LABOR LAW BEYOND U.S. BORDERS: DOES WHAT HAPPENS OUTSIDE OF AMERICA STAY OUTSIDE OF AMERICA?

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INTRODUCTION

This Article examines issues of extraterritoriality that have arisen in American labor law, resistance to such legal extension in Canada and Great Britain, and the law of the nation-state inside of the United States and its potential for being influenced from abroad. Specifically, I focus on some of the labor case law that has emerged under the Alien Tort Claims Act of 1789 as well as the extent to which American courts are examining foreign law in addressing domestic issues as a general proposition. In this connection, the Article discusses some American labor law issues arising under the National Labor Relations Act, particularly during the time of my chairmanship of the National Labor Relations Board during the 1990s. It concludes with a focus upon corporate codes of conduct, particularly that of FirstGroup America, where I serve as the Independent Monitor.

I. AMERICAN LABOR LAW AND ITS EXTRATERRITORIAL EFFECT

In the beginning of modern labor law in the United States was the National Labor Relations Act of 1935 which, through the prism of an administrative process (albeit with the important feature of judicial review upon an expert agency),[1] promoted the basic concept of freedom of association and the process

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of collective bargaining to resolve disputes between labor and management as fundamental public policy. The National War Labor Board augmented this by fostering arbitration and no-strike clauses as well as so-called union security provisions (requiring union "membership" as a condition of employment[2]), which gave labor a more secure place at the table.[3] The United States Supreme Court, after it cleared away much of the underbrush of antitrust law and restraint of trade concepts as applied to organized labor,[4] soon enshrined the principle of freedom of association as part of the First Amendment to the United States Constitution.[5] All of this was more than a half decade before[6] the

paper stage. As the transformation to article commenced, Mr. Scanlon's role expanded appreciably in the extra innings.

1. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (setting forth the present standards for judicial review of NLRB decisions); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

2. NLRB v. General Motors Corp., 373 U.S. 734 (1963) (holding that union security clauses requiring the payment of union initiation fees and dues are lawful under the NLRA).

3. *See generally* JAMES B. ATLESON, LABOR AND THE WARTIME STATE: LABOR RELATIONS AND LAW DURING WORLD WAR II (1998); Jesse Freidin & Francis J. Ulman, *Arbitration and the National War Labor Board*, 58 HARV. L. REV. 309 (1945).

4. United States v. Hutcheson, 312 U.S. 219 (1941) (holding that labor unions acting in their self-interest and not in combination with non-labor groups enjoy statutory exemption from the Sherman Act); *see e.g.* Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 (1945) (holding that statutory labor exemption did not have automatic immunity but rather protected union conduct undertaken by itself or with other labor groups, but not with non-labor groups).

5. Thomas v. Collins, 323 U.S. 516 (1945) (holding state statute requiring registration of labor organizers invalid as applied because First Amendment rights are applicable to union activity); *see also* Smith v. Arkansas State Highway Employees, 441 U.S. 463, 465 (1979) (holding that a state highway commission could refuse to hear grievances filed by a union while entertaining grievances filed by employees individually, while recognizing that "[t]he public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation from doing so"); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) (holding that compulsory collective bargaining is not a constitutional right); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (holding that a court order to disclose names and addresses of organization's members would violate the First Amendment); Atkins v. City of Charlotte, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969) (three-judge court) (finding that the "right of association includes the right to form and join a labor union"); *cf.* Staub v. City of Baxley, 355 U.S. 313 (1958) (striking down city ordinance prohibiting solicitation of members for organization without a permit when discretion as to whether to grant a permit was not cabined by definitive standards or other controlling guides); United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 883 (D.D.C. 1971), *aff'd*, 404 U.S. 802 (1971) (finding that the right of public employees to "organize collectively and to select representatives for the purposes of engaging in collective bargaining" is a fundamental constitutionally protected right).

Frequently, such issues have been dealt with under the doctrine of preemption. *See* Hill v. Florida *ex rel.* Watson, 325 U.S. 538 (1945) (holding that state statute requiring business agents of labor unions to qualify for annual license is preempted because it is in conflict with National Labor Relations Act).

6. William B. Gould IV, *Labor Law for a Global Economy: The Uneasy Case for International Labor Standards*, *in* INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 81, 83 (Robert J. Flanagan & William B. Gould IV eds., 2003)

International Labor Organization's Conventions Nos. 87 and 98 were ratified in Indonesia.[7]

One can safely say that not only American labor law was the inspiration for the development of its Canadian analogue in 1944 as Professor Harry Arthurs has noted,[8] but also that it was important to the ILO itself well before Convention No. 87 was promulgated in 1949. It was American involvement and its adherence to the NLRA that established the environment in which the Declaration of Philadelphia was issued in 1944. And victors' justice was to bring the basic concept of unfair labor practice concept absent the NLRA secret ballot box election machinery to Japan notwithstanding the fact that there was no Japanese word for "unfair labor practices."[9]

Note that the early development of labor law and America's stance towards the international community promoted involvement and contact, albeit within the context of the assumption that others should follow America. The early extraterritoriality decisions fashioned by the Supreme Court assume, for the most part, that National Labor Relations Board jurisdiction could extend beyond our shores if reflected in congressional intent.[10] The Taft-Hartley

[hereinafter Gould, *Uneasy Case*].

> The first of major organized meetings was organized by the Swiss government in 1881, and dealt with international legislation on factories. After a failure to attract sympathetic recruits, Switzerland tried again with a conference planned for Berne in 1889—but it was not held, though four other countries accepted invitations. In 1890, Germany organized a conference in Berlin that fourteen states attended. This conference lasted ten days, but produced no policy conclusions. Subsequent meetings were held in Brussels (the United States participated in this one, along with twelve European countries), Paris, Basel, Cologne, and, once again, Berne.
>
> Between 1904 and 1915 there were more than twenty bilateral agreements on labor issues between various European countries and in one case even the United States. Italy, France, and Germany were the most frequently involved.

Id.

7. *See* BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE (2005); GERRY RODGERS, EDDY LEE, LEE SWEPSTON, & JASMIEN VAN DAELE, THE ILO AND THE QUEST FOR SOCIAL JUSTICE, 1909-2009 (2009); *cf.* William B. Gould IV, Book Review, 44 BRIT. J. INDUS. REL. 582 (2006) (reviewing BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE (2005)). *See generally* E.A. LANDY, THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF I.L.O. SUPERVISION (1966). The issue of international regulations and supervision goes back prior to the twentieth century itself. For a good general discussion of law and policy in this area, see *Developments in the Law—Jobs and Borders: Legal Tools for Altering Labor Conditions Abroad*, 118 HARV. L. REV. 2202 (2005). *See generally* INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY (Robert J. Flanagan & William B. Gould IV eds., 2003).

8. Harry Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271, 279 (2001).

9. For a discussion of the development of the wording of the Japanese law to manage the competing concerns of accurately identifying unlawful behavior and writing a statute that sounded "natural" in Japanese, see WILLIAM B. GOULD IV, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 39-40 (1984) (*citing* TADASHI HANAMI, LABOR RELATIONS IN JAPAN TODAY 80-81 (1979)).

10. Int'l Longshoremen's Ass, Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 198-99 (1970) ("In these cases, we concluded that, since the Act primarily concerns strife

amendments to the NLRA, though widely decried by organized labor as a "slave labor act" principally for imposing restrictions and injunctions upon national emergency disputes which affected health and safety,[11] restricted various forms of union strike activity, and made unions suable for breach of a no-strike pledge[12]—did not appear to interfere with union growth and left the country's commitment to freedom of association and collective bargaining unamended! Thus, when one considers the body of law that may be exported under the rubric of extraterritoriality, both rights and obligations of organized labor are inevitably part of what is extraterritorial but there has been no diminution of the public policy promoting freedom of association and collective bargaining.

The most prominent example dealing with the extraterritoriality issue came when the Board, addressing cases involving professional leagues which

between American employers and employees, we could reasonably expect Congress to have stated expressly any intention to include within its coverage disputes between foreign ships and their foreign crews."); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (holding intrusion into arena of international relations must be affirmatively expressed by Congress). *But see* Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244 (1991) (expressing a rigid requirement for Congressional intent in favor of extraterritoriality). Aligned with *Aramco* are *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) (holding that the NLRA only applies to workplaces in the United States and its possessions); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949) (holding that Congress's Eight Hour law does not apply to a contract where the construction work is to be done in a foreign country that the United States has no control over).

11. *See* Labor-Management Relations (Taft-Hartley) Act § 206, 29 U.S.C. § 176; United Steelworkers of America v. United States, 361 U.S. 39 (1959) (holding that evidence of the strike's effect on specific defense projects supported a judgment that the strike endangered the nation's safety).

