

Is the Garment Industry Trying to Pull the Wool over Your Eyes?

The Need for Open Communication to Promote Labor Rights in China

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I. Introduction

The People's Republic of China has a sordid history of labor rights abuses,¹ but how best to address labor and other human

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1. See 1 STATE DEPT., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1999, 1018, 1019 (2000) ("The [g]overnment continued to restrict tightly worker rights."), available at http://www.state.gov/www/global/human_rights/1999_hrp_report/china.html. A note on citations to the World Wide Web in this Article: one purpose of this Article is to demonstrate the value of the Internet as a tool for the exchange of information. See *infra* notes 225-250 and accompanying text. In political environments where the government tightly restricts the availability of hardcopy sources, as in China, the Internet is particularly valuable. See *infra* note 249 and accompanying text. Therefore, in addition to traditional sources, this Article gives parallel citations to the World Wide Web whenever possible. Because the "transient" nature of some websites makes Internet information hard to verify, and makes it difficult to hold purveyors of inaccurate information accountable, Internet information can be unreliable. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 18.2.1, at 132 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000) [hereinafter BLUEBOOK]. This Article therefore attempts to avoid citations *exclusively* to Internet sources. In some cases, however, precious information is not available anywhere else. See *id.* at 133; see also *infra* note 4 (citing English translations of relatively recently enacted Chinese statutes). For a discussion of factors to consider when assessing the credibility of conflicting, unverifiable reports of labor conditions in China, see *infra* notes 175-181 and accompanying text. This Article follows the latest BLUEBOOK guidelines for Internet citations, i.e., "available at" preceding a Uniform Resource Locator (URL) indicates that the source is available both in traditional form and on the Internet, whereas "at" preceding a URL indicates that the source is found exclusively on the Internet. See BLUEBOOK, *supra*, at 133. This Article follows the practice of giving a parallel Internet citation only the first time a source is cited. The purpose of citing to the Internet in this Article is to demonstrate how anyone in the world with Internet access can readily find laws and treaties, information on legal principles, and reports on labor conditions in China. Therefore, citations to

rights issues in China has been a vexing problem for U.S. policy makers.² The extent to which labor rights problems in China should concern non-Chinese people has also been a subject of controversy.³

While many Chinese laws, particularly those provisions enacted over the past decade, facially protect many labor rights,⁴ abuses of such rights continue in spite of the law.⁵ U.S. corporations, particularly garment manufacturers, are turning increasingly to factories in China and other developing nations as a cheap means of manufacturing products for sale in the United States.⁶ Labor rights activists in the United States have long argued for conditioning China's acceptance into the world economic community upon an improvement in its labor and human rights record.⁷ These labor activists focused much of their energies on attempting to defeat the Normal Trade Relations for the People's Republic of China Act, commonly referred to as the Permanent Normal Trade Relations Act, or PNTR.⁸ While the

commercial Internet sources that require a fee for access, such as Lexis.com or Westlaw.com, are avoided.

2. See, e.g., 146 CONG. REC. 111, S8727-29 (daily ed. Sept. 19, 2000) (statement of Sen. Harkin) (explaining his belief that "there is no standard cut-and-dried approach when it comes to advancing human rights," and that his decision to vote for normal trade relations for the People's Republic of China had been a difficult one, considering the complex factors weighing on both sides). All parts of the Congressional Record cited in this Article are available at <http://thomas.loc.gov/>.

3. See Erik Eckholm, *China's Rights Stand: Progress or an Irrelevance?*, N.Y. TIMES, Nov. 26, 2000, at A9.

4. See, e.g., China Labour Act § 7 (1994), translated at <http://natlex.ilo.org/txt/E94CHN01.htm> ("Labourers shall have the right to participate in and organize trade unions . . ."); § 15 ("No employing units shall be allowed to recruit juveniles under the age of 16."); § 33 (permitting workers to enter into a collective contract with employers); § 36 (providing that workers "shall work for no more than eight hours a day [and/or] more than forty-four hours a week on average"); § 48 ("The state shall implement a system of guaranteed minimum wages.").

5. See STATE DEPT., *supra* note 1, at 1059-64; see also CHARLES KERNAGHAN, MADE IN CHINA: THE ROLE OF U.S. COMPANIES IN DENYING HUMAN AND WORKER RIGHTS 1 (2000), available at <http://www.nlcnet.org/report00/introduction.html> (citing examples of labor rights abuses by U.S. corporations in China).

6. See Labour Rights in China, *No Illusions: Against the Global Cosmetics SA8000*, CHINA LABOUR BULLETIN (1999), at http://www.china-labour.org.hk/9907e/e_sa8000.htm [hereinafter *No Illusions*].

7. See, e.g., AFL-CIO, *Senate Ignores China's Human Rights Abuses and Votes for Permanent Trade Rights*, at http://www.aflcio.org/news/2000/0919_china.htm (last visited Apr. 4, 2001) (describing the AFL-CIO's fight against the Normal Trade Relations for the People's Republic of China Act as part of an ongoing effort to protect workers' rights internationally).

8. See The Normal Trade Relations for the People's Republic of China Act, Pub. L. No. 106-286, 114 Stat. 880, (2000) [hereinafter PNTR].

U.S. Congress expressed grave concerns over human rights abuses in China during debates on PNTR,⁹ it apparently rejected the argument that the United States could effectively use the threat of withholding Most Favored Nation (MFN) trade status as leverage to advance U.S. interests.¹⁰ On October 10, 2000, President Clinton signed PNTR into law, putting an end to the United States's annual review of China's MFN trade status.¹¹ The passage of PNTR guarantees China's admittance into the World Trade Organization (WTO),¹² which has virtually no provisions concerning labor rights.¹³

Because of the close relation of labor rights to the global economy, and because of the unique impact foreign labor issues have on U.S. interests, the focus of this Article is Chinese industrial labor rights abuses, as opposed to other human rights abuses.¹⁴ While labor rights abuses are by no means unique to

9. See *id.* § 511(b) (authorizing the Secretary of Labor "to establish a program to conduct rule of law training and technical assistance related to the protection of internationally recognized worker rights in the People's Republic of China"); § 513 (prohibiting funds for such a program from being provided to any Chinese entity that the President has reason to believe is committing human rights violations).

10. See, e.g., 146 CONG. REC. S8729 (daily ed. Sept. 19, 2000) (statement of Sen. Harkin) ("In the case of China, I am convinced that granting PNTR will not hinder our efforts to improve human rights there. I believe, in fact, it will actually help us in that endeavor.").

11. See PNTR § 101(a)(1) (terminating the application to China of the law calling for annual trade status review); see also Trade Act of 1974, 19 U.S.C. §§ 2431-2439 (1994) (establishing annual trade status review that preceded PNTR).

12. See PNTR § 101(b).

13. The agreement establishing the WTO incorporates by reference the document commonly known as GATT 1947. See Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13 (1994). GATT 1947 provides that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . relating to the products of prison labour.

General Agreement on Tariffs and Trade, Oct. 30, 1947, 61-V Stat. A-11, 55 U.N.T.S. 187 [hereinafter GATT]. In other words, WTO nations are not required to regulate against trade in the products of prison labor, but such regulations are an exception to the general rule against barriers to free trade. There are no similar provisions for other labor rights abuses. See also AFL-CIO, *The WTO: Uniquely Positioned to Enforce Workers' Rights*, at http://www.aflcio.org/globaleconomy/workers_05_enforce.htm (last visited Apr. 4, 2001) (explaining that provisions for protection of workers' rights are absent from the WTO, and calling for the inclusion of such provisions).

14. See *infra* notes 62-69 and accompanying text.

China, events currently unfolding bring China's labor situation to the fore.

A discussion of the labor situation in Chinese factories implicates several principles of public policy. First is the international legal principle of national sovereignty.¹⁵ Second is the principle of a free-market economy.¹⁶ Third is the philosophical principle that human rights abuses anywhere should be a matter of global concern.¹⁷ The issue of conditions in Chinese factories also has broad practical implications for Americans.¹⁸

Section II of this Article discusses the interplay of these abstract and practical considerations. A detailed account of the problem leads into an explanation of justifications for outsiders' concern with the Chinese labor rights situation.¹⁹ A description of five possible approaches to the issue follows: relying on China's own municipal laws;²⁰ advancing labor rights through PNTR;²¹ applying business codes of conduct;²² implementing intergovernmental organizations' mechanisms for promoting compliance with treaties;²³ and promoting greater awareness among Chinese workers of their own legal rights through communications media such as the Internet.²⁴

Section III assesses the effectiveness of the various strategies by first looking at their limitations, and then discussing how those limitations might be overcome.²⁵ This Article argues that the unifying theme behind all the strategies for improving workers' rights in China must be a drive for more open communication. To advance workers' rights in China, Chinese laborers must have

15. See *infra* note 34 and accompanying text.

16. See also David Weissbrodt & Marci Hoffman, *The Global Economy and Human Rights: A Selective Bibliography*, 6 MINN. J. GLOBAL TRADE 189, 189 (1997) ("Developments in this century suggest . . . that market economy and free trade foster economic development and thus promote many economic rights as well as civil and political rights."). See generally ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 22-25 (Lloyd Reynolds & William Fellner eds., Irwin Paperback Classics in Econ. 1968) (1776) (articulating principles that became the foundation of classic Western economics).

17. See *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., Preamble, at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

18. See *infra* notes 48-69 and accompanying text.

19. See *infra* notes 29-87 and accompanying text.

20. See *infra* notes 88-92 and accompanying text.

21. See *infra* notes 93-100 and accompanying text.

22. See *infra* notes 101-129 and accompanying text.

23. See *infra* notes 130-146 and accompanying text.

24. See *infra* notes 147-157 and accompanying text.

25. See *infra* notes 158-250 and accompanying text.

greater access to information about their rights under international standards and the laws of their own country,²⁶ they must be able to voice grievances effectively,²⁷ and outsiders must be able to find out what really happens in Chinese factories.²⁸

This Article concludes that a reduction in constraints on communication is necessary to advance each of these goals, and that the Internet holds unique promise for doing so. Thus for China to be open for business without trammeling workers' rights, it must also become open to the free flow of ideas.

