

# **Re-Planting a Field: International Labour Law for the Twenty-First Century**

Inaugural Lecture

Paul van der Heijden Chair in Social Justice

Leiden Law School  
October 13, 2014

by Lance Compa

*Dean Rick Lawson, former university rector Paul van der Heijden, faculty colleagues and colleagues from other faculties of the university, students, friends, and family:*

Thank you for the invitation to deliver this inaugural lecture as the first holder of the Paul van der Heijden Chair in Social Justice at Leiden Law School. Creation of this chair is a fitting honour for Professor van der Heijden, who has done so much for the law school and the university, and who continues to make enormous contributions to the cause of social justice as chairman of the International Labor Organization's Committee on Freedom of Association.

I now have the pleasure of co-teaching with Paul van der Heijden a series of classes on international labour law to students in the labour law masters program. This inaugural lecture is serving as our first class for the sixty students in the program. I want to take advantage of this opportunity to introduce students to the topics we will be treating in the class and to share an overall assessment of the international labour law field.

## **I. Introduction**

### **A. The Emergence of New International Labour Law**

In 1990 I first proposed teaching a course on international labour law at Yale Law School, where I had started my legal studies twenty years earlier. A common response from many professors was "there's no such thing – you must mean comparative labour law." Here is American labour law, there is Canadian labour law, let's compare Dutch labour law, and so on. But the idea of labour law crossing borders was still a novelty.

This view reflected the fact that for most of the 20th century, workers' struggles took place in rigidly domestic settings with little resonance in international affairs. The International Labour Organization played a vital role in setting international labour standards and taking up complaints about violations. But the ILO's reports about abuses against workers and trade unionists in many countries rarely entered public consciousness. In the United States, the organization's work was unknown except among specialists.

Luckily for me, allies in the law school supported my proposal, and I began teaching international labour law then. Today the field has dramatically expanded. A new labour rights movement has brought labour law to the international arena and won several legal regimes linking labour rights, human rights, and international trade.

In this talk I want to trace the development of the field and how international labour law has taken root in five areas: 1) trade legislation (namely, the US and EU Generalized System of Preferences), 2) trade agreements, 3) international organizations, 4) corporate social responsibility, and 5) lawsuits in national courts. In each, I try to give one or two examples of how international labour law works in practice. But first, some background on the international labour law field and my involvement with it.

## **B. Bridging the Trade-Labor Divide**

For most of the twentieth century, high-level economic policy makers rejected any linkage between labour standards and the global economy. When human rights advocates argued that countries and firms should not gain competitive advantage by killing union organizers or exploiting child labour, trade ministers, international officials and multinational executives said, "That's politics, not business."

Policy elites maintained this division while they broadened global economic integration after the Second World War. New international bodies took shape to channel globalization. They included the World Bank and the International Monetary Fund, global trade groups like the General Agreement on Tariffs and Trade and its successor World Trade Organization, and economic coordinating bodies like the Organization for Economic Cooperation and Development. For them, opening markets and safeguarding investors' profits was the key to economic growth, and growth the key to solving social problems.

But international trade is inherently social and political, not just commercial. Global commerce and trade agreements had profound, accumulating political and social effects on working people around the world. In many countries, shifting patterns of trade and investment uprooted jobs and broke apart social ties. In others, they created jobs and spurred worker migration from agriculture to industry with equally profound effects. These creative and destructive impacts often occurred together.

New forms of globalization in the latter part of the 20<sup>th</sup> century ignited the new international labour rights movement. The United States lost its post-war economic hegemony as European countries and Japan rebuilt their economies in the 1950s and 60s. The emergence of "Asian Tigers" in the 1970s and 80s turned many other developing countries away from an inward-tending, import-substitution industrialization strategy toward an export-led strategy inserting themselves and their workers into the global economy. More recently, China's push into world trade added hundreds of millions of workers to the global labour force.

Recent decades also saw the growth of a global supply chain system linking large multinational apparel and electronics firms to tens of thousands of subcontracted supplier factories around the world. Brand-name firms search constantly for lowest-cost suppliers. Since labour cost is the most elastic, compared with fixed costs of land, machines, materials and energy, workers end up bearing the weight of labour exploitation in this new global supply chain system.

This new globalization has pushed labour rights high on the international agenda. The World Trade Organization is still in denial. It just says “there is no work on this subject in the WTO’s Councils and Committees . . . WTO agreements do not deal with labour standards as such.” Instead, dozens of bilateral and regional trade agreements are bypassing the organization. And many of these agreements contain a social clause tying trade benefits to respect for workers’ rights.

The growing labour rights movement helped revitalize the International Labour Organization and set its sights on other international trade and financial institutions. Consumer and social justice groups pressed multinational firms for social responsibility codes promising fair treatment of workers in supply chain factories and fields. Creative legal advocates won important judicial victories putting multinational corporations on notice: respect international labour standards in host country operations, or face costly damage suits in home country courts.

I don’t mean to suggest that labour rights advocacy sprang to life in the late 20<sup>th</sup> century. Spartacus fought the Roman Empire’s exploitation of slave labour in the century before Christ. Five centuries ago, the Dominican friar Bartolomé de las Casas was an international human rights champion, appealing to the Spanish Crown for decent treatment of indigenous mine and plantation workers in the conquest of Latin America. Anti-slavery movements gained victories throughout the 19<sup>th</sup> century.

European activists and intellectuals created the International Workingmen’s Association in 1864. This First International fell apart at its Hague congress in 1872, but soon reconstituted itself as the Second International. That body established May 1 as the international workers’ day (commemorating an American labour struggle, in fact) and March 8 as the international women’s day.

The founding of the ILO in 1919 and its survival while the League of Nations fell apart were testimony to the enduring significance of international labour standards. Efforts to make labour rights and standards an essential part of a new International Trade Organization in the post-World War II Bretton Woods framework likewise signalled the importance of workers’ rights in the global economy. As an American, I’m sorry that US opposition killed the ITO and its social clause in the early 1950s as part of the Cold War conflict of the time. It set back by decades a chance to develop effective trade-labour linkage.

### C. Labour and Human Rights

When I finished law school I went to work in the trade union movement as a grass-roots organizer and negotiator (though I used my legal training in labour board cases and labour arbitrations). My first day on the staff of the electrical workers' union, I stood on a public sidewalk at 6:30 in the morning distributing flyers to employees entering a wire and cable factory in Plymouth, Massachusetts, urging them to join the union (coincidentally, Plymouth is where the Pilgrims from Leiden landed on the *Mayflower*).

The plant manager came out with a vicious, snarling Doberman Pinscher on a leash and chased me away, slackening the leash for the dog to snap at my legs as I retreated. "You can't do this," I said. "I have a constitutional right to be here." "Screw you and your constitutional rights," he said, pursuing me to my car. The dog kept jumping at the car window until I drove away.

That was my introduction to the reality of freedom of association in the United States, where workers face harsh employer resistance when they try to form a union. But it was also an introduction to the power of the law effectively applied.

In fact, I did have a constitutional right to be there. We secured a restraining order from Massachusetts state court allowing me to distribute flyers at the factory gate without fear of facing the Doberman again. The organizing campaign took two more years, but in the end workers voted in favour of union representation. This episode taught me an important early lesson that has stayed with me since: imperfect as it may be, the law can make a real difference for workers' rights.

Using the Doberman Pinscher was an exceptional case. Most American employers are more sophisticated than that. They use tactics developed by anti-union consultants (most of them lawyers, I'm sorry to say) to convince workers that the workplace will close if a union is formed.

