸ Governments have also assisted TNCs’ global expansion through the creation of international financial organizations and trade agreements that ease capital mobility and access to global markets. The World Bank, the International Monetary Fund (IMF), and the World Trade Organization (WTO) foster a favorable investment climate for TNCs in the global south by conditioning loans and preferential trade status to developing nations on their implementation of economic “liberalization,” through policies such as privatization of public services and legal protection of intellectual property.¹⁹

Multilateral, bilateral, or regional international trade agreements, which eliminate tariffs on foreign imports and other trade barriers, are part of a broader set of governmental policies and practices facilitating corporate expansion into new international markets. The policy of trade/labor linkage seeks to tie capitalist expansion to stronger labor standards by conditioning the trade agreement signatories’ right to free market access on their national enforcement of labor standards.²⁰ The logic of linkage is

15. BEVERLY J. SILVER, *FORCES OF LABOR: WORKERS’ MOVEMENTS AND GLOBALIZATION SINCE 1870*, at 137-38, 145-46 (2003); STEGER, *supra* note 10, at 31-32.

16. SILVER, *supra* note 15, at 154-55.

17. For an excellent discussion of the reasons for and impact of the “deindustrialization” of the United States, see Ansley, *supra* note 13, at 1758-82. See also SILVER, *supra* note 15, at 48-49.

18. Maskus, *supra* note 3, at 4, 9-13, describing poor working conditions in export processing zones, which exist in more than 70 countries and are defined by the United Nations Conference on Trade and Development as “a well-defined geographical area, enjoying customs privileges and other incentives, in which the primary activity is processing of goods for export.” *Id.* at 9-10. See also Elvia R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras*, *Latina Critical Legal Theory, and Gender at the U.S.-Mexico Border*, 49 DE PAUL L. REV. 729 (2000); Lance Compa & Jeffrey S. Vogt, *Labor Regulation and Trade: Labor Rights in the Generalized Systems of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL’Y J. 199 (2001); Tina Rosenberg, *Globalization*, N.Y. TIMES, Aug. 18, 2002, at sec. 6, page 28.

19. See STEGER, *supra* note 10, at 40-43; Guy Brucculeri, *A Need to Refocus the Mandate of the International Monetary Fund and the World Bank*, 17 W.R.L.S.I. 53, 70-73 (2004); Risa L. Lieberwitz, *Confronting Privatization and Commercialization of Academic Research: An Analysis of Social Implications at the Local, National, and Global Levels*, 12 IND. J. GLOBAL LEG. STUD. 109, 140-44 (2005).

20. For descriptions of labor standards included in trade agreements, see Pagnataro, *supra* note 2, at 387-406, 417 (describing the core labor standards, including the

appealing, as trade agreements facilitate capital mobility and enhance corporate profits by eliminating tariffs on foreign goods. Rather than relying on voluntary policies of "corporate social responsibility,"²¹ trade/labor linkage attempts to condition expanded market access on the inclusion of enforceable labor standards in trade agreements. Advocates support linkage as a means of improving labor conditions in developing countries, given workers' vulnerability to exploitation and minimal mobility.²² Improving labor standards internationally is also advocated as one means of equalizing the playing field among countries competing for corporate investment, by reducing governments' ability to attract investment and manufacturing through low wages, minimal benefits, and poor health and safety standards.²³

How do these arguments fare when viewed in the context of current global capitalist expansion? What are the potential consequences of either adopting or failing to adopt linkage provisions? First, if trade agreements do not include labor standards, global capital mobility will continue its unfettered search for cheap and pliant labor forces to achieve higher corporate profits and greater control over labor and natural resources. But, what will happen if there is regulation of corporations through linkage of trade rights and labor standards? The same thing—the expansion of global capitalism will continue essentially unimpeded, regardless of trade/labor linkage. Even partial success in raising labor standards in developing countries cannot possibly create wages and working conditions that rival unionized wages in the U.S. or Europe, or even non-union wages in the southern U.S.²⁴ And while any improvement in labor standards for workers in developing countries would be a positive result, such improvements through trade/labor linkage will still leave the TNCs in the position to pay these workers extremely low wages with few benefits.²⁵ Furthermore, monitoring the enforcement of any protective labor regulation will be extremely difficult, leaving corporations, for the most part, free of mean-

right of association and collective bargaining, prohibitions on forced labor or child labor, minimum wages, and safety and health protections, mandated by the U.S. Congress in the Trade Act of 2002 and the Bipartisan Trade Promotion Authority for inclusion in U.S. trade agreements. The author argues that the United States-Central American Trade Agreement does not fully comply with this Congressional mandate); Taylor, *supra* note 2, at 416-17 (describing the labor standards in the North American Agreement on Labor Cooperation, which is the labor side agreement to the North American Free Trade Agreement).

