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IN DEFENSE OF TRANSNATIONAL DOMESTIC LABOR REGULATION

Abstract: "Transnational domestic labor regulation" (TDLR) is unilateral regulation introduced by a national government that is designed to influence labor practices in foreign jurisdictions. Many governments already use a variety of measures to try and influence foreign labor practices. TDLR has the potential to empower foreign workers and influence the balance of power in foreign industrial relations system in ways that might lead to improvements in labor conditions over time. Particularly interesting is the potential for TDLR to harness or steer the many private sources of labor practice governance already active in shaping labor conditions within global supply chains. However, whether governments should be trying to influence foreign labor practices at all is a controversial question. Does such a strategy not amount to unwarranted interference in the sovereign right of the foreign governments to regulate labor conditions within their own borders? Is this not just another form of Northern protectionism designed to undermine the comparative advantage of developing countries? This article explores the arguments both for and against a unilateral legislative strategy that aims to improve working conditions in foreign countries. While, ultimately, the author is supportive of the strategy, he concludes that the design of the model must incorporate the legitimate warnings in many of the criticisms of the strategy.

Keywords: labor law, transnational law, decentred regulation, New Governance, governance, global supply chains, globalization, private regulation, non-governmental organizations, multinational corporations

JEL classification: K 20, K31, K 33

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In Defense of Transnational Labour Regulation

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GOVERNMENTS of advanced economic nations have been wrestling with an intriguing question: To what extent should they seek to use their influence to encourage improved labor practices in workplaces located in economically developing countries. Should the American government expend financial and political resources on trying to improve working conditions in Chinese factories? It is a controversial question.

On one side of the debate is the argument that the determination of what are acceptable employment practices within a particular place is a matter best left to the political leaders responsible for governing that place—national governments—and the local industrial relations actors, including employers, employees, and, where they exist, unions. On the other side is the argument that while multinational corporations (MNCs) have reaped huge financial rewards from globalization and the proliferation of the global sourcing model over the past quarter century, they have often done so by exploiting poor working conditions in countries where independent unions are non-existent or outlawed altogether and national governments are either unable or unwilling to enforce decent labor standards to protect workers.

In fact, western governments have sought to influence conditions of work in developing countries through a variety of methods, including by supporting direct trade-labor linkages in regional and supranational trade agreements or 'soft law' measures intended to reward decent labor practices and punish offensive ones. Some governments have also enacted unilateral legislation intended to influence labor practices in foreign jurisdictions. It is this type of legislation that is the focus of this paper. More specifically, I am interested in the debates that surround this form of regulation.

Legislation enacted in one country that is intended to influence labor practices in other countries can be labelled *transnational domestic labor regulation* (TDLR).[1] It is "transnational"

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[1] David Doorey, TRANSNATIONAL DOMESTIC LABOUR REGULATION: USING DOMESTIC DISCLOSURE REGULATION TO INFLUENCE FOREIGN LABOUR PRACTICES (Ph.D Dissertation, Osgoode Hall Law School, 2009); David Doorey, *Who Made That?*

in the broad sense envisioned by Jessop, who defined transnational law to include, "all law which regulates actions and events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories."[2] State-based laws that create incentives for foreign governments to improve labor laws, or foreign producers to improve labor practices are included, such as Generalized Systems of Preferences, which grant import preferences based on compliance with specified labor standards.[3] A law that denies the importation of a product made under working conditions that violate a standard—such as child or prison labour—would also qualify as TDLR, since its objective is to encourage foreign suppliers to cease the offending practice.[4]

But I am mostly interested in regulation that is designed to influence or 'steer' the behaviour of MNCs, and the many factory owners engaged by them around the world that produce their goods, with the policy objective of causing improved labor practices in foreign factories.[5] TDLR of this sort offers interesting potential in an era in which capital is global and governance of business behaviour is divided into complex arenas of State-based and private forms of regulation. It draws on the lessons of so-called 'decentred' or 'reflexive' legal theory, or what is often labelled New Governance on this side of the Atlantic.[6] The idea, in very general terms, is

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Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation (2005), 43 OSGOODE HALL L.J. 353 ("Who Made That").

[2] *See* Philip Jessup, TRANSNATIONAL LAW (1956) at 3.

[3] *See* the discussion in Kevin Kolben, *Integrative Linkages: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes* (2007), 48 HARV. INT.'L L.J. 203 at 213-14; Yaraslau Kryvoi, *Why European Trade Sanctions Do Not Work* (2008), 17 MINN. J. INT'L L. 209; Jeffrey Vogt & Lance Compa, *Labor Rights in the Generalized System of Preferences: A 20-Year Review* (2003) 22 COMP. LAB. L. & POL'Y J. 199.

[4] This was the intended model of a Bill introduced in the mid-1990s in the U.S. by Senator Bill Harkin that became known as the *Child Labor Deterrence Act*, (S. 613, 103rd Cong. (1993), which would have banned products made by "child labor". *See* discussion in Kaushik Basu, *Compacts, Conventions, and Codes* (2001) 34 CORNELL INT.'L L.J. 487 at 490-91.

[5] Kaushik Basu, *Compacts, Conventions, and Codes* (2001), 34 CORNELL INT.L L.J. 487 at 490-91, used the phrase "extra-national action" to describe "action taken by a nation within its own territory that creates incentives in other *countries* to improve [international labor standards]." My use of TDLR is broader in that it is intended to include legislation that aims to influence normative labor practices by influencing the conditions under which those practices emerge. This may include legislation intended to encourage foreign states to take action on labor practices, but influencing *government* action is only one possible variant of TDLR. TDLR targets as the actual employers and the MNCs that source from them, and the many other private actors they engage with on labor practice matters.

[6] The literature is extensive. For a thorough overview of the New Governance literature, *see* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought* (2004), 89 MINN. L. REV. 343; on 'decentred' regulation, see Julia Black, *Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World* 53 CUR. LEG. PROBLEMS 103 (2001); on 'reflexive law', see Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC. REV. 239 (1983); Harry Arthurs, *Corporate Self-Regulation: Political Economy, State Regulation, and Reflexive Labor Law* in Cynthia Estlund & Brian

that some social and economic problems are more effectively addressed through indirect legal signals that guide, steer, or encourage changes in behaviour by influencing the conditions under which behavioural norms emerge in practice. A 'decentred' legal orientation encourages lawmakers to think about what sorts of legal signals might create the perception by employers or within MNCs that it is in their economic interest to introduce measures to improve labor practices.

Viewing concerns about abusive labor practices within global supply chains through the lens of decentred regulation opens up possibilities for the use of regulation to harness and agitate those forces that, in practice, already influence normative labor conditions in those workplaces. Labor practices within modern global supply chains are today determined, not just by national labor laws and prevailing market conditions, but also by pressures, rules, risks, and opportunities whose origins lie not in government action or local labor market forces, but in the efforts of non-State activists interested in improving supply chain labor practices. These include, for example: investigations, monitoring, and campaigns—or the threat of them—being waged by non-governmental organizations (NGOs), unions, academics, and journalists; the requirements of multi-stakeholder and industry led initiatives that have as their stated objective the elimination of 'sweatshops'; student activists pressuring their educational institutions to adopt 'no sweat' policies; and consumers and activist investors wishing to avoid companies that condone abusive labor practices.

The rules and norms that have resulted from the interactions of these groups with employers and MNCs have been variously described as 'outsourced', 'non-governmental'[7], or 'private labor regulation' (PLR)[8], the term I employ in this paper. If labor practices are in fact influenced by PLR, as many authors have claimed, then this creates opportunities for TDLR that have been

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Bercusson, eds., REGULATING LABOR IN THE WAKE OF GLOBALISATION (2008); Doorey, *supra* note 1; David Hess, *Social reporting: a reflexive law approach to corporate social responsiveness* (1999), 25 J. CORP. L. 41.

[7] *See* Dara O'Rourke, *Outsourcing Regulation: Analyzing Non-Governmental Systems of labor Standards and Monitoring* 31 POLICY STUDIES J. 1 (2003), who employs both of these terms.