My experience was nothing compared with abuses suffered by trade unionists and workers' rights advocates in many other parts of the world:

- In 1980 armed men in civilian clothing abducted and "disappeared" the entire executive council of Guatemala's National Workers Central trade union. The 27 leaders were never seen again, and the crime was never solved.
- In 1982 agents of the Pinochet dictatorship in Chile abducted, tortured and murdered Tucapel Jiménez, a dissident union leader who had criticized military rule.
- In 1993, armed men abducted, tortured, raped and murdered Marsinah, a 25-year-old woman who was leading a strike at a watch manufacturing factory in East Java.

- In 1994, armed men shot to death 14-year-old Iqbal Masih riding his bicycle near his Pakistani village home. He had gained the world's attention in 1993 when he testified at the International Labour Organization and other world forums about his experience as a bonded child labourer making rugs for export to developed country markets. Widely seen as a killing contracted by child labour employers to silence more revelations, his murder was never solved.
- In 2012, apparel union organizer Aminul Islam was found tortured and killed after meeting with workers near a garment manufacturing centre near Dhaka, Bangladesh. His killing remains unresolved.

These and too many cases like them make international labour law a human rights field, too. Freedom of association and trade union rights have always been part of the Universal Declaration of Human Rights and the UN human rights covenants, as well as inter-American and European instruments. But until this century, many human rights advocates saw workers' organizing and collective bargaining as economic concerns unrelated to human rights. Killing of trade unionists was a criminal matter, not one involving freedom of association.

That view has changed. Today, human rights are central to international labour law, and the field is rich in opportunities for research and practice at the intersection of human rights, labour rights and global trade.

#### **D. Instruments, Mechanisms, and Questions**

Taking workers' interests into account in the global economy has led to creation of many new legal instruments and mechanisms for implementation. Like any legal system, these new regimes have two basic features: 1) a set of rules and related obligations of countries and multinational companies to fulfil them, and 2) complaint mechanisms that come into play when rules are violated or obligations are unmet.

Important questions follow from each of these two general features:

- Does the system involve "soft law" as it is sometimes put, where the rules serve as guidelines and the compliance mechanisms have no enforcement behind them? Or is it a "hard law" system with binding norms and strong enforcement measures?
- To what extent is a trade and labour regime part of a broader integration process with political, financial, cultural and other non-commercial goals, like that of the European Union? Or is it a strictly commercial arrangement as in the North American Free Trade Agreement?
- As for rules and obligations to fulfil them, how precise or how broad are their definitions? From what sources are they derived -- from human rights instruments, from ILO conventions, from the labour laws of participating nations,

or from the minds of those who write them? Again, are these standards and obligations binding, or are they just statements of good intention?

- To what extent are cross-border rules "harmonized" so that countries or companies must conform to them, even if it means changing their laws or their practices? Alternatively, to what extent are the rules flexible, taking into account countries' levels of development or their distinct laws, cultures, traditions of labour-management relations, sovereignty concerns and the like, or companies' own distinct management strategies and practices?
- As for procedural mechanisms, do "standing" requirements mandate that only governments can make complaints? Only trade unions or companies? Only injured parties? Or can independent human rights groups or other NGOs, or even just concerned citizens, lodge complaints, too? Must they exhaust domestic procedures before turning to international mechanisms?
- How transparent is the process? Do procedures include field investigations, public hearings, or other forums where workers' voices can be heard? Do governmental authorities control the process, or is there a role for independent monitoring, reviews, audits, evaluations or arbitrations by independent bodies?
- What are the consequences of violations? Do procedures lead to economic sanctions or loss of trade benefits for labour rights violators, making for a true "social clause" linking labour rights and trade? Or do the procedures forego sanctions, relying instead on shame and negative publicity to change the actions of a country or a company concerned about reputational risk?

## **E. Of Cases and Controversies**

Many inaugural lectures involve theoretical concepts. But I'm more interested in what lawyers in the United States call "cases and controversies" – real conflicts involving real people and real consequences (the phrase comes from our Constitution's Article III, which creates the judicial system and the jurisdiction of federal courts; it precludes courts from issuing advisory opinions or taking up cases involving potential or speculative effects).

I was a trade unionist and a labour lawyer for many years before turning to teaching and research. Practice still informs my scholarly work, as I try to ground my research in workers' real-life struggles. Correspondingly, since I still work closely with trade unions and human rights organizations, I try to apply my scholarship to practice in the field.

I'm fortunate to have been involved at several inflection points in the development of international labour law. I was part of an American labour-NGO coalition in the early 1980s lobbying the United State congress for the first labour rights clause in a preferential trade program, the US Generalized System of Preferences. After we won it, I represented workers and unions in some of the first cases under the clause.

In 1995 I became the top American official at the new labour commission created by the first trade-labour instrument in any free trade agreement, the North American agreement among Mexico, Canada, and the United States. After joining the Cornell faculty in 1997, I served as counsel to many trade unions and NGOs in complaints and cases under the NAFTA labour accord.

Later I worked with civil society groups in cases arising under trade agreements with Central America and Colombia. I'm working now with American and European colleagues on proposals for a strong social dimension in the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the United States and the European Union.

I have long been involved in efforts to enforce codes of conduct under corporate social responsibility programs. I have also joined legal teams bringing lawsuits in American courts on behalf of workers who suffered rights violations in foreign countries. In many years of collaboration with Human Rights Watch, I applied human rights analysis to US labour law and the many ways it fails to comply with ILO standards on workers' freedom of association.

If I have a theory about international labour law, I suppose it's a theory of permanent experimentation. Let us try every handle in the international labour rights toolbox to win justice for workers, and learn from successes and failures as we go.

Many advocates and activists want a magic bullet to solve the problem of injustice in the global workplace. Choices include a social clause in the World Trade Organization, real "teeth" for the International Labour Organization, a strong labour chapter in trade agreements, enforceable codes of corporate social responsibility, binding United Nations norms on business and human rights, national courts punishing companies that violate international labour standards, and more.

But we will never have a perfect instrument and mechanism to end injustice against workers in the global economy. We face too many moving parts, too many unforeseen political and economic shifts, and too scarce resources in a world where mobile global capital has inherent advantage over place-bound workers and trade unions.

Instead of looking for a once-and-for-all solution, we must find what social movement theorists call "opportunity structures" for justice in incremental steps, not one giant leap. For lawyers, this means using international labour law creatively, learning from both victories and defeats how to do better the next time.

Now, on to the battlegrounds.

## II. Labour Rights in Trade Legislation

### A. Winning a Labour Rights Clause

In the fall of 1982 a small group of labour, religious, and human rights activists began charting a new course for workers' rights in American trade policy. We were dismayed at both the social effects of free trade without human rights concerns and at a narrow "Stop Imports!" response to globalization by much of the labour movement. Instead, we favoured developing countries' access to the US market, but on a foundation of respect for workers' fundamental rights.

As a first step in this direction, our coalition sought a labour rights amendment to the Generalized System of Preferences. The GSP is a centrepiece of US trade policy, providing duty-free entry for thousands of products from most of the world's developing countries to help their economic development. We argued that a labour rights clause in the preference system should ensure minimum fair labour standards for workers as a condition of preferential access to the American market.

We mounted an effective lobbying campaign, and congress adopted the GSP labour rights clause in 1984. From then on, a country's beneficial status depended on "taking steps to afford internationally recognized worker rights to workers in the country." The legislation set forth the following five-part definition of such rights, which has been repeated many times in other US trade laws:

- the right of association;
- the right to organize and bargain collectively;
- a prohibition on the use of any form of forced or compulsory labour;
- a minimum age for the employment of children; and
- acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

Just as important as these standards was the petitioning process to challenge a country's benefits when labour violations occurred. This mechanism let advocates in the United States collaborate with foreign counterparts to file complaints, to testify at public hearings, and to launch public pressure campaigns against governments that violated workers' rights and against companies that profited from the violations.

