

# ADR and the Settlement of International Labor Disputes: A Proposal for Conciliation Through the Permanent Court of Arbitration

*Arnold Zack* \*

## I. INTRODUCTION

Wouldn't it be wonderful if we could resolve all those disputes involving fleeing corporations, young children working twelve-hour days, overworked labor inspectors ignoring local labor laws, employees locked in their factories and deprived of toilet breaks? Or those disputes concerning workers losing their sixty-cent per hour jobs because the employer moved the factory to a neighboring country with even lower wages, or peasants who had to forage for food on drought-stricken land because consumer protest in some far off country pressured a potential factory owner to shutdown or relocate a sweatshop?

We have all read the newspaper accounts of deplorable working conditions in too many developing countries providing "unfair" competition to unionized workers or politically astute consumers in industrialized countries. We have all deplored the exploitation of poor workers in countries which fail to adhere to even the most basic precepts of international labor standards, as promulgated by the International Labour Organization ("ILO") or by conscientious employers with codes of conduct to prevent such employee abuse. Certainly we would prefer a world in which there was no such exploitation and where workers were not played off against one another. It would indeed be wonderful to have a world in which employers voluntarily made provision for fairness at the workplace, where the conventions of the ILO and codes of conduct were all upheld, where misdeeds were willingly corrected when discovered, and such relationships were all happily and effectively self-monitored.

But such is obviously not the case. Conflict is rife, protests are increasingly evident, meetings of international bodies dealing with trade issues have to be cloistered in remote areas beyond the reach of protestors, and too many

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\* Past President, National Academy of Arbitrators, U.S.A.

employees throughout the developing world continue to be exploited through their working conditions.

The question is, can we do anything about it? The Permanent Court of Arbitration (“PCA”) is to be commended for convening a Seminar to consider whether there is a way in which we can mitigate some of the evils resulting from capital exploitation of the most defenseless workers in the employment chain. But the scope of the problems of free trade, international labor standards, and the combative roles of governments, unions, employers and non-governmental organizations (“NGOs”) create seemingly insurmountable obstacles obstructing any effort to adapt conventional dispute resolution systems to such a vast, constantly changing arena.

Before internationalization, during the days of protectionism and high tariffs, things were much more comfortable. The ILO’s conventions, which assure protection against slavery, child labor, in favor of freedom of association and the like, have long been in place, but they are only enforceable by governments themselves if they have deigned to adopt them as national law, and hardly ever by the powerless workers who were too often the victims of violations of these conventions. And, certainly, the United Nations and the Declaration of Human Rights<sup>1</sup> offered language and terminology (and, in reality, no more than that), to hold out to workers the expectation that they should be treated better, some day.

With increased mechanization and automation of manufacturing, permitting assembly by unskilled workers and reduced costs of transportation, and with the unleashing of capital mobility, it became possible for factories to be viable in virtually any community in the world, and profitable wherever they were able to find ever-cheaper sources of unskilled labor to replace what used to be skilled labor assembly in industrialized nations. For example, the shoe industry rapidly moved from labor-intensive cordwaining in the Northeast of the United States to mass-production shoe manufacture to the Midwest – closer to the central U.S. market – and thence overseas, where shoes and sneakers are machine-made and assembled by local unskilled labor. The same has occurred in the U.S. apparel industry, which evolved from being labor-intensive with highly skilled sewers and cutters, to overseas fabric manufacture utilizing unskilled assemblers. It is estimated that in 1997, sixty percent of U.S.

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1. Universal Declaration on Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at p. 71 (1948).

consumer apparel was assembled overseas,<sup>2</sup> while socks, which are entirely machine-made and require no low-cost labor assembly, continue to be made totally within the United States.

