

Who Made That?: Influencing Foreign Labour Practices through Reflexive Domestic Disclosure Regulation

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Osgoode Hall Law Journal 43.4 (2005) : 353-405.

<http://digitalcommons.osgoode.yorku.ca/ohlj/vol43/iss4/1>

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Who Made That?: Influencing Foreign Labour Practices through Reflexive Domestic Disclosure Regulation

Abstract

An important tool of "decentred" regulation, including reflexive law, is corporate information disclosure. Disclosure regulation can have an important normative influence on corporate behaviour because it introduces a risk element that must be managed by corporate leaders. The challenge for regulators is to identify the scope of disclosure that will cause corporate responses of the sort desired by the state. This article considers the potential role of disclosure regulation as a tool for influencing labour practices beyond the borders of the regulating state and, in particular, within the vast global supply chains of multinational corporations. In the context of improving labour practices in developing states, the goal of regulation must be foremost the empowerment of the workers and their organizations in those states, and of the indigenous and emerging global social movements that assist them. The article examines three recent proposals for mandatory disclosure of information about global labour practices, and concludes that the least ambitious of them (disclosure of factory addresses) may contribute to this goal more effectively than broader proposals that seek to inject raw information about actual labour practices into the consumer and investor markets of advanced economic states.

Keywords

Disclosure of information--Law and legislation; Labor; Developing countries

WHO MADE THAT?: INFLUENCING FOREIGN LABOUR PRACTICES THROUGH REFLEXIVE DOMESTIC DISCLOSURE REGULATION[©]

DAVID J. DOOREY*

An important tool of “decentred” regulation, including reflexive law, is corporate information disclosure. Disclosure regulation can have an important normative influence on corporate behaviour because it introduces a risk element that must be managed by corporate leaders. The challenge for regulators is to identify the scope of disclosure that will cause corporate responses of the sort desired by the state. This article considers the potential role of disclosure regulation as a tool for influencing labour practices beyond the borders of the regulating state and, in particular, within the vast global supply chains of multinational corporations. In the context of improving labour practices in developing states, the goal of regulation must be foremost the empowerment of the workers and their organizations in those states, and of the indigenous and emerging global social movements that assist them. The article examines three recent proposals for mandatory disclosure of information about global labour practices, and concludes that the least ambitious of them (disclosure of factory addresses) may contribute to this goal more effectively than broader proposals that seek to inject raw information about actual labour practices into the consumer and investor markets of advanced economic states.

La divulgation des informations des sociétés représente un outil important d'une réglementation «décentralisée,» y compris du droit réfléchi. Réglementer la divulgation peut exercer une grande influence normative sur le comportement des sociétés, parce que cela introduit un élément de risque, que doivent gérer les chefs de sociétés. Le défi, pour les autorités de réglementation, consiste à définir à quel point la divulgation provoquera des réactions des sociétés, du genre que souhaite l'État. Cet article réfléchit au rôle éventuel que remplirait la réglementation sur la divulgation, s'il faut influencer les pratiques de travail par-delà les frontières de l'État codificateur et en particulier, au sein des vastes chaînes d'approvisionnement planétaires des multinationales. Dans le contexte d'une amélioration les pratiques de travail des États en voie de développement, le but de la réglementation doit être avant tout la prise de pouvoir des travailleurs et de leurs organismes dans ces États, et les mouvements sociaux locaux naissants dans le monde, qui se tiennent à leurs côtés. L'article examine trois propositions récentes visant la divulgation obligatoire de renseignements relatifs aux pratiques de travail mondiales, et arrive à la conclusion que la moins ambitieuse d'entre elles (divulgation de l'adresse des usines) peut mieux contribuer à cet objectif que les propositions à caractère plus ambitieux, qui cherchent à déverser, sur les marchés de consommation et d'investissement des États économiques évolués, des renseignements sans indulgence sur les véritables pratiques de travail.

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Frequent reports of punishing labour conditions endured by workers employed throughout the global supply chains of multinational corporations (MNCs) have, in recent years, energized campaigns by non-state actors that aim to shame MNCs into taking responsibility for the labour practices under which their products are made. These campaigns have influenced many MNCs to adopt private codes of conduct through which they propose to enforce compliance by their suppliers with specified labour standards.¹ Presumably, these corporations are engaging in risk management in response to a perceived increase in demand by their customers or shareholders to avoid the taint of products made under “sweatshop” conditions. Broad-based public acceptance of many of these voluntary corporative initiatives is impeded, however, by a continued lack of transparency. Some corporations have responded to public pressures by agreeing to disclose the names and addresses of their factories and suppliers or the results of “social” audits of those factories.² Nevertheless, most corporations still

¹ See Sol Picciotto, “Rights, Responsibilities and Regulation of International Business” (2003) 42 Colum. J. Transnat’l L. 131 at 139; Virginia Haulfler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Washington, D.C.: Carnegie Endowment for International Peace, 2001); Claire Moore Dickerson, “Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field For Developing Workers” (2001) 53 Fla. L. Rev. 611; Harry Arthurs, “Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation” in Joanne Conaghan, Richard Michael Fischl & Karl Klare, eds., *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002) 471 [Arthurs, “Corporate Codes”]; Olivier Boiral, “The Certification of Corporate Conduct: Issues and Prospects” (2002) 142 Int’l Labour Rev. 317; and Rhys Jenkins, “The Political Economy of Codes of Conduct” in Rhys Jenkins, Ruth Pearson & Gill Seyfang, eds., *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy* (London: Earthscan, 2002) 13.

² The most notable example is the decision of Nike, Inc. (“Nike”) in April 2005 to disclose on its corporate website the names and addresses of its 700 supplier factories that make Nike branded products. See “Active Factories,” online: <<http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=activefactories>>. Other companies, such as Jansport and Gear, had been voluntarily disclosing their factory locations on their websites for several years. Nike had in the past refused to disclose its factory locations, arguing that this information was “intellectual property” that needed to be kept from its competitors. See Maria Gillen, “The Apparel Industry Partnership’s Free Labor Association: A Solution to the Overseas Sweatshop Problem or the Emperor’s New Clothes?” (2000) 32 N.Y.U.J. Int’l L. & Pol. 1059 at 1097 and 1097, n. 138. Other companies, including Timberland and Levi-Strauss, have since followed Nike’s lead and have disclosed their factory locations. Links to all of the companies that disclose their factory addresses can now be found on the website of the International Textile and Garmets Workers Federation, online: <<http://www.itglwf.org/displaydocument.asp?Index=1158&Language=EN&DocType=Links>>. In addition, many MNCs that sell clothing to U.S. and Canadian universities have agreed to the demand of the Students Against Sweatshops campaign to provide the factory locations of

refuse to disclose information about which employees make their products and the conditions under which those workers were employed.³

The veil of secrecy that shields the employment practices within global supply chains from public scrutiny has attracted growing criticism in recent years, manifested in a plethora of proposals for increased transparency of global labour practices. Activist shareholders and non-governmental organizations (NGOs) have challenged corporations to become more transparent about the labour practices within their production chains;⁴ politicians have proposed laws that would require greater transparency of labour practices information as a condition for preferred trade status;⁵ international institutions have proposed

contractors, and this information is disclosed on the website of Worker Rights Consortium. See "About the Factory Disclosure Database," online: <http://www.workersrights.org/about_fdd.asp>. The Fair Labor Association, and some of its member corporations individually, also recently began to disclose incidents of non-compliance with its code of conduct by participating companies and licensees. See <<http://www.fairlabor.org/all/transparency/charts2002.html>>. In The Gap's "2003 Social Responsibility Report," the company disclosed for the first time a breakdown of violations of the labour components of its code of conduct by country (though not by factory). See <http://www.gapinc.com/social_resp/social_resp.htm>. Social Accountability International lists the addresses of factories receiving SA8000 accreditation on their website. See "SA8000 Certified Facilities" (13 September 2005), online: <<http://www.sa-intl.org/index.cfm?fuseaction=document.showDocumentByID&nodeID=1&DocumentID=60>>.

³ The Retail Council of Canada argues that even information about the identity and location of suppliers is proprietary and should not be subject to mandatory disclosure. See Sharon A. Maloney, General Counsel and Senior Vice-President, Government Relations, "Submission to the Public Policy Forum Consultation on a Proposal (and its Alternatives) to Verify Labour Standards in the Apparel Industry" (26 September 2003), online: <www.ppforum.ca/textile_labelling/cRetail_Council_of_Canada.pdf> at 10. See also Gillen, *ibid.*, and see: Roots, Open Letter to Customers, online: <http://www.roots.com/new_canada/html/pr_open_letter.shtml>.

⁴ Examples of NGO-led initiatives include: Ethical Trading Action Group, "Coming Clean on the Clothes We Wear: Transparency Report Card" ranking fifty companies on the level of disclosure relating to labour practices, online: <<http://www.maquilasolidarity.org/campaigns/reportcard/>>; the International Right-to-Know campaign for legislation requiring U.S.-based companies to disclose a broad range of information about their labour and environmental practices (online: <<http://www.irtk.org/>>); the U.S. National Labor Committee's proposal to amend the Tariff Act of 1930 to require public disclosure of information, including factory addresses (online: <http://www.nlcnet.org/news/public/files_upload/Legislation.pdf>); a similar initiative of Corporate Sunshine Working (online: <<http://www.corporatesunshine.org/>>); and the Ethical Trading Action Group's disclosure campaign, which is discussed later in this article. For a summary of recent shareholder proxies and resolutions, see *e.g.* the Investor Responsibility Research Center, *Corporate Social Issues Reporter* (August/September 2004).

⁵ An example is the *Corporate Codes of Conduct Act*, H.R. 4596 (Rep. McKinney), introduced 7 June 2000. See Mark B. Baker, "Tightening the Toothless Vise: Codes of Conduct and the Multinational Enterprise" (2001) 20 Wis. Int'l L.J. 89 at 112.

voluntary codes for MNCs that include transparency requirements;⁶ and academics have made a variety of proposals for greater disclosure of labour practices information.⁷

These proposals implicitly engage the literature on “decentred” regulation, an approach that assumes that the state can influence normative practices indirectly by shaping the context in which society’s various actors and subsystems interact and bargain with one another.⁸ Of particular relevance is the theory of “reflexive law,” developed primarily by Gunther Teubner.⁹ Reflexive law encourages the state to influence the development of privately produced normative systems and practices by influencing communications between institutions intermediary to the state and free markets.

The recent proposals for mandatory disclosure of information about global labour practices take the notion of a decentred state to a different level. The theory is that a state can influence through indirect means the practices of multinational private actors beyond the borders of the regulating state. The principal regulatory tool to accomplish this task is mandatory disclosure of information about the foreign practices of the multinational actor. These models recognize that new communications technologies permit information to be shared instantaneously by a myriad of private actors dispersed around the globe. Therefore, information disclosed in one regulating state cannot be contained within the borders of that state. This has implications for the multinational actor, which must reflect upon how the information will be received by actors across the planet and how it may be used by

⁶ See e.g. the United Nation’s Global Compact, which requests that signatory companies disclose in their annual reports a “Communication on Progress,” which the UN recommends should comply with the reporting requirements designed by the *Global Reporting Initiative* (GRI). The GRI reporting framework includes a variety of labour and employment indicators. See <<http://www.globalreporting.org/guidelines/2002/c52.asp>>.

⁷ See Part V.

⁸ See Julia Black, “Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World” (2001) 53 *Curr. Legal Probs.* 103 [Black, “Decentring Regulation”]; Julia Black, “Proceduralizing Regulation: Part I” (2000) 20 *Oxford. J. Legal Stud.* 597 [Black, “Proceduralizing Regulation”].

⁹ See “Substantive and Reflexive Elements in Modern Law” (1983) 17 *Law & Soc’y. Rev.* 239 [Teubner, “Reflexive Elements”]; “After Legal Instrumentalism? Strategic Models of Post-Regulatory Law” in Gunther Teubner, ed., *Dilemmas of Law in the Welfare State* (Berlin: Walter de Gruyter, 1985) 299 [Teubner, “After Legal Instrumentalism”]; *Law as an Autopoietic System* (Oxford: Blackwell, 1993) [Teubner, *Autopoietic System*].

antagonistic forces to harm or impede its own internal goals and objectives. In theory, requiring transparency about global labour practices could contribute to a climate in which the worst employers are punished, and the best rewarded. This could in turn contribute to the creation of a normative system of labour practices that encourages improved labour practices outside of formal regimes of state-based or supranational substantive labour standards.

But significant obstacles impede designers of a model of mandatory disclosure of global labour practices. If poorly designed or implemented, such a model is likely to lead to unintended consequences that could leave the workers who are the intended beneficiaries even worse off than they are at present. Indeed, this is a problem with many forms of reflexive or decentred regulation, as it is with market-based approaches to regulation. The outcomes of the interactions the models seek to facilitate are unpredictable, and the governance mechanisms are imprecise. When the regulation is intended to influence private conduct in another sovereign state, particular caution must be exercised so that the legitimate exercise of that state's right to shape its own domestic policies is not undermined.

This article considers these issues in reference to three recent proposals to require MNCs to disclose information relating to labour practices within their global supply chains: (1) the "Ratcheting Labour Standards" (RLS) model of Charles Sabel, Dara O'Rourke and Archon Fung;¹⁰ (2) Cynthia Williams' proposal to require disclosure of labour practices information within the scheme of U.S. securities law;¹¹ and (3) a proposal by a Canadian NGO, the Ethical Trading Action Group (ETAG), which would require disclosure only of the factory locations at which apparel imported to Canada was made.¹²

¹⁰ Charles Sabel, Dara O'Rourke, and Archon Fung have produced a number of papers in which they develop their RLS model, including: "Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace," online: Columbia Law School <<http://www2.law.columbia.edu/sabel/papers/ratchPO.html>> [Sabel, O'Rourke & Fung, "Ratcheting"]; and "Realizing Labor Standards" in Sabel, O'Rourke & Fung, eds., *Can We Put an End to Sweatshops?* [*An End to Sweatshops?*] (New Democracy Forum Series, Joshua Cohen & Joel Rogers, eds. Boston: Beacon Press, 2001) 3 [Sabel, O'Rourke & Fung, "Realizing"].

¹¹ Cynthia Williams, "The Securities and Exchange Commission and Corporate Social Transparency" (1999) 112 Harv. L. Rev. 1197.

