

# A NEW GLOBALIZATION: MEDIATING THE ROLE OF MEDIATION IN ENFORCING INTERNATIONAL FAIR LABOR STANDARDS

JASON R. WIENER\*

## I. INTRODUCTION

Imagine, for a moment, that the world had the opportunity to witness the coming together of all participants in the burgeoning economic revolution as they methodically and rationally mediated a mutually advantageous framework for globalization's future. Following the collapse of the traditional cold war competition between the two hegemonic superpowers, a new era of globalization ushered in unprecedented change largely without consulting or even involving the myriad affected players. Few will argue that any feasible alternative exists to this new world order, and most agree that the elimination of trade barriers and the liberalization of capital flow, labor supply, services, commodities, supply chains, and means of production is somewhat inevitable.

Throughout the last two decades, however, unforeseen global economic growth has accompanied growing wage disparity, increasing worker exploitation, macro-economic polarization, declining influence of labor unions, and empowered consumers.<sup>1</sup> As a result, new voices have emerged with visceral energy to decry this compounding inequality. New groups have coalesced to combat child labor, indecent work conditions, substandard wages, and union-busting employers, and to suggest meaningful

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\* Jason Wiener received a J.D. from Suffolk University Law School in Boston, MA, where he graduated *cum laude* with distinction in the International Law Concentration. He completed his B.S. at Cornell University's School of Industrial and Labor Relations and studied at the Bocconi Institute in Milan, Italy. For this and so much more, I thank my parents, Karen and Paul, my brother Bruce, and Olivia.

<sup>1</sup> See Lee Swepston, *Globalization and International Labor Standards: Countering the Seattle Syndrome*, (Oct. 14, 2002), at <http://www.rwi.lu.se/pdf/seminar/swepston.pdf>; Arnold Zack, *ADR and the Settlement of International Labor Disputes: A Proposal for Conciliation Through the Permanent Court of Arbitration*, in *LABOR BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT* 125 (The International Bureau of the Permanent Court of Arbitration eds., 2003). The work of these two authors, experts in labor standards and alternative dispute resolution respectively, have inspired much of this paper. Both have published extensively on their respective areas of expertise and this paper does not purport to recount their prevailing theories. Rather, this paper is intended to analyze the debate through a novel lens. A theoretical approach like the one presented here can yield, if not an actual mediation of global labor disputes, then present a solution or resolution generating paradigm.

alternatives. Hence, I will introduce through the mediation paradigm the slate of stake holding parties, discuss their relative positions and interests with respect to globalization, and evaluate options that these parties have to improve the game.<sup>2</sup> I will conclude that the international organization as an entity is most equipped to create and deliver neutral, respected and well organized mediation services to resolve international labor disputes.<sup>3</sup> In the context of international labor disputes, globalization's stakeholders appear to conflict because no global mechanism exists at present to unblock channels of communication, to clarify chains of command, to realize the value in unforeseeable relationships, and to interface representatives of consumers, workers, industry, and governments.

## II. CONTEXT OF DISPUTE FOR MEDIATION

Initially, it is important to discuss the reality-based ground rules for the globalization "game" as between the so-called "parties."<sup>4</sup> I refer to globalization as a game of sorts, because the parties interact and react similarly to those in the classic prisoner's dilemma.<sup>5</sup> As such, parties often couch their true fundamental interests in positions intended to deceive or exploit other parties. Each party typically acts or makes decisions with the goal to maximize self-interest. However, the parties operate

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<sup>2</sup> I do not presume the likelihood that such face-to-face negotiation or mediation is plausible. This paper is, however, premised on the notion that multi-party mediation can serve a vital role in including any and all parties involved in a particular dispute or engaged in a relationship. In this case, globalization appears to involve a complex system of relationships that invariably excludes some interested parties. Additionally, to the extent that any and all parties would have an equal opportunity to grieve or discuss its complaints to a mythical third-party neutral, mediation could provide a novel forum for problem-solving. Lastly, with input from all stakeholders, these mythical mediators could permute the plethora of positive options generated by the independent and interest-based work of the parties to help divine positive solutions.

<sup>3</sup> See *infra* Part V.

<sup>4</sup> The terms that appear in quotations, such as "game," "players" and "parties," are designed to denote an artificially created relationship between the various groups and interests that are often in confrontation. For the purpose of this paper, the aforementioned parties are assumed to appear before an impartial third-party mediator.

<sup>5</sup> Many mediation training courses engage participants in an exercise to maximize each party's value individually and collectively. This exercise proceeds within the parameters of the prisoner's dilemma, where each participant's actions proceed unbeknownst to competitors and without knowledge of other's decisions.

within a broader universal context where the strength of the system is also at stake. These parameters mirror mediation as a forum for dispute resolution because the system is designed to facilitate open communication and trust and ultimately, to cultivate an ongoing relationship and mutually amenable solutions. The use of mediation principles as a metaphor to resolve global confrontation surrounding globalization will become clearer after the parties have been introduced.

