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**HUMAN RIGHTS MEAN BUSINESS:
BROADENING THE CANADIAN APPROACH TO BUSINESS AND HUMAN RIGHTS**

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INTRODUCTION

1. At the turn of the century, as at its beginning, the world's nations are a disparate series of economies varying enormously in their social characteristics. Speaking generally, in the North, countries have passed through an industrial revolution, through a period of progressive and incremental improvements in standards of living and a period of gradual, if imperfect, diffusion of wealth through the ranks of society. In the South, for various reasons, nations evidence fewer of these transformations. In the developed nations, fundamental human rights, including labour rights, have been advanced, codified and, for the most part, observed. In developing countries, even where these standards have been codified, many are often ignored, sometimes egregiously.
2. At the same time, by reason of a complex mix of developments in information and communication technology and an incremental codification of liberalised trade and, increasingly, investment rules, the international economy has become "globalised". Economic integration and globalization are relatively non-problematic where globalization links developed nations with broadly homogenous views on fundamental human rights standards. They become more controversial where they integrate developed and developing countries with different records on human rights. In the latter circumstances, trade and investment have the potential to straddle a range of human rights environments, prompting two critical questions. First, to what extent should Northern businesses operating overseas be expected to apply international human rights they abide by in their home jurisdiction in countries where they need not observe these standards? Second, to what extent should businesses evaluate, and respond to, the broader human rights impact of their trading or investment operations in a country with a repressive, human rights-abusing regime?

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3. Notably, businesses have been grappling with similar questions for some time. For example, in 1850, Belgian textile manufacturers and mine operators decided amongst themselves to ban child labour in their facilities. Dissenters from the compact found it advantageous to continue hiring children, thereby undercutting the prices of those competitors abiding by the rules. In the absence of laws of general application forcing defectors to conform to the minimum age requirements of the agreements, the ethical operators found it impossible to maintain their standards and returned to employing children.¹
4. Meanwhile, in apartheid-era South Africa, foreign multinationals bolstered, both directly and indirectly, the regime's capacity to stave off political liberalization. In this regard, two US car companies were accused of supplying South African security forces with vehicles² and at least one Canadian bank was a regular lender throughout the apartheid period to the country's military-industrial and nuclear industries.³ Similarly, South Africa received vital assistance from key US bankers and investors.⁴ Further, US firms in South Africa were concentrated in strategic sectors⁵ and provided key technological and infrastructure support in these areas. In fact, US companies played a critical role in bolstering South Africa's capacity for refining imported oil and provided capital and engineering skills for the country's coal liquefaction projects,⁶ projects that were designed to make South Africa less vulnerable to external pressures.
5. Despite the significant consequences of their presence, these foreign firms demonstrated a great reluctance to intervene and influence South African government policy. For example, US corporate executives argued that they were in South Africa "as guests of the South African government. To antagonise the Government [was] to jeopardise the companies' ability to function."⁷ The US business community's recalcitrance was eventually overcome by demonstrating that inaction on human rights issues had consequences that dwarfed those associated with action. The very real prospect that the US Congress would impose sanctions in 1985 drove the US Chamber of Commerce in South Africa, for the first time, to apply pressure on the Botha regime by imploring it "to abolish influx control, extend voting rights to Blacks, and open a dialogue with all races and political movements."⁸ In 1985, President Reagan signed an executive order disallowing government export assistance to US companies in South Africa that failed to abide by the Sullivan Principles, a code of conduct on business operations in the apartheid state.⁹ Appeals for reforms to apartheid were made in South African newspapers by US firms just before the President signed his order. These companies formed the US Corporate Council on South Africa and pledged "they would lobby for political reform in South Africa."¹⁰

¹ Ernest Mahaim, *The Principles of International Labor Legislation*, 166 ANNALS AM. ACAD. POL. & SOC. SCI. 10 (1933), as cited in Michael Tonya, *Baby Steps towards International Fair Labor Standards*, 24 CASE W. RES. J. INT'L L. 631 (1992).

² See UN Centre Against Apartheid, THE SULLIVAN PRINCIPLES: NO CURE FOR APARTHEID: A PUBLIC STATEMENT, Notes and Documents No. 16/80 at 5 (1980).

³ See RENATE PRATT, IN GOOD FAITH: CANADIAN CHURCHES AGAINST APARTHEID 101 (Wilfred Laurier Press 1997).

⁴ RICHARD HULL, AMERICAN ENTERPRISE IN SOUTH AFRICA 245 (New York University Press 1990). There is compelling evidence that in the absence of investor loans, the apartheid regime would have faced a debilitating economic crisis after the Sharpeville massacre. Similar difficulties may have been encountered during the oil crisis of the early 1970s and in the aftermath of the Soweto massacre but for US private sector support. *Id.* at 301, for a discussion of the role of US businesses in providing support to the regime after Soweto.

⁵ *Id.* at 334. US firms controlled 44% of foreign direct investments in oil, 33% in automobiles and 70% in computers.

⁶ *Id.* at 271.

⁷ UN Centre Against Apartheid, *supra* note 2 at 3.

⁸ Hull, *supra* note 4, at 337.

⁹ Exec. Order No. 12,532, 50 Fed.Reg. 36,861 (1985).

¹⁰ Hull, *supra* note 4, at 337.

6. Lessons can be drawn from both these examples. Implicit in the Belgian scenario are three themes of contemporary relevance. First, as with any other factor of production, economising on labour in a fashion inconsistent with ethical norms may produce a competitive advantage to a firm and, taken on a national scale, a comparative advantage for a nation-state. Second, competitors disadvantaged by these practices are likely to seek similar advantages for themselves. Last, to be effective, any check on the market impetus to compete by debasing labour standards must be enforceable universally, lest defectors undermine the viability of the compact. Additional, pertinent lessons flow from the South African example. First, business operations in a country with a repressive, human rights abusing regime are capable of bolstering that regime and increasing its staying power. Second, businesses will generally respond to human rights concerns where the consequences of inaction on human rights-related issues outweigh the consequences of action.

7. The chapter that follows examines these contentions. Part I analyses the phenomenon of “globalization” and its consequences for international trade and investment, as well as discussing the relationship between economic integration and human rights. It pays particular attention to the concept of “constructive engagement” and proposes that the simple maximisation of integration is not the most effective way of prompting human rights sensitive development. Part II focuses on the relationship between business and human rights and reveals similarities between contemporary developments in this area and the Belgian and South African patterns described above. Part III draws on the findings of the chapter to critique the Canadian Government's present approach to economic integration and human rights. The paper concludes that the present Canadian policy on business and human rights is inadequate and recommends a series of reforms to this strategy.

PART ONE: GLOBALIZATION AND PUBLIC POLICY

8. Globalization, broadly put, is the dismantling of barriers between countries. Clearly, part of what is termed "globalization" reflects new advances in technology and communications, developments that are diffuse in origin and not easily attributable to the policy agenda of governments. On the other hand, the other dimensions of globalization -- those associated with increased trade and investment -- reflect a progressive and incremental codification of liberalised international trade and investment laws. These developments have as their origin concrete policy decisions by governments.

GLOBALIZATION AND HUMAN DEVELOPMENT

9. The underlying economic justification for liberalised trade stems in large part from the concept of comparative advantage.¹¹ Under the classical comparative advantage model, countries engaged in trade can specialise in those endeavours that represent the most efficient allocation of their factors of production. Such a division of labour will prompt a net increase in the amount of product in circulation and lower prices than would exist if the countries were to produce the whole range of products in a closed economy. The net result will be universal gains from trade. Thus, the economic justification for liberalised trade is improvements in net economic well-being. The Organization for Economic Co-operation and Development (OECD), in a recent study, puts this rationale as follows:

The case for open markets rests on solid foundations. One of these is the fact that when individuals and companies engage in specialisation and exchange, a country will exploit its comparative advantage. It will devote its natural, human, industrial and financial resources to their highest and best uses. This will provide gains to firms and consumers alike.¹²

10. In many instances, however, trade and economic integration have been justified not simply as a method for maximising prosperity, but ultimately as a means of serving laudable political ends. The linchpin of the modern trade regime, the General Agreement on Trade and Tariffs, was the brainchild of policy makers persuaded that the prolonged Depression of the 1930s and the Second World War were, in part, the product of the beggar-thy-neighbour trade policies.¹³ These policies were in turn the result of an anarchic international law trade regime.¹⁴ Similarly, the European Coal and Steel Community, the precursor of the European Economic Community, and now European Union, was explicitly an effort to internationalise control over those smokestack industries most closely associated with armament production.¹⁵
11. In more recent times, proponents of economic integration between Northern nations and those with poor records on human rights have urged that economic integration, or "constructive

¹¹ See MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 4 (Routledge 1995).

¹² OECD, *OPEN MARKETS MATTER: THE BENEFITS OF TRADE AND INVESTMENT LIBERALIZATION* 9-10 (OECD 1998) <www.oecd.org/ech/events/>.

¹³ See TREBILCOCK & HOWSE, *supra* note 11, at 20. See also League of Nations, *COMMERCIAL POLICY IN THE INTERWAR PERIOD: INTERNATIONAL PROPOSALS AND NATIONAL POLICIES*, 22 (Official No.: 1942.II.A.6), as reported in ROBERT HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 6-7 (Butterworth, 1990): "trade [in the inter-war period] was consistently regarded as a form of warfare, as a vast game of beggar-my-neighbour, rather than a co-operative activity from the extension of which all stood to benefit. The latter was the premise on which the post-war conferences based their recommendation...".

¹⁴ See *id.* at 5-7.

¹⁵ GEORGE BERMANN, *EUROPEAN COMMUNITY LAW* 5-6 (West Publishing, 1993). France, in particular, was concerned with balancing German rearmament as a check to Soviet expansionism with guarantees against German militarism. The solution was to internationalise and integrate, through freer trade and a transnational administration, the coal and steel industries.

engagement", in the form of trade and investment will serve important human development and human rights goals by sparking political liberalization — defined as including observance of human rights — in countries governed by repressive regimes. In Canada, the Business Council on National Issues (BCNI), the country's foremost business lobby group, has enunciated a constructive engagement position, arguing that companies should engage in more business with non-democratic countries because "trade will act as a positive catalyst for change."¹⁶ Similarly, the most recent Canadian Government foreign policy statement notes that "human rights tend to be best protected by those societies that are open — to trade, financial flows, population movements, information and ideas about freedom and human dignity."¹⁷ In a 1996 speech, Canadian Foreign Affairs Minister Axworthy urged that "...both trade and the promotion of human rights can serve the same purpose -- namely bettering the well-being of individuals."¹⁸ In a November 1998 statement, Minister Axworthy repeated these assertions:

The issue [of the relationship between trade and human rights] has never been a crude trade-off between promoting commerce or human rights. They are not mutually exclusive but mutually reinforcing. The promotion of good governance, democracy and human rights are essential to the creation of a climate for sustainable economic development which benefits everyone. Economic prosperity in turn enhances the prospects for stable societies that allow human rights to flourish. The Asian crisis shows what can happen when this equation is out of balance.¹⁹

12. Supporters of constructive engagement argue that the multinational business presence in repressive countries may promote political liberalization and greater respect for human rights by exposing populations to liberal, human rights-supporting values. Thus, "[i]n the context of China, [US] business leaders have frequently asserted that the web of contacts between Chinese citizens and US investors that develops in the course of business relationships promotes the transfer of liberal democratic values from this side of the Pacific to the East."²⁰ Contact with transnational businesses is also viewed as "promot[ing] greater integration of the host country in the international community, thereby enlarging its exposure to the shared values of civilized nations."²¹
13. The positive spin-offs of this "demonstration effect" will be reinforced by economic growth prompted by trade and investment. This economic expansion will bring new wealth to the

¹⁶ Thomas d'Aquino, CEO of the BCNI in International Centre for Human Rights and Democratic Development (ICHRDD), SUMMARY REPORT: GLOBALIZATION: TRADE AND HUMAN RIGHTS, THE CANADIAN BUSINESS PERSPECTIVE 2 (ICHRDD February 1996).

¹⁷ Department of Foreign Affairs and International Trade (DFAIT), CANADA IN THE WORLD 34 (1995). Prime Minister Chrétien has often asserted a correlation between political liberalization and multinational investment in China, claiming that human rights are best promoted by open trade. See Clyde Graham, *Chrétien quietly raises human rights with Chinese premier*, CANADIAN PRESS, October 14, 1995.

¹⁸ *Notes for An Address by the Honourable Lloyd Axworthy, Minister of Foreign Affairs, At the Consultations with Non-governmental Organizations in Preparation for the 52nd Session of the United Nations Commission on Human Rights*, February 13, 1996. See also *Notes for An Address by the Honourable Raymond Chan, Secretary of State (Asia-Pacific), Before the House of Commons on the Anniversary of Events in Tiananmen Square*, June 4, 1996: "With regard to economic partnership, systematic and wide-ranging contact leads to calls for greater openness and freedom. Trade reduces isolationism. Trade also expands the scope of international law and generates the growth required to sustain social change and development. A society that depends little on trade and international investment is not open to the inflow of ideas and values."