¹² The Maquila Solidarity Network, an NGO that acts as the Secretariat for ETAG, includes on its website links to all of the various documents related to ETAG's disclosure campaign. See "Disclosure Campaign" online: <<http://www.maquilasolidarity.org/campaigns/disclosure/>>

Part I provides an overview of an emerging pluralist vision for the development of a normative model of global labour standards that draws upon the contribution of non-state actors and forces. In Part II, I review more carefully the literature on the contribution of “decentred” and reflexive law, and consider its potential contribution to this pluralist vision. Part III examines the role of information disclosure as a regulatory tool for influencing corporate conduct. The particular challenges of designing an effective disclosure regime are then considered in Part IV, with an emphasis on the challenges that are most relevant to a potential disclosure model addressing global labour standards. Part V reviews the three proposals for mandatory disclosure of labour practices. Finally, in Part VI, I evaluate these proposals in light of the earlier observations about the challenges of designing an effective disclosure model of this sort.

I. A PLURALIST VISION FOR NORMATIVE LABOUR STANDARDS

Much of the globalization literature describes an enfeebled state, hobbled by the forces of economic globalization and regionalization.¹³ In labour law, the argument takes a distinct and now familiar form.¹⁴ The general thesis is that a confluence of factors,

index.htm>. See also D.J. Doorey, “Disclosure of Factory Locations in Global Supply Chains: A Canadian Proposal to Improve Global Labour Practices” (2005) 55 Can. Rev. Soc. Pol’y 104.

¹³ The literature is extensive. Examples include: Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996); Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London: Routledge, 1995); Susan Strange, *The Retreat of the State* (Cambridge: Cambridge University Press, 1996); David Held *et al.*, eds., *Global Transformations: Politics, Economics and Culture* (Stanford: Stanford University Press, 1996); Christoph Schreuer, “The Waning of the Sovereign State: Towards a New Paradigm for International Law” (1993) 4 E.J.I.L. 447; and Robert Wai, “Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization” (2002) 40 Colum. J. Transnat’l L. 209.

¹⁴ H.W. Arthurs, “Labour Law Without the State” (1995) 46 U.T.L.J. 1 [Arthurs, “Without the State”]; David M. Trubek, Jim Mosher & Jeffrey S. Rothstein, “Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks” (2000) Law & Soc. Inquiry 1187; Sabel, O’Rourke & Fung, “Realizing,” *supra* note 10; Bob Hepple, “New Approaches to International Labor Regulation” (1994) 26 Indus. L.J. 353 [Hepple, “New Approaches”]; Katherine Van Wezel Stone, “Labour and the Global Economy: Four Approaches to Transnational Labor Regulation” (1995) 16 Mich. J. Int’l L. 987; Adelle Blackett, “Global Governance, Legal Pluralism and the Decentred State: A Labor Law Critique of Codes of Corporate Conduct” (2001) 8 Ind. J. Global Legal Stud. 401; Steven R. Ratner, “Corporations and

including advances in communications technology and the liberalization of regional and international trade and capital, “compress time and space” by permitting instantaneous transactions and complex global production networks of contractors and subcontractors to flourish.¹⁵ These developments alter power relations within states in favour of corporate interests, particularly those of large MNCs, because they at once facilitate the option of “exit”¹⁶ by capital as a strategic response to rising labour costs, and weaken unions and governments, the traditional countervailing actors to corporate power.¹⁷ Labour law’s traditional role in the pursuit of countervailing power to corporations¹⁸ is strained as a result, as a new emphasis on maintaining a “business friendly,” competitive environment relative to other jurisdictions begins to dominate policy discourse.¹⁹

The spectre of a multinational “regulatory race to the bottom” in labour standards resulting from this competition has fuelled debate over the desirability and potential form of new models of supranational labour law. The argument for enforceable supranational labour standards has thus far attracted little state support, and has been

Human Rights: A Theory of Legal Responsibility” (2001) 111 Yale L.J. 443; and Ozay Mehmet, Errol Mendes & Robert Sinding, *Towards a Fair Global Labour Market: Avoiding the New Slave Trade* (London: Routledge, 1999).

¹⁵ *Ibid.* On “time-space compression” see e.g. Santos, *supra* note 13 at 85-98; William E. Scheuerman, “Global Law in Our High-Speed Economy” in Richard P. Applebaum, William L.F. Festiner & Volkmar Gessner, eds., *Rules and Networks: The Legal Culture of Global Business Transactions* (Oxford: Hart, 2003) 103 [Scheuerman, “High-Speed Economy”]; Manuel Castells, *The Rise of the Network Society* (Malden, MA: Blackwell, 1996); and Erica Schoenberger, “Competition, Time, and Space in Industrial Change” in Gary Gereffi & Miguel Korzeniewicz, eds., *Commodity Chains and Global Capitalism* (Westport, CT: Praeger, 1994).

¹⁶ Eyal Benvenisti, “Exit and Voice in the Age of Globalization” (1999) 98 Mich. L. Rev. 167; Gerald Epstein, “International Capital Mobility and the Scope for National Economic Management” in Robert Boyer & Daniel Drache, eds., *States Against the Market: The Limits of Globalization* (London: Routledge, 1996) 211.

¹⁷ Arthurs, “Without the State,” *supra* note 14; Harry W. Arthurs, “The Collective Labour Law of a Global Economy” in Chris Engels & Manfred Weiss, eds., *Labour Law and Industrial Relations at the Turn of the Century* (The Hague: Kluwer Law International, 1998) 143 [Arthurs, “Collective Labour Law”]; Harry Arthurs, “Landscape and Memory: Labour Law, Legal Pluralism, and Globalization” in Ton Wilthagen, ed., *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (Amsterdam: Koninklijke Nederlandse Akademie van Wetenschappen, 1998); Hepple, “New Approaches,” *supra* note 14; and Stone, *supra* note 14.

¹⁸ Otto Kahn-Freund, *Labour and the Law* (London: Stevens for the Hamlyn Trust, 1972).

¹⁹ Arthurs, “Collective Labour Law,” *supra* note 17 at 154; Hugh Collins, “Regulating for Competitiveness” (2001) 30 Indus. L.J. 17.

soundly rejected by developing states that view such proposals as thinly-disguised Northern protectionism.²⁰ Renewed energy and purpose at the International Labour Organization (ILO), culminating in a “retreat”²¹ to “core” standards, has not resulted in any greater sanctioning powers being conferred on the ILO, with the result that it remains an institution promulgating voluntary standards that are routinely violated by states. Efforts to link trade benefits to compliance with labour rights through a “social clause” in trade agreements, most notably the World Trade Organization (WTO) and General Agreement on Tariffs and Trade (GATT), have failed under the weight of opposition from developing countries.²² Furthermore, existing forms of transnational labour regulation, most notably within the European Community and the Labour Side Agreement to the North American Free Trade Agreement (NAFTA) have, thus far, been modest in the realm of labour law, failing, for example, to guarantee enforceable rights to freedom of association and collective bargaining.²³

The relative dearth of new regimes of formal, state-created supranational labour law should not, however, be equated with an

²⁰ Simon Deakin & Frank Wilkinson, “Rights vs. Efficiency? The Economic Case for Transnational Labour Standards” (1994) 23 *Indus. L.J.* 289; Brian Alexander Langille, “General Reflections on the Relationship of Trade and Labor (Or: Fair Trade as Free Trade’s Destiny)” in Jagdish N. Bhagwati & Robert E. Hudec, eds., *Fair Trade and Harmonization: Prerequisites for Free Trade?*, vol. 2 (Cambridge: MIT Press, 1996) 231; and Kaushik Basu, “Compacts, Conventions, and Codes” (2001) 34 *Cornell Int’l L.J.* 487 [Basu, “Compacts”].

²¹ Hepple, “New Approaches,” *supra* note 14 at 358.

²² Elisabeth Cappuyna, “Linking Labor Standards and Trade Sanctions: An Analysis of their Current Relationship” (1998) 36 *Colum. J. Transnat’l L.* 659; Erika De Wet, “Labor Standards in a Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organization” (1995) 17 *Hum. Rts. Q.* 443; Lance Compa, “...And the Twain Shall Meet? A North-South Controversy Over Labor Rights and Trade” (1995) 23 *Lab. Res. Rev.* 51; Virginia Leary, “The WTO and the Social Clause: Post Singapore” (1997) 8 *E.J.I.L.* 118; Gijbert van Liemt, “Minimum Labor Standards and International Trade: Would A Social Clause Work?” (1989) 128 *Int’l Lab. Rev.* 443; and Steve Charnovitz, “The Influence of International Labor Standards on the World Trade Regime: A Historical Overview” (1987) 126 *Int’l Lab. Rev.* 565.

²³ Catherine Barnard, *European Community Employment Law*, 2d ed. (Oxford: Oxford University Press, 2000). A number of authors emphasize that the benefits of NAFTA’s labour side agreement (the North American Agreement on Labour Cooperation, “NAALC”) include its potential to encourage cross-border co-operation by unions and labour activists, as well as its “spotlight” effect, which may build pressure on companies and states to improve labour practices. See e.g. Lance Compa, “NAFTA’s Labor Side Accord: A Three Year Accounting” (1997) 3 *NAFTA L. & Bus. Rev. Am.* 6; Roy J. Adams & Parbudyal Singh, “Early Experience with NAFTA’s Labour Side Accord” (1997) 18 *Comp. Lab. L. & Pol’y J.* 364.

absence of global labour law. As Teubner and others have observed, in the sphere of labour, as in other legal sectors, new forms of "global law" are emerging "in 'relative insulation' from the state, official international politics and international public law."²⁴ These nascent forms of global labour law take as their target of governance not states, but the giant MNCs that are perceived to be in a position to address and improve global labour standards through direct intervention and through leadership in the pursuit of "best practices." Therefore, in the search for a burgeoning global labour law, it is an error to focus solely on the actions of states and the international institutions they have created. Corporate codes of conduct,²⁵ international framework agreements between MNCs and international union federations,²⁶ internal works councils or committees²⁷ adopted by MNCs, and corporate campaigns waged by NGOs and social and worker activists may all influence normative labour practices quite apart from the state.

²⁴ Gunther Teubner, "Global Bukowina: Legal Pluralism in the World Society" in Gunther Teubner, ed., *Global Law Without a State* (Aldershot: Dartmouth Publishing, 1997) at 3, reference omitted [Teubner, "Global Bukowina"]. See also Trubek, Mosher & Rothstein, *supra* note 14; Santos, *supra* note 13; Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 E.J.I.L. 538; Anthony Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990); and Arthurs, "Collective Labour Law," *supra* note 17.

²⁵ Lance Compa & Tashia Hinchcliffe-Darricarrère, "Enforcing Labor Rights Through Corporate Codes of Conduct" (1995) 33 Colum. J. Transnat'l L. 663; Jorge F. Perez-Lopez, "Promoting International Respect for Worker Rights through Business Codes of Conduct" (1993) 17 Fordham Int'l L.J. 1; Arthurs, "Corporate Codes," *supra* note 1; Dickerson, *supra* note 1; Neil Gunningham & Joseph Rees, "Industry Self-Regulation: An Institutional Perspective" (1997) 19 Law & Pol'y. 363; Bob Hepple, "A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct" (1999) 20 Comp. Lab. L. & Pol'y J. 350; Neal Kearney, "Corporate Codes of Conduct: The Privatized Application of Labour Standards" in Sol Picciotto & Ruth Mayne, eds., *Regulating International Business: Beyond Liberalization* (New York: St. Martin's Press, 1999) 205; and Michael Posner & Justine Nolan, "Can Codes of Conduct Play a Role in Promoting Workers' Rights?" in Robert J. Flanagan & William B. Gould IV, eds., *International Labor Standards: Globalization, Trade, and Public Policy* (Stanford: Stanford Law and Policy, 2003) 207.

²⁶ See "Trade Union Councils and Networks Within Multinationals" (2000) 30 European Works Council Bull. 7 ["Councils and Networks"]; Keith D. Ewing, "Legal Accountability of TNCs" (2004) 11:3 Int'l Union Rts 8.

²⁷ The European Works Councils Directive requires community-scale undertakings to establish works councils composed of employee representatives for the purpose of informing and consulting employees on a range of issues. See EC, *Council Directive 95/45 of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees*, [1994] O.J.L. 254/64. Internal works councils and committees within MNCs have also emerged voluntarily, however, outside of the formal requirements of the EC Directive.

The extent to which these private models of labour governance have any real impact on the conduct of employers varies, of course, over time and space and by company. There have, however, been enough instances of MNCs addressing labour abuses in response to pressure from consumers, workers, and shareholders that the normative impact of these non-state forms of “global law” cannot be ignored in any exploration of the emergence of a global labour law.²⁸ A number of authors have identified this trend. For example, David Trubek, Jim Mosher, and Jeffrey Rothstein describe an emerging transnational vision for industrial relations in the following terms:

This vision rejects the idea that regulatory possibilities are confined to the binary choice between the national and the global and asserts that a complex regime can be constructed by weaving together normative arenas at many levels and across borders, deploying private rules, local practices, national laws, supranational forums, and international law in the interest of effective protection of workers and their rights.²⁹

Boaventura de Sousa Santos describes, similarly, the emergence of cosmopolitan transnational advocacy networks of NGOs, unions, and human rights organizations that aim “to counteract detrimental effects of hegemonic forms of globalization” and which have evolved “out of the awareness of the new opportunities for transnational creativity and solidarity created by the intensification of global interactions.”³⁰

Teubner argues that a theory of “global legal pluralism” is required to explain new forms of emerging “global law,” and he asserts that “global law will grow mainly from the social peripheries, not from the political centres of nation-states and international institutions.”³¹ Harry Arthurs expresses similar sentiments when he suggests that the enfeeblement of the state in the realm of labour regulation “may refocus attention on local struggles, on indigenous, implicit, and informal

²⁸ See Sabel, O'Rourke & Fung, “Realizing,” *supra* note 10; Mary Graham, *Democracy by Disclosure: The Rise of Technopopulism* (Washington: Governance Institute/Brookings Institution Press, 2002) [Graham, *Democracy*]; Mary Graham, “Regulation by Shaming” *Atlantic Monthly* 285:4 (April 2000) 34 [Graham, “Shaming”]; Dickerson, *supra* note 1; Janelle Diller, “On the Possibilities and Limitations of NGO Participation in International Law and its Processes: Corporate Applications” (2001) 95 *Am. Soc. Int'l Proc.* 304; and Konrad Yakabuski, “Ethical Tack Pays for Gilden” *The Globe and Mail* (7 December 2005) B2.

²⁹ Trubek, Mosher & Rothstein, *supra* note 14 at 1193. See also Teubner, “Global Bukowina,” *supra* note 24; Arthurs, “Collective Labour Law,” *supra* note 17.