The instant dispute necessitating mediation arose when thousands of disgruntled protestors flocked to the streets to oppose what they believed was the impersonal and destructive force of globalization while neatly suited business and governmental representatives entered modern edifices and engaged in largely closed-door negotiations regarding free trade.<sup>6</sup> Protests surrounding the World Trade Organization (WTO), the International Monetary Fund (IMF) and the World Bank have engulfed cities, most recently in Seattle in 1999, Prague in 2000, Quebec and Genova (Genoa) in 2001, and Washington in 2002.<sup>7</sup> Protestors represented a spectrum of causes and voiced a broad range of grievances, but the thematic center was the growing dissatisfaction with the ill effects of globalization. This is often manifested in terms of worker exploitation and a fear that rogue less developed countries (LDCs) would deliberately ignore domestic labor laws to attract foreign investment.<sup>8</sup> The ensuing violent reactions do not help sustain globalization's status quo and signal a need for reform.

### III. THE PARTIES: THEIR INTERESTS, POSITIONS, AND OPTIONS GENERATED

#### A. LABOR ACTIVISTS

The foregoing briefly introduces activists as protestors who publicly and sometimes violently oppose the inequality that globalization has wrought on much of the developing world.

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<sup>6</sup> These protests took shape most prominently and attracted significant public awareness in Seattle in 1999 as the World Trade Organization ("WTO") Ministerial Conference got underway.

<sup>7</sup> KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 7 (2003).

<sup>8</sup> The notion that less developed countries ("LDC") would compete for foreign investment by failing to enforce labor laws or ignore violations of labor standards, thereby lowering costs of production for the companies, has been coined a "race to the bottom." *Id.* at 4.

Public protest is only one small faction of activism and represents the most spectacled manifestation of the group's position. In a broader context, the role of activist groups is to campaign for labor rights and monitor corporate and governmental compliance with labor standards.<sup>9</sup> Groups that have garnered public attention in the fight for compliance with labor standards include Corporate Watch, Press for Change, National Labor Committee and student groups like United Students Against Sweatshops (USAS).

Principally, the modus operandi of such labor activists include investigating labor conditions associated with products, agitating for better labor standards and compliance with existing ones, and stimulating awareness among consumers to demand higher standards.<sup>10</sup> Experts classify these categories of activists as human rights vigilantes because they name themselves as representatives of workers in LDCs and consumers.<sup>11</sup> The publicized position of the National Labor Committee, for example, is to secure the rights of workers as fundamental human rights generally and, in particular, to secure the right of workers to freely associate and to create new democratic workplaces and societies in their own nations through public education, research and social activism.<sup>12</sup> USAS opposes the "excesses and exploitation of the global economy", especially the use of sweatshop labor.<sup>13</sup> USAS also demands that universities guarantee that the apparel bearing its logo is made under decent working conditions. To this effect, students have organized to "affect the larger industry that thrives in secrecy, exploitation, and the power relations of a flawed system."<sup>14</sup> Activists apply pressure to corporations, governments, and institutions by exposing instances of indecent working conditions, publicizing their campaigns among the consuming public, encouraging boycotts of goods produced under indecent conditions, and, reluctantly, engaging in public demonstrations designed to induce, cajole, or threaten.<sup>15</sup>

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<sup>9</sup> *See id.* at 4.

<sup>10</sup> *See id.* at 49.

<sup>11</sup> *Id.*

<sup>12</sup> The National Labor Committee, at <http://www.nlcnet.org/nlc/Mission.shtml> (last visited Feb. 23, 2005).

<sup>13</sup> United Students Against Sweatshops [hereinafter "USAS"], at <http://www.studentsagainstsweatshops.org/about/about.php> (last visited Feb. 23, 2005).

<sup>14</sup> *Id.*

<sup>15</sup> *See* ELLIOTT & FREEMAN, *supra* note 7, at 50.

Altruistic notions of equality and social justice underlie activist groups' sometimes crass tactics. For instance, USAS proclaims its solidarity with workers in LDCs to build relationships with other progressive movements and to connect local and global struggles.<sup>16</sup> It also struggles to eliminate oppression within society, organizations, and within humanity by confronting prejudice and exposing its corrosive tendencies.<sup>17</sup> USAS believes that universities should maintain and enforce labor standards that pertain to apparel bearing its logo, and it promotes ethical and legal labor codes of conduct and full public disclosure of company information.<sup>18</sup> The National Labor Committee is interested in obtaining recognition for workers' rights as fundamental human rights.<sup>19</sup> Few can argue with their virtuous goals and interests upon deeper investigation.

In the theoretical mediation that this paper assumes by fiat, representatives from activist groups could generate unique options for improving adherence to labor standards. For instance, anti-sweatshop campaigns have been successful in popularizing a link between logos of brand name products and the work conditions under which the goods are produced.<sup>20</sup> As a result, activist groups have created a system of accountability whereby goods-producing companies, whose logos are highly valuable, can either voluntarily report superior working conditions, permit vigilante groups to report on decent working conditions, or risk tarnishing their image through damaging publicity of indecent conditions.<sup>21</sup> Activist groups have developed another laudable system of labeling known as "fair trade," by which groups such as Transfair USA certify products that conform to wage, working conditions,

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<sup>16</sup> USAS, *supra* note 13.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The National Labor Committee, *supra* note 12.

<sup>20</sup> See generally NAOMI KLEIN, NO LOGO: TAKING AIM AT THE BRAND BULLIES (1999).