12. Labor-Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185; *see* Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970) (holding that the anti-injunction provisions of the Norris-LaGuardia Act do not preclude a federal district court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement when the agreement contains provisions enforceable under Section 301(a) of the Labor-Management Relations Act for binding arbitration of the grievance dispute that led to the strike); William B. Gould IV, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 STAN. L. REV. 533 (1978); William B. Gould IV, *On Labor Injunctions, Unions, and the Judges: The* Boys Markets *Case*, 1970 SUP. CT. REV. 215; *cf.* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401 (1981) (holding that members of a union who go out on a wildcat strike, in violation of a strike clause, are not liable for damages); William B. Gould IV, *The Supreme Court's Labor and Employment Docket in the 1980 Term*, 53 U. COLO. L. REV. 1 (1981). However, as noted *infra*, note 15, the approach to extraterritoriality was cautious even in cases involving Section 301. *See* Labor Union of Pico Korea v. Pico Prods., Inc., 968 F.2d 191, 194-96 (2d Cir. 1992) (holding that Section 301 of the Labor-Management Relations Act is inapplicable to a labor contract executed between a South Korean union and a wholly-owned South Korean subsidiary of a U.S. corporation because there is no "unmistakably clear" legislative intent for extraterritorial application which is necessary to overcome the general rule that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done") (citations omitted).

covered both the United States and Canada, quietly repudiated[13] an earlier decision involving soccer refusing to certify an appropriate unit covering a Canadian club,[14] and quickly extended our jurisdiction north of the border.[15] This occurred when my Board sought an injunction in the 1994–95 baseball strike covering Canadian as well as American clubs.[16] Here the Board simply mirrored what our predecessors had done during the 1981 strike (the second in history), i.e., seeking league-wide injunctive relief for both the United States and Canada in American courts.[17] Within a few months of that decision, our Board, in an election involving the National Basketball Association and the NBA Players Association, through the New York City Regional Director, asserted jurisdiction over Canadian clubs. The Regional Director noted:

> The National Basketball Players Association . . . has been recognized by the NBA as the exclusive bargaining representative for players to be employed by these teams [the Toronto Raptors and the Vancouver Grizzlies] . . . in the future and has appointed an agent for service in Canada. The record further reveals that the players initially on the rosters of these two teams were acquired from other NBA member teams as a result of the expansion draft and, of course, will play close to 50% of the season within the United States . . . . It is well settled that the Board's statutory jurisdiction encompasses foreign employers doing business within the territorial United

13. *See* cases cited *infra*, notes 16, 17 and 18.

14. North American Soccer League, 241 N.L.R.B. 1225 (1979) (holding North American Soccer League to be a single entity, but refusing to exert jurisdiction over the Canada-based clubs on the grounds of extraterritoriality). The Fifth Circuit affirmed the Board's holding, but did not address the extraterritoriality issue. North Am. Soccer League v. NLRB, 613 F.2d 1379 (5th Cir. 1980).

15. This was not the first time that American labor law had been applied to subject matter in Canada. *In re* Detroit & Can. Tunnel Corp., 83 N.L.R.B. 727, 731-32 (1949) (asserting jurisdiction where only half of the work involved was performed in the United States). However, most of the Board's decisions, even during my chairmanship, have been cautious in approaching the issue of extraterritoriality. *Compare* Range Sys. Eng'g Support, 326 N.L.R.B. 1047, 1048 (1998) (upholding Board's determination that Board's jurisdiction does not extend to cover U.S. citizens permanently working at a foreign facility of a U.S. employer), Computer Scis. Raytheon, 318 N.L.R.B. 966, 970-71 (1995) (holding that Board's jurisdiction does not extend to cover employees of American companies working at military bases in foreign territories), GTE Automatic Elec. Inc., 226 N.L.R.B. 1222, 1223 (1976) (holding that Board's jurisdiction does not extend to cover workers permanently assigned to Iran), *and* RCA OMS, Inc., 202 N.L.R.B. 228, 228 (1973) (holding that Board's jurisdiction does not extend to cover Greenland-based employees), *with* Freeport Transp., Inc., 220 N.L.R.B. 833, 834 (1975) (asserting jurisdiction when half of the employees' work gets performed in the United States), *and* Detroit & Can. Tunnel Corp., 83 N.L.R.B. 727, 731-32 (1949) (holding that workers who work both in the United States and Canada should be included in an election while those who work exclusively in Canada should be excluded from it).

16. Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Cir. 1995).

17. Silverman on Behalf of N.L.R.B. v. Major League Baseball Player Relations Comm., Inc., 516 F. Supp. 588 (S.D.N.Y. 1981).

States.[18]

In a sense, these cases go beyond the earlier and more recent ones[19] carrying American labor law into Canada and Mexico when workers are temporarily employed in those countries. Developments under antitrust law,[20] and even in the antidiscrimination arena where the Court had held that the Civil Rights Act of 1964 did not apply to discriminatory conduct in Saudi Arabia against Jews[21] and was quickly reversed by Congress,[22] also support an expansive view of extraterritoriality.

Of course, the practical effect of extraterritoriality cannot be viewed *in vacuo*. Some consideration of foreign jurisdictions' reactions to extraterritoriality must be taken into account. Inevitably there has been pushback. Of course, outside of the context of extraterritoriality itself, the first major illustration of this is from the 1970s in Great Britain where the unions would not accept the idea that Taft-Hartley should come to the United Kingdom[23] and the elections of 1974 and 1976 reversed a brief interlude of the perceived transplanting of America associated with the Conservative Government. And in a case directly implicating the American extraterritorial issue—even before the NLRB asserted jurisdiction over baseball and basketball—the Ontario Labor Relations Board asserted jurisdiction over a lockout of baseball umpires and provided for the replacement of the locked-out umpires while noting that "the situation in Ontario is only a small slice of the collective bargaining pie that is largely driven and regulated by forces outside

18. Nat'l Basketball Ass'n, NLRB Case No. 2-RD-1354 (1995) (decision of Regional Director, Region 2).

19. The Board paved the way with a series of decisions protecting the rights of workers who worked both in the United States and abroad. *See*, *e.g.*, Detroit & Canada Tunnel Corp., 83 N.L.R.B. at 731-32 (asserting jurisdiction where only half of the work involved was performed in the United States); Cal. Gas Transport, Inc., 347 N.L.R.B. 1314 (2006), *enf'd*, 507 F.3d 847 (5th Cir. 2007) (Mexico); In re Asplundh Tree Expert Co., 336 N.L.R.B. 1106 (2001), *enforcement denied*, Asplundh Tree Expert Co., 365 F.3d 168 (3d Cir. 2004) (Canada). At the Supreme Court level, see F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 174 (2004) (instructing that as long as a "statute's language reasonably permits an interpretation" that avoids extraterritorial application, a court "should adopt it"); EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991) (requiring "clearly expressed" intent for a statute to apply beyond U.S. borders). One of the best discussions of this subject matter is Todd Keithley, *Does the National Labor Relations Act Extend to Americans Who Are Temporarily Abroad?*, 105 COLUM. L. REV. 2135 (2005).

20. *F. Hoffmann-La Roche Ltd.*, 542 U.S. at 165 (recognizing extraterritorial reach of Sherman Act, but holding that exercise of such jurisdiction would not be reasonable where a foreign plaintiff's claim is based wholly on foreign harm because it "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs").

21. *Aramco*, 499 U.S. 244 (holding that Title VII of the Civil Rights Act did not extend to an American citizen working abroad under the employ of an American corporation).

22. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1077.

23. William B. Gould IV, *Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971*, 81 YALE L.J. 1421 (1972).

Ontario."[24] Recognizing that there was a tactical advantage in the fact that the replacement of those locked out was lawful in the United States but unlawful in Ontario, the Board noted that "fragmented collective bargaining" and the assertion of jurisdiction by different provincial boards was inherently part of the Canadian legal framework. Within months of this decision, the Ontario Board asserted jurisdiction over NBA referees who had also been locked out. The Board, noting that no one had ever suggested that tradespeople in the construction industry were beyond Ontario jurisdiction simply because their employment in Ontario was "sporadic", and companies based elsewhere, applied the reasoning of the baseball umpires case and asserted jurisdiction.[25] Although the British Columbia Labor Relations Board subsequently refused to exercise jurisdiction in response to a petition for representation by players of the Vancouver Canucks,[26] the United States appears to have taken little note of these developments in sports. Here, globalization has become the watchword of the twenty-first century and international tensions—between, for instance, the legal systems of Japan and the United States[27]—loom large.

Recently, however, there has suddenly emerged a considerable interest in developments north of the border in response to the debate about the Employee Free Choice Act and labor law reform in this country. For now, there is a focus upon the card-check system of recognition which was once a uniform practice in Canada in the 1960s, but has now been abandoned by a majority of the provinces.[28] Similarly, there has been much discussion of first contract arbitration, a practice enshrined in the legislation of many of the Canadian provinces, but one which is used selectively and sparingly, except in Manitoba where it is automatically available at the end of a specific time period. This important feature appears to have escaped the attention of the first contract

24. Ass'n of Major League Umpires v. American League, [1995] O.L.R.B. 540 (Can.).

25. Nat'l Basketball Referees Ass'n v. Nat'l Basketball Ass'n, [1995] OLRB 1389 (Can.).

26. Orca Bay Hockey Limited Partnership, [2007] B.C.L.R.B. No. B172/2007 (July 31, 2007), *available at* http://www.lrb.bc.ca/decisions/B172$2007.pdf .