Since adoption of the GSP labour rights amendment in 1984, the United States has conducted more than one hundred reviews on beneficiary countries' compliance with the "taking steps" requirement. Allowing for repeated reviews of the same country, almost fifty different countries have come under labour rights scrutiny. Fifteen saw benefits suspended, and twenty more were put on "continuing review," a form of probation meant



to spur positive changes without imposing trade sanctions. Several of the suspended countries undertook labour reform measures to meet GSP requirements and thus regained benefits. The continuing review process persuaded others to make improvements, too.

## **B. An Early Example: The Chile Case**

### Dictatorship and Repression

An early example of effective use of the GSP labour clause involved Chile, where the government of Salvador Allende had adopted reforms favouring workers and trade unions after taking office in 1970. But the Allende government and its experiment in democratic socialism were short-lived. The smashing of Chile's democracy by a military coup in 1973 also brought the destruction of the organized labour movement and the imprisonment, torture, exile, or murder of thousands of union activists.

General Augusto Pinochet dissolved the country's main labour federation and seized its assets on the grounds that it was a subversive political body, not a labour organization. The new military regime banned collective bargaining and abolished the right to strike. Additionally, the right to freely associate was crushed. If workers wanted to hold a meeting to discuss workplace issues, the date, time, place, and agenda had to be delivered in advance to the local police, who stationed themselves inside the meeting taking notes on what occurred. Military governors could remove union officials deemed "unsuitable."

More than a decade later, labour abuses were still epidemic. Outspoken union leaders suffered internal banishment to remote areas of the country. Some were killed by military death squads. Throughout the mid-1980s, human rights monitors reported hundreds of cases of abduction, torture, beatings, and threats against trade union activists. Union leaders were banned from membership or activity in any political party.

Labour legislation violated workers' rights, too. Pinochet's Labour Code denied workers in seasonal industries like agriculture, construction and many natural resources sectors the right to organize by requiring that workers be employed continually for at least six months. Where a union did exist, collective bargaining was limited to the single workplace and to a single issue, wages. Employers, on the other hand, were free to lock out employees, hire strike breakers and negotiate directly with individual employees instead of dealing with the union.

### The GSP Labour Rights Petition

In 1987 I wrote a complaint for US unions and NGOs challenging Chile's beneficiary status because of the military government's abuses against workers. We worked closely with Chilean unionists and human rights monitors to collect information proving the charges of systematic labour right violations. Even though the Chilean government charged that they betrayed the national economy, independent union leaders in Chile supported the complaint and came to Washington to testify about labour rights violations by the Pinochet regime.

Acting on the complaint, the United States suspended Chile from beneficiary status in February 1988. The GSP cut-off jolted Chilean economic and political elites. Business interests earlier happy with military rule and a suppressed labour movement now worried about economic sanctions just at a time when they hoped to expand their exports to the United States.

Chile's economic elites could live with a government that was an international pariah politically, as long as its free-market, export-oriented policies stayed intact and their profits kept rolling in. However, when exports to the United States became threatened by Pinochet's labour policies, business interests began softening their support for the dictatorship. Some joined calls by labour, human rights and other democratic forces for an end to the dictatorship and a return to more democratic rule. In a plebiscite in October 1988 the Chilean people voted to do just that. A solid majority said "No" in a referendum on whether General Pinochet should continue as head of government.

I would be overstating the case to say that the GSP decision was the difference in Chile's return to democratic government. But the US GSP action should not be discounted, either. In 1991, with a new, democratically elected government in place and trade unions freely functioning, Chile's GSP benefits were restored.

Many other cases that arose under the GSP labour clause demonstrated both its effectiveness and its limitations. A 1990 complaint against Indonesia, for example – where the Suharto military regime suppressed trade unions as much as Chile's Pinochet – failed to advance in face of powerful lobbying by US multinational companies with large investments there, especially in the natural resources sector. A comprehensive examination of GSP labour cases reflected what most lawyers learn in the course of their practice: you win some, you lose some, and not always depending on the merits of your case. Where trade and labour rights intersect, geopolitical and economic interests often weight heavily in the outcome.

### **C. And Only Last Year: The Bangladesh Case**

To this day labour and human rights groups have continued filing petitions on labour practices under the American preferential program. The GSP has been overtaken by trade agreements with some countries (including Chile) but it is still an important labour rights tool. Moreover, adoption of the labour rights clause in the US preferential program prompted the European Union to insert labour conditionality into its own GSP system.

A recent, dramatic example of US and EU action involves Bangladesh. In 2012 the United States put Bangladesh on “continuing review” status after the torture and murder of union leader Aminul Islam. His killing worsened already widespread suppression of workers and unions in Bangladesh's enormous apparel sector, second-largest in the world after China. The review intensified after a deadly fire later the same year at the Tazreen Fashions factory in Dhaka that killed over a hundred workers.

Then came the April 2013 Rana Plaza building collapse that killed more than a thousand workers. The United States suspended GSP trade preferences for Bangladesh. It pointed not only to building safety abuses, but also to harsh repression of trade unions that deprived workers of any voice on health and safety or other working conditions. Unions existed precariously in only a handful of thousands of apparel factories. Most workers who tried to form unions were fired and blacklisted for their efforts. The United States insisted that Bangladesh would have to address the crisis in worker organizing, not just building safety, to regain GSP benefits.

The US move was mostly symbolic, because trade preferences are not applied to apparel imports from Bangladesh. But Europe is an even bigger market for Bangladesh than the United States, and the EU's trade program covers apparel imports. Loss of EU GSP benefits would stagger the industry, compared with the effect of US suspension on smaller sectors.

The United States and Europe coordinated a response. Knowing the signalling power of a cut-off, the United States suspended GSP benefits to force change without doing too much damage to the Bangladesh economy. Meanwhile, the European Union continued GSP benefits for Bangladesh, but told the government and business owners that they had to show positive changes quickly.

In months following the American "stick" and the EU "carrot," workers successfully formed unions in dozens of new apparel factories without suffering dismissals, blacklisting, or killing. They secured a foothold in the industry and gained traction for collective bargaining, not just on health and safety but on wages and other working conditions, too.

International union organizers and Bangladeshi trade unionists directly credit the GSP actions with their advances. These gains are fragile. The story of labour rights in Bangladesh and other countries has to be rewritten every day, not always with happy endings. But these cases demonstrate the power of trade-labour linkage when conditions align for its effective use.

### **III. Labour Standards in Free Trade Agreements**

#### **A. Trade on a Good Foundation**

Trade among nations is a good thing. Your own Hugo Grotius explained why it is good for the Netherlands:

. . . Our land does not promise metals or produce luscious vines; we do not even have an abundance of crops and wool. Nature has denied us what she has granted others; but since the mother of all did not wish to disinherit us, instead of the many gifts she showered on others she left us the seas and the winds and the perilous and difficult business of trading. . . . For us they

are the only means by which we can support such a numerous people and prevent being mocked by our enemies and useless to our friends.<sup>1</sup>

What Grotius said about the Netherlands is true for all countries. Trade can be a force for good. But it must happen on a proper human rights foundation.

The premise of labour rights advocates is a simple one: no country -- and no company operating in any country -- should gain a competitive advantage in global trade by outlawing independent unions, killing union organizers, banning strikes, using forced labour or brutalized child labour, or otherwise violating workers' basic rights. Besides addressing such fundamental human rights concerns, a labour rights regime should also challenge governments and firms to provide wages, benefits, health and safety, and other working conditions consistent with human dignity.