[8] *See* Kolben, *supra* note 3 at 225-26:

> Perhaps the most important story to emerge in international labor rights has been the rise of a parallel system of labor rights enforcement that might be termed "private regulation". Private regulation in the context of transnational labor encompasses a broad range of practices, generally outside the strict purview of the State, that serve to regulate working conditions and the employer-employee relationship. The actors in such a system are not solely businesses and their agents, but also include a broad range of civil society members that participate in the private regulatory process, including welfare and human rights organizations, churches, and trade unions.

underexplored in the legal literature. For example, if MNCs are more likely to insist that their suppliers comply with local labor laws if failing to do so will lead to negative publicity in a campaign organized by NGOs, then a law empowering the NGOs may create even greater pressures for MNCs to monitor their suppliers' labor practices. In other words, TDLR could be used to harness PLR, with the objective of raising the probability that desirable outcomes will result, such as improved labor conditions in supplier factories.

An example of this might be a law that requires MNCs to disclose information about their global supply chains that increases the risk to the MNCs of permitting abusive labor conditions in their supplier factories to go unchecked.[9] States can use regulation to *'inject risk'* into supply chain management systems in the expectation that the companies' risk management responses will ultimately improve the environment under which labor practice norms emerge within supply chains. A law requiring every supplier to be identified with a name and address, for example, could alter the power dynamic between the MNC, their suppliers, and the many private activists engaged in monitoring and reporting on supply chain labor practices by making it easier and cheaper for the activists to monitor, thereby increasing the risk profile to the companies of permitting abusive labor conditions to persist.[10] This change in relative power could *indirectly* encourage the MNC, and the contractor, to take steps to reduce the possibility of being exposed as a labor rights violator, which in turn could have a positive benefit on labor practices.

Whether or not a law that seeks to influence supply chain labor practices in this sort of indirect manner would be effective in practice is an interesting, and as yet, largely untested hypothesis. But testing that hypothesis is not my purpose here. There is another question that needs to be addressed first. It is whether a regulatory project of *transnational domestic labor regulation* that seeks to harness the power of PLR, with the aim of improving foreign labor practices, is a good idea in the first place. Ultimately, my objective is to defend the use of TDLR as a means of trying to improve labor practices in foreign jurisdictions. However, my enthusiasm for TDLR is tempered, and my prescriptions for the form of TDLR influenced by, legitimate concerns raised by opponents to this form of labor governance.

This paper proceeds as follows. Section I explores the question of why a government would consider passing legislation that targets foreign labor practices. In other words, is it feasible that the plight of foreign workers could push its way onto the busy legislative agendas of governments today? In fact, improving labor practices in developing states is already on the agenda of many developed country governments, and some have actually passed laws to try

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[9] Doorey, "Who Made That", *supra* note 1.

[10] *Ibid.* And *see* David Doorey, *Can Mandatory Factory Disclosure Improve Supply Chain Labor Practices?: A Case Study of Nike and Levi-Strauss* (2008), 1 COMPARATIVE RESEARCH IN LAW & POL. ECONOMY RESEARCH PAPER SERIES (on-line at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1000198).

and influence those practices. It does not require too great a leap of faith to imagine that other governments could be influenced to take similar measure sin the future, particularly if their citizens continue to express concern about labor practices.

The remainder of the article is devoted to debating the key arguments in favour of and against the use of domestic regulation to try to influence foreign labor practices. Section II examines anticipated arguments against TDLR. Section III then considers responses to these arguments while also describing arguments in support of the project of TDLR. One theme that emerges from these debates about TDLR is that a key focus of any long-term strategy to improve labor conditions is the need to effect change in local industrial relations systems, most notably by finding ways to empower the workers themselves in their dealings with their employer. In Section IV, I flesh out this argument, and I argue that the need to encourage the development of countervailing power to capital at the local level should shape any attempt to develop a strategy of TDLR.

I. FOREIGN LABOR PRACTICES AND THE DOMESTIC POLITICAL AGENDA IN DEVELOPED STATES

Governments of economically developed countries are being asked by their citizens and concerned groups to address abusive labor practices in developing states. Sometimes, these requests take the form of demands for governments to introduce tariffs or to ban outright the importation of goods from one or more countries in order to protect local industries and employment from what are perceived as "unfair" trade caused by the availability of cheap labor abroad.[11] But often, especially in the past decade, the argument in favour of government action to encourage improved foreign labor practices is couched as an ethical issue.

The Canadian government recently commissioned a study of a proposal by an NGO (the *Ethical Trading Action Group*) that would have required the disclosure of the name and address of the factories where a garment was manufactured by means of an amendment to the Regulations to the Federal *Textile Labelling Act*.[12] For a variety of reasons (including, most notably, industry resistance), the final report rejected the proposal to require factory information disclosure. However, it also acknowledged a strong consensus among industry and NGOs in favour of an

[11] *See*, for example, discussions in Brian Langille, *Eight Ways to Think About International Labor Standards* (1997), 31 J. WORLD TRADE 27; Pietra Rivoli, THE TRAVELS OF T-SHIRT IN THE GLOBAL ECONOMY (2005) (exploring the many efforts of American apparel-makers, retailers, and unions to persuade law-makers to prohibit or limit apparel imports from low-wage countries in order to protect "American jobs").

[12] *Textile Labelling Act* (R.S., 1985 c. T-10) and *Textile Labelling and Advertising Regulations* (C.R.C., c. 151). The findings of the study are found in Public Policy Forum, *Consultation on a Proposal to Verify Labor Standards in the Apparel Industry - Outcomes and Recommendations* (July 22, 2005) *available at*: < http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1897&lg=e>

increased role by the Canadian government in helping to promote improved labor practices in foreign jurisdictions:

There is strong support from all stakeholders for the Canadian government to enhance its multi and bilateral efforts to encourage other countries to enforce international labour standards (such as those identified by the ILO). Some of the activities suggested include:

- Linking access to the Canadian market to compliance with basic labour standards;
- Supporting the protection of labour standards in multilateral trade agreements;
- Working with bilateral trading partners to help develop and implement appropriate and effective mechanisms to support basic labour rights; and
- Creating an organization like the Fair Labor Association...to help identify and promote best practices in encouraging and enabling fair labour practices both domestically and internationally.[13]

Through a variety of institutions and measures, the government of Canada already participates actively in encouraging and assisting Canadian businesses in developing corporate social responsibility systems and practices for global business, and in assisting or encouraging improved enforcement of labor standards in foreign countries.[14]

And Canada is a relatively minor player in this regard. The British Department of Trade and Industry was recently assigned the task of promoting better "social" practices by British companies.[15] The Ethical Trading Initiative was created in 1998 with the encouragement and financial support of the Department in response to "increasing pressure – from trade unions, non-governmental organisations (NGOs) and UK consumers...to ensure decent working conditions for the people who produce the goods they sell."[16]

In the U.S. during the mid-1990s the Clinton administration responded to pressures from the public, labor groups, and domestic textile and apparel producers to address the use by

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[13] *Ibid.*

[14] *See, e.g.*, the web site of the Federal government describing its participation in various "corporate social responsibility" initiatives that encourage Canadian businesses to strive to improve labor practices abroad: <http://strategis.ic.gc.ca/epic/site/csr-rse.nsf/en/Home>, and the government's International Trade and labor Program, which "focuses on promoting good governance and the rule of law, respect for international labor standards, a more equitable distribution of the benefits of globalization, and participating in international efforts to improve respect for labor rights": <http://www.hrsdc.gc.ca/en/lp/ila/Overview.shtml>

[15] *See* Simon Deakin & Richard Hobbs, *False Dawn for CSR? Shifts in regulatory policy and the response of the corporate and financial sectors in Britain* (2007) 15 CORPORATE GOVERNANCE 68

[16] *See* ETI web site at: <http://www.ethicaltrade.org/Z/abteti/index.shtml>

American apparel companies of low wage workers in other parts of the world by facilitating the creation of the *Apparel Industry Partnership* in 1996, which later formed the *Fair Labor Association*.[17] American politicians have proposed legislation that would limit imports of consumer goods made under abusive labor practices or reward corporations that adopted codes of conduct with labor components and took specified steps towards ensuring compliance throughout their global supply chains.[18] The U.S. government also insisted on the inclusion of a "labour side agreement" in the NAFTA and in other subsequent trade agreements, and generally has pursued an aggressive strategy of unilateral and bilateral trade based initiatives that encourage foreign states to improve their domestic labor standards and practices.

