CHAPTER 9

GLOBALIZATION AND ITS EFFECT ON COLLECTIVE BARGAINING AND LABOR ARBITRATION

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Speaker: Arnold M. Zack, NAA Past President, Boston, Massachusetts
Panelists: Roy L. Heenan, O.C., Heenan Blaikie LLP, Montreal, Quebec
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I. INTRODUCTION

Bognanno: Good afternoon. My name is Mario Bognanno. I'm an arbitrator, and a professor at the University of Minnesota.

As the title of this session suggests, we will be discussing a number of issues bearing on globalization and its effects on industrial relations. Because "globalization" is not typically addressed at sessions of the Academy, it might be helpful if I frame the context.

What is meant by the term "globalization?" Generally, globalization refers to the fact that the world's national economies are becoming increasingly integrated and interdependent. For example, since the 1980s, there has been an 8-fold increase in foreign direct investments, reaching $8 trillion in 2003; and a 12-fold increase in the number of multinational corporations, reaching 61,000 in 2003.[1] Indeed, multinational corporations have an ownership interest in about 900,000 foreign affiliate operations across the world, employing a combined workforce of 54 million work-

[1]UNCTAD, *World Investment Report 2004* (New York: United Nations, 2004), Annex Table 3.3 at 376.

ers.[2] With worldwide economic integration, countries, companies, and employees are no longer thought to be attached to a single nationality.

The expansion of globalization has been triggered by the spread of capitalism, falling tariffs, and falling non-tariff barriers that make international trade more attractive than ever before. For example, capitalism is taking root in China, as property rights mature and public enterprises are privatized. In addition, falling tariffs, expanding trade, increased foreign direct investments and so forth are a consequence of the World Trade Organization (WTO), regional multinational agreements (e.g., the European Economic Community (EEC) in 1986, the North American Free Trade Agreement (NAFTA) in 1994, and the Central American Free Trade Agreement (CAFTA) in 2004), and dozens of bilateral free trade agreements (FTAs) between countries around the world. In the case of the United States, several FTAs have been entered into in recent years, including treaties with Israel, Australia, and Jordan, for example. Many more are on the horizon with countries such as Vietnam, Oman, Peru, and Columbia.

Globalization has wrought change in industrial relations the world over. In North America—Canada and the United States—it is clear that dwindling private sector union density is partially caused by globalization: a point the panel will be discussing.

There are other connections between globalization and collective bargaining. For instance, management's bargaining power is enhanced, relatively speaking. And, even in our profession, one cannot help but hypothesize that the American Arbitration Association's (AAA) and Federal Mediation and Conciliation Service's (FMCS) reports of declining requests for arbitration panels must be related to globalization.

The panel will address a host of related issues. Do workers around the world enjoy fundamental rights on the job? Do the international organizations like the International Labor Organization (ILO) and regional agreements, like NAFTA or CAFTA, provide due process machinery needed to efficiently protect worker rights? Can newly industrialized workers rely on the promises that are nested in corporate codes of conduct? And what, if anything, are the labor movements in North America doing about globalization's effects on employment relations?

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[2]UNCTAD, *World Investment Report 2004* at 8–9.

Following my introduction of the panelists, Arnie Zack, our principle speaker, will kick off the dialogue by commenting in some detail on globalization's impact on workers. Next, I will introduce each of the panelists and they will share remarks that will go somewhat beyond the outline that Arnie will present. On my far left is Judith Scott. Judy is a partner in the law firm of James & Hoffman in Washington, DC. Since 1996, Judy has served as General Counsel of the Service Employees International Union (SEIU). She is well versed in matters of worker rights, both at home and abroad. At home, the SEIU has organized and worked extensively on behalf of low-wage immigrant workers. On the international arena, the SEIU and sister unions from around the world have worked at organizing multi-national corporations. I'm hoping, Judy, at some point you can share with us some of the successes and failures associated with SEIU's attempts to organize multinational corporations (MNCs) offshore. Judy has a degree from Wellesley College and Northeastern College of Law.

To Judith's right is Jonathan Hiatt. Since 1995, Jonathan has served as General Counsel for the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO). From 1986 to 1995, he served as General Counsel for the SEIU. And, from 1974 to 1985, he was a partner in a law firm of Angoff, Goldman, Manning, Pyle, Wanger, and Hiatt of Boston, Massachusetts. Jonathan holds a degree from Harvard College and Berkeley's Boalt Hall School of Law. Like Judith, Jonathan has spent years working on matters of international labor rights, seeking the adoption of enforceable international labor standards, and pointing out the imbalance between the remedies that are available to businesses for trade rule violations as opposed to labor's access to remedies for worker rights rule violations.

Next to Jonathan is Roy Heenan. Roy is an internationally recognized authority on matters effecting labor and human rights. Roy is well schooled in NAFTA and is a roster member under the agreement's chapter 19 dispute settlements procedure. In addition, he is a North American Agreement on Labor Cooperation (NAALC) expert and a tribunal member of the Inter-American Development Bank. Roy is recognized as one of Canada's "best" labor and employment attorneys. In 2005, he was inducted as a fellow in the American College of Trial Lawyers. Roy has lectured on industrial relations and labor law at McGill University, at Laval University, and the University of Ottawa. He continues to teach occasionally at the Industrial Relations Center at Queens College.

Roy was the founder and chair of Hennen and Blaikie, a labor law firm in Montreal. He earned his undergraduate and law degrees from McGill University.

Last, let me introduce a man known by us all. Arnie Zack is a mediator, an arbitrator, and, more importantly, has been and is deeply involved in international matters for several decades. He also serves as a judge with the Administrative Tribunal of the Asia Development Bank. He sits on the steering committee of the permanent court of arbitration and consults with the International Labor Organization (ILO) and the International Monetary Fund. Over the years, he has consulted with numerous countries from Australia to South Africa on matters involving dispute resolution. The people in this room know Arnie as the path-blazer for the Academy's due process protocol and as a former president.