¹⁹ *Notes for An Address by the Honourable Lloyd Axworthy to the International Conference on Universal Rights and Human Values "A Blueprint for Peace, Justice and Freedom"*, November 27, 1998.

²⁰ Diane Orentlicher & Timothy Gelatt, *Public Law, Private Actors: the Impact of Human Rights on Business Investors in China*, NW. J. INT'L L. & BUS. 66, 98 (1993). For example, in a letter from the Business Coalition for U.S.-China Trade to President Bill Clinton on May 12, 1993, opponents to a strong human rights stand by the US administration wrote: "We in the business community . . . believe that our continued commercial interaction fuels positive elements for change in Chinese society. The expansion of trade and free market reforms has strengthened the pro-democratic forces in China." Cited in *id.* at 81.

²¹ *Id.* at 99.

society and, through "trickle-down," permit the development of a middle class. The demands of this burgeoning middle class — particularly its aspirations for political participation — will, in turn, fuel the political liberalization process. Thus, economic liberalization, investment and the operations of the free market will, through their own inexorable logic, subvert repressive governments.

14. Perhaps the most comprehensive endorsement of the constructive engagement ideal is that enunciated by USA*Engage, the anti-sanctions US business lobby group. In its discussion paper *Economic Engagement Promotes Freedom*, the group argues that US investment brings with it Western values and, indeed, that the very operating systems preferred by US corporations have an anti-authoritarian bent.²² More importantly,

. . . market-oriented economic development causes social changes that impede authoritarian rule. These include widespread education, the opening of society to the outside world, and the development of an independent middle class...This growing middle class has profound long-term political implications...A well-educated independent middle class does not depend on the state for economic advancement, and thus is far more free to challenge political control. A government faced with this change must seek the support of the middle class and must respond to middle class demands for greater political freedoms, the rule of law and the elimination of corruption.²³

15. To justify its position, the paper points to a strong empirical correlation between per capita income and freedom.²⁴

EVALUATING GLOBALIZATION AS PUBLIC POLICY

16. By the logic outlined above, a principal public policy justification for economic integration has been, and remains, tied to human development. Thus, globalization is not a public policy end in itself, but merely a means to an end. It is a tool of prosperity and development whose worth and effectiveness deserves to be measured, not in terms of how closely the tool approximates the ideal of free trade *per se*, but with reference to how well the policy contributes to the objective for which it is developed. Thus, economic integration is only successful where it increases prosperity, security and human rights-sensitive development.
17. The OECD argues in a recent study that "[t]rade and foreign direct investment are major engines or growth in developed and developing countries alike...In the last decade, countries that have been more open have achieved double the annual average growth of others."²⁵ However, critics argue that this economic integration and economic growth will not automatically induce respect for human rights. The widely-respected political scientist Samuel Huntington, while generally supportive of the constructive engagement model, would disagree with its single-minded economic determinism.²⁶ Huntington points to a loose correlation between wealth as measured by gross national product/capita and democratization to hypothesize that countries in the middle income brackets are most prone to make the transition to democracy. He uses case studies to

²² According to USA*Engage, the flatter, less hierarchical organizational structures adopted by US companies over the last decade "require fundamentally different organizations systems and ways of thinking, particularly in formerly authoritarian workplaces. Training an individual to spot a flaw on an assembly line, for example, and to stop the entire line to repair it, can require a significant — and positive — change. Such an individual may have to overcome an ingrained deference to authority, and may develop an enhanced sense of independence and self-worth." See <www.usaengage.org/studies/engagement.html> as of October 1998.

²³ *Id.*

²⁴ For a similar discussion from a Canadian source, see Standing Senate Committee on Foreign Affairs, *CRISIS IN ASIA: IMPLICATIONS FOR THE REGION, CANADA, AND THE WORLD* 104-5 (December 1998).

²⁵ OECD, *supra* note 12, available on the Internet at <www.oecd.org/ech/events/open.htm> as of February 1999.

²⁶ See SAMUEL HUNTINGTON, *THE THIRD WAVE* (University of Oklahoma Press, 1991).

argue that "economic development appears to have prompted changes in social structure and values that, in turn, encouraged democratization."²⁷ For Huntington,

. . . economic development involving significant industrialization lead[s] to a new, much more diverse, complex and interrelated economy, which becomes increasingly difficult for authoritarian regimes to control. Economic development creat[es] new sources of wealth and power outside the state and a functional need to devolve decision making.²⁸

18. Yet, while "[a]n overall correlation exists between the level of economic development and democracy...no level or pattern of economic development is in itself either necessary or sufficient to bring about democratization."²⁹ Other scholars have gone even further, concluding that "democracy and respect of human rights are not linked to economic development."³⁰
19. In fact, the empirical evidence relating to constructive engagement is unconvincing.³¹ A simple statistical exercise run for the purpose of this paper confirms the views of critics. Data on foreign direct investment as a percentage of GDP in 1980 and 1996 were drawn from the 1998 World Bank Development Indicators. As an measure of human rights, data from the 1997 Freedom House civil rights report were collected.³² Several Pearson product moment coefficient tests were run to test for any correlation between good human rights records, as measured by Freedom House, and foreign direct investment as a percentage of GDP.³³ In no instance was there any statistically significant correlation between foreign direct investment and human rights.³⁴ In other words, there was no evidence that those nations with high rates of foreign direct investment, as a percentage of their GDP, were more respectful of human rights than nations with lower rates.

²⁷ *Id.* at 65.

²⁸ *Id.*

²⁹ *Id.* at 59.

³⁰ Michael Leicht, *Trade policy and human rights*, 33 *INTERECONOMICS* 4 (1998).

³¹For statistical studies, see John Lonfregan & Keith Poole, *Does high income promote democracy?*, 49 *WORLD POLITICS* 1, 1, 29 (1996): "We find that even after correcting for many features of the political and historical context, the democratizing effect of income remains as a significant factor promoting the emergence of democratic political institutions. However, the small magnitude of our estimated income effect suggests the democratizing effects of high income are modest...Our findings indicate that policies that seek to increase the economic development of countries with authoritarian governments as a means of changing them into democracies, such as the current policy of many democracies towards China, may take more years to have an effect than current policymakers imagine." See also the statistical study of Adam Przeworski & Fernando Limongi, *Modernization -- Theories and Facts*, 49 *WORLD POLITICS* 2, 155, 177 (1997): "The emergence of democracy is not a by-product of economic development. Democracy is or is not established by political actors pursuing their goals, and can be initiated at any level of development."

³²The Freedom House survey ranks countries from one to seven, with "1" representing the most freedom and "7" the least freedom. In assigning numerical labels under "civil rights", Freedom House considers, *inter alia*, freedom of assembly, freedom of political organization, equality before the law, protection from political terror, the presence of free trade unions and free businesses and personal freedoms such as property rights. See Freedom House, *Freedom in the World* 531 (Freedom House 1996).

³³ Pearson product moment correlations can be used for interval data. The data sets analysed in this study can be characterized as such a sort of date. The test produces a co-efficient, r , that ranges from -1.0 to 1.0, inclusive, and reflects the extent of a linear relationship between two data sets. Negative figures reflect a negative relationship while positive figures suggest a positive relationship between variance in the data sets. The correlations demonstrate covariance in the date sets, not causality. The coefficient, r , can be squared to arrive at a coefficient of determination. The coefficient of determination, r^2 , represents "the proportion of the variance in Y that may be accounted for by its linear relationship with X or vice versa." DON ARY & LUCY JACOBS, *INTRODUCTION TO STATISTICS* 186 (Holt, Rinehart and Winston 1976).

³⁴ Tests: r for FDI as % of GDP/Freedom House scores for 133 countries for which 1996 date were available: 0.0144; same, without OECD countries (except Mexico and S. Korea): -0.0478; r for change in FDI as % of GDP between 1980-96/1996 Freedom House scores for 102 countries for which data were available: -0.1289; same, without OECD countries: -0.1872; r for change in FDI as % of GDP between 1980-96/change in Freedom House scores between 1980-96 for the 102 countries for which date were available: -0.0507; same, without OECD countries: -0.0637.

20. Taken together, these findings support the view that economic liberalization alone is not a sufficient pre-requisite for political liberalization. As one observer puts it, "economic growth and prosperity, if upheld in a politically restrictive context are unlikely to pave the way for a sustainable drive toward democracy...A reform strategy that focuses on both economic liberalization and the expansion of civil society will be the most viable."³⁵ Complaints can be made that no such balanced approach is evident in many of the countries that have been "constructively engaged."³⁶ However, as Part II suggests, there is some reason to hope that governments have begun to pay at least lip service to a more nuanced vision of human rights and economic integration.

³⁵ MAHMOOD MONSHIPOURI, *DEMOCRATIZATION, LIBERALIZATION & HUMAN RIGHTS IN THE THIRD WORLD* 174 (Lynne Rienner Publishers 1995).

³⁶ For example, the human rights situation in China has not improved, despite billions of dollars in increased investment. In fact, in recent months, there is evidence of a renewed crackdown on human rights and democracy activists by hard-liners, despite China's much publicized endorsement of the two international human rights covenants. For a discussion, see Miro Cernetig, *China: Dragons and doves*, THE GLOBE AND MAIL, Jan. 16, 1999, at D1: "More than 20 years after the West opened up diplomatic relations with China, it is easy to think the Chinese are slowly becoming us. Certainly, most of our foreign-policy makers, the folks who came up with the philosophy known as 'engagement' with China, like to stoke this comforting illusion...But its getting harder to believe. The truth is that relations with China are hardening in a way that hasn't been seen since tanks rolled over students in Tiananmen Square a decade ago." In response to the most recent crackdown, Canada sent a diplomatic protest to the Chinese Minister of Foreign Affairs. Raymond Chan, Secretary of State (Asia-Pacific), perhaps in an admission of frustration, stated that "We value the bilateral dialogue that we have established with China on human rights issues...We therefore expect the Chinese authorities to show greater tolerance for the peaceful expression of political views by their citizens." DFAIT, CANADA AND OTHER COUNTRIES JOIN IN PROTEST AGAINST HARSH SENTENCING OF CHINESE DISSIDENTS, Press Release, Dec. 23, 1998. In 1999, Human Rights Watch, in its *World Report 1999* <www.hrw.org/hrw/worldreport99/>, reported that "[d]espite some encouraging developments, China's human rights practices remained cause for concern...Western governments seized on tentative signs of tolerance to strengthen calls for engagement, a desirable goal, but one that in policy terms all too often meant silence on China's egregious human rights record." In July 1996, the group released *Human Rights Abuses Are Bad for Business*, a report documenting "a deterioration of the human rights situation [in China] over the last twelve months in terms of a draconian crackdown on crime, arbitrary detention, restrictions on freedom of expression, moves against Hong Kong, continuing religious persecution, and the most severe repression in years of nationalist movements in Tibet, Xinjiang and Inner Mongolia." See also *US: China Human Rights A Farce*, ASSOCIATED PRESS, March 6, 1996 and Rod Mickleburgh, *China relentless in pursuit of critics*, THE GLOBE AND MAIL, Oct. 28, 1996, at A12: "...there is no evidence of increased respect for human rights in China, despite billions of dollars of foreign investment pouring in every year. In fact, most observers say the situation is getting worse." If anything, as Canada's refusal to endorse a UN resolution condemning Chinese human rights abuses at the 53rd UN Commission on Human Rights may indicate, increased trade and investment by Western nations in China may have increased the reluctance of Western leaders to risk export industry jobs by taking a tough human rights stand and demanding political reforms. See, for example, Associated Press, *supra*: "President Clinton initially threatened to cut off China's trade privileges [in response to human rights concerns], then reversed himself two years ago under pressure from business leaders worried about the loss of billion of dollars in exports. U.S. sales to China are believed to account for more than 150,000 American jobs." Prime Minister Chrétien's response has been very similar: "We can be the boy scout if we want...If you want us to be the only country in the world boycotting China, fine. But we'll lose a lot of business, a lot of jobs." Cited in Rod Mickleburgh, *supra*, at A12. Human Rights Watch, in its *World Report 1999*, *supra*, reported that "[i]n 1998, the Dutch government, long a critic of China's human rights record...refused to sponsor a human rights resolution on China at the United Nations Human Rights Commission. Apparently linked to this silence on human rights, in February the Chinese government awarded Royal Dutch/Shell the largest single foreign investment in Chinese history...". As one Western diplomat has been cited as saying: "China can pretty well do what it wants these days...The West is not at the point where it is ready to gang up and take the same position on these [human rights] matters. Right now, no one wants to run the risk of being put on a blacklist by speaking out too critically in public. Overall, I think China must be very satisfied." Mickleburgh, *supra*. This point has been echoed in the context of Canada's relations with other nations as well. As one commentator puts it, by "[p]ursuing a foreign policy that has been guided by the need to expand trade as the means to promote democracy in developing countries, Canada has tended to overlook [human rights] issues such as workers' rights." Rhéal Séguin, *Trade mission skirts rights issue*, THE GLOBE AND MAIL, Jan. 13, 1997, at A1.