II. Background

A. The Problem

Whether as a result of facial inadequacy of Chinese laws or their inadequate enforcement, various accounts of widespread labor rights abuses continue to emerge from China.²⁹ Reports of some of the worst atrocities come from factories making garments and shoes for export to the United States. The National Labor Committee has recently reported, for example, that Timberland shoes are made in China by "16 and 17-year-old girls [forced to] work . . . up to 14 hours a day, seven days a week putting in a 98-hour workweek . . . earning 22 cents an hour . . . [often in] [f]actory temperature[s] reach[ing] more than 100 degrees F[ahrenheit]."³⁰

The obstruction of the free exchange of information and ideas is at the root of many of the labor problems in China. This obstruction operates on three levels. First, the Chinese system denies factory employees the right to speak freely to the outside world about what goes on in their workplaces. For example, the

26. See 146 CONG. REC. 111, S8728 (daily ed. Sept. 19, 2000) (statement of Sen. Harkin) (citing as an example of China's "unacceptable" human rights situation the case of "a lawyer who was arrested and thrown in jail. His offense: he had set up a small table outside a factory to advise workers of their rights under Chinese law.").

27. See *Proposed Draft Principles Relating to Human Rights Conduct by Companies*, U.N. ESCOR Comm. on Human Rights, U.N. Doc. E/CN.4/Sub.2/2000/WG.2/WP.1, ¶ 29 (2000) [hereinafter *Draft Principles*].

28. See CHARLES KERNAGHAN, *MADE IN CHINA: BEHIND THE LABEL 7* (1998), ("Without corporate disclosure, guaranteeing the public's right to know, there is no way to hold corporations accountable for human and worker rights – and these abuses will continue behind closed doors.").

29. See STATE DEPT, *supra* note 1, at 1019.

30. KERNAGHAN, *supra* note 28, at 7. For further examples of labor rights abuses, see *id.* at 71-76; see also STATE DEPT, *supra* note 1, at 1059-64. For an assessment of the reliability of reports from non-governmental organizations (NGOs) such as the National Labor Committee, see *infra* notes 175-181 and accompanying text.

same young women working under such oppressive conditions in the Timberland factory "are threatened and coached to lie to U.S. Company auditors."³¹ Second, the system denies legal advocates the right to send, and workers the right to receive, information about workers' rights. An example is the report from China of "a lawyer who was arrested and thrown in jail. His offense: he had set up a small table outside a factory to advise workers of their rights under Chinese law."³² Finally, the system denies workers the right to communicate with one another for the purpose of forming associations to air their grievances collectively before management.³³

B. Justifications for Outsiders to Concern Themselves with the Problem in China

Before reaching the question of *how* labor rights in China can be advanced, it is necessary to first answer the question of *why* outsiders should concern themselves. Article two, paragraph seven of the U.N. Charter reflects the traditional belief that each nation is entitled to govern itself, and therefore has a right to freedom from outside intervention. It states that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter."³⁴

However, this principle of national sovereignty has competed with the principle of the universality of human rights, embodied in other provisions of the U.N. Charter.³⁵ The latter principle has gained prominence as the international community has become increasingly interconnected since World War II. One commentator explains that "in practice U.N. concern with violations of human rights has moved from the highly restricted category of violations threatening international peace and security, to the wider category of gross violations constituting a consistent pattern, to the present broad category of violations of any U.N. human rights standard."³⁶ Thus, the application of the principle of national

31. KERNAGHAN, *supra* note 28, at 7.

32. 146 CONG. REC. 111, S8728 (daily ed. Sept. 19, 2000) (statement of Sen. Harkin).

33. See STATE DEP'T, *supra* note 1, at 1059.

34. U.N. CHARTER art. 2, para. 7.

35. See *id.* arts. 56 & 57.

36. MENNO T. KAMMINGA, INTER-STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS 119 (1992).

sovereignty to human rights issues may soon become no more than a chapter in history.

Then again, China may be a special case that still requires some deference to the principle of national sovereignty. While China's opposition to human rights initiatives often seems like a transparent and tyrannical control device,³⁷ a consistent stand merits some respect. Indeed, one commentator has noted that "[o]f all member states, the People's Republic of China has had one of the most consistently 'anti-interventionist' voting records on human rights questions, even before China itself became the subject of a U.N. resolution."³⁸

Moreover, history entitles China and other developing nations to be resentful and suspicious of European and American colonialism and imperialism.³⁹ It is perhaps a form of values-imperialism to impose Western standards of fairness on China in disregard of the universally recognized right of self-determination for nation-states.⁴⁰ Western do-gooders perhaps have no business championing human rights on behalf of foreign workers who do not necessarily share the Western view of the value of human rights.⁴¹ This consideration is especially relevant if human rights are won at the expense of economic opportunity for people trying to improve their meager lot in life.⁴²

Therefore, outsiders whose instinct is to push for reform inside China should be careful to provide justifications for actions that may constitute infringements upon China's national

37. See, e.g., Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 1-2 (1996) (describing China's response during the 1994 debate in the United States concerning whether to renew China's MFN status).

38. KAMMINGA, *supra* note 36, at 109.

39. See PETER MALANCZUK, *MODERN INTRODUCTION TO INTERNATIONAL LAW* 13 (7th ed. 1999). Malanczuk elaborates:

[I]n the nineteenth century the international community to a large extent had virtually become a European one on the basis of either conquest or domination. By about 1880, Europeans had subdued most of the non-European states, which was interpreted in Europe as conclusive proof of the inherent superiority of the white man, and the international legal system became a white mans' club, to which non-European states would be admitted only if they produced evidence that they were "civilized."

Id.

40. See *id.* at 211.

41. See Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 131 (1999).

42. See MALANCZUK, *supra* note 39, at 211 ("In many parts of the world social and economic rights have the same or even greater importance for the individual than the rights of liberty.").

sovereignty. In the final analysis, however, there are sufficient justifications for foreigners to concern themselves with the labor situation in China.

As mentioned, the first justification is the notion that humans everywhere should be concerned with human rights abuses anywhere.⁴³ This concept is most comprehensively embodied in the Universal Declaration of Human Rights, which by its very title suggests that human rights concerns transcend national borders.⁴⁴ The Preamble provides:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people . . .

Now, therefore, The General Assembly Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations.⁴⁵

Many human rights non-governmental organizations (NGOs) take up this theme, suggesting that compassion dictates a concern for one's fellow humans in foreign lands.⁴⁶ This human rights rationale is the most value-laden justification for involvement in China, and thus is the most subject to criticisms of cultural imperialism.⁴⁷

The justifications for promoting labor rights in China do not end with an abstract concern for human rights. A second justification is likewise based fundamentally on conscience, but looks at the situation from a practical angle. This is the consumer-interest justification: no consumer should have to be complicit in a system at odds with his or her own values, whatever they may be.⁴⁸ For example, if a student at a U.S. university believes that it

43. See Howse, *supra* note 41, at 149.

44. See *Universal Declaration*, *supra* note 17.

45. *Id.* at Preamble.

46. See, e.g., AMNESTY INT'L, REPORT 2000, at 273 (2000) (explaining that Amnesty International takes global action on the belief that "all human rights should be enjoyed by all people at all times," without regard to borders), available at <http://www.web.amnesty.org/web/ar2000web.ns/ar2000>.

47. See Howse, *supra* note 41, at 150-51.

48. See generally COUNCIL ON ECON. PRIORITIES, SHOPPING FOR A BETTER WORLD: THE QUICK AND EASY GUIDE TO ALL YOUR SOCIALLY RESPONSIBLE SHOPPING (2000) (providing report cards on transnational corporations (TNCs) ostensibly to enable consumers to make informed and conscientious purchasing

is immoral for thirteen-year-old children to be put to work in garment factories, that student is entitled to assurances that the jersey he buys at his campus bookstore has in fact not been made by a thirteen-year-old.⁴⁹ Inasmuch as goods made in China are sold to U.S. consumers, those consumers are entitled to concern themselves with what happens in the factories where the goods are made.⁵⁰ Thus, the assertion that how China solves its problems is strictly China's business, fails. In an increasingly global economy, China's labor problems are outsiders' business.⁵¹ This justification does not fall so easily to criticisms of Western value bias because, at least theoretically, it works in reverse: a Chinese consumer is likewise entitled to assurances that she is avoiding U.S.-made products whose modes of production do not comport with her values.

This consumer-interest justification, while compelling, is limited in its application. Under this rationale, American scrutiny of Chinese factories is justified only for those factories producing goods for export to the United States.⁵² This Article focuses on factory labor, as opposed to agricultural or mining labor, not only because some of the worst Chinese labor abuses take place in factories,⁵³ but also because China's chief exports to the United States are factory-made goods.⁵⁴

Conversely, perhaps the conscientious American consumer can best help the average Chinese worker by supporting a legal and economic system that will increase the Chinese standard of living instead of insisting on specific provisions of labor law.⁵⁵ Do

decisions).

49. See generally UNITED STUDENTS AGAINST SWEATSHOPS, at <http://home.sprintmail.com/~jeffnkari/USAS/> (last visited Apr. 4, 2001).

50. See KERNAGHAN, *supra* note 28, at 66-67.

51. See Lena Ayoub, *Nike Just Does It – And Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 397 (1999).

52. See KERNAGHAN, *supra* note 28, at 67.

53. See, e.g., KERNAGHAN, *supra* note 5, at 1 ("Recent in-depth investigations of 16 factories in China producing car stereos, bikes, shoes, sneakers, clothing, TVs, hats and bags for some of the largest U.S. companies clearly demonstrate that Wal-Mart, Nike, Huffy and others and their contractors in China continue to systematically violate the most fundamental human and worker rights, while paying below subsistence wages.").

54. See U.S. DEP'T OF COMMERCE, U.S. TRADE BY COMMODITY WITH CHINA, at <http://www.ita.doc.gov/td/industry/otea/usfth/top80cty/china.cp> (last updated May 25, 2000) (showing "Miscellaneous Manufactured Articles" as the top category in 1999 of U.S. imports from China at forty-two billion dollars).