<sup>21</sup> See ELLIOTT & FREEMAN, *supra* note 7, at 52–54. Interestingly, activist groups are reluctant to give approval to certain products because there is the possibility that the company or one of its subcontractors abuses workers somewhere. *Id.* at 54. Positive report cards that ignore or fail to field worker abuse could damage the credibility of activist groups. On the other hand, these groups are also hesitant to publicize lists of products to boycott because they fear that reduction in sales of goods made under poor conditions will further harm the workers these groups intend to protect. *Id.*

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and fair price standards.<sup>22</sup> The popularity of the “fair trade” label has spilled over into the apparel context, and college campus bookstores offer “sweat-free” alternatives to traditional unlabeled items.<sup>23</sup>

Activist groups, especially those with more moderate tactics, realize that worst-case alternatives involve prolonged strikes, fracturing relationships with the firms that they monitor, negative publicity as a result of demonstrations turned violent, and loss of entry privileges that allow them to monitor compliance. To avoid such retrenchment, vigilante groups realize the value in, and therefore seek to deepen, relationships with the firms and subcontractors that they monitor. Credibility and legitimacy are key concerns, and so activist groups attempt to base their anti-sweatshop and fair labor campaigns on reliable statistics, public education, and realistic labor standards.

#### B. WORKERS IN LDCs: UNIONIZED, NON-UNIONIZED, AND QUASI-UNIONIZED

The second inextricable component of the struggle to interlace fair labor standards and globalization involves the workers of LDCs. These workers come to the mediation with varying degrees of bargaining leverage. I classify the workers into three categories: unionized, non-unionized, and quasi-unionized. It is necessary to compare these three distinct categories of workers because they present different issues for mediation. Unionized workers often come from more advanced countries where there is a long tradition of collective bargaining and where employers and governments respect the labor laws. Non-unionized workers tend to come from LDCs where subcontractors and firms frequently circumvent or plainly ignore labor standards and squelch any attempt to unionize production plants.<sup>24</sup> Many remember

<sup>22</sup> See *id.*; see also Transfair USA, at <http://www.transfairusa.org/> (last visited Feb. 23, 2005). Fair Trade coffee has now become a popular feature in many mainstream and niche coffee houses, such as Starbucks. Transfair USA reported that as of 2002 around 160 importers and roasters, 10,000 retail outlets and 200 college campuses were offering fair trade coffee. These numbers are still small and account for roughly \$400 million in sales in the \$18 billion coffee market. See ELLIOTT & FREEMAN, *supra* note 7, at 39–40; Lisa Lipman, *Coffee Companies Agree to Engage in Fair Trade*, ASSOCIATED PRESS, Sept. 24, 2000, available at [www.globalexchange.org/campaigns/fairtrade/coffee/ap092400.html](http://www.globalexchange.org/campaigns/fairtrade/coffee/ap092400.html).

<sup>23</sup> See ELLIOTT & FREEMAN, *supra* note 7, at 38. These items are usually produced by unionized workers in settings that are verified as sweatshop free. *Id.*

<sup>24</sup> Excluding the apparel industry, which accounts for roughly five percent of global trade, countries in Southeast Asia are notorious violators of anachronistic labor

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the famous controversy surrounding horrific forced labor conditions in Burma/Myanmar in the late 1990s. Exploitation of workers had become so rampant that the International Labour Organization (ILO) initiated a so-called “Article 33” retaliation for the first time in its history.<sup>25</sup> Lastly, workers are sometimes represented by what I coin as quasi-unions. These organizations may exist as façades for employer domination, government operated unions that are otherwise powerless, or “old boys clubs” wrought with graft and corruption.<sup>26</sup>

Due to the enormous disparity in bargaining leverage between the three categories of workers, there is a seeming contradiction between the non-unionized group’s position on labor standards vis-à-vis globalization and its underlying interests. In extreme cases where forced labor or child labor conditions prevail, workers feel utterly powerless to overcome their oppressive employers.<sup>27</sup> In many cases, these workers become complacent and even appreciative of their diminutive compensation, albeit unaware of the possibility for improvement. Most workers even oppose efforts to unionize the plants because they fear jeopardizing their jobs, or worse, upsetting their authoritarian bosses. Despite inhumanely long working hours, the lack of fire or emergency exits, locked factory doors, and poorly ventilated workplaces, workers in non-unionized and even some in quasi-unionized LDCs are thankful to have jobs that earn them vital income. These workers often internalize the oppression that surrounds them, and they become abusive to others. They misplace

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laws and perpetrators of indecent working conditions. For example, of the approximately 500 Cambodian-owned subcontracting firms, only about twelve have collective bargaining agreements that contain arbitration clauses. Interview with Arnold Zack, Past President, National Academy of Arbitrators, in Boston, Mass. (Nov. 18, 2004) [hereinafter Arnold Zack Interview].

<sup>25</sup> See ELLIOTT & FREEMAN, *supra* note 7, at 104; Arnold Zack Interview, *supra* note 24. R

<sup>26</sup> For example, in China, there is only one trade union, called the All-China Federation of Trade Unions, and it is government sponsored and operated. See Arnold Zack Interview, *supra* note 24; ELLIOTT & FREEMAN, *supra* note 7, at 52–53. The All-China Federation of Trade Union’s website describes in further details its representational capacity, although it is worth noting that due to its close-association with the government of China, the information is likely highly to be propagandized. See All-China Federation of Trade Unions, About ACFTU at <http://www.acftu.org.cn/about.htm> (last visited Feb. 24, 2005). R

<sup>27</sup> See Arnold Zack Interview, *supra* note 24; Save the Children, <http://www.savethechildren.org/> (last modified Feb. 2, 2005); Corporate Social Responsibility Forum, <http://www.csrforum.org/csr/csrwebassist.nsf/content/a1a2a3d4.html#anchor35>; ELLIOTT & FREEMAN, *supra* note 7, at 114. R

their aggression on family and friends, and they see fellow workers in LDCs as competitors for their jobs rather than comrades. Many workers in LDCs thus take the position that their jobs, no matter how degrading, are better than unemployment, and they are willing to perform whatever task, no matter how dehumanizing, in order to earn a mere pittance.