At lunch yesterday, Arnie shared his vision for a due process protocol that would have international applications: a protocol that could be incorporated in the framework of an international agency like the ILO, for application; or, perhaps, included by reference, in bilateral trade agreements. Fulfilling this vision will not be easy; a point, by the way, that was made in last November's issue of the *Economist*. Arnie, that issue's lead story was, "Tired of Globalization? But in Need of Much More of It," and its followup story was "Arnie's Uphill Struggle."

Arnie has taught for the past 21 years at the Labor and WorkLife Program at Harvard Law School. He's a Tufts College graduate. He's a Yale Law School graduate. He has a MPA from Harvard. Ladies and gentlemen, it's hard for me to imagine that we could assemble a panel with more expertise to comment on globalization and its effects on collective bargaining and labor arbitration.

II. Paper Presentation by Arnold M. Zack*

I come to this session as a product of the union-management history in this city and country. My dad, Counsel for the House Labor Committee, was one of the draftsmen of the Wagner-Connery Act. At age six, I am told, I was in the Supreme Court Chamber when the *Jones Laughlin* case was argued, with my dad on brief.

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*Arnold Zach is a former President of the NAA and serves as a consultant to the ILO on international labor standards.

Since then my career in labor-management arbitration, just as is true for union and management representatives here, has been concerned with ensuring workplace fairness. That has been our theme, and the NAA theme. I, for one, never thought about arbitration outside the union–management relationship, and have in fact done none of those cases. But I have long felt that the NAA has an obligation to extend our theme of fairness outside our narrow collective bargaining relationship. That is why, when I was NAA President, at the goading of John T. Dunlop, we initiated the Due Process Protocol, to protect workers who were threatened with unfair procedures under employer-promulgated systems, forcing employees to use arbitration in lieu of recourse to the courts on statutory disputes. That is also why we initiated the idea of spelling out the *Common Law of the Workplace*[1] to advise disputants using those systems what we in the labor-management universe considered to be fair practices. When I appointed Ted St. Antoine to manage that task, I had little expectation that it would provide such an important contribution to the union-management arbitration field as well as to the employment arbitration field. As you may know, the guidance of that volume is now available on our www.naarb.org Web site.

Now, 11 years later, we learn as newspaper readers that companies are fleeing from the United States to other countries; that factories where we used to arbitrate have been moved abroad to produce the same products for the U.S. market. Should we still be concerned with workplace fairness, for employees in foreign factories? Can we have any impact on globalization? Indeed, what is the impact of globalization on our profession? What can we do to pressure the new globalized enterprises to conform to basic labor standards to which we have committed our careers, union, management, and neutrals? That may be the best, if not the only, way to slow down what appears to be a rapid race to the bottom. We must come to realize that our traditionally comfortable U.S. and Canadian labor-management communities are under attack and that the bottom line is that we must help to raise the level of water for all workers around the world, to protect them against the exploitation that will even further erode our efforts to compete in the international marketplace.

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[1] *See* National Academy of Arbitrators, Common Law of the Workplace: The Views of Arbitrators (Theodore St. Antoine, ed., 2005).

I wish to focus on three concerns about the role of labor relations in the developing world. First, a brief description of the labor relations turf "out there." Second, the role of International Labor Organization (ILO) labor standards in the competing countries. Third, the impact on our lives and whether we can do anything about it.

First, the landscape: As participants in labor-management arbitration, we function in a government-endorsed atmosphere that encourages the privatized resolution of disputes, which in most industrialized countries are resolved by works councils, industry councils and Labor Courts. We are a bit arrogant to think that we are "the universe." Although those labor courts and councils elsewhere do cover most, if not all, workers, our profession lamentably covers a minimal percentage of workers, providing due process and just cause standards to 8½ percent of workers in the U.S. private sector and to 18 percent of workers in the Canadian private sector. The vast majority of workers in the United States have only the statutory protections of the Occupational Safety and Health Act (OSHA) and the Fair Labor Standards Act (FLSA), and resort to the courts against various forms of employment discrimination. Union and management partners negotiate wages hours and working conditions for the organized sector while we arbitrators like to think we have set the standards of fairness for the whole workplace through our decisions and through volumes like the *Common Law of the Workplace*. However, we probably have had woefully little impact on the world outside of collective bargaining. Arbitration of collective bargaining disputes, after all, is provided in only a few countries. In the United States, Canada, and South Africa it is paid for by the parties in the private sector. In a few other countries it is also available as a government service, as in Australia, Bermuda, Cambodia, and the Philippines. But arbitration is a rather rare phenomenon.

It is true that many non-unionized employers, particularly in the United States, have piggybacked on the credibility of our labor management arbitration to seek legitimization of their self-created alternative dispute resolution (ADR) systems of litigation-avoidance, but the reach of those systems is small as well; at best, the same number of employees as are protected under collective bargaining agreements. Thus, there are still probably 110,000,000 non-unionized U.S. workers whose only protection is through invoking the laws of the land in courts of general jursidiction.

The United States provides far less employee protection and social benefits than do the countries of Europe. Most European countries provide much greater statutory protection for workers with laws guaranteeing severance pay, vacation pay, pensions, health care, and the like. Works Councils and Industry Councils provide more widespread unionization than does our system of majoritarianism, and, in addition, most countries elsewhere offer employees access to specialized labor courts to resolve challenges over workplace treatment. European countries are losing jobs as well because of the high cost of maintaining their present social network, such as the 35-hour week in France, which may account for why, in globalization, so many European car manufacturers have opened factories in the United States to avoid the high costs of tax-supported social programs at home. They can open operations in the United States without those high taxes, with minimal employee health care costs, with lower wages than at home and with the prospect of legally evading any preexisting worker pension responsibilities. European as well as American enterprises now have a different profile.

