On limiting global injustice in the face of weak international institutions

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The questions that concern me here arise from the interaction between the weak enforcement regimes characteristic of the international system and the logic that drives the race to the bottom. This interaction is often said to limit the possibility of promoting global justice, or even the possibility of ameliorating the most extreme global injustices. Without meaningful global enforcement, the argument goes, it is pointless to try to improve the conditions of the worst-off because those who must internalize the costs will go elsewhere.

Both of the interacting terms in setting up this puzzle depend on stylized facts that are instantiated in the actual world in varying degrees. The global environment is far from devoid of enforcement mechanisms. Indeed, in a world increasingly marked by “failed states” and civil wars, regional and other transnational enforcement mechanisms might often be stronger than those within many countries—belying the picture of a world of mutually isolated Weberian bubbles floating in an anarchic sea. And this is even before norms get into the picture. As for the race to the bottom, economists famously see it everywhere they look, while political scientists often find that it fails to materialize as anticipated.

So we should not assume right off the bat that this is always and everywhere a problem, or, where it is a problem, that it will take precisely the form that the stylized facts might lead us to anticipate.

Nonetheless, much writing about global justice advocates substantial redistribution of resources from wealthy to the poor while saying little or nothing about how this might be accomplished.1 Absent a world government with efficacious redistributive institutions, the options seem to be unilateral actions by some governments or perhaps groups of governments. But then the interaction noted at the outset potentially comes into play. This seems to suggest that practical people should put off worrying about global injustice until there are substantially better global enforcement mechanisms.

Or does it? If we tackle specific injustices, as distinct from broaching the subject worldwide redistribution to achieve a just international order, instructive possibilities arise.

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One type of unilateral mechanism that is available to comparatively powerful players in the international system involves setting conditions for trade and other benefits. In the United States, for instance, Congress’s 1984 renewal of the Trade Act’s provision authorizing the President to grant tariff relief to developing countries excluded any country that “has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country (including any designated zone in the country.” These include the rights of association, organizing and free collective bargaining, prohibitions on “any form of forced or compulsory labor,” minimum age employment requirements, and “acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and help.”

This was a unilateral US action, but it had an international dimension because the State Department’s interpretation of the triggering criteria was based on International Labor Organization conventions. Between 1985 and 1992 thirty three countries were reviewed under this provision. Nicaragua, Romania and the Sudan, were removed from the program and Chile, Paraguay, the Central African Republic, Burma and Liberia were suspended. Similar Presidential oversight is required by the 1983 Caribbean Basin Economic Recovery Act and the 1985 Congressional reauthorization of the Overseas Private Investment Corporation which insures investors in less developed countries. Legislation of this kind can nudge countries in the direction of embracing global minimum labor standards that reflect basic human interests. It might also be wise, for domestic political reasons, to urge earmarking tariffs derived from the enforcement of these laws to compensate workers who are harmed by social dumping.

Such legislation is only as good as the capacity and willingness of the world’s most powerful governments to enforce it. The first Clinton Administration’s rapid about-face on campaign promises to stand up to China on this front revealed the considerable political leverage of forces that resist them. The Clinton Administration did marginally better with labor side-agreements to NAFTA, signed in September 1993. They provide for trade sanctions of up to $20 million (or suspension of equivalent NAFTA trade benefits) for countries that persistently fail to enforce occupational safety and health, child labor or minimum wage requirements. As Barenberg notes, however, the agreement is limited by the fact that requires enforcement only the country’s own requirements in

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2 The International Labor Organization was set up in 1919 to begin creating a multilateral regime protecting basic labor rights. For a thoughtful discussion of attempts in United States legislation to increase its enforcement through unilateral linkage of trade benefits to abiding by ILO provisions, see Harlan Mandel, “In pursuit of the missing link: International worker rights and international trade?” Columbia Journal of Transnational Law Vol. 27 (1989), pp. 443-482.


this regard, it contains no sanctions for violations of the countries’ other labor standards, collective bargaining laws, or any multilateral labor standards. This is a matter of particular concern in an international context in which new trade treaties abound—as has been the case over the past decade-and-a-half. In the United States treaties have the force of federal law. Unless such constraints are put in place, trade treaties can preempt prior state and even federal legislation such as the NLRA. There is thus a substantial danger that hard won domestic labor standards can be undermined by trade agreements like NAFTA and GATT if they are deemed non-tariff barriers to trade, producing “downward harmonization” of domestic standards rather than “upward harmonization” of foreign ones. Comparatively toothless as the NAFTA labor side agreements might be, they are thus a step in the right direction.