21. For critiques of voluntary "corporate codes of conduct," see Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J 347, 357-60 (1999). For a defense of the utility of corporate codes of conduct, see Kamil Ahmed, *International Labor Rights - a Categorical Imperative?*, 35 R.D.U.S. 145, 172-80 (2004).

22. Cf. Harry Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271, 275-76 (2001) (discussing the fact that "unlike capital, goods, or information, workers generally do not move across national borders in our global economy").

23. See Pagnattaro, *supra* note 2, at 388-90.

24. See Barry and Reddy, *supra* note 3, at 632-34.

25. *Id.*

ingful labor standards. This enforcement problem would exist even if trade agreement labor provisions included more stringent enforcement mechanisms than currently exist in NAFTA and other trade agreements, because of the difficulties of creating enforcement agencies with sufficient power and independence from international trade institutions to regulate effectively.

II. Linking Trade with the Right of Association

A. Global Capitalism and Right of Association

Despite the inability of trade/labor linkage to slow the expansionist forces of global capitalism, I specifically favor linking trade rights and workers' right of association. This position is based on a realistic assessment of the powerful forces of global capitalism—a position that recognizes that labor provisions in trade agreements will not meaningfully affect the machinery of capitalist expansion. Regardless of the existence of international trade agreements, or the inclusion of labor standards provisions in such trade agreements, the logic of capitalism is expansionist. The dual goals of capitalism—to increase profits and to control resources—require global capital mobility to enable corporations to create new markets, gain access to materials needed for production, and relocate manufacturing to countries with cheaper and more vulnerable workforces. International trade agreements facilitate global capital mobility, but they do not cause corporations to relocate to other countries. The negative effects of U.S. corporate relocations to developing countries include the poor labor standards in the maquiladoras in Mexico and other export processing zones. A description of a causal link between NAFTA or other trade agreements and these relocations, however, misses the fundamental systemic characteristics of capitalism, which motivated corporate relocation to Mexico and other countries, before and after NAFTA, in search of cheap labor and resources.²⁶

The current global context is one of almost complete hegemony of capitalist economies. Combined with the bolstering institutional structures of the World Bank, IMF, and WTO, this global economic context leaves little hope that trade/labor linkage will have an impact on corporate power. Specific labor standards in trade agreements, such as a minimum wage, health and safety protections, elimination of child labor, and prohibitions on sexual discrimination, will not be enforced effectively and will not slow corporate relocations in search of exploitable workforces. Investing large amounts of energy into lobbying for such broad trade/labor linkage can lead to a justified feeling of despair, given the futility of even well-meaning

26. See Christopher L. Erickson & Daniel J.B. Mitchell, *Labor Standards and Trade Agreements*, 19 *COMP. LAB. L. & POL'Y J.* 145, 161 (1998) (concluding that "much of the American trade expansion with Mexico is due to the unilateral decision of the Mexican government in the late 1980s to liberalize the economy and to abandon an earlier protectionist policy. NAFTA was a ratification in treaty terms of this change within Mexico, not the cause of it.").

calls for such provisions. Instead, focused advocacy on conditioning trade rights on workers' right of association can more effectively confront the difficulties of creating meaningful trade/labor linkage in the global economy. A realistic assessment of global capitalism includes both an evaluation of the current forces and a long-term view of the potential to resist or overcome these forces. At some point, global capital will exhaust the supply of vulnerable workforces in developing countries, just as corporations reached the limit of untapped exploitable U.S. workforces in the southern states. At that global saturation point, workers' right of association—particularly through unionization on an international scale—will present the greatest potential for pushing back against the forces of global capitalism.