The German government utilizes the *Gesellschaft für Technische Zusammenarbeit* (GTZ), a publicly funded company, in pursuit of improved labor conditions in developing countries.[19] The Federal Minister for Economic Cooperation and Development noted recently the government's commitment to advancing labor standards in the preface to a report of the GTZ, entitled *Making Globalisation Socially Equitable: Implementing Core labor Standards in Selected German Development Cooperation Projects*:

> The German Government attaches great importance to implementing internationally accepted social standards, regarding them as an important part of
> human rights to which all countries and business enterprises as well must measure up. We aim to contribute to global economic development and at the same time to help establish decent working and living conditions in developing countries. In this context, the ILO quite rightly points out that labor standards play a special role in achieving a greater balance between social progress and economic growth.[20]

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[17] *See* discussions in Maria Gillen, *The Apparel Industry Partnerships Free Labor Association: A Solution to Overseas Sweatshop Problem or the Emperor's New Clothes?* (2000), 32 N.Y.U. J. INT.'L L & POL. 1059

[18] Harry Arthurs, *Corporate Self-Regulation: Political Economy, State Regulation, and Reflexive Labor Law* in Ton Wilthagen and Ralf Rogowski (eds.) REFLEXIVE LABOR LAW: STUDIES IN INTERNATIONAL AND EUROPEAN EMPLOYMENT LAW AND LABOR MARKET POLICY (not yet published) at 4 (describing the *Corporate Code of Conduct Act,* H.R. 5377 (109th Congress), introduced by Democrat Cynthia McKinney, which would have required American corporations that employ greater than 20 people in a foreign country, directly or indirectly, to adopt a code of conduct regarding workers rights, core labor standards, environmental standards, and human rights, and would have given preference in the awarding of government contracts to companies in compliance. The Bill can be viewed on-line at: <http://www.govtrack.us/congress/billtext.xpd?bill=h109-5377>).

[19] *See* the GTZ website, on-line at: <http://www.gtz.de/en/index.htm>

[20] THE WORKING GROUP ON SOCIAL STANDARDS, MAKING GLOBALISATION SOCIALLY EQUITABLE: IMPLEMENTING CORE LABOR STANDARDS IN SELECTED GERMAN DEVELOPMENT COOPERATION PROJECTS, (2003) *available* on-line at: < http://www.gtz.de/de/dokumente/en-ak-broschuere.pdf>.

Among other projects, the GTZ helped fund the development of the RUGMARK initiative that targets child labor in India.[21]

Other countries have recently invested in initiatives designed to encourage domestic corporations to adhere to the principals and standards set out in international instruments. The Swedish government introduced the *Swedish Partnership for Global Responsibility* in 2002 to encourage companies to adhere to the OECD Guidelines for Multinational Enterprises and to the principals of the UN Global Compact. In 2003, the Italian Ministry of Foreign Affairs introduced an initiative known as *Global Compact Italy: Sustainable Development through the Global Compact,* which seeks to encourage Italian companies to respect the Global Compact, the ILO Tripartite Declaration on Multinational Enterprises, and the OECD Guidelines on Multinational Enterprises in their international activities.

The French government introduced disclosure regulation aimed at influencing how large French companies manage labor conditions throughout their global supply chains. The *Nouvelles Régulations Economiques* (NRE), adopted in 2001, and Decree Number 2002-221, passed in February 2002, require France's largest corporations to report annually on a broad range of environmental and social issues, including many indicators targeting labor practices directly.[22] In addition to the requirements to report on "human resources" and "labor" issues, the Decree requires that the corporations report on "community issues", an attempt to identify the company's social and environmental footprint in the communities in which it operates. One notable requirement in this respect is for companies to indicate the extent to which ILO core conventions are followed by the company's subsidiaries, the methodologies used to track this information, and "the importance of subcontracting to their operations and how they promote compliance by their subcontractors with fundamental labor rights, including conventions of the International Labor Organization."[23]

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[21] *See* Alakh Sharma, Rajeev Sharma, Nikhil Raj, *The Impact of Social Labeling on Child Labor in India's Carpet Industry* (ILO-IPEC, Working Paper, 2000), *available* on-line at: <http://www.gtz.de/de/dokumente/en-Impact-of-social-labelling-in-indian-carpet-industry.pdf> at 17.

[22] Law No. 2001-420, May 15, 2001. The Regulations applies to French companies listed on the premier marche, which consists of companies with the largest market capitalization value. *See generally*, Lucien Dhooge, *Beyond Voluntarism : Social Disclosure and France's Nouvelles Régulations Economiques* (2004), 21 ARIZONA J. INT.'L & COMP. L. 441. Note also Cynthia Williams' argument that American securities laws should require a similar reporting on global activities, including in regards to a variety of labour-related variables: Cynthia Williams, *The Securities and Exchange Commission and Corporate Social Transparency* (1999), HARV. L. REV. 1199.

[23] Dhooge, *ibid.* at 450-51, describing art. 148-2 of the Decree. Dhooge notes that drafting ambiguities in the Decree led to confusion about which disclosure requirements apply to foreign operations and which apply solely to operations within France: ibid. at 476-477. *See also* discussion in Mary Lou Egan, et al., *France's Nouvelles Regulations Economiques: Using Government Mandates for Corporate Reporting to Promote Environmentally Sustainable Economic Development* (Unpublished, Paper presented to the Annual Conference of the Association for Public Policy and Management, Washington, D.C., November 2003) [on file with author] at 11.

We can speculate on why governments expend resources on these activities. Perhaps they believe that domestic businesses that source from foreign employers who treat their employees decently will be more productive and competitive (economic argument), or that all governments have a responsibility to advance human rights issues everywhere (human rights argument), or that abusive labor practices in foreign jurisdictions amounts to "unfair" trade advantage over local producers (trade argument), or that voters simply expect their government to participate in improving conditions for foreign workers (political argument). But, regardless of the reasons, it is clear that the issue of foreign labor practices has already made it onto to the political agenda of many governments.

TDLR is also a politically viable idea, because it can be attractive to politicians from across the political spectrum. It draws on the same core set of beliefs as "new governance" and "decentred" regulatory approaches.[24] Those approaches to regulation are usually directed at the governance of *domestic* activities, while TDLR targets foreign activities. But the similarities are obvious. The philosophy is to use regulation to influence the private development of norms by altering power relations that shape private negotiations about those norms. Since this approach to regulation often draws on market forces, on citizen empowerment through information creation and dissemination, and on a vision of the state as a facilitator[25], even those politicians otherwise suspicious of business regulation, and of labor regulation in particular, may find it attractive because it fits within their worldview of the appropriate role of the state in governing economic actors.

Politicians on the more progressive side of the political spectrum may also find TDLR attractive, particularly if it includes provisions aimed at empowering labor and human rights activists in their engagements with MNCs and employers. For example, we would expect regulation that made it easier or less costly for activists to uncover reputation-damaging information about MNCs to be supported by the activists and their political allies. [26] It is even possible that some forms of TDLR would be supported by corporations, particularly if there was a realistic

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[24] *Supra* note 6.

[25] *See, e.g,* Harry Arthurs, *The Administrative State Goes to Market (and Cries 'Wee, Wee, Wee' All the Way Home* (2005) 55 U. TOR. L.J. 797 at 810 (describing how "neoliberals" perceive the purpose of regulation "to facilitate rather than constrain private conduct").

[26] For example, the proposal to amend the Canadian *Textile Labelling Act* Regulations to require factory disclosure was pushed by the NGO Ethical Trading Action Group, which is coalition of trade unions, human rights organizations, and faith-based organizations interested in improving labor conditions in developing states. And see the example of the *Corporate Code of Conduct Act* introduced by Democrat Cynthia McKinney, *supra* note 18, who in explaining the rationale for the legislation stated that, "It is time we reclaim the global economy for the people who make it work and stop pandering to corporate interests who build their empires on the backs of the innocent". *See* Russell Mokhiber & Robert Weissman, *Big Ideas on Corporate Accountability and Global Sustainability*, COMMONDREAMS.ORG (20 June 2000), *available* on-line at: <http://www.commondreams.org/views/062000-104.htm>.

possibility of some alternative measures being taken that involved more direct or costly forms of regulation, or if the corporation has already taken all or part of the steps proposed in the legislation. For example, after Levi-Strauss voluntarily disclosed publicly its global supplier list (name and addresses), it's Vice President in charge of global supplier labor issues indicated he was supportive of a law that would require all apparel manufacturers to do the same, as a means of leveling the playing field. [27]

Therefore, while the prospects should not be overstated, the political conditions may be sufficiently favorable in some countries to warrant the more thorough and critical exploration of the project of TDLR that follows. Of course, the fact that there may be pressures on governments of the states to address abusive labor practices in developing countries does not mean that those governments will, or should, respond in the form of regulation. The question of whether governments *should* attempt to influence workplace behaviour in other states is a complex one. This is the subject for the remainder of the paper.