55. See STATE DEP'T, *supra* note 1, at 1018 (explaining that Chinese reforms tending towards a market-based economy have helped raise the standard of living there); see also China Labour Act § 10 (1994), translated at

we really help the Chinese worker if we insist on labor standards so rigid that Nike, for example, no longer finds it profitable to have its factory there, and the worker ends up unemployed?⁵⁶

The third justification for U.S. concern with Chinese factories is the adverse impact on U.S. labor of labor rights abuses in developing countries.⁵⁷ The unequal position of Chinese laborers relative to their U.S. counterparts threatens to undermine the gains that organized labor has made in this country, because U.S. corporations will, in a "race to the bottom," take their jobs where the labor is cheapest.⁵⁸ In one sense, American and Chinese workers compete with each other for jobs,⁵⁹ but in another sense, they have a common interest in implementing global labor standards, precisely so they will not have to compete with each other.⁶⁰ After all, if labor standards are elevated not just in China, but everywhere else in the world, Nike will have no place else to take its business.⁶¹

In this context, it is worth noting that American labor's involvement in the issue is not motivated purely by altruistic concerns for its Chinese counterparts, nor even for American consumers.⁶² It is not clear whether altruistic concerns or practical ramifications are the more justifiable grounds for inquiry into the internal affairs of foreign nations. Although altruistic

<http://natlex.ilo.org/txt/E94CHN01.htm> ("The state shall create conditions for employment and increase opportunities for employment by means of the promotion of economic and social development.").

56. See Worker Rights Consortium, *Worker Rights Consortium for the Enforcement of University Licensing Codes of Conduct*, at http://www.workersrights.org/detailed_outline.html (last visited Apr. 4, 2001) ("Once violations at a site have been confirmed, the pressure on the licensee will be to improve conditions, rather than to shut down factories where violations have been found. Otherwise, there would be an incentive for workers *not* to report abusive conditions.").

57. See *No Illusions*, *supra* note 6.

58. See *id.*

59. See *id.*

60. See AFL-CIO, *supra* note 7 ("The fight against permanent NTR for China was part of the AFL-CIO's ongoing campaign to 'Make the Global Economy Work for Working Families' by joining together with unions, human rights groups and other allies around the world to end child labor and sweatshops, protect and expand the rights of workers and provide a counterbalance to powerful and rich multinational corporations.").

61. See Constitution of the International Labour Organization, June 28, 1919, Preamble, 49 Stat. 2712, 2714, 15 U.N.T.S. 35, 36 [hereinafter ILO Constitution] ("The failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries . . .").

62. See Howse, *supra* note 41, at 150 (listing several grounds in addition to altruism for extending labor concerns beyond national borders).

motivations seem more laudable by definition, motivations based purely on self-interest are perhaps more defensible because they do not depend on subjective value judgments. In the end, U.S. policy arguments regarding trade with China have largely revolved around what is in the best interests of the United States, not what is the right thing to do in the abstract.⁶³ Hence, U.S. labor's stance, even if self-serving to a degree, is perfectly consistent with the ground rules for debate on trade policy.

The consumer-interest and labor-interest justifications have certain parallels.⁶⁴ Both seek to end inhumane and unfair working conditions overseas.⁶⁵ Both apply only to labor abuses as opposed to other human rights abuses, and both apply primarily to factories making goods for U.S. markets, because workers there are in the most direct competition with U.S. laborers.⁶⁶

However, once certain minimum standards for wages and working conditions are met, American consumer and labor interests diverge.⁶⁷ The U.S. consumer, once she can be assured that she is not buying into a system contrary to her own values, has an interest in purchasing the best quality merchandise at the best price, and does not want superfluous labor costs passed on to her.⁶⁸ The U.S. laborer, on the other hand, whose job may pay something more than minimum wage, has an interest in ensuring that Chinese wages are no lower than his are.⁶⁹ Thus, any

63. See *infra* note 95 and accompanying text (discussing pros and cons of PNTR).

64. See COUNCIL ON ECON. PRIORITIES, *supra* note 48, at 1-2 (explaining that consumers are entitled to be alerted about companies that fail to establish adequate workplace standards).

65. See *id.* at 3.

66. See 145 CONG. REC. 111, S8682 (daily ed. Sept. 19, 2000) (statement of Sen. Byrd) ("I believe that PNTR and the new U.S.-China trade pact, that panacea of all good things, will encourage mainly one phenomenon – one phenomenon; namely, more U.S. corporations will move operations to China to capitalize on low-wage production for export back here to the United States.").

67. See COUNCIL ON ECON. PRIORITIES, *supra* note 48, at 1-2 (detailing American consumers' support for international basic workers' rights). But see Brad L. Bacon, *The People's Republic of China and the World Trade Organization: Anticipating a United States Congressional Dilemma*, 9 MINN J. GLOBAL TRADE 369, 387 (2000) (noting benefits of free trade to consumers in the form of increased choices of goods).

68. See *No Illusions*, *supra* note 6 (explaining that TNCs operate to "meet consumer demands of quality, price and timing."). See generally PNTR, Pub. L. No. 106-286, § 103, 114 Stat. 880, 882 (2000) (providing safeguards against market disruption, and reflecting the assumption consumers will want to buy equivalent products at the cheapest price).

69. See 146 CONG. REC. 111, S8683 (daily ed. Sept. 19, 2000) (statement of Sen. Byrd) ("Good paying jobs with good benefits, largely in the manufacturing sector, are leaving our shores and being replaced by low skill, low wage jobs in the services

proposal that seeks to rely on both U.S. consumer and labor interests as justifications for promoting Chinese labor rights should go no further than ensuring a minimum code of conduct for businesses.

As a corollary to the consumer interest justification, some commentators cite corporate interests as another rationale for promoting labor rights in China, arguing that businesses have an interest in maintaining fair conditions in factories because consumers demand it.⁷⁰ More precisely stated, however, the business interest is in maintaining the *appearance* of fair conditions in factories, while keeping labor costs as low as possible.⁷¹ This is a motivation towards a very different end than the improvement of workers' positions. When labor rights abuses do occur, consumers want to facilitate open communication, while businesses want to suppress it.⁷² Business interests therefore cannot properly be understood as an alternative motivation for promoting labor rights in China.

China's treaty obligations form the fourth and final justification for scrutinizing labor conditions inside China. As a U.N. member, China has a general obligation under the U.N. Charter to promote human rights in the economic and social context.⁷³ Moreover, China has ratified some international conventions that articulate specific fair labor practices.⁷⁴ Insisting

sector.").

70. See, e.g., Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 157 (1997) (describing the corporate interest argument).

71. See *No Illusions*, *supra* note 6.

72. See *id.*

73. See U.N. CHARTER art. 55. Article 55 provides:

The United Nations shall promote:

(A) higher standards of living, full employment, and conditions of economic and social progress and development;

(B) solutions of international economic, social, health, and related problems; . . . and

(C) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Id. The next article states that "all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." *Id.* art. 56; see also *id.* art. 2, para. 2 ("All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.").

74. See Convention Concerning the Application of the Weekly Rest in Industrial Undertakings, Nov. 17, 1921, 38 U.N.T.S. 17 (ratified by China May 17, 1934); Convention Concerning the Creation of Minimum Wage-Fixing Machinery, June

on compliance with such principles, thus, is not meddling in internal Chinese affairs, but rather holding China to its admitted international obligations.⁷⁵ This justification does not suffer from the abstraction and potential value bias of the human rights justification.⁷⁶ Furthermore, China's treaty obligations apply equally to all Chinese factories, unlike the consumer and labor interest justifications.⁷⁷ Still, holding China accountable for enforcement of labor rights and other human rights on the

16, 1928, 39 U.N.T.S. 3 (ratified by China May 5, 1930); Convention Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 297 (ratified by China Apr. 28, 1999) (setting fifteen years as the minimum age for work, with certain exceptions). Although some of these conventions were signed or ratified by the Nationalist Chinese government prior to the Communist revolution, the current Chinese government has apparently not questioned the validity of such treaties on those grounds. All of the conventions listed are in force under international law. See Int'l Labour Org., *Ratifications of the Fundamental Human Rights Conventions by Country* (Nov. 12, 2000), at <http://ilolex.ilo.ch:1567/public/english/docs/declprint.htm>.

China has not, however, ratified the following labor rights treaties: Freedom of Association and Protection of the Right to Organise Convention, Sept. 7, 1948, 68 U.N.T.S. 17; Right to Organise and Collective Bargaining Convention, July 1, 1949, 96 U.N.T.S. 257; Convention Concerning Forced or Compulsory Labour, June 26, 1930, 39 U.N.T.S. 291; Convention Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291; Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 38 I.L.M. 1207 (not yet in force). See Int'l Labour Org., *supra*. Nor has China ratified the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, a more general human rights treaty [hereinafter CCPR]. See Int'l Labour Org., *supra*.

The United States, by comparison, has ratified the Covenant on Civil and Political Rights, but has ratified neither the Covenant on Economic, Social and Cultural Rights, nor several of the other treaties mentioned above. See Int'l Labour Org., *supra*. Thus, neither country has ratified anything approaching the full slate of labor rights treaties. However, the United States has, through alternative domestic measures, more fully embraced the principles embodied even in those conventions it has not ratified. See, e.g., 29 U.S.C. § 163 (1947) (preserving the right to strike).

Because ratification of ILO treaties does not correlate to passage of parallel domestic laws, treaties are not a good measure of a nation-state's endorsement of international labor rights standards. Instead, ratification by a country is significant because it provides both a rationale and a means for other countries to pressure for labor rights across borders.

75. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

76. See Howse, *supra* note 41, at 169-71.

77. See, e.g., Convention Concerning the Application of the Weekly Rest in Industrial Undertakings, *supra* note 74, art. 2 (providing that "the hours of persons employed in any public or private industrial undertaking or any branch thereof shall be limited by the treaty).

grounds of that nation's treaty obligations is limited only to the terms of the treaties it has ratified.⁷⁸

China's international agreements provide a much stronger justification for intervention today than they did even a few short months ago. China's ratification on February 28, 2001, of the International Covenant on Economic, Social and Cultural Rights⁷⁹ signals its willingness to comply with the agreement's provisions protecting: "just and favourable conditions of work,"⁸⁰ "the right of everyone to an adequate standard of living,"⁸¹ "the right of everyone to form trade unions" and the "right to strike."⁸²

Furthermore, although China has left the International Covenant on Civil and Political Rights unratified, it has recently made a commitment on paper to work with the United Nations on the broader human rights issues covered by that treaty.⁸³ On November 20, 2000, Chinese President Jiang Zemin and U.N. High Commissioner for Human Rights Mary Robinson completed a Memorandum of Understanding sketching a plan for China to get outside help conforming with provisions of both the Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil

78. See Vienna Convention on the Law of Treaties, *supra* note 75, art. 26.

79. See Elisabeth Rosenthal, *China Ratifies Major U.N. Rights Accord*, N.Y. TIMES, Mar. 1, 2001, at A9.

80. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 7, 993 U.N.T.S. 3, 5 [hereinafter CESCR]. "Just and favourable conditions of work" include "fair wages," "a decent living," "safe and healthy working conditions," "equal opportunity . . . to be promoted," and "rest, leisure and reasonable limitation of working hours . . ." *Id.*

81. *Id.* art. 11.

82. *Id.* art. 8. More fully, section 1 of article 8 provides:

The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

Id.

83. CCPR, *supra* note 74, art. 22.

and Political Rights.⁸⁴ These treaties include provisions concerning the right to strike⁸⁵ and freedom of expression.⁸⁶ By ratifying the Covenant on Economic, Social, and Cultural Rights, and by signing the Memorandum of Understanding regarding that treaty and the Covenant on Civil and Political Rights, China has apparently acceded to greater outside involvement in the human rights situation there.⁸⁷

The overall rationale for Americans to take an interest in Chinese labor rights abuses is strongest when the individual justifications overlap. This Article therefore primarily addresses means for improving labor conditions in those Chinese factories that produce goods for export to the United States; provide jobs that might otherwise go to U.S. workers; and fail to comply with minimum labor standards China has recognized by treaty.

C. Potential Solutions

1. China's Internal Laws

China has municipal statutes and regulations largely consistent with international standards on child labor, minimum wage, maximum work hours, and the rights to unionize and collectively bargain.⁸⁸ Chinese officials claim that there is no cause for concern because such laws adequately protect labor rights.⁸⁹ However, human rights reports on China tell a story of lax enforcement of these laws.⁹⁰ Although some observers point to passage of the Labor Act of 1994 as evidence of a trend toward greater recognition of labor rights,⁹¹ others maintain that despite passage of these laws, conditions are not improving.⁹²

84. See Eckholm, *supra* note 3.

85. See CESC, *supra* note 80, art. 8(1)(d).

86. See CCPR, *supra* note 74, art. 19.

87. See *id.*

88. See, e.g., *supra* note 4.

89. See, e.g., *Committee Report on Complaint Against the Government of China Presented by the International Confederation of Free Trade Unions*, (ICFTU), ILO Report No. 316, § 351 [hereinafter ILO Report No. 316] (summarizing the Chinese government's position that the Labor Law provides adequate provisions for settlement of collective bargaining disputes).

90. See, e.g., STATE DEPT, *supra* note 1, at 1019 ("The government continued to restrict tightly worker rights."); KERNAGHAN, *supra* note 5, at 1.

91. See Hilary K. Josephs, *Labor Law in a "Socialist Market Economy": The Case of China*, 33 COLUM. J. TRANSNAT'L L. 559, 559-60 (1995).

92. See Anita Chan, *Workers' Rights Are Human Rights*, CHINA RTS. F. (Summer 1997), at <http://www.hrichina>.

2. Possibilities for Reform Facilitated by PNTR

Historically, the United States used the threat of not renewing China's MFN trade status as a means to draw attention to, if not actively advance, human rights in China.⁹³ Some proponents of PNTR for China argued that the loss of this leverage was really no loss at all, because it was never used effectively.⁹⁴

While the extended implications of passing PNTR are the subject of great controversy,⁹⁵ PNTR by its terms essentially accomplishes two things. First, it puts an end to United States's annual review of China's trade status.⁹⁶ Second, it removes barriers to trade with China by paving the way for China to join the WTO.⁹⁷

The WTO currently has essentially no provisions for labor standards.⁹⁸ Nevertheless, proponents of PNTR tout possible

93. See, e.g., Stirling, *supra* note 37, at 1-2 (illustrating how trade regulation is potentially the most effective mechanism for the enforcement of human rights).

94. See, e.g., 146 CONG. REC. S8729 (daily ed. Sept. 19, 2000) (statement of Sen. Harkin).

95. Compare, e.g., *U.S.-Bilateral Trade Agreement and the Accession of China to the World Trade Organization: Hearing on H.R. 4444 Before the House Comm. on Ways and Means*, 106th Cong. 46 (2000) [hereinafter *Hearing on H.R. 4444*] (statement of the Honorable Charlene Barshefsky, U.S. Trade Representative) (arguing that China's accession to the WTO will provide the United States with "new export opportunities that mean jobs and growth for Americans"), with ROBERT E. SCOTT, CHINA CAN WAIT: WTO ACCESSION DEAL MUST INCLUDE ENFORCEABLE LABOR RIGHTS, REAL COMMERCIAL BENEFITS 7 (1999) (predicting that China's accession to the WTO could result in "a net loss of 607,000 jobs in the U.S., mostly in the manufacturing sector."). Supporters of PNTR also claimed that to defeat the bill would have put U.S. workers at a competitive disadvantage with the rest of world in accessing China's markets. See President's Message to Congress on PNTR Status for China, 36 WEEKLY COMP. PRES. DOC. 493 (Mar. 8, 2000). This argument seems to rely on the dubious proposition that U.S. corporations will pass along to American workers any benefit gained from doing business with China. See SCOTT, *supra*, at 2 ("The WTO deal outlined by the U.S. trade representative in April [1999] would primarily benefit U.S. companies that invest in China while harming workers in both countries."). In fact, it is unclear whether many corporations will ultimately have any U.S. workers at all. Corporations such as Nike, for example, already "only retain design, accounting, public relations and retailing in their home base in the developed countries." See *No Illusions*, *supra* note 6. Fortunately for U.S. workers, PNTR comes at a time when U.S. unemployment is at historic lows. See 145 CONG. REC. 111, S8683 (daily ed. Sept. 19, 2000) (statement of Sen. Byrd).

96. See PNTR, Pub. L. No. 106-286, § 103, 114 Stat. 880, 882 (2000).

97. See *id.* § 101(b).

98. See Stirling, *supra* note 37, at 33. Since the U.S. Senate vote for PNTR (including granting China acceptance into the WTO in its current form) was 83-15, there seems to be no political will to change the WTO to include labor provisions. See U.S. Senate Roll Call Votes, 106th Congress, 2d Sess. (2000), at http://www.senate.gov/legislature/vote.1062/vote_00251.html; see also Howse, *supra* note 41, at 132 ("Resistance within the World Trade Organization to any formal linkage between trade and core international labor rights remains powerful.").

positive consequences for labor and other human rights,⁹⁹ arguing that the influx of people and ideas will help to bring positive change in China.¹⁰⁰ This argument recognizes that open communication is central to reform in China.

3. Business Codes of Conduct

In recent years, voluntary business codes of conduct have emerged as another possible avenue for promoting compliance with international labor standards in factories worldwide.¹⁰¹ U.S. labor rights proponents may have viewed business codes of conduct as a weak alternative to holding China's MFN status contingent upon an improved labor rights record;¹⁰² however, the passage of PNTR may require labor rights proponents to take another look at business codes of conduct and other alternatives to annual review of MFN status.

These business codes of conduct have generally taken one of two forms: modest rules to which businesses voluntarily subscribe, or sterner provisions that businesses are somehow pressured into accepting.¹⁰³ The story of the response to campus concerns that U.S. universities were selling sweatshop-made garments is illustrative of the tension between these two approaches to business codes of conduct.¹⁰⁴ At President Clinton's behest, the White House Apparel Industry Partnership (AIP) was created in 1996, bringing together representatives from human rights groups and universities.¹⁰⁵ Garment corporations such as Nike were also

99. See *supra* note 10 and accompanying text (citing Senator Harkin's statement that he thought PNTR might actually help human rights endeavors).

100. See, e.g., *Hearing on H.R. 4444*, *supra* note 95, at 38 (statement of Honorable Charlene Barshefsky, U.S. Trade Representative) (claiming that China's acceptance into the international community through accession to the WTO "will give China's people more access to information, and weaken the ability of hardliners in government to isolate China's public from outside influences and ideas").

101. See, e.g., Fair Labor Ass'n, *Workplace Code of Conduct* (1997), at <http://www.fairlabor.org/html/amendctr.html>; Soc. Accountability Int'l, *Social Accountability 8000*, at <http://www.sa-intl.org/sa8000.htm> (last visited Apr. 4, 2001).

102. See, e.g., AFL-CIO, *Senate Ignores China's Human Rights Abuses and Votes for Permanent Trade Rights*, at http://www.aflcio.org/news/2000/0919_china.htm (last visited Apr. 4, 2001) (describing the AFL-CIO's fight against PNTR as part of an ongoing effort to protect workers' rights internationally).

103. See Worker Rights Consortium, *Worker Rights Consortium Executive Summary*, at http://www.workersrights.org/executive_summary.html (last visited Apr. 4, 2001).

104. See Fair Labor Ass'n, *Fair Labor Association Questions & Answers*, at <http://www.fairlabor.org/html/affiliates/university.html> (last visited Apr. 4, 2001).

105. See Sweatshop Watch, *Fair Labor Association=Starvation Wage* (Dec. 1998),

invited to participate.¹⁰⁶ Out of the AIP grew the Fair Labor Association (FLA), which in 1998 developed a code of conduct for U.S. businesses using overseas factories, and provided a plan for monitoring compliance.¹⁰⁷

Critics argued that any entity with a structure based on engagement with corporate interests such as Nike could not be entrusted to ensure the fair treatment of laborers.¹⁰⁸ Indeed, many of the labor and human rights groups that had been part of the AIP refused to be signatories to the FLA, objecting that the code of conduct and the monitoring plan were biased in favor of the corporations. These skeptics claimed that the FLA was little more than a public relations gambit for the big corporations, who had no intention of jeopardizing their cheap sources of labor.¹⁰⁹ In the spring of 2000, American labor groups, students, and human rights groups not aligned with the FLA established the Worker Rights Consortium (WRC) as an alternative.¹¹⁰ Supporters of the FLA countered that the corporations are key players, and that the new organization, by not enlisting corporate cooperation, cannot be effective as a practical matter.¹¹¹ Sixty-two schools have signed on with the new WRC,¹¹² while another 147 schools are allied with the corporate-affiliated FLA.¹¹³

The U.N. has also articulated a set of principles for business conduct.¹¹⁴ This "Global Compact," announced by Secretary-General Kofi Annan in January 1999, asks businesses to subscribe to nine principles of conduct drawn from the Universal Declaration

at http://www.sweatshopwatch.org/swatch/headlines/1998/sw_fla.html.