³⁰ Santos, *supra* note 13 at 263.

³¹ Teubner, “Global Bukowina,” *supra* note 24 at 7.

lawmaking, on movements which have not become juridified but which actually draw their strength and sustenance from grass-roots involvement.”³² In these visions for a new global normative order in labour law, the state is not situated at the hub of the regulatory wheel, but rather as one actor in a pluralistic environment of state and non-state normative regimes.

This pluralist vision of an emerging global labour law affords a substantial role for non-state actors such as unions, consumers, investors, religious groups, and human rights activists and organizations. It encourages an exploration of forms of state regulation that might facilitate the creation of labour practice norms through indirect means. This role is not entirely a new one for many states. The labour law systems of most advanced economic states have long relied upon indirect forms of regulation, the most obvious being the institution of collective bargaining.³³ Collective bargaining law encourages employers and workers to negotiate their own web of rules, but does so by establishing a framework designed to alter the relative bargaining power of the parties. The ILO’s core conventions on freedom of association, the right to organize, and collective bargaining³⁴ promote a similar steering role for states in the governance of domestic employment relations. The challenge considered here is how state-based regulation can influence the development of global, pluralist models of normative labour practices applicable to corporations beyond the borders of the regulating state.

The crucial role of the state in ensuring that the appropriate national frameworks are in place to support emerging global legal

³² Arthurs, “Without the State,” *supra* note 14 at 45. See also Hepple, “New Approaches,” *supra* note 14 at 363; Blackett, *supra* note 14; Robert O’Brien, “NGOs, Global Civil Society and Global Economic Regulation” in Picciotto & Mayne, *supra* note 25, 257; and the Report of the Director-General of the International Labour Organization to the 85th Session of the International Labour Conference (1997), in which he urged the ILO to consider the “the mobilization of non-governmental actors,” including businesses, consumers, and retailers, as a result of the difficulties some states have in complying with ILO Conventions in the face of regulatory competition for capital (*ibid.* at 27).

³³ See Teubner, “Reflexive Elements,” *supra* note 9; Jill Murray, “The Sound of One Hand Clapping?: The ‘Ratcheting Labour Standards’ Proposal and International Labour Law” (2001) 14 *Austl. J. of Lab. L.* 306; and Harry Arthurs, “The Law of the Shop: The Debate Over Industrial Pluralism” (1985) 38 *Curr. Leg. Probs.* 83.

³⁴ Convention 87, Freedom of Association and Protection of the Right to Unionize (1948); and Convention 98, Right to Organize and Collective Bargaining (1949).

orders has been noted in other contexts, most notably with regard to *lex mercatoria* and international commercial arbitration.³⁵ State law can encourage an emerging global system of private commercial law by ensuring that foreign arbitration awards are enforceable in domestic courts. Here, the state fosters private forms of global “self-regulation.” Is there a comparable role for the state in the development of a private legal order governing global labour rights? Certainly, some advanced economic states can influence foreign labour practices by conditioning trade privileges on the establishment and enforcement of specified standards. The U.S. and European Generalized System of Preferences are obvious examples. These mechanisms have influenced positive developments in labour practices within some states by creating an incentive for foreign states and employers to improve those practices “voluntarily.”³⁶

This article considers a different sort of tactic with overlapping objectives. The focus here is on using domestic regulation to empower foreign indigenous movements, including workers’ and labour movements, as well as foreign governments, to enable them to develop more localized countervailing strategies to mobile global capital. This approach requires the state to identify forces that influence the key interactions between the industrial relations actors that shape normative labour practices in foreign states, and then to use domestic regulation to activate, agitate, intensify, or reinforce those forces. It challenges us to examine how state law might engage private actors (such as NGOs, human rights groups, consumer groups, investors, religious groups) that have not historically participated directly in the formation of normative models of labour standards. This challenge leads the labour lawyer into unfamiliar territory. What is needed is an approach to regulation that recognizes the norm-creating potential of complex interactions between

³⁵ See Wai, *supra* note 13; Graf-Peter Caliess, “Reflexive Transnational Law: The Privatization of Civil Law and the Civilisation of Private Law” (2002) 23 *Zeitschrift für Rechtssoziologie* 185, online: <http://www.luciusverlag.com/zeitschriften/ztschr_rechtssoziologie/zeitschrift_fuer_rechtssoziologie_2_2002.htm>; Teubner, “Global Bukowina,” *supra* note 24; and Reza Banakar, “Reflexive Legitimacy in International Arbitration” in Volkmar Gessner & Ali Cem Budak, eds., *Emerging Legal Certainty: Empirical Studies On The Globalization Of Law* (Aldershot, UK: Ashgate, 1998).

³⁶ Jeffrey S. Vogt & Lance Compa, “Labor Rights in the Generalized System of Preferences: A 20-Year Review” (2003) 22 *Comp. Lab. L. & Pol’y J.* 199.

multiple domestic and international private actors. The most obvious candidates are theories of “decentred regulation” or “reflexive law.”³⁷

II. “DECENTRED” REGULATION AND REFLEXIVE LAW

A. *A Decentred Role for the State*

The notion of a decentred state supports a pluralist vision of regulation.³⁸ Regulation that is decentred, or responsive,³⁹ or reflexive, perceives for the state an indirect role in the governance of complex social and economic matters, a role as facilitator and motivator of the norm-producing potential of non-state actors. Decentred law involves, then, the regulation of the “contextual conditions” of self-regulation, or the “regulation of self-regulation,” but with the instrumental intent of achieving state objectives.⁴⁰ It seeks to encourage the private creation of substantive outcomes from the periphery of social and economic interactions, by discovering ways to regulate procedures to influence communications and bargaining by private actors.

Decentred regulation is often posited as a “post-modern” regulatory theory, as a solution to the incapacity of states to regulate complex social and economic problems in modern societies by means of “command-and-control” (CAC) regulation.⁴¹ CAC is described in the decentred regulation literature as the promulgation by the state of substantive, technical legal rules backed by sanctions in the form of civil fines or criminal prosecution.⁴² In presenting decentred regulation as a

³⁷ See e.g. Calliess, *supra* note 35; Ralf Rogowski & Ton Wilthagen, eds., *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Boston: Kluwer Law and Taxation Publishers, 1994); William E. Scheuerman, “Reflexive Law and the Challenges of Globalization” (2001) 9 J. Pol. Phil. 81 [Scheuerman, “Reflexive Law”]; and Benjamin J. Richardson, “Diffusing Environmental Regulation Through the Financial Services Sector” (2003) 10 M.J.E.C.L. 233.

³⁸ Black, “Decentring Regulation,” *supra* note 8 at 104.

³⁹ Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending The Deregulation Debate* (New York: Oxford University Press, 1992); and Gunningham & Rees, *supra* note 25.

⁴⁰ See Teubner, *Autopoietic System*, *supra* note 9 at 67; and Teubner, “Reflexive Elements,” *supra* note 9; Black, “Decentring Regulation,” *supra* note 8.

⁴¹ See Teubner, “Reflexive Elements,” *ibid.*; Helmut Wilke, “Societal Guidance Through Law?” in Alberto Frebbrajo & Gunther Teubner, eds., *State, Law, And Economy As Autopoietic Systems: Regulation And Autonomy In A New Perspective* (Milan: Giuffrè, 1992).

⁴² See Black, “Decentring Regulation,” *supra* note 8 at 105-06; Robert Baldwin, “Regulation: After Command and Control” in Keith Hawkins, ed., *The Human Face Of Law*:

solution to the failures of CAC, “decentralists” find themselves aligned with “deregulationists,” those who argue for a retreat to a greater reliance on market forces and individual employment contracts to distribute economic and social outcomes.⁴³ The two camps appear to diverge, however, on the solution to the regulatory failure of CAC, at least rhetorically. Decentralists continue to envision a strong instrumental activist state, but one with a renewed focus on indirect, procedural forms of regulation that emphasize self-regulation. For this reason, some commentators have likened the decentred approach to regulation to “Third Way” politics, which envisions a largely self-governing civil society facilitated, enabled, democratized, and encouraged by a guiding state.⁴⁴

The reasons posited for the incapacity of states to regulate through CAC vary. In its most radical form, the argument is a key component of autopoietic systems theory developed, most notably, by Niklas Luhmann⁴⁵ and Teubner. Others are less abstract in their critiques of CAC, arguing that many social problems have simply become too complex to regulate through a myriad of technical rules, and that governments lack the expertise to regulate complex modern issues, such as pollution, or the ability to enforce rules through sporadic inspections.⁴⁶ More recently, though, the notion of an enfeebled state, which underlies most critiques of CAC in the decentralist literature, has attracted the attention of writers interested in theories of globalization

Essays in Honour of Donald Harris (Oxford: Oxford University Press, 1997); James Paul Kimmel, Jr., “Disclosing the Environmental Impact of Human Activities” (1990) 138 U. Pa. L. Rev. 505; Neil Gunningham & Peter Grabovsky with Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998); and Eric Orts, “Reflexive Environmental Law” (1995) 89 Nw. U.L. Rev. 1227.

⁴³ See e.g. Richard Posner, “Some Economics of Labor Law” (1984) 51 U. Chicago L. Rev. 988.

⁴⁴ See Callies, *supra* note 35 at 189; Christopher H. Schroeder, “Third Way Environmentalism” (2000) 48 U. Kan. L. Rev. 801; Hugh Collins, “Is there a Third Way in Labour Law?” in Conaghan, Fischl & Klare, *supra* note 1, 449; and Anthony Giddens, *The Third Way: The Renewal Of Social Democracy* (Cambridge: Polity Press, 1998).

⁴⁵ Niklas Luhmann, *The Differentiation of Society* (New York: Columbia University Press, 1982); Niklas Luhmann, “The Self-Reproduction of Law and its Limits” in Teubner, ed., *Dilemmas of Law in the Welfare State*, *supra* note 9, 111.

⁴⁶ See William Sage, “Regulating Through Information: Disclosure Laws and American Health Care” (1999) 99 Colum. L.J. 1701; William Pederson, “Regulation and Information Disclosure: Parallel Universes and Beyond” (2001) 25 Harv. Envtl. L. Rev. 151.

and the law, and transnational governance.⁴⁷ It is here, more so than in the national context, where the limitations of more direct forms of regulation are most visible.

A decentralist vision of regulation is the legal paradigm best suited to transnational regulation. Scheuerman explains the basis for this argument succinctly in the following passage:

The attempt to develop an authentically transnational system of economic regulation dramatically underscores the Achilles' heel of the classical model of a solitary lawmaker outfitted with the task of undertaking the direct regulation of a host of distinct social activities. If the notion that the legislature can serve as an omniscient source of "central steering" already evinced signs of decay within the confines of the nation-state, it risks becoming fundamentally anachronistic given the unprecedented complexity implied by the tasks of transnational regulation.⁴⁸

The indirect manner of regulation posited by a decentralist approach to governance has been presented as a potential solution to the challenges of transnational governance in a variety of areas ranging from environmental regulation⁴⁹ to commercial governance⁵⁰ to intellectual property.⁵¹

B. *"Reflexive Law" as a Paradigm for Influencing Foreign Corporate Activities*

The decentralist approach to regulation is associated closely with the work of Gunther Teubner, and his theory of "reflexive law." Teubner argues that law has evolved according to three ideal "types."⁵² The first is "formal" law, in which the state "creates and applies a body of universal rules" that are then developed by legal professionals who employ "peculiarly legal reasoning to resolve specific conflicts."⁵³ Formal law facilitates "private ordering" by establishing basic market

⁴⁷ See e.g. Calliess, *supra* note 35; Scheuerman, "Reflexive Law" *supra* note 37; Richardson, *supra* note 37; Orts, *supra* note 42; Black, "Proceduralizing Regulation," *supra* note 8 at 600; and Banakar, *supra* note 35.

⁴⁸ Scheuerman, *ibid.* at 88.

⁴⁹ Richardson, *supra* note 37; Orts, *supra* note 42.

⁵⁰ Banakar, *supra* note 35.

⁵¹ Calliess, *supra* note 35.

⁵² Teubner, "Reflexive Elements," *supra* note 9 at 240.

⁵³ *Ibid.*

structures in the form of rules of contract, property, and tort.⁵⁴ Legal institutions act primarily as “referees,” resolving disputes related to these basic rules.⁵⁵

As societies become more complex, formal laws become insufficient to deal with their regulatory needs. A new paradigm, “substantive law,” emerges in response. Substantive law shifts the “norm rationality”—the fundamental principles which justify the specific way that legal norms should govern human actions⁵⁶—from “autonomy to regulation”:

The justification for substantive law is to be found in the perceived need for the collective regulation of economic and social activities to compensate for inadequacies in the market. Instead of delimiting spheres for autonomous private action, the law directly regulates social behavior by defining substantive prescriptions.⁵⁷

Thus, substantive law confers on the state the responsibility for “defining goals, selecting normative means, prescribing concrete actions, and implementing programs.”⁵⁸ Substantive law is therefore instrumental law; the state uses law in pursuit of specific social or economic outcomes.

Teubner argues that as societies continue to grow in complexity, they become increasingly differentiated into a variety of horizontal social subsystems, such as the economic, political, religious, scientific, and legal subsystems. These create their own internal norms and discourses so that no one subsystem can communicate directly with another or impose upon another subsystem norms produced outside of it.⁵⁹ This has profound implications for regulation, according to Teubner, because it means that substantive, top-down, CAC-style laws are destined to be ineffective since “[t]he differentiation of specialized discourses within society precludes a simple hierarchical model of rulers

⁵⁴ *Ibid.* at 252.

⁵⁵ Orts, *supra* note 42 at 1255.

⁵⁶ Teubner, “Reflexive Elements,” *supra* note 9 at 252.

⁵⁷ *Ibid.* at 253.

⁵⁸ *Ibid.* at 254.