II. ARGUMENTS AGAINST A TRANSNATIONAL DOMESTIC LABOR REGULATION (TDLR) PROJECT AND PLR

A number of arguments against the idea of using domestic regulation to harness, influence, or shape the private creation of labor practice norms in foreign jurisdictions come to mind. I will comment on six of them.

A. TDLR UNDERMINES FOREIGN GOVERNMENT NATIONAL SOVEREIGNTY AND COMPARATIVE ADVANTAGE

The initiatives and campaigns undertaken by labor activists sometimes promote standards that are inconsistent with domestic laws or that impose more demanding requirements for employers than those set out in the local labor laws that apply to the factories. By attempting to raise labor standards above those required by local laws and prevailing market conditions, PLR interferes with the sovereign right of national governments to determine domestic labor policies, and undermines the comparative advantage in relatively low labor costs that economically developing states exploit in order to attract investment from MNCs. In other words, the argument is that PLR is a form of Northern-based protectionism.[28] As such, state-

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[27] Doorey, *supra* note 10 at 58.

[28] *See, e.g.*, argument in Basu, *supra* note 5. Jagdish Bhagwati, *A Letter to a Columbia University Committee engaged in decision on question of a "Living Wage" in judging whether apparel firms supplying Columbia T-shirts should be asked to sign on to a Social Responsibility Code, available* on-line at: <http://www.columbia.edu/~jb38/liv_wage.pdf>:

based regulation that encouraged and legitimized PLR initiatives would, by association, also constitute an indirect form of protectionism aimed at discounting comparative advantage in low labor standards.

There are several ways in which PLR initiatives may come into conflict with national labor policies. One occurs when the state has introduced labor laws, yet has no intention of actually enforcing them, or has ratified an international labor convention with no intention of implementing it into national laws. For example, some developing countries have established *de facto* export processing zones in which there exists an implicit understanding that labor laws will not be enforced, or at least will be largely ignored.[29] PLR that encourages compliance with national labor laws, or with ratified international conventions, would conflict with a state policy based on non-compliance and non-enforcement. In these circumstances, the government does not wish assistance with enforcement, because effective enforcement actually undermines the government's labor strategy.

The outcomes pursued by PLR can also conflict with national labor policies in more obvious ways. For example, by encouraging higher or better labor practices than required by domestic state labor regulation, PLR could cause labor costs to rise, which in turn could undermine the government's attempts to exploit comparative advantage in low labor costs as a way to attract foreign inward investment. Or, more directly, PLR may produce standards and norms that conflict directly with national labor laws.

An obvious example of this latter scenario is the requirement in most private labor initiatives that employers respect freedom of association and the rights to unionize, engage in collective bargaining, and strike when these requirements apply to thousands of suppliers operating in China. These are all "core" rights in ILO instruments, enshrined not only in Conventions 87 and 98, but also in the Constitution of the ILO and in its 1998 Declaration on Fundamental Principals and Rights at Work. However, Chinese law does not permit independent unions and free collective bargaining, and China has not ratified either ILO Convention 87 or 98. Therefore, not only do many PLR initiatives demand that employers provide greater rights to workers than

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...many (including altruistic NGOs) in the poor countries see the drive towards raising the local cost of production of apparel in particular (because this where the export advantage of the poor countries has always raised demands for protection by our textile unions such as UNITE and corporate interests in the industry) by paying yet higher wages (exceeding even the wage premium [already paid by most MNCs]) as essentially 'masked protectionism" which is aimed essentially at reducing the force of international competition.

[29] Adelle Blackett, *Global Governance, Legal Pluralism and the Decentred State: A Labor Law Critique of Codes of Corporate Conduct* (2001) 8 IND. J. GLOBAL LEG. STUD. 401 at 424-25; Yaraslau Kryvoi, *Why European Union Trade Sanctions Do Not Work* (2008), 17 MINN. J. INT'L L. 209 (arguing that governments fail to enforce core international labor conventions because: (1) the lack the capacity or expertise to enforce these standards; (2) because they are ideologically opposed to the standards ("political reasons"); or (3) because they believe doing so will discourage foreign inward investment ("economic reasons").

required by Chinese law, but they also require employers to act in a manner that *violates* Chinese labor law. [30]

Why should the government of one country encourage the private development of labor practice rules and norms that are inconsistent with the national laws of other countries? Perhaps the example of China and freedom of association is not ideal for confronting the problem of conflict between private and State regulation. We might be tempted to dismiss the issue by pointing out that freedom of association, the right to unionize, the right to collective bargaining, and the right to strike are today so universally accepted as fundamental human rights that China (or any other state) has no claim to a sovereign right to suppress them on the basis of philosophical, political, or economic beliefs. Certainly, this is the view of the ILO itself, which has long asserted that respect for the principles in Conventions 87 and 98 is implied in its Constitution and therefore is a condition of ILO membership.[31] China is an ILO member. We might argue, therefore, that governments have a "moral" or "political" duty to promote the realization of fundamental human rights in foreign states, even if the governments of those states would prefer for any number of reasons that these human rights are not respected.[32]

This is a strong argument for encouraging PLR that might lead to greater respect for internationally recognized "core" labor rights. If all PLR pursued the singular objective of

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[30] Some private initiatives have attempted to resolve this difficulty by requiring employers to recognize "alternative" or "parallel" methods for workers to gain collective representation in countries where independent unions are illegal. An example is the Base Code of the U.K.-based NGO Ethical Trading Initiative, article 2.4 of which provides:

> "2.4 Where the right to freedom of association and collective bargaining is restricted under law, the employer facilitates and does not hinder the development of parallel means for independent and free association and bargaining".
>
> The ETI has explained this article as follows:
>
> The trade union organisations which are members of ETI have never believed that it was possible to trade ethically in countries where fundamental workers rights are denied in this systematic manner. However, in recognition of the reality of China's dominance in global manufacturing, and the unwillingness of ETI member companies and other companies to move their production from China to democratic states, the ETI trade union side agreed article 2.4 of the Base Code. In those countries in which freedom of association is denied by law, but only in those countries, the ETI base code requires member companies to facilitate parallel means for independent and free association and bargaining, for example by supporting the establishment of other forms of independent representative structures for workers, such as health and safety committees. Until now, there have been no such examples of sustainable alternative structure in these dictatorships and such limited structures do not comply with any international labor standard.

[31] Blackett, *supra* note 29 at 126.

[32] *See* Iris Young, *Responsibility and Global Labor Justice*, (2004) 12 J. POL. PHIL. 365 (arguing that advanced economic states and their citizens have a "political responsibility" to advance labor rights in developing countries).

encouraging respect for a bundle of universally accepted "fundamental" rights, then regulation encouraging PLR could be justified on those terms.[33] For example, if a government believed that the Global Compact, the SA8000, or the Fair Labor Association encourage respect for universally recognized labor rights, then it could design regulation that required companies within its regulatory grasp to join those programs, and to report on their progress in complying with the programs.[34]

Difficulties arise, though, because of the uncertainty associated with private and "decentred" style regulation. Private regulation may evolve in unpredictable ways, and produce norms that are inconsistent with those desired by the state seeking to use regulation to influence the private creation of norms (the "Regulating State"). While it is possible that PLR may produce results consistent with the values respected by the Regulating State, or with international legal norms such as those espoused by the ILO, there is no guarantee it will. Nor should we expect that the norms and standards pursued through PLR, or the Regulating State's opinions of what norms and standards are desirable, or the nature of internationally recognized norms and standards will remain constant over time. This creates the perennial threat of incongruence between the objectives of the Regulating State and the outcomes of the private regulation it has sought to harness in pursuit of those objectives.