106. *See id.*

107. *See id.*

108. *See id.* The FLA board is set up to include six seats for companies and six seats for NGOs. *See* Fair Labor Ass'n, *supra* note 104.

109. *See* Sweatshop Watch, *supra* note 105.

110. *See* Maria Roeper, *Worker Rights Consortium, An Anti-Sweatshop Initiative, Holds Founding Conference* (Apr. 7, 2000), at http://www.workersrights.org/conference_press_release.html.

111. *See* Fair Labor Ass'n, *supra* note 104 (stating their belief that "lasting change is more likely if companies make an affirmative commitment to the FLA's code of conduct and its monitoring principles" and characterizing the WRC's approach as "more adversarial . . . to companies").

112. *See* WRC Member Sch. (including the University of Minnesota), at http://www.workersrights.org/member_schools.html (current through Oct. 18, 2000).

113. *See* Fair Labor Ass'n, *Colleges and Universities Affiliated with the FLA* (including Grinnell College), at <http://www.fairlabor.org/html/affiliates/university.html> (last visited Mar. 21, 2001).

114. *See* The Global Compact - The Nine Principles, at <http://www.unglobalcompact.org/gc/UNWeb.nsf/content/thenine.htm> (last visited Mar. 21, 2001).

of Human Rights, the Declaration of the International Labour Organization on fundamental principles and rights, and other U.N. documents.¹¹⁵ The Global Compact addresses environmental concerns, labor rights issues, and more general human rights issues within businesses' "sphere of influence."¹¹⁶ The nine principles are broad generalities, and the Global Compact has no provisions whatsoever concerning monitoring compliance.¹¹⁷ The Global Compact falls into the category of modest codes to which businesses are asked to voluntarily subscribe.

However, the U.N. Commission on Human Rights is in the process of developing a more detailed set of guidelines for corporate behavior.¹¹⁸ The new U.N. scheme attempts to synthesize various prior codes created by the U.N. or other international organizations, corporations, unions, or NGOs.¹¹⁹ The explanatory paper accompanying the proposed code presents the draft simply as "a point of departure for discussion."¹²⁰ The draft includes detailed provisions for company conduct, but lacks any recognition of the right to strike, as provided for in the Covenant on Economic, Social and Cultural Rights.¹²¹

In its current stage of development, the draft contains only provisions concerning corporate conduct and general provisions requiring "independent verification and regular reporting."¹²² More specific provisions concerning monitoring compliance are to come in a later draft. The drafters make no attempt at this stage to say whether the code "should be voluntary, legally binding, or how it should be enforced or implemented."¹²³ They suggest that for now, companies might voluntarily adopt the code of conduct,¹²⁴ but predict that their set of principles "might eventually be viewed as legally binding."¹²⁵ They recognize that, ultimately,

115. *See id.*

116. *See id.*

117. *See id.*

118. *See Draft Principles, supra* note 27.

119. *See id.* ¶ 19.

120. *Id.* ¶ 21.

121. *See* CESCR, *supra* note 80, art. 8(1)(d) ("The States Parties to the present Covenant undertake to ensure . . . the right to strike, provided that it is exercised in conformity with the laws of the particular country."). China became a party to this convention on February 28, 2001. *See supra* notes 84-87 and accompanying text.

122. *Draft Principles, supra* note 27, ¶ 39.

123. *Id.* ¶ 22.

124. *See id.* ¶ 9.

125. *Id.* ¶ 18.

"companies . . . cannot be asked to replace governments in their primary responsibilities for the protection of human rights."¹²⁶

The drafters acknowledge that "a major challenge in regard to such human rights codes of conduct is the development of procedures for monitoring compliance, verifying implementation, and reporting,"¹²⁷ and suggest that these issues will be given careful consideration in future drafts. The drafters comment that "companies should make known to stakeholders the location of their offices, subsidiaries, and factories, so that stakeholders can be reassured that the companies' products and services are being produced under conditions that respect labour and other human rights standards."¹²⁸ The authors further note that such a code will be most effective when businesses allow "unannounced inspection visits by monitors, protection of the confidentiality of complainants, [and] unsupervised interviews of workers during any visits."¹²⁹

4. Enforcement of Treaties by International Bodies

The International Court of Justice (ICJ) is the "principle judicial organ of the United Nations."¹³⁰ Nations party to the ICJ generally have recourse to the ICJ to resolve treaty disputes.¹³¹ Created in an era before transnational corporations (TNCs) and international non-governmental organizations were significant players in international affairs,¹³² the Statute of the International Court of Justice provides that "[o]nly states may be parties in cases before the Court."¹³³ Nations submit to the jurisdiction of the ICJ voluntarily,¹³⁴ but once the ICJ's jurisdiction is accepted, the decisions are considered legally binding.¹³⁵

A second avenue is available for promoting treaty compliance for those treaties that fall under the International Labour

126. *Id.* ¶ 17.

127. *Id.* ¶ 24.

128. *Id.* ¶ 15 n.50. The document explains that "the term 'stakeholder' includes any group or individual which is affected by the operations of the company. Stakeholders include owners, stockholders, employees, customers, suppliers, neighboring communities, individuals, governments, and others who may be affected or influenced by its activities." *Id.*

129. *Id.*

130. Statute of the International Court of Justice, June 26, 1945, art. 1, 59 Stat. 1055, 1057, 33 U.N.T.S. 993, 994; *see also* U.N. CHARTER art. 92.

131. *See* Statute of the International Court of Justice, *supra* note 130, art. 1.

132. *See* MALANCZUK, *supra* note 39, at 282.

133. Statute of the International Court of Justice, *supra* note 130, art. 34.

134. *See* MALANCZUK, *supra* note 39, at 282.

135. *See id.* at 288.

Organization (ILO).¹³⁶ The ILO allows not only member nations but also any "industrial association of employers or of workers" to submit complaints concerning a member nation's non-compliance with an ILO convention.¹³⁷ The committee is then authorized to assess the complaints and address concerns to governments of nations alleged to have breached treaty provisions.¹³⁸ Governments have an opportunity to respond,¹³⁹ and then the ILO makes a report and recommendations.¹⁴⁰

The ILO recently demonstrated a previously unseen capacity to impose its "recommendations" on a delinquent member.¹⁴¹ In response to recalcitrant behavior by the government of Myanmar in violation of the Forced Labour Convention, the ILO Governing Body utilized the never-before-invoked article 33 of the ILO Convention.¹⁴² Article 33 authorizes the ILO, when faced with a member nation that flouts the Organization's recommendations, to take "such action as it may deem wise and expedient to secure compliance therewith."¹⁴³ Pursuant to article 33, the ILO adopted for Myanmar a resolution that calls upon "the Organization's constituents as a whole – governments, employers and workers [to] . . . take appropriate measures to ensure that [Myanmar] . . . cannot take advantage of . . . relations [with the constituents] to perpetuate or extend the system of forced or compulsory labour,"¹⁴⁴ calls upon international organizations to "cease as soon as possible any activity that could have the effect of directly or indirectly abetting the practice of forced or compulsory labour,"¹⁴⁵ and calls upon the U.N. Economic and Social Council "to place an item on the agenda of its July 2000 session concerning the failure of Myanmar to implement the recommendations."¹⁴⁶ Thus, the

136. See generally ILO Constitution, *supra* note 61.

137. See *id.* art. 24.

138. See *id.*

139. See *id.* arts. 24, 26.

140. See *id.* art. 28.

141. See Int'l Labour Org., *ILO Governing Body Opens the Way for Unprecedented Action Against Forced Labour in Myanmar*, available at <http://www.ilo.org/public/english/bureau/inf/pr/2000/44.htm> (last visited Mar. 4, 2001).

142. See *id.*

143. ILO Constitution, *supra* note 61, art. 33.

144. *International Labour Conference Resolution Concerning the Measures Recommended by the Governing Body Under Article 33 of the Constitution with Respect to Myanmar*, at <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/pr-4.htm> (last visited Mar. 12, 2001).

145. *Id.*

146. *Id.*

Myanmar case may serve as a precedent for using the ILO's mechanisms to secure compliance with labor treaties.

5. The Internet

There is a consensus among all parties concerned with labor and other human rights abuses that communication, particularly through the Internet, must be part of the solution.¹⁴⁷ According to a U.S. State Department estimate, almost nine million people had access to the Internet in China at the end of 1999.¹⁴⁸ This was up from an estimated 200,000 Chinese Internet users in 1997.¹⁴⁹ Some experts estimate that by 2003, the number will be roughly thirty-five million, and that China will be the second largest Internet market in the world, behind only the United States.¹⁵⁰

The communicative power of the Internet has been widely recognized. Even the U.S. Supreme Court has taken notice, in the landmark First Amendment case of *Reno v. ACLU*:

The [World Wide] Web is . . . comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. From the publisher's point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals "No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web."¹⁵¹

Justice Stevens went on to explain that:

This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line¹⁵² can become a town crier with a voice that

147. See, e.g., *Hearing on H.R. 4444*, *supra* note 95, at 38 (2000) (statement of the Honorable Charlene Barshefsky, U.S. Trade Representative) (arguing that China's accession to the WTO will "enable foreign businesses to participate indirectly in information industries, such as telecom, including the Internet").

148. See STATE DEP'T, *supra* note 1, at 1021.

149. See *The Internet in China* (National Public Radio, Nov. 24, 1999), available at <http://search.npr.org/cf/cmn/cmnpd01fm.cfm?PrgDate=11/24/1999&PrgID=3>.

150. See *id.*

151. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853 (1997) (quoting *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 838 (E.D. Pa. 1996)).