Critics argue that protectionism is the motive behind calls by American and European advocates for a labour-trade "linkage." On the contrary, I believe that concern for human rights is the animating force. In many developing countries exploited workers produce goods for companies and consumers in the Global North. European and American citizens have a special responsibility to press our governments to promote workers' rights in global trade, and our corporations to respect them.

Social justice for working people is not a by-product of economic growth. Policy makers have to choose it and build it into the architecture of trade and investment systems. Ultimately, we must decide if workers will be *objects* of impersonal trade and investment forces, or *subjects* capable of making their rights and protections a priority for the global economy.

## **B. Negotiating the NAALC**

Trade-labour linkage in US legislation set the stage for applying the same principle to trade agreements. In 1992, labour advocates convinced presidential candidate Bill Clinton to promise a supplemental labour accord to the North American Free Trade Agreement among the United States, Mexico and Canada. Clinton won the election and delivered. Titled the North American Agreement on Labour Cooperation (NAALC), the labour accord took effect alongside the trade pact in January 1994. It was the first trade agreement that included labour rights and labour standards, setting a benchmark for all that followed.

The NAALC set out eleven labour principles that the three signatory countries committed themselves to promote:

- 1) freedom of association and protection of the right to organise
- 2) the right to bargain collectively
- 3) the right to strike

---

<sup>1</sup> Quoted in Peter Borschberg, *Hugo Grotius, the Portuguese and Free Trade in the East Indies*, NUS Press, Singapore 2011, p. 264.

- 4) prohibition of forced labour
- 5) protection of child labour
- 6) minimum wage, hours of work and other labour standards
- 7) non-discrimination
- 8) equal pay for equal work
- 9) occupational safety and health
- 10) workers' compensation
- 11) migrant worker protection.

The three NAFTA governments pledged to effectively enforce their national labour laws in these eleven subject areas. With this feature, the NAALC introduced what has become a constant among labour provisions in trade agreements: a threshold obligation to effectively enforce national labour laws, rather than to incorporate and apply international norms in place of national law.

The North American trading partners were not ready to adopt supranational labour standards and then change their national legislation to meet them. Unlike many areas of commercial law, labour law is tightly bound to national traditions and cultures of labour-management relations. Labour law reflects the compromise struck over a long period of class struggles within national boundaries. Governments are reluctant to yield sovereignty over labour law the way they might yield sovereignty over intellectual property or investment law.

The NAALC's complaint procedures reflect a mostly soft-law system. It contemplates investigations, public hearings, research, reports, consultations, evaluations, recommendations and similar measures. Critics say it is "toothless." But for advocates willing to test it, the NAALC has emerged as a viable arena for creative transnational action. It provided an opportunity for workers, trade unions and their allies in the United States, Mexico and Canada to work together concretely to defend workers' rights against abuses by corporations and governments.

### **C. NAALC Complaints and Cases**

The NAALC created a cross-border complaint mechanism. Trade unions and other civil society organizations can file complaints alleging a country's failure to enforce its labour law. But these complaints are filed with labour ministries of the other countries, not the country where violations occurred. These other labour ministries then review the case to determine whether the complained-against country was effectively enforcing its law.

This cross-border complaint system generated new forms of collaboration among labour lawyers in all three countries. The complaint mechanism created space for sustained legal work: gathering evidence and crafting a complaint, meeting with government officials and pressing them for action and follow-up, preparing witnesses to testify in public hearings, engaging technical experts in health and safety cases, articulating demands, launching media campaigns, and other forms of advocacy. Correspondingly, corporations

and governments also developed international labour law expertise to defend themselves in the new complaint system.

More than forty complaints and cases have arisen under the NAFTA labour accord. Here are two examples, one on pregnancy testing in Mexico and one on migrant labour conditions in the United States:

#### The Pregnancy Testing Case

In 1997 American and Mexican human rights and women's rights advocates filed a complaint against multinational companies' widespread pregnancy testing of women workers in maquiladora factories along the US-Mexican border. When young women applied for jobs, they had to submit to urine testing to see if they were pregnant. If the test was positive, companies refused to hire them. Even more: women already employed had to undergo periodic testing. If they were pregnant, managers would transfer them to the night shift or to a dangerous, dirty job to induce them to quit.

A coalition of US and Mexican human rights and women's rights NGOs argued that this practice and the failure of the labour authorities to combat it violated Mexico's obligations under the NAALC. The US labour department accepted the case and held public hearings in cities along the Mexico-US border. Combined with public hearings, demonstrations by workers and support groups on both sides of the border created a media firestorm. Several big US companies like Motorola and General Motors announced they would halt pregnancy testing, and the Mexican federal government passed new laws to prohibit it. Since then, pregnancy testing has been mostly eliminated in the maquiladora factories.

#### The Washington State Apple Case

When the US government negotiated the NAFTA labour agreement, it assumed that Mexico was the problem, not itself or Canada. But the agreement applies equally to all three countries. The tables turned when a cross-border coalition of civil society groups filed a complaint in 1997 with Mexico's labour ministry about violations of migrant workers' rights in the United States.

Each fall, more than 50,000 Mexican workers harvest fruit in the state of Washington, the largest apple-growing region in the United States. Employers stifled their efforts throughout the 1990s to form trade unions, to bargain collectively, to have job health and safety protection, to end discrimination, and to make other workplace gains.

In 1998 a hearing in the case was held in Mexico City. The hearing was a dramatic example of the reach of the NAALC "platform" and the leaping of spatial, language and cultural boundaries in the North American context. Mexican labour ministry officials heard accounts of labour rights abuses by a delegation of Mexican workers employed in the United States thousands of miles to the North.

The Mexican ministry conducted an investigation and issued a report demanding consultations between the labour secretaries of the two countries. The secretaries agreed on a program of public outreach and public hearings chaired by US and Mexican officials from the two federal governments and from the Washington state government. The cumulative effect of these efforts led to better pay and better housing conditions for workers, and the state labour agency added many new Spanish-speaking inspectors.

#### **D. A NAALC Appraisal**

The new instruments and institutions of international labour rights advocacy reflected in the NAALC are indeed flawed. But they created space where advocates can unite across frontiers to promote new norms, mobilise actors, call to account governments and corporations, disseminate research findings, launch media campaigns, educate each other and the public, challenge traditional notions of sovereignty, and give legitimacy to their cause by invoking human rights and labour rights principles.

In all this work, labour and human rights lawyers play a central role. We created a cross-border legal network of the three countries that meets on a regular basis to review cases and make strategic choices for new ones. In April of this year, for example, another NAALC complaint about recruiting and mistreatment of Mexico migrant workers in other sectors resulted in a wide-ranging outreach, education and training program on temporary workers' rights. The program is being conducted jointly by the two labour ministries in both countries, with Mexican labour ministry and consular officials sitting side-by-side with their American counterparts as they meet with Mexican workers.

The NAALC is still widely criticized for lacking teeth. But whatever the merits of that argument, the agreement broke the resistance of policy elites to linking trade and labour concerns in free trade agreements. It established the principle of trade-labour linkage in all the agreements that followed. For that alone, leaving aside my own view that it indeed can get good results when used creatively, the labour agreement has had a significant impact on global economic policy.

#### **E. The US-Jordan Agreement and ILO Standards**

Trade-labour linkage evolved as the United States continued pursuing bilateral and regional free trade agreements. A 2000 trade pact with Jordan included a labour chapter as an integral part of the agreement rather than a side deal. It also made reference for the first time to ILO standards.

One key change in the international labour law field between the 1994 North American agreement and the 2000 US-Jordan agreement was the ILO's adoption in 1998 of its Declaration on Fundamental Principles and Rights at Work. That declaration set out four "core" items on 1) rights of association and collective bargaining; 2) forced labour; 3) child labour, and 4) non-discrimination.