The problem becomes clearer when we consider the "living wage" requirement, for example, rather than "freedom of association". Whereas most governments and even most MNCs today may be prepared to concede, at least rhetorically, that freedom of association and collective bargaining rights should be respected in work places, there is comparatively little agreement on the desirability of the "living wage" requirement.[35] The precise definition of a "living wage" and

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[33] In practice, very few if any states actually comply fully with the ILO's core conventions on freedom of association (Conventions 87 and 98). For instance, Canadian governments are frequently found to be in violation of the these Conventions by ILO supervisory bodies: *see* discussion in Brian Burkett, John Craig, Jodi Gallagher, *Canada and the ILO: Freedom of Association Since 1982* 10 CAN. J.L.E.L.J. 231. Moreover, the Supreme Court of Canada has ruled that the Charter's protection of freedom of association does not include a right to strike, even though Convention 87, which Canada ratified in 1972, has been interpreted by the ILO to include that right: *Reference Re Public Service Employees Relations Act (Alberta)*, [1987] 1 S.C.R. 313. Therefore, even states that have relatively advanced economic and legal systems have difficulty satisfying ILO "core" standards. This is a fact often noted by governments of developing countries and other opponents of PLR initiatives and campaigns that call for compliance with these standards by employers in economically developing states.

[34] *See, e.g.*, Archon Fung, *Deliberative Democracy and International Labor Standards* (2003), 16 GOVERNANCE 51 (arguing for regulatory intervention that encourages "decentralized deliberation" about labor standards by private and public actors, including disclosure requirements); Charles Sabel, Archon Fung, & Dara O'Rourke, *Realizing Labor Standards* in CAN WE PUT AN END TO SWEATSHOPS? (2001) at 26 (arguing that states could encourage PLR by requiring companies to adopt a code of conduct and report on supplier compliance with its terms).

[35] *See* discussion in Wesley Cragg, *Human Rights and Business Ethics: Fashioning a New Social Contract* (2000), 27 J. BUS. ETHICS 205 at 216; Bhagwati, *supra* note 28.

how to calculate it is a matter of considerable debate, even within the labor rights movement itself, although it is generally understood to involve some measure of compensation that provides a worker with the means to afford the basic necessities of life in the community in which they live. The SA8000 Code of Conduct includes the following language:
8.1 The company shall ensure that wages paid for a standard working week shall always meet at least legal or industry minimum standards and shall be sufficient to meet basic needs of personnel and to provide some discretionary income.[36]

This definition is typical in the way it treats legal minimum wage laws as a floor. The usual expectation is that a living wage will be higher than that required by the domestic statutory minimum wage laws.

The living wage, as it applies to global supply chains[37], has been pushed almost exclusively by private labor activists pressuring MNCs and universities. Some corporate-supported private labor initiatives today include a living wage standard, most notably the Ethical Trading Initiative in the U.K., and the Workers' Rights Consortium and the SA8000 Standard in the U.S. But it was studied and rejected by the Fair Labor Association[38], it rarely appears in internal codes of conduct, and wage levels are not directly addressed in the ILO's "core" conventions at all, reflecting a lack of consensus on whether there should be some universal standard in wage levels. Thus, the living wage remains a highly contested standard, with little corporate support; even corporations that have come to support ILO core conventions in their internal codes of conduct have resisted the "living wage" standard. For example, in 2006, the ETI suspended Levi-Strauss' membership because the company refused to endorse the "living wage" standard in the ETI base code.[39]

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[36] *See* web site of Social Accountability International for the SA8000 Code, on-line at: < http://www.sa-intl.org/index.cfm?fuseaction=document.showDocumentByID&nodeID=1&DocumentID=136>. The University of Toronto's Code of Conduct for Licensees requires payment of wages "which comply with all applicable laws and regulations and which match or exceed the local prevailing wages and benefits in the relevant industry or which constitute a living wage, whichever provides greater wages and benefits. It is the spirit and goal of this clause that wages should be sufficient to meet basic needs and to provide some discretionary income": *available* on-line at: <http://www.trademarks.utoronto.ca/downloads/code_of_conduct.pdf>

[37] There is a strong legislative movement in the U.S. requiring "living wages" for public sector workers and as a procurement condition. *See, e.g.*, Bruce Nilssen, *Living Wage Campaigns from a 'Social Movement' Perspective: The Miami Case* (2000), 25 LABOR STUDIES J. 29.

[38] *See* the FLA report dated October 2003, entitled, *Beyond Questions of Principal: Exploring the Implementation of Living Wages in Today's Global Economy, available* on-line at: <http://www.fairlabour.org/all/resources/livingwage/FLA_livingwage_forum_report.pdf>. *See also* discussion in O'Rourke, *supra* note 7 (explaining that the original union participants in the AIP, which led to the FLA, withdrew in part due to their realization that whatever code emerges from the process would not include a "living wage" requirement.)

[39] *See* ETI's recounting of the decision, on-line at: <http://www.ethicaltrade.org/Z/lib/2007/02/levistrauss2-stmt/index.shtml>. Following the suspension, Levi-Strauss withdrew its membership in the ETI in February 2007.

The important point for our purposes is that PLR may result in employers being pressured to adhere to standards that remain contested and that may effectively undermine domestic labor policy strategies.[40] If the living wage standard became widely adopted as a measure of decent labor practices, it could result in pressures for employers in developing countries to pay more than either national wage laws or local labor market conditions would dictate. This could be good for the workers, but only if the increase in wage costs does not cause foreign investors to downsize or "exit" altogether in favour of cheaper labor elsewhere.

It is this kind of fine balancing that governments are expected to engage in when determining domestic labor policies. This is one reason why some economists and many developing country politicians oppose the living wage movement, and the PLR movement more generally. They argue that private labor regulation, such as a living wage requirement for local producers, can throw off the delicate balancing of interests that governments are expected to weigh when setting domestic policies.[41] Legislation that sought to legitimize or empower PLR is objectionable on this basis too.

B. PLR MAY SEEK TO PRODUCE NORMS THAT CONFLICT WITH SOCIAL NORMS IN THE FOREIGN STATES

PLR might also produce—or at least seek to produce—workplace norms that are inconsistent with the dominant *social* norms of the communities in which the workplaces are situated. An obvious example relates to child labour. In some countries, child labor is built into the very fabric of society. While it may be possible to achieve wide-spread agreement that bonded and forced child labor is wrong, in many developing countries, child labor is both normalized and expected as a principal means of earning sufficient family income to ensure basic human needs are satisfied. These are issues that have helped shape the ILO's careful approach to child labour, for example.

But PLR may seek to produce norms that run head-on into prevailing social norms. This might disturb the prevailing social order in harmful ways. For example, if PLR were to encourage MNCs to avoid contractors that use child labor, this could eliminate from the local families a

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See also the 2008 report entitled *Clearing the Hurdles* prepared by a coalition of labor rights groups called the Fair Play Campaign, describing a survey of leading sports wear companies and the reasons given by the companies why they would not support a 'living wage' standard for their suppliers, *available* on-line at: < http://www.clearingthehurdles.org/proposal/d1>.

[40] *See* David Weil & Carlos Mallo, *Regulating Labor Standards via Supply Chains: Combining Public/Private Interventions to Improve Workplace Compliance* (2007), 45 BRIT. J. IND. REL. 791 at 794: "[private labor regulation] systems are usually detached from the traditional regulatory mechanisms in the nations where they operate and consequently do not complement—and at worst undermine—those government systems."

[41] Basu, *supra* note 5.

crucial source of income without providing any alternative. It will not necessary mean, for example, that the children simply return to school. There may not be a school. The child may be forced to find other, even worse employment, or the child's family may become more destitute. This is a cautionary argument against attempts to encourage PLR to tinker or alter complex industrial relations systems without a full understanding of the components of that system and how they interact with one another.[42]

C. RELIANCE BY PLR CAMPAIGNS AND INITIATIVES ON MARKET FORCES IS INAPPROPRIATE AND INEFFECTIVE

A related objection is that the principal source of power upon which most PLR initiatives and campaigns rely—consumer markets and, to a lesser degree, investment markets—is an inappropriate tool to address human rights concerns, including labor rights. Kolben has summarized this objection as follows:

Private initiatives and regulation...are primarily orientated toward satisfying particular *consumer* and *market* demands. They are creations of corporations to address these demands, and as such lack legitimacy and might be blind to some of the broader objectives of a public labor law system. ...Consumer preferences can be fickle—just as consumers might like red pajamas today and blue pajamas tomorrow, consumers might like labor rights today, but lose interest tomorrow.[43]

Basu is blunter in his objection to PLR initiatives and campaigns that seek to harness consumer and investor preferences in pursuit of improved labor conditions in developing countries. He argues that they are "deeply unfair" to the workers they are purporting to aid because, *inter alia*, foreign market forces are incapable of addressing the systemic causes of poor labor conditions in developing countries, although they can cause responses by employers and MNCs that actually harm the workers (for example, consumer boycotts can cause layoffs in a factory without creating any alternative employment opportunities for the laid-off workers).[44] Deploying Northern market forces in an attempt to influence labor conditions in developing countries is not sustaining, and is potentially harmful to the very people intended to benefit.