27. *See* William B. Gould IV, *Globalization in Collective Bargaining, Baseball, and Matsuzaka*, 28 COMP. LAB. L. & POL'Y J. 283 (2007); Victoria J. Siesta, Note, *Out at Home: Challenging the United States-Japanese Player Contract Agreement Under Japanese Law*, 33 BROOK J. INT'L L. 1069 (2008). *See infra* note 29.

28. William B. Gould, IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1, 6 (2009); William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in America*, 43 U.S.F. L. REV. 291, 305 (2009). For an extensive discussion of relevant Canadian provisions of law, which relate to the contemporary labor law reform debate in the United States, see Ginette Brazeau, Can. Indus. Relations Bd., Canadian Experience with Certification by Card Check and First Agreement Arbitration (July 20, 2009) (on file with author); Pierre Flageole, Vice-Chair, Commission des Relations du Travail du Québec, Card Check and First Contract Arbitration: The Quebec Experience (July 20, 2009) (on file with author); Kenneth G. Love, Chairperson, Sask. Labour Relations Bd., Speech to the Association of Labor Relations Agencies (July 20, 2009) (on file with author).

arbitration proponents in the United States.

Tactical advantage is key in extraterritorial litigation or discussion of comparative experiences. The British unions are a good example of this: they were initially hostile to the Common Market, as it was called in the '50s and '60s, but then turned to the European Union as a lifeboat to rescue them from the repressive labor legislation of the Thatcher Government. American unions, similarly, have tried to extend freedom of association to disputes involving workers employed, for instance, by ships operating under so-called "flags of convenience" and for whom the law of developing countries provided minimal assistance.[29]

But there has been pushback aplenty in some of the adjudicated cases where the British Columbia Labour Board considered a case filed by the Vancouver Canucks, Local of the NHL Players Association[30]—and the Ontario Labour Relations Board took jurisdiction[31] knowing that locked-out workers might be replaced altogether in the United States,[32] but would not be in Canada. Ironically, American unions, which have pushed for the protection of extraterritoriality, recoiled against this approach when the Board's jurisdiction and its prohibition against certain kinds of secondary boycotts was applied to secondary activity engaged in by American and Japanese unions in concert. In a case arising in the 1990s, I noted in dissent[33] that the Supreme Court holding in *International Longshoremen's Association v. Allied International Inc.* (finding the International Longshoremen's Association's (ILA's) refusal to unload cargo shipped from the Soviet Union in protest of the Afghanistan invasion by the U.S.S.R. fell within the NLRB's jurisdiction)[34] was applicable here because the unlawful activity was not "wholly extraterritorial" and the Board's assertion of jurisdiction posed no threat of interference with comity since the Board did not seek jurisdiction over Japanese unions.[35] In the *Coastal Stevedoring* case I noted there was a statutory vacuum in Japan that had not

29. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); *cf.* Int'l Longshoremen's Ass'n v. Ariadne Shipping Co., 397 U.S. 195 (1970) (upholding the right to picket a foreign ship for substandard wage conditions while it was docked in Florida).

30. Orca Bay Hockey Ltd. P'ship, [2007] B.C.L.R.B. No. B172/2007 (July 31, 2007).

31. Ass'n of Major League Umpires v. Am. League, [1995] O.L.R.B. 540 (Can.); Nat'l Basketball Referees Ass'n v. Nat'l Basketball Ass'n, [1995] OLRB 1389 (Can.).

32. NLRB v. Brown, 380 U.S. 278 (1965) (regarding lockouts in multi-employer bargaining contexts); Harter Equip., Inc., 280 N.L.R.B. 597 (1986), *enforced*, Local 825, Int'l Union of Operating Eng'rs, 829 F.2d 458 (3d Cir. 1987).

33. Int'l Longshoremen's Ass'n, 323 N.L.R.B. 1029, 1031 (1997) *on remand from* Int'l Longshoremen's Ass'n v. NLRB, 56 F.3d 205 (D.C. Cir. 1995) (Chairman Gould, dissenting) (attached as an Appendix A). The Board majority did not address the extraterritoriality issue and thus my opinion cannot be viewed as a dissent on this matter.

34. Int'l Longshoremen's Ass'n v. Allied Int'l Inc., 456 U.S. 212 (1982) (holding that secondary boycotts were not protected, even if motivated by political rather than economic purposes).

35. 323 N.L.R.B. at 1031.

enacted Taft-Hartley-type amendments, thus diminishing the potential for conflict between the two statutory frameworks. This was a rare instance of an American labor law opinion actually examining foreign law. My judgment remains that my dissent represents a correct view, particularly given the result would not have offended comity or public policy.

As a general proposition, agencies and courts have shied away from reliance upon or examination of foreign or international law in labor cases. A few years back I wrote that had I relied upon an ILO Convention in any of my opinions as Chairman of the NLRB, I would have most probably been impeached and, at a minimum, the already-diminished appropriations coming to my agency would have been reduced further.[36] This situation is hardly surprising given the fact that, except in two relatively minor instances, the United States has not ratified any of the key or "core" ILO Conventions, i.e., those addressing freedom of association, discrimination, forced labor, and child labor.[37] Indeed, in the late 1970s, the United States withdrew from the ILO altogether principally because of the agency's condemnation of Israel, though Israel itself did not withdraw![38] While the Supreme Court has frequently confronted international legal issues even in this new, post-September 11, 2001 era, the basic concepts have yet to weave their way into American thinking.

And yet, some changes are taking place in the United States, which fall roughly into two categories. The first category—in which American courts have specifically referenced and relied upon international labor law obligations irrespective of whether the United States has ratified relevant treaties or not—are the cases arising under the Alien Tort Claims Act of 1789,[39] an area about

36. William B. Gould IV, *Labor Law and Its Limits: Some Proposals for Reform*, 49 WAYNE L. REV. 667, 684 (2003).

37. The ILO has been extremely ineffective—a state of affairs no doubt furthered by American attitudes. *See* Diamond Ashiagbor, *Collective Labor Rights and the European Social Model*, 3 L. & ETHICS OF HUM. RTS. 222 (2009); Breen Creighton, *The ILO and Protection of Freedom of Association in the United Kingdom*, *in* HUMAN RIGHTS AND LABOUR LAW: ESSAYS FOR PAUL O'HIGGINS 1, 1-2 (K.D. Ewing et al. eds., 1994); Alan Hyde, *The International Labor Organization in the Stag Hunt for Global Labor Rights*, 3 L. & ETHICS OF HUM. RTS. 153 (2009); Virginia A. Leary, *Lessons from the Experience of the International Labour Organization*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 580 (Philip Alston ed., 1992); Faina Milman-Sivan, *Freedom of Association as a Core Labor Right and the ILO: Toward a Normative Framework*, 3 L. & ETHICS OF HUM. RTS. 109 (2009); Guy Mundlak, De-Terrotorializing Labor Law, 3 L. & ETHICS OF HUM. RTS. 188 (2009); Hani Ofek-Ghendler, *Globalization and Social Justice: The Right to Minimum Wage*, 3 L. & ETHICS OF HUM. RTS. 266 (2009); Note, *Reconsidering Extraterritoriality: U.S. Labor Law, Transnational Organizing, and the Globalization of the Airline Industry*, 47 COLUM. J. TRANSNAT'L L. 576 (2009).

38. WALTER GALENSON, INTERNATIONAL LABOR ORGANIZATION: AN AMERICAN VIEW (1981).

39. 28 U.S.C. § 1350 (2006) (granting federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

which Professor William Dodge has spoken at this conference.[40] A second area involves the adoption or consideration of concepts relating to international labor law but in which no explicit reference has been made to international labor law itself. It is to the first that I now turn.

II. ALIEN TORT CLAIMS ACT OF 1789

One of the most remarkable developments of American law in recent years has been the use of the Alien Tort Claims Act (ATCA) of 1789 to regulate conduct of American corporations doing business abroad under the standards of international labor law as reflected by the Conventions establishing "core" principles according to international norms. These cases have arisen with considerable frequency over the past three decades.[41]

A landmark decision not involving labor issues, *Sosa v. Alvarez-Machain*, has set the stage for these developments.[42] In *Sosa* the Court concluded "history and practice" sustains the view that "federal courts could entertain claims once the jurisdictional grant [of the 1789 statute] was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time."[43] The Court, speaking through Justice Souter, emphasized as necessary "judicial caution" in exercising jurisdiction and required any claim predicated upon the contemporary law of nations to "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[44] The bar must be "high" in recognizing causes of action for violating international law, said the Court, noting that there might be "potential implications" for foreign relations between the United States and other countries. The door to such actions, said the Court, was "still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[45] A number of cases, some of them in the freedom of association arena, have come before the courts since *Sosa*.