152. Justice Stevens omitted here the fact that not only a phone line, but also a

resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.¹⁵³

The Chinese government has attempted to restrict Internet use, but has been only partially successful.¹⁵⁴ One measure the Chinese government has taken has been to enact strict licensing rules regulating news content.¹⁵⁵ Only two online news organizations, SINA.com and sohu.com, have been granted licenses under these new rules.¹⁵⁶ However, the Internet is by its nature resistant to such attempts to crack down on it.¹⁵⁷

III. Analysis

A. Limitations on the Effectiveness of Various Proposals

The best hope for reform in China is through a variety of strategies working in concert. Most strategies that hold promise, however, are similarly limited by a dependence upon the free flow of information.

computer, are necessary to access most types of Internet communication.

153. *Reno*, 521 U.S. at 870.

154. It is well beyond the scope of this Article to delve into the technical feasibility of Internet policing, but one of the most recent human rights reports available details the Chinese government's attempts:

Chinese authorities struggled to gain control of the Internet, with its estimated 16 million users. By the end of 1999, regulations had already banned web operators from linking to foreign news sites, and companies operating websites from hiring their own reporters. New regulations issued in March 2000 forbade China-based websites from reporting news from "independent news organizations," thus limiting them to state-controlled sources Starting in March, some twenty provinces set up special Internet police to expand the *sao huang* ("sweep away the pulp") campaign, ostensibly aimed at removing pornography from the Internet. In practice it was used to ban postings the government considered objectionable [A] court sentenced Qi Yanchen, a founding member of the quasi-independent China Development Union, to a four-year prison term, in part for posting parts of his book, *The Collapse of China*, on the Internet Stringent new regulations came into force on September 26, 2000 banning any materials judged subversive, supportive of so-called cults, damaging to reunification efforts with Taiwan, or harmful to China's reputation. Content and service providers were required to keep records of all users and content for 60 days and to hand over the information to police on demand.

HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2001: EVENTS OF 2000, at 183 (2001); see also STATE DEP'T, *supra* note 1, at 1032-34 (detailing the Chinese government's attempts to crack down on the Internet during 1999).

155. See Reuters, *China Approves Two Portals for Online News* (Dec. 29, 2000), at http://search-engines-ranking.com/news/archive00/001229_sina_sohu_0.html.

156. See *id.*

157. See *Reno*, 521 U.S. at 889-90 (O'Connor, J., concurring in the judgment, concurring in part and dissenting in part).

1. China's Internal System

Inasmuch as China's internal system restricts the free flow of information, it is the problem, and not a potential solution. Systemic impediments to reform under the current Chinese form of government make it unlikely that China's internal mechanisms, without more, will ever achieve industry compliance with international labor standards. The Western notion of the rule of law has historically been slow to catch on in China,¹⁵⁸ and there is no truly independent judiciary.¹⁵⁹ The U.S. State Department explains:

[T]he judiciary is subject to policy guidance from both the Government and the Communist Party, whose leaders use a variety of means to direct courts on verdicts and sentences in politically sensitive cases [O]ne expert estimated that more than 70 percent of commercial cases in lower courts were decided according to the wishes of local officials rather than the law.¹⁶⁰

Furthermore, in an environment dominated by government-run enterprises, prosecutorial power is entrusted to officials who are "either intimately connected with or even the same as those who are violating workers' rights."¹⁶¹

Even to the extent that Chinese labor laws are fairly enforced, they are facially inadequate to protect workers' rights.¹⁶² Most significantly, the omission from Chinese law of any protections for the right to strike¹⁶³ drastically impairs workers' ability to express their dissatisfaction.¹⁶⁴

Unequivocal recognition of the right to strike is not likely forthcoming from the Chinese government.¹⁶⁵ China steadfastly maintains that striking itself is not a right, but rather one means to an end.¹⁶⁶ China further maintains that it has adequate

158. See Ambassador Charlene Barshefsky, *Trade Policy and the Rule of Law*, 9 MINN. J. GLOBAL TRADE 361, 364 (2000) (remarking that under Chairman Mao, China was in essence "an 'a-legal' society – a nation with neither lawyers, nor law enforcement, nor laws").

159. See STATE DEP'T, *supra* note 1, at 1028.

160. *Id.*

161. Mary Gallagher, *An Unequal Battle: Why Labor Laws & Regulations Fail to Protect Workers*, CHINA RTS. F. (Summer 1997), at <http://www.hrichina.org/crf/english/97summer/e6.html>.

162. See, e.g., ILO Report No. 316, *supra* note 89, § 365 (criticizing the Chinese government's failure to recognize the right to strike).

163. See STATE DEP'T, *supra* note 1, at 1060.

164. "Historically, workers have always had to win rights. These rights were never granted or audited into existence." *No Illusions*, *supra* note 6.

165. See STATE DEP'T, *supra* note 1, at 1060.

166. See, e.g., ILO Report No. 316, *supra* note 89, § 351 (summarizing the

alternative means to accomplish those ends.¹⁶⁷ The crackdown on labor rights activists is part of a broader policy of attempting to silence dissent.¹⁶⁸ To the Chinese government, organizing a strike in opposition to state-controlled employers is tantamount to treason.¹⁶⁹ Because China is not likely to independently enforce existing law or to sincerely embrace labor rights principles it has not heretofore recognized, some form of external influence is necessary.

2. U.S. Corporations Acting Alone

Any strategy that relies exclusively on TNCs to bring about improvements in labor conditions cannot provide the sort of external influence needed to overcome China's inertia.¹⁷⁰ By their very nature, TNCs are motivated by the bottom line rather than a sincere interest in improving labor conditions.¹⁷¹

Thus, attempts at developing and implementing business codes of conduct can be effective only to the extent that the very corporations that are the subjects of the monitoring do not control the process.¹⁷² TNCs and autocratic governments embrace corporate codes of conduct with weak enforcement mechanisms

Chinese government's position that the labor law provides adequate provisions for settlement of collective bargaining disputes).

167. *See id.*

168. *See* AMNESTY INT'L, ANNUAL REPORT 2000 (2000), available at <http://www.web.amnesty.org/web/ar2000web.nsf/ar2000>.

169. *See* Han Dongfang, *A Long Hard Journey: The Rise of a Free Labor Movement*, CHINA RTS. F. (Winter 1995) (explaining that there are no free labor unions in China, and that the labor unions that do exist are simply arms of the government, "serving to control workers by playing the part of hired thugs and public security in workplaces"), at <http://www.hrichina.org/crf/english/95winter/e9.html>; *see also* HUMAN RIGHTS WATCH, *supra* note 154, at 180 (reporting Former Premier Li Peng's announcement that China would not tolerate any political system that would "negate the leadership of the Communist Party").

170. "American people no longer believe that companies can be trusted to police themselves or to guarantee respect for fundamental human rights." KERNAGHAN, *supra* note 28, at 63. *See generally* *No Illusions*, *supra* note 6.

171. *See* *No Illusions*, *supra* note 6 (explaining that TNCs operate to "meet consumer demands of quality, price and timing"). *See generally* PNTR, Pub. L. No. 106-286, § 103, 110 Stat. 880, 882 (2000) (providing safeguards against market disruption, and reflecting the assumption that consumers will want to buy equivalent products at the cheapest price).

172. The Worker Rights Consortium is a practical improvement upon industry-controlled monitoring organizations. United Students Against Sweatshops is convinced that, no matter how well-intentioned these organizations may be, their effect will be to relieve the pressure to clean up the industry, to cover up abuses, and to lend the credibility of schools' names to the very companies that have created the global sweatshop system. *See* Worker Rights Consortium, *supra* note 103.

because such codes allow participating entities to look good signing on without requiring them to actually change.¹⁷³ Any code of business conduct that does not contain strong provisions regarding monitoring of compliance, that is, safeguards for communicating information about what really goes on in factories, is thus subject to abuse.¹⁷⁴ Codes lacking such provisions should be regarded with skepticism, and businesses' and governments' motives should be scrutinized.

Corporations have a keen interest in restricting the dissemination of information about the occurrence of labor rights abuses.¹⁷⁵ If they acknowledge claims of labor rights abuses at all, corporations respond by insisting that their own codes of conduct adequately protect workers' rights, and imply that horror stories of labor rights abuses are unverifiable exaggerations.¹⁷⁶ Organizations tied to U.S. labor have an incentive to paint as nasty a picture as possible of labor conditions in China.¹⁷⁷ If U.S. labor leaders can scare consumers into believing that overseas labor conditions are abominable, they protect American jobs.¹⁷⁸ Whom, then, to believe? Without independent reporting of the type that freely speaking press, NGOs, or labor unions might provide, without freedom of association acting to protect workers' ability to air their grievances, and without neutral investigative fact-finding by an independent judiciary, outsiders cannot say with certainty whether or not labor abuses are happening.¹⁷⁹

In any question of credibility, the benefit of the doubt is with the side arguing for increased emphasis on human rights, particularly rights of open communication such as a free press and the freedom for workers to air their grievances. Those who would "delink" human rights considerations from trade policy considerations arouse suspicion that they have something to fear from a more open flow of information.¹⁸⁰ Corporations appear to want to maintain the status quo when they refuse to support measures that would pressure the Chinese government to adopt

173. See *No Illusions*, *supra* note 6.

174. See Worker Rights Consortium, *supra* note 103.

175. See KERNAGHAN, *supra* note 28, at 67.

176. See *id.* at 15.

177. See *supra* notes 62-69 and accompanying text.

178. See *supra* notes 62-69 and accompanying text.

179. See KERNAGHAN, *supra* note 28, at 7.

180. "What companies fear most is the light of day. Public exposure is to them what a cross means to Dracula. They do not want a widespread public debate focused on conditions and wages in their offshore factories . . ." *Id.* at 67.

more open policies, and when they are resistant to stern provisions in business codes of conduct for monitoring compliance.¹⁸¹

Business codes of conduct emphasizing truly independent monitoring provisions, such as that promulgated by the Worker Rights Consortium (WRC), are thus superior to more modest codes such as the Fair Labor Association's (FLA). With respect to substantive standards for factory conditions, none of these codes requires substantially more than Chinese laws and treaties that on their face already recognize international labor standards.¹⁸² Therefore, the value of a code is primarily in its ability to monitor and promote compliance with such existing standards.¹⁸³

There are several similarities between the WRC and FLA procedures for monitors, as outlined in the respective charter documents of each organization.¹⁸⁴ Both frameworks call for internal and "independent" monitoring,¹⁸⁵ and both organizations call for the involvement of local NGOs.¹⁸⁶

What distinguishes the WRC plan is its theme throughout the monitoring system of complete independence from the influence of the corporations being monitored.¹⁸⁷ The WRC plan calls for TNCs to publish the locations of all of their factories, as well as factories with whom they subcontract.¹⁸⁸ The WRC puts a greater emphasis on unannounced inspections and on soliciting candid information from workers themselves.¹⁸⁹ The WRC plan has the benefit of not having to rely on voluntary cooperation from the companies that are the subjects of the monitoring.¹⁹⁰ Instead,

181. *See id.*

182. *See* Fair Labor Ass'n, *Charter Document*, available at www.fairlabor.org/html/amendctr.html (last visited Mar. 7, 2001); *Draft Principles*, *supra* note 27, ¶¶ 17-24. *See generally* China Labor Act, at <http://natlex.ilo.org/txt/E9YCHN01.htm> (last visited Mar. 7, 2001).