But with the trend to maximizing profits and minimizing costs (particularly labor costs through globalization), so too has come the growing awareness of the exploitive working conditions in that previously quiescent third world work force, through the revolution of rising expectations. These expectations have evolved from workers seeking short-term employment to purchase bicycles and radios, whereas they now desire televisions and computers that increasingly link them to the internet and alert them to the inequities of the international labor market. They have also become the focus of trade unions and other NGOs which seek improved wages, better health and safety protection, and restrictions on the exploitation of child labor and women in the workforce, and strive to enhance the workers' share of the productivity pie – all of which have the effect of raising labor costs and enticing mobile employers to move to yet cheaper labor markets. Local governments too often ally themselves with the employers in their effort to retain them for the tax revenue, jobs and other economic benefits they provide to the community or to the country. In their efforts to improve the lot of the local workers, these NGOs (and even trade unions) often find themselves in direct opposition to comparable institutions (including trade unions) in industrialized and market economies which are seeking to preserve jobs and the way of life of workers in countries from which industries have already fled.

Through NGO and worker protest, the world has taken greater notice of the plight of the workers in these developing countries, as well as the protests of workers in industrialized countries who see globalization and capital flight as a threat to their long-enjoyed benefits. The effort must be viewed not only in the context of the self-interest of workers from industrialized countries who see their jobs moving overseas, but also in the context of those workers in overseas factories who see their newly-acquired employment jeopardized by the prospect of future flight by employers to even less developed economies. This fluid movement of capital must further be viewed in the context of the ILO conventions, the codes of conduct and fair practice espoused by employers to assuage the protest groups in the industrialized nations, the local laws and

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2. Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP LAB. L. & POLICY J. p. 355 (1999). In 1961, only 4% of clothes sold in the U.S. were imported.

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enforcement standards, and the diverse agendas of NGOs dedicated to child protection, the ecology and a variety of other priorities. In this muddled scenario, what can be done to reduce the tension at international economic gatherings, to ensure fairness for workers in both industrialized and developing nations, and to fulfill society's commitments to fairness and justice in the workplace?

### II. IS INTERNATIONAL LAW THE ANSWER?

It obviously would be most appropriate if there were a legal framework for challenging unfair working conditions. But before there can be any prospect of legal rights being enforced, such an illusory legal system presupposes the existence of a body of enforceable international law establishing workplace rights; the existence of legislation ensuring specific workplace rights; the existence of an international legal and judicial system for processing claims of violation of such international laws; the standing of non-governmental disputants to utilize such a system; and the willingness and ability of disputants to navigate their way through such a system. The great difficulties that were faced by the international society, for example, in establishing such a legal system for monitoring and enforcing international war crimes, and the years spent in seeking to develop an international judiciary for internal justice within the European Union, testifies to the difficulties inherent in crafting such a system of international law for the widespread problems of workplace fairness and justice.

Even the North American Free Trade Agreement ("NAFTA"),<sup>3</sup> while successful in developing a vehicle to rein in workplace excesses within its jurisdiction, gives no right of challenge to deprived individuals or groups, but restricts protest to those disputes initiated solely by governments – and then only to the extent that the challenge concerns the enforcement by another member state of its own internal statutes, which is a far cry from any commonly understood concept of individual legal rights.<sup>4</sup>

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3. North American Free Trade Agreement, Washington, Dec. 17, 1992, entry into force Jan. 1, 1994, U.S.-Can.-Mex., 32 I.L.M. p. 605.

4. North American Agreement on Labor Cooperation between the Governments of Canada, the United Mexican States and the United States of America, 32 I.L.M. p. 1499 (1993), art. 27. See further J. Christopher Thomas, *The Advantages and Disadvantages and the Potential Usefulness of Alternative Dispute Resolution of Interstate Labor Disputes*, in this volume at p. 101.

Certainly, individuals and groups may bring legal action against corporations and citizens within a state to secure adherence to the laws of that state. But the reach of such challenge is confined to the laws of that state as enforcer, and it rarely extends beyond those laws to international norms, standards or conventions.