Thus, linkage of trade and the right of association represents a meaningful tactic to build an international labor movement over the long term. A consistent focus on the right of association recognizes that international collective action is necessary to resist corporate exploitation. The inclusion in trade agreements of the right of association will not be more effectively enforced than other labor standards, but the focus on the right of association retains its importance as a tactic in a broader strategy of creating an international labor movement. The ultimate goal of international unionization may be as profound as a complete shift of ownership and control of corporations to workers. But, in any event, a preliminary goal of international union organizing will be a redistribution of power, in the form of sharing both the wealth and decision-making authority, from employers to the unions representing the workforce. Most likely, this redistribution will take place through collective bargaining between employers and unions, where workers can decide, with their representative unions, what *their* priorities are in raising labor standards.

It is difficult—perhaps impossible—at the current moment to know when this saturation point of global capital will occur. In the meantime, efforts to establish an international labor right of association will contribute to current unionization campaigns throughout the world and will help position the labor movement for greater success in unionization when the threat of capital flight is no longer a geographical possibility.

B. Reasons for Placing a Priority on the Right of Association

The primary reason for placing a priority on the right of association in linkage proposals is the essential nature of unionization as the means for labor to engage in collective action to redistribute wealth and power. There are additional related reasons for favoring the right of association over other labor standards in the linkage debate. These reasons also demonstrate that linking the right of association and trade would most effectively address the objections raised by linkage opponents.²⁷

First, the right of association is a fundamental right that can be applied both universally and in a way that is sensitive to the differences in

27. See Barry and Reddy, *supra* note 3, at 548-49, 555-65 (providing an extensive discussion of the opponents' arguments).

levels of development in different countries. The right of association is inherently situationally sensitive, as labor organizations will choose different priorities in bargaining, depending on the social and economic conditions of the particular employer and region. Universal application of the right of association can contribute to the growth of labor unions and other social justice organizations through which workers can make demands in the political and economic spheres. The right of association is, therefore, integrally linked to other labor rights, such as a livable wage, due process in the workplace, and health and safety protections. The implementation of the right of association, however, will result in varied substantive outcomes in wages and other labor standards in different countries and regions, depending on the power of the particular labor movement and other local conditions. Thus, inclusion of the right of association in international trade agreements responds to the objection that linkage inappropriately imposes advanced capitalist conditions on early capitalist developing countries.

A related objection to trade/labor linkage is a freedom of contract argument. Similar to the position that trade/labor linkage is not situationally sensitive, the freedom of contract argument views labor standard provisions in trade agreements as impediments to businesses' ability to move to locations that will provide them with the greatest competitive advantage. Similar to the "situationally sensitive" objection, the freedom of contract argument states that trade/labor linkage seeks artificially to impose inflated requirements for wages and other labor standards on workplaces in developing economies. In the form of a freedom of contract argument, this objection critiques linkage as an attempt by powerful industrial nations to interfere with businesses' ability to negotiate freely with their employees for terms of employment appropriate for the particular historical and regional conditions.

Judicial and legislative developments from earlier periods of U.S. history reinforce the conclusion that prioritizing the right of association overcomes the objections that trade/labor linkage interferes with employers' freedom of contract. The right to trade freely is appropriately conditioned on respecting the rights of association—in particular, the right to unionize, as explained by Justice Holmes in 1896, writing as a justice on the Massachusetts Supreme Court, dissenting against a broad labor injunction issued in *Vegeahn v. Guntner*.²⁸ Holmes drew a parallel between businesses' right to engage in free trade in a competitive market and workers' collective right to compete freely in negotiations with their employers over wages and other working conditions.²⁹ As later recognized in the 1935 enactment of the

28. 167 Mass. 92, 104-09 (1896).

29. "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way." *Id.* at 108.

NLRA, genuine freedom of contract does not exist when the employer has the power to impose a contract of adhesion.³⁰

The right of association also forms the foundation for a genuine freedom of contract in international trade, where the right to unionize will provide employees with collective power to avoid contracts of adhesion. The right of association promotes autonomy for workers, enabling them to select union representation and define the bargaining agenda. Employers cannot rationally complain that collective bargaining interferes with their freedom of contract; under no legitimate conception of freedom of contract is it required that employers have an advantageous bargaining position over individual employees. Through collective bargaining, the union and employer mutually agree to contractual provisions that apply to the group and the individual employees, including wages, benefits, health and safety, and participation in workplace decisions. The collective can also protect the individual from abuse of power by the employer—for example, through collective bargaining for due process in the workplace, which requires that employers use their power to hire, fire, and discipline in ways that comport with due process, including protection from racial, religious, and gender discrimination.