This argument is tied up with claims that governments ought, in any event, to be able to determine their own domestic labor policies free from outside interference by both foreign

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[42] This essentially is Basu's point when he argues that national governments are best situated to address domestic labor practices because only they can understand the complexities of the issues involved: *see supra* note 5 at 492-93.

[43] Kolben, *supra* note 3 at 229.

[44] Basu, *supra* note 5 at 493.

governments and private actors. Foreign governments in particular should not attempt to influence policy in foreign states. Cragg puts the argument this way:

The problem with democratic regimes is that 'the publics' whose interests the regimes are justified in protecting and advancing are national publics. When national governments seek to extend their definitions of the public interest beyond national geographic boundaries, their definitions of that interest, or what has been described as the common good, become unilateral... Democratic governments can speak for and legitimately describe only the common interests of those who elect them.[45]

Put in these terms, the argument could be interpreted as a normative claim that governments should not concern themselves with labor practice issues outside of their direct legislative authority.[46] But the argument has another meaning too: it suggests not only that governments lack the proper authority to attempt to govern foreign behaviour, but also that governments lack the capacity to know or learn what is in the "best interest" of foreign citizens, and therefore that they should not attempt to engage in such a project.

D. PLR LEGITIMIZES THE SUBSTITUTION OF PRIVATE OR "SELF" REGULATION FOR STATE REGULATION

Another argument against TDLR that would rely on PLR is that PLR can undermine or supplant national labor regulation by legitimizing a system of governance based principally in self-regulation and market forces. For example, Blackett argues that corporate self-regulation initiatives tend to supplant national labor laws, rather than co-exist with them, particularly when they are intended to apply in spaces where national labor laws are non-existent or not enforced, such as in export processing zones:

The cumulative result of MNCs in many EPZs in the *de facto* deregulation of labor relations in these zones. Perched above these deregulated spaces is a new form of legality—self-regulation of labor standards by actors with annual revenues that far exceed the gross domestic product of most developing countries in which they are based. This new form of legality emphasizes not the fixed context of the domestic workplace, but rather the increasingly dynamic notion of the transborder product in the new international division of labour. When seen in the context of EPZs, therefore, self-regulatory initiatives fit logically within the framework of transnational consumerism through trade, in which Western consumers and MNCs seek to replace the

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[45] Cragg, *supra* note 35 at 219.

[46] Although that is not what Cragg intends. Rather he argues that neither national governments nor private industry have the authority or ability to act as regulators in defining what and how norms should be applied within MNCs in various countries. He argues that a "cooperative" approach to governance is needed that includes a role for governments, industry, and civil society.

state—and the social partners themselves (that is, local employers and workers)—as the new regulators. [47]

Zumbansen makes the same point about labor codes of conduct in particular, arguing that they, "embrace company-level regulation of work-related issues while often rejecting union involvement or other forms of organized worker representation. As such, voluntary codes bear the danger of cutting the ties between the worker and the outside system of institutional safeguards."[48]

Blackette and Zumbansen are primarily concerned with corporate *self*-regulation and other initiatives developed and governed by industry. Many PLR initiatives and campaigns involve unions and various other actors who are antagonistic to industry in defining, monitoring, and implementing standards. Therefore, it would be inaccurate to associate all PLR with corporate "self" regulation. But the fundamental point of the argument remains the same. It is that the absence of the State and its power to coerce the other industrial relations actors means that PLR envisions a completely different sort of industrial relations system in which relative power is determined by market forces (consumer, investment, labour, and product markets).[49] This absence of the State as a countervailing power to capital obviously benefits the more powerful actor in the labor relationship: employers and MNCs.

Underlying this line of argument is the premise that stable, effective industrial relations systems ultimately require a strong local government prepared to bolster (and control) worker power through protective labor legislation that facilitates independent union representation and other labor standards. Insofar as PLR tends to envision and legitimize a system of private ordering

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[47] Adelle Blackett, *Codes of Conduct and the Labor Regulatory State in Developing Countries* in HARD CHOICES, SOFT LAW, John Kirkton & Michael Trebilcock, eds. (2004) 121 at 124-25.

[48] Peer Zumbansen, *The Parallel Worlds of Corporate Governance and Labor Law* (2006), 13 IND. J. GLOBAL LEG. STUD. 261 at 295 (available at: http://ssrn.com/abstract=902650); Kolben, *supra* note 3 at 228-29: "Critics [of PLR] are concerned that private regulation threatens and possibly undermines public regulation." And *see also* Harry Arthurs, *Corporate Self-Regulation: Political Economy, State Regulation, and Reflexive Labor Law* in Cynthia Estlund & Brian Bercusson, eds., REGULATING LABOR IN THE WAKE OF GLOBALISATION (2008) 19 at 30 (arguing that corporate self-regulation in the form of codes of conduct "facilitate or normalize the shift of power from unions and workers to employers" by "masking or cosmeticizing the decline of state labor law").

[49] *See also* Harry Arthurs, *Private Ordering and Worker's Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labor Market Regulation* (hereinafter "Corporate Codes") in LABOR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES (Joanne Conaghan, *et al,* eds., 2002) at 487: "...one might argue, half a voluntary code is better than no regulation. But while this argument may have merit, it does not address the further concern of labour, human rights advocates, and social movements: that to acknowledge the potential of corporate good intentions and to accept employer self-regulation even as a transitional measure is to legitimate the existing global economic system and its ultimately unpalatable manifestations in workplace and communities around the world."

that largely or completely ignores this central role of the State and the crucial role power relations plays in industrial relations, the argument goes, it is both doomed to failure beyond the occasional band-aid fix or, perhaps worse, is impeding the development of more effective state participation by districting attention from it. This argument suggests that encouraging PLR initiatives and campaigns through domestic regulation is wrong-headed because PLR tends to perpetuate a dysfunctional model of labor governance in which disproportionate power rests in the hands of corporations and employers who are unmotivated to effect any real, sustainable change that empowers workers.

E. PLR SHIFTS RESPONSIBILITY FOR DEFINING APPROPRIATE STANDARDS FROM STATES TO UNACCOUNTABLE PRIVATE ACTORS

Another criticism of PLR is that it tends to download responsibility for determining what standards are appropriate to private actors who ultimately are unrepresentative and unaccountable to anyone. The form of the argument differs depending upon what sort of PLR initiative or campaigns are being discussed. For example, initiatives such as codes of conduct that are developed and implemented by corporations or industry, without the participation of other external actors (such as unions or NGOs)—what I referred to above as corporate "self" regulation[50]—are criticized for the reason that they merge the "regulator" and the "agent" and ignore the need for a legitimate countervailing power to capital in the form of state regulation or collective bargaining.[51] These arguments recognize, correctly, that corporations have little interest in building this countervailing power themselves, and that "self" regulation is usually perceived by them as an alternative to these other forms of countervailing power. Thus, as Blackett argues: "[t]o accept that [MNCs] are indeed acting as regulators over particular places puts the normative question—who should regulate-in stark relief."[52]

When multi-stakeholder codes and other initiatives promulgated by private actors other than corporations are involved, the argument is often expanded to include attacks on the legitimacy and accountability of those actors as well. For example, unions are attacked on the basis that they represent the interests of a narrow core of relatively privileged workers that most often does not include the sorts of workers that are usually the target of PLR initiatives and

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[50] On the various definitions and applications of "self" regulation, *see generally* Black, *Decentering Regulation*, *supra* note 6.

[51] *See, e.g.*, Blackett, *supra* note 29 at 422: "The codes of corporate conduct and their enforcement mechanisms signify a crucial theoretical departure from traditional industrial relations principals. They are essentially an extension of management power to self-regulate, but in a domain that would traditionally be addressed through one of two means: protective legislation adopted by the state, or collective bargaining. *See also* Arthurs, *supra* note 49 at 482, 487.