PART TWO: THE COMPONENTS OF “RESPONSIBLE TRADE”

21. In 1997, Foreign Affairs Minister Axworthy, in a speech at McGill University, noted that “[t]rade on its own does not promote democratization or greater respect for human rights...The key issue here is not a crude choice between trade or human rights, but rather a need for responsible trade.”³⁷ This statement represents an acknowledgement that mere economic integration is not enough to meet human rights objectives.
22. Yet, exactly what constitutes “responsible trade” remains an open question. Logically, a finding that raw economic liberalization does not automatically lead to improved respect for human rights suggests, at best, that certain pre-requisites of constructive engagement must be met if improvements in the human rights environment are to follow increased economic integration. It is submitted that there are two, logical pre-requisites for the effective operation of constructive engagement: adherence to workplace labour rights and avoidance of complicity with human rights abuses.

PRE-REQUISITE ONE: LABOR RIGHTS

23. The liberalising influence of business activities will likely be felt only if businesses abide by human rights standards in their own workplaces -- or in the workplaces of their sourcing partners -- that, at minimum, exceed local standards. Clearly, there can be no “demonstration effect” if there is no demonstration by the firm itself. Similarly, it seems unlikely that there can be a demonstration of human rights-reinforcing “liberal democratic values” if firms turn a blind eye to abuses by their suppliers. Nor is it likely that there can be expedited growth in a middle class via economic trickle down if the firm or its suppliers pay local wage rates in an environment where wages are actively and coercively repressed.
24. There remains a fair measure of debate as to what baseline standards companies should employ in their overseas operations where local standards are poor or simply unenforced. Concern has been expressed in the South that labour standards not be inconsistent with the level of economic development characteristic of the country. Governments whose country's comparative advantage is said to rest on inexpensive labour costs are reluctant to see their competitiveness eroded by artificially rigid labour standards. Some Northern firms pledge to apply home country standards in their overseas operations. The Confederation of Danish Industries, for example, reportedly has a set of guidelines requiring companies to pursue the same level of “social responsibility in their new host country as in their home country.”³⁸ However, the simple importation of Northern standards seems the approach most likely to give rise to excessive standards. The better approach is to apply baseline international norms.
25. In recent years, much attention has been focused on a subset of international labour rights viewed by an increasing number of observers as fundamental and, arguably, universal. In the mid-1990s, the OECD identified four “core” labour standards found in ILO and UN conventions as human rights. These are: freedom of association³⁹; non-discrimination in the workplace⁴⁰; a ban

³⁷ *Notes for An Address by the Honourable Lloyd Axworthy Minister of Foreign Affairs At McGill University “Human Rights and Canadian Foreign Policy: Principled Pragmatism”*, October 1997.

³⁸ See RICHARD HOWITT, REPORT ON EU STANDARDS FOR EUROPEAN ENTERPRISES OPERATING IN DEVELOPING COUNTRIES, European Parliament, PE228.198/DEF.

³⁹ A key element of international labour rights, freedom of association is protected by ILO Conventions No. 87 (1948) and No. 98 (1949). The Universal Declaration of Human Rights, UNGA Res. 217(III), UN GAOR, 3rd Sess., Supp. No. 13, at 71, UN Doc. A/810, at 71 (1948), Article 20, also deals with rights of association and, in Article 23, protects the right to form and to join trade unions for the protection of one's interests. The International Covenant on Civil and Political Rights, (1966) 999 U.N.T.S. 171, 1976 Can. T.S., No. 47, defines a

on child labour⁴¹, and; a ban on forced labour.⁴² According to the OECD, violation of these norms is a matter of particular humanitarian concern.⁴³ In May 1995, the Director-General of the International Labor Organization launched a campaign calling for universal ratification of the conventions containing these core standards. Labelled "fundamental principles" by the ILO, these four standards were invoked in the June 1998 ILO *Declaration on fundamental principles and rights at work*, a call by the 86th Session of the International Labor Conference for all ILO members to ratify the conventions containing these rights. In fact, the International Labor Organization and UN conventions in question are widely, though not universally, ratified by the states of the world.⁴⁴ It is these broadly affirmed rights that are increasingly being viewed as the minimum labour rights baseline.

26. Yet, while these norms are widely recognized by the world's nations, they are often honoured in the breach.⁴⁵ Clearly, observing these rights increases the short term cost of labour. As a consequence, as labour represents an important, if declining, cost of production, there may be strong incentives for companies and countries to compete by debasing even these labour standards.⁴⁶ The OECD, in a 1996 study, found "evidence that some governments felt that restricting certain core labour standards would help attract inward FDI [foreign direct investment]." ⁴⁷ In addition, the OECD has conceded that some firms may in fact respond to the cost advantages of repression. The OECD notes that "in a number of...countries which are among the primary destination for OECD investment, the record of compliance with core

right to "freedom of association with others, including the right to form and join trade unions for the protection of one's interests" in Article 22. *See* also Article 8 of the International Covenant on Economic, Social and Cultural Rights, (1966), 999 U.N.T.S. 3, 1976 Can. T.S., No. 46.

⁴⁰ Rights to non-discrimination permeate international legal instruments. *See*, for example, Universal Declaration of Human Rights, Article 23, International Covenant on Economic, Social and Cultural Rights, Article 7, and ILO 111 (Discrimination (Employment and Occupation) Convention) (1958).

⁴¹ The ILO has pledged to adopt a new standard on the elimination of the most "intolerable forms" of child labour by 1999. Note, however, that Article 32 of the existing Convention on the Rights of the Child indicates that "States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." The Convention on the Rights of the Child is amongst the most widely ratified treaties in history. As of 1997, only 6 countries had not signed it.

⁴² Under the first ILO forced labour treaty, Convention 29 of 1930, forced labour is outlawed, with forced labour being defined as "all work or service which is exacted from any person under the menace of penalty and for which the said person has not offered himself voluntarily." The Universal Declaration of Human Rights, Article 4 and 23, the Covenant on Civil and Political Rights, Article 8, and the Covenant on Economic, Social and Cultural Rights, Article 6, also contain relevant language.

⁴³ OECD, TRADE AND LABOUR STANDARDS, COM/DEELSA/TD(95)5 at 14 (1995). According to the OECD, "[t]he humanitarian concern is particularly strong in the case of certain forms of child labour, such as work of very young children and cases of exploitation and prostitution. Extreme forms of forced labour...also provoke strong feelings. Likewise, the international community appears to be very sensitive to the issue of racial, political, religious and sex discrimination. Finally, certain acts of anti-union discrimination (such as imprisonment and murder of union members) can be considered as blatant violations of human rights."

⁴⁴ As of December 1998, Convention 29 on forced labour had 149 ratifications, Convention 98 on the rights to organize and bargain collectively had 139, Convention 100 on equal pay, 137, Convention 111 on non-discrimination, 130, Convention 105 on forced labour, 133, Convention 87 on freedom of association, 122 and Convention 138 on child labour, 66. *See* the ILO homepage: <www.ilo.org/public/english/50normes/whatare/fundam/index.htm> as of February 1999.

⁴⁵ For example, according to the International Confederation of Free Trade Unions, ANNUAL SURVEY OF VIOLATIONS OF TRADE UNION RIGHTS - 1998 (June 1998), in 1997 "nearly 300 trade unionists were killed for standing up for their rights, 1681 were tortured or ill-treated, 2329 were detained, there were 3369 cases of intimidation and there was blatant interference in union affairs in 79 countries". *See* the ICTFU web page at <www.icftu.org>.

⁴⁶ OECD, *supra* note 43, at 40: "...there is some evidence that over the short-run, episodes of improvements of freedom of association can be associated with a loss of competitiveness."

⁴⁷ OECD, TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE, COM/DEELSA/TD(96)8/FINAL at 36, 47 (1996).

labour standards is tarnished, particularly with respect to freedom-of-association rights, although to different degrees."⁴⁸ According to the OECD, "there is no definitive evidence on the extent to which FDI responds to the level of core labour standards."⁴⁹ In fact, "low or non-existent labour standards may have a detrimental effect on FDI decisions. They indicate a risk of future social discontent and unrest, and include the risk of consumer boycotts."⁵⁰ However, "it is readily admitted that expectations of high profitability due to the economic environment provided in host countries may be able to outweigh some of the concerns foreign investors [have] about low levels of observance of core labour standard by host government[s]."⁵¹ Further, while the OECD was not able to identify what impacts multinationals have on core labour rights, it did note that multinationals employ most of the workers in the world's export processing zones (EPZs). As such, "the radically lower degree of unionisation in EPZs in comparison with the domestic economy as a whole could suggest that [multinational businesses] do not contribute to the improvement of the practical situation of unions"⁵² and, one might infer from other practices in these zones, of labour rights generally.⁵³ This conclusion, coupled with the rash of recent controversies related to poor labour practices by suppliers for major US firms operating overseas,⁵⁴ suggest that the common approach of many businesses to core labour standards is strongly inconsistent with the philosophy of constructive engagement.

PRE-REQUISITE TWO: AVOIDING COMPLICITY

27. Logically, the improvements in human rights predicted by the constructive engagement model will occur only if the presence of the firm does not result in increased repressive activity by the regime that counters any positive human rights impacts the firm's presence might have. Further, the firm's presence must not reinforce the capacity of a regime that systematically violates human rights to stave off the demands for political liberalization predicted by the constructive engagement model.
28. It is wrong to assume that business will invariably act in a fashion detrimental to repressive regimes. In this regard, there are several ways in which a firm's presence in a nation with a oppressive government can encourage the regime to increase its *repressive activity* and engage in human rights abuses that would otherwise not occur. First, the regime may use repressive means to produce infrastructure designed for use by the business. In Burma, for example, the military dictatorship -- now known as the State Peace and Development Council (SPDC) -- has been accused of using forced labour to build infrastructure for the Yadana pipeline, a project involving

⁴⁸ *Id.* at 46.

⁴⁹ *Id.*

⁵⁰ *Id.* at 47.

⁵¹ *Id.*

⁵² *Id.* at 49.

⁵³ See United Nations Conference on Trade and Development (UNCTAD), WORLD INVESTMENT REPORT: GLOBALIZATION, INTEGRATED INTERNATIONAL PRODUCTION AND THE WORLD ECONOMY (United Nations 1994). For a discussion of labour conditions in EPZs, see International Confederation of Free Trade Unions, BEHIND THE WIRE: ANTI-UNION REPRESSION IN THE EXPORT PROCESSING ZONES, on the Internet at <www.icftu.org> as of February 1999: "Multinational enterprises have a strong presence in the export processing zones either because they have direct investment there, or often because they subcontract local firms there. They therefore bear heavy responsibility for the working conditions prevailing in the zones." Note, however, that in some countries, while EPZ conditions as a whole are often worse than in the rest of the country, "[s]ome of the multinationals in the export processing zones provide better conditions than national enterprises."

⁵⁴ For a discussion of these controversies, see CRAIG FORCESE, COMMERCE WITH CONSCIENCE? (International Centre for Human Rights and Democratic Development 1997) and CRAIG FORCESE, PUTTING COMMERCE INTO CONSCIENCE (International Centre for Human Rights and Democratic Development 1997).

major US and French multinational companies.⁵⁵ Also in Burma, indentured workers under military control were used in 1996 to upgrade an industrial zone used by many foreign textile manufacturers.⁵⁶

29. Second, the regime may use repressive means to provide firms with resources. In Colombia, for example, Human Rights Watch criticized two major multinational oil consortiums for retaining the services of the Colombian military to protect their pipelines. These security forces have been implicated in massive human rights abuses, including killings, beatings and arrests.⁵⁷ In Indonesia, government army officials hired as security at a mining site on Irian Jaya have been accused of torturing and extra-judicially executing local people opposed to the mine.⁵⁸ In Nigeria, oil companies have been implicated in "the systematic suppression by Nigerian security forces of protesting local communities."⁵⁹ In Burma, Burmese forces providing security for the massive Yadana pipeline have committed "violations against villagers along the pipeline route, including killings, torture, rape, displacement of entire villages, and forced labour."⁶⁰ In Chad and Cameroon, a coalition of European and African environmental groups and German parliamentarians have pointed to a "noticeable increase in human rights violations" in the region surrounding another multinational corporation pipeline project. In particular, through the first eight months of 1998, there were persistent reports of "increased killings of civilians by government forces" in this area.⁶¹ More recently, in India, Human Rights Watch has accused the multinational firm Enron of being complicit in efforts by security forces to quash protest against its power project. Specifically, the company "benefited directly from an official policy of suppressing dissent through misuse of the law, harassment of anti-Enron protest leaders and prominent environmental activists, and police practices ranging from arbitrary to brutal...The company...paid the abusive state forces for the security they provided to the company."⁶²
30. Third, the regime may accommodate business interests by resorting to repression to forestall labour unrest. In this regard, a number of countries have been accused, not only of violating core labour rights as noted above, but of engaging in other human rights abuses to keep labour cheap and pliable. For example, in Sri Lanka, police regularly and brutally repress labour disputes in EPZs and have been implicated in assaults and disappearances of workers.⁶³ In Indonesia, the military has also been accused of "disappearing" workers.⁶⁴ Police have intervened in overwhelming force in labour disputes in Bangladeshi EPZs.⁶⁵ Similarly, in the Philippines, trade unionists have been "visited" by government agents to convince them to end

⁵⁵ See Earth Rights International & Southeast Asian Information Network, TOTAL DENIAL: BURMA 32 (July 1996).