This situation presumably improves slightly in places where workers are represented by quasi-unions. These workers, however, tend to become disenchanted with their union representatives either because the workers witness the graft and nepotism themselves or because the union is a pretext for employer or governmental domination. Workers may even harbor anti-union animus and may resist attempts to reform or elect a new union. Similar to workers in non-unionized locales, these workers assumedly appreciate the opportunity for marginal employment more than the belief in solidarity with fellow workers. Thus, these workers may become territorial over their jobs, despite the potential for improved working conditions, and may harbor contempt for international labor standards. Both non-unionized and quasi-unionized workers disdain activist groups and challenger unions because of their disruptive influence in the workplace. Both groups likely feel insecure about their jobs because they are unaware of the potential for improvement. Employers often keep them in the dark intentionally.

As mentioned, workers in all three categories share similar fundamental interests but fear that exposure might jeopardize their livelihood: "If I didn't have this job, we wouldn't have enough to eat."<sup>28</sup> At this weak bargaining level, workers have a basic interest in employment, however marginal, to provide sustenance for themselves and their family. When wants and needs are charted in a hierarchical pyramid, the more powerless and underrepresented the workers, the more fundamental their need for basic provisions of food, shelter, and security.<sup>29</sup>

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<sup>28</sup> Peter Goodman & Paul Blustein, *A New Pattern Is Cut for Global Textile Trade: China Likely to Dominate as Quotas Expire*, WASH. POST, Nov. 17, 2004, at A01. A twenty-year old female worker spoke this in support of the \$40 monthly wage she earns to support her family in a rural village where people walk barefoot through trash-strewn streets. *Id.* Interestingly, her job in Sri Lanka is at risk because once China obtains Most Favored Nation Status under WTO rules January 1, 2005, potentially 30 million jobs in the textile industry could be uprooted and moved to China, which has the world's cheapest labor. *Id.*

<sup>29</sup> This phenomenon is known as Maslow's hierarchy of needs. See Maslow's Hierarchy of Needs, at <http://www.ship.edu/~cgboeree/maslow.html>. At basic levels,

Workers represented by quasi-unions may have some institutional advantages over their non-unionized brethren such as channels through which to air grievances, however illusory, and moderate compliance with labor standards and organizational representation, albeit corrupt. Quasi-unionized workers desire accountability of their union to constituents, transparency in its relationship with employers and government, and meaningful improvement in adherence to labor standards. These workers may slide slightly up Maslow's hierarchy of needs and may have the leverage to seek association with other workers in legitimate organizations.<sup>30</sup> Workers at the Asia Brewery, Inc.'s Cabuyao plant expressed their underlying interests by going on strike in October of 2004 to protest their employer's failure to recognize a duly elected challenger union that had successfully ousted a former union that had lost the support of the worker.<sup>31</sup> This example also demonstrates the worst-case alternative for workers in precarious positions because they know that going on strike risks employer lockout, hiring of replacement "scabs," employer retaliation, and undermining job security and industrial peace.<sup>32</sup>

Within the context of a theoretical mediation, workers realize the worst-case alternatives to a mutually advantageous outcome such as striking, picketing, and work slowdowns. More civil alternatives arise to the extent that legitimate unions represent the workers. Workers in more developed countries typically utilize contractual grievance arbitration procedures and

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individual workers with little labor protection are struggling to meet their fundamental needs for safety. *Id.*

<sup>30</sup> *See id.*

<sup>31</sup> Beverly Natividad, *Asia Brewery's Striking Workers Dispersed*, GLOBAL NEWS WIRE – ASIA AFRICA INTELLIGENCE WIRE, Oct. 6, 2004. Notably, guards armed with truncheons and water cannons arrived to disperse more than a hundred workers who had staged a strike against the employer's attempt to co-opt the union election. *Id.*

<sup>32</sup> *See, e.g.,* Beverly Natividad, *Cojuangco Sugar Workers Defy Return-to-Work Order; 8 Killed in Picket*, GLOBAL NEWS WIRE – ASIA AFRICA INTELLIGENCE WIRE, Nov. 17, 2004. In this example, eight workers were killed and roughly fifty were wounded in the Philippines when 1,000 military officials came to a plant at Central Azucarera de Tarlac to force some 2,000 workers back to work. These officers warned the workers to abandon their picket line and return to work in the plant. The altercation transpired because workers refused to comply with a return-to-work order issued by the Labor Secretary after conciliation meetings failed. Apparently, management failed to attend the last conciliation meeting prior to the strike. *Id.* The loss of human life is a worst case scenario by itself.

collective bargaining as a way of maintaining and promoting industrial peace. Additionally, the American-style collective bargaining relationship utilizes shop stewards as liaisons between the union and the employer. This liaison acts as a lightning rod for complaints from both ends and facilitates more open communication between bargaining unit members and the employer. Therefore, security, transparency, accountability, and open communication between workers, their representative unions, and employers are the heart of workers' interests.