Similarly, the right of association does not present a problem of protectionism. Because it is both universally applicable and situationally sensitive, the right to associate does not provide an opportunistic means for creating *de facto* trade barriers. This can be illustrated by comparing trade/labor linkage on the basis of a minimum wage with linkage based on the right of association. While proponents of trade/labor linkage can articulate a demand for a minimum wage provision in international trade agreements in terms of providing a fundamental labor right, such a demand may be a pretext for a protectionist tactic designed to maintain trade barriers by scuttling trade agreements or imposing sanctions under trade agreements. Protectionists may seek linkage provisions that act as trade barriers due to a signatory nation's predictable failure to fulfill the pre-determined labor standards. The right of association, by contrast, can contribute universally to the growth of unions, which can define their own collective demands in ways appropriate to the country's economic and social conditions. Through the right of association, the labor movement of a particular country can win the protection of labor standards, an achievement that respects the autonomy and self-determination of those workers.³¹ This is qualita-

30. Section 1, "Findings and declaration of policy," of the National Labor Relations Act, states, in part: "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury . . . by restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151 (2005).

31. Cf. Lowell Turner & Richard W. Hurd, *Building Social Movement Unionism: The Transformation of the American Labor Movement*, in *REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE 21ST CENTURY* 9, 11 (Lowell Turner et al. eds., 2001) (defining social movement unionism as "a type of unionism based on member involvement and activism").

tively different from protectionist labor standards set by trade agreements, such as a minimum wage.

It is especially important for labor unions in developed countries to avoid protectionist tactics. As proponents of trade/labor linkage, unions should choose tactics that promote international labor solidarity, while rejecting those that promote divisions among workers. Unions in advanced capitalist economies must come to grips with the fact that the industrial base of jobs has been largely eliminated from their countries.³² Many of these unions have accepted this, turning to national union campaigns in service sector businesses that cannot relocate.³³ Unions should bring this same understanding to their positions on international trade agreements, recognizing that protectionism will not prevent the relocation of jobs to developing countries and can exacerbate divisions among workers across national borders. Protectionist tactics, such as a minimum wage standard in trade agreements, can encourage workers in industrialized countries to blame workers in developing countries for “taking” their jobs at a low wage. Unions should, instead, advocate for trade/labor linkage that encourages workers to see their common interests on the basis of class membership rather than citizenship. Universal enforcement of the right of association benefits workers in all countries and can be supported for the same reasons by workers and labor movements in all countries where the right to unionize is poorly enforced, including the United States. Conversely, employers in all countries will oppose enforcement of the right to unionize for similar reasons, as the right to unionize interferes with employers’ unilateral control over workers and profits.

The focus on workers’ common class interests in supporting a universal right of association can also promote alliances among unions that recognize that the goals of the labor movement can be achieved only by organizing on both a national and international basis. Some unions are engaging in cross-border alliances in coordinated organizing campaigns against TNCs, including the use of trade/labor linkage provisions as one organizing tactic.³⁴ Such alliances are difficult to achieve and will not alleviate most of the immediate pain of corporate relocations. The process of building relationships among unions and workers in different countries, however, can help workers who have lost jobs fix the responsibility for those losses on their employers rather than on workers in developing

32. See Ansley, *supra* note 13, at 1765-72 (discussing the shift of U.S. jobs to the service sector and the growth of the contingent work force).

33. See Steven Greenhouse, *Unions Focus Attention on Workers in Service Industries*, N.Y. TIMES, June 16, 2006, at C1.

34. See, e.g., Jim Wilson, *From “Solidarity” to Convergence: International Trade Union Cooperation in the Media Sector*; David Jessup & Michael E. Gordon, *Organizing in Export Processing Zones: The Bibong Experience in the Dominican Republic*; Larry Cohen & Steve Early, *Globalization and De-Unionization in Telecommunications: Three Case Studies in Resistance*, in *TRANSNATIONAL COOPERATION AMONG LABOR UNIONS* 202-22 (Michael E. Gordon & Lowell Turner eds., 2000).