Many labour advocates saw the ILO's 1998 declaration as an advance. For many, it was a riposte to the WTO's 1996 refusal to encompass workers' rights in trade rules. It gave sharp focus to central labour demands. It gave the ILO a new, stronger platform to inject labour concerns into global economic debates. Now, reference to the ILO core labour standards is *de rigueur* not only in trade agreements, but in every workers rights formulation – in OECD guidelines, new UN guiding principles, World Bank performance standards, corporate codes of conduct, global framework agreements, and more.

The US-Jordan trade agreement was the first to incorporate ILO core standards. All U.S. trade agreements since then have done the same. It was also the first trade accord that applied the same dispute resolution mechanism for labour disputes as that for commercial disputes. This held out at least a possibility of economic sanctions if a dispute resolution panel of arbitrators found a party in violation of its commitments.

## **F. The US-Central America Agreement**

In 2006, United States negotiated a trade agreement with five Central American countries and the Dominican Republic, usually called CAFTA. Less than one month ago, on September 18, the US government announced is taking a labour dispute case to arbitration – the final step in the dispute resolution procedure. This is the farthest any trade-labour case has moved toward genuine enforcement.

The case stems from a complaint by a coalition of unions and human rights groups alleging the Guatemalan government's failure to effectively enforce its labour laws. According to the complaint, factory owners first deny entry to labour inspectors. If inspectors manage to gain entry and find violations, managers defy remedial orders. If the labour ministry imposes fines, they refuse to pay. If a court orders fines to be paid, they still refuse – and nothing happens, because the weak legal system has no means of enforcing court orders. This, in addition to continuing dismissals, threats, assaults, and assassinations of trade union activists.

As with earlier labour rights petitions, the Guatemala filing resulted from close consultation, collaboration, and strategizing among labour and human rights lawyers in Central America and in the United States. The nearly 100-page complaint contained a detailed recitation of facts, careful citing of the CAFTA labour chapter's standards and obligations, and closely reasoned legal arguments tying the facts to requirements of the trade agreement's labour provisions. After the complaint was submitted, international labour law specialists in the US labour department negotiated an extensive action plan with Guatemalan counterparts. Guatemala's failure to fully apply the plan led to the recent US move to arbitration.

The United States later negotiated trade agreements with Korea, Peru and Colombia with even stronger labour chapters requiring parties to implement ILO core labour standards in their national legislation. Peru and Colombia undertook extensive labour law reform measures to meet these terms. Now the governments have negotiated action plans with the US labour department to ensure their effective application.



## **G. Labour and Trade in the European Union**

The European Union has also inserted labour rights provisions into trade agreements with other countries. I leave aside labour standards inside the EU. You will learn from other professors in this room who are much more knowledgeable than I about labour directives for EU member states and about cases such as *Viking* and *Laval*, in which social rights clash with EU rules on business establishment and competition.

Beginning the early 1990s, the EU introduced a human rights clause in trade agreements with developing countries. It implicated fundamental labour rights, but not explicitly. Since then, Europe has moved more pointedly to include labour standards in sustainable development chapters, starting with the EU-Cariforum agreement of 2008 and embodied more recently in trade agreements with Central America, Peru and Colombia.

The newer agreements carry forward the human rights clause with a commitment to “respect for democratic principles and fundamental human rights.” On labour rights, the EU and its trading partners commit to effectively implement in their laws and practice the fundamental ILO *conventions*, not simply the core principles as in US trade pacts. The United States insists that adherence to the core principles does not require adherence to the ILO conventions connected to the principles.

This feature of the EU’s accords is stronger than the American measure. But in another contrast to US trade deals, the EU agreements focus exclusively on dialogue and cooperation. They do not link labour standards to any dispute settlement mechanisms that might result in “hard” fines or trade sanctions. The ultimate consequence for failure to comply with the commitments of these chapters is unclear, other than increased public pressure and scrutiny.

As an example of the EU’s “soft” approach, in January of this year a civil society group asked the commission to invoke the consultation clause in the EU-Korea trade agreement. The group argued that Korea was violating the agreement by a series of repressive anti-union actions criticized by the ILO, especially against the teachers and railway workers.

The advocacy group requested that the EU commence consultations under the Sustainable Development chapter of the agreement. The commission responded that it would continue to use dialogue, track progress with the ILO, and pursue ongoing engagement before considering formal consultations. The results of such engagement are not yet evident.

The differences between the US and EU trade agreements pose an interesting challenge for negotiations now underway between the two powers on a transatlantic trade and investment partnership. Will the EU insist on American ratification of all the ILO core

conventions, as it has done in other agreements, or will it yield to the US view that only requires adherence to general principles, not to specific conventions? Will the United States insist on trade sanctions as a remedy for labour violations, as it has done in other agreements, or will it yield to the EU approach in which dialogue and consultation, not trade measures, are the response to violations? Is the EU approach too soft? Is the American approach too hard? This is a key policy debate in the international labour law field, one that we should take up in our class together, too.

## **IV. International Organisations and International Labour Law**

### **A. The ILO and the OECD**

The International Labour Organization is the pre-eminent body in the labour law field. If the ILO did not exist, the first order of business in the global community would be to create it.

The ILO sets international standards and oversees their application. It promotes decent work everywhere, lately with innovative “better work” programs for global supply chain factories. It tackles child labour, forced labour and trafficking. And it conducts these and other initiatives in a framework of tripartism unique among international organizations. Governments, trade unions, and employers all have a constitutional role in ILO governance.

I must note, however, that a crisis now besets the organization’s tripartite functioning. After accepting for decades the ILO’s view that the right to strike is inherent in freedom of association, employers are now insisting that there is no right to strike under international law. The dispute could end up in the International Court of Justice in The Hague, something that has not happened since 1934. This crisis will be a focus of attention and discussion in our class.

For international labour lawyers, the two ILO oversight committees are central actors: one on freedom of association and one on application of ratified conventions. They give concrete meaning to international labour standards through their examination of complaints and cases. Their decisions are characterized by rigorous legal analysis and reasoning, creating jurisprudence that is authoritative in the field even though their decisions are not “enforceable” in a hard-law sense.

ILO standards and international labour law have become significant elements in the work of other international organisations as well. A notable one is the Organisation for Economic Cooperation and Development (OECD). Based in Paris, the organization is often called the “think tank” for its 34 member countries. First in 1976 and most recently in 2011, it adopted Guidelines for Multinational Enterprises encouraging global firms to implement core labour standards in their worldwide operations.

Civil society organizations can file complaints against multinational corporations alleging violation of OECD guidelines on labour standards. In each member government, entities

known as National Contact Points (NCPs) receive and consider complaints and offer their good offices toward mediation of the disputes. Trade unions worldwide view the Dutch NCP as the most advanced, independent, and effective, with many successful case resolutions.

In some 200 labour cases filed since the guidelines were first adopted in 1976, international labour lawyers familiar with global labour standards and procedures have played key roles. They help gather evidence, draft complaints, and shepherd them through sometimes complicated procedural steps. Unions have been recognised, workers have been reinstated, dangerous working conditions have been fixed, and other progress has been made thanks to the OECD guidelines.

One example I know well led to a successful outcome of a US trade union's campaign to help hundreds of warehouse employees at the US subsidiary of a French multinational company. Brylane, Inc. was the US distributor of the French firm Pinault-Printemps-Redoute (PPR), the parent company of Gucci and other famous brands. When workers began their organizing effort in 2002, local managers launched a typical American management-style antiunion campaign, threatening workplace closure and dismissing the most outspoken union activists.

The union filed a complaint that company tactics ran afoul of the OECD Guidelines. While the US NCP had no power to order Brylane to change its behaviour, the case provided a triggering mechanism for a wider international campaign.