183. *See* Sweatshop Watch, *supra* note 105.

184. *See id.*

185. *See* Fair Labor Ass'n, *supra* note 182; *see also* Fair Labor Ass'n, *supra* note 104; Fair Labor Ass'n, *Comparison of the FLA and the WRC*, at <http://www.fairlabor.org/html/affiliates/university.html> (last visited Mar. 7, 2001); Worker Rights Consortium, *Worker Rights Consortium for the Enforcement of University Licensing Codes of Conduct*, at http://www.workersrights.org/detailed_outline.html (last visited Mar. 7, 2001).

186. However, the State Department notes that "[t]here are no independent domestic NGO's that publicly monitor or comment on human rights conditions" in China. STATE DEP'T, *supra* note 1, at 1053.

187. *See* Worker Rights Consortium, *supra* note 185 (explaining that industry representatives will have "no influence" over the inspection process); *see also supra* note 172 (comparing the WRC and United Students Against Sweatshops).

188. *See* Worker Rights Consortium, *supra* note 185.

189. *See id.*

190. *See id.*

the WRC proposes to force the industry into compliance by denying lucrative college and university licensing contracts to TNCs that do not comply.¹⁹¹ Included in the conditions is acceptance of factory inspections on the WRC's terms.¹⁹²

The FLA responds that its framework will have broader applicability, not only to other garment manufacturers, but also to other industries.¹⁹³ The WRC strategy is limited in its applicability to those apparel manufacturers seeking university licenses.¹⁹⁴ The trade-off is that the FLA must enlist the cooperation of industry in order to achieve broader applicability. Thus, each code has severe limitations.

While the WRC plan is generally preferable, the FLA also plays a constructive role. Labor rights activists need all the leverage they can find, particularly in light of the passage of PNTR. Although both the FLA and the WRC are non-profit organizations, they nevertheless compete in that each strives to get as many schools as possible to participate in its plan.¹⁹⁵ Despite some bad blood between the two organizations,¹⁹⁶ the competition between them seems to be turning into a healthy one. Each organization has made changes in response to the other's criticism.¹⁹⁷ Moreover, schools are provided a choice, when awarding licensing contracts, between supporting the FLA, with its broad scope, and the WRC, with its greater assurances of truly independent monitoring.

Schools should be wary, however, of embracing a plan that claims broad applicability, but in fact has little or no practical effect.¹⁹⁸ In selling human rights plans to businesses, labor rights activists must be careful not to sell out the principles that justify scrutiny of activities in China.¹⁹⁹ U.S. citizens are justified in promoting human rights in China because U.S. consumers are entitled to information about what really happens in sweatshops,²⁰⁰ not because U.S. businesses are entitled to attract

191. *See id.*

192. *See id.*

193. *See* Fair Labor Ass'n, *supra* note 185.

194. *See id.*

195. *See supra* notes 112-113 and accompanying text.

196. *See supra* notes 101-113 and accompanying text.

197. In response to criticism, the Worker Rights Consortium has now published a code with specific provisions. *See* Worker Rights Consortium, *supra* note 185. The FLA likewise recognizes that it is a work in progress, and has identified areas for improvement. *See* Fair Labor Ass'n, *supra* note 104.

198. *See* Worker Rights Consortium, *supra* note 185.

199. *See* KERNEGHAN, *supra* note 28, at 10.

200. *See supra* notes 48-54 and accompanying text.

consumers with warm-fuzzy feelings about the production of their sweatshirts.²⁰¹

Just as American TNCs using Chinese factories have an interest in preventing Americans from finding out about abuses in those factories, they also have an interest in preventing abused factory workers from finding out about the rights that Americans enjoy. If PNTR is to have the beneficial effect of bringing Western ideas to China, activists must make sure that supremacy of corporate profit is not the only Western idea that finds its way to Chinese laborers.²⁰²

Unfortunately, it appears that "Just do it" is the only American slogan that workers in slave-like conditions in Nike's Sewon Factory in Jiaozhou City, China learn.²⁰³ This ubiquitous catch-phrase, after all, is the message that ironically hangs on their factory wall,²⁰⁴ not anything remotely like "all men are created equal, . . . they are endowed by their Creator with certain unalienable Rights . . . among these are Life, Liberty and the pursuit of Happiness."²⁰⁵ It is naïve at best to suggest, as proponents of PNTR have, that "[t]he very presence of American business has exposed the Chinese to a culture where individual rights are respected and human dignity valued."²⁰⁶

Those who are sincerely concerned about labor rights in China cannot rest on the hope that Chinese workers will discover the principles of open communication and free association through the fumes of glue and shoe leather.²⁰⁷ If increased openness has been achieved in China in recent years, the credit does not belong

201. See *supra* notes 70-72 and accompanying text.

202. See KERNAGHAN, *supra* note 28, at 10. The author quotes Chinese labor activist Han Dongfang:

People have always said foreign investment is the hope of China. This is our bridge to the world. But what comes across the bridge are 12-hour shifts, seven-day work weeks and only two trips to the bathroom a day. What comes across are factory fires that kill hundreds of workers who are locked in because their bosses are afraid they will steal the products. The Chinese government has put an invisible net across the bridge that allows money to come in but not the freedoms of a civil society, not the rule of law and not free trade unions.

Id.

203. See KERNAGHAN, *supra* note 5, at 69.

204. See *id.*

205. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

206. *Hearing on H.R. 4444*, *supra* note 95, at 179 (statement of Frederick W. Smith, Chairman, President and Chief Executive Officer, FedEx Corporation).

207. See KERNAGHAN, *supra* note 28, Preface (recounting the story of a Chinese college graduate's "dreams of democracy, freedom and human rights" having been shattered by his experience at a foreign-managed factory).

to the increased presence of American TNCs.²⁰⁸ U.S. labor and human rights activists must continue to use the opening of China to make further contacts with their Chinese counterparts, and thus increase Chinese workers' awareness of their rights.

3. The ICJ and the ILO

The ICJ suffers from several impediments. At the outset, the Court's scope is limited to disputes between nations that have voluntarily submitted to its jurisdiction. Malanczuk explains that "where states see their vital interests involved, they will not submit easily to adjudication."²⁰⁹ In addition, only nations may be parties,²¹⁰ and the government of one nation may have no incentive to bring a claim against another. As Congress' overwhelming vote in passing PNTR demonstrates, the U.S. government is politically reluctant to pressure China on labor rights.²¹¹

Furthermore, the U.N. has not settled upon an effective means of enforcing ICJ judgments.²¹² The U.N. Security Council has authority to "make recommendations or decide upon measures to be taken to give effect to" an ICJ decision,²¹³ but it has never used that authority.²¹⁴ ICJ decisions "are often simply ignored."²¹⁵

The enforcement problem would be especially acute in any ICJ case between the United States and China, for the United States used its veto power to block enforcement of an ICJ decision in a dispute with Nicaragua.²¹⁶ China, one of the other permanent members of the Security Council, could do the same.²¹⁷

The ILO's recent actions against Myanmar show that the ILO scheme is not hampered in the same way as the ICJ.²¹⁸ The ILO could theoretically take action against China to ensure treaty compliance, regardless of whether China agrees to the proceedings.²¹⁹ Unions do not have to wait for their governments

208. *See id.*

209. MALANCZUK, *supra* note 39, at 292.

210. *See supra* note 133 and accompanying text.

211. *See supra* note 98 (showing that H.R. 4444, PNTR, passed eighty-three to fifteen).

212. *See* MALANCZUK, *supra* note 39, at 288-89.

213. U.N. CHARTER art. 94.

214. *See* MALANCZUK, *supra* note 39, at 288.

215. *Id.* at 291.

216. *See id.* at 289.

217. *See* U.N. CHARTER arts. 23, 27.

218. *See supra* notes 136-146 and accompanying text.

219. As is the case with the U.N. Security Council, China holds a permanent

to take action but may submit complaints directly to the ILO themselves.²²⁰ The ILO has shown itself capable of invoking article 33 of its constitution to take measures putting real pressure on offending nations.²²¹

Hence, the primary limitation on the ILO as an avenue for promoting reform in China may be its dependency on access to reliable information on factory conditions. It has been a tremendous challenge to get necessary information on conditions in Myanmar.²²² Similar hurdles exist in China.²²³ When foreign governments or outside individuals do not know about specific instances of labor rights violations, they cannot bring them to the attention of the ILO.²²⁴

B. Overcoming the Limitations

The exchange of information is the key to pushing reform. The Internet may be the best hope for freeing Chinese workers from the shackles of a system that attempts to silence dissent.²²⁵ Whether in the hands of international labor unions, sympathetic NGOs, or Chinese laborers themselves, the Internet can be a powerful tool for effectuating the necessary flow of information. More than any other medium, the Internet has the potential to enable Chinese workers to disseminate accounts of factory conditions, access information about their rights, and

seat on the ILO Governing Body. While there is no veto power, it may be substantially more difficult to bring sanctions against a powerful nation such as China than against a small pariah like Myanmar. See Int'l Labour Org., *Governing Body of International Labour Office*, at <http://www.ilo.org/public/english/standards/relm/gb/index.htm> (last visited Mar. 4, 2001).