[52] Blackett, *supra* note 29 at 432.

campaigns.[53] NGOs are attacked as being variously unaccountable to anyone, or for being unduly influenced by the ever-pressing need to preserve donors or expand their donor base. Blackett explains:

The channels of accountability for NGOs are sometimes non-existent. ...relations between local civil society groups and transnational NGOs may themselves be problematic. Indeed, some NGOs need to safeguard close relationships with international donor agencies; this concern might effect their local delivery. The gulf between NGOs in the north and those in the south is further widened by inequities of power, limited access to technology and resources, the prevalence of the English language, and divergent interests. Some attention to the implications of these disparities is therefore warranted. Yet, the labor rights advocacy surrounding codes of corporate conduct emphasized NGO representation without focusing on the representative character of the groups that are engaged in advocacy.[54]

A common theme in these sorts of "legitimacy" arguments against PLR is concern about the absence of voice and participation by the factory workers who are the intended beneficiaries of most PLR initiatives and campaigns or of local NGOs and unions who at least can claim to have some direct link to the workers on the ground.[55] Not surprisingly, therefore, these arguments often conclude with a common prescription: that a system of governance that targets supply chain labor practices must ultimately involve participation by local workers and unions and by local government authorities in the form of decent labor regulation.[56] This is a point to which I will return later.

F. THE COSTS OF TDLR WOULD OUTWEIGH ANY POTENTIAL BENEFITS

Lastly, any new form of business regulation today will be confronted with the argument that it imposes costs on business that are not warranted by the potential benefits likely to flow from the regulation. Often this argument is accompanied by dire predictions of job losses and increased consumer prices, among other adverse effects, particularly when the activity targeted can be transplanted to other jurisdictions or is a component of global business activity. Certainly the trend in recent years in many states has been *away* from new forms of business regulation, particularly regulation addressing labor practices. Therefore, any government that attempted to introduce new regulation on domestic businesses that would target *foreign* labor

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[53] *See, e.g.*, Blackett, *supra* note 29 at 472.

[54] *Ibid.* at 438.

[55] *See* Arthurs, *supra* note 49 at 487; Blackett, *ibid.* at 430.

[56] *See* Arthurs, *ibid*; Blackett *ibid.* at 431.

practices should anticipate a hostile response from the business community, and be prepared to justify the regulation on a cost-benefit analysis.

When the target of the regulation is workplaces in other countries, part if not all of the "benefit" will take the form of a moral argument: that it is the responsibility of "rich" countries to improve working conditions in "poor" countries, or that domestic consumers demand and are entitled to goods that are not made in "sweatshops", and so on. There are several difficulties with those sorts of arguments. One difficulty is that the expected benefit to foreign workers to be derived from the regulation will often be obscure or speculative, so measuring it will be difficult for a government. Secondly, there is a coordination problem that can create competitive problems for companies subject to the regulation: if the requirements apply only to companies within the jurisdictional grasp of the Regulating State, then this will create an incentive for companies to avoid that grasp, perhaps by exercising the option of "exit". For example, a Canadian law that created an obligation on companies that sell their products in Canada to take certain steps to ensure decent supply chain labor practices may lead companies to pull out of the Canadian consumer market.[57]

If even some of the companies caught by the regulation exercise the "exit" option, this could have negative effects on the economy of the Regulating State, or on consumers in those states if it means less choice or higher prices. Furthermore, enforcing requirements that apply to extraterritorial behaviour may prove extremely difficult: Canadian inspectors would not likely be welcomed into factories in foreign states. Therefore, the benefits of the TDLR targeting foreign labor practices may prove extremely difficult to measure.

III. ARGUMENTS IN SUPPORT OF TRANSNATIONAL DOMESTIC LABOUR REGULATION

The preceding section described serious objections to PLR, which by inference challenge the project of TDLR that would seek to harness PLR towards government policy objections, such as improving labor conditions in foreign states. Those arguments might be enough to dissuade governments from exploring TDLR. Certainly, proponents of TDLR would need to respond to the arguments. This section will explore what those responses might be.

A number of general observations immediately come to mind. One is that we need to be clear on what issue we are addressing. The debate is not whether there *should or should not be PLR*. PLR already exists, having developed largely without the assistance of states, and there is little

[57] This possibility seems more realistic when the Regulating State has a small consumer market. It seems unfeasible that a company that sells consumer goods would pull out of the United States or the European Community, for example, which boast huge consumer markets.

sign that codes of conduct, private monitoring, multi-stakeholder initiatives, and market-based publicity campaigns are going to fade away any time soon. The question considered here is whether PLR can be put to use in ways that advance government policies, such as reducing labor abuses in foreign states.

A second point is that, since there is no generic model of TDLR, it is not possible to make sweeping generalizations about what impact TDLR is likely to have on foreign labor practices. For example, an American law conferring import trade tariff benefits on products made abroad in compliance with specified labor standards might have a very different impact on labor conditions in those foreign states than a law requiring merely that American-based corporations adopt and publish a code of conduct for all of their suppliers.

Both types of regulation would meet our definition of TDLR, since they are domestic laws attempting to influence foreign labor practices, but the incentives and risks they create are different. In other words, it is possible that one model of TDLR might lead to greater compliance with host-state labor laws, while another produces no result at all, while a third leads to improvements above standards in local labor laws. The argument that PLR and TDLR will undermine comparative advantage, for example, does not apply equally to all three of those scenarios. Similarly, the costs associated with one model of TDLR may be dramatically different than those of another model. The point is that the power of the arguments in the preceding section may rise or fall depending upon the particular design of the TDLR.

And, finally, it is important to recognize that, while improving labor practices may be their ultimate objective, the impact of PLR and TDLR may be subtle at first, and not immediately recognizable from outside the organizations affected. One of the lessons of decentred regulatory theory is that legal signals can influence behaviour indirectly, over time, by influencing the norm-creating processes within institutions and subsystems. Black makes this point, for example, about 'reflexive' legal regulation: "one of the roles of reflexive law is to set the decision-making procedures within organizations in such a way that the goals of public policy are achieved."[58] While PLR and the activities and role of private labor activists have been widely studied, relatively little research has been directed at how organizations, including

[58] Black, *Decentring Regulation, supra* note 6 at 126. Many others have similarly emphasized how decentred regulation seeks to influence internal decision-making processes within organizations. *See, e.g.*: Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State* (National Europe Centre Paper No. 100, 6 June 2003) at 9: "The modest conception of law's capabilities [in reflexive law theory] has led to a concern with targeting the internal management systems of regulated entities in order to secure compliance with regulatory goals"; Eric Orts, *Reflexive Environmental Law* (1995) 89 Nw. U. L. REV. 1127 at 1267, noting that a strategy of reflexive law is "channeling communications within the organizational structure of social institutions" with the expectation that influencing how information is gathered and used in an organization can influence how organizations act in response to that information; Daniel Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance* (1999), 23 HARV. ENV'L. L. REV. 441 at 448.

MNCs, actually perceive and respond to risks posed by PLR. The arguments in the preceding section may undervalue the potential contribution of PLR and TDLR by largely ignoring their potential impact on the ways in which global supply chains are governed. These themes are developed more fully in this Section.

A. THE SOVEREIGN STATE AND LABOR PRACTICE GOVERNANCE

The argument that PLR and TDLR are forms of northern protectionism draws on a vision of national governments possessing a right to determine what labor standards are appropriate within their borders free from interference from "outside" actors. However, this is an overly simplistic and distorted view of how workplace norms are determined in practice today, at least in those domestic factories that form part of the global apparel supply chains.

Factory owners who might otherwise have ignored national labor laws that are rarely enforced might nevertheless find value in complying with those laws, or with codes of conduct, if doing so will help attract or maintain orders from MNC customers; practices that violate local health and safety laws, but that have been ignored by local officials for years, might be corrected in response to private monitoring; employees dismissed for union activities might be reinstated in response to PLR campaigns when local state officials failed to respond[59]; personal relationships and interactions at the factory level influence labor practice norms within global supply chains in the usual ways that labor law and industrial relations scholars have long recognized[60]; even personal relationships between buyers and productions managers employed or acting on behalf of MNCs and local factory owners can have a more significant impact on investment decisions than concerns about labor costs and labor regulation.[61]

In fact, recent studies find that labor costs and labor regulation play a relatively minor role in influencing sourcing decisions, at least as between competing developing countries. Thus, in a widely-cited study, the OECD found that there was 'no evidence that low [labour] standards

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[59] There are numerous examples of this occurring. A recent one involved Montreal-based Gildan Activewear, which agreed to reemploy workers dismissed after they attempted to organize an independent union at a company-owned factory in Honduras. This decision followed an extended campaign against Gildan waged by a variety of labor groups, media outlets, and that included investigations by both the Fair Labor Association and the Workers' Rights Consortium, both of which confirmed that Gildan had discriminated against the workers for union activities. The story is recounted by one of the NGOs' involved, the Maquila Solidarity Network, on-line at: <http://www.maquilasolidarity.org/canpaigns/gildan/index.htm>. *See also* K. Yakabuski, *Ethical Tack Pays Off for Gildan*, GLOBE AND MAIL (7 December 2005), B2.