⁵⁹ Patrick Capps & Henrick Palmer Olsen, “Legal Autonomy and Reflexive Rationality in Complex Societies” (2002) 11 Soc. & Legal Stud. 547 at 551.

and ruled.”⁶⁰ Thus, while the political subsystem can attempt to use the legal subsystem to influence behaviour within other subsystems, the results will necessarily be unpredictable and unstable because no one subsystem possesses the knowledge and wisdom to predict how its communications will be interpreted and acted upon by the other social subsystems.⁶¹ Moreover, attempts to impose externally created norms through legal regulation can result in what Teubner describes as the “regulatory trilemma”: indifference within the regulated subsystem; damage or destruction of the regulated subsystem through “creeping legalism”; or destruction of the legal subsystem itself through the “oversocialization” of law.⁶²

According to Teubner, the solution to this inevitable failure of substantive law is to be found in the evolution of law towards a new paradigm that he calls “reflexive law.” Reflexive law recognizes law’s limitations as a tool for controlling complex social behaviour. It focuses on the norm-producing potential of intermediate institutions between the state and markets and private actors and seeks ways to mobilize, to influence, to steer, to “irritate”⁶³ those institutions so that they create desirable norms and practices. Eric Orts explains reflexive law in the following terms:

Reflexive law forsakes direct regulation and focuses instead on how law can rationally structure processes and procedures—both of the legal system itself and other social systems—in view of the complexity of society and its problems. ... Rather than trying to regulate a social problem as a whole, reflexive law aims to enlist other social institutions to treat the issue. Reflexive legal strategies look to influence the processes of intermediary institutions, such as government agencies and companies, rather than regulate social behavior directly. ... [Reflexive law aims] to encourage thinking and behavior in the right direction.⁶⁴

⁶⁰ “The ‘State’ of Private Networks: The Emerging Regime of Polycorporatism in Germany” (1993) B.Y.U.L. Rev. 553 at 556. See also Orts, *supra* note 42 at 1260.

⁶¹ Black, “Proceduralizing Regulation,” *supra* note 8 at 602.

⁶² *Ibid.*; Teubner, “After Legal Instrumentalism,” *supra* note 9; and Colin Scott, “Regulation in the Age of Governance: The Rise of the Post-Regulatory State” in Jacint Jordana & David Levi-Faur, eds., *The Politics of Regulation* (Cheltenham: Edward Elgar, 2004) 145.

⁶³ Gunther Teubner, “Regulatory Law: Chronicle of Death Foretold” (1992) 1 Soc. & Legal Stud. 451 at 463 [Teubner, “Death Foretold”].

⁶⁴ *Supra* note 42 at 1262, 1264.

Reflexive law, therefore, seeks not to order specific social or economic outcomes, but to facilitate communication between subsystems and social actors in a manner that will lead to the private creation of socially desirable norms and practices. It “attempts to guide human action by redefining and redistributing property rights”⁶⁵ and by compensating for “inequality of power and information”⁶⁶ in society.

Whether law is an autopoietic subsystem characterized by closed subsystems,⁶⁷ whether law’s evolutionary response to increasingly complex societies means that reflexivity will necessarily become the “dominant form of post-modern law,” as Teubner asserts,⁶⁸ and the extent to which CAC regulation is actually impotent as a modern governance tool, are among the claims of reflexive law that remain highly contested.⁶⁹ These debates tend to play out within the theoretical domain of the state’s capacity to govern behaviour within its own borders. But certain claims of reflexive law appear particularly buoyant when the target of state-based regulation is private behaviour outside of the state’s formal jurisdiction. In this context, for example, the claim that CAC regulation has limited capacity to influence behaviour seems less controversial. Moreover, reflexive law’s prescriptions for indirect forms of governance that can influence private conduct open new possibilities for governance beyond state borders.

Two aspects of reflexivity appear to have particular relevance in the context of the governance of foreign activities by a state. First, reflexive regulation seeks to cause private actors to engage in self-reflection, to learn about and contemplate the negative externalities associated with their conduct. This process may cause these actors to make voluntary adjustments in their behaviour that are consistent with the goals of the state. Second, reflexive law encourages lawmakers to consider how to motivate and facilitate the creation of private networks of countervailing power to existing powerful economic interests. It

⁶⁵ Teubner, “Reflexive Elements,” *supra* note 9 at 255.

⁶⁶ *Ibid.* at 277.

⁶⁷ See Anthony Beck, “Law as an Autopoietic System?” (1994) 14 *Oxford J. Legal Stud.* 401; Capps & Olsen, *supra* note 59.

⁶⁸ “Reflexive Elements,” *supra* note 9 at 246. See *e.g.* Orts, *supra* note 42 at 1263, disputing this claim.

⁶⁹ See *e.g.* Hubert Rottleuthner, “The Limits of Law—The Myth of a Regulatory Crisis” (1989) 17 *Int’l J. Soc. L.* 273. See also Teubner’s reply to Rottleuthner in Teubner, “Death Foretold,” *supra* note 63.

therefore welcomes the emergence of transnational networks of actors that seek to build countervailing power to global capital, and challenges regulators to explore possibilities to influence interactions between global capital and these burgeoning forces of private antagonistic actors. Both of these regulatory goals seem well suited to the challenge of influencing the conduct of MNCs across state borders because the manner by which they seek to influence is not confined by jurisdictional boundaries.⁷⁰

III. INFORMATION DISCLOSURE REGULATION AS A TOOL FOR INFLUENCING CORPORATE BEHAVIOUR

A. *Information Disclosure and Domestic Corporate "Social" Performance*

The "tools" of reflexive law, or decentred law more generally, include incentives, taxes, subsidies to intermediate institutions (such as consumer watchdog groups), and other mechanisms to alter power relations between antagonistic groups, including most notably for our purposes, mandatory information disclosure.⁷¹ Corporate information disclosure regulation is intended to cause corporate "self-reflection" by injecting new risk factors into the management thought process. As Louis Loss has so eloquently noted in relation to securities disclosure laws, "[p]eople who are forced to undress in public will presumably pay some attention to their figures."⁷² Disclosure regulation can also be used to mobilize and empower non-state actors and thereby to influence the conditions of engagement within which these actors bargain with corporations over issues of interest to the state. It encourages corporations to adjust the behaviour targeted by the disclosure law in order to minimize potential negative reaction by stakeholders that could interfere with corporate objectives. In this way, disclosure regulation may facilitate a climate in which it makes good business sense for

⁷⁰ See Scheurman, *supra* note 37; Calliess, *supra* note 35.

⁷¹ See Black, "Decentering Regulation," *supra* note 8 at 126; Teubner, "Reflexive Elements," *supra* note 9 at 277; Orts, *supra* note 42; Richardson, *supra* note 37; Richard Stewart, "A New Generation of Environmental Regulation?" (2001) 29 *Capital U.L. Rev.* 121.

⁷² *Fundamentals of Securities Regulation*, 2d ed. (Boston & Toronto: Little, Brown & Co., 1988) at 33. See also Louis Lowenstein, "Financial Transparency and Corporate Governance: You Manage What You Measure" (1996) 96 *Colum. L. Rev.* 1335 at 1344.

corporations to “voluntarily” adjust behaviour in ways desired by the state.

The use of disclosure regulation as a tool for influencing corporate practices is of course not novel. Financial disclosure has long been a predominant regulatory strategy of the corporate and securities laws of many countries, particularly the United States.⁷³ Furthermore, disclosure of risk information in the form of product labelling is a dominant feature of consumer law in most states.⁷⁴ These types of disclosure requirements are often justified in market terms: they are intended to correct information asymmetries that impede the efficient operation of markets. In other instances, however, disclosure regulation is intended not so much to correct market distortions as to influence corporate behaviour, including corporate social practices, such as environmental or human rights practices. As Breyer noted over twenty years ago, information disclosure regulation may be used to curb undesirable corporate conduct by “bringing legal or moral pressure to bear upon those engaging in it.”⁷⁵

An interesting example of this form of “social disclosure” regulation is the *U.S. Home Mortgage Disclosure Act*, enacted by U.S. Congress in 1975, which requires lending institutions to disclose a racial breakdown of loan recipients to discourage racially based lending practices.⁷⁶ The best known examples of social disclosure regulation, however, are those that target environmental practices. The *U.S. Emergency Planning and Community Right-to-Know Act* of 1986,⁷⁷ for

⁷³ See John Coffee, “Market Failure and the Economic Case for a Mandatory Disclosure System” (1994) 70 Va. L. Rev. 717; Joel Seligman, “The Historical Need for Mandatory Corporate Disclosure Systems” (1983) 9 J. Corp. L. 1; Louis Brandeis, *Other People’s Money And How Bankers Use It* (New York: Harper & Row, 1967); Williams, *supra* note 11; Lowenstein, *ibid.*; Wesley A. Magat & W. Kip Viscusi, *Informational Approaches to Regulation* (Cambridge: MIT Press, 1992); and Mary Condon, *Making Disclosure: Ideas And Interests In Ontario Securities Regulation* (Toronto: University of Toronto Press, 1998).

⁷⁴ See Graham, *Democracy*, *supra* note 28; Stephen Breyer, *Regulation And Its Reform* (Cambridge, MA: Harvard University Press, 1982); and Sanford Grossman, “The Informational Role of Warranties and Private Disclosure About Product Quality” (1981) 24 J.L. & Econ. 461.

⁷⁵ Breyer, *ibid.* at 161. See also Lowenstein, *supra* note 72 at 1342; Merrit B. Fox, “Required Disclosure and Corporate Governance” (1999) 62:3 Law & Contemp. Probs. 113 (1999).

⁷⁶ 12 U.S.C. §2801-10 (1994). See also “History of HMDA,” online: Federal Financial Institutions Examination Council <<http://www.ffiec.gov/hmda/history2.htm>>.

⁷⁷ 42 U.S.C. 11001 [*Right-to-Know Act*]. See also the review of the European Community’s EMAS program in Orts, *supra* note 42.

example, creates a Toxics Release Inventory (TRI) and requires corporations to disclose the amounts of designated toxins released into the community.⁷⁸ The results are then compiled by the Environmental Protection Agency (EPA) and posted on the EPA's website.⁷⁹ A primary objective of the legislation, according to Pederson, is to pressure corporations that produce social costs in the form of pollution to "consider voluntary action to reduce it."⁸⁰

Mary Graham has described, in anecdotal fashion, how this disclosure law caused one corporation to make "voluntary" reductions in emissions:

The day it became clear that disclosure was a powerful regulatory tool was June 30, 1988, when Richard J. Mahoney, then the head of Monsanto, made a dramatic announcement on the eve of the first TRI reporting deadline. Mahoney said bluntly that he had been astounded by the magnitude of Monsanto's annual release of 374 million pounds of toxins. He vowed to cut the release of air emissions by 90 percent worldwide by the end of 1992—news to the engineers at the company's thirty-five plants. A year later, when the EPA announced first-year results for all companies, USA Today ran a special report naming the worst polluters, and the National Wildlife Federation published a book titled *The Toxic 500*. Such companies as Du Pont and 3M vowed to reduce toxic pollution. Corporate shaming had produced results.⁸¹

This short anecdote highlights two important aspects of disclosure-induced reflexivity. Firstly, by forcing corporations to compile information about their activities, disclosure laws may both educate and encourage "self-reflection" by corporate leaders on matters that the state deems important. Implicit in a legal requirement to disclose information about one's activities is a duty to collect that information. Disclosure regulation therefore forces self-referential fact-finding. If disclosure of the information may impede the company's own goals—

⁷⁸ *Right-to-Know Act, ibid.*, §313.

⁷⁹ "Toxics Release Inventory Program," online: Environmental Protection Agency <<http://www.epa.gov/tri>>.

⁸⁰ Pederson, *supra* note 46 at 151. See also Robert V. Percival *et al.*, *Environmental Regulation: Law, Science and Policy*, 2d ed. (Little, Brown & Co., 1996) at 624 (It was anticipated by Congress that disclosure of the information would "enable the public to put substantial pressure on companies to reduce emissions"); Shameek Konar & Mark Cohen, "Information as Regulation: The Effect of Community Right to Know Laws on Toxic Emissions" (1987) 32 *J. of Env'tl. Econ. & Mgmt* 109; Andy Gouldson, "Risk, Regulation and the Right to Know: Exploring the Impacts of Access to Information on the Governance of Environmental Risk" (2004) 12 *Sustainable Dev.* 136; and Mark Stephan, "Environmental Information Disclosure Programs: They Work, But Why?" (2002) 83 *Soc. Sci. Q.* 190.

⁸¹ Graham, *Democracy, supra* note 28 at 21-24.

perhaps by threatening the firm's public image in a manner that might influence sales or by increasing public demand for more direct forms of state intervention—then it may encourage corporate leaders to take a more personal interest in the targeted social practice.⁸²

This may lead to the introduction of better internal information flow systems designed to ensure that relevant information is both collected and conveyed up the corporate chain to responsible executives and directors. This in turn introduces a form of internal discipline.⁸³ Subordinates or contractors directly responsible for the targeted practices will reflect more carefully on their conduct if they will ultimately be held accountable through discharge, loss of contracts, or some other form of discipline.⁸⁴ For example, Edward Iacobucci argues that mandatory disclosure of executive compensation levels and methodology “disciplines” compensation committees and directors to “carefully consider their choice of pay instruments” because they will need to justify their decisions to shareholders, the media, and other interested stakeholders.⁸⁵ In this way, disclosure regulation may, by indirect means, address problems in corporate culture that have historically permitted or encouraged employees or suppliers to engage in undesirable behaviour.

Secondly, various groups in society—including consumers, investors, workers, and social activists—can use the information to pressure corporations to adjust their behaviour in a manner desired by the state. Disclosure regulation transfers to the corporate actors the cost of collecting information that can then be used by antagonistic forces to challenge corporate practices.⁸⁶ This is particularly important in the

⁸² *Ibid.* at 144-45.

⁸³ See George W. Coombe, Jr., “Multinational Codes of Conduct and Corporate Accountability: New Opportunities for Corporate Counsel” (1980) 36 *Bus. Law.* 11 at 24 (“increased corporate disclosure ... could have a healthy internal effect upon that process causing management to approach corporate policy decisions with the realization that many will become publicly available; accordingly, more corporate decisions will be arrived at with heightened management appreciation of potential public impact”). See also Lowenstein, *supra* note 72 at 1357 (external discipline of financial disclosure laws improve “internal discipline” of managers).

⁸⁴ See comments of Gunningham & Rees, *supra* note 25 at 382.

⁸⁵ Edward M. Iacobucci, “The Effects of Disclosure on Executive Compensation” (1998) 48 *U.T.L.J.* 489 at 501.

⁸⁶ See *e.g. ibid.* at 497-98 (mandatory disclosure of executive compensation lowers the cost to shareholders of collecting the information and thereby facilitates shareholder activism aimed at influencing compensation practices).

context of efforts to influence corporate practices in foreign jurisdictions, because the cost of collecting information about those practices will often prove prohibitively expensive for most non-state actors. Access to information about the conduct of powerful actors may expose vulnerabilities and thereby alter power dynamics in bargaining between various private actors.⁸⁷

For example, Graham and Andy Gouldson have both documented the work of environmental groups that have used information obtained pursuant to environmental disclosure laws to expose and publicly shame the worst corporate polluters.⁸⁸ These studies are supported by a recent report of the EPA, which documents the range and activities of private actors who use the toxins release information to campaign against, and sometimes work with, corporations to identify ways to improve environmental performance.⁸⁹ Benjamin Richardson argues for mandatory disclosure of global environmental practices in order to empower and encourage environmental activism by financial service providers and investors.⁹⁰ Similarly, Iacobucci argues that executive compensation disclosure laws “encourage investor activism” and, in particular, encourage institutional investors to build public reputations for careful monitoring of compensation practices.⁹¹ Each of these arguments shares the central premise that disclosure regulation can have important normative influence on corporate behaviour by empowering private actors to act as monitors of corporate conduct.