### III. IS ARBITRATION THE ANSWER?

If international and national laws are ineffective vehicles for enforcing international standards of fairness, how about doing it through arbitration? I am certainly a proponent of arbitration, which has, after all, been my basic day job for more than four decades. In arbitration, unlike litigation, the adversaries can contract to adhere to international labor standards even if they are not so bound by national or international law. Under arbitration, they have the right to select their own decision maker, and have access to arbitrators who are knowledgeable of the subject matter. They in effect create their own enforceable law and select their own judge. Arbitration is more expeditious than litigation, particularly when the parties have selected a neutral who is familiar with the issues in dispute. It avoids the delays of extensive pre-litigation discovery and depositions, and the potential for extended litigation that stems from the availability of countless appeals. In focusing on the dispute at the hearing, and by doing away with pre- and post-litigation wrangles, the process is also less expensive, and with arbitrator expertise it will usually result in fewer hearing days, with resulting savings in both time and money.<sup>5</sup> But although arbitration may escape the legal and institutional problems associated with enforcement of international law and is far more flexible than resort to litigation, it nonetheless requires the legal underpinning of contract law for the judgment of the arbitrator to be enforced. And, just as there is no body of enforceable law for international workplace disputes, there is likewise no body of enforceable law for contract disputes. International arbitration between civil

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5. Henry H. Drummond, *Transnational Small and Emerging Business in a World of Nike and Microsoft*, 4(2) J. SMALL & EMERGING BUS. L. p. 300 (2000), recommending adopting as an international standard the *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, Task Force on Alternative Dispute Resolution in Employment, National Academy of Arbitrators (1995), available at <http://www.naarb.org/protocol.html> (visited March 2003). As the initiator of the Protocol, I would welcome its adoption for international labor standards issues, but I believe that the absence of any international neutral judiciary to push its adoption would make the effort futile.

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parties or states requires a mechanism for enforcement which is usually achieved by the agreement of disputants to be bound by the laws of a specific legal entity, usually the rules of an arbitration administrator who is in turn bound by the national law of a particular country.

Undertaking to develop a structure for arbitration of international labor standards issues, in the absence of a pre-existing body or structure or institution of international law, thus requires that the parties to the arbitration agreement voluntarily negotiate and commit themselves to their own body of law or enforceable labor standards within their arbitration agreement. And when one considers the problems of international labor standards and the multiple players, the difficulty of securing a broad agreement among all the potential players to adhere to a negotiated standard of fairness or justice underscores the improbability of such a forum being effected.

It is unlikely that any employers, unions, NGOs or governments would commit in advance to adhere to any code of fairness or justice, and be willing to set forth the standards for adherence and to submit any challenges to violation thereof to arbitration, and then be bound by the decisions of the arbitrator to whom they would need to cede their final and binding authority over the outcome of their dispute. It is probably even less likely that these disputants would agree to arbitrate such a dispute once it has arisen, when positions are entrenched and the risks of winning or losing in arbitration are obviously greater or lesser for the various participants. The absence of any positive arbitration forum for prospective (let alone existing) disputes underscores the unwillingness of players in the employment field to subject themselves to a binding decision by some arbitrator, even if mutually selected. And once a dispute has arisen, the prospects of achieving agreement on a mutually acceptable arbitrator becomes even more problematic.

There is a perception from the successful experience of labor-management arbitration in the United States and Canada that workplace arbitration provides an expeditious, routinized process for resolving disputes arising over issues under fairness or workplace justice. That has been true of collective bargaining agreements which universally provide for a grievance and arbitration system to resolve disputes arising out of the interpretation or application of the parties' agreements and over questions of the just cause of employer-imposed discipline and discharge. But the underlying contractual relationship between union and management that spawns appeal to arbitration is usually lacking in employment relationships outside those countries. Collective bargaining arbitration works because the union and management parties to the collective agreement have a

greater stake in the preservation and continuity of their relationship, and willingly cede to their choice of outside arbitrator the right to dispose of any individual dispute which might otherwise impede the smooth continuity of that ongoing collective relationship. That tends to be a far cry from the types of disputes with which we are concerned in the international non-collective bargaining world, where protestors other than the employees' union challenge an employer's, or a government's, actions, and where their efforts are focused on triumphing in that individual dispute rather than on the perpetuation of the collective bargaining relationship between the employer and the designated union of its employees. Indeed, for some of the protestors, the escalation of the dispute to a broader venue than the employment relationship, rather than its resolution, may be the primary goal of their involvement.

#### IV. IS CONCILIATION OR MEDIATION THE ANSWER?

The evidence shows that, for the present at least, disputes over workplace fairness and justice have failed to stimulate the international community to develop binding legal standards to protect workers at work, let alone the legal machinery to ensure that those legal standards are complied with. The evidence also shows that, in the absence of an enforceable contractual relationship establishing enforceable standards of workplace fairness among those involved in employment issues, there is little prospect of negotiating a contractual relationship which would empower arbitration as a device for final and binding resolution of disputes arising out of a claimed violation of those standards.