⁵⁶ See Canadian Friends of Burma, DIRTY CLOTHES-DIRTY SYSTEM 11-12 (CFOB 1996).

⁵⁷ See Human Rights Watch, *World Report, 1997* and *World Report, 1999* (available on the Internet at <www.hrw.org/hrw/worldreport99/special/corporation.html> as of February 1999). See also Dan Atkinson, *BP denies MEP's Colombia claims*, THE GUARDIAN, Oct. 23, 1996; Amnesty International, COLOMBIA: BRITISH PETROLEUM RISKS FUELLING HUMAN RIGHTS CRISIS THROUGH MILITARY TRAINING (June 30 1997); Project Underground, *Oil Companies Buying Up Colombian Army to Fight Pipeline Violence*, DRILLBITS & TAILINGS, Sept. 1, 1996.

⁵⁸ Pratap Chatterjee, *The Mining Menace of Freeport McMoRan*, MULTINATIONAL MONITOR, April 1996 at 11. For a detailed description of the military role in the events and their aftermath, see also Amnesty International, INDONESIA: FULL JUSTICE? MILITARY TRIALS IN IRIAN JAYA, AI Index: ASA 21/17/96, March 1996.

⁵⁹ Jessie Banfield, *The corporate responsibility debate*, AFRICAN BUSINESS, Nov. 1998 at 30-31.

⁶⁰ Human Rights Watch, *World Report 1999* (1999).

⁶¹ *Id.*

⁶² Human Rights Watch, THE ENRON CORPORATION: CORPORATE COMPLICITY IN HUMAN RIGHTS VIOLATIONS (January 1999), available on the Internet at <www.hrw.org/hrw/reports/1999/enron/>, as of February 1999.

⁶³ Sunil Ratnapriya, *Busting Labor in Sri Lanka*, MULTINATIONAL MONITOR, Jan./Feb. 1995 at 32.

⁶⁴ Robert Weissman, *Repression to Cooperation: Challenges for Women Workers in Southeast Asia*, MULTINATIONAL MONITOR, November 1993 at 20.

⁶⁵ *Nike workers arrested, injured, fired in Bangladesh*, LABOR ALERTS/LABOR NEWS, Aug. 3, 1997.

their trade union activities, while other trade union leaders in the textile sector have been abducted and tortured by armed men.⁶⁶ In Burma, a sit-down strike by workers at a South Korean firm exporting garments to Western countries — including Canada — was broken by a government paramilitary unit that threatened to shoot workers who refused to return to work.⁶⁷

31. Similarly, there are several ways in which a firm's activities may bolster the *repressive capacity* and the staying power of a regime which systematically violates human rights. First, the firm may produce products used by the regime that increase its repressive capacity. For example, as noted above, two US car companies were accused of supplying apartheid-era South African security forces with vehicles.⁶⁸ Firms in a trading rather than investment relationship with repressive regimes can also provide products used by a regime in its repressive activities. For example, in the past, Canadian companies having supplied "dual purpose" military-civilian aircraft to regimes with poor human rights records such as Peru, China, Saudi Arabia and Iran.⁶⁹ In 1994, dual-purpose helicopters were sold in a secret arrangement to Colombia, a country with an atrocious human rights record.⁷⁰
32. Second, the firm may be a major source of revenue that increases a regime's repressive capacity.⁷¹ For example, the Yadana pipeline project in Burma backed by US, French and Thai companies will provide the Burmese junta with its largest source of foreign capital.⁷² In 1993, Petro-Canada International abandoned its Burmese operations, but not before facing intense criticism for having paid the Burmese regime a non-refundable \$6 million cash "signing bonus" for permission to conduct oil explorations.⁷³ More recently, Vancouver-based Indochina Goldfields announced in November 1998 the start-up of a US\$300 million copper mine in Burma, one that is jointly owned by the regime's mining company.⁷⁴ Edmonton-based Mindoro Resources, meanwhile, has partnered directly with the regime in a Burma gold exploration project.⁷⁵

⁶⁶ International Confederation of Free Trade Unions, *supra* note 53.

⁶⁷ Canadian Friends of Burma, *supra* note 56, at 21.

⁶⁸ See note 2 above.

⁶⁹ See Ken Epps, *Canada's unrecorded military trade*, PLOUGHSHARES MONITOR, Sept. 1996 at 20.

⁷⁰ Dave Todd, *Copter deal to Colombia approved*, THE MONTREAL GAZETTE, June 8, 1994.

⁷¹ For example, at least one Canadian mining company has reportedly provided financial support to the new government in the Democratic Republic of Congo, a regime that has since been implicated in human rights abuses against Rwandan refugees. See Associated Press, *Canadian company helps pay for rebels*, THE GLOBE AND MAIL, May 10, 1997 at A1; Gordon Clark, *Firm pays millions to rebels in Zaire*, VANCOUVER PROVINCE, May 11, 1997 at A4. Also, at least one major Canadian retail company has been accused of sourcing clothing from factories whose major shareholders include the Burmese army Directorate of Procurement, the body charged with purchasing arms and military equipment for the military regime. See Canadian Friends of Burma, *supra* note 56, at 23. In Sudan, an oil concession currently owned by Canadian company, Talisman Energy, is expected to bring in annual revenues of US\$1 billion, or a tenth of Sudan's present gross national product. See *Canadian Oil Company Employs Mercenaries in Sudan*, DRILLBITS & TAILINGS, August 7, 1997. The Sudanese government has been under United Nations Security Council sanctions for massive human rights abuses including the deliberate and arbitrary killings of villagers, the abduction of scores of children and torture of suspected government opponents.

⁷² See Earth Rights International & Southeast Asian Information Network, *supra* note 55, at 1 and Lucien Dhooge, *A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations*, 24 N.C. J. INT'L L. & COM. REG. 1 (1998). Note, however, that while "revenues from the pipeline were supposed to bolster and support the weak Burmese economy by mid-1998", the IMF has reported that the "junta has already mortgaged its projected revenues of \$200 million a year to repay new loans and finance its 15 percent stake in the project." Profits from the project are expected to be delayed until 2002. See Human Rights Watch, *supra* note 60.

⁷³ See *Petrocan ending drilling in Myanmar*, THE GLOBE AND MAIL, Nov. 3, 1992.

⁷⁴ Indochina Goldfields, *START OF COPPER PRODUCTION AT MONYWA PROJECT CONFIRMS INDOCHINA GOLDFIELDS' FIRST MINE ON TARGET TO BECOME ONE OF THE INDUSTRY'S LOWEST COST PRODUCERS*, Press release, Nov. 2, 1998. Indochina Goldfields, *INDOCHINA GOLDFIELDS COMPLETES FINANCING TO CONSTRUCT MYANMAR COPPER MINE*, Press Release, Sept. 24, 1997.

⁷⁵ Mindoro Resources, *MINDORO INCREASES INTEREST AND IDENTIFIES NEW GOLD POTENTIAL IN MYANMAR PROJECT*, Press Release, Jan. 12, 1998.

33. Third, as with apartheid-era South Africa, the firm may provide infrastructure in the form of roads, railways, power stations, oil refineries, or the like, that increases a regime's repressive capacity. For example, in Burma, a country where telephones and faxes are closely controlled by the government, several international telecommunications companies -- including at least one Canadian firm -- have supplied, directly or indirectly, telephone equipment to the military government. Human rights groups say that this technology has been monopolised by the military regime to conduct its affairs.⁷⁶
34. Finally, the presence of the firm in the country may provide international credibility to an otherwise discredited regime. For example, multinational firms in South Africa provided moral support to the apartheid regime⁷⁷ and augmented the ranks of the pro-South Africa lobby abroad preaching tolerance for apartheid. More recently, opponents of foreign investment in Burma argue that
- [e]ach new foreign enterprise that sets up shop in Burma only serves to validate the regime's belief that it can get away with resorting to slave-like practices to build the infrastructure these companies need. And above all, it is political legitimacy that [the regime] is after. It's the reason why, every time another Western business executive signs an investment deal with the Burmese military power, he or she is feted in the state-run media with a laudatory story and pictures with top army officials, everyone smiling in the camera.⁷⁸
35. In Nigeria, "Royal Dutch/Shell provided both increased financial investment and a diplomatic public relations shield for the Nigerian government."⁷⁹ In Afghanistan, a major US oil company has concluded a pipeline agreement with the Taliban *de facto* regime and has reportedly actively lobbied the US State Department to extend formal diplomatic recognition to the Taliban, despite the group's poor record on human rights.⁸⁰
36. In each of these examples, the contribution made by the firm augments the capacity of the firm to resist the changes supposedly induced by the firm's presence.

CONCLUSION

37. Taken together, the analysis in this section suggests that if the stated human rights benefits of economic integration are to emerge, businesses operating overseas should be expected to apply international core labour rights in countries where these standards are not observed. Further, steps must be taken to mitigate the negative human rights impact of business trading or investment operations in countries with a repressive, human rights-abusing regime. In other words, as noted in a recent report on the Asia crisis by the Canadian Senate Standing Committee on Foreign Affairs, business "has an important role to play, both in human-rights promotion and in ensuring that it itself does not contribute to abuses."⁸¹
38. For its part, the Canadian Government appears willing to accept that "responsible trade" requires looking "at the specific type of economic activity involved, in terms of its social impacts."⁸² To

⁷⁶ Paul Watson, *How Burma's junta defies world*, TORONTO STAR, March 16, 1997 at A12. Interview with Christine Harmston, then-Co-ordinator, Canadian Friends of Burma, July 1997.

⁷⁷ Lou Wilking, *Should US Corporations Abandon South Africa?* in THE SOUTH AFRICAN QUAGMIRE 390 (S. Prakash Sethi, ed., Ballinger, 1987). See also JEANNE STEPHENS, MNCS AND CHANGE IN SOUTH AFRICA 38 (MA Thesis, Carleton University, Ottawa, 1983).

⁷⁸ Canadian Friends of Burma, *supra* note 56, at 12.

⁷⁹ Human Rights Watch, *World Report 1997* at 360.

⁸⁰ *Unocal looks to Afghanistan's Taliban for New Profits*, DRILLBITS & TAILINGS, Aug. 2, 1997.

⁸¹ Standing Senate Committee on Foreign Affairs, *supra* note 24, at 105.

⁸² Axworthy, *supra* note 37.

this end, the Government has focused on issues such as core labour standards and voluntary codes of business conduct. While these initiatives represent important first steps, as will be argued in Part III, there is reason to query whether these strategies alone will be effective in meeting the “pre-requisites” of constructive engagement.

PART THREE: STRATEGIES OF RESPONSIBLE ECONOMIC INTEGRATION

39. The Canadian approach to date, as described by Minister Axworthy, appears to have three prongs: first, working to define core labour standards at the ILO; second, taking a "leadership role" at the World Trade Organization (WTO) on core labour standards; and third, supporting voluntary business codes of conduct, particularly the 1997 International Code of Ethics for Canadian Business.⁸³ The development of core labour standards at the ILO is discussed above. The section that follows urges that while the Government efforts in the other two areas are laudable in principle, much remains to be done to ensure that the first pre-requisite of constructive engagement is met. Further, the Government to date has done very little to grapple with the second pre-requisite of engagement: curtailing business complicity with repressive regimes.