⁸⁷ Cass R. Sunstein, “Information Regulation and Informational Standing: Atkins and Beyond” (1999) U. Pa. L. Rev. 613 at 619; Teubner, “Reflexive Elements,” *supra* note 9 at 277; Werner Antweiler & Kathryn Harrison, “Toxic Release Inventories and Green Consumerism: Empirical Evidence from Canada” (2003) 36 C. J. Econ. 495 at 496; Richardson, *supra* note 37 at 261; and Iacobucci, *ibid*.

⁸⁸ Graham, *Democracy*, *supra* note 28; Gouldson, *supra* note 80.

⁸⁹ Environmental Protection Agency Toxics Release Inventory Program, “How Are The Toxics Release Inventory Data Used” (2003), online: United States Environmental Protection Agency <<http://www.epa.gov/tri>>.

⁹⁰ *Supra* note 37 at 261.

⁹¹ *Supra* note 85 at 501.

B. *Domestic Information Disclosure Regulation and the Regulation of Foreign Activities*

A notable characteristic of disclosure regulation is that its product, information, cannot easily be constrained by national borders. As Graham notes, disclosure regulation creates “the potential for impacts that are not circumscribed by state or national boundaries. Information required in one jurisdiction becomes available everywhere, unimpeded by political or geographical barriers.”⁹² Moreover, access to this information is today often instantaneous: anyone with Internet access can obtain information posted there. This feature of modern society has obvious implications for the governance of multinational actors.⁹³

Individuals and organizations scattered across the globe can now share and distribute information about corporate behaviour instantaneously.⁹⁴ The Internet can both facilitate and empower local and global networks of actors in their campaigns to pressure MNCs and their many suppliers to address labour practice issues. Thus, a requirement to disclose information that is not otherwise easily obtainable can both empower local advocacy movements in host states, and also facilitate transnational advocacy networks that share with local movements the objective of pressuring MNCs to improve labour practices within their global supply chains.

Consider, for example, recent proposals by a coalition of labour, environmental, and human rights organizations known as the International Right to Know Campaign (IRKC).⁹⁵ IRKC has proposed that existing U.S. environmental disclosure laws apply to all foreign

⁹² Graham, *Democracy*, *supra* note 28 at 11.

⁹³ Scheuerman, “High-Speed Economy,” *supra* note 15.

⁹⁴ For consideration of how labour organizations are using the Internet in campaigns to improve labour practices, see Eric Lee, *The Labor Movement and the Internet: The New Internationalism* (Chicago: Pluto Press, 1997); W.J. Diamond & R.B. Freeman, “Will Unionism Prosper in Cyberspace?: The Promise of the Internet for Employee Organization” (2002) 40:3 Brit. J. Indus. Rel. 569; and Arthur B. Shostak, “Today’s Unions as Tomorrow’s CyberUnions: Labor’s Newest Hope” (2002) 23 J. Lab. Res. 237.

⁹⁵ See International Right to Know Campaign (IRKC) “List of Affiliates,” on file with author. See also the website of the Global Corporate Sunshine Group, online: <<http://www.corporatesunshine.org/>>, which argues for greater disclosure of foreign corporate social and environmental conduct within the scheme of securities disclosure laws. On this latter approach, see Williams, *supra* note 11.

operations of U.S. MNCs in addition to domestic operations.⁹⁶ The IRKC points to the *Foreign Corrupt Practices Act* as an example of the successful use of domestic disclosure regulation to influence foreign practices of MNCs.⁹⁷ That legislation creates offences for bribery of foreign officials by MNCs and relies for its enforcement largely upon a series of accounting and reporting requirements in the statute.⁹⁸ Disclosure regulation that targets foreign practices, such as that proposed by IRKC, would have obvious reflexive attributes.

Like its domestically-targeted counterpart, such a regulation would require MNCs to introduce information-gathering processes. Labour practices information would be compiled, reviewed, and ultimately disclosed by corporate officials, who would seek to prevent or at least minimize negative reaction by the public, the state, or their business partners. This aspect of reflexivity should not be underestimated. Many MNCs deny knowledge of the labour practices of their foreign suppliers. For example, in response to ETAG's proposal for mandatory disclosure of factory locations, the Retail Council of Canada asserted that "tracking clothing factories is almost impossible."⁹⁹ This is a somewhat surprising admission, since it implies that MNCs and retailers in the apparel industry are not only unaware of who is making the products being sold to Canadian consumers, but also, by implication, that they have no knowledge of the conditions under which those products are made. Certainly this may be the case for some MNCs and, if true, bolsters the argument for mandatory disclosure of information about foreign operations because it identifies a failure of self-regulation. A disclosure regime targeting foreign activities would oblige corporations to introduce processes for tracking the many links within their global supply chains, a useful management exercise and one that is

⁹⁶ IRKC, "International Right to Know: Empowering Communities Through Corporate Transparency" (January 2003), on file with author.

⁹⁷ 15 U.S.C. § 78dd1-78dd3 (1998).

⁹⁸ Commentary on the *Foreign Corrupt Practices Act* is voluminous. For recent treatments, see, H. Lowell Brown, "Extraterritorial Jurisdiction Under the 1988 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?" (2001) 26 N.C.J. Int'l L. & Com. Reg. 239; Steven R. Salbu, "The Foreign Corrupt Practices Act as a Threat to Global Harmony" (1999) 20 Mich. J. Int'l L. 419.

⁹⁹ Sharon Maloney, spokesperson for the Council, quoted in Erica Johnson, "'Cut It Out' Campaign focuses on sweatshop labour," *Canadian Broadcasting Corporation* (27 March 2002), online: <<http://www.cbc.ca/consumers/market/files/home/cutitout/>>.

necessary for any business seeking to be a socially responsible global actor.¹⁰⁰

Additionally, the information disclosed under the IRKC proposal could facilitate local and transnational activism designed to pressure corporations to adjust their conduct. Information disclosed pursuant to a U.S. law requiring disclosure of emissions levels in Colombia, for example, could be used by Colombian environmental groups to pressure local officials to take action against the corporation or to pressure the corporation directly. The information might also facilitate links between environmental activists in other countries, and other interested stakeholders who share similar objectives or concern about the practices of a particular corporation. In this way, state-based corporate social disclosure regulation has the potential to build countervailing power to corporate interests by arming foreign indigenous civil society groups as well as transnational advocacy networks with potentially useful information that might otherwise have been inaccessible.

IV. THE CHALLENGE OF DESIGNING EFFECTIVE DISCLOSURE REGULATION

I have focused so far on the potential contribution of disclosure regulation to the emergence of non-state forces that could influence foreign corporate social practices. In this part I explore some of the challenges that must be addressed by any effective disclosure regime. Designing an effective, instrumental disclosure regime is tricky business. Three challenges in particular need to be considered in the design of a disclosure model addressing foreign labour practices: (1) How can the state ensure that the information is presented in a manner that is meaningful to the intended audience?; (2) How can the state verify the information?; and (3) How can the state avoid unintended, adverse effects arising from market responses?

¹⁰⁰ For example, some companies include in their codes of conduct a clause intended to permit it to keep track of the identity of all subcontractors who perform work on the company's products. See e.g. "Roots Workplace Code of Conduct" (September 2004), online: <http://www.roots.com/new_canada/html/about_us/RootsCodeofConduct.pdf>, which requires that suppliers disclose to Roots Canada the "name and address of every subcontractor used in the production of Roots garments and products" (*ibid.* at 1).

A. *The Information Disclosed is Not Meaningful to the Targeted Audience*

Advocates of corporate information disclosure from Louis Brandeis forward have identified the manner in which information is presented as crucial to the success of disclosure regulation.¹⁰¹ If the information is not presented in a manner that is meaningful to the intended audience, then disclosure regulation may have no effect, or worse, may cause people to become "less informed."¹⁰² This observation is supported by a variety of studies exploring how consumers react to product labelling initiatives.¹⁰³ It is unclear what relevance these findings would have in the context of disclosure of information about foreign labour practices, but we can anticipate a number of challenges that will confront designers of a system of disclosure regulation that relates to labour practices in foreign states.

One obvious problem arises from the limited knowledge most consumers possess about global labour practices. Consider, for example, a requirement for companies to disclose to consumers the actual terms and conditions of employment of a particular group of foreign workers.¹⁰⁴ Most consumers in advanced economic states will lack sufficient contextual knowledge to fully assess raw information about labour practices, such as wage levels or hours of work. How will a Canadian consumer react to a clothing label that discloses that the employees who made the garment were paid twenty cents per hour, and

¹⁰¹ Brandeis, *supra* note 73 at 71; Breyer, *supra* note 74 at 163; Cass R. Sunstein, *Free Markets and Social Justice* (New York: Oxford University Press, 1997) at 337 [Sunstein, *Free Markets*]; Cass R. Sunstein & Richard Pildes, "Reinventing the Regulatory State" (1995) 62 U. Chicago L. Rev. 1; Graham, *Democracy*, *supra* note 28; and Magat & Viscusi, *supra* note 73 at 186.

¹⁰² Sunstein, *Free Markets*, *ibid.* at 284.

¹⁰³ *Ibid.* at 337-38; W. Kip Viscusi, "Predicting the Effects of Food Cancer Risk Warnings on Consumers" (1988) 43 Food Drug Cosm. L.J. 283; W. Kip Viscusi *et al.*, *Learning About Risk: Consumer and Worker Responses to Hazard Information* (Cambridge: Harvard University Press, 1987); and Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge: Harvard University Press, 1993) at 33-38. See also Gouldson, *supra* note 80 at 142 (discussing the challenge of presenting complex environmental information in a manner accessible to the public).

¹⁰⁴ Ayres has proposed that labour practices information should be "monetized" and provided to consumers in raw form at the point of purchase as a means of casting the consumer as the "ethical sovereign determining what level of compensation is fair." This proposal would raise these issues directly. See Ian Ayres, "Monetize Labor Practices" in *An End to Sweatshops?*, *supra* note 10, 80 at 83.

worked a fifteen hour day in a non-unionized workplace in Bangladesh? Are those “good” or “bad” conditions of work by Bangladeshi standards? By South Asian standards? What is an appropriate comparator? What “signal” is this information intended to send?

Without any context in which to assess this raw information, consumers will filter it through their own personal knowledge, biases, and experiences. For many consumers in advanced economic states, whose experiences of employment conditions are limited to those in advanced economies, raw information about labour practices in developing countries may lead to a “gasp response”—a feeling that the product was made in horrible, “sweatshop” conditions. “Ethical” consumers might react by “boycotting” the product and purchasing another product on the rack that appears from the information on the label to have been made under “better” conditions.¹⁰⁵ But consumers then face a daunting challenge: on what basis can they compare the relative conditions of work in different cities, countries, and regions? How will they know if the Bangladeshi worker is really being treated more unfairly than a worker earning a slightly higher hourly pay in Lesotho? Finally, regardless of which product they choose to purchase, consumers will have no way of knowing how their decision will ultimately affect the workers; they may be rewarding a good employer, or contributing to circumstances that lead poorly paid workers into even greater desperation, or both.

From a regulatory perspective, then, is this disclosure model successful? The answer depends on what one perceives to have been the

¹⁰⁵ The manner and extent to which consumer purchasing decisions are influenced by information about labour practices is a matter of ongoing empirical debate. See *e.g.* Monica Prasad *et al.*, “Consumers of the World Unite: A Market-Based Response to Sweatshops” (2004) 29:3 *Lab. Stud. J.* 57 (nearly 1/4 of consumers were willing to pay up to 40 per cent more for a pair of socks with a label indicating that they were made under good working conditions); Richard B. Freeman, “What Role for Labor Standards in the Global Economy” (12 November 1998), online: National Bureau of Economic Research <<http://www.nber.org/~freeman/Papers%20on%20RBF%20website/un-stan.pdf>> at 6 (approximately 80 per cent of respondents indicated that they would not buy products made under poor working conditions if this information were known); University of Marymount Center for Ethical Concerns, “New Marymount University Survey Warns Manufacturers/Retailers: Consumers Don’t Want Sweatshop Goods” (November 1999), online: <<http://www.marymount.edu/news/garmentstudy/overview.html>> (approximately 75 per cent of respondents indicated they would avoid shopping at a retailer known to sell products made in “sweatshop” conditions); and Enviro-nics International, “Millennium Study” (1999), on file with author (51 per cent of respondents claimed to have “punished” a corporation during the previous year for poor social practices).

objective. If the goal is to provide consumers with more information on which to base buying decisions, the regulation might be considered a success, and leaving consumers to sort out what the information means may be justifiable from a market perspective. But if the ultimate objective of this sort of disclosure regulation is to improve the lot of the world's poorest workers, then a disclosure model that provides raw information about labour practices in developing states to consumers in advanced economic states may prove detrimental. While such a regime would possess reflexive potential, the response it evokes in the actors in the various subsystems involved may discourage investment in the world's poorest states. Those states, or more specifically, the workers in those states, could be punished and relegated to perpetual poverty because working conditions there offend the sensibilities of privileged consumers in foreign states. MNCs, upon which those states so desperately depend for economic growth, may simply decide to stay away and avoid any controversy. It is difficult to discern any way in which this result could help workers.