On their side of the Atlantic, French and Dutch unions representing workers in France and the Netherlands pursued the complaint with their own NCPs, adding to pressure on PPR to halt the anti-union tactics of its American management. But the French and Dutch trade union actions did not stop there. Along with civil society allies, they mounted demonstrations at company headquarters in Paris and at Gucci headquarters in Amsterdam protesting Brylane's interference with workers' organizing at the American warehouse. French union leaders met privately with top corporate management urging a solution to the crisis at its US subsidiary.

The OECD complaint changed what otherwise would have been just another local labour dispute into an international affair. The combined European pressure led PPR to order American managers to halt their anti-union campaign and let workers choose union representation without management interference. In May 2003, Brylane and the union reached agreement on a three-year collective agreement with significant gains for workers including wage increases, substantial benefits improvements, and a strong health and safety committee.

## **B. The World Bank and the United Nations**

Other international organisations have also woven labour standards into their policies and programs. A decade ago, the World Bank's private sector financing arm set "performance standards" requiring firms to ensure good labour practices in bank-supported projects. In

1990, the United Nations established the UN Global Compact. It provides an opportunity for companies to publicly commit to a set of ten principles of corporate social responsibility, including one with ILO core labour standards.

In 2011 the UN adopted new Guiding Principles on Business and Human Rights. The UN Guiding Principles call upon governments to protect human rights, upon businesses to respect human rights and to use “due diligence” to avoid risks, and upon both to provide effective remedies for victims of rights violations. Workers’ rights provisions in the guiding principles reflect ILO core labour standards and ILO core conventions.

The UN protect-respect-remedy framework has been widely disseminated in the business and human rights field. Under Dutch chairmanship, this framework was incorporated into the OECD guidelines discussed earlier. The Netherlands was the first EU country to adopt a National Action Plan for the UN Guiding Principles, and the Dutch government also plays a leadership role streaming these principles into other policy arenas.

The business and human rights field is still in flux. Some countries think that the UN guiding principles are too soft. Earlier this year, they introduced a resolution for a legally binding treaty on corporations and human rights. Other countries think that the guiding principles should be the final word, or that more time should pass to judge their effectiveness.

## **V. The Turn to Corporate Social Responsibility**

### **A. The Emergence of the CSR Movement**

Everything discussed up to now has involved state action at national and international levels, such as labour rights in trade legislation, labour chapters in trade agreements, and labour standards in intergovernmental bodies’ guidelines and principles. But private initiatives have also expanded the field of international labour law.

For labour rights, the corporate social responsibility (CSR) phenomenon began with a relative handful of companies twenty years ago. Media exposés in the 1990s of child labour and other abuses in a few brand name retailers’ supply chain factories – Nike was a prominent case – prompted the movement toward corporate social responsibility. Nike and others’ initial response was “Don’t blame us. All we do is contract for price, quality, and delivery. We are not responsible for conditions inside the factories.” But that defence quickly succumbed to the self-evident proposition that, as we say in English, “Who pays the piper calls the tune.” If I understand it correctly, your phrase is more succinct and more poetic: “Wie betaalt, bepaalt.”

The brands moved from denial to acceptance of responsibility, and the CSR movement took off. Now thousands of firms have embraced the concept. A similarly new and expanding movement for socially responsible investment (SRI) has also taken shape. It is driven by investors who want to see their money put to socially useful purposes and still see it grow – doing well by doing good.

Social labelling is another variant of the CSR movement. One example is GoodWeave (formerly called Rugmark), an NGO that approves labels for handmade carpets from South Asia. GoodWeave has a well-developed inspection system that allows for surprise visits rather than advance notice. The label ensures that carpets are made by adult workers in decent conditions. Just one added note: I'm thrilled that a long-time friend and colleague of mine, Kailash Sathyarti, one of the founders of Rugmark, just won the Nobel Peace Prize for his work against child labour.

Another variant of new private sector social responsibility initiatives is the fair trade movement. It promotes the idea of socially responsible consumers, not just corporations, by certifying that products meet labour, environmental, and human rights standards. Fair trade programs invite consumers to pay a small extra price for assurance that their purchases were made or produced under decent conditions. A note here, too: I cannot help but notice that in the Netherlands, the fair trade label is much more prevalent than in the United States. I always thought that Max Havelaar was a famous Dutch ecologist, until I learned recently that he was the fictional protagonist of a 19<sup>th</sup> century anti-colonialist Dutch novel. We in the United States should find an American counterpart.

Transparency and disclosure have become bywords in the international labour law field, making CSR reporting another growth sector. For one thing, more and more governments are asking global firms to report on their efforts to comply with international labour standards. The Netherlands government is a leader in this regard: each year the Ministry of Economic Affairs ranks the 500 largest Dutch companies on the transparency of their sustainable business practices and social responsibility performance.

In the United States, the federal government requires all publicly-traded firms sourcing mineral-based products from conflict zones in Africa (tin, tungsten and gold, for example) to report on their efforts to prevent human rights abuses. California passed a law requiring all firms doing business in the state – in practice, every multinational enterprise in the world – to report annually on their efforts to eliminate labour trafficking. These and other reporting requirements have created growing demand for legal advice from international labour law specialists.

On their own, thousands of companies have undertaken annual reporting on compliance. Membership in the UN Global Compact requires such reports by participating firms. The Global Reporting Initiative is another example that involves hundreds of companies submitting to comprehensive sustainability reporting. Again, for students interested in finding work in this field, the growth of corporate social responsibility and socially responsible investment has created a booming new market for legal advice, public relations and communications counselling.

## **B. Multi-Stakeholder Initiatives**

Multi-stakeholder codes of conduct bring trade unions, consumers, human rights groups, fair trade advocates, students and other civil society organizations to the table with

companies to push for better labour conditions in global supply chain workplaces. Sometimes governments are involved, too. Among the most prominent are the US-based Fair Labour Association, Worker Rights Consortium, and Social Accountability International; UK-based Ethical Trading Initiative, and the Netherlands-based Fair Wear Foundation and Clean Clothes Campaign. These bodies, too, need solid legal analysis and advice.

When codes of conduct and CSR initiatives started to proliferate in the 1990s, I was sceptical. I saw them as exercises in public relations, not real change. Even more insidious, they posed a threat of weakening regulation by states and supplanting the role of trade unions.

These tensions in corporate social responsibility programs have not disappeared. I still believe that effectively enforced national laws and international standards, along with trade unions and collective bargaining, are the best ways to advance workers' interests. In this light, CSR initiatives should be seen as supplements, not substitutes. However, I have seen enough positive results from CSR initiatives in specific cases to think they are worth preserving and strengthening. They provide opportunities for creative strategies by labour and human rights advocates and for positive actions by multinational firms.

### Kukdong

A late 1990s case well-known among labour rights activists involved a Korean-owned factory in Mexico called Kukdong, where workers succeeded in forming the first independent trade union in Mexico's supply chain system. Nearly all the major actors in the codes of conduct movement came together to demand that Nike, Reebok and other firms cancel orders unless factory management honored workers' rights. The companies responded positively, and the workers gained their union.

### Fruit of the Loom

In 2010, the multi-stakeholder Worker Rights Consortium and the American student organization United Students Against Sweatshops launched a nationwide protest against Fruit of the Loom's closure of a factory in Honduras that employed hundreds of workers. Management shut the plant after employees formed the first union in the company's eight Honduran facilities. The US students' social movement argued that the closure violated the company's CSR commitments under multi-stakeholder codes of conduct.