RESPONSIBLE TRADE AND UNIVERSALIZING LABOR REGULATION

40. Labor rights were originally considered a legitimate part of the international trading regime.⁸⁴ After the Second World War, the negotiators of the International Trade Organization (ITO) charter proposed linking trade to important labour standards.⁸⁵ While the final version of the charter diluted these and similar provisions into a mere call for members to eliminate "unfair labour conditions, particularly in production for export,"⁸⁶ the proposed ITO would likely have gone much further in legitimating consideration of labour issues in the trade context than did the General Agreement on Tariffs and Trade, the key instrument in the international trade regime following the US Congress' refusal to ratify the ITO.⁸⁷

41. Since the late 1980s, US legislators, galvanized by the sense that foreigners are competing unfairly, have been reasonably persistent in arguing that the next "round" of trade talks will be dominated by the "blue and green" agenda: labour and environment.⁸⁸ Little progress to that end was made during the Uruguay Round of trade talks themselves. In December 1996, the WTO's members, in a Ministerial Statement, once again failed to agree on some means of enforcing labour standards via trade law. The Statement indicated that WTO members "...renew our commitment to the observance of internationally recognized core labour standards." However, it concluded that the "International Labor Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them." It further opined, in keeping with the constructive engagement model, "that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question."⁸⁹

42. The WTO clearly sees the principal actor in the labour rights area as being the ILO. Yet, the ILO is hamstrung by the absence of any enforcement powers. The ILO may not compel

⁸³ *Id.*

⁸⁴ See Steve Charnovitz, *The influence of labour standards on the world trading regime*, 126 INTERNATIONAL LABOR REVIEW 5, 565 (1987).

⁸⁵ Tonya, *supra* note 1, at 641-642.

⁸⁶ Article 7, Chapter II of the Havana Charter, E/CONF.2/78 (March 24, 1948), UN Doc. ICITO/1/4 (1948)..

⁸⁷ Tonya, *supra* note 1, at 642.

⁸⁸ The US position during the Uruguay Round in 1986 was to include labour rights in the negotiating round. See Erika de Wet, *Labor Standards in the Globalised Economy: The inclusion of a social clause in the General Agreement on Tariffs and Trade/World Trade Organization*, 17 HUMAN RIGHTS QUARTERLY 443, 445 (1995).

⁸⁹ WT/MIN(96)/DEC, 18 December 1996, *Ministerial Conference*, Singapore.

conduct by its members and has no capacity to impose sanctions for labour rights violations.⁹⁰ While the ILO has, since January 1997, promoted such initiatives as "social labelling" certifying that all goods produced in its territory are the product of good working standards and has moved on developing international consensus on core labour rights, its reliance on suasion rather than sanctions remains problematic.⁹¹ As one commentator has put it, the 1996 WTO Statement coupled with the ILO's status "leaves the protectors of labour standards in a troublesome position: as the sole agreed upon authority on the issue, the ILO does not have the necessary means to achieve its goals, but instead has to rely on the commitment and action of the individual countries for progress in the labour context."⁹²

43. The Canadian position on the linkage issue is unclear. At the Singapore Ministerial then-Trade Minister Art Eggleton commented that

[t]here is a perception that somehow increasing trade flows may be harmful; that it leads to job losses, not job creation. While the ILO [International Labor Organization] is the primary forum for dealing with core labour standards, we, in the WTO, need to respond to these concerns by showing that increased adherence to a rules based system together with further trade liberalization leads to greater economic growth, which benefits us all.

44. This position seems to echo the stance ultimately adopted by the WTO.
45. Prior to the Singapore Ministerial, some concern was expressed in a Canadian Department of Foreign Affairs and International Trade policy paper that it was then

. . . premature to negotiate linkages of ILO 'core' labour Conventions and WTO trade rights and obligations...There is a real danger that the linkage of often generally stated ILO obligations for ratifying states, with the WTO's relatively more defined and concise rules could be exploited for protectionist interests . . . This points to the need for legal clarification of the scope of the ILO "core" Conventions...The clarification of "core" labour rights is a task for the ILO, not the OECD, and certainly not the WTO.⁹³

46. It remains to be seen whether the recent efforts at articulating core labour rights discussed above render these comments moot and what position Canada will take in the next Ministerial Conference, slated for December 1999, and in the expected "Millennium Round" of broad-based trade negotiations. At the time of this writing, the House of Commons Standing Committee of

⁹⁰ The OECD, *supra* note 47, at 61, has described the limited functions of the ILO on core labour rights as follows: "...the ILO has an important role as a focal organization where universal agreement on core labour standards can be reached. It can also persuade countries that it is in their own interest to promote basic labour rights and to avoid workers' exploitation, while also informing the international community on cases of non-respect of core labour standards. In poor countries, the ILO technical assistance may also contribute to the eradication of child labour exploitation." The OECD reports at 61 that while monitoring of conventions relating to forced labour and non-discrimination is viewed as problematic, "there is some evidence that most governments respond to complaints" brought regarding freedom of association. However, as the process functions on the basis of complaints, "governments from countries where union rights are best protected are likely to more often criticized than other governments less concerned with union rights."

⁹¹ It is notable that where trade measures under the US General System of Preferences (*see* note 110 below) have been used to penalise poor labour practices, trade unionists from developing countries have reported that their governments have "responded to the criticism in the GSP petition more seriously than they [have] ever reacted to a negative judgement by the ILO's Committee on Freedom of Association or Committee of Experts." *See* PHARIS HARVEY, U.S. GSP LABOR RIGHTS CONDITIONALITY: "AGGRESSIVE UNILATERALISM" OR A FORERUNNER TO A MULTILATERAL SOCIAL CLAUSE 6 (International Labor Rights Fund 1995).

⁹² Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNAT'L L. 659, 684 (1998).

⁹³ ROBERT STRANKS, LOOK BEFORE YOU LEAP: "CORE" LABOR RIGHTS, Policy Staff Commentary No. 14 (Department of Foreign Affairs and International Trade 1996).

Foreign Affairs has announced public hearings, seeking public input on, *inter alia*, trade linkage with labour and other human rights.⁹⁴

47. At the same time, even if the Government's vision of responsible trade does not extend to a formal linkage, there is room for the government to apply its vision of "core" labour rights unilaterally. The Standing Senate Committee on Foreign Affairs has noted, for example, that the government "provides extensive trade and overseas investment promotion services, including the granting of invitations on Team Canada trade missions, without first assessing the company's human rights record".⁹⁵ The Committee has recommended that "[i]n order to ensure that Canadian public funds are being spent in a manner that complements Canadian values, the provision of federal assistance to support commercial activity should be made conditional on adherence to the minimum international standard for human rights."⁹⁶ In this regard, the Standing Committee cited with approval a recommendation that

Laws should be promulgated (a) conditioning government procurement on adherence by firms to . . . core labour rights in their overseas operations; (b) conditioning financial and investment support contributions by government agencies, including the Export Development Corporation and CIDA [Canadian International Development Agency], on adherence by firms to...core labour rights in their overseas operations; and (c) requiring that adherence to these [standards] be assessed with reference to independently audited reports.⁹⁷

48. Such an approach, in the words of the Committee, would "mesh well" with the government's endorsement of voluntary codes of conduct.

RESPONSIBLE TRADE AND VOLUNTARY CODES OF CONDUCT

49. Much discussion in recent years has focused on voluntary business codes of conduct, the most detailed of which commit businesses to voluntarily adhere to key labour and human rights. Governments have been active in promoting these codes. In the United States, the Clinton

⁹⁴ See House of Commons, HOUSE OF COMMONS STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTERNATIONAL TRADE TO UNDERTAKE COMPREHENSIVE PUBLIC HEARINGS ON CANADIAN INTERESTS IN FORTHCOMING WORLD TRADE ORGANIZATION NEGOTIATIONS on the Parliamentary web-site at <<http://www.parl.gc.ca/>>.

⁹⁵ Standing Senate Committee on Foreign Affairs, *supra* note 24, at 105.

⁹⁶ *Id.* at 110.

⁹⁷ *Id.* at 107, citing CRAIG FORCESE, PUTTING COMMERCE INTO CONSCIENCE (International Centre for Human Rights and Democratic Development 1997). The *Export Development Act*, R.S.C. 1985, E-20, as amended, the statute governing the Export Development Corporation is presently up for its five year mandatory review. The *Briefing Note* and *Terms of Reference* for this review indicate that "...the Review will include specific recommendations and identify changes, if required, to the provisions of the Act and regulations or to EDC operations that will improve the competitiveness of Canadian exporters and investors within the context of the government's other public policy objectives (e.g. ... human rights)." According to the same documents, the Review Team's consultations, written analysis and recommendations are to include scrutiny of several questions, including the following topic: "Given its commercial orientation, has EDC used its mandate effectively to support the government's overall trade-related public policy objectives and priorities? (e.g. human rights.)". At the time of this writing, the Review Committee has not released its report.

On the issue of government procurement, there is some concern that conditioning procurement on human rights performance might run afoul of the Government Procurement Agreement of the WTO. Recently, the European Union has brought a trade complaint against the United States for a Massachusetts Burma selective purchasing law barring dealings with companies operating in Burma. It remains to be seen, however, whether the Massachusetts law is in fact a violation of the GPA or that human rights selective purchasing laws in general are GPA-illicit. For a recent discussion of issues surrounding the Massachusetts law, see Jennifer Loeb-Cederwall, *Restrictions on trade in Burma: Bold moves or foolish acts?* 32 NEW ENG. L. REV. 929 (1998). For a discussion of selective purchasing laws at the municipal level, see Craig Forcese, *Municipal buying power and human rights in Burma: The case for Canadian municipal selective purchasing policies*, 56 U.T. FAC. L. REV. 2, 252 (1998).

Administration has sought to defuse criticism of its failure to consider human rights concerns during its renewal of China's most favoured nation trading status by promoting, albeit softly, a model voluntary code of conduct for US businesses overseas and has played an active role in the development of the Apparel Industry Partnership, a code on overseas sweatshop labour. Similarly, in 1994, the then-governing Labor Party of Australia called for a national voluntary code for Australian businesses operating in the South Pacific.⁹⁸ More recently, the European Parliament has adopted a resolution urging European enterprises operating in developing countries to develop a European Code of Conduct that would be fairly inclusive in content and robust in terms of implementation and monitoring.⁹⁹

50. Codes of conduct are becoming increasingly commonplace. Some estimates suggest that upwards of 85% of large US companies have codes of some sort.¹⁰⁰ Somewhat fewer businesses have codes dealing with the human rights implications of their overseas operations. In a recent survey of 150 US multinational corporations in sectors deemed likely to have supplier codes, San Francisco-based Business for Social Responsibility found that 25 firms had human rights codes.¹⁰¹ Another survey by Boston-based Franklin Research and Development found that roughly 10% of US multinationals had overseas human rights guidelines.¹⁰² A more comprehensive survey on the child labour practices of US retailers and textile manufacturers by the US Department of Labor in 1996 revealed that of 42 major textile retailers and manufacturers surveyed and willing to make public their responses, 36 had adopted some form of policy specifically prohibiting the use of child labour in overseas production facilities. Two of the respondents also had country human rights guidelines that they used to determine in which countries they would invest.¹⁰³ Finally, a content analysis of a 1998 International Sourcing Report from the New York-based Council on Economic Priorities surveying prominent US corporations, suggests that 80 of the 145 responding businesses had codes of conduct containing labour rights standards.¹⁰⁴

⁹⁸ For a discussion of these initiatives, see CRAIG FORCESE, *COMMERCE WITH CONSCIENCE?* (International Centre for Human Rights and Democratic Development 1997) and FORCESE, *supra* note 97. For an update on the US measures, see Robert Liubicic, *Corporate codes of conduct and product labelling schemes: The limits and possibilities of promoting international labour rights through private initiatives*, 30 *LAW & POLY INT'L BUS.* 111, 123, 124 (1998); Jeremy Lehrer, *Trading Profits for Change*, 25-SPG *HUM. RTS.* 21 (1998).

⁹⁹ See European Parliament, *EUROPEAN BREAKTHROUGH IN COMBATTING MULTINATIONAL ABUSES*, News Release, 15 January 1999. See also European Parliament, *RESOLUTION ON EU STANDARDS FOR EUROPEAN ENTERPRISES OPERATING IN DEVELOPING COUNTRIES*. Minutes (EN) A4-0508/98 (January 15, 1999), available on the Internet at <www2.europarl.eu.int>.

¹⁰⁰ Surveys in the late 1980s suggest that, at that time, as many as 77% of large US corporations had some sort of corporate code of conduct. See Robert Sweeney & Howard Siers, *Ethics in Corporate America*, *MANAGEMENT ACCOUNTING* 34 (June 1990) (56% of US corporations have codes); *Survey Examines Corporate Ethics Policies*, *JOURNAL OF ACCOUNTANCY* 16 (Feb. 1988) (75% of large US corporations have codes). This percentage may be as high as 80-85% at present. See Ethics Resource Center, *CREATING A WORKABLE COMPANY CODE OF ETHICS*. See also, Frank Bradley, *Prepare to make a moral judgement*, *PEOPLE MANAGEMENT* (May 4, 1995).

¹⁰¹ See Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?* 199 *FORDHAM INT'L. L. J.* 1963, 1974 (1996). The Business for Social Responsibility survey apparently focused on businesses selected for their significance and the surveyor's sense that they would be likely to have codes (i.e. labour intensive textile firms, retailers). Telephone Interview with Aaron Cramer, Director, Business and Human Rights Program, Business for Social Responsibility Education Fund, August 1996.