We all know the stories of the flight of traditional U.S. industries to foreign countries: textiles, garments, shoes, furniture, autos, computers, and on and on. The list increases with every news report and we are faced with overwhelming losses of manufacturing jobs, with U.S. workers being forced into lower paying service jobs, a lingering forecast of the future of U.S. employment. The jobs that are leaving are moving to factories where mechanization prevails and the human involvement is increasingly only unskilled assembly. That is the story with our traditionally home-grown garment industry. Now our socks are all made in the United States because their manufacture is totally automated. But garments have to be assembled and now 60 percent of U.S. clothing is assembled by unskilled workers in developing countries, working in factories that have been established off shore, looking to maximize their profits by lowering their labor costs and selling their output to contracting U.S. brand companies who import them for sale in the United States. The countries to which these factories move are eager to get the work for their urbanizing citizens. But, the governments are loathe to antagonize the factory owners by invoking enforcement of the national labor laws. They fear that the factories will move the jobs to neighboring countries that pay even lower wages or pay even less attention to providing workplace

protections. The result is a world in which unskilled workers in developing countries are forced to work in exploitive conditions, because "a bad job is better than no job at all."

This brings me to the second point: the presence, usefulness, and potential of international labor standards. We all accept the fact that in the United States and Canada, workers who are denied their statutory rights can go to administrative agencies or the courts to assert their right to legal protections. But in the developing countries, even though there may be protective statutes on the books, their enforcement is scant, if at all. The governments pander to the factories to keep jobs within their boundaries; the government labor ministries are understaffed, underpaid, and often corrupt; and the workers have little recourse to unionization or to statutory protection. They are beyond the reach of U.S. laws, local laws are ignored, and there are no international laws or agencies offering protection.

It is in this dismal vacuum that we now find ourselves. But things have been changing, at least in the garment industry. Recognizing that colleges and universities spend $5 billion a year on logo clothing, student and consumer protest groups and unions have pressured the purchasers to require that their brand companies purchase from only factories that adhere to the advisory standards set forth in the Conventions of the ILO, a specialized agency of the United Nations founded in 1919. Ed Potter, representing enlightened U.S. management, Jon Hiatt, and others convinced the ILO in 1995 to promulgate a group of Eight Fundamental Conventions, as the Core Eight Conventions. These include Freedom of Association and the right to collective bargaining (87 and 98), the abolition of forced labor (29 and 105), equality and elimination of discrimination (100 and 111), and elimination of child labor (138 and 182). With increasing pressure on the brand companies, the effort has gone beyond the college and university logos to the creation of the 10-year Multifibre Agreement in 1994, which provided increased market share to companies that manufactured garments in Cambodia, Sri Lanka, Viet Nam, Indonesia, and Bangladesh in conformity with the Core Eight Conventions. The result has been to increase the workplace protections for those working in the garment industry in those countries. 30,000,000 workers in those countries benefited from that protection and market access. The conditions were not perfect, and the wages were low, but workers enjoyed a level of workplace protection they had not had before. It has been a great accomplishment, but with lingering concerns.

First, the Multifibre Agreement ended on December 31, 2004, and it applied to only the garment industry, yet, as a result, most U.S. garment manufacturers and sportswear companies in the United States have issued Codes of Conduct on their own or of groups such as SAI 8000 or Fair Labor Association, subscribing to fair labor standards for their supplying factories. Most have monitoring procedures where they or contract monitoring groups visit the factories to ensure that they comply with the Brand's Code of Conduct and the Core Conventions. That is an awesome task. Disney clothing and logo items are manufactured in 13,000 factories in 50 countries. Gap buys from 2,500 factories in 52 countries. They employ hundreds of inspectors to ensure Code and Convention compliance. The story in Cambodia, for example, has been rewarding; the factories have agreed to stay and expand and now employ 300,000 workers working under ILO standards.

But as good as the garment area may be in providing fair labor conditions, that segment of production accounts for only 5 percent of world trade. The public has not been similarly aroused to ensure fair working conditions in the manufacture of tire rims, automobiles, microwaves, TV sets, and the other consumer items that make up the remaining 95 percent of world trade. China remains the elephant in the room, luring factories to employ its 1.3 billion citizens, with a current workforce of close to 650,000,000, and selling its output to the United States that used to buy those same products from local companies employing U.S. workers. In one city in Guangdong, there are 1,400 shoe factories making shoes primarily for export. China will export 5.6 billion pairs of shoes this year. Ten percent of Chinese exports to the United States are sold in Wal-Marts. China currently manufactures 50 percent of the world's apparel and in 2010 is forecast to produce 75 percent of the world's apparel. Eighty percent of the world's shipping containers are already made in China, as is 60 percent of the world's furniture. China currently produces more than half of the world's TVs, microwaves, refrigerators, toasters, and on and on. Those products, other than apparel, sporting goods, and toys, are largely off the consumer's radar screen because there is little consumer/student militancy to insist that the brands selling from those factories conform to the Core Conventions. The government's All Chinese Trade Union Federation is the only permitted union, with independent unions being prohibited, and thus flagrant violations of the ILO conventions in support of freedom of association and collective bargaining result. Visiting a modern

Hundai auto factory in Beijing last month, I was assured that, despite the law providing for a 40-hour work week, the normal 6-day 72-hour work schedule for all employees was totally "voluntary."

This brings me to the third and final issue. What is the impact of this global profile on our labor relations system and what can be done? Clearly our comfortable arena of collective bargaining can hardly be transferred to other countries, let alone to China. There is no governmental requirement of mediation or arbitration or institutions for putting such dispute resolution processes into place under any national laws. To the extent that there has been national adoption of ILO conventions, most are ignored in the quest for national industrial development, maximization of profits, and the demands of international trade. There is no international law requiring nations to conform to the ILO Conventions.

Yet despite the absence of worker-friendly or even enforced national laws, and despite the absence of international laws, there are still prospects for achieving a broader access to the protections of the Core Conventions for the factories producing in China and elsewhere. The Code of Conduct movement has rallied great support and there are promising signs. The ILO estimates that there are 260 Corporate Codes of Conduct that call for compliance with the Core eight Conventions.