To its credit, Fruit of the Loom sat down with movement representatives and the Honduran trade union to negotiate a resolution. The company agreed to reopen the factory, rehire the workers, recognize the union, and negotiate a collective agreement. Even more remarkably, management agreed to allow freedom of association training in its other Honduran factories. I've been fortunate to be part of an oversight committee that provides freedom of association training emphasizing ILO standards in those non-union plants. Since then, workers in four more Fruit of the Loom factories have formed trade unions.

Where these unions are in place, our oversight group gives follow-up training on positive industrial relations and collective bargaining. Some 5,000 Fruit of the Loom workers in Honduras now have collective agreements providing higher wages, better conditions, and strong health and safety committees. They have maintained high productivity levels, and the company has added employees. It is the world's first sustained, companywide independent union organizing in the apparel manufacturing sector, and it is the product of creative legal maneuvering and social mobilization using a CSR framework.

### Bangladesh Apparel Sector

It required a disaster on the scale of the Rana Plaza building collapse and its 1,129 victims to provoke the latest and most important initiative in the multi-stakeholder social responsibility field.

More than one hundred companies (most of them European, but with twenty American firms, too) joined with global trade unions, independent unions in Bangladesh, and NGOs in Europe, the United States and Bangladesh to create the Bangladesh Accord on Fire and Building Safety. The ILO agreed to serve as an independent chair of the group. Alongside the American NGOs International Labour Rights Forum and Worker Rights Consortium and the Canadian Maquiladora Solidarity Network, the Netherlands NGO Clean Clothes Campaign has played a key role in creating and implementing the Accord.

The Accord contains binding commitments by brands to fund building inspections and necessary repairs, with an innovative arbitration clause to resolve disputes. A group of mostly American companies led by Wal-Mart and The Gap set up an alternative project called the Alliance for Bangladesh Worker Safety. It does not qualify as a genuine multi-stakeholder initiative, however, because it reflects a unilateral move by multinational firms that did not want to negotiate with trade unions and civil society or to include them in governance of the project. Nor does it contain binding obligations or an enforcement mechanism such as arbitration.

At the same time, the United States, Canada and several European governments have also provided important financial and programmatic support to the ILO and the Bangladesh government to quickly increase capacity for inspection and enforcement of safety standards. The Netherlands has taken a leadership role in this initiative, shaping EU strategy and policy to create safe working conditions in the Bangladesh apparel industry.

## **VI. Using Lawsuits in National Courts**

### **A. Unocal and the ATCA**

Any survey of international labour law must take into account what many lawyers do best: filing a lawsuit to win justice. Historically, it was unthinkable to file lawsuits in US courts for workers who suffered abuses in Burma or Mexico or Central America. But in the past quarter-century, American international labour law specialists have found many

ways to take action on behalf of workers in other countries who have been victimized by US-based companies.

International labour and human rights lawyers brought a famous lawsuit in the 1990s against the California-based energy company Unocal. The plaintiffs were Burmese villagers brutalized by the military government into forced labour for a pipeline project undertaken by Unocal and its French partner Total. The villagers had to clear the jungle to make way for the pipeline and build barracks for soldiers guarding it. The same soldiers burned the villagers' homes, raped their wives, and killed them if they resisted.

Lawyers used a 200-year old US law called the Alien Tort Claims Act (ATCA). That law gave federal courts jurisdiction to hear lawsuits brought by foreign citizens alleging torts in violation of international law. When the act was adopted in 1789 it aimed at piracy. Two centuries later, it addressed violations of international human rights law.

Lawyers crafted an "aiding and abetting" theory tying Unocal to the actions of the Burmese dictatorship. The courts rebuffed the company's jurisdictional defences such as *forum non conveniens* (the case should be heard in the courts of Myanmar, not in the United States) and sovereign immunity (it was the government that did these horrible things, not Unocal).

But courts were not functioning in Myanmar's military regime, one of the tests for application of the *forum non conveniens* defence. As for the sovereign immunity defence, internal e-mails, reports, and other communications produced in the discovery phase of litigation, when each side has to convey to the other relevant information in its possession, showed close coordination between Unocal and the military. The court ordered the case to proceed to trial before a jury.

Unocal settled the case before trial for many millions of dollars (the exact amount is confidential). Since then, the US Supreme Court has reduced the scope of the ATCA, requiring more direct involvement by individual company executives for a case to proceed. But the Unocal outcome signalled an important advance in the international labour law arena. It alerted both corporations and social justice advocates that national courts can be used for international labour violations.

## **B. Common Law Tort Claims**

The alien tort statute is not the only jurisdictional basis for lawsuits in American courts on behalf of workers abroad. That act conferred jurisdiction on federal courts. But state courts have always been available for plaintiffs of any nationality to bring common law tort suits against a defendant within the court's jurisdiction, even when the alleged harm occurred in another state or in another country.

Common law tort suits in state courts do not have to implicate international human rights law. They can proceed on traditional tort claims such as negligence, wrongful death, kidnaping, assault and battery, intentional infliction of emotional distress and others.



A successful plaintiff can recover 1) actual damages for expenses or lost income, 2) compensatory damages for pain and suffering, and 3) punitive damages to penalize the offender. These often amount to substantial sums of money. Moreover, in class action suits with many plaintiffs who suffered the same harm, monetary recovery can be extraordinarily large, in the millions and sometimes tens of millions of dollars. Since they normally receive 30 percent of an award as compensation, plaintiffs' lawyers have high incentive to pursue such lawsuits.

### Costa Rican Plantation Workers and Pesticide Poisoning

American lawyers turned to Texas state courts for 800 Central American plantation workers rendered sterile by an American-made pesticide. With bare hands and with no warning of its effects, for years workers applied the pesticide DBCP in banana groves of Costa Rica's flat coastal plains. Made in the United States by Dow Chemical and Shell Oil and known for its sterilizing effects, the chemical had been banned in the United States in 1977. But the companies continued shipping DBCP to Latin America.

The pesticide poisoning meant that the men who worked on the plantations could never have children. International labour lawyers filed a class action suit in Texas state court in Houston, where Dow and Shell had regional headquarters facilities. Alleging negligence on the companies' part, they sought millions of dollars in damages for Costa Rican workers whose lives were ruined by DBCP.

Dow and Shell cited the *forum non conveniens* doctrine to argue that the case should be heard in Costa Rican courts, not in the United States. Costa Rica did have a sound legal system, but its civil law system limited awards for pain and suffering and for punitive damages. Feeble penalties there would not dent company treasuries.

Lawyers countered that workers would come to Texas to testify about lost chances for children, broken marriages, impotence from the psychological effects of sterility, shame in their communities, and other consequences of the companies' actions. Besides that, most of the documentary evidence was in Texas, where key decisions were made.

This jurisdictional dispute went to the Texas Supreme Court and took six years to resolve. In 1990 the court ruled in workers' favour, saying the case could go to trial before a Texas jury. After this ruling, attorneys for the workers and the companies went through months of "discovery," a mandatory pre-trial stage where each side can examine the other's evidence and take statements from each other's witnesses to avoid surprises, and resulting delays, during the trial.

Faced with the likelihood of large punitive damages if the case went to a jury, Dow and Shell settled the case for \$20 million in 1992. Depending on their age and time in the fields, up to \$15,000 went to each worker whose life was ruined by DBCP.

Workers (and lawyers, too) might have gotten more from a sympathetic jury. They had a strong case for large punitive damage awards. Why did the plaintiffs and their attorneys settle the case, if they could get more by going to trial on such a compelling set of facts?

Behind the scenes, the lawyers knew they had problems. How would workers from Costa Rican villages fare under harsh cross-examination by corporate lawyers in a Texas courtroom full of strange people?

Specific dates of employment and dates of using the chemical were critical. For workers who cannot read or write and do not keep records, time is a matter of seasons and events – soon after the earthquake, when my uncle died, in the rainy season – not days, months and years. Sharp cross-examination could wreck the lawyers' time line in their case, not because they were wrong, but because dates were so hard to fix.