### C. CORPORATIONS: EMPLOYER ASSOCIATIONS, "DO-GOOD" COMPANIES, AND FOREIGN SUBCONTRACTORS

Often considered the most powerful voice in the debate surrounding globalization, and certainly its driving force, transnational companies are beholden to shareholders whose primary interest is unequivocally clear: wealth maximization. Without undertaking a philosophical critique of capitalism, it is worth noting that private firms maximize profits by exploiting the productivity of two principal production inputs, capital and labor, and by maximizing output relative thereto in the form of cheap products. Fortunately, traditional economic models are yielding to more socially conscious and long-term strategies. Private firms take several forms: employer associations; brand name producers; "do-good" companies and little known foreign production subcontractors, to name a few.<sup>33</sup>

Unsurprisingly, private enterprises are almost unanimously anti-union, promoters of unbridled free trade,<sup>34</sup> in favor of unrestricted capital mobility, free market enthusiasts, anti-regulation, and in favor of the ability to freely seek out cheap, unregulated labor. Companies have traditionally been loath to

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<sup>33</sup> See generally ELLIOTT & FREEMAN, *supra* note 7. Capitalist philosophy is the subject for another discussion; however, for the purposes of this paper, corporate codes of conduct can be credited with some of the most progressive labor standards reforms. Nevertheless, corporate good-will is not always sufficient to guarantee decent working conditions, and this sector is largely responsible for worker exploitation.

<sup>34</sup> As an aside, the corporate sector tends to be pro-free trade only if its industry is at the moment relatively more competitive than those from other countries. In the case of less competitive industries, companies tend to favor governmental safeguards such as subsidies, high tariff barriers, etc. This is beyond the scope of this paper, but it is worth mentioning.

cede any bargaining power to unions because it purportedly hinders the ability of the enterprise to freely make business decisions.<sup>35</sup> On the surface, companies may maintain that indecent working conditions are just negative externalities of the certain labor market realities, or they deny outright that such conditions exist at all.<sup>36</sup> Additionally, pursuant to traditional supply and demand economics, companies seek to offer the market cheap products to increase demand and to compete with other producers.

Interestingly, beneath the positional façade, corporate interests are malleable and can be cleanly enmeshed with workers' interests. A substantial body of empirical evidence suggests that while companies themselves may not have social consciences, shareholders do have them, and they wield enormous leverage over the enterprise.<sup>37</sup> Socially responsible investing accounted for roughly thirteen percent of the estimated \$16.3 trillion under professional management in the United States in 1999.<sup>38</sup> Also, there is evidence that a company's share price responds relatively elastically to negative publicity regarding poor working conditions.<sup>39</sup> For instance, Nike, which faced allegations that their products were produced under indecent conditions, experienced a drop in its share price of nineteen percent from 1996 through 2000 that was statistically attributable to bad publicity.<sup>40</sup> As another example, shareholders of Unocal, by a one third vote, put pressure on the directors to adopt a code of conduct that included the ILO's four core labor standards.<sup>41</sup>

In addition to pressure from share price and shareholders, companies are extremely interested in maintaining the positive

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<sup>35</sup> At common law, corporate boards of directors are vested with virtually unbridled discretion to make decisions on behalf of the corporation with little right of challenge. See 18 Am Jur 2d CORPORATIONS § 26. This is important because the law recognizes that to conduct business effectively, corporate decision-makers must have authority and freedom to expend capital and labor to create profits.

<sup>36</sup> Companies are often guilty of willful ignorance because they fail to investigate reports or monitor the working conditions of subcontractors. See ELLIOTT & FREEMAN, *supra* note 7, at 42.

<sup>37</sup> See *id.* at 40–44.

<sup>38</sup> See *id.* at 40; Socialfunds.com, *Introduction to Socially Responsible Investing*, at [www.socialfunds.com/page.cgi/article1.html](http://www.socialfunds.com/page.cgi/article1.html) (last visited Feb. 24, 2005).

<sup>39</sup> See ELLIOTT & FREEMAN, *supra* note 7, at 40.

<sup>40</sup> *Id.* at 40.

<sup>41</sup> *Id.* at 41.

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reputation of their logo or label.<sup>42</sup> In many cases, companies define themselves and sometimes an entire industry by their brand label or logo (e.g., Xerox, Kleenex, Escalator, Coca-Cola, Levi's, IBM, Apple). Thus, the reputation that is connected with the logo or brand is a vital asset. Not surprisingly, activist groups target popular brand names in connection with anti-sweatshop campaigns. For example, campaigns have linked Levi Strauss to forced labor in overseas plants, Wal-Mart to child labor in Bangladesh, Nike and Reebok to child labor and sweatshops in Indonesia, the Gap to indecent working conditions in El Salvador, Taco Bell to labor standards violations, and Pepsi to a sweatshop in Burma.<sup>43</sup>

A tarnished logo or brand label not only costs these companies in terms of share price and shareholder dissatisfaction, but also in terms of consumer behavior. Despite the prevailing belief that consumers only care about obtaining cheap products, credible studies substantiate the claim that consumers are willing to spend slightly more to purchase products made under good labor conditions.<sup>44</sup> The growing fair coffee trade as a share of the multi-billion dollar coffee market, campus bookstores that maintain sweat-free zones, apparel with union-made tags, and the emergence of other socially conscious niche markets (e.g. The Body Shop) evidence consumers' willingness to spend slightly more money for goods produced in decent working conditions. Noticeably, there is potential value for corporations in realizing the powerful connection between activist groups who launch fair labor standards campaigns and consumers.<sup>45</sup> Therefore, at stake for corporations is the business of their consumers.