In an ATCA case coming before *Sosa*[46]*—Estate of Rodriguez v. Drummond Co.*—a Colombian union and the heirs of mineworkers asserted

40. William S. Dodge, *Labor Rights Claims Under the Alien Tort Statute*, *in* INTERNATIONAL LABOR STANDARDS, RIGHTS AND BEYOND: A CONFERENCE AT STANFORD LAW SCHOOL (2009) (on file with author).

41. The first important case to arise with regards to the Alien Tort Statute is generally considered to be *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

42. 542 U.S. 692 (2004). *See generally* Note, *Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 COLUM. L. REV. 112 (2006); Beth Stephens, *Sosa v. Alvarez-Machain: "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533 (2004).

43. *Sosa*, 542 U.S. at 714.

44. *Id.* at 725.

45. *Id.* at 729.

46. For some of the cases that came after *Sosa*, see *infra* note 54.

claims in federal district court under both ATCA and the Torture Victim Protection Act.[47] Decedent mineworkers had worked in the defendant company's coal mines in Colombia and had been the leaders of a union in negotiation with the company. The complaint alleged that Colombian paramilitaries, acting as agents of the company, entered the mining facilities and murdered the mineworkers. The court concluded that ILO Conventions 87 and 98, which protect the right to organize and engage in collective bargaining, are "norms of customary international law," even though the United States has not ratified either of them.[48] The court notes that the "rights to associate and organize" have been characterized as "fundamental rights" in Article 22 of the International Covenant on Civil and Political Rights.[49] The court further notes that "rights to associate and organize are reflected [not only] in the [Covenant], [but also] the Universal Declaration of Human Rights, and Conventions 87 and 98 of the ILO."[50]

The Supreme Court subsequently said in *Sosa* that, although the Covenant does bind the United States as a matter of international law, the United States had ratified the covenant with the express understanding that it was not self-executing and did not "create obligations enforceable in the federal courts."[51] And on the Universal Declaration, the Court said it "does not of its own force impose obligations as a matter of international law."[52] Both the Covenant and the Universal Declaration could not therefore establish "relevant and applicable" rules of international law enforceable in United States courts.[53]

In *Aldana v. Fresh Del Monte Produce, Inc.*, also decided in the months immediately before *Sosa*, the district court rejected the defendants' argument that a lack of "consistent practice" among nations in upholding the rights to associate and organize establishes the absence of an international legal norm.[54] However, the court went on to note that the fact that less than one-third of ILO signatory countries have ratified the Conventions undercuts any "firm basis for declaring a universal obligation of customary international law for the right to associate and organize."[55] The Eleventh Circuit opinion, issued after *Sosa*,

47. 256 F. Supp. 2d 1250, 1253-54 (N.D. Ala. 2003).

48. *Id.* at 1263.

49. *Id.* at 1264.

50. *Id.*

51. 542 U.S. at 735.

52. *Id.* at 734.

53. *Id.* at 735.

54. 305 F. Supp. 2d 1285, 1297 (S.D. Fla. 2003), *aff'd in part and vacated in part* 416 F.3d 1242 (11th Cir. 2005). More recently, the same circuit court of appeals has taken a restrictive view of claims of torture by union leaders. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1258 (11th Cir. 2009) (upholding district court's dismissal of ATCA claims for lack of subject matter jurisdiction because the Colombia government's registration and toleration of private paramilitary forces did not transform those forces' acts into state action and because the war crimes exception did not apply).

55. *Aldana*, 305 F.Supp.2d at 1298.

found that the "alleged systematic and widespread efforts against organized labor in Guatemala [are] too tenuous to establish a prima facie case, especially in the light of *Sosa*'s demand for vigilant doorkeeping."[56]

In any event, the failure to unanimously ratify the Conventions could pose a barrier to the right of foreign workers outside of the United States to bring claims in American courts under *Sosa* case law. The United States has been a major proponent of and signatory to the 1998 Declaration on Fundamental Principles and Rights at Work unanimously concurred in by all members of the ILO—but the instrument by its own terms does not carry the force of law and is simply designed to promote observation of so-called "core" principles. Though the United States has not ratified Conventions 87 and 98 dealing with the right to organize and engage in collective bargaining, the relatively high overall rate of ratification coupled with the inclusion of the rights to associate and organize in other international instruments would seem to argue for the existence of an international consensus and customary norms of international law as contemplated by *Sosa*.[57]

Aside from ILO Conventions 87 and 98, other labor Conventions arising out of the Declaration have figured in some of the post-*Sosa* ATCA litigation. Beyond freedom of association and organizing, the major labor principles[58] promoted by the Declaration include (1) prohibitions against forced labor;[59] (2) prohibitions against discrimination in employment; and (3) "effective"

56. Aldana v. Fresh Del Monte Produce, Inc., 416 F.3d 1242, 1247 (11th Cir. 2005).

57. Dodge, *Labor Rights Under ATCA*, *supra* note 38 at *4. Professor Dodge points out that the authority upon which the Supreme Court principally relied when defining the customary international law of human rights—Section 702 of the Restatement (Third) of Foreign Law—repeatedly cites the Universal Declaration, the Covenant and other treaties that could not "themselves establish the relevant and applicable rule of international law." *Id.* at *4-5, *5 n.17 (*citing* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987) (repeatedly citing to the Universal Declaration of human rights and the International Covenant on Civil and Political Rights)); *see also id.* at *5 n.18 (*citing* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. i ("Some multilateral agreements may come to be law for non-parties that do not actively dissent. . . . A wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law.")).

58. Some of the difficulties with these standards lie in the fact that unilateral standard setting is prone to executive manipulation and that treaties simply require each nation to adhere to "each country's existing labor laws… [and] do not identify a common floor." Developments in the Law, *Legal Tools for Altering Labor Conditions Abroad*, 118 HARV. L. REV. 2202, 2214 (2005). In addition, the ILO is ineffective in enforcing its core standards. *See generally* BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 47-56 (2005).

59. For prison labor problems that give rise to rulings under the National Labor Relations Act, see, for example, Speedrack Products Group, Ltd. v. N.L.R.B, 114 F.3d 1276, 1282 (D.C. Cir. 1997) (citing 320 NLRB 627, 629-30 (1995) (Chairman Gould, concurring and dissenting)), in which the court accepted the dissent's view that free-world workers on work release could be covered within the same appropriate unit under the National Labor Relations Act. The issues with prison labor and the reconciliation of American practice with international labor law have indeed been problematic. Gould, *Uneasy Case*, *supra* note 6, at 99, 102.

abolition of child labor. The United States has ratified one of the forced labor conventions, Convention 105, as well as one of the child labor conventions, Convention 182. Both have figured in some of the post-*Sosa* ATCA litigation.

Aside from the enormous amount of time litigation requires and the regular obstacles to transnational litigation posed by extraterritorial discovery, supervision and enforcement,[60] post-*Sosa* ATCA litigation presents an additional obstacle when applying even ratified Conventions such as 105 and 182. The problem is illustrated in a recent case, *Roe I v. Bridgestone Corp.*[61] *Bridgestone*, involving alleged forced labor violations in Liberia by a company doing business in the United States, is a good example of the way in which the Court's admonition in *Sosa* is being read.[62] Workers on a Liberian rubber plantation alleged, *inter alia*, that exploitative working conditions coupled with the plantation's physical isolation amounted to forced labor. In a careful and painstaking opinion, the court dismissed the case, noting that the labor practices at issue were "somewhere on a continuum that ranges from those clear violations of international law (slavery or labor forced at the point of soldiers' bayonets) to more ambiguous situations involving poor working conditions and meager or exploitative wages."[63]

The court began by assuming that a forced labor violation could be made out under ATCA if any Convention was deemed applicable in the United States. Here, the relevant Conventions on forced labor consisted of both ILO Conventions 29 and 105. The court noted that the United States has not ratified Convention 29 but that it and Liberia had ratified Convention 105 which "did not outlaw all forms of forced labor", but rather suppressed any form of it used "for certain prohibited purposes, including political and ideological education, economic development, [or] as a means of labor discipline."[64]

The court, in language which has implications for American slave reparations, rejected the idea that the workers' labor was forced because their

60. *Cf.*, Bauman v. DaimlerChrysler, 579 F.3d 1088 (9th Cir. 2009) (upholding dismissal of a case brought by Argentinian plaintiffs against DaimlerChrysler for lack of personal jurisdiction because the Europe-based parent corporation did not have sufficient control over its American subsidiary to support a finding of an agency relationship).

61. 492 F. Supp. 2d 988 (S.D. Ind. 2007).