1. For the past six years, I have been proposing to the ILO that it establish a Global Conciliation Center that could provide conciliators to facilitate resolution of disputes involving fair labor standards with a roster of conciliators from around the world competent in local languages to be called in to help resolve issues at the World Trade Organization (WTO), World Bank (WB), or International Monetary Fund (IMF) meetings or disputes in factories over disputes involving alleged violations of ILO Conventions. The ILO has traditionally declined to consider participating in any structure that would detract from the role of its tripartite national members (despite their obvious ineffectiveness, corruption, unacceptability, and the like). That reluctance might be changing, based on discussions in Geneva on April 10–11, 2006, and the eagerness of the Permanent Court of Arbitration to serve as the outside administrator of such a conciliation institution.
2. In Guatemala in February 2006, under the aegis of The Clinton Foundation's Global Fairness Initiative, discussions

were held to develop a countrywide program of conformity to ILO conventions to help market Guatemala exports to the United States. Another such meeting is scheduled for June in El Salvador. Through the Permanent Court of Arbitration (PCA) we are working on developing a CAFTA-wide conciliation service to help facilitate disputes over labor standards issues in Central America

3. SAI 8000 and the Fair Labor Association, both consortiums of brand employers, nongovernment organizations (NGOs), trade unions, and consumer groups are developing uniform Codes of Conduct. SAI 8000 is considering the development of a grievance mechanism to bring in an external conciliator to help resolve protests over alleged violations of company Codes of Conduct. They are even considering arbitration as a possible device for resolving such disputes where the disputants are so agreed.
4. The Chinese government hosted a meeting on the topic of International Labor Standards at Renmin University on April 1–2 of this year to bring labor standards people from the United States and Europe to discuss the role of the Core Standards in the future industrial expansion of China. Chinese academics and government officials alike decried the failure to permit freedom of association and the rights of unionization in the burgeoning private sector. Yet, the authorization of such a session attended by some 400 Chinese officials and scholars underscores the recognition by the government itself that the international labor standards movement "has legs."

These signs do not mean adoption of U.S. or Canadian mediation and arbitration systems, nor the availability of work for U.S. or Canadian mediators and arbitrators, but they do open the door to union management and neutrals to help guide China and other countries toward conformity to international labor standards. For management representatives, a great contribution can be made by ensuring that the overseas factories to which your clients send work adhere to the Core Eight. Indeed, you might exert some influence to achieve adherence to the labor clauses in WTO and World Bank endeavors in developing countries or in regional Free Trade Agreements. For union representatives, a great contribution can be made in helping the unions of the developing countries in their efforts to achieve collective bargaining. A number

of unions such as SEIU do provide assistance to overseas unions such as in Cambodia. The AFL-CIO Solidarity fund has been helping unions in developing countries for many years, and efforts should be made to turn the All Chinese Trade Union Federation (ACFTU) toward the path of worker representation. For students and consumers, a great contribution can be made by monitoring the working conditions in many of these factories through Web sites such as www.studentsagainstsweatshops.org or www.workersrights.org or www.chinalaborwatch.org or www.cepa.org or www.nlc.org and then e-mailing your inquiries or objections to the cited Code infractions.

For the neutrals, there may someday be opportunities to provide services to help resolve some of these workplace conflicts. Despite the noble efforts of many employers to prescribe adherence to fair standards for their supplying factories, the vast number of such supplying factories, which in turn also subcontract, raises questions of whether even the most committed monitoring is objective, particularly when concerned with charges of violations of Code 87 and 98. In the best of worlds the monitoring would be done by a neutral body, such as the ILO, totally independent of influence or funding by the brand, perhaps using neutrals to do the monitoring on an industry or national basis. And ideally too, there should be resort to neutrals, mediators, and arbitrators to help the willing develop national codes of conduct as is being tried in Guatemala, or minimally to help the brands fashion grievance procedures with resort to an international cadre of mediators or arbitrators to help resolve labor standards disputes that are beyond resolution by the parties themselves. If the ILO-PCA project described above gains acceptability and an international corps of conciliators becomes a reality, our mediators and arbitrators might become active participants in helping to protect workers in the fleeing factories from workplace exploitation. In doing so we may also help to raise the level of the waters to ensure, at the least, that the products we consume from such factories are not made in exploitative conditions. But, even before we become involved, there is a good deal that our union and management friends can do right now, even more than we neutrals can do. It should be a rapid and joint effort and, at minimum, it will reflect our continuing commitment to ensuring workplace fairness. Indeed, it might well deter or at least postpone that ever looming "race to the bottom."

III. PANEL DISCUSSION

Heenan: Ladies and gentlemen, many thanks for the invitation to be back here before the Academy. I have to repeat what I've said on previous occasions. Every time I look at this august body, I think of my roots. As some of you may know, I was born in Mexico. And there's a famous Mexican gypsy curse— the worst a Mexican gypsy can wish you is the following: [first spoken in Spanish] "May you be found between lawyers." Because your job is largely to be found between lawyers, you have my deepest sympathy. I was reminded of something I said at the Vancouver meeting, Casey Stengel's famous statement, which I think also applies to arbitrators, "The most difficult job of a manager was to keep those that hated him away from those that were merely undecided."

My good friend, Arnie, and I met in Vienna last week; and I asked Arnie what the topic was for this session and what he was going to say. He gave me a brief sketch. And, I said, "Arnie, our topic though, is about globalization and its effect on collective bargaining." His answer to me was interesting because it reflects the view that collective bargaining is really irrelevant in this scheme. Is it? I don't think so. And, I'll tell you why a little later.

I congratulate Arnie on the global conciliation initiative in the ILO and the work he is doing there. That's important work, and it has to continue. The Guatemala initiative, as an example, is also interesting, to get Guatemala to conform to the ILO standards. But we have a problem here. The United States and Canada have a problem here. Arnie has identified eight ILO Fundamental Conventions. But, how can you go to Guatemala and say, "The ILO conventions, although they are not good for us, they are good for you!" There's a certain amount of negative reaction to that. And, I remember having this discussion on NAFTA and the NAALC. Mexico, of course, has ratified the whole lot. The question was whether you enforce them. But, you've got to realize that we've got to get our own house in order first. It's not good enough to tell somebody, "You've got to do this, that and the other," if you're not prepared to do it yourself. There is a credibility gap here.

Now, concerning China, there's undoubtedly a lot of accuracy in the examples that Arnie has given us. But I'll tell you, what worries me most about China is not the facts that are mentioned there but the U.S. deficit. Most of that U.S. deficit is held by China, which means that at any time, our currency and our way of life

can be under attack. We have got to get our own house in order if we're going to compete globally.