¹⁰² The Franklin pollsters focused on major US retailers and brand name goods manufacturers. Telephone Interview with Simon Billenness, Franklin Research and Development, February 1997.

¹⁰³ US Department of Labor, *THE APPAREL INDUSTRY AND CODES OF CONDUCT: A SOLUTION TO THE INTERNATIONAL CHILD LABOR PROBLEM?* 370 (1996). The Department of Labor survey focused on the largest apparel manufacturers, department stores and mass merchandisers as measured by 1995 annual sales figures.

¹⁰⁴ Council on Economic Priorities, *INTERNATIONAL SOURCING REPORT* (March 1998).

51. The proportion of corporations in Canada that have some sort of corporate code of conduct is also high, though the data are incomplete.¹⁰⁵ However, a 1996 CLAIHR/ICHRDD survey of the 98 largest Canadian businesses operating internationally suggested that relatively few Canadian companies have codes of conduct dealing with the human rights impacts of their overseas operations. While 49% of the respondent companies reported possessing international codes of conduct, only 32% had codes containing some of the so-called core labour rights, while only 14% had codes containing all the core labour rights. Similarly, only 14% had any sort of provision touching on business relations with repressive regimes.¹⁰⁶

Effectiveness of codes of conduct

52. Given these figures, it comes as no surprise that there has been a sharp debate regarding the effectiveness of codes. The dilemma implicit in the use of corporate codes of conduct as means of promoting human rights is illustrated by the example of South Africa. In 1977, the Reverend Leon Sullivan, a member of the General Motors board of directors, proposed the Sullivan Principles dealing with the behaviour of US corporations in South Africa. The Principles outlined a code of conduct designed to allow US corporations to operate in South Africa without partaking in the systematic human rights abuses characteristic of the apartheid regime. Many observers feel that firms generally did a good job abiding by the Principles.¹⁰⁷ However, the success of the codes stemmed not so much from the altruism or social responsibility of the corporations as from the realization that the alternative to the code was full-scale economic sanctions. Corporations were also motivated by potent shareholder pressure from large public pension funds and constraints imposed by US state and municipal governments on procurement from businesses operating in South Africa.¹⁰⁸ In the absence of these "big sticks," adherence to the Principles may well have been less marked.¹⁰⁹
53. Critics contend that most modern human rights codes have been introduced by corporations, not so much in response to a management commitment to corporate social responsibility, but largely in reaction to external pressures.¹¹⁰ These pressures include developments in trade law. In this regard, since 1984, the United States has introduced a series of unilateral measures protecting worker rights overseas that might prove highly disruptive to corporate activities if

¹⁰⁵ A 1981 survey of 125 of the largest Canadian businesses ranked by revenue found that 49% of the 51 responding corporations had "corporate statements of objectives." LEN BROOKS, CANADIAN CORPORATE SOCIAL PERFORMANCE 75 (Society of Management Accountants 1986). A more extensive and recent study published in 1992 surveyed 461 firms listed in the 1988 *Financial Post* 500. Of the 225 firms that responded to the survey, 60% reported either having, or being in the process of developing, codes of conduct. Yet, only 75 of the 225 respondents were deemed to have "fairly well-developed codes of ethics" rather than simple credos, corporate mission statements or the like. Maurica Lefebvre & Jang Singh, *The Content and Focus of Canadian Corporate Codes of Ethics*, 11 JOURNAL OF BUSINESS ETHICS 799 (1992).

¹⁰⁶ The 1996 CLAIHR/ICHRDD survey is reported in FORCESE, *supra* note 98.

¹⁰⁷ See discussion in Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L. L. 663, 674 (1995) and in Liubicic, *supra* note 98, 123, 124.

¹⁰⁸ See FORCESE, *supra* note 97.

¹⁰⁹ Personal Communication with Al Cook, former Deputy Director of the International Defence and Aid Fund for South Africa, former Executive Director of the Canada-South Africa Cooperation, May 1996.

¹¹⁰ See comments in Compa & Hinchliffe-Darricarrère, *supra* note 107 and those in Lehrer, *supra* note 98, at 21 and in Debora Spar, *The spotlight and the bottom line*, FOREIGN AFFAIRS, Mar/Apr 1998 at 7. Similarly, codes of conduct introduced to govern business domestic operations reflect the emergence of external pressures. As one study examining US codes has noted, "during the period 1960 to 1994, many of the Fortune 1000 companies have voluntarily enacted corporate codes of conduct, and...this activity coincides with the growth in regulatory, prosecutorial, and judicial incentives for corporate self-regulation during this period." John Ruhnka & Heidi Boerstler, *Governmental incentives for corporate self-regulation*, 17 J. BUS. ETHICS 3 (1998).

imposed on nations in which businesses have invested or from which they are sourcing.¹¹¹ Other developments in this area include the labour rights regime under the NAFTA side agreement and the prospect of linkages between trade and labour rights at the WTO.¹¹²

54. Also included among external pressures is litigation in US courts stemming from violations of human rights abroad.¹¹³ Pressure for corporate social responsibility from consumers, whether private or institutional, has also become more marked, particularly in the retail sector,¹¹⁴ as have demands from shareholders and investors.¹¹⁵

¹¹¹ In 1984, Congress added labour conditions on the extension and renewal of General System of Preferences tariff benefit to potentially eligible nations. An infringement of "internationally recognized worker rights" would remove a nation from eligibility under the system. 19 U.S.C. § 2702(b)(7). US practice in recent years has been to rely to a growing extent on the standards set out in international labour conventions to measure compliance with the GSP conditions. The evidence suggests that this system has had a beneficial impact on the labour policies of US trading partners. In 1995, the European Union (EU) followed the US lead in establishing labour conditionalities for its own GSP program. Developing nations with good labour records are granted even lower tariffs than under the straight GSP. The U.S. has also tied labour standards to its unfair trade remedy under Super 301 of the Trade Act. Section 301 envisages retaliation for trade practices deemed "unreasonable" or "inequitable." Unreasonable behaviour includes conduct that harms workers rights as defined by the GSP conditions. See FORCESE, *supra* note 97. For the relationship between these measures and codes, see Compa & Hinchliffe-Darricarrère, *supra* note 107, at 675.

¹¹² *Id.* at 674.

¹¹³ Greater observance of international human rights standards by US corporations has been fuelled, in part, by "innovative litigation by foreign employees claiming worker rights violations." Compa & Hinchliffe-Darricarrère *supra* note 107, at 674. For a discussion of a recent lawsuit on human rights grounds, see Dhooze, *supra* note 72.

¹¹⁴ For a more detailed discussion of these campaigns, see FORCESE, *supra* note 97. Recent studies suggest that "public attention to such issues as the use of prison labour in products exported to the United States is making human rights a 'bottom line' concern for multinational companies." Orentlicher & Gelatt, *supra* note 20, at 96. Some recent US surveys suggest that a sizeable majority of Americans prefer to buy from a retailer they know is not sourcing products or materials from sweatshops. See John McClain, *Government Fingers Retailers that Sell Sweatshop-Made Clothing*, ASSOCIATED PRESS, Dec. 5, 1995: "69 percent of Americans are more likely to shop at stores on the list [of non-sweatshop using business prepared by the US Department of Labor]." Under the Department's "No Sweat" program, a list of "Trend-setters" in the US textile industry is released for companies who agree to ensure that their suppliers are not using sweatshop labour. For more on US consumer attitudes, see also Vivian Marino, *Garment Workers Get Attention*, ASSOCIATED PRESS, June 18, 1996: "A recent poll by Marymount University in Arlington, Va., said 84 percent of 1,008 individuals questioned would pay a dollar more for a garment that cost \$20, if it were guaranteed to be made at a legitimate factory. Seventy-eight percent would avoid shopping at stores that sell garments made in sweatshops." For a discussion of how this motivates code development, see Liubicic, *supra* note 98, at 114, 115: "A corporation's decision to self-regulate through a code of conduct or labelling scheme is a 'combination of altruism and enlightened self-interest,' though the latter factor appears to predominate. U.S. MNCs make themselves subject to these measures when it appears that doing-or not doing-so will be relevant to a significant number of consumers when they decide whether or not to purchase one or more of an MNC's products. Relevance to consumers arises as a result of pressure for improved overseas workplace standards from government, media, unions, human rights organizations, financial institutions, and other consumers. Corporations are often responsive to such pressure because they fear negative publicity that will lead to a loss of market share and, ultimately, profits." The economic rationale for codes is reflected in the recent receptivity of US retail companies to the Apparel Industry Partnership: "Apparel companies had expected that Asian markets would be the source of new revenue and growth as demand flattened in the United States. But the Asian economic crisis -- particularly due to mismanagement by corrupt and abusive governments -- stifled the new demand. Reliant on image, faced with shrinking revenues and public scrutiny of their treatment of workers, companies could ill-afford to drive consumers away because of their poor human rights records." Human Rights Watch, *supra* note 60.

¹¹⁵ See FORCESE, *supra* note 97. The impact of shareholder activism on business human rights behaviour has been enormous. In the case of South Africa, shareholder proposals were employed to promote use of the Sullivan Principles as well as to call on corporations to cease operations in South Africa. See Valerie Ann Zondorak, *A New Face in Corporate Environmental Responsibility: The Valdez Principles* 18 B.C. ENVNTL. AFF. L. REV., 457, note 109 (1991). More recently, a number of resolutions have been filed with companies operating in Burma asking these firms to review and develop guidelines that would stop them from doing business in countries where there are systematic violations of human rights. The world's largest pension fund — the Teachers Insurance and Annuity Association and College Retirement Equities Fund — as well as Harvard University and Williams College have all

55. These observations regarding the importance of external pressures in inducing appropriate corporate behaviour are echoed in a March 1998 Industry Canada report. Discussing conditions conducive to successful code development, the report notes that

[w]hile codes are voluntary -- firms are not legislatively required to develop or adhere to them -- the term 'voluntary' is something of a misnomer. Voluntary codes are usually a response to the real or perceived threat of a new law, regulation or trade sanctions, competitive pressures or opportunities, or consumer and other market or public pressures...[O]nce the code is in place, the initial pressure that led to its creation may dissipate, which could cause compliance among adherents to taper off.¹¹⁶

56. The study urges that "voluntary codes that are well designed and properly implemented can help achieve public-interest goals...However, a code that is poorly designed, improperly implemented, or used in inappropriate circumstances, can actually harm both its proponents and the public."¹¹⁷ As noted by other observers, a code of conduct "is not a corporate compliance program -- it is only part of it, and maybe not even the more important part of a corporate compliance program."¹¹⁸ As a consequence, "the existence of a formal written corporate code of conduct is evidence that a company has begun a process of instituting a self-regulation program, but it is not conclusive evidence that the process has been completed or that it is effective."¹¹⁹

57. Clearly, monitoring of a code is required to ensure compliance. In 1996, in its study of corporate codes dealing with child labour, the US Department of Labor noted that "a credible system of monitoring -- to verify that a code is indeed being followed in practice -- is essential."¹²⁰ However, relatively few corporations have codes that provide for reliable monitoring, let alone the independent audits widely viewed by human rights groups as a key aspect of long-term code effectiveness.¹²¹ As the Department of Labor put it, "most of the codes of the respondents do not contain detailed provisions for monitoring and implementation, and many of these companies do not have a reliable monitoring system in place."¹²² Overseas investigation by the Department revealed that "[w]hile monitoring for product quality, and even for health and safety conditions, is customary in the garment industry, the field visits by Department of Labor officials suggest that monitoring for compliance with provisions of the codes of conduct of U.S. garment importers dealing with other labour standards — and child labour in particular — is not."¹²³ Where there is monitoring "there seems to be relatively little interaction between, on the one hand, monitors, and on the other hand, workers and the local community. It also appears that

backed these or similar proposals during the 1990s. Bloomberg, *Shareholders Ask Companies to Stop Doing Business in Burma*, Dec. 14, 1995. Resolutions have also been filed with US oil companies operating in Nigeria. These proposals often have called upon these firms to "thoroughly describe the nature and extent of [their] relationships with the Nigerian government, as well as actions taken by [them] to press the Nigerian government to cease repression of labour, environmental and human rights activists." Others are similar to the Burma resolutions in asking that firms lay down guidelines on divestment in instances where there is a pattern of ongoing and systematic violation of human rights, a government is illegitimate, and there is a call by human rights advocates, pro-democracy organizations or legitimately elected representatives for economic sanctions against their country. Rose Umoren, *Pension Funds, Citizens Mount Pressure on Oil Firms*, INTERPRESS SERVICES Dec. 21, 1995.

¹¹⁶ Government of Canada, VOLUNTARY CODES: A GUIDE FOR THEIR DEVELOPMENT AND USE 8-9 (March 1998).