As a last resort, consumers en masse boycott the product line associated with a company whose indecent working conditions have been exposed. This can cause market share, share value and enormous profit losses in the short-term and potentially long-term decline or atrophy. In response, corporations have attempted to insure against negative publicity and brand

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<sup>42</sup> See generally KLEIN, *supra* note 20 (recounting the history of product branding and adroitly exposing the ubiquity of logos and branding). Thus, a company's logo or brand label is one of its most coveted assets. R

<sup>43</sup> ELLIOTT & FREEMAN, *supra* note 7, at 43–44; see also KLEIN, *supra* note 20, at 361. R

<sup>44</sup> See ELLIOTT & FREEMAN, *supra* note 7 at 35–39. R

<sup>45</sup> See *id.* at 44. Companies realize this and Pepsi pulled out of the Burmese market after allegations were made of human rights abuses and Levi Strauss withdrew production from China because of the human rights situation there. *Id.* at 44–45.

tarnishing by developing progressive codes of conduct. In 1992, Levi Strauss adopted the first code of conduct addressing sweatshop issues, and many other companies have followed suit.<sup>46</sup> Codes of conduct have proliferated, and in 2001 the OECD reported that 246 major firms have such codes, which the firms demand be posted conspicuously in subcontractor factories.<sup>47</sup> As will be discussed further below, companies hire independent groups to monitor compliance; for example, the Gap spent \$10,000 annually for monitoring a single plant in El Salvador.<sup>48</sup>

A race to the top has resulted from the proliferation of corporate codes of conduct, whereby firms build the cost of labor standards compliance into their cost of production and no longer view labor standards as an externality. Further, firms compete to implement and guarantee compliance with ever more stringent codes of conduct in order to advertise their “virtue.”<sup>49</sup> Independent groups have also promulgated codes of conduct, and these serve as benchmarks or alternatives to corporate codes (e.g., Fair Labor Association, Social Accountability International (SAI) and the Workers’ Rights Consortium (WRC)).<sup>50</sup> Corporate enterprises are foundationally interested in maintaining the positive image associated with their brand and logo, promoting consumer loyalty, and competing with other producers for market share and profits. To satisfy these interests, companies must rely on consumer groups, monitoring agencies, activist groups, and even the workers themselves. Thus, nurturing a future relationship within the context of mediation is critical.

#### D. NON-GOVERNMENTAL ORGANIZATIONS

Non-governmental organizations (NGOs) are distinct from vigilante activist groups because companies and governments voluntarily request their services to monitor compliance with fair labor standards. In addition, NGOs provide a vital interface between work conditions in foreign factories, consumers, international organizations, and governments. NGOs rely heavily on

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<sup>46</sup> See KLEIN, *supra* note 20, at 361; ELLIOTT & FREEMAN, *supra* note 7, at 43.

<sup>47</sup> See ELLIOTT & FREEMAN, *supra* note 7, at 43.

<sup>48</sup> *Id.*

<sup>49</sup> See *id.* at 63.

<sup>50</sup> See *id.* at 59–63. The plurality of corporate and independent codes of conduct differ significantly on whether they enshrine, for instance, the core ILO standard right to association, the right to collective bargaining and, most controversially, the right to earn a living wage. *Id.*

their trustworthiness and credibility among companies to gain access to and supervise remote work settings. On the other hand, NGOs covet their reputation to maintain access to private meetings of government and international organization officials. NGO reports often form the basis of name and shame campaigns, retaliatory discipline, or the issuance of a seal of approval. As an inter-party liaison, NGOs act more like mediators than as parties to a global mediation. However, NGOs are essentially service providers: their interests either broadly or narrowly relate to issues of the public good that are essential to a complete mediation of labor standards and solutions that meaningfully contribute to the option generation process.

In a joint mediation session, it is likely that NGOs would remain guarded and hesitate to express a position that may jeopardize their established relationships with companies, governments, or international organizations. Many international labor NGOs focus on child labor and forced labor in production facilities. They carefully balance their advocacy of workers' rights against their needs for information and right of access to decision-making organizations such as the U.N., the ILO, and even national governments.<sup>51</sup> NGOs covet their consultation status with the U.N. and shy away from taking an overly controversial position that might upset the member states or the Secretariat.<sup>52</sup> Working relations with the U.N. allow NGOs to influence policy decisions and to provide an independent source of information.<sup>53</sup> On the other hand, NGOs must not jeopardize their relationships with the companies whose operations they monitor to verify compliance with codes of conduct and fair labor standards. NGOs typically conduct public awareness campaigns, educational programs, name and shame at the government level and information gathering. Therefore, NGOs generally posture themselves neutrally; however, discussions in private sessions would yield their underlying interests.

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<sup>51</sup> Examples of NGOs include: Union of Needletrades, Industrial and Textile Employees ("UNITE"); International Labor Rights Fund, U.S. Child Labor Coalition, Save the Children, Bunyad Literacy Community Council, Amnesty International, Human Rights Watch, Free the Slaves. *Id.* Many NGOs are single-issue organizations whose mission is narrowly defined, while others are larger organizations who separate their mission into separate campaigns.

<sup>52</sup> *See e.g.* UN-NGO Relations, at <http://www.un-ngls.org/ngorelations.htm> (last visited Feb. 24, 2005).