Arnie has referred in the area of collective bargaining to what he calls our comfortable arena of collective bargaining. Well, how comfortable are we with that arena when we're looking at globalization and competing internationally? The system that we have, as you know, exists only in three countries: United States, Canada, and South Korea. And interestingly enough, South Korea is now revisiting the whole area. The problem is that it is much too adversarial. Arnie mentioned that only 8 ½ percent of the workers in the private sector in the United States are covered by unionization and collective agreements and a corresponding 18 percent in Canada. But that's not China's fault. That's our own doing. I really think we have to look at our systems if we're going to be able to compete globally. Look at the typical collective agreement that you are called upon to administer. "This is my work, you won't do it." "Different classification, you won't do it." Heaven forbid that a supervisor will touch any work. Rigid hours. Resistance to change. The collective agreement is really built to maintain a status quo and avoid change. But, globalization is about change. Our adversarial system doesn't really work or make us able to compete in that setting.

It was interesting that in 1993, Minister Reich said that the purpose of the Dunlop Commission was to make sure that management and labor, workers and employers, are productive. Here are the questions he posed: What, if any, new methods or institutions should be encouraged or required to enhance workplace productivity through labor management cooperation and employee participation? Question number two: What, if any, changes should be made in the present legal framework and practice of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay? And, question number three: What, if anything, should be done to increase the extent to which workplace problems are directly resolved by the parties, themselves, rather than recourse to the state?

I mention those questions because those were his three priorities. I would suggest to you that very little has changed since 1993 despite remarkable efforts. We still are stuck in our old patterns. But, I don't agree with Arnie. And, I don't have his same pessimism on the race to the bottom. Why not? I'd suggest to you that the U.S. economy is weathering the storm. The unemployment rate, as we speak today, is at 4.7 percent. That's pretty low compared

with where we've been in the past. It's much lower than Europe. The U.S. success, as pointed out by the Organisation for Economic Co-operation and Development (OECD) in its job study,[1] has been in avoiding structural unemployment. Its success has been in creating private sector jobs. That's very contrary to the European experience, where very few private sector jobs are being created. The OECD attributes the success in North America to the greater labor market flexibility. And, Arnie's example of European car manufacturing coming to the states is a good example of why.

The OECD job study points out that to compete in a globalized world, the future is in knowledge workers. The study states, "knowledge, not capital, land, or labor is now the basic economic resource." Knowledge workers now make up one-third of the working population of the United States. If you think of it, in the early 1900s, 85 percent of our workers were in agriculture. Now, fewer than 3 percent are.[2] In industry, 75 percent of workers in 1950 were in manufacturing. We're now somewhere between 10 and 15 percent in that field.[3] What is happening is a transformation into other areas. Value in today's economy is created by productivity and innovation, both applications of knowledge to work.

What the OECD job study also tells you is this: to achieve productivity gains in knowledge work, the employee must be involved. Employee involvement is essential in the workplace of the future. And in most knowledge industries, this is the case. You'll have to realize that our traditional collective bargaining and unionization forum has resisted employee involvement in this sense.

So, I ask you when we talk about our comfortable arena of collective bargaining, are we really comfortable with the system? I can tell you that I am not and have not been for some time. In Canada, a few years ago, the Angus Reid Group did a national survey of trade unionists. The results were startling to me. Eighty-one percent of the employees indicated they would prefer a new

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[1]OECD Jobs Study: Facts, Analysis, Strategies, (OECD Publications, 1994), *available at* www.oecd.org/dataoecd/42/51/1941679.pdf. The Organization for Economic Cooperation and Development presented The OECD Jobs Study: Facts, Analysis, Strategies to the June 1994 meeting of the OECD Council. To date, the detailed empirical and analytical underpinning of the Jobs Study has been published in eleven subsequent reports.

[2]*Id.* The Jobs Study reviews the findings of Price Pritchett, The Employee Handbook for New Work Habits for a Radically Changing World: 13 Ground Rules for Job success in the Information Age (Pritchett & Associates 1994); Angus Reid Group: National Survery of Trade Unionists, 1995.

[3]*Id.* The Jobs Study reviews the findings of Peter F. Drucker, Post-Capitalist Society (New York, Harper 1993) at 8.

type of labor relations based more on a cooperative model rather than on a system that is adversarial and confrontational.[4] I don't think we've built that. What's happening is it's being built outside of the collective bargaining system amongst knowledge workers who are non-unionized. I think we really have to re-double our efforts either to re-think our traditional labor relations system or to provide for a more cooperative model.

Arnie talks about the race to the bottom. But, look at the jobs that are being created in the United States. That's the great strength of your economy, the creation of new jobs. It is the ability to avoid structural unemployment and to keep your unemployment level at half of what it is in Europe at the present time. Look at a country like France, with at least double, if not more, the unemployment rate. And, any attempt to change is met by great resistance as we have seen recently.

So, I'm less pessimistic. I think there is growth in jobs. I think our challenge in the area that we are is to make sure that our industrial relations system and our collective bargaining system meet the flexibility and cooperation that I think they cry out for.

Thank you.

Bognanno: Thank you, Roy. Jonathan Hiatt.

Hiatt: Thank you very much. When I was invited to participate in this panel, I was told that I was going to be a commentator and that it was a panel, that Arnold Zack was going to be the presenter, and two or three others would also be commentators. A few days ago, I received a draft of Arnold's presentation; however, as we walked in today, Arnie confessed that the presentation that's in your packets is now a subsequent draft of what had been sent to the commenters a few days ago. He assured us, though, that as long as we stayed within the framework of the global economy, we would still be "on message."

So, with that, let me say a few things about the two major areas covered in the draft concerning the role that collective bargaining and arbitration can have in the enforcement of labor standards: first, with respect to the ILO and the core labor conventions; and the second, with regard to codes of conduct.