¹¹⁷ *Id.* in preface.

¹¹⁸ Ruhnka & Boerstler, *supra* note 110.

¹¹⁹ *Id.*

¹²⁰ US Department of Labor, *supra* note 103, at 9.

¹²¹ For a discussion of independent monitoring, see FORCESE, *supra* note 97. See also discussion by Liubicic, *supra* note 98, at 136. How to fund independent monitoring and keep this monitoring independent is a key concern at present. See discussion in Terry Collingsworth & Bama Athreya, DEVELOPING EFFECTIVE MECHANISMS FOR IMPLEMENTING LABOR RIGHTS IN THE GLOBAL ECONOMY (International Labor Rights Fund 1998). <www.laborrights.org> as of February 1999.

¹²² US Department of Labor, *supra* note 103, at v, 9.

¹²³ *Id.* at 101.

monitors have a technical background in production and quality control and are relatively untrained with regard to implementation of labour standards."¹²⁴

58. More recently, the 1998 Council on Economic Priorities report suggests that only 1/3 of the companies with sourcing codes included language in their codes concerning monitoring. If past patterns are any indication, even fewer of these companies rely on independent monitoring. In Canada, meanwhile, only 14% of the respondent firms in the 1996 CLAIHR/ICHRDD survey reported use of independent monitors.

“Responsible trade” and the 1997 International Code of Ethics

59. As noted above, the Canadian Government endorsed a very general international code of ethics in 1997.¹²⁵ The code takes the form of a statement vision, beliefs, values and principles, but contained no specific guidelines on application. On the positive side, the code pledges companies to support and promote the protection of international human rights within businesses' sphere of influence and not to be complicit in human rights abuses. The companies also vow to promote freedom of association and expression in the workplace and ensure consistency of firm practices with universally accepted labour standards, such as child labour. On the negative side, the code does not articulate exactly which human rights standards, other than freedom of association and exploitation of child labour, will be met, nor precisely what each firm will do to guarantee these rights.¹²⁶ More critically, the code includes no real provisions relating to implementation, let alone independent monitoring.¹²⁷ Further, after a year and a half, the code only has 14 signatories. After reviewing this code, the Standing Senate Committee on Foreign Affairs recommended that "the federal government work together with business organizations to establish a Canadian business ethics code, the coverage of which would be considerably greater than the one currently in place."¹²⁸

Conclusion

60. While voluntary codes of conduct represent one popular approach to overseas human rights concerns, a poorly drafted and implemented code of conduct is, at best, useless and, at worst, counterproductive insofar as it gives the appearance of action where none has been taken. Notably, in part because of the pressure/response mode of code development and because of expense and technical difficulty in developing the independent monitoring necessary to render these codes credible, "claims about the transformative potential of private initiatives may be overstated."¹²⁹ If, as the research cited above suggests, codes are successful to the extent that the external pressures are strong, then the development and effective implementation of codes will continue to be dependent on the glare of publicity and will disproportionately affect companies with a image and reputation to protect, particularly those in the consumer goods sector. Maintaining and broadening the spotlight on the multitude of companies, and ensuring adherence to codes, will tax the limited resources of human rights and labour groups, effectively rendering many companies immune from scrutiny.

¹²⁴ *Id.* at 107.

¹²⁵ Available on the Internet at <www.uottawa.ca/hrrec/busetics/codeint.html> as of February 1999.

¹²⁶ Notably, Canadian Occidental Petroleum, one of the 14 companies that has signed the code, has broadened the list of labour standards it will observe to also include those relating to forced labour and non-discrimination in employment. See Canadian Occidental's Internet site at <www.cdnoxy.com/coe/cdethic.html>.

¹²⁷ The code merely indicates that "[t]he signatories of this document are committed to implementation with their individual firms through the development of operational codes and practices that are consistent with the vision, beliefs, values and principles contained herein."

¹²⁸ Standing Senate Committee on Foreign Affairs, *supra* note 24, at 108.

¹²⁹ Liubicic, *supra* note 98, at 149.

61. Further, given the present preoccupation with corporate codes of conduct, some concern can be expressed that a focus on such voluntary measures will take pressure off governments to work towards more systematic means of encouraging respect for international human rights, such as linkages between trade and human rights. Relying on the existence of codes to justify a failure to take more binding action would be problematic for two reasons. First, any view on the part of policy makers that codes represent a replacement for mandatory measures ignores that fact that codes are in fact developed as a response to external pressures. Second, as was noted recently by a European Parliament Rapporteur on codes of conduct, "[v]oluntary regulation can do a great deal to promote better practice, but the worst offences will only ever be prevented through national and international laws and binding rules. Such systems can operate in parallel: binding rules to ensure minimum standards and voluntary initiatives to promote higher standards."¹³⁰ Thus, at best voluntary codes represent a partial solution.
62. In this context, any endorsement by the Canadian Government of voluntary codes must, first, be of well-drafted codes containing a series of pre-requisite guarantees. The most reasonable standards required of the code would be core labour rights. Second, given past experience with poorly implemented codes, only codes that contain some measure of independent and credible monitoring are worthy of endorsement. Third, any code endorsement undertaken by the Government should be complemented with measures creating what Industry Canada calls "conditions conducive to successful code development"; namely, "pressures for code development". Taking the steps recommended by the Standing Senate Committee in the section above would undoubtedly constitute important pressures for code development,¹³¹ as would liberalising the restrictions on ethical shareholder activism extant in the present federal corporate law.¹³² Finally, given the shortcomings of voluntary measures as an overarching regulatory tool, the present Government fondness for codes should in no way detract from a more aggressive Canadian policy favouring a multilateral linkage between trade and labour.

RESPONSIBLE TRADE AND REPRESSIVE REGIMES: THE MISSING AGENDA

63. As with labour rights violations, many of the examples of business complicity with repressive regimes outlined in the context of the second pre-requisite to constructive engagement might be addressed, at least in part, by the adoption of detailed and effectively-implemented codes and guidelines by companies. As with the Sullivan Principles, these codes would outline how firms will relate to regimes who engage in human rights abuses. A number of US firms have adopted such measures on either a formal or ad hoc basis.¹³³ Further, as noted above, the 1997 code of ethics endorsed by the Canadian Government does indicate that companies will "not be complicit in human rights abuses". Yet, the missing agenda in Canada relates to how the Government will respond where Canadian companies do not act responsibly and are insulating an acknowledged and seemingly incorrigible pariah regime from the anticipated liberalising effects of constructive engagement. The situation in Burma provides a case in point.

¹³⁰ HOWITT, *supra* note 38

¹³¹ See note 96 and accompanying text.

¹³² For an illustration of restrictions on shareholder activism under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, see *Re Varsity Corp. v. Jesuit Fathers of Upper Canada* (1987), 59 O.R. (2d) 459 (Ont. H.C.) *aff'd* (1987) 60 O.R. (2d) 640 (Ont. C.A.). For discussion, see FORCESE, *supra* note 97 and CRAIG FORCESE, OWNING UP: THE CASE FOR MAKING CORPORATE MANAGERS MORE RESPONSIVE TO SHAREHOLDER VALUES (Democracy Watch 1997).

¹³³ See FORCESE, *supra* note 98, for a discussion of the Levi's Country Guidelines. Levi Strauss, Macy's Liz Claiborne, Eddie Bauer, Texaco and Amoco have all pulled out of Burma following "mounting criticism of their presence" in that country. Eddie Bauer explained their action as follows: "After months of researching the situation, we deemed that the political climate and growing opposition to trade in Burma posed a potential threat to our future manufacturing opportunities." Reported in Spar, *supra* note 110.

64. In July 1997, Burma, one of the most egregious human rights abusers in the world, was asked to join the Association of Southeast Asian Nations (ASEAN). ASEAN nations have argued that political liberalization in Burma is best promoted by engagement. Yet, while trade and investment between Burma and Singapore and Malaysia soared in 1996, the US State Department reported that "[t]he [Burmese] Government's severe repression of human rights increased during 1996, even as increased economic activity fostered the appearance of greater normalcy."¹³⁴
65. In 1997, many Western nations concluded that engagement with Burma was ineffectual. The United States imposed unilateral economic sanctions against Burma,¹³⁵ while Europe¹³⁶ and Canada imposed limited trade sanctions.¹³⁷ In justifying its action, the Canadian Government noted that

Canada's promotion of international human rights is founded on our long-standing principle of effective influence. . . Dialogue and engagement generally offer the best vehicle to effect change. . . Dialogue is, however, impossible without a willing partner. Burma's ruling State Law and Order Restoration Council (SLORC) has consistently rebuffed efforts by Canada and other countries to engage in dialogue.¹³⁸

66. Minister Axworthy noted that "[t]he actions we have taken...are intended to convey the seriousness of our concerns over the suppression of political freedoms and our frustration with Burma's failure to curb the production and trafficking of illegal drugs."¹³⁹ However, unlike the US measures, the Canadian sanctions do not apply to investment in Burma, and the Government has expressed strong reluctance to introduce more expansive sanctions, despite calls for such action from Burmese democratic leaders¹⁴⁰ and the recent announcement of several joint ventures between Canadian firms and the repressive Burmese regime.¹⁴¹

¹³⁴ US Department of State, BURMA HUMAN RIGHTS PRACTICES, 1996 (March 1997). See also Zunetta Liddell, Human Rights Watch-Asia, in J. MacDonald, *Singapore Eyeing Burma Profits* ASSOCIATED PRESS, May 24, 1996: "[t]here is absolutely no evidence so far that increasing investments [in Burma] has improved the situation in terms of forced labour and other human rights violations."

¹³⁵ See Executive Order 13,047, Fed. Reg. 28,301 (1997): "The order prohibits United States persons from engaging in any of the following activities after its issuance: -entering a contract that includes the economic development of resources located in Burma; -entering a contract providing for the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources located in Burma; -purchasing a share of ownership, including an equity interest, in the economic development of resources located in Burma; -entering into a contract providing for the participation in royalties, earnings, or profits in the economic development of resources located in Burma, without regard to the form of the participation; -facilitating transactions of foreign persons that would violate any of the foregoing prohibitions if engaged in by a United States person; and -evading or avoiding, or attempting to violate, any of the prohibitions in the order."

¹³⁶ The European Commission decided in March 1997 to suspend trading benefits to Burma under the Generalised System of Preferences (GSP) program. See Human Rights Watch, *World Report 1999*.

¹³⁷ The Canadian government had withdrawn Burma's General Preferential Tariff eligibility under the *Custom Tariff*, R.S.C. c.41 (3rd Supp.), as amended, (see *General Preferential Tariff Withdrawal Order—Burma (Myanmar)*, SOR/97-398) and placed the country under the Area Control List under the *Export and Import Permits Act*, S.C. 1991, c.28, as amended (see *Order Amending the Area Control List*, SOR/97-397).

¹³⁸ DFAIT Press Release, CANADA ANNOUNCES FURTHER ACTIONS ON BURMA, August 7, 1997 No. 130.

¹³⁹ *Id.*

¹⁴⁰ In January 1997 Aung San Suu Kyi, Burma's leader for democracy and winner of the 1991 Nobel Peace Prize, asked students at American University to "please use your liberty to promote ours" and to "take a principled stand against companies which are doing business with the military regime of Burma," a nation she characterized as "the shadowlands of lost rights." G. Kramer, *Suu Kyi Urges U.S. Boycott*, ASSOCIATED PRESS, 27 January, 1997. In April 1998, Dr. Sein Win, Prime Minister of the National Coalition of the Government of the Union of Burma, the deposed democratically elected government of the country, asked the House of Commons Standing Committee on Foreign Affairs to "increase the sanctions the Canadian government now has". Christine Harmston, then-Co-ordinator of Canadian Friends of Burma urged, during the same proceedings, that "Canada, while supporting the democracy movement, cannot also be allowing our Canadian companies to go in and

67. The recognition by the Canadian government, on the one hand, that diplomatic and trade engagement is not a workable policy vis à vis Burma, and, on the other, its failure to curtail the presence of Canadian companies in that country, must be regarded as a clear human rights policy failure. Burma is a country in which it is virtually impossible to do business without supporting the regime at some level. As former US ambassador to Burma, Burton Levin, puts it: "[f]oreign investment in most countries acts as a catalyst to promote change, but the Burmese regime is so single-minded that whatever [income] they might obtain from foreign sources they pour straight into the army while the rest of the country is collapsing."¹⁴²
68. At least on the nominal level, part of the Government's failure to act on investment in Burma relates to the legislative tools available to the Government. For some time, some policy makers have apparently been of the view that unilateral investment sanctions are impermissible under Canadian law.¹⁴³ However, the legislation in question, the *Special Economic Measures Act*, is clear that Cabinet may choose to impose sanctions where it is of the opinion that a grave breach of international peace and security has occurred that has resulted, or is likely to result, in a serious international crisis.¹⁴⁴ Clearly, this is a discretionary power, albeit one that is fettered. In the author's experience, the debate at present, in policy circles, focuses on what is meant by "breach" of international peace and security. The Department of Foreign Affairs apparently takes the view that "breach of international peace and security" must accord with the, admittedly, ill-defined international construction of this language. Thus, in its opinion, a breach would require a trans-border conflict and Cabinet would be acting improperly to impose sanctions in the absence of such a conflict.
69. The Department's position is very conservative and is largely inconsistent with the more flexible view of the Act contained in the law's legislative history.¹⁴⁵ Critically, it has the effect of making it near impossible for the Government to impose investment sanctions in most of the countries where Canadian business involvement with repressive regimes must be a cause of concern, including Burma, and increasingly, Sudan. The absence of a credible Canadian sanctions law undermines the leverage the Canadian Government might have over business. As was the case with US companies in South Africa, the possibility of sanctions should be viewed as a means of

collaborate with the State Law and Order Restoration Council of the current military regime in giving it hard currency and helping to fill the coffers of this regime. This must stop immediately. In that way we are talking about further sanctions; stopping Canadian investment, so therefore investment sanctions; and looking at various ways in which we can cut off all Canadian people's money from going to support this regime." See Standing Committee on Foreign Affairs and International Trade, EVIDENCE, Tuesday, April 28, 1998 <www.parl.gc.ca/InfoComDoc/36/1/FAIT/Meetings/Minutes/faitmn47-e.htm>.