<sup>53</sup> *See id.*

Based on the foregoing, NGOs appear interested in their credibility and maintaining positive relations with the companies for whom they provide services and with the governing bodies to whom they furnish independently gathered information. The mission statements of these NGOs reveal interests that are markedly similar to those of vigilante activist groups. That is, most seek to virtuously promote the fundamental rights of workers and to promote compliance with labor standards.<sup>54</sup> NGO interest in regulating workplace labor conditions is closely aligned with that of governments, international organizations, and the workers themselves.

NGO contributions to campaigns that expose indecent work conditions and subsequent improvement in LDCs demonstrates the value of having NGOs present in a mediation of global labor standards. NGOs have collaborated with companies in developing mechanisms to enforce corporate codes of conduct. At the option generation stage of mediation, NGOs suggest myriad positive ideas.

After reports surfaced exposing child labor conditions in Bangladeshi apparel factories, NGOs collaborated with the ILO, UNICEF, and U.S. lawmakers to transition laboring children to school instead of allowing them to resort to prostitution.<sup>55</sup> At the critical stage between firing the children and their spiral into prostitution, NGOs pressured Bangladesh manufacturers, exporter associations, and U.S. trade representatives to negotiate an understanding that Bangladeshi manufacturers would only fire the children when educational opportunities were available for them.<sup>56</sup> As a result of this negotiation, the proportion of factories using child labor declined substantially from 43% in 1995

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<sup>54</sup> See, e.g., International Labor Rights Fund, at <http://www.laborrights.org/> (last visited Feb. 27, 2005); Child Labor Coalition, at <http://www.stopchildlabor.org/about-us/aboutclc.htm#mission> (last visited Feb. 27, 2005); Save the Children, at <http://www.savethechildren.org/mission/index.asp> (last visited Feb. 27, 2005); Bunyad Literacy Community Council, at <http://www.bunyad.org.pk/profile.htm> (last visited Feb. 27, 2005); Free the Slaves, <http://www.freetheslaves.net/> (last visited Feb. 27, 2005).

<sup>55</sup> See ELLIOTT & FREEMAN, *supra* note 7, at 112–13. Senator Tom Harkin introduced the “Child Labor Deterrence Act” to “bar manufactured imports from any foreign industry that used child labor.” *Id.* at 112. Many feared that a boycott of Bangladeshi produced apparel would force children factory workers into prostitution as an alternative.

<sup>56</sup> *Id.* at 113. NGOs were instrumental in promoting and revitalizing the negotiations that had stalled in 1994 when Republicans took control of Congress. *See id.*

to 4% in 2000, and about 8,000 children received educational services once they left the factories.<sup>57</sup>

In another successful campaign, NGOs effectively utilized their network of relationships to leverage the International Federation of Football Associations (FIFA) to adopt a code of labor practices that barred child labor in connection with the manufacturing of soccer balls.<sup>58</sup> In this case, NGOs were instrumental in bringing together the Sialkot (Pakistan) Chamber of Commerce and Representatives of soccer ball manufacturers to sign an agreement with the ILO and UNICEF to reduce child labor and provide health and training services.<sup>59</sup> A Pakistani NGO, the Bunyad Literacy Community Council, provided health services, vocational training, and microcredit and savings programs.<sup>60</sup> NGOs realized the value in connecting resourceful government institutions, industry representatives and consumers to develop an economical alternative to exploitative labor.

Lastly, NGOs were successful in the late 1990s and early 2000s in developing a protocol within the global confectionary industry to reduce child labor used in cocoa production in the Ivory Coast.<sup>61</sup> Following exposure of child labor trafficking and forced labor in the Ivory Coast, the International Labor Rights Fund petitioned the U.S. Customs Service to monitor cocoa imports under U.S. law that prohibited the importation of products made with forced child labor.<sup>62</sup> In response, the cocoa industry preempted an NGO campaign and voluntarily created the “International Cocoa Initiative” to collect and study information on forced child labor and to devise means of eliminating it.<sup>63</sup> These cases demonstrate the positive influence and the capacity for creative solutions that NGOs provide. Seated next to other parties

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<sup>57</sup> *Id.*

<sup>58</sup> *See id.* at 114. NGOs mobilized consumers, players and major marketers of soccer equipment to end the use of child labor to produce soccer balls. The International Federation of Football Association (“FIFA”) feared a fan backlash and thus adopted a code of conduct. *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 115.

<sup>62</sup> *See id.* at 115–16.

<sup>63</sup> *Id.* at 116. Agencies of the United States provided survey results documenting that almost 300,000 children worked in hazardous conditions on cocoa farms. The U.S. Department of Labor and the ILO funded a program to provide education and vocational training to workers to children removed from forced labor conditions. *Id.*

in a mediation, NGOs certainly would provide a balanced perspective and a tested expertise in creative problem-solving.

The aforementioned parties by no means represent an exhaustive slate of stakeholders in the globalization and labor standards debate. Rather, each category can be subdivided to represent varying interests within the group. For the purposes of a meaningful mediation, however, broad interest-based coalitions would be more manageable and would encourage consensus building. As global mediation develops, it may be possible and even advantageous to break down the categories to isolate certain interests. At the incipient stages, however, a principled and systematic structure needs to triage the more pressing issues.