Does that mean we should give up our effort to bring dispute resolution to such troubled workplaces? Or that we should accept without comment the self-righteous and too often unenforceable proclamations of international enterprises that they provide fair and just workplaces? Or that they willingly and voluntarily conform to ILO conventions or pertinent national labor protective legislation? Or that we should stand by and watch escalating conflicts and violence at international meetings that drive international business and government leaders into increasingly policed meeting venues?

The preferred course for achieving workplace fairness, I suggest, is through persuasion and conciliation/mediation.<sup>6</sup> In the absence of any legal structure for

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6. Although conciliation and mediation are not identical processes, the two terms are used interchangeably for the purposes of this paper.

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enforcing adherence to fair standards, and in the light of the broadening and escalating nature of disputes on these issues, I think the time is ripe for evolving a structure and system which will encourage the various disputants to minimize their blustering rhetoric in preference for a mechanism which would seek resolution of their conflicting claims and actually achieve progress toward their proclaimed goals of helping to assure workplace fairness and justice. Although perhaps unenforceable through existing legal or contractual processes, the standards of fairness are recognized and accepted, and constitute the basis for discussions as to whether or not they are being lived up to. But what is lacking at present is a mechanism that can bridge the gap between the proclaimed standards and the complaints of those who challenge their implementation. That mechanism could be conciliation/mediation. The objective now is to establish a credible institution which educates the world community, the international organizations, states, local governments, unions, employers, NGOs and potential disputants about the futility of continuing and ever-escalating conflicts and about the potential benefits that can result from having mutually acceptable mediators help to resolve these pervasive conflicts.

Conciliation/mediation is neither mandatory nor binding but does provide an opportunity for resolution of conflict when two or more disputants are unsuccessful in trying to resolve their conflicts by direct negotiation or confrontation. It makes available a third party to help them when they so request, or when they can be encouraged to use conciliation/mediation to further or resume negotiations, to transmit messages, to come up with new ideas, and above all to urge the disputants to rethink their confrontational positions and seek accommodation in the effort to resolve their conflict. Conciliation and mediation are old and respected tools for resolving disputes used successfully in a myriad of relationships and disputes. Conciliators or mediators in the employment field, as in other commercial or legal fields, would be individuals with experience in the issues in dispute, with respected reputations in helping parties reduce their conflicts, and who gain the confidence and trust of the disputants. Conciliation and mediation are voluntary, entered into voluntarily, and continued only for as long as the disputing parties believe the process is helping them reduce the gap and conflict between them.

A mediator has no power or authority to impose any resolution on the disputants, bearing only the power of mutual persuasion with which the disputants have appointed him or her. There is no guarantee that conciliation/mediation will work, or indeed that all disputants will even enter into such procedures, if their agenda is escalating rather than reducing conflict.

But for those committed to minimizing conflict or resolving disputes, conciliation/mediation is a valuable, if not essential, tool. It is a tool not currently “on tap,” although in a particular dispute it might be created. It is created at present only when those in conflict jointly undertake to initiate or create the process. How much better it would be to have an ongoing institution to which a single protesting party might turn for help in order to persuade another party or parties to meet, discuss, and hopefully negotiate their differences to resolution! The ready availability of such an institution would encourage routinization of appeals for conciliation/mediation and hopefully make the process an accepted venue for resolving international workplace disputes.

And *now* would be an ideal time to initiate such an effort, as globalization takes its ever greater toll on employees and workplace working conditions, as greater international attention and visibility fuels greater group protest over the unfairness of inadequate workplace conditions, and as more and more people in the developing world find themselves pulled from the failing agricultural sector into the burgeoning industrialized sector.