62. *See also* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2008) (en banc) (allowing the imposition of a qualified requirement that plaintiffs exhaust the remedies available in the jurisdiction where the tort occurred before bringing ATCA claim); Licea v. Curacao Drydock Co., Inc., 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008) (awarding a total of $80 million under ATCA where the company refused to defend the case); Doe v. Wal-Mart Stores, Inc., 2007 U.S. Dist. LEXIS 98102, 20-21 (C.D. Cal. Mar. 30, 2007) (dismissing an ATCA claim based on alleged arbitrary withholding of employees' pay for failing to clear the equivalent claim requirement set by *Sosa*), *aff'd*, Doe v. Wal-Mart Stores, Inc., 2009 U.S. App. LEXIS 15279 (9th Cir. July 10, 2009).

63. *Roe I*, 492 F. Supp. 2d at 1010.

64. *Id.* at 1012 (noting that Convention 105 applies to the use of forced labor as punishment for participation in strikes and as a means for racial, social, national, or religious discrimination).

ancestors were abducted, kidnapped, and physically threatened, countering that "plaintiffs are not in a position to assert claims for money damages today based on the mistreatment of their ancestors."[65] The court also rejected the claim that workers were employed under forced labor conditions because they had nothing left to spend after they had spent their wages at company stores and other company facilities, noting that they did not allege "induced indebtedness" under Convention 29 (a form of indebtedness once prevalent in the United States in connection with "sharecropping" in the Deep South). The court also rejected the plaintiffs' argument that the absence of employment alternatives which forces workers to remain in their jobs, is a form of forced labor under international law. Finally, with regard to alleged threats of dismissal from current employment, the court noted "that the expressed fear of losing one's current employment is a clear indicator that the current employment is not forced labor. . . .[Plaintiffs allege that they] might lose the same jobs they say they are being forced to perform."[66]

Undoubtedly, the court's drawing of a demarcation line between exploitative conditions and forced labor is valid. The question is whether the line was drawn appropriately in *Bridgestone*. Improvement in substantive wages, hours, and working conditions is not, as the court noted, a remedy for forced labor:

Higher wages, rest days and holidays, and the security of a proper employment relationship, better housing, education, and medical care are all understandable desires. But better wages and working conditions are not the remedy for the forced labor condemned by international law. They remedy for truly forced labor should be termination of the employment and the freedom to go elsewhere. . . Yet the adult plaintiffs allege in their Complaint that they are afraid of losing the very jobs they say they are forced to perform.[67]

Plaintiffs in *Bridgestone*, however, argued that by virtue of their isolation they could not leave their jobs unless they had financial assistance to do so. The court replied that it was "not aware of a basis in international law for stating that an employer must provide transportation or food or other necessities to a worker who wishes to leave his job."[68] What was missing here, in the court's view, was punishment inflicted for leaving the job: "Without that element of deliberately inflicted harm, the definition of forced labor would expand to reach many people who work at poor jobs to support themselves simply because they have no better alternative."[69] Yet if, in fact, workers are unable to leave their jobs because of impoverished conditions, this argues *for* a prima facie finding of a forced labor violation.

65. *Id.* at 1014.
66. *Id.*
67. *Id.* at 1016 (citations omitted).
68. *Id.* at 1018.
69. *Id.*

The court did not dismiss other claims relating to child labor where the allegation was of a violation of ILO Convention 182, which prohibits the worst forms of child labor, such as those that are likely to impair the child's health, safety, or morals. In both the child labor and forced labor contexts, the court's assumption was that ratification by the United States was a prerequisite for ATCA liability. On the forced labor issue the court said that "[i]t would be odd indeed if a United States court were to treat as universal and binding in other nations an international convention that the United States government has declined to ratify itself."[70] But is this a requirement under ATCA? In *Filartiga v. Pena-Irala*, the Court of Appeals for the Second Circuit seems to have assumed that an international norm which is part of the law of nations under the 1789 statute does not necessarily require ratification.[71] That decision does not appear to be contradicted by the Court in *Sosa*. On the other hand, *Sosa* seemed to assume that the Universal Declaration of Human Rights, for instance, could only be the basis for an ATCA violation if there was an express intent to make it domestic law. The Second Circuit weighed in on the issue post-*Sosa* in the *South African Apartheid Litigation* cases.[72] There, as Judge Korman's dissent implies, plaintiffs' ATCA claims were remanded by the Circuit Court majority for further proceeding after reversal of the lower court's dismissal even though the United States had not ratified the applicable international instrument on apartheid.[73]

I am of the view that *Bridgestone* and Judge Korman's dissent in the *South African Apartheid* case are in error in that the treatment of similar issues inside the borders of the United States can act, alongside of the requisite international consensus, as a basis for universality and specificity within the meaning of the extant precedent.

70. *Id.* at 1015.

71. 630 F.2d 876, 880 (2d Cir. 1980) ("In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.").

72. *In re* South African Apartheid Litigation, 346 F. Supp. 2d 548 (S.D.N.Y. 2004), *aff'd in part, vacated in part, and remanded sub nom.* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007) (holding that actions taken by multinational corporations doing business in apartheid South Africa did not amount to state action in violation of international law, even though the corporations benefited from unlawful state action by the apartheid government).

73. *See* Khulumani, 504 F.3d at 320 (Korman, J., concurring in part and dissenting in part) ("[W]hile it may be an overstatement to describe the list of countries that have ratified the Convention as a rogues' gallery of human rights violators, the Convention has not been ratified by the United States, most other mature democracies, or other states that play a significant role in international affairs, including three of the five permanent members of the United Nations Security Council—the United States, the United Kingdom, and France. Indeed, it has not been ratified by the post-apartheid Republic of South Africa. Thus, it is not a persuasive source of customary international law on this point." (citation omitted)).

This is why, given the relationship between slavery and its prohibition under the Thirteenth Amendment with the twentieth-century constitutional progeny which has extended its prohibition beyond the pre-1865 institution,[74] forced labor, is part of ATCA. The same is true of discrimination, given the comprehensive nature of American fair employment legislation beginning in the 1960s and Congress's reversal of the one anti-extraterritorial case, *Arabian American Oil Company*, in which the Supreme Court had earlier refused to extend antidiscrimination law beyond the United States.[75]

Moreover, the fact is, as the Supreme Court of Norway has assumed in addressing alleged violations of freedom of association in its country,[76] inevitably American courts must see these issues within the backdrop of American law. This is the process that was undertaken in the *Unocal* decision.[77] The United States Supreme Court, notwithstanding some recent backsliding,[78] has interpreted the Thirteenth Amendment expansively to extend

74. The Court has held peonage laws to be unconstitutional under the Thirteenth Amendment. *See* Pollack v. Williams, 322 U.S. 4, 15 (1944) (holding forced labor unconstitutional except as a "means of punishing crime" or as a part of limited civic duty or public service); Taylor v. Georgia, 315 U.S. 25, 29 (1942) (holding that antifraud statutes compelling employment violate the Thirteenth Amendment); Bailey v. Alabama, 219 U.S. 219, 227-28 (1911) (holding that antifraud statutes compelling employment violate the Thirteenth Amendment); Clyatt v. United States, 197 U.S. 207, 215-17 (1905) (holding that debt bondage was a form of "involuntary servitude" under the Thirteenth Amendment). However, coerced labor for a public purpose has been held to be constitutional. Butler v. Perry, 240 U.S. 328 (1916). *See also* Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002); Igor Fuks, Note, Sosa v. Alvarez-Machain *and the Future of ACTA Litigation*, 106 COLUM. L. REV. 112 (2006).

75. EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

76. *Basic Rights Pertaining to Labour*, 17 INT'L LAB. L. REP. 95, 110-11 (1998).

77. Doe v. Unocal Corp., 110 F.Supp.2d 1294, 1308 (C.D. Cal. 2000), *opinion vacated, appeal dismissed by* Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005):

Unocal cites the Supreme Court's 1916 opinion in *Butler v. Perry*, 240 U.S. 328 (1916), to support its argument that governments are permitted to utilize forced labor for the public good. In *Butler*, a Florida statute which forced residents to work on roads and bridges for ten hours a day for six days a year or to pay $3, was challenged under the 13th Amendment. *Id.* at 329-30. The Supreme Court, in upholding the statute, stated that it is "well settled that, unless restrained by some constitutional limitation, a state has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is a part of the duty which he owes the public." *Id.* at 330. Unocal's public service argument is not compelling. There is ample evidence in the record linking the Myanmar government's use of forced labor to human rights abuses. The use of forced labor by the states of the United States during the early years of the twentieth century is hardly analogous to the nature of the forced labor utilized by SLORC in recent years. Moreover, there is an issue of fact as to whether the forced labor was used to benefit the Project as opposed to the public's welfare. *See generally* INTERNATIONAL LABOUR OFFICE, FORCED LABOUR AND HUMAN TRAFFICKING: CASEBOOK OF COURT DECISIONS (2009), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_106143.pdf.