Many of the workers were not formally married either. This was a problem under Texas law. Damages for sterility might be denied to workers were not married.

Sheer nervousness was a factor, too. When the first small group of workers came to Houston to give depositions to company attorneys in the pre-trial discovery phase, they were put in a high-rise hotel. They had rarely seen a building taller than two stories, and their experience with those was that earthquakes tore them down. They huddled in terror all night fearing the building was going to topple, and they were tired and confused at the deposition.

Dow and Shell had the resources to string the litigation along for years more. Already several years had passed while the *forum non conveniens* and other jurisdictional matters were resolved. A trial would take at least months, and appeals years more. Some of the older workers had already died waiting for some recompense. Between the challenges of the litigation, the fragility of their clients and the weight of their adversaries, settling the case was perhaps the right choice.

### Guatemalan Apparel Workers and the Comity Principle

International labour lawyers turned to another innovative legal strategy to help end one of the longest and bitterest labour disputes in Guatemala. The American owner of a shirt-making plant called Inexport fired more than 100 union members after they formed a union in 1989 and sought bargaining. He claimed the unionists were communists and guerrilla sympathizers. He hired armed guards to patrol the factory, frightening other workers into submission. Fired workers who staged a protest at the factory gate were assaulted by guards.

The Inexport owner's actions violated Guatemalan law. In proceedings before Guatemalan courts, workers won judicial orders for reinstatement and back pay. But the owner never complied with court orders. The law enforcement system was so feeble that no government officials took steps to enforce labour court rulings. Three years after their firings, the workers were still out of jobs and pay.

In 1992 labour rights advocates devised a plan to sue the Inexport owner in the United States. They traced the owner's sales and distribution networks to find possible jurisdiction in an American court. They learned that the owner's distribution headquarters were in Miami, with substantial funds in Florida banks.

At first the legal team thought to file an ATCA lawsuit. But worried that Florida state court judges would be unsympathetic to an international human rights law argument, they opted for a cause of action that Florida courts often dealt with in international business and international divorce disputes: a lawsuit to enforce the judgment of the Guatemalan courts.

Such a suit would be based on longstanding principles of "comity" among courts of different countries that agree to honour and enforce each other's judgments against defendants in their jurisdiction. A Florida court could not enforce a reinstatement order, but it could seize Inexport's assets in Florida banks to satisfy the Guatemalan courts' back-pay order.

The lawsuit provoked widespread publicity and consternation in Guatemalan business circles. American and Guatemalan company owners all had bank accounts in Miami, as well as homes and condominiums that could be targeted by legal action. "I'll be next if you don't settle this case," Guatemala's businessmen told Inexport's owner. Again, the company owner settled the case rather than risk going to trial. He reinstated all the dismissed workers to their jobs, started regular monthly payments for all back wages, and recognized the union as workers' representative.

#### Mexican Maquiladora Workers and a Bikini Parade

The California-based owner of a maquiladora factory called EMOSA in Tijuana, Mexico, just across the US border from San Diego, California, felt the sting of a well-crafted labour rights lawsuit. At an employee picnic at the Mexican plant in 1995, the owner had more than a hundred women workers perform a "bikini parade" – all in good fun, he said. He videotaped them, with zooming emphasis on certain areas of their bodies.

Maquiladora workers' support groups in Tijuana told San Diego-based labour advocates what happened. An international labour law team filed a civil lawsuit in California state court charging the owner with the common-law tort of "intentional infliction of emotional distress" because of the psychological pain and humiliation they endured. In the discovery phase, the court ordered the defendant to provide a copy of the video to the lawyers.

As a US citizen residing in California, the company's owner fell within the state court's jurisdiction. The company's owner asked the court to dismiss the case because events occurred in Mexico and the workers lived there. The case belongs to Mexican courts, he argued, citing the *forum non conveniens* rule. The judge said, "You're here, the events

took place ten miles away, and the plaintiffs can easily come to give evidence. We are going to trial.”

Fearful of the videotape going to a jury, the owner’s attorneys quickly negotiated a settlement. The company paid thousands of dollars to each of the victims. Wide publicity about the lawsuit in the maquiladora industry had a ripple effect, too, dampening any temptations to treat workers in such a blatantly sexist fashion.

### **C. A Final Note on Lawsuits**

I don’t want to overstate the power of tort lawsuits in American state courts. Jurisdictional hurdles, language differences, cultural differences, travel costs, and other complications mean that conditions must be just right for a lawsuit to proceed.

Most companies can take advantage of intricate rules in US corporate law to insulate themselves against liability for violations by their subsidiaries or subcontractors. They use large corporate law firms in New York, Washington, and Los Angeles that fight a war of motions for dismissal, motions for summary judgment, motions to transfer to another venue, and other courtroom maneuvers. These legal actions take years to resolve and often starve the comparatively smaller resources of labor rights NGOs and attorneys.

Getting past these barriers to a trial of evidence brings new challenges for labor rights advocates. Logistics of representing clients sometimes thousands of miles away are daunting. Language barriers and cultural differences make it difficult to prepare witnesses for testimony and to nurture them through the courtroom experience. Whether to settle a case before judgment is a delicate choice that is often fraught with tension between lawyers and clients. Even after a victory, finding clients to give them money they won can be hard when the live in remote villages or urban slums.

It is no surprise that international lawsuits are dramatic, ground-breaking, and few. But even in a small number of significant cases, this labour rights strategy can win justice for victims and have a wider deterrent effect on potential wrongdoers.

## **IX. Conclusion: A Word to the Students**

Professor van der Heijden and I will enter into the details of these subjects starting with our next class. In the meantime, I hope that the brief survey presented here has conveyed the variety, the interest, and the excitement of work in the international labour law field.

In addition to its intrinsic interest, the field holds employment prospects for new lawyers. Job opportunities are expanding along with the global economy and global concern for human rights and workers’ rights. National governments, international institutions, multinational firms, NGOs, trade unions, multi-stakeholder bodies, socially responsible investment groups and other organizations are adding staff to handle international labour legal and policy concerns.

I realize that my own experience on the side of trade unions and human rights organizations colours my views. I don't mean to seem unfair to the many good people who practice international labour law on behalf of corporations, investment groups, consulting bodies and governments.

Our work as international labour lawyers can be done from a labour and human rights advocacy stance defending workers and confronting rights violators. It can be done from within corporations promoting best practices, superior human resources policies, and strict application of codes of conduct in supply chain operations. It can be done from within investment and consulting groups that advise investors and companies. It can be done from within governments and international organizations trying to balance labour and business interests and reconciling workers' rights with the need for economic development.

One of my former students has just been elected as the United States' independent expert on the UN Human Rights Committee. Another went to work for Apple and is devoted to improving conditions for workers in the electronics supply chain. Another is at Exxon-Mobil managing sustainability projects, including labour standards.

A former student research assistant is now at the US Department of Labour negotiating with foreign governments to improve labour standards under free trade agreements. Other former students are now the Vietnam country director of the Fair Labour Association, counsel to the Worker Rights Consortium in Washington, and senior analyst at Social Accountability International in New York.

One former student is responsible for human rights programs at the International Trade Union Confederation in Brussels. Another just became the labour attaché at the American embassy in Bangladesh. Many have gone to work for specialized consultancies that advise corporations on compliance with social responsibility standards, and for socially responsible funds advising investors on putting their money to good purposes.

I could give more examples, but my point is that we are a growing community of lawyers trying to advance the same cause embodied in the title of the Paul van der Heijden Chair: social justice. For students here who become enthusiastic about the field, I invite you to join us.