#### V. THE ROLE OF THE ILO

For decades, the ILO has proclaimed universal standards of workplace conduct through its conventions and more recently, through its Freedom of Association Committee and its Declaration of Fundamental Principles and Rights at Work (“Declaration of Principles”).<sup>7</sup> Despite its efforts to expose violations of the conventions and to provide acceptable workplace practices, too many of the issues to which it alerts the world have remained intractable and unresolved. Those nations which stand in violation of the ILO conventions are often called to task for violations of the rights contained therein through resort to the Committee of Experts, but without a readily available procedure for mediating such conflicts in lieu of formal and often unacceptable recommendations on such violations.

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7. ILO Declaration of Fundamental Principles and Rights at Work, adopted by the International Labour Conference, 86<sup>th</sup> Session, Geneva, June 1998. Memorandum Update on ILO Core Labor Standards Declaration, ABA Labor and Employment Law Section, International Law Committee, Nov. 1999.

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In matters brought before the tripartite Freedom of Association Committee concerning trade union rights, the several thousand claims which have been investigated in recent years and on which Recommendations have been made often remain unresolved. On child labor issues, despite member state ratification of the Forced Labor Convention,<sup>8</sup> numerous examples of violations continue to arise, all too often without closure.

With the adoption of the Declaration of Principles, there is now a vehicle for bringing to light violations of the core standards of the ILO conventions, regardless of whether the subject conventions have been adopted. The procedures for investigation, reports and debates within the ILO have a long tradition of delay, to the detriment of the very workers whom the procedures were designed to help, and to the ILO itself as an agency expected to eradicate such unacceptable wrongdoing efficiently.

## VI. WORLD COMMISSION ON THE SOCIAL DIMENSION OF GLOBALIZATION

On November 6, 2001, the ILO Director-General Juan Somavia announced the creation of the World Commission on the Social Dimensions of Globalization, to be chaired jointly by President Tarja Halonen of Finland and President Benjamin Mkapa of Tanzania, to “examine ways in which all international organizations can contribute to a more inclusive globalization process that is acceptable and fair to all.”<sup>9</sup> In its charge, the Commission will “analyze the impact of globalization on employment, decent work, poverty reduction, economic growth and development,” and seek to “forge a broad consensus on the issues, including the involvement of all interested international organizations as well as governments and organizations representing workers and employers, and launch a process for addressing the key issues posed by the global economy to make globalization sustainable and promote the fair sharing of its benefits.”<sup>10</sup>

The initiative to bring to the table world leaders and world organizations to address the growing crisis of the international workplace is certainly

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8. Convention concerning Forced or Compulsory Labor (No. 29), June 28, 1930, entry into force May 1, 1932.

9. *Enhancing the Action of the Working Party on the Social Dimension of Globalization: Next Steps*, Working Party on the Social Dimension of Globalization, WP/SDG, Geneva, Nov. 2001.

10. *ILO Tackles Social Consequences of Globalization*, ILO Press Release, Nov. 6, 2001.

commendable. But it portends more high-level research, investigation and studies, and while the “forging of a broad consensus” of international leaders and their institutions is desirable, more is needed than mere hortatory proclamations of commitment to do good. The problems of workplace fairness and justice, sweatshop exploitation, denial of access to toilets, failure to provide health and safety protection, and flight of employers to ever-cheaper wage sites is continuing daily and is beyond the ken of heads of state and institutions meeting at international conferences. The workplace violations of fairness continue to grow, and the missing link is the availability of an institution which can apply the laudatory international standards to those workplaces. The achievement of the goals of the World Commission would be more readily applicable to those workplaces where the violations occur if there was available machinery to achieve that “broad consensus” on a *local* level, by bringing together, in the spirit of fair working standards, the local players who too often ignore (if not deliberately) and violate international norms.

Achievement of local workplace consensus at the worksites of the developing world, among employers, workers, governments and NGOs, would not only reduce daily workplace conflict where it is most oppressive and permit access to the proclaimed international standards, but it would also put a practical face on the high-minded rhetoric of the participants in the Commission’s work. And, most importantly, it would provide on-going models of how cooperation and consensus at the local level can lead to the achievement of the Commission’s objectives at an international level.