78. United States v. Kozminski, 487 U.S. 931 (1988) (holding that psychological coercion, alone, does not violate the Thirteenth Amendment because involuntary servitude requires the presence of forced labor under threat of physical force or restraint). *Compare*

beyond slavery itself to various forms of involuntary servitude.[79] The history of litigation involving the slave trade even prior to the Thirteenth Amendment itself suggest that American courts, in considering ACTA complaints, should view problems relating to forced labor and slavery in a manner that would recognize, for instance, that Liberian workers really had no opportunity to leave due to their isolation and the tradition relating thereto.[80]

True, the United States is one of only seven countries to have ratified as

United States v. Alzanki, 54 F.3d 994 (1st Cir. 1995) (finding involuntary servitude where employer threatened domestic worker with deportation), *and* Vinluan v. Dolye, 60 A.D.3d 237 (N.Y. App. Div. 2009) (holding that a prosecution for criminal conspiracy of nurses from the Philippines who engaged in a mass resignation that endangered critically ill pediatric patients is in violation of the Thirteenth Amendment's ban on involuntary servitude), *with* Haas v. Wisconsin, 241 F.Supp. 2d 922, 934 (E.D.Wis. 2003) (holding that incarceration for failure to comply with a judgment of forfeiture does not constitute involuntary servitude and peonage in violation of the Thirteenth Amendment), Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 181 (4th Cir. 1996) (holding that community service requirement for high school students does not constitute involuntary servitude), Sharp v. State, 783 P.2d 343 (Kan. 1989) (holding that law requiring lawyers to represent indigent criminal defendants does not run afoul of the Thirteenth Amendment), *and* Moss v. Superior Court (Ortiz), 950 P.2d 59, 68 (Cal. 1998) (holding that child support does not constitute forced labor).

79. *See* James Pope, *The Thirteenth Amendment versus the Commerce Clause: Labor and the shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002). *See generally*, Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 499 (1989) ("The place to begin is with the key attributes that distinguish slave labor from free labor. First among these is the scope of the right to quit and the right to seek new employment without the permission of one's former employer. These rights determine what penalties employers may impose on employees who quit and how employers may attempt to control their employees' access to competing employment opportunities.") For insight into the reception of the Thirteenth Amendment by William B. Gould, a former slave who was fighting for the Union Navy during the Civil War, see WILLIAM B. GOULD IV, DIARY OF A CONTRABAND: THE CIVIL WAR PASSAGE OF A BLACK SAILOR 227 (2002) ("Tues. March 7th [1865]. At Corruña [Spain]... We receive [mail] from the states. I re[ceive] one letter from C.W.R. and five [pa]pers. We have an account of the passage of the amendment to the Con[sti]tution prohibiting slavery througho[ut] the United States. C is quite well. ___ have had A fair at N. for the benefit of the Freedmen. We now have plenty of news.").
Earlier, he had commented on the Emancipation Proclamation: "Sun. March 8th [1863]. Off New Inlet [North Carolina]… Read the Articles of War. Also the Proclamation of Emancipation. Verry [sic] good." *Id*. at 137.

80. Wolff, *supra* note 71, at 1038 ("Illicit U.S. participation in the foreign slave trade was one of the principal dramas of the American experience with slavery in the nineteenth century, and, I argue, it was one of the evils at which the Thirteenth Amendment was aimed. The issue remained salient following the Civil War, as the trade in slaves continued in Brazil and the West Indies for some years. In this respect, the Thirteenth Amendment and its implementing statutes have always had "extraterritorial" application. The doctrines explored above hardly trod upon unexplored terrain.") Professor Wolff recites the long list of cases coming before American courts involving the slave trade prior to the promulgation of the Emancipation Proclamation. *Id*. at 994-1037. *See generally* HUGH THOMAS, THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE, 1440-1870 (1997); Eric Foner, *A Forgotten Step Toward Freedom*, N.Y. TIMES, Dec. 30, 2007, at A10.

few as two of the major, "core" Conventions,[81] and has not ratified any conventions relating to freedom of association, the right to organize, and the right to bargain collectively.[82] But the policies of freedom of association and collective bargaining for workers have been accepted and promoted since the Norris-LaGuardia Act of 1932 and the National Labor Relations Act of 1935. Nothing in the Taft-Hartley amendments qualified this in any way. The difficulty, as noted below, is that this policy has not always been enforced in actuality. But the United States supports it. This is why the *Drummond* holding to the effect that those ILO Conventions were a proper source of law under ATCA is correct notwithstanding the limitations fashioned in *Sosa*. The same basic policy exists within the borders of the United States and the international consensus is a strong one.

III. THE LAW INSIDE THE UNITED STATES

The use of foreign as well as international law has created a great policy debate in recent years in the United States. Yet the Supreme Court, for instance, in both cases addressing the capital punishment of juveniles[83] as well as anti-sodomy laws,[84] has looked abroad—the latter decision relying upon a decision of the European Court of Human Rights in Strasbourg to reexamine earlier precedent to the contrary. This is not new, representing a tradition of which the Court's language of more than 100 years is illustrative: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon

81. Declaration of the Fundamental Principles and Rights at Work, June 19, 1998, 37 I.L.M. 1233 [ILO], *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm. *See generally* Özen Eren, *The Continuation of ILO Principles in the 21st Century Through the Compliance Pull of Core Labor Rights*, 13 J. WORKPLACE RTS. 303 (2008); Ratifications of the Fundamental Human Rights Conventions by Country, http://www.ilo.org/ilolex/english/docs/declworld.htm. The "core" ILO conventions are numbers 29 (forced labor), 87 (freedom of association and protection of the right to organize), 98 (right to organize and collective bargaining), 100 (equal remuneration), 105 (abolition of forced labor), 111 (discrimination—employment and occupation), 138 (minimum age), and 182 (worst forms of child labor). Of these eight, the United States has ratified only numbers 105 and 182. The other six countries to have ratified two or fewer of the eight "core" ILO Conventions are Brunei, the Maldives, the Marshall Islands, Myanmar (née Burma), the Solomon Islands, and Tuvalu. Of those six nations, only Myanmar has a population of over one million people.

82. List of Ratifications of International Labour Conventions, http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byCtry.cfm?lang=EN&CTYCHOICE=0610.

83. Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988) (plurality opinion) (holding that executing juveniles for crimes committed when they were under sixteen was unconstitutional).

84. Lawrence v. Texas, 539 U.S. 558 (2003) (holding a Texas statute criminalizing certain homosexual conduct unconstitutional).

it are duly presented for their determination."[85]

As Yale Law School Dean Harold Hongju Koh has written: "From the beginning [of the Republic] . . . American courts regularly took judicial notice of both international law and foreign law (the law and practice of other nations) when construing American law."[86] Thus, as Chief Justice John Jay said in 1793, "[T]he United States had, by taking a place among the nations of the earth, become amenable to the law of nations"[87] and had construed American law so as to avoid violation of the law of nations where any possible construction to the contrary existed.

The Declaration of Independence states that its reasoning is prompted out of "a decent respect to the opinions of mankind."[88] As Justice Ruth Ginsburg has stated: "The drafters and signers of the Declaration of Independence cared about the opinions of other peoples; they placed before the world the reasons why the States, joining together to become the United States of America, were impelled to separate from Great Britain."[89] For obvious historical reasons, at the beginning, the Court integrated English common law into American jurisprudence and indeed had looked to the practices of the King of Great Britain in determining the legal status of Indian tribes under the Constitution.[90]

At least twice in recent years the Supreme Court has been called upon to address the issue of freedom of association protection within the meaning of our own constitutional precedent and has done so without any reference whatsoever to ILO conventions.[91] Similarly, when I was Chairman of the

85. The Paquete Habana, 175 U.S. 677, 700 (1900); *accord* Hilton v. Guyot, 159 U.S. 113, 163 (1895) ("International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.").

86. Harold Hongju Koh, *Agora: The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45 (2004).

87. Chisholm v. Georgia, 2 U.S. 419, 474 (1793).

88. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

89. Assoc. Justice Ruth Bader Ginsburg, Address at the 99th Annual Meeting of the American Society of Int'l Law, *A Decent Respect to the Opinions of [Human]kind* (Apr. 1, 2005), *available at* http:// www.asil.org/events/AM05/ginsburg050401.html.

90. *See* McDonald v. Hovey, 110 U.S. 619, 628 (1884) ("[W]here English statutes ... have been adopted into our own legislation, the known and settled construction of these statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority."). This and the preceding paragraph are taken from my article, *Fundamental Rights at Work and the Law of Nations: An American Lawyer's Perspective*, 23 HOFSTRA LAB. & EMP. L.J. 1, 5-6 (2005).

91. Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 291 (1979) (holding that compulsory collective bargaining is not a constitutional right); Smith v. Ark. State Highway Employees, 441 U.S. 463, 465 (1979) (holding that a state highway commission

National Labor Relations Board, the Board directly relied upon freedom of association as defined in the NLRA Preamble when unions sought to represent employees in connection with employment protection statutes like minimum wage,[92] antidiscrimination legislation,[93] as well as free speech.[94] The same protection was afforded prisoners working for private employers during release time[95]—but there was no reference to the ILO or forced labor principles.

Arguably akin to both freedom of association and slavery are some of the issues arising out of the Supreme Court's 2002 holding in Hoffman v. NLRB[96] that undocumented workers in the United States, though employees under labor law,[97] are not entitled to backpay under the NLRA because this would be at odds with immigration law.[98] Hoffman, in my view, was wrongly decided for

could refuse to hear grievances filed by a union while entertaining grievances filed by employees individually, while recognizing that "[t]he public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation from doing so"). An earlier freedom of association case involving free speech rights for unions is *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (holding that "[t]he right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as a part of free speech, but as part of free assembly."). *Contra* Health Servs. & Support-Facilities Subsector Bargaining Ass'n v. British Columbia, [2007] 2 S.C.R. 391, 2007 SCC 27 (Can.) (holding that the Charter guarantees a right to collectively bargain). For further discussion of this subject see Brian Etherington, *The* B.C. Health Services and Support *Decision—The Constitutionalization of a Right to Bargain Collectively in Canada*, 30 COMP. LAB. L. & POL'Y J 715 (2009); Brian Langille, *The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It*, 54 MCGILL L.J. 177 (2009); Armand de Mestral & Evan Fox-Decent, *Rethinking the Relationship Between International and Domestic Law*, 53 MCGILL L.J. 573 (2008); Sara Slinn, *No Right (to Organize) Without a Remedy: Evidence and Consequences of the Failure to Provide Compensatory Remedies for Unfair Labour Practices in British Columbia*, 53 MCGILL L.J. 687 (2008).

92. *52nd St. Hotel Associates*, 321 N.L.R.B. 624 (1996) (holding that a union's provision of legal services to nonunion employees seeking unpaid wages under the Fair Labor Standards Act was not an unlawful attempt to corrupt a union election).

93. Professor Catherine Fisk has pointed out that the principle of *52nd Street Hotel Associates* applies to employment protection legislation generally. Catherine Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 60 (2002).

94. *Caterpillar, Inc*., 321 N.L.R.B. 1178, 1184 (1996) (Chairman Gould, concurring) (promoting idea of free speech for both sides in union campaigns).

95. *Speedrack Prods. Group, Ltd*., 320 N.L.R.B. 627, 629-30 (1995) (Chairman Gould, concurring and dissenting) (attached as Appendix B), *enforcement denied*, 114 F.3d 1276, 1282 (D.C. Cir. 1997) (adopting and extensively quoting my dissent in the National Labor Relations Board decision). *Contra* Hoffman Plastic Compounds, Inc. v. Nat'l. Labor Relations Bd., 535 U.S. 137, 151-52 (2002) (rejecting my Board's holding in A.P.R.A. Fuel *Oil Buyers Group, Inc.*, 320 N.L.R.B. 408 (1995) that undocumented workers were entitled to back pay remedies). *See generally* Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361 (2009).

96. Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 151-52 (2002).

97. Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883, 892 (1984).

98. My Board had held that such workers *are* entitled to backpay. A.P.R.A. Fuel Oil Buyers Group, Inc., 324 N.L.R.B. 630, 632 (1997) *abrogated by Hoffman Plastic Compounds, Inc*. For a discussion of the aftermath of this decision and congressional

the reasons set forth by Justice O'Connor two decades earlier, i.e., the failure to protect such workers creates an incentive to employ them and exploit both legal and illegal workers.[99] However, in any event, these cases involved compensation that would have been obtained had the employees worked for the employer.

If workers are denied wages for work actually performed, their status not only fails to provide them with freedom of association guaranteed under the First Amendment and international law,[100] it would subject them to a slave-like status where their work is performed without compensation.[101] None of the cases involving employment law relied upon, or attempted to distinguish, international labor law.

Finally, on the relevance of international or foreign law, Justice Sonia Sotomayor was questioned at length about her willingness to rely upon foreign law and its use by several members of the Senate who cross-examined her vigorously on this issue[102]—reflecting a previously expressed hostility towards

response thereto, see WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS AND THE NLRB 133-34 (2000) [hereinafter GOULD, LABORED RELATIONS].

99. *Sure-Tan, Inc*., at 892.

100. Complaints Against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), Case No. 2227, GB.288/7, ¶¶ 551-613 (November 2003), *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/gb-7.pdf (ILO Committee on Freedom of Association case regarding Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002)); *see also* Complaint against the Government of the United States presented by the United Automobile, Aerospace and Agricultural Implement Workers of America International Union (UAW) and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) Report No. 350, Case No. 2547, ¶¶ 732-805 *available at* http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=4817&chapter=3&query=%28%28United+States%29%29+%40ref&highlight=&querytype=bool&context=0 (ILO Committee on Freedom of Association case regarding *Brown University*, 342 NLRB 483 (2004)).

101. Courts have largely awarded backpay for work already performed. Sandoval v. Rizzuti Farms, Ltd., 2009 WL 959478, *3, n.5 (E.D.Wash. 2009); David v. Signal Intern., LLC, 257 F.R.D. 114, 123-24 (E.D.La. 2009); Galdames v. N & D Inv. Corp., 2008 WL 4372889, *2 (S.D.Fla. 2008); Jimenez v. Southern Parking, Inc., 2008 WL 4279618, *5 (S.D.Fla. 2008); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501-02 (W.D.Mich. 2005); Zavala v. Wal-Mart Stores, Inc., 393 F.Supp.2d 295, 325 (D.N.J.2005); Martinez v. Mecca Farms, Inc., 213 F.R.D. 601, 604-05 (S.D.Fla. 2002); Liu v. Donna Karan Int'l, Inc., 207 F.Supp.2d 191, 192 (S.D.N.Y. 2002); Flores v. Amigon, 233 F.Supp.2d 462, 464 (E.D.N.Y.2002); Flores v. Albertsons, Inc., 2002 WL 1163623 at *5 (C.D. Cal. 2002); Reyes v. Van Elk, Ltd., 148 Cal.App.4th 604, 614-615 (2007); Serrano v. Underground Utilities Corp., 407 N.J.Super. 253, 269 (N.J.Super. 2009). *But see* Renteria v. Italia Foods, Inc., No. 02-495, 2003 WL 21995190, at *6 (N.D.Ill. 2003) (holding that, in light of Hoffman, undocumented workers are entitled to compensatory damages under FLSA, but not other remedies like back or front pay which would contravene the policies underlying IRCA and otherwise assume the continued and unlawful employment of undocumented workers).

102. *Sen. Coburn Questions Judge Sotomayor at Supreme Court Nomination Hearings*,

foreign law.[103]

In 2009 many of Justice Sotomayor's inquisitors not only decried reliance upon foreign law but extracted promises from her that she would not be guided by foreign opinion about the United States. It would seem as though a "decent respect to the opinions of mankind"[104] was unknown to or forgotten by a number of the members of the Senate Judiciary Committee.

IV. CORPORATE CODES OF CONDUCT

But adjudicated cases are not the only source of new policy inside the United States. Corporate codes of conduct and social responsibility constitute another approach. One example of this is the FirstGroup Freedom of Association Independent Monitor Program,[105] designed to assist the company and its stakeholders in meeting their Corporate Social Responsibility (CSR)[106] objectives as they relate to employees' human rights. Specifically, the Independent Monitor Program serves to monitor a company's compliance with its commitment to respect employees' right to freedom of association—to choose whether to be represented by a labor organization.[107]

I helped to design and implement this program for FirstGroup plc, a multinational transportation corporation with its principal operations in the United Kingdom, first in connection with the United States and more recently in Canada. The Program has been praised by both company and union officials and has reduced the level of public criticism levied at the company for its actions towards employees' organizing efforts.[108]

A bit of background for this program is relevant. Long before the establishment of the independent monitor process, in 2001, FirstGroup implemented a CSR policy,[109] which included among other things a commitment to the principle that employees have the rights of freedom of

WASH. POST, July 15, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/07/15/AR2009071501414.html.

103. H.R. Res. 568, 109th Cong. (2005); S. Res. 92, 109th Cong. (2005).

104. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 2 (2003).

105. FirstGroup America, FirstGroup America – Freedom of Association Policy, *available at* http://www.foamonitor.com/pdf/FOA_Policy-June_2009.pdf [hereinafter FOA Policy].

106. FirstGroup America, Corporate Social Responsibility Policy, *available at* http://www.foamonitor.com/pdf/Corporate_Social_Responsibility_Policy-3-08.pdf [hereinafter CSR Policy].