Models of disclosure that provide processed information to the markets are an alternative to disclosure of raw employment data. "Product labelling" schemes are an obvious example. A "green dolphin" label might signal that a product is environmentally friendly in a more effective manner than providing reams of raw data from scientific studies. A "RUGMARK" label may satisfy carpet buyers that children did not make the carpet, and relieve them of the need to examine a label or website with the ages of the workers posted. A label indicating "SA8000 approved" could come to signify to consumers that the manufacturer complied with certain core labour standards, without having to disclose detailed information about actual workplace practices around the world.¹⁰⁶ The key aspect of these schemes is that an agent

¹⁰⁶ The SA8000 standardized code is probably the most extensive certification model applying to labour practices. The SA8000 model is inspired by the ISO9000 and ISO14000 series of standardized quality and environmental codes although it includes more substantive performance requirements based to a significant degree on core ILO conventions. The NGO Social Accountability International certifies auditors to conduct audits of factories seeking to obtain SA8000 certification. As of October 2005, 710 facilities had received SA8000 certification. See Social Accountability International, "Overview of SA8000," online: <<http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473>>.

that has credibility with the intended recipients must compile, verify, and codify the information into a standardized format.¹⁰⁷

Although these social labelling schemes provide consumers and investors with information that they can more easily interpret, they are difficult to monitor in practice. Labour practices are not easy “facts” to verify, particularly when the employment takes place in foreign states with governments that are not keen on external institutions monitoring local labour practices. Even the seemingly benign issue of the actual wage rate paid to an employee by a contractor in a developing state may be impossible to determine without interviewing the employee directly or conducting a full forensic accounting of the employer’s books, assuming that the employer even keeps accurate records. Verification becomes exponentially more difficult in relation to more complex standards, such as freedom of association and the right to bargain collectively. Even in advanced economic states with sophisticated labour courts or tribunals, determining whether an employer has violated these rights often involves lengthy and complex litigation. Was the employee terminated for poor performance or for union activity? Did the employer intimidate employees with the hope of influencing their support for a union, or was the employer exercising lawful free speech? Is the employer refusing to bargain with the union, or simply taking a tough and uncompromising bargaining position? These are not always easy issues to determine, even in states with strong labour laws and adjudicative mechanisms. How then can we depend upon private “social auditors” to decide these complex issues through occasional spot audits and informal interviews?¹⁰⁸

¹⁰⁷ For a more ambitious example of processed information labelling see Kimmel, *supra* note 42.

¹⁰⁸ The Worker Rights Consortium (WRC) refuses to “certify” factories because of its belief that it is impossible to determine compliance with labour practices by means of occasional audits:

Given that there are tens of thousands of garment factories nestled in dozens and dozens of countries, it is impossible for the University to know with certainty that all factories are complying with conditions set by the Code. Experience has shown that factories are often “cleaned up” for short periods of time, but then return to significantly violating the Code. One-time investigations often just cover up poor working conditions. Hence, certifying “compliance” of an entire corporation or factory is ultimately impossible and only extends the probability that the name of the University will be lent to companies that are still profiting off of abusive working conditions.

Therefore, any model that requires disclosure of information about labour practices, even in a processed form, will run into the problem of how to verify that information. A regulatory model based solely upon the unverifiable statements of the regulated entity may have some reflexive benefits, but is unlikely to garner much public support or confidence. Third-party monitoring is an option, but, as I will discuss in Part IV B, below, credibility problems and expense are challenges also likely to plague a disclosure model that relies on private “social” auditors.

B. *Expense and Monitoring*

A common objection to many information disclosure models is that the cost of collecting the information and monitoring compliance exceeds the benefits of disclosure.¹⁰⁹ With respect to a scheme of mandatory disclosure of labour practices information, we can make a number of general observations. Firstly, we can anticipate that with respect to their own employees, the cost to corporations of collecting the information would be negligible. Presumably, employers keep records of this sort of information for their employees, so that the cost of compiling it would consist primarily of the person-hours involved in coordinating information coming in from various operations around the world. Indeed, software programs such as Oracle-PeopleSoft are specifically designed to enable corporations to keep detailed records of employees and workers scattered across vast geographic areas.¹¹⁰

Collecting information about the employees of the many global contractors used by MNCs may prove to be a significantly more involved and costly process. True, many MNCs already keep detailed records of information about particular suppliers, including quality, cost, and

See “Key WRC Principles” (10 August 2001), online: <http://www.workersrights.org/wrc_about.pdf> at 1-2. For a more general critique of the social monitoring practices of one prominent consulting firm, see Dara O’Rourke, “Monitoring the Monitors: A Critique of Third-Party Labour Monitoring” in Jenkins, Pearson & Seyfang, *supra* note 1, 196. See also The Gap’s “2004 Social Responsibility Report,” in which the company acknowledges that violations of freedom of association are “more widespread than our data suggests,” owing to the difficulty of monitoring this standard through periodic social audits. Online: <http://www.gapinc.com/public/documents/CSR_Report_04.pdf> at 20 [2004 CSR Report].

¹⁰⁹ See e.g. Sunstein, *Free Markets*, *supra* note 101 at 137-38.

¹¹⁰ See <<http://www.oracle.com/applications/peoplesoft/hcm/ent/module/hr.html>>.

delivery times data. It would therefore not seem to be a particularly onerous burden for the state to require corporations to record basic conditions of employment applied by their contractors in addition to those applied by the MNCs themselves. The MNCs no doubt have the bargaining power to insist that the contractors provide this information at regular intervals. There may, however, be significant discrepancies in many instances between what the conditions of employment at a contractor in a developing state are supposed to be—what the MNC is told they are—and what they are in practice. Such discrepancies are especially likely where the host state is known not to be diligent in enforcing its own labour and employment laws, a common problem in much of the Global South.¹¹¹ Short of placing a monitor in every factory at all times, it is a practical impossibility for large MNCs with sprawling global networks of suppliers to monitor the actual conditions of employment in effect when their products were made.¹¹² Canada obviously cannot send inspectors to examine workplaces in Bangladesh to verify the accuracy of the information provided by MNCs. Finally, there is little reason to expect that the developing states themselves would cooperate in a system of independent monitoring for the same reasons that those states have tended to reject other proposed forms of global or transnational labour law.

As a result, in all but those few instances where an independent monitor has been able to observe or discover the actual labour conditions associated with the production of a particular item, the best information that a disclosure model targeting labour practices can provide may be what the terms of employment were supposed to be at the moment that product was being made, according to the terms of written contracts or the contractor's or MNC's word. That information might prove to be of limited value if, as is very possible, it fails to attract broad public confidence. Worse still, the information could lead to the public being misled about what is really happening in the workplaces. If the regulation were to require MNCs to monitor the actual conditions of

¹¹¹ See Blackett, *supra* note 14 at 403-06. See also David M. Dror, "Aspects of Labour Law and Relations in Selected Export Processing Zones" (1984) 123 *Int'l Lab. Rev.* 705.

¹¹² George Heller, CEO of the Hudson's Bay Company, advocates the creation of a retail industry global database of suppliers and monitoring results that would be accessible only to industry insiders. He argues that such a database makes sense because it is impossible and prohibitively expensive for any one company to monitor all supplier factories. See Marina Strauss, "HBC Executive Leads Drive to Stem Sweatshop Labour" *The Globe and Mail* (19 May 2004) B1.

employment applied during the production run of every one of their products in every facility on the planet, however, then the cost of that regulation to the corporations would be prohibitive. Moreover, the results of self-monitoring of this nature would likely be received with suspicion in any event, because the corporation would have an obvious incentive to report that the labour practices complied with local laws or codes of conduct, as the case may be.

C. *Harmful Unintended Consequences*

A final challenge raises important questions about whether information disclosure regulation and the market forces it seeks to mobilize are appropriate tools in the pursuit of human rights, including labour rights.¹¹³ Critics argue that market mechanisms are too blunt a tool for addressing labour practices because they are incapable of recognizing and responding appropriately to the complexities of the social, economic, historical, political, and cultural context that shape labour practices. This is of particular concern when the consumer markets in advanced states are engaged in order to influence labour practices within developing states. Kaushik Basu argues that encouraging consumers in advanced states to “sanction” MNCs for perceived poor labour practices within their global supply chains is misguided and “deeply unfair” to the workers who are the targeted beneficiaries of the scheme, and to the nation state in which they live.¹¹⁴ The principal problem is that of unintended consequences.

Basu notes, for example, that if enough consumers boycott a product that they are informed was made by child labour, this may cause the MNC (or its supplier) to stop employing children or to stop using the supplier that employs the children. But consumers have no way to ensure that the impact of this is not that the children are thrown into more desperate poverty or forced from the export-driven sector to the indigenous sectors, where labour conditions are often worse, or into

¹¹³ See Basu, “Compacts,” *supra* note 20 at 493; Kaushik Basu, “The View from the Tropics” in *An End to Sweatshops?*, *supra* note 10, 59; and Ronnie Lipschutz, “Doing Well by Doing Good? Transnational Regulatory Campaigns” in John D. Montgomery & Nathan Glazer, eds., *Sovereignty Under Challenge: How Governments Respond* (New Brunswick, N.J.: Transaction Publishers, 2002) 291.

¹¹⁴ Basu, “Compacts,” *supra* note 20 at 493.

prostitution.¹¹⁵ Market-based sanctions can also result in disproportionate harm for the poorest of states. States that rely more heavily on child labour (such as those in sub-Saharan Africa) due to extreme poverty, lack of educational opportunities, or cultural norms, will likely be harmed most if the supplemental income received from child labour is lost while no alternative source of income is introduced to compensate. The problem is that market-based responses usually ignore the essential link between labour practices and the social and economic conditions within the host state. Basu contends that policies designed to improve these practices must address such broader contextual issues. A boycott by North American and European consumers of products made by children will not address systemic causes of poverty and inequality, and will likely worsen the plight of both children and their families.

Basu argues, therefore, that only the state has the contextual knowledge and institutional capability to pursue systemic solutions. Thus, he concludes that “the main agency for labor standards policy has to be with the national governments, which can tailor the policy to each nation’s specific needs and context.”¹¹⁶ Others have made the same point in different forms. Ronnie Lipschutz argues, for instance, that “absent the political conditions within countries supporting workers’ rights, consumer choice and market pressure are unlikely to supply them.”¹¹⁷ These arguments recognize that fundamental transformations in labour law require a strong, committed indigenous labour force aided by a state prepared to support its efforts to improve local working conditions by encouraging local countervailing forces to capital. Initiatives that seek to influence labour laws in developing states by invoking foreign market forces may overlook the necessary role of the state in developing sustainable industrial relations systems if they focus too narrowly on MNCs as the locus of labour practices governance.

Our attention is therefore directed back to the central role of local institutions and governments, local struggles, and the voice of the workers in the developing states. It is in these local interactions that sustainable solutions to raise labour standards must be found and not in

¹¹⁵ *Ibid.* at 491. See also Dickerson, *supra* note 1.

¹¹⁶ *Ibid.* at 495.

¹¹⁷ *Supra* note 113 at 314. See also Guy Standing, “Human Development” in *An End to Sweatshops?*, *supra* note 10, 72 at 79.

the trends and whims of foreign consumer and investor markets. This does not mean that market forces and corporate campaigns have no role to play in the emergence of a global labour law, but it may have implications for the design and potential contribution of an information disclosure regime targeting labour practices in developing countries. Facilitating consumer and investor sovereignty by requiring disclosure of detailed information about foreign labour practices may be the wrong approach if the objective is to empower indigenous movements and institutions within the developing states to build local solutions that reflect local circumstances. A more restrained scope of disclosure may be warranted, one which engenders corporate self-reflection through the threat of potential market backlash, but does so in a subtler manner and encourages local solutions by empowering private and state actors within the developing states.

V. INFORMATION DISCLOSURE REGULATION AND GLOBAL LABOUR PRACTICES

With these issues and challenges in mind, I turn now to consider three recent proposals that seek to use mandatory disclosure of information about foreign labour practices as a tool for improving those practices. Underlying each proposal is the premise that mandatory information disclosure may lead to an improvement in foreign labour practices. Each proposal also accepts the fundamental notion that the nation state can—and should—legislate disclosure of information related to corporate conduct beyond the borders of the state.

A. *Mandatory Disclosure of Labour Practices Information in Securities Laws*

The focus of disclosure requirements in U.S. securities regulation is financial, that is, quantitative information governed by standardized accounting rules. The scope of required disclosure is generally subject to a “materiality” test, defined in relation to the likelihood that a reasonable investor would find the information significant¹¹⁸ or that the information could have a significant effect on

¹¹⁸ See Williams, *supra* note 11 at 1208-09 (discussing the U.S. test of materiality); see also *TSC Indus, Inc. v. Northway Inc.* 426 U.S. 438 (1976).

share value.¹¹⁹ Information about corporate social performance, including labour or human rights practices, has not traditionally been required by securities laws since that information has not been perceived by regulators to be of significance to the economic shareholder.

Cynthia Williams has challenged the Securities and Exchange Commission's (SEC) focus on financial disclosure as an overly narrow interpretation of the powers originally conferred on it. In particular, she argues that the section 14(a) power of the SEC to require proxy disclosure "as necessary or appropriate in the public interest or for the protection of investors" was intended by Congress to permit the SEC to require disclosure of all forms of information that would permit investors to assess management conduct and competence.¹²⁰ Williams summarizes SEC proceedings in the 1970s and 1980s in which attempts were made by activist shareholders to demand that the SEC order expanded disclosure of information related to environmental and human rights performance. The most notable proceedings were the various applications by the National Resources Defense Council (NRDC), in which the SEC ultimately accepted that it does have the authority to order expanded disclosure of social performance issues, but declined to do so because there was insufficient evidence that shareholders were interested in information other than that which was "economically material."¹²¹

Williams argues that the investment market has changed significantly since the NRDC applications were decided. Today, billions of dollars are invested in so-called social funds and green funds.¹²² It is therefore no longer the case that socially conscious investors represent an insignificant minority. Moreover, she argues that it is increasingly the case that poor social performance may have direct economic effects in the form of adverse public reaction and costly lawsuits:

¹¹⁹ See e.g. Ontario's *Securities Act*, R.S.O. 1990, c. S-5, s. 1 (defining "material fact") and National Policy 51-201, "Disclosure Standards" at Part 4 (defining "materiality").

¹²⁰ *Supra* note 11 at 1245.

¹²¹ *Ibid.* at 1246-58.

¹²² *Ibid.* at 1267-68 and 1288-89.

As information about international labor practices, for instance, becomes more accessible and as firms further distinguish themselves through price and production values, compliance and non-compliance with international treaty provisions on labor rights can be expected to have more profound financial effects, particularly if consumers increasingly engage in purchasing or boycotting products on the basis of the firm's treaty compliance records.¹²³

Furthermore, Williams asserts, the manner in which a corporation handles environmental and human rights issues, including labour practices, is an important indicator of managerial competence and philosophy, which are important even to the purely economic investor.¹²⁴

Therefore, Williams argues that the SEC should require disclosure of a large volume of social performance information, including information about both domestic¹²⁵ and foreign labour practices. In terms of the latter, Williams proposes that firms be required to disclose, *inter alia*: information already required by the U.S. equal employment laws in relation to domestic employees; average hourly wages per job category and how those wages compare to the applicable minimum wage in the host state; benefits offered to employees; educational opportunities offered to employees under the age of eighteen; unionization rates and the employer's conduct during recent organizing campaigns; and a description of the host state's labour laws.¹²⁶

B. *Ratcheting Labour Standards*

The "ratcheting labour standards" (RLS) proposal of Sabel, O'Rourke, and Fung seeks to chart a course between what they refer to as top-down regulation based on uniform standards and the proliferation of voluntary initiatives to address global labour practices introduced by MNCs in response to public protests. Thus, in its assumption that states can not regulate labour practices by CAC regulation, the RLS model rests on a premise similar to that relied on by much of the decentralist literature. Here, the argument rests in part on

¹²³ *Ibid.* at 1282. See also Williams' comments at 1285-86.