#### VII. HOW SHOULD THIS BE ACHIEVED?

When originally asked by ILO Director-General Somavia to lay out my proposal to him for an international conciliation/mediation mechanism, I had suggested its inclusion as a component of the ILO structure akin to the investigatory functions of their International Body of Experts. But the tripartite structure of the ILO did not embrace all the struggling players at the workplace level, which excluded important NGOs and minimized many of the conflicts which often occur between national and local government authorities in dealing with employers and worker groups. I had suggested the possibility of establishing an external freestanding institution to administer such a conciliation/mediation service. But now, with the establishment of the World

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Commission and its invitation to “all interested international organizations”<sup>11</sup> wishing to partake in this broad consensus building, I believe the ideal institution to carry forward the concept of conciliation/mediation of workplace conflicts involving international standards would be the Permanent Court of Arbitration. Certainly, for the reasons set forth above, arbitration in the absence of enforceable rights is not the appropriate vehicle for resolving the workplace conflicts that exist throughout the globalized economy. Persuasion and application of the concepts of conciliation and mediation are likely to be more fruitful and productive and more hopeful in moving towards the international goals of the World Commission.

Thus, I would propose the creation of an international conciliation/mediation institution, under the guidance and administration of the PCA, either within its structure or as an ancillary facility, to which disputants of local or international workplace disputes, employers, workers, unions, governments and NGOs could appeal for help in the violations of core ILO standards, proclaimed codes of conduct, and the ILO Declaration of Fundamental Principles.

Under this proposal, upon receiving a request for conciliation, the administrator would seek to secure agreement of the other workplace parties to undertake conciliation of the dispute. In this role, the administrators would in fact be seeking to guide the adversaries into conciliation, or at least to the negotiating table. Once an agreement to the process has been reached, I would anticipate that the administrator would offer the names of conciliators, either locally available from an international roster maintained by the institution with conciliators seconded from national conciliation and mediation centers or local government bodies, or from a separate international roster to which volunteer conciliators might be appointed after appropriate vetting and training. Hopefully, the conciliators would be trained in workplace conciliation/mediation, familiar with local languages, and available for such assignments on relatively short notice. Hopefully, too, their compensation would be provided by the host government agencies making them available.

While the participation of a conciliator in any conflict does not guarantee resolution of the pending dispute, conciliators may be effective in reducing the areas of conflict, in helping the parties develop procedures for monitoring their future relations and potential conflicts, and possibly in helping them develop a commitment to certain standards, with perhaps even arbitration as the agreed-

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11. 12 WORLD ARB. & MEDIATION REP. p. 220 (2001).

upon monitoring vehicle. At the very least, the conciliator would be able to show the disputants the benefits of discussing outstanding issues, and the availability of the process to resolve future disputes where the parties so desire.

The establishment of such an institution on an international basis is obviously a time-consuming and costly undertaking, requiring the development of links to national conciliation bodies, the establishment of criteria for listing on the institution's roster, the development of training programs and the announcement of availability to institutions working at workplace sites. The project need not be established in full on an international level. Rather, there would be advantages to undertaking its development on a pilot project basis in a confined geographical area of the world, with cooperation from divergent groups who have faced prior problems in seeking workplace dispute resolution in that region. Such a regionalized or localized approach could be observed by the Global Commission, and perhaps encouraged by international organizations from other regions of the world where there is similar interest by the disputants in developing procedures for resolving, or at least forestalling, workplace disputes over fair and just workplace standards.

#### VIII. FUTURE IMPACT

If the above-described structure were developed, and if it proved to be effective in resolving workplace disputes in its pilot project areas, one could foresee that disputants (at least those seeking to resolve conflicts for the benefit of workers in such areas) would turn to such an institution as a viable tool for helping to resolve their conflicts, rather than taking to the streets in demonstration at international meetings. Indeed, the international organizations responsible for investment and participation in the economic lives of such countries could well make adherence to the conciliation concept and the conciliation institution a prerequisite for the provision of economic support for the countries and their economic institutions.

#### IX. CONCLUSION

The proposal for establishing an international institution for conciliating workplace disputes in the context of conformity to international labor standards is new, challenging and promising. It provides an important link between, on the one hand, proclamations of achieving the standards and, on the other hand, their actual implementation at the workplace. The proposal separates protestors

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intent on challenging the continuing rush to globalization from those sincerely interested in improving the working conditions of its victims. As such, the proposal is timely and worthy of more investigation and support.