countries.³⁵

III. Enforcing the Right of Association

Even with acceptance of the general principle of linkage between trading rights and the right of association, trade agreement signatories will continue to disagree about the exact parameters of the right of association.³⁶ To be meaningful, the right of association should include workers' right to form and join unions of their own choosing, collective bargaining for unionized workers, the right to strike, enforcement of collective bargaining agreements, and the right of individuals and unions to participate in the political process. To ensure the independence and autonomy of unions, employers should be prohibited from supporting or dominating labor organizations. National and local laws should provide effective sanctions against employers who violate the right of association. As in all proposals for linking trading rights and other labor standards, however, linkage based on the right of association will likely be poorly enforced in the short-term. Further, as discussed in Section I, a realistic assessment of current social conditions and long-term goals of the labor movement recognizes that linkage in trade agreements will neither result in rigorous enforcement of labor standards nor affect the forces driving global capitalist expansion. The importance of linkage focused on the right of association, including requirements of legislative recognition of the right to unionize, bargain collectively, and strike, lies in its potential to improve the short- and long-term position of labor unions to organize workers and to build cross-border alliances among unions in signatory nations.

While recognizing the difficulty of effectively implementing a linkage between trade and the right of association, proposals should strive, nevertheless, to create rigorous international enforcement mechanisms. An independent international enforcement agency should be created with adequate investigative and enforcement powers, including an enforceable order of trade sanctions for violations of the right of association. There is a strong argument for assigning the enforcement function to an international institution independent of the WTO and other trade organizations, which lack the institutional interest or expertise to enforce labor or political rights.³⁷ Delegating enforcement to the WTO would not be a credible solution, given the examples of the WTO bending to the interests of TNCs, as in the case of the WTO Agreement on Trade-Related Aspects of Intellectual

35. See Ansley, *supra* note 13, at 1782-84, 1891-92 (describing the Ohio-based Farm Labor Organizing Committee's cooperative project with Mexican workers).

36. See Lance Compa, *Assessing Assessments: A Survey of Efforts to Measure Countries' Compliance with Freedom of Association Standards*, 24 *COMP. LAB. L. & POL'Y J.* 283, 283-85 (2003) (discussing the complexities of defining the scope and content of the right of association and in measuring rates of compliance with freedom of association standards).

37. For a countervailing argument advocating the use of the WTO to enforce core labor standards, see Ahmed, *supra* note 21, at 164-70.

Property Rights (TRIPS),³⁸ which requires developing countries to adopt Western-style intellectual property laws.³⁹ TRIPS was created largely due to the power of the U.S. Trade Representative to the WTO, under the influence of large U.S. corporations.⁴⁰ There is also an argument against placing the enforcement function in a tripartite institution like the ILO, comprised of governments, employers, and unions. The presence of employers as equal partners will undermine effective enforcement of labor standards, as will the presence of governments that are not strongly committed to enforcing the right to unionize.⁴¹ A separate international enforcement agency to enforce the trade/right of association linkage should be independent from the parties and governments involved in the disputes.

Conclusion

There is a significant difference between, on the one hand, a broad trade/labor linkage that includes multiple kinds of labor standards and, on the other hand, the linkage proposal advocated here, which principally focuses on the right of association. While both seek to improve labor conditions, the right of association is focused on the larger goal of shifting power and wealth from capital to labor. The only means to achieve this long-term goal is by building a labor movement, through workers engaging in collective action on an international scale. And the only way accurately to assess the difficulties of building a global labor movement is to take seriously the realities of the current and future power of global capital. An honest assessment of the forces of global capital supports the conclusion that trade/labor linkage will neither diminish the expansionist forces of capitalism nor significantly improve labor standards. Labor standards will only improve through the demands of a labor movement that is created by the collective action of workers—either as an exercise of legally protected rights to unionize or in the face of violations of those rights. Thus, trade/labor linkage should be envisioned in terms of this broader collective struggle, with proposals that can make some contribution to supporting workers' right to organize. While this proposal requires a long-term vision of building a labor movement strong enough to win basic labor standards for workers, it presents an outline for change predicated on an accurate account of the realities of current social and economic forces.

38. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994).

39. See Lieberwitz, *supra* note 19, at 140-41.

40. See Susan K. Sell, *TRIPS and the Access to Medicines Campaign*, 20 WIS. INT'L. L.J. 481, 485-89 (2002).

41. For critiques of the ILO as being a weak and ineffectual institution due to its tripartite structure and its lack of enforcement powers, see Sean Cooney, *Testing Times for the ILO: Institutional Reform for the New International Economy*, 20 COMP. LAB. L. & POL'Y J. 365 (1999).