¹²⁴ *Ibid.* at 1284-85..

¹²⁵ *Ibid.* See summary, *ibid.* at 1307-08.

¹²⁶ *Ibid.* at 1309-10.

the incapacity of advanced economic states to command the behaviour of MNCs outside of their own jurisdiction:

The most effective regulatory bodies belong to national governments, but the subjects they seek to regulate are ... international, sprawling across the globe. At most, these national authorities can enforce labor standards by rejecting goods that they identify as having been produced under sub-standard conditions ...¹²⁷

The argument also refers, however, to the perceived enfeeblement of all states to regulate employers by CAC regulation within their own borders. The heightened need for global firms to be flexible and the pressure placed on contractors to respond to these demands will cause domestic employers to “violate externally determined general rules.”¹²⁸ Thus, states, and particularly developing states, are perceived to be incapable of monitoring compliance with fixed labour standards.¹²⁹ Therefore, the RLS model is proposed as a solution to both the threat of a global regulatory race to the bottom in labour standards, and to the futility of CAC as a domestic regulatory tool in all states.

The RLS model is aimed at the “continuous improvement” of labour practices within the global supply chains of MNCs. It would accomplish this by promulgating four principles: transparency, competitive comparison, continuous improvement, and sanctions.¹³⁰ The principle of transparency

suggests a world in which consumers, workers, activists, and the public at large have the information they need to accurately and confidently identify initiatives to improve labour standards, gauge the results of those efforts, and compare successes of firms, localities, and even nations against one another.¹³¹

The RLS authors argue for “full social transparency” of information such as facility locations, wage levels, and health and safety conditions.¹³²

¹²⁷ Sabel, O'Rourke & Fung, “Ratcheting,” *supra* note 10 at 7.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ Sabel, O'Rourke & Fung, “Realizing,” *supra* note 10 at 19-25.

¹³¹ *Ibid.* at 19.

¹³² *Ibid.* at 21.

In an RLS model, firms would be “required” to adopt and disclose a code of conduct, to permit independent audits of compliance with the code, and to disclose the methods and results of those audits.¹³³ The results of these audits would be delivered to a new “super monitor,” acting at the supranational level. This new agency would emerge most probably from existing international institutions such as the World Bank, the UN, or the ILO. The super monitor would process the information received from all of the monitors into a uniform format that would permit consumers to compare employers operating within economically-similar states, and it would then disclose the information publicly in some manner. This transparency would facilitate a competition in pursuit of “best practices” between corporations intent on winning the support of consumers, and a parallel competition between monitors vying for auditing contracts.¹³⁴ In this way, the RLS authors envision a “ratcheting” upwards of labour standards over time as firms make continuous improvements in response to initiatives by competing firms and lessons learned through experience. RLS would thus create a “race to the top in which firms sought to outdo one another in social performance, just as they now compete on more conventional dimensions,” such as product quality and price.¹³⁵

The final principle of the RLS model is sanctions. The authors argue that voluntary market pressures are crucial to the RLS model, but concede that these private forces alone are insufficient.¹³⁶ At the same time, however, the sanctions must differ from “conventional regulation, where firms are punished for failing to meet minimum performance criteria.”¹³⁷ Thus, firms that fail to disclose the information required by the RLS model “should be presumed to have something to hide, and be punished for violating” the principle of transparency.¹³⁸ Moreover “truly recalcitrant firms” who fail to adopt measures “that have proven

¹³³ *Ibid.* at 26. Precisely how corporations would be “required” to participate in RLS, and who would require them to do so, are not specifically indicated by the authors.

¹³⁴ *Ibid.* at 21-22.

¹³⁵ *Ibid.* at 24.

¹³⁶ *Ibid.* at 25.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

effective for their peers” should also be punished for failing to comply with the principle of “continuous improvement.”¹³⁹

The authors argue that RLS would “generate a vast amount of information that does not currently exist about how firms actually perform socially”¹⁴⁰ This information could be used to pressure corporations by an “array of actors,” most notably “[h]undreds of millions of socially sensitive consumers” who would base their purchasing decisions on the information.¹⁴¹ Journalists, activists, and investors would also use the information to “shame poorly performing companies.”¹⁴² Firms would use the information to “benchmark” their performance and learn to improve. And the information would fuel and inform a wide-ranging debate on global labour conditions based on the attainable best practices of participating firms. This model is obviously reflexive in design, seeking to cause corporations to reflect upon the treatment of the workers in their global supply chains by exposing labour practices to market forces generated by an array of non-state actors.

C. *Mandatory Disclosure of Location of Factories*

A more recent disclosure initiative was proposed by ETAG, a Canadian-based NGO representing various labour and religious organizations. In 2001, ETAG proposed an amendment to the Regulations to an existing federal statute, the *Textiles Labelling Act*.¹⁴³ That legislation applies only to textile products sold in Canada, so the scope of ETAG’s proposal is quite narrow. The Regulations require corporations to disclose information relating to textiles sold in Canada, including the types of fibres used in the product, the name of the dealer, and, in some cases, the country of origin of imported products.¹⁴⁴ Much of this product information goes onto the product label itself, but information about the dealer of the product (such as its company name

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.* at 27.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ R.S.C. 1985, c. T-10.

¹⁴⁴ See *Textile Labelling and Advertising Regulations*, C.R.C., c. 1551, especially ss. 11-12.

and address) can be obtained by accessing a "CA Number" for the dealer, which can be searched on a government website.¹⁴⁵

ETAG proposed that companies be required to disclose additionally the names and addresses of all facilities, including those of contractors and subcontractors, where the product was made.¹⁴⁶ This information would not be placed on the label directly, but would be added to the information included in the CA Number system on the government's website. Consumers would therefore learn of the new information only if they sought it out, or were otherwise informed of it. State enforcement would only be necessary if a corporation provided false information, at which point the state could order the correct information to be provided or levy a fine.

The stated purpose of the proposed amendment was to "strip away the veil of secrecy that allows companies to hide their links to sweatshop abuses" and thereby "make it easier for consumers to make ethical choices when they shop."¹⁴⁷ At present, only a small percentage of garments sold in the retail markets of advanced industrial states can be traced to their production source. The core presumption underlying the proposal for factory location disclosure is that coalitions of NGOs and labour organizations, notably including those from the host states, could use the information to link MNCs to specific factories and to interview the workers directly about how they are treated.¹⁴⁸ Thus, the theory is that factory location information alone is sufficient to aid burgeoning transnational advocacy networks in their efforts to build information banks about contractors and MNCs around the globe. In addition, according to ETAG, the mere threat that abusive conditions applied to workers within their supply chain could be publicly exposed would encourage companies "to become more knowledgeable about their supply chains, establish longer-term business relationships with

¹⁴⁵ "CA Number Database Search," online: Competition Bureau <<http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/cp01120e.html>>.

¹⁴⁶ See "Disclosure Campaign," *supra* note 12.

¹⁴⁷ "ETAG Launches Corporate Disclosure Campaign," (February 2001), online: Maquila Solidarity Network <<http://www.maquilasolidarity.org/campaigns/disclosure/launch.htm>>.

¹⁴⁸ See The Conference Board of Canada, "Study of a Proposal (and its Alternatives) to Amend the Textile Labelling and Advertising Regulations," report prepared for the Competition Bureau (February 2003), online: Competition Bureau <<http://strategis.ic.gc.ca/pics/ct/c02546e.pdf>> at 23.

trusted suppliers, and better monitor labour practices in their supply chains.”¹⁴⁹

VI. EVALUATION OF THE PROPOSALS

Each of these proposals contains obvious reflexive elements. Each seeks to use domestic laws to communicate with MNCs in a discourse recognizable to corporate leaders, namely, the threat of market sanctioning by consumers and investors that could threaten market share, revenues, and ultimately profits. The state is “decentred” in the sense that it does not command substantive outcomes, but rather seeks to cause “voluntary” improvements in normative labour practices by mobilizing forces that will cause corporate self-reflection. I turn now to an assessment of whether the proposals sufficiently address the three questions that, as I suggested in Part IV, above, must be addressed in the design of an effective disclosure regime.

A. *Providing Meaningful Information*

The ETAG proposal avoids the challenge of providing information in a meaningful and contextual manner because no conditions of employment would be directly disclosed under the model. Information about labour practices might be disclosed to consumers later, as a result of investigations undertaken by non-state actors at the factories identified, but that sort of information is already made available to consumers when corporate campaigns are initiated.¹⁵⁰ Both Williams’ proposal and the RLS model, on the other hand, require

¹⁴⁹ ETAG, “Transparency and Disclosure: New Regulatory Tools to Challenge Sweatshop Abuses,” submission to Public Policy Forum’s National Consultation on Textile Labelling (30 September 2003), online: <<http://www.maquilasolidarity.org/campaigns/nosweat/pdf/ETAG%20-%20Transparency%20and%20Disclosure.pdf>> at 10 [“Transparency and Disclosure”].

¹⁵⁰ See e.g. Clean Clothes Campaign, “Made in Southern Africa” (2002), online: <<http://www.cleanclothes.org/ftp/Africa-report.pdf>> (describing the results of audits of garment factories in five southern African nations used by MNCs); UNITE, “The Gap’s Global Sweatshop” (November 2002), online: <http://www.behindthelabel.org/pdf/Gap_report.pdf#search='unite%20and%20the%20gap'> (describing the results of interviews with employees of a number of contractors of The Gap); Yakabuski, *supra* note 28; Andrew Ward, “Coke struggles to defend positive reputation—the world’s most valuable brand has been tarnished by accusations over labour abuses and environmental damage” *Financial Times* (6 January 2006) 21; and David Teather, “Disney accused of labour abuses in Chinese factories” *The Guardian* (20 August 2005) 29.

disclosure of labour practices information. This brings into play all of the challenges we noted earlier.

The RLS authors address the challenge of how to provide meaningful information by assigning to a new supranational super monitor the task of assuring “the comparability of monitoring data and methods” and generating “rankings” of employers and monitors prior to dissemination of the information.¹⁵¹ This presumably is an attempt to provide the consumer with a context in which to evaluate the information. The information would be presented not as raw data, but in a format that permits consumers to recognize which employers are the leaders within a particular country or region, or to choose products based on their learned trust of certain monitors. It is not clear precisely how this would work in practice.¹⁵² In theory, though, using a central body to process raw information into a user-friendly format permitting comparisons of overall performance would provide more meaningful information to consumers than a model that provides consumers with reams of raw data about labour practices.¹⁵³

Only Williams proposes disclosure of raw employment data without any formal intermediary processing.¹⁵⁴ But the raw information would not be provided directly to consumers at the point-of-purchase. It would go first to shareholders, most of whom would have a financial interest in allowing the corporation an opportunity to take corrective measures to respond to any abuses identified before attempting to pressure the corporation through a broader, public campaign. Moreover, prior to disclosure, the corporation would have an opportunity to investigate how the practices in their operations compared to general conditions of employment in the industry and geographic region in which they were are located. The corporation could then present the information in a format that permitted shareholders to assess its relative performance. This could be a useful

¹⁵¹ Sabel, O'Rourke & Fung, “Realizing,” *supra* note 10 at 5.

¹⁵² Would consumers need to research the information on a website before buying, or would the information somehow be made available at the point-of-purchase? The answer will have important consequences for the effectiveness of the model since we can assume that most consumers will not invest personal time to research these issues before making purchases.

¹⁵³ See *e.g.* Kimmel, *supra* note 42, who proposes that the U.S. EPA process environmental risk information according to a standardized scale from 1-50 that would enable consumers to make easy comparisons (*ibid.* at 537).

¹⁵⁴ *Supra* note 11. See also Ayres, *supra* note 104.

exercise since it would encourage the corporation to identify “best practices” in the industry within geographic regions. Other actors, such as NGOs and union members, who may or may not be shareholders, would also be able to access the information, and, if dissatisfied with the corporation’s response, use it to mobilize consumer forces against the corporation. The resulting public debate might itself reveal a broader context, within which motivated consumers could then situate the raw information disclosed.

B. *Monitoring and Expense*

A difficulty with Williams’ proposal, however, is that it fails to deal with the challenges of monitoring and expense in any detail.¹⁵⁵ How can the SEC and the shareholders know that the information is accurate? She likely did not dwell on the problem of monitoring because she limits her proposal for information to the direct employees of the regulated corporation. The SEC would not need to deal with the more challenging task of verifying conditions of work for persons who are employees of suppliers in foreign jurisdictions. This limitation significantly reduces the reflexive potential of the regulation in relation to complex global supply chains,¹⁵⁶ and exposes a potential limitation of using securities law as the regulatory tool for disclosure regulation targeting global labour practices. The link between the governance of the regulated corporation on the one hand, and the relationship between a third party supplier and its employees on the other, may appear too tenuous to motivate a securities regulator to intervene.

The challenge of monitoring the information is dealt with head on by the RLS model, which would require MNCs to pay monitors to periodically audit each factory that produces their goods. Many MNCs do this already. The contribution of the RLS model would be to make this process mandatory, and, as discussed in Part V B, above, to introduce a

¹⁵⁵ Notably, unlike the others, her proposal would not require disclosure of names and addresses of foreign operations, only that information be disclosed “per country” or “per facility” if there are five or more facilities in one country. But even then, there would be no requirement for the employer to name those facilities or give the address (*supra* note 11 at 1309). This is an unnecessary limitation because it would not facilitate private monitoring of the facilities.