To date, the most extensive experience with transnational enforcement, and the most ambitious model, comes from the European Union. The Community Charter of Basic Social Rights for Workers was adopted by all member countries except Britain in December 1989, the 200th anniversary of the French Universal Declaration of Human Rights. It created a community-wide framework of employment standards, with the prevention of social dumping as one of its explicit goals. The Agreement on Social Policy, signed at Maastricht in 1992, is the Charter’s implementing legislation. Member states are primarily responsible for implementing the agreement in accordance with the EU’s governing principle of subsidiarity (whereby the Community acts only when set objectives can be more effectively achieved than through action by member states). However, the agreement is to be backed up the Council of Ministers’ directive power. It has broad authority to set “minimum requirements for gradual implementation” in the areas of health and safety, working conditions, information and consultation of workers, gender equality of opportunity and “integration of persons excluded from the labor market.”

The Council first acted on this authority in 1994, issuing a directive on the establishment of European Works Councils for firms employing at least 1,000 workers.

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7 Conrad Weiler, “GATT, NAFTA, and state and local powers,” Intergovernmental Perspective, Vol. 20, No. 1 (Fall 1993/Winter 1994), pp. 38-41. Among the more pressing issues in this regard in late 1996 was GATT. At the end of the Uruguay Round, the Clinton Administration proposed continuing negotiations toward minimum global labor and environmental standards, enforceable by a new World Trade Organization, at the Singapore Round in 1996-7. Barenberg, “Federalism and American labor law,” p. 105. The labor piece of this appeared in late 1996 to have been dropped in subcommittees, however. (Barenberg, in conversation).
10 Agreement on Social Policy Concluded Between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland (Maastricht, February 7, 1992), Article 2.
where 150 or more employees work in two or more member states. It remains to be seen whether these works councils will turn out to strengthen labor as much as the German ones on which they are modeled. But the directive creating them is an important first step. More ambitious possibilities under discussion in Europe include requiring firms to incorporate under EC law as European companies, binding all European corporations (not just cross-border ones) through labor law directives, mandating choice among a limited menu of industrial relations regimes, and perhaps eventually requiring some Euro-wide collective bargaining. Developments of this last kind are clearly a long way off, even in Europe. But in the emerging world of transnational capitalism, the EC as it has evolved to date offers a credible model for thinking about cross-border enforcement in the interests of justice.

Another potentially promising course is to look at examples of institutions within nations that have operated unilaterally beyond their borders in the face of weak international enforcement regimes. One such is such as the Alien Torts Claims Act. Adopted by the first Congress in the Judiciary Act of 1789 to prosecute international pirates and slavers who wreaked havoc along the American coast, it provides foreigners who suffer human rights injuries outside the United States a federal forum through which to pursue their claims. In the past few years it has been invoked, with some success, to make multinational companies in the U.S. pay for human rights and environmental abuses abroad, and recent decisions have extended its jurisdiction into the realm of labor rights as well.

Another test case that has been evolving over the past two decades has been the Bhopal litigation. In December 1984, in Bhopal, India, seven to eight thousand people died following a methyl isocyanate leak at a Union Carbide plant. In 1989, the case was settled in the Indian courts for $470 million. In 1999, victims dissatisfied with the settlement and the pace at which the Indian government was disbursing the funds to victims filed suit in the US under color of the Alien Torts Claims Act. The case was dismissed, principally on the ground that the that The Bhopal Act passed by the Indian parliament in 1985 prevented individuals or organizations other than the Government of India from bringing an action against Union Carbide or its officials.

The dismissal is the subject of ongoing litigation in the US federal courts. This litigation suggests another reason for favoring such unilateral instruments as the Alien

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12 For the story of how the German works councils, conceived initially to limit union power, actually helped strengthen it, see Thelen, Union of Parts, pp. 63-83. As Peter Swenson has pointed out to me in conversation, there is some doubt as to whether this could occur with the European Works Councils as presently constituted, since the 1994 directive contains no arbitration requirement. For a relatively optimistic early assessment of The European Works Councils, see Lowell Turner, “The Europeanization of labor: structure before action,” European Journal of Industrial Relations (November 1996), pp. 325-44.


Torts Claims Act, to wit, it can prevent corrupt(ible) governments from conspiring with corporations to limit their exposure for harms that they commit.

Just as unlikely coalitions can emerge to frustrate efforts to work against the race to the bottom, unlikely coalitions can also be put together to sustain them. Had there been neo-classical economists before the slave trade and child labor in the west were abolished, they would have said that any such efforts would be bound to fail. Yet history demurred. The campaigns to abolish slavery and child labor in the west were notable successes.15 To be sure, this involved creative coalitions among labor unions, humanitarian and Christian groups, and decisive action from powerful governments—particularly Britain—at critical junctures. Now we are presented with the same phenomenon on a global scale, but it is far from obvious that something similar could not be made to work again.

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