#### **IV. THE MEDIATORS: THE ROLE OF GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS**

The foregoing sections have introduced the parties, their respective positions, interests, and options generated. This section will propose candidates for the mediator role to facilitate a process whereby the parties communicate, build positive relationships, and negotiate mutually advantageous solutions to globalization's downside.

National governments could provide mediation services to affected parties where established labor laws and healthy collective bargaining relationships exist. Governments have the authority and resources to institutionalize mediation as an alternative dispute resolution mechanism. For instance, the U.S. passed the National Labor Relations Act and the Fair Labor Standards Act in the 1930s to create a system of dispute resolution and fair labor standards for employers, workers, and unions. Today, LDCs and international organizations perceive the U.S. system of labor relations and fair labor standards as a benchmark for success. Mediation is becoming an increasingly popular alternative to litigation and even arbitration because of its curative and transformative features.

National governments, however, may not always appear neutral to parties. Like the parties themselves, governments, too, are self-interested. In LDCs, national governments are interested in attracting and maintaining foreign direct investment.<sup>64</sup>

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<sup>64</sup> See *supra* note 8 and accompanying text.

This can lead to a race to the bottom whereby governments deliberately ignore labor standards and labor laws to create a market alternative for cheap labor.<sup>65</sup> Further, workers may inherently fear a government's alignment with industry and fail to see the benefit in government-run mediation. Activist groups and NGOs often accuse national governments of complicity in overlooking violations of labor laws and labor standards. Therefore, national governments may only be able to serve a limited role as the provider of mediation services.

The most promising candidate to mediate disputes surrounding labor standards is therefore the international organization. Scholars have debated the qualifications of many different organizations to fill the mediator role, and I suggest that the ILO and the Permanent Court of Arbitration, funded by member states and the U.N. (and its sub-bodies), are optimal.<sup>66</sup>

The ILO has already developed an expertise in recognizing universal standards of workplace conduct. Through its many conventions, its Freedom of Association Committee and the Declaration on Fundamental Principles and Rights at Work, the ILO has devised a system, albeit imperfect, of exposing violators before the Committee of Experts.<sup>67</sup> The ILO has effectively investigated charges of workers' rights violations within the Freedom of Association Committee; however, undue delay often hurts the very workers the ILO intends to protect.<sup>68</sup> Through creation of the World Commission on the Social Dimensions of Globalization, the ILO was one of the first international organizations to embrace a strategy of dispute resolution that attempted to include a more representative slate of globalization participants.<sup>69</sup> Through this broad initiative that promotes a

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<sup>65</sup> *Id.*

<sup>66</sup> Arnold Zack has advocated for creation of a formal institutionalized system of mediation at the international level. Mr. Zack's article on conciliation through the Permanent Court of Arbitration has inspired this conclusion. *See Zack, supra* note 1.

<sup>67</sup> *See id.* at 133; ILO Declaration on Fundamental Principles and Rights at Work, adopted by the ILO, 86th Session, Geneva, June 1998, available at [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static\\_jump?var\\_language=EN&var\\_pagename=DECLARATIONTEXT](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT) (last visited Feb. 28, 2005).

<sup>68</sup> *See Zack, supra* note 1, at 134.

<sup>69</sup> *See id.*; *Enhancing the action of the Working Party on the Social Dimension of Globalization: Next steps*, Working Party on the Social Dimension of Globalization, 282nd Sess., BG.282/WP/SDG/1, Geneva, Nov. 2001.

fairer distribution of globalization's benefits, the World Commission purports to invite "all interested international organizations."<sup>70</sup>

The ILO has the well-respected and time-tested infrastructure and highly trained personnel necessary to deliver high quality and reputable mediation services. The Permanent Court of Arbitration, currently with an expertise in arbitration, has the institutional capacity to provide mediation services to employers, workers, unions, governments, NGOs, and activist groups.<sup>71</sup> The benefits of an international mediation institution are readily imaginable. Mediation promotes dialogue between disputing parties instead of conflict, it enables the parties to have control over the substantive outcome, it is useful in a multiparty setting, and it provides a transparent process of dispute resolution.<sup>72</sup>

## V. CONCLUSION

The foregoing depicts a theoretical mediation paradigm whereby a more representative share of participants can influence globalization's path. As I demonstrate, conflicts over violations of labor standards typically arise due to a lack of communication, unclear chains of command, needless posturing, and underutilized relational networks. If given the opportunity to confront violators in a non-threatening, voluntary, and confidential forum, stubborn positions yield to workable and often mutually aligning interests. When stripped of inflexible positional façades, parties demonstrate similar interests that mediators can efficiently align. On their own, many parties have already unilaterally and sometimes jointly crafted creative solutions. However, through mediation the parties could generate options through a voluntary, multifaceted, clearly channeled medium. Mediation offers the prospect of a timely, cost-effective, neutral, and confidential setting in which to resolve international labor disputes. Mediation would cultivate value-added relationships and assist the parties in devising mutually beneficial resolutions.

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<sup>70</sup> See Zack, *supra* note 1, at 136; 12 WORLD ARB. & MEDIATION REP. 220 (2001).

<sup>71</sup> Zack, *supra* note 1, at 136.

<sup>72</sup> See Arnold Zack, *Draft Proposal for an International Labor Conciliation Institution*, CORE-ILS: Conciliation Offices for the Resolution of International Labor Disputes (Mar. 22, 2004). This paper does not purport to identify or debate the advantages of such an international mediation institution. Rather, by depicting a theoretical mediation between disputants in international labor disputes, the benefits are self-evident.