107. FOA Policy, *supra* note 105.

108. LANCE COMPA, FIRSTGROUP'S FREEDOM OF ASSOCIATION POLICY: A POSITIVE INNOVATION 1(2008) (on file with author).

109. CSR Policy, *supra* note 106.

association and collective bargaining.[110] These rights emanate from the International Labour Organization's 1998 Core Labor Standards Declaration.[111]

In 2006, the company faced criticism and questions from its stakeholders and unions regarding the company's commitment to its CSR policy vis-à-vis its behavior towards unions in the United States.[112] At that time, the Chairman of the Board of Directors committed to the eradication of anti-union behavior and to remain neutral with respect to union membership.[113] Subsequently, the company drafted and implemented a Freedom of Association (FOA) Policy[114] to reinforce the company's commitment to the principle of employees' freedom of association rights, as set forth in the company's CSR policy.[115]

Near the end of 2007, the company asked me to become FirstGroup's Independent Monitor of the FOA Policy in the United States. I accepted the position and helped to create the Independent Monitor Program which included a complaint process that employees, unions, and lawyers representing employees can utilize.

Submitting a complaint to the Office of the Independent Monitor does not affect the right to file an unfair labor practice charge with the National Labor Relations Board or to complain to any other public agency.[116] Those wishing to file a complaint with the Independent Monitor do so by submitting a signed complaint to the Office of the Independent Monitor within 60 days of any alleged violation.[117]

The Office of the Independent Monitor has received complaints from both employees and union representatives alleging that managers and supervisors discriminated against an employee based on union activity; made anti-union comments; enforced overly broad no-talking, solicitation, and distribution rules; and prohibited the wearing of union insignia, among other things. A basic premise of the Program is that these matters would be handled by the Office of

110. *Id*.

111. *Id*.

112. MARTIN HELM, AN INCREDIBLE JOURNEY… THE FIRST STORY 150-51 (2009). This initiative is illustrative of one of the avenues through which globalization carries ideas across national boundaries that gets discussed in Harry Arthurs, *Extraterritoriality by Other Means: How Labor Law Sneaks Across Borders, Conquers Minds and Controls Workplaces Abroad*, 21 STAN. L. & POL'Y REV. 527 (2009); *see also* Martin Mayer, *Transatlantic Winning Formula*, TRANSP. INT'L MAG., July 2009, *available at* http://www.itfglobal.org/transport-international/ti36road.cfm.

113. Ian Forsyth, *Lobby Wants FirstGroup to Adopt Workplace Human Rights Policy*, ABERDEEN PRESS & J., July 6, 2006, at 9.

114. FOA Policy, *supra* note 105.

115. CSR Policy, *supra* note 106.

116. FirstGroup America, Freedom of Association Policy Compliance Monitoring Program Overview, *available at* http://www.foamonitor.com/pdf/Compliance_Monitoring_Program_Overview-8-25-09.pdf [hereinafter Compliance Monitoring Program Overview].

117. *Id*.

the Independent Monitor while the actual recognition process through secret ballot box elections would continue to proceed through the National Labor Relations Board.[118]

Under the Program, the Office of the Independent Monitor (a team of investigators assists me)[119] investigates the allegations, and I report my findings to the company and the complaining party.[120] As Independent Monitor, I strive to complete my report within 30 days of the filing of the complaint,[121] and the company strives to implement or address my recommendations, by adopting, not adopting, or modifying the recommendations, within 30 days of receiving the report.[122] The company's response is sent to both my office and the complaining party.[123]

I also periodically report to the company's Board of Directors regarding my activities and findings and have responded to inquiries sent to the company by third-party organizations.[124]

One of the central features of the Program is to publicize the Program and the FOA Policy to employees and managers—the National Labor Relations Act itself (in contrast to other American employment statutes) requires no publicity or postings in employer facilities.[125] This FirstGroup publicity is one of the important reasons why the Program provides such strong support for employees' rights of freedom of association. Publicity has taken the form of letters to employees, paycheck attachments, glass-enclosed bulletin boards with program documents at facilities, web-based training for managers, inclusion in the employee handbook, a DVD video shown to all employees at monthly safety meetings,[126] and a website for the Program.[127] These steps improved (1) employees' awareness and understanding of their freedom of association rights and the Program, and (2) management's adherence to the company's FOA Policy.

Since its inception, my Office has issued 106 reports over its first twenty-six months that addressed nearly 250 alleged FOA Policy violations filed by both employees and seven different unions. Both the number of complaints and

118. Forsyth, *supra* note 113.

119. Andrew J. Olejnik, Stanford Law School '04, is my Special Assistant in Chicago.

120. Compliance Monitoring Program Overview, *supra* note 110.

121. *Id*.

122. *Id*.

123. *Id*.

124. Memorandum from William B. Gould IV to Sir Moir Lockhead (Sept. 16, 2008) (on file with author).

125. Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 38-39 (1987).

126. William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. Rev. 291, 342 (Fall 2008).

127. Office of the Independent Monitor for FirstGroup America, http://www.foamonitor.com/ (last visited Jan. 24, 2010).

the number of violations generally have decreased over time, and there is some evidence that the company has worked cooperatively with the unions to resolve any problems—a positive development as compared to protracted litigation.

The Program has addressed the vast majority of complaints in less than 60 days, which represents a dramatic decrease from the average time for unfair labor practice charges to be addressed by the National Labor Relations Board,[128] let alone the period of time that could be consumed by an appeal to the federal courts. A critical ingredient involved in expediting the FirstGroup America process lies in the fact that hearings[129] are not required and thus far have not been utilized.

The reports have found FOA Policy violations which have required a variety of remedies devised by the Office of the Independent Monitor. In general, the company has adopted the recommendations, and employees' freedom-of-association rights have not been impeded. However, at the same time, the company has rejected a number of my recommendations, particularly where it was found that employees had been dismissed in violation of the FOA policy. Thus, at this juncture, the idea that the program effectively augments or substitutes for more cumbersome legal procedures[130] must be tentative and qualified.

Most importantly, following the implementation of the Program, the evidence supports the proposition that the company is not engaging in anti-union campaigning, genuinely supports employee free choice, and can coexist with labor unions through a policy devised by business—an environment has been established where employee free choice can be realized and collective bargaining commenced. The key is not how union support is evidenced, but rather management's posture during union organizing campaigns, i.e., one of not involving the employer in an anti-union campaign.

The Independent Monitor Program has been an ambitious, unprecedented, and successful undertaking for a company and stakeholders concerned about freedom of association rights for its employees. Such a Program can provide a number of benefits to companies and their stakeholders who would like to establish a strong commitment to corporate social responsibility and employees' rights under the principles of international labor law.[131]

128. National Labor Relations Board, 73rd Annual Report of the National Labor Relations Board for the Fiscal Year that Ended September 30, 2008 138 (2009), *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/Annual%20Reports/Entire2008Annual.pdf.

129. "[T]he path to systemic reform . . . probably lies not only in easing agency workloads and increasing their resources, but also in recognizing that trial-type procedures are not necessarily the best or only fair means of reaching administrative decisions." George A. Bermann, *Administrative Delay and its Control*, 30 AM. J. COMP. L. SUPP. 473, 474 (1982).

130. For a discussion of delays involved in public law, see GOULD, LABORED RELATIONS, at 287-305.

131. But, as noted above, conclusions about the program's positive features must be tentative at this point.

Though this may represent a model for other corporations with or without a negotiation process with a labor union—in the case of FirstGroup there were a half-dozen or so unions who had been attempting to organize their employees (they have been successful in winning NLRB representation elections in an overwhelming number of instances)—the practice has not thus far been followed by other companies although it has not been widely publicized.

To some extent, the spread of such policies will depend on trade union energy and initiatives in coordinating with European unions as well as the legal strictures that may be imposed upon such unions.[132]

CONCLUSION

America[133] has been slow to take account of foreign and international law, but globalization has begun to alter this fact. Extraterritoriality issues, inevitable comparisons of foreign systems by those within and outside the United States, and the Alien Tort Claims Act of 1789 have all played a role in the changes of the past few decades. Whatever happens outside of the United States does not remain outside of our own borders. Case law, comparative discussions and studies, and corporate codes of conduct have all played a role in this process. As described above, the questions under the National Labor Relations Act and ATCA movement of multinational corporations from abroad into the United States[134] as they bring with them their own heightened concern with and sensitivity to international labor law and standards which are generally more hospitable to the unions in collective bargaining will further this process. Indeed, what happens outside of the United States does not stay outside of our country.

132. *See generally*, Victoria G.T. Bassetti, *Weeding RICO out of Garden Variety Labor Disputes*, 92 COLUM. L. REV. 103 (1992).

133. Here and throughout this paper, I have used the word "America" to refer to the United States of America even though there are, of course, many American countries. This shorthand is used for brevity only. It will not, I hope, be taken for arrogance, but rather for simple economy of language.

134. William B. Gould IV, *Multinational Corporations and Multinational Unions: Myths, Reality and the Law*, 10 INT'L L. LAW 655 (1976).