220. See *supra* note 137 and accompanying text.

221. See *supra* notes 141-146 and accompanying text.

222. See Blaine Harden, *How to Commit the Perfect Dictatorship*, N.Y. TIMES, Nov. 26, 2000, at A5.

223. See KERNAGHAN, *supra* note 5, at 5.

224. Commentators have suggested that labor rights issues in China could be advanced under the Alien Tort Claims Act. See Douglas S. Morrin, *People Before Profits: Pursuing Corporate Accountability for Labor Rights Violations Abroad Through the Alien Tort Claims Act*, 20 B.C. THIRD WORLD L.J. 427 (2000) (reviewing RUSSEL MOKHIBER & ROBERT WEISSMAN, *CORPORATE PREDATORS: THE HUNT FOR MEGA-PROFITS AND THE ATTACK ON DEMOCRACY* (1999)). Others have suggested using the fairness in advertising provisions of the Federal Trade Commission Act. See Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603 (2000). Like most strategies with any chance of effectively advancing Chinese labor rights, litigation in U.S. courts is heavily dependent upon access to reliable information concerning what really happens in Chinese factories.

225. See *The Internet in China*, *supra* note 149.

communicate with one another for the purpose of organizing to collectively air their grievances.²²⁶

Certain properties of the Internet give it unique potential to overcome the Chinese government's penchant for restricting all forms of communication. It can reach a wide audience almost instantaneously, before censors have time to act.²²⁷ It also protects anonymity.²²⁸

Justice O'Connor, dissenting in part in *Reno v. ACLU*,²²⁹ recognized that "[b]ecause it is no more than the interconnection of electronic pathways, cyberspace allows speakers and listeners to mask their identities."²³⁰ She further explained that "[s]ince users can transmit and receive messages on the Internet without revealing anything about their identities . . . it is not currently possible to exclude persons from accessing certain messages on the basis of their identity."²³¹ Justice O'Connor unfortunately mischaracterized this property of the Internet as an unmitigated shortcoming,²³² when in fact it is also one of the Internet's unique virtues. As the Supreme Court acknowledged almost forty years earlier, "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."²³³ Because the Internet conceals not only of the identity and geographical location of the speaker, but also the identity and geographical location of all receivers of the information, it provides an even greater safeguard of anonymity than a conventional publication that merely omits the author's name.²³⁴

However, Chinese authorities have demonstrated that state-of-the-art technology has some ability to peer through the Internet's veil of anonymity.²³⁵ A recent online article, *Police*

226. See *id.*; see also *Hearing on H.R. 4444, supra* note 95, at 38 (statement of Hon. Charlene Barshefsky, U.S. Trade Representative) (arguing that China's accession to the WTO will "enable foreign businesses to participate in information industries, such as telecom, including the Internet").

227. See *The Internet in China, supra* note 149.

228. See *id.*

229. 521 U.S. 844 (1997).

230. *Id.* at 889 (opinion of O'Connor, J., concurring in the judgment, concurring in part and dissenting in part).

231. *Id.* at 890 (internal citation omitted).

232. See *id.* at 891.

233. *Talley v. California*, 362 U.S. 60, 64 (1959) (upholding the right of a pamphleteer to distribute anonymous pamphlets).

234. Compare the leafleteer in *Talley, id.*, with the anonymous sources for the National Labor Committee reports, the latter being unseen and the whereabouts of whom are never known. See KERNAGHAN, *supra* note 5, at 5.

235. See *supra* note 154 and accompanying text.

Brutality in Cyberspace, warns that governments can and do track down persons who use the Internet in ways deemed unlawful.²³⁶ But the article is primarily revealing in light of its source. The article comes from SINA.com, one of only two Internet news services licensed by the Chinese government.²³⁷ The frightful title typifies an overall tone that carefully postures to appear critical of government crackdowns.²³⁸

When one understands, however, that the content has likely been reviewed and approved by Chinese government censors,²³⁹ one recognizes the article as a series of government threats craftily masquerading as an independent editorial. The authors admonish, "[N]ever underestimate the power of governments [G]overnments, courts and regulatory bodies are proving unusually creative in finding that physical Achilles heel, whether it is targeting the company itself or its customers, suppliers, advertisers, investors and transaction facilitators."²⁴⁰ The article continues, "[t]here is truly nowhere to hide from the long arm of commercial law."²⁴¹ While the article is ostensibly about business technology and not politics,²⁴² the reader is clearly to infer that unacceptable political speech will be likewise punished. The English version of the article then lapses into the second person: "[y]ou aren't even safe sitting at home downloading a couple of MP3s from an acquaintance overseas. Unless you are surfing from a virtual computer, your equipment itself can also be targeted to help enforce laws."²⁴³ The most prominent feature of the SINA.com logo, a large, watchful eye,²⁴⁴ is thus not the keen eye of

236. See SINA.com, *Police Brutality in Cyberspace*, at <http://english.sina.com/news/TechBuddha/2000/1130/TechBuddha.html> (last visited Mar. 23, 2001).

237. See *id.*; see also Reuters, *supra* note 155 ("Chinese Internet portals sina.com and sohu.com said on Friday they had been granted news-publishing licenses under restrictive new rules due to take effect next week.").

238. See SINA.com, *supra* note 236.

239. See Reuters, *supra* note 155.

The rules, which will force all Web sites to use politically vetted content from existing state media, are part of an effort by Communist authorities to block potentially subversive content spreading online. SINA and Sohu already comply with the rules, so the award of the licenses will have little effect on their sites.

Id.

240. SINA.com, *supra* note 236.

241. *Id.*

242. See *id.* The article superficially comports with the requirement that online news reports be devoid of political content, but the politically loaded message between the lines is thinly disguised. See *id.* When the government approves of the message, such a thin veil is apparently acceptable to the censors.

243. *Id.*

244. See <http://sina.com> (last visited Apr. 4, 2001).

an independent news source, but the eye of Big Brother gazing straight at the reader. The designers of this symbol surely calculated its psychological impact.

Despite such control tactics, the consensus among advocates for reform in China is consistent with Justice Stevens' and Justice O'Connor's opinions in *Reno* that the Internet is virtually impossible to police effectively.²⁴⁵ The Chinese government's efforts to restrict the Internet suggest that the authorities are extremely nervous about the power of the Internet to disrupt their control over the exchange of information.²⁴⁶ While the availability of limited technology to track sources of individual Internet transmissions exists,²⁴⁷ it will only become more difficult for such tracking technology to keep pace with the sheer volume of Internet transmissions as use of the Internet continues to grow exponentially.²⁴⁸ One expert on Asian technology trends has noted that:

In Asia, the Internet is stirring a social revolution In the past, many Asians have felt repressed; they have felt unable to talk about so many things. On the Internet, they can be anonymous. They can say they hate their boss and talk freely about sex. And talk politics The reach of the Net has already had a fundamental impact on Asian politics As the Internet provides access to ideas and information, people develop more diverse points of view. The Net and related technologies are encouraging individuals to express their opinions more frequently, efficiently and vociferously. Asian governments that previously relied on control will be forced to concede a higher degree of freedom to their people. The Internet, inadvertently and indirectly, will soon be the foremost exponent of democracy. The power of millions of people connected by the Net will change the world, and governments will have no choice but to change too.²⁴⁹

245. See, e.g., Yu Jie, *Fight for China: The People Have New Weapons: The Internet and the Law*, Says Yu Jie, ASIaweek (Nov. 24, 2000) (providing as an example that "[n]arrow-minded Chinese officials blacked out the news that Paris-based Gao Xingjian had won the Nobel Prize for Literature. But discussions on Gao and his works are everywhere on the Internet. The Internet police just can't do anything about it!"), at http://www.asiaweek.com/asiaweek/magazine/2000/1124/ann.voices_china.html; see also *The Internet in China*, *supra* note 149.

246. See *supra* note 154 and accompanying text.

247. See *supra* note 154 and accompanying text.

248. See STATE DEPT, *supra* note 1, at 1032-34.

249. Yat Siu, *Swift and Total: That's What the Internet's Impact on Asia Will Be*, Says Techno Whiz Yat Siu, ASIaweek (Nov. 24, 2000), at http://www.asiaweek.com/asiaweek/magazine/2000/1124/ann.voices_net.html.

The Internet has apparently become the medium of choice by which global human rights activists publish material on China.²⁵⁰

IV. Conclusion

It is ironic that the government of a nation that defiantly claims a Marxist/Maoist heritage embracing the slogan "workers of the world, unite!" is, by virtue of its own paranoid grip on power, enabling U.S. corporations to subjugate the workers among its own citizens. The Chinese government is not likely to reform on its own, and the passage of PNTR leaves precious few levers for advancing human rights. The best and most realistic strategy is to attack the problem on as many fronts as possible, while being wary of disingenuous proposals that could be counterproductive.

Because most of the labor problems are closely related to restrictions on the flow of information, the overarching theme in advancing labor rights must be the promotion of freer speech and communication. Thus, business codes of conduct that bring abuses to light by explicitly requiring disclosure of factory locations, unannounced inspections, confidentiality safeguards, and unsupervised interviews of workers should be preferred over codes that merely prescribe business conduct without adequately providing for monitoring; and, in working with China under the new Memorandum of Understanding on Human Rights, the U.N. should emphasize associational rights such as the right to form truly free unions and the right to strike. These rights will enable workers to voice their grievances more effectively. Above all, the growth of the Internet should be encouraged because it can help wherever open communication is required. The struggle for labor rights is thus inseparable from the broader struggle for the human right of free expression.

250. See, e.g., <http://www.hrichina.org> (providing daily updates, links and alternative English or Chinese versions of the website at the click of a mouse). This Article has given parallel Internet citations for sources when possible, and, significantly, it was possible for most sources. See, e.g., STATE DEPT, *supra* note 1, available at http://www.state.gov/www/global/human_rights/1999_hrp_report/china.html (2000). That several of the sources on which this Article relies are available exclusively through the Internet, see, e.g., Fair Labor Ass'n, *supra* note 185, is testament to the unique power of the Internet to facilitate the free exchange of ideas and information.