In terms of background, I find it difficult to be overtly optimistic about labor standards in the global economy. This is particularly so in the United States, where we've lost 3.5 million manufacturing jobs since 1998. It's predicted that we are now on the verge

[4]Angus Reid Group: National Survery of Trade Unionists, 1995.

of losing many millions more service sector jobs and probably at an even faster rate. However, one thing that I think is helpful to remember is that a century ago we were in a position in this country very analogous to that where we are right now in the global economy. We had the Triangle Shirtwaist fire in 1911, where you had a mostly young, including underage, female workforce that was locked in a building in New York working 10- to 12-hour days, seven days a week. A fire broke out. They couldn't get out. People jumped to their death or were burned to death. A total of 188 people died. This triggered a major demand for reform, for improvement of working conditions, for legislating working conditions, yet nothing happened for some time.

Eighty-two years later, a fire broke out in the Kader Toy Manufacturing Company in Bangkok, Thailand, that makes Muppet dolls, Homer Simpson dolls, and other dolls for Toys R Us, Wal-Mart, and for all of the other retail outlets that sell toys in the United States. Now, of course, they're all made in China. Once again, no labor protections, an almost all-female workforce, including many 13- and 14-year-old girls, exits locked, 12- to 18-hour days, seven days a week, and so on. Several hundred people died, and many more were seriously injured.

I mention this because in the United States, the initial attempts at reform and achieving labor standards by legislation were thwarted; even though Teddy Roosevelt had a very progressive agenda for labor reform, there was a huge outcry by the National Association of Manufacturers and banks that kept change from happening for quite some time. But over the next couple of decades, workers achieved the right to organize and bargain collectively, the right to a minimum wage, and other key workplace protections. Those reforms really did translate into workers being able to capture a greater share of their own productivity; a growing consumer class that was able to purchase the fruits of that productivity and eventually become the burgeoning American middle class.

Thus, ironically, one trend that may give some hope for an international law that protects worker rights is the lack of, and even the decline of, a consumer class that's able to buy the products that are being produced in many of these countries. At some point, it may be in the multinational corporations' self-interest to submit to some degree to the push for worker rights, in order to foster the very middle class that Henry Ford recognized early in the last century was necessary to maintain sufficient demand for corporations' output.

Meanwhile, what the labor movement is trying to ensure is that it isn't just corporate rights that are protected by trade agreements, the World Bank, and the WTO. We would like to see more of a balance between the protection of corporations' interests and those of workers and consumers. We believe that as a matter of good economic policy, political policy, and human rights policy, worker rights in trade agreements should be just as enforceable as intellectual property rights, for example, already are.

That takes me to Arnold's question of a greater role for mediators and arbitrators, in the enforcement of worker rights not only in trade agreements, but potentially in the World Bank's and other international lending agencies' terms of engagement. Interestingly, for example, the International Finance Corporation of the World Bank recently adopted a requirement that adherence to specified labor standards be made a condition of private sector loans offered by the World Bank. So, we are starting to see these labor standards being put into other international agreements that have some enforceability, and where mediators and arbitrators may indeed have a greater role to play.

Moreover, with the ILO Declaration of Fundamental Principles that was passed in 1998, we have, for the first time, an international consensus as to what the core labor standards should be, standards that take into account the different levels of development in developing countries. They don't require a minimum wage. They don't require specific benefit levels. Rather, they are process oriented, structure oriented. As Arnie said, they include, most importantly, freedom of association, the right to organize, and collective bargaining. And, although a good number of countries, including the United States, have not ratified these conventions, what was so important in 1998 was that all 170-some odd countries that belong to the ILO agreed, by virtue of their continuing participation in the ILO, to adhere to the principles underlying these core conventions.

This was an important development. For one thing, a good number of countries have adopted laws pertaining to freedom of association and collective bargaining since 1998. They are asking for technical assistance in drafting those laws and looking for ways that they can get help in enforcing them. And, so I do agree with Arnie that this is another place where arbitration and mediation, perhaps through the ILO, could be very useful.

Where I perhaps part ways is with respect to the corporate codes of conduct. For the most part, the codes of conduct that corporations are voluntarily adopting are really just aspirational and de-

signed to protect their reputations; they are very different from enforceable agreements, whether in the form of bilateral trade agreements, international agency loan conditions, or national laws, much less collective bargaining agreements.

Although in some cases well-meaning, these codes are not and should never be confused with enforceable obligations. They are very limited in their value. Indeed, they are prevalent mainly in those industries where branding is important, because it is the reputational motivation that drives corporations to adopt them. Furthermore, even as a public relations tool, the codes of conduct movement has lost a lot of steam of late. It is now mostly the vendors of code-related services (e.g., accounting firms) that are promoting the codes. And, I would not like to see arbitrators and mediators becoming just another set of vendors that are seeking to legitimize these ultimately unenforceable standards that are unilaterally set by the companies, themselves, rather than by collective bargaining or under national or international law.

Thank you.

Bognanno: Thank you, Jon. Judy Scott.

Scott: First of all, I want to thank the Academy and Arnie for arranging this particular workshop. It is becoming clear that globalization is giving rise to issues that we must address as labor practitioners. At one point, this topic generated mainly academic discussion; now it presents very real challenges in the lives of workers both in the United States and abroad. As a result, the labor movement is grappling with how to participate in this debate and ensure that worker rights are protected throughout the world.

The labor movement in the United States does not take the position there shouldn't be globalization or that there shouldn't be trade. The question is how to manage the globalization and trade process in a way that makes sure that workers share in the wealth that is being created and human rights are protected. I thought it was interesting that Arnie began his presentation describing the labor law landscape in the United States and what type of labor-management practices we are exporting when we talk to people about U.S. labor rights. When you look at some of the international reviews of our labor law structures, such as the Human Rights Watch report that came out in 2000[5] and the International Confederation of Free Trade Unions' report that came out in 2004,[6]

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[5]Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards*, 2000 Report, www.hrw.org/reports/2000/uslabor.

[6]*See generally* www.icftu.org.

you see an indictment of labor laws here in the United States for their failure to have any kind of effective enforcement. Most organizing campaigns are battles where workers are intimidated, suspended, or fired for union activity. That is not the kind of system that we should want to export to other places.