¹⁴¹ See note 74, 75, above. The EU faces a similar predicament. As noted by Human Rights Watch, *supra* note 60, "[d]espite condemnatory statements by E.U. bodies over the political and human rights situation in Burma, European companies went ahead with investments. The gas pipeline constructed across southern Burma to Thailand by the French oil giant Total, in partnership with the U.S. corporation Unocal, was completed in mid-year, while the British oil company Premier began construction of a new pipeline in the same area, despite E.U. recommendations against trade in Burma."

¹⁴² Quoted in Canadian Friends of Burma, *supra* note 55. Recent estimates suggest that roughly one-sixth of earnings from clothing exports is used to purchase armaments for the military government. *Id.* at 8.

¹⁴³ See the comments by Member of Parliament Bill Graham, chair of the House of Commons Standing Committee on Foreign Affairs in *supra* note 140: "...the only legal mechanism for [imposing sanctions] in Canada would be under the legislation, which permits us to apply United Nations-organized sanctions. I don't think there's anything we can do on a unilateral basis..."

¹⁴⁴ S.C. 1992, c. 17, s.4.

¹⁴⁵ For example, on second reading of the Act, then Minister of External Affairs Barbara McDougall indicated that "the purpose of the Bill C-53 is to enable Canada to impose a broad range of economic sanctions against a state or part of a state whose actions pose a serious threat to international peace and security or fail to conform to commonly accepted standards of behaviour...Bill C-53 does not dictate the policy considerations that would determine whether or not to apply sanctions in any particular situation, nor does it dictate the types of measures to be used when the government decides to apply sanctions." Parliament of Canada, COMMONS DEBATES at 7403, 7405 (Feb. 20, 1992).

prompting companies to act responsibly in their investment decisions. The prospect of facing investment sanctions should that complicity be with a serious, human rights-violating regime might act as a real incentive to avoid complicity. As a consequence, reform of the *Special Economic Measures Act* to clarify its scope is urgently required if the Government is to respond to the second pre-requisite of constructive engagement.

70. It should be noted that the threat of sanctions is not the only incentive mechanism available to the Government to reduce the prospect of Canadian business complicity with pariah regimes. As discussed in the context of labour rights, other tools conditioning extension of certain government benefits on human rights performance are possible. In the particular case of pariah regimes, there is also a tax policy aspect. Canadian tax law allows Canadian companies to deduct a portion of their foreign business income tax from their Canadian taxes, even in the absence of a formal tax treaty between Canada and the foreign jurisdiction.¹⁴⁶ Even where Canada has annulled double taxation treaties on human rights grounds in the past, this unilateral tax relief has remained. Thus, when Canada annulled the Canada-South Africa Double Taxation Agreement in 1985, critics argued that this move was largely symbolic as companies were able to continue deducting taxes paid in South Africa and Namibia under the foreign tax credit provisions of the *Income Tax Act*.¹⁴⁷
71. In 1998, the Senate Standing Committee on Foreign Affairs cited with approval a recommendation that the "government should publicly establish thresholds of systematic human rights abuses beyond which the government...[*inter alia*,] will not provide tax credits for taxes paid to the regime...".¹⁴⁸ This approach is a reasonable and logical way of reducing the incentive Canadian businesses might have to operate in countries where their operations contribute to human rights problems.¹⁴⁹

¹⁴⁶ *Income Tax Act*, R.S.C. 1985, 5th Supp., s-s.126(2). See discussion in VERN KRISHNA, THE FUNDAMENTALS OF CANADIAN INCOME TAX, 5th Ed. 1166 (Carswell, 1995).

¹⁴⁷ See PRATT, *supra* note 3, at 189.

¹⁴⁸ Standing Senate Committee on Foreign Affairs, *supra* note 24, at 106.

¹⁴⁹ The impact of eliminating this measure may be reduced by the fact that the foreign taxes for which credits are available do not include resource royalties. See Revenue Canada Interpretation Bulletin IT-270, *Foreign Tax Credit*. In a state with a poor administrative structure, resource royalties and licensing arrangements may be more important source of revenue for the state than income tax.

CONCLUSION

72. At present, the world community faces what Sir Leon Brittain calls "moral implications of globalization".¹⁵⁰ If governments do not address these issues, globalization risks fuelling an anti-liberalization backlash¹⁵¹ and social anomie, leading some commentators to wonder if the world "may be moving inexorably toward one of those tragic moments that will lead historians to ask, why was nothing done in time."¹⁵² As the OECD notes, "[m]uch of the disquiet of policy-makers and broad segments of the population about liberalisation owes to the fact that adjustment to a liberalised environment is...borne before the wider and larger tangible benefits can begin to be felt."¹⁵³ As a consequence, governments must "implement a set of policies whose central aim must be to shorten the time it takes for societies to adjust to changed economic circumstances."¹⁵⁴ In the context of international human rights, an assumption that economic development abroad will automatically induce improvements in human rights is not supported by the empirical record. Concrete policies on human rights are required.
73. The Canadian Government, at present, seems to favour strongly a policy of constructive engagement, but one nuanced by a three-pronged approach to "responsible trade". As this paper has argued, this three-pronged approach leaves much to be desired. The present emphasis on voluntary business codes of conduct is particularly problematic. First, the code that has been endorsed by the Government is inadequate in both its scope and in terms of its provisions relating to implementation. Second, the Government has done little to maximize corporate incentives to introduce, and abide by, codes of conduct. Third, there is some concern that the Government will come to view voluntary codes as a replacement rather than supplement for more binding measures, such as a more robust linkage between the international trade and labour regimes. In this last regard, its attitude towards the linkage issue has been, at best, lukewarm. If Canada has been playing a leadership role at the WTO, as promised by Minister Axworthy, then it has led, to date, to the maintenance of the status quo. Finally, the Government has failed to deal adequately with circumstances where Canadian companies are lending support to repressive regimes.
74. Unfortunately, while the long term economic consequences of debased human rights standards may not be economically advantageous to companies themselves,¹⁵⁵ so long as companies are

¹⁵⁰ SIR LEON BRITTAN, GLOBALIZATION: RESPONDING TO NEW POLITICAL AND MORAL CHALLENGES, World Economic Forum, Davos, Jan. 30, 1997 cited in Leicht, *supra* note 30.

¹⁵¹ See Eleanor Fox, *Globalization and its challenges for law and society*, 29 LOY. U. CHICAGO L. J. 891 (1998). The phenomenon of "free-trade" backlash is most apparent in the United States. Ross Perot's surprisingly successful 1992 US presidential bid was animated by a strong anti-North American Free Trade Agreement (NAFTA) message and the public fear of the "great sucking sound" of US jobs moving to under-regulated Mexico. Bill Clinton managed to dispel much of this public antipathy towards NAFTA, but only after promising that the agreement would include labour and environmental side accords. More recently, Pat Buchanan, the controversial candidate for the 1996 US Republican presidential nomination, owed much of his early success in the Republican primaries to his anti-free trade stance and his railings against "corporate greed and companies that exploit cheaper overseas labour and that lay off workers to increase their bottom line." *N.H. Transformed Buchanan*, ASSOCIATED PRESS, Feb. 20, 1996. The Buchanan message invoked concern with poor overseas labour standards of US firms to justify more protectionist policies. While Buchanan did not win the nomination and other candidates endorsed free trade, his message of economic malaise did sway key Republican party players. The 1996 Republican Platform pledged that a Republican administration would "vigorously implement the North American Free Trade Agreement, while carefully monitoring its progress, to guarantee that its promised benefits and protections are realized by all American workers and consumers."

¹⁵² Ethan Kapstein, *Workers & the world economy*, 75 FOREIGN AFF. 3, 16, 18 (1996).

¹⁵³ OECD, *supra* note 12, at 62.

¹⁵⁴ *Id.*

¹⁵⁵ First, practices on the part of business that validate poor human rights standards in the developing world, while simultaneously placing "downward harmonisation" pressures on standards in developed nations, may have the long-term effect of stripping away buying power in the North while at the same time forestalling its growth in the

driven by what one observer has called "short-term interests and rent-seeking,"¹⁵⁶ poor human rights practices will persist. Multinationals have been able to justify poor practices "by appealing to the unstoppable force of global competition." As in the Belgium of 1850, "[i]f they held to higher standards, they claim, their rivals would instantly overwhelm them."¹⁵⁷ Meanwhile, as in the South Africa of the 1970s and 1980s, other firms have justified inaction on state human rights, sometimes committed in response to the firm's presence, by arguing that "it would be wrong to affront" the sovereignty of the countries in which they have invested.¹⁵⁸ Given these views, limited progress will be made until recalcitrant companies see a business incentive in acting responsibly. As one observer has put it, companies will "see the light" when they "feel the heat."¹⁵⁹

75. If the Canadian Government wishes to follow the OCED's admonishment that countries forestall objections to liberalization by adopting policies "to shorten the time it takes for societies to adjust to changed economic circumstances", then it should take the steps outlined in this paper. These measures would help ensure that when Canadian businesses go abroad, they are part of the solution, not part of the problem. Otherwise, the much touted promise of economic integration may be delayed, if not stalled, and the policy of constructive engagement risks becoming, to use the words on one critic, "two weasel words used in succession".¹⁶⁰

South. Thus, to the extent that businesses continue to depend on consumer demand in emerging and developed markets for the bulk of their profits, poor human rights practices abroad may be bad for business in the long-term. The OECD contests whether this downward harmonisation phenomena is significant. It urges that the "so-called 'pauper labour' argument is fundamentally flawed because it assumes that international competitiveness depends only on relative wages. In actual fact, firms pay attention not so much to the wage rates they pay their workers, but to labour costs per unit of output, or wages adjusted for productivity." See OECD, *supra* note 12, at 59, 73-77 available on the Internet at <www.oecd.org/ech/events/clouds.htm> as of February 1999. However, in an earlier 1996 study, the OECD noted that in this cost/productivity calculus, there may be "greater importance attached to cost considerations for labour intensive, low-skill production activities." OECD, *supra* note 47, at 47. Anecdotal evidence suggests that firms in this sector do respond to differences in working conditions. In February 1999, Levi Strauss announced the closure of 11 North American plants. The closures were designed to give the company flexibility to manufacture in contract facilities overseas where wages and costs are lower. A company spokesman noted that the company had "tries for as long as possible to maintain a large...manufacturing base in North America, but it's becoming less and less feasible given the high costs and competitive pressures." Levi's is one of the few major garment companies in North America that retains a manufacturing base in Canada or the United States. See Michael MacDonald, *Levi Strauss cuts 600 jobs in Canada, 11 plants closed in North America*, CANADIAN PRESS, Feb. 22, 1999. Second, as noted above, competition via erosion of standards (perceived or real) may also have political repercussions disadvantageous to business. The perception that offensive overseas human rights practices are being used to hone national competitiveness in emerging markets may well increase pressure in Northern nations for highly protectionist measures and erode political commitment to economic liberalization.

¹⁵⁶ Leicht, *supra* note 30.

¹⁵⁷ Spar, *supra* note 110.

¹⁵⁸ See discussion concerning Shell in Nigeria in Banfield, *supra* note 59.

¹⁵⁹ Paraphrased from Lehrer, *supra* note 98, at 21.

¹⁶⁰ Roy Culpepper, president of the North-South Institute, cited in Bruce Cheadle, *Busy year in foreign policy ends to mixed reviews*, CANADIAN PRESS, Dec. 16, 1997.