¹⁵⁶ Many MNCs do not directly employ any of the workers who produce their goods within the global supply chain. For instance, Nike outsources all of its production to over 900 contractor factories employing approximately 600,000 workers. See Dale Neef, *The Supply Chain Imperative* (New York: American Management Association, 2004) at 12.

super monitor to process the results flowing in from monitors around the globe. The need for this new supranational institution means the realization of the RLS model is beyond the control of any one state and therefore renders its emergence highly improbable. It is also likely to be extremely expensive, since every corporation governed by it would be required to retain monitors on a continuous basis to roam the globe conducting audits, and somebody (presumably the corporations or national governments, perhaps through funding to international organizations) would need to fund the new super monitor. As a result of these costs, the RLS model would presumably attract considerable and sustained opposition from corporations. That is not necessarily a reason to reject it, but it does mean that a broad coalition of state support would be necessary for the model to emerge, since no single state could impose these costs without encouraging a mass exit of capital to non-participating states.

In addition, the monitoring system in RLS faces a serious credibility problem since the corporations and the monitors will have a relationship of reciprocal dependence. The authors of RLS respond to this dilemma by suggesting that consumer markets will force monitors to act independently because only truly impartial audits will win the approval of consumers. As a result, corporations will begin to choose monitors that have the greatest public credibility. This vision is highly optimistic. It assumes that vast numbers of global consumers will take great care to sort out competing allegations about which monitors provide the most accurate information about employment practices occurring thousands of miles away. It further assumes that consumer response will be so forceful and unambiguous that corporations will scurry to hire monitors consumers prefer, even if the corporations themselves lack trust in those monitors. In practice, much of the inevitable (and already occurring) bickering between corporations, monitors, and other actors about whether a particular monitor's methods were fair and impartial will likely be received by consumers as static, or met with sufficient indifference or uncertainty that no clear message from consumers will be discernible, except perhaps in the most extreme and obvious cases.

The ETAG proposal, on the other hand, avoids the problem of monitoring almost entirely, and its cost would be negligible to both corporations and the state. The only data that needs to be provided are the names and addresses of contractors and subcontractors, data that the corporations likely already possess or can easily obtain from their

contractors or supply chain intermediaries. The possibility that the information provided would be confirmed (or contested) by an array of non-state actors creates an incentive for corporations to provide accurate information. True, the proposal is not costless to corporations. Apart from the costs associated with collecting and tracking the list of suppliers, there is a legitimate argument that mandatory disclosure of factory locations would create a “freerider” problem.¹⁵⁷ That is, Corporation A’s competitors may seek to benefit from the investment by Corporation A in the improvement of conditions in one of its supplier’s factories by transferring work to that factory. In that case, the original investment of Corporation A will benefit the competitor at no cost to the competitor, while perhaps leading to slower production runs for Corporation A as the factory becomes busier.

The freerider argument is a valid one in some circumstances. However, databanks that link factories to MNCs already exist and continue to grow as corporations voluntarily disclose the identity of their factories for strategic, corporate social responsibility reasons or to comply with NGO-led initiatives, and as labour organizations obtain greater expertise in acquiring this information through investigative techniques.¹⁵⁸ Moreover, knowledgeable participants in the global labour practices movement can already identify many factories from the non-specific disclosure required by organizations like the Fair Labor Association, which publishes violations of labour rights in factories by nation in a format that identifies the number of employees in the factory, the date of the audit, and the name of the auditor. In short, there is at present an uneven level of disclosure about factory locations that can lead to perverse results: those corporations that are most transparent are also the most vulnerable to adverse campaigning if labour abuses are identified in their factories. The ETAG proposal would have the benefit of encouraging a fairer and more consistent level of transparency.

¹⁵⁷ This is the argument made by The Gap in response to demands by NGOs for it to follow Nike’s lead by disclosing its factory locations. See Maquila Solidarity Network, “Codes Memo No. 19” (September 2005), online: <<http://www.maquilasolidarity.org/resources/codes/index.htm>> at 3.

¹⁵⁸ See e.g. the website of the ITGLWF, *supra* note 2, which is facilitating the maintenance of a factory database by providing links to all factories that have been disclosed by companies and multi-stakeholder initiatives. See also the factory database maintained by the Workers Rights Consortium, online: <<http://www.workersrights.org/search/index.asp?reset=1>>.

C. *Harmful Unintended Consequences and State Sovereignty*

Finally, under the ETAG model, markets are not the primary norm-producing institution being tapped. The name and address of a factory is itself a neutral piece of information of no particular value or meaning to market participants. The ETAG proposal would nevertheless likely trigger important reflexive responses in the targeted corporations that could possibly lead to more beneficial outcomes in global labour practices than more ambitious proposals requiring vast information about actual employment practices (for example, wages, hours of work, unionization rates).

The reason this may be the case has much to do with the problem of unintended consequences described earlier. In Part IV I noted Basu's argument that consumer and investor markets in advanced economic states are incapable of effecting a measured response that accounts for variances in local socio-economic forces in developing states. Sustainable policies to raise labour standards require domestic involvement by a strong state and by local actors, those parties that understand the nuances of local labour markets. If we accept this notion, that the most effective way to improve labour practices is to empower local workers and local states to build countervailing powers to that of global and domestic capital, then we must measure the potential contribution of disclosure regulation by its ability to advance this agenda.

Measured by this standard, a disclosure model that requires only that factory names and addresses be disclosed has important reflexive benefits. The fact that the location of factories would be public information increases the risk to corporations of unexpected investigations of working conditions at those factories by private actors. The introduction of this new risk factor would cause some corporations to take a more active interest in ensuring that abusive conditions will not be uncovered there. For example, in its 2004 Social Responsibility Report, The Gap acknowledged that it learns of many of the violations of the freedom of association and discrimination requirements of its Code of Conduct from NGOs and unions, and it claims as a goal moving forward to "explore ways to integrate trade union and NGO insights

more systematically into [its] monitoring processes.”¹⁵⁹ The factory disclosure model proposed by ETAG would make it easier for these groups to conduct their investigations and to communicate their findings directly to corporate officials who are in a position to respond. This process would make it more difficult for MNCs to ignore violations within their supplier factories, and would create an incentive to both build a dialogue with local worker activists groups and take pre-emptive measures to reduce the number and severity of violations being uncovered by these private actors. In this way, disclosure of factory addresses alone can create an incentive for corporations to engage in self-reflection comparable to that created by regimes requiring more extensive disclosure of actual labour practices.

More importantly, if the only information made available is which workers made a particular product, and where and for whom they work, then those interested in the actual labour practices at that factory would need to investigate conditions directly or have someone else do so. This process is likely to encourage dialogue with the workers, and probably the participation of other local actors, like unions or social activist groups, who speak the language of the workers and are most able to gain their trust. Foreign private actors interested in how particular workers are treated could build coalitions with these local groups to help develop processes for collecting information on labour practices. The threat of using foreign market forces lingers in the background as an incentive for employers to behave, but the information that would be conveyed to those markets would need to be obtained directly from the workers involved. If those workers, or the local institutions that help them, are sceptical about the intent or possible effect on employment of a foreign-based initiative to gather information about their labour conditions, then they can refuse to cooperate in the fact-finding, or, at least, have an opportunity to participate in how that information is used.

For example, workers might believe that their employer is paying them too little and exposing them to dangerous conditions. Those workers might be prepared to accept the assistance of foreign consumers, investors, and activists if it could create pressure on their employer to correct those problems. They may not want that “help,”

¹⁵⁹ 2004 CSR Report, *supra* note 108 at 20.

however, if it could cause their employer to lose a major contract, or lay off dozens of workers, or close down and move to another location. An effective, information-based campaign to influence consumers could have that effect. The employees who are the targeted beneficiaries of market-based campaigns must surely be involved in the decision as to whether and when foreign market forces should be brought to bear on their employer. If the employees are involved in the process of gathering the facts about their employment conditions, and have a voice in how that information is to be used, then they are more likely to have a real say in shaping a response to those conditions.

Models that require corporations, or monitors hired by them, to disclose the purported actual terms and conditions of employment at a foreign facility are, in contrast, likely to bypass this crucial step of local input into decision making. In the case of a proposal such as Williams', the workers may be bypassed altogether and the information disclosed might be based solely on the terms of formal written contracts, if any, or (more likely) the word of the employer. If a monitor is involved, as in the RLS model, workers may or may not be interviewed about their conditions of employment. More importantly, though, under all schemes that require disclosure of actual labour practices, the workers cannot elect not to have their working conditions tested against the unpredictable opinions of privileged foreign consumers. The decision to subject their job security to the whims of foreign markets will have been made for them, and usually by a foreign government, since even the RLS authors acknowledge that many developing states would not voluntarily consent to participate in RLS.¹⁶⁰

The RLS model is therefore subject to the criticism that it is paternalistic. The opinions of local workers, activists, and governments may be completely ignored throughout the RLS processes.¹⁶¹ For example, the outcome of the market process encouraged by RLS might be a boycott of a product, even if the employees who make the product neither wished this to occur nor thought that it would have any positive

¹⁶⁰ Sabel, O'Rourke & Fung, "Ratcheting," *supra* note 10 at 16.

¹⁶¹ *Ibid.* The RLS authors acknowledge that their model "possibly" interferes with state sovereignty, but they dismiss these concerns largely on the basis that the many developing states have elected not to protect the core rights of their citizens when, for example, they set up "export processing zones" in which labour laws are relaxed or ignored altogether. They argue that states should not therefore have a monopoly on governance of domestic labour practices.

influence in their lives. The foreign markets in which the RLS authors place so much hope could even decide that the workers' employers were treating them better than needed, so that the response of the employers could be to worsen conditions (to lower labour costs, worsen health and safety practices, et cetera) This is because RLS rejects any base level of labour conditions; rather than set out normative standards, it encourages all labour standards to be determined by foreign consumer purchasing habits and market forces.

A model of disclosure requiring only information about factory locations envisions a greater role for the workers who are the intended beneficiaries of these sorts of initiatives. Any campaign that emerges from the information will almost certainly include the participation of local workers and citizens, who may elect to seek support for their domestic causes by soliciting the assistance of foreign private actors and markets. The necessity of local input provides a greater assurance that the needs of the local workers will be considered and respected in the formulation of global strategies to influence labour practices within global supply chains. A wealth of information about global labour practices similar to that envisioned by the RLS authors could be developed, but only with the involvement of the workers themselves. No such guarantee exists under the other models considered here.

Finally, disclosure of factory location alone could actually bolster state sovereignty. Full transparency of factory locations would enable private actors to identify MNCs that "cut and run" in response to exposure of poor labour practices by one of its contractors, or in response to an attempt by one of those contractors or the host state to raise labour standards. It would be possible to track the flow of supplier contracts and to investigate what role, if any, labour practices played in decisions to award and terminate contracts.¹⁶² Coalitions of local and transnational actors could use this information to pressure MNCs to remain in a state, or to retain a contractor, even if labour costs begin to rise or the employees of a supplier unionize, and to stigmatize those MNCs that flee.

For example, in 2000, the Hudson's Bay Company ("The Bay") was awarded the dubious distinction of "Sweatshop Retailer of the Year" (it actually tied with Wal-Mart) by the Canadian NGO Maquila

¹⁶² This argument is presented by IRKC, *supra* note 95 at 15.

Solidarity Network. The principle source of criticism against The Bay was its decision to “cut and run” from several factories in Lesotho after learning of a variety of abusive labour practices in the factory.¹⁶³ In 1992, a shareholder resolution put forward by two union pension funds calling on The Bay to respect ILO principles throughout its supply chain and to implement reporting requirements to discourage “cut and run” practices by the company received a surprisingly high vote of 36.8 per cent. Shareholders were met on their way into that meeting by protesters distributing flyers and chanting “don’t cut and run.”¹⁶⁴ While it has not been possible to confirm a direct association between these campaigns and the development of The Bay’s sourcing policies, we can observe that the current policy of The Bay includes a commitment to “influencing change” in their supplier factories when violations of its Corporate Code are identified.¹⁶⁵

If disclosure regulation could assist forces seeking to discourage MNCs from punishing employees who seek to bargain collectively, or from disinvesting in a state where labour regulations are being enforced, then that regulation would make a significant contribution towards an improved model of normative global labour practices. If the threat of capital flight is reduced, if MNCs can be encouraged by non-state actors to make longer term commitments to suppliers, then contractors and host states may begin to feel that raising labour standards will not cost them foreign direct investment.¹⁶⁶

VII. CONCLUSION

In terms of reflexivity, a model requiring disclosure only of factory locations achieves many of the benefits of disclosure models that are broader in the scope of information required, while avoiding many of the difficulties that could plague those models. Moreover, of the

¹⁶³ See the various documents on the Maquila Solidarity Network’s website on its campaign against The Hudson’s Bay Company, online: <<http://www.maquilasolidarity.org/campaigns/hbc/updates.htm>>.

¹⁶⁴ See Shareholder Association for Research and Education (SHARE), Press Release, “Record Numbers Support Shareholder Resolution at The Bay on Sweatshops” (23 May 2003), online: <<http://share.ca/files/news/02-05-23-HBC.pdf>>.

¹⁶⁵ See Hudson’s Bay Company, *Product Sourcing*, online: <<http://www.hbc.com/hbc.socialresponsibility/sourcing/initiatives/ProductSourcing.pdf>> at 2.

¹⁶⁶ Lipschutz, *supra* note 113.

three disclosure proposals considered, the ETAG proposal seems most feasible from a purely pragmatic perspective. It is far less complex and ambitious. Unlike the RLS model, for example, it does not depend upon the improbable emergence of a new supranational super monitor, and, since many MNCs have already been persuaded to make voluntary disclosure of the addresses of their factory locations, it would provide greater consistency, a more level playing field, and is likely to be confronted with a less hostile corporate response than either the RLS or Williams' proposal.¹⁶⁷

This is not intended to suggest that more extensive disclosure models are not possible. States must be cautious, however, in attempting to influence employment practices in foreign jurisdictions. Labour law models depend on a strong guiding state that is capable of incorporating local contexts into policy formulations, and on local struggles and movements that can build countervailing power to capital. Market-based regulatory tools are useful only insofar as they advance the interests of local workers by altering the balance of power in domestic employment relationships in their favour, and by facilitating a regulatory climate in which the state is encouraged to regulate employment standards. It cannot be assumed that foreign markets are capable of producing these results. More research is needed in order to determine whether and how exposing consumer and investor markets in advanced economic states to information about employment conditions in developing states is likely to aid in the emergence and support of these domestic forces. In the meantime, a more modest proposal to require disclosure of factory locations seems both feasible and potentially useful as a tool for motivating positive self-reflection by global producers and for facilitating burgeoning transnational networks that seek to influence positive change in employer behaviour worldwide.

¹⁶⁷ See *supra* note 1. Several Canadian retailers, including Roots and Mountain Equipment Co-op, have indicated they would support a law requiring disclosure of factory locations provided it applied to all industry participants. See "Transparency and Disclosure," *supra* note 149.