And, when Roy is talking about the fact that unemployment rates may be low here, we also have to look at what kind of jobs people are working these days in the United States. We represent a lot of service sector workers at the SEIU, a lot of janitors, and other types of service workers, where non-union jobs offer no health care, no pension coverage, and people are often working two or three jobs to stay above the poverty line. And, frankly, a lot of major corporations are outsourcing to subcontractors who aren't even honoring the basic wage-and-hour laws of the United States. As a result, it is not unheard of to find hotels throughout America where there are women cleaning the hotel rooms as "independent contractors," and being paid by the room. Sometimes they work for subcontractors who have the cleaning contracts for only the ninth and the tenth floors! The level of poverty and disparity between the wealthy and the working people of America is becoming greater and greater. So, we really have to look carefully to see what is working in the United States. We need to design a global program that lifts all boats rather than one that pits worker against worker throughout the world.

The question is: Can the ILO labor standards be achieved? As Arnie pointed out, the enforcement mechanisms right now are inadequate. If you go to the ILO with a case that raises violations of ILO labor standards, unless you have an egregious case—such as the murders of trade union activists in Columbia—it is hard to get the ILO to intervene. The run-of-the-mill, garden variety (but widespread) cases of discharges and other coercive employer activity—which is so destructive of the right to organize—generally will not invoke ILO remedies. Activists argue that it has to be murders and the blood in the streets to generate ILO attention. Otherwise the ILO turns you back to local laws and government frameworks that supposedly—on their face—protect the worker. As a result, we are trapped without an effective enforcement mechanism for the ILO core labor standards right now. We would applaud the kind of proposal that Arnie made about some kind of council to explore the question of enforcement of ILO core labor standards. Likewise, the ILO enforcement is focused on countries, not multinational corporations.

When you look at the area of trade agreements, there's really just been one trade agreement that has had effective labor standards. That is the Cambodia Trade Agreement that Arnold referred to, the 1999 bilateral trade agreement between the U.S. and Cambodia, that basically said to Cambodia that it could increase its quota of what it exports in terms of textiles and garments, if it was able to show that it was in substantial compliance with its labor laws and with the ILO's core labor standards. And what was the result? The United States, at that time, got very actively involved in Cambodia, including support for the enforcement of labor standards there. As a result, conditions allowed the birth of a very vibrant textile worker/garment worker union. I was in Cambodia in 2004, and the interesting thing is that although the trade agreement was directed at the textile and garment industry, the fact that the government was under great scrutiny about how it was treating labor rights also established an environment where a vibrant hotel workers union was able to grow.

I was in Cambodia during the hotel workers strike against Raffles International Hotel. The strike sought to enforce an arbitration award that ordered certain pay provisions to be incorporated into the hotel network's pay system. Raffles refused to comply with the arbitration award, and the workers went out on strike. I had the opportunity to join a side meeting between the hotel owners, SEIU President, Andy Stern, and several other union leaders to talk about compliance. Meanwhile, as we met, striking workers rallied outside in front of a security force dispatched by a very repressive government. But the government forces were held at bay because they knew that Cambodia could not get an increase in the country's export quotas unless it was seen as complying with labor standards. And, that was the key link. Unfortunately, that link does not exist anywhere else. That's the only effective U.S. bilateral trade agreement for labor rights, and now it has expired. As Jon and Arnold pointed out, however, there's still a vibrant union movement in Cambodia, although it is operating under increasingly difficult circumstances and repression. It has actually increased membership, but it's a difficult thing to protect Cambodian jobs against the race to China for even cheaper wages.

I also want to speak to what Roy is saying about productivity in the United States. When I was at the United Auto Workers in the 1980s, I was assigned to plant closing negotiations. It was striking how little bargaining room was available when we sat down at the bargaining table and asked: "What will it take to keep this factory

here in the United States and not move to Mexico?" Management's problem wasn't so-called "inflexible work rules." Such work rules went out the door a long time ago. Our current collective bargaining agreements are lean, mean, and very efficient from lots of perspectives. Instead, the key issue was: "Can you agree that these union workers will be paid $2.50 an hour?" Of course we couldn't agree to such a wage concession. It doesn't even meet the minimum wage requirement. "Well," they would reply, "that's what we can pay workers in Mexico."

The bottom line question is wage competition. The critical factor has always been the amount of pay. If you go to China now, it's remarkable to see the huge number of factories producing goods. And, what happens in those factories? The owners are under massive pressure to decrease, decrease, and decrease again the cost of filling orders. Similar pressure occurs in Bangladesh, Cambodia, and Thailand, to name a few—as multi-nationals seek ever cheaper sources of goods. So, the end result is to drive people's wages lower and lower.

This panel has talked about how ILO labor standards fit into corporate codes of conduct. There has been a very progressive effort within the university anti-sweatshop movement directed at Nike and other apparel brands to restrict the licensing of the university logo to goods that are produced in plants that honor codes of conduct including monitoring. Well, it turns out that a review of the impact of 10 years of this anti-sweatshop program reveals that plant conditions in developing countries abroad are either the same or worse than when this program began. The Worker Rights Consortium (WRC), which is the leading group in this whole effort, is taking an entirely new look at how to design its program. What WRC is finding is what Jon was describing—companies are using their codes of conduct as public relations devices but for little else. They're saving their public reputations by signing the code of conduct and by saying they have monitoring programs. But who is monitoring? It's often corporate-controlled monitoring. It's done pursuant to prearranged schedules, not in response to worker complaints. And they are not transparent, so people cannot monitor the monitors or evaluate the true impact of what is really happening on the shop floor. The only effective monitor is an independent worker organization (i.e., a union) that is there 24/7 to pursue grievance procedures and enforce the wage and hour requirements.

The WRC has just announced that it is changing its program and insisting that the brands agree to something called the "Designated Supplier Program." While factory owners were signing codes of conduct with Nike, for example, Nike was only giving each factory a small percentage of its orders. Meanwhile, Wal-Mart was in the same factories filling the other percentage of production capacity. So while Nike was telling the factory owner to honor the minimum wage laws, health and safety, and other labor standards, Wal-Mart wasn't enforcing the same codes. Also, Nike was not paying the factory owner more money for its product even though it was now supposed to be produced pursuant to the code. So, what happens in that situation? A factory owner has a major incentive to hide that it's not honoring the code, because it is under intense financial pressure to keep its costs low. Yet when you look at these retail deals, the cost of complying with labor standards is extremely low when compared with the overall cost of the apparel item. For very little cost, the universities could say to Nike or to the other brands: "You must pay the factory the money it will cost for that product to be produced at a living wage and pursuant to the code." So, WRC is changing its program to have universities require the brands to use designated supplier factories. WRC wants the universities to say to the brands: "You can't put our logo on your sweatshirts unless that sweatshirt is produced in a designated factory, where you consolidate your production and pay enough to enable the factory to produce that good at a living wage, subject to effective monitoring, and a union." In the end, WRC believes that is the only way to ensure that supplier factories will not close as soon as they sign a code of conduct or that work is not shifted away to other cheaper factory sources. Seventeen universities, so far, have signed onto the Designated Supplier Program, including Duke, Cornell, and a number of others.

Before I close, I want to draw your attention to a recent development involving Wal-Mart and its supplier code of conduct. Wal-Mart recently filed a brief in support of its motion to dismiss a lawsuit brought against it by the International Labor Rights Fund in federal district court in California. Wal-Mart is being sued by workers at its supplier factories in about five different countries who assert their rights as third-party beneficiaries of Wal-Mart's standards for its supplier factories, i.e. its code of conduct. They claim these supplier factories have failed to abide by the code and that Wal-Mart has failed to enforce these standards. And what has

Wal-Mart argued in response to this lawsuit? Wal-Mart generally argues the claims lack merit because: "Judicial activism is not appropriate where our country's trade policy objectives intentionally leave the enforcement of and compliance with foreign country laws to each of the respective foreign countries involved." In other words, the fault does not lie with Wal-Mart or other American companies; it was the factories' failure to follow the laws of their country. Wal-Mart maintains there is no authority to transform Wal-Mart's rights into contractual duties. According to Wal-Mart, the alleged wrong-doers are the foreign factories, not Wal-Mart: "The fact that the local legal systems may not work as well as they could to redress such wrongs, if true, is unfortunate. However, such failings are alleged to be known and accepted by the foreign policy makers of the United States who encourage and support bilateral trade with countries involved in this case despite any labor law issues that may exist."

Wal-Mart's arguments in its brief to the court aptly reflect one of the reasons the labor movement does not believe that corporate codes of conduct alone make a real difference in improving workers' lives on the factory floor. Strong independent worker organizations are critical to that goal.

Thank you.

Bognanno: We have a few minutes if there are any questions from the floor.

Zack: Point of personal privilege. Judy was talking about the strike at Raffles. All the other hotels had settled except for Raffles; I got a call from Mike Lerner, who runs the Cambodian Arbitration Council (CAC) there, asking can we get a mediator in to resolve this dispute? So, I went on the listserv for the Academy and I asked if any of you were available to go to Cambodia immediately to work on this. I got about six responses from people saying, "I can't go this week but I can go next week." And "I have done mediation on these issues and the issues were in dispute in Las Vegas and Atlantic City." We had qualified mediators to resolve that dispute, so it sort of underscores that here could be an international roster of mediators. When we couldn't get Americans, I contacted Commission Michael Gay in Australia; and he went up the next day and resolved the dispute. But it can be done.

Bognanno: I'd like to try to put a cap on this. We have a couple of questions that we put together beforehand. And let me just read the first one to you because I know the panel can't see it. What is the role of collective bargaining in this age of globaliza-

tion both in North America and beyond? I think this might be a question for you, Roy, because we're asking, basically, what is the role of unions in a knowledge economy?

Heenan: Thank you. That was a little bit of what I was addressing in my speech. We have to be able to meet the competition and to be more flexible. I think we are. And I'd just like to pick up on something Judy said. Yes, it is true that some of the jobs that have been created are the lower-end jobs. That's true. By the way, the OECD study suggests that one of the things that countries have to do is have entry-level jobs. The problem is when those entry-level jobs become the only level jobs. But, the other jobs are growing in the knowledge sector. It's creating private sector jobs, but away from unionization. The knowledge worker has to be intimately involved with his or her work, and our unionization system rather discourages that. The union does the bargaining. The union makes the rules. And, we don't have provisions for employee involvement in the way that's necessary, particularly, for knowledge work. But don't make any mistake about it. Not all the jobs that are being created are entry-level jobs. A lot of the jobs being created are knowledge workers in technological fields, which are virtually immune right now from our system of collective bargaining.

Bognanno: Judith, do you or John want to respond?

Scott: I also skipped a very important issue regarding what unions are doing about this. One of the issues that we are facing—both the AFL and the Change to Win unions together—arises from the fact that union density is decreasing in not only the United States, but also abroad. In talking with our union comrades in Europe, for example, we have learned that union density is going down in countries where traditionally it has been very high. And the challenge is—we all agree—that we have to organize across borders and support one another internationally. The growth of the multinational corporation is helpful in one respect. The labor movement can now focus together on a particular multinational corporation at the same time. And we can work together across borders. We now have a multi-country and multi-union social responsibility campaign against Group 4 Securicor, which includes the Wackenhut security officer business. We have been meeting with trade union lawyers from Sweden, Uruguay, Poland, Indonesia, and India to discuss our common concerns with this multinational. Our union organizers are doing cross-border training. We're exchanging organizers. And so we are now running multinational organizing efforts across borders throughout the

world because we recognize we cannot be as effective if we restrict our efforts to a "one country at a time" approach.

The second thing we have been doing is concluding global union framework agreements. They are essentially a type of code of conduct that's usually negotiated through a global union federation. These instruments are not the final answer. At this time they are generally not legally enforceable. They don't contain arbitration clauses. But recently, we concluded a global agreement with Securitas, which is a Swedish-based company, with security services throughout Europe and North America. And, in that agreement for the first time, in addition to pledging compliance with labor standards, Securitas agrees to much more concrete provisions for protecting the workers' right to form unions. The agreement commits the company to recognizing the union based on the minimum legal requirements of the country where the organizing is taking place. So, for example, in the United States, that would mean voluntary recognition based on a card check arrangement. In the end we believe that we need to take these global union framework agreements and turn them into much more concrete organizing agreements with legal enforcement provisions.