[60] Harry Arthurs, *Understanding Labor Law: The Debate Over 'Industrial Pluralism'* (1995), CURRENT LEGAL PROBLEMS 38.

[61] *See* Richard Appelbaum, William Felstiner, & Volkmar Gessner, RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS (2001).

countries enjoy a better global export performance than high-standards countries'.[62] These results warrant caution in assessing the argument that PLR and TDLR will undermine the comparative advantage of developing states. Even if PLR and TDLR were to lead to improvements in labor practices within developing states, it does not follow that this will cause MNCs to disinvest from those states.

The conditions of work in any given factory that is part of the global supply chain model are today largely determined by market conditions and business decisions made outside of the state where the factory is located. More important than local labor laws on the investment decisions of MNCs are such things as the demands imposed by the complex quota systems that govern the international apparel industry[63], and other business concerns related to: factory capacity, unit price, technology, retailer demands, intellectual property, marketing strategies, product quality, delivery time reliability, worker skills, local infrastructure, tax rates, and the quality of domestic property and contract law regimes.[64]

Thus, the link between the role of national labor laws and investment decisions appears tenuous at best. National governments in the host states (states in which the factories are located) still have influence over these norms and over investment decisions, but that influence should not be overstated. PLR initiatives and campaigns already play a role in influencing normative labor practices, and will continue to do so in the future. Dashwood makes this point: To argue that there is no scope for voluntary initiatives, and that corporate responsibility should be strictly a state regulatory affair, is unhelpful. An either/or approach to state regulation (that is, hard law) and voluntary initiatives (namely soft law) runs the risk of being overtaken by events. What is actually occurring is a hybrid situation, with state regulation prevailing in some areas along with voluntary initiatives in other areas.[65]

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[62] *Trade, Employment, and Labor Standards: A Study of Core Workers' Rights and International Trade* (OECD, Paris, 1996) at 12-13. *See* Langille, *supra* note 11 at 39-42 (discussing the OECD findings). *See also* Alan Hyde, *A Stag Hunt Account and Defense of Transnational Labor Standards - A Preliminary Look at the Problem*, CORNELL LEGAL STUDIES RESEARCH PAPER NO. 06-010, *available* on-line at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896381> (describing studies finding no link between low levels of labor standards and levels of trade and inward capital investment); David Charny, *Regulatory Competition and the Global Coordination of Labor Standards* (2000), 3 J. INT'L ECON. L. 281.

[63] For a thorough exploration of these issues, *see* Rivoli, *supra* note 1.

[64] *See, e.g.*, Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator* (2007), 39 CONN. L. R. 1739 (available at: http://ssrn.com/abstract=953216); Angela Hale & Jane Wills, THREADS OF LABOUR: GARMENT INDUSTRY SUPPLY CHAINS FROM THE WORKERS' PERSPECTIVE (2005).

[65] Hevina Dashwood, *Corporate Social Responsibility and the Evolution of International Norms* in John Kirton & Michael Trebilcock, Hard CHOICES, SOFT LAW, VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT, AND SOCIAL GOVERNANCE (2004) AT 189.

Hepple described this development as "a shift from public to private regulation", wherein national and international labor laws interact with privately developed codes and rules up and down the supply chain.[66]

My point is that an argument based on the concept of absolute state sovereignty over labor practice norms in supply chain labor practices ignores what is already happening in practice. The question we should be asking is not *whether* PLR initiatives and campaigns undermine some theoretical notion of state sovereignty over the governance of labor policy and practices, but *how* PLR interacts with national labor laws and policies, and with the many other factors that influence supply chain labor practices, in determining and sustaining those practices. Only then can we perceive how those complex interactions might be influenced in ways that might produce *different* labor practices.

B. PLR AND TDLR MIGHT BOLSTER GOVERNMENT SOVEREIGNTY BY IMPROVING COMPLIANCE WITH NATIONAL LABOR LAWS

In assessing these inter-relations, it is important to adopt a realistic and pragmatic understanding of the role and impact of PLR initiatives and campaigns. This requires us to sort out a vast range of claims and allegations about the impact of PLR initiatives and campaigns. A peculiar aspect of the debates about the impact of PLR is the degree to which opinions vary sharply about its influence. While one set of critics of PLR argue that its impact is potentially devastating to the economies of developing countries because it will destroy comparative advantage and thrust the workers into even more dire conditions, another set argues that PLR is a meaningless corporate-led smokescreen that will never have any meaningful impact on actual labor practices. Both claims cannot be correct.

In fact, though, both claims may be correct some of the time. PLR might occasionally cause an employer to layoff workers, who will then be worse off if no alternative source of income exists. Other times, PLR will have no impact whatsoever on an employer that is prepared to violate labor laws. The lesson for a government considering TDLR that would harness PLR to reduce labor abuses is to design a model that would produce the positive effects on labor practices (i.e. improved compliance with labor laws) without also producing the negative effects (unemployment, worsening of conditions).

This might prove to be an impossible task; or it might not. But it would be wrong to claim that *all* PLR, and *all* TDLR that sought to harness PLR, will produce negative effects for the targeted workers and the foreign governments. Sometimes, PLR could help both. For example, if PLR encouraged better compliance with local, applicable labor laws when the host-state

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[66] Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct* (1999), 20 COMP. LAB. L.& POLICY J. 350 at 353.

government was having difficulty enforcing its own laws, then this would presumably benefit both the workers and the government. The same is true of ratified international conventions. A government that has ratified an international labor convention has thereby promised to bring those standards into effect domestically. Thus, insofar as PLR, perhaps bolstered by TDLR, were to encourage greater domestic compliance with those standards, it would support the host-state's policies rather than undermine them.

True, sometimes governments do not want their labor laws to be enforced, and do not intend to actually bring an international convention into effect, because 'non-enforcement' or 'non-implementation' is a *de facto* policy decision designed to encourage investment. But the argument that states ought to be able to systemically and deliberately ignore their own laws, or ratify conventions only to disregard them, is deserving of little moral or legal support. Labor laws are a signal to the industrial relations actors and to the local and global community of a government's values. Little is served by deferring to a supposed right of governments to publicly convey one set of values, but then to pursue different ones in practice. Holding governments to the laws they have passed improves transparency and enhances democracy and dialogue between states and private actors about what labor policies are appropriate. These are strong reasons for supporting PLR that encourages compliance with domestic labor laws and with international conventions ratified by national governments.

Therefore, an American law that encouraged greater compliance with labor standards that a foreign government had itself promised to enforce would not impede that states' sovereignty. It would, rather, aid that state's efforts to enforce those standards. This is an important point, because in fact PLR initiatives often do encourage compliance with domestic labor laws, or at least attempt to. For example, the most common requirement found in corporate codes of conduct is respect for national labor laws.[67] Labor activists that monitor and campaign against domestic labor law violations can pressure MNCs and local employers to do a better job of legal compliance. Commentators such as Lipschutz have argued that in this way "international activism", in the form of corporate campaigns and private monitoring, can help developing states "gain control of regulatory policy and effectively enforce applicable laws on a national basis as they had not been able to do before". Therefore, he argues, PLR initiatives can "enhance state sovereignty with respect to global capital".[68] Kolben has argued similarly that PLR measures often "boost public regulatory capacity" in developing countries.[69]

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[67] Rhys Jenkins, *The Political Economy of Codes of Conduct* in Rhys Jenkins, Ruth Pearson, and Gill Seyfang, eds., CORPORATE RESPONSIBILITY AND LABOR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY (2002) 13 at 15.

[68] *See, e.g.*, Ronnie Lipschutz, *Doing Well by Doing Good? Transnational Regulatory Campaigns, Social Activism, and Impacts on State Sovereignty* in John Montgomery & Nathan Glazer, eds., SOVERIEGNTY UNDER CHALLENGE: HOW GOVERNMENTS RESPOND (2002) 291 at 294.

[69] *See* Kolben, *supra* note 3 at 233-34.

One reason why this is the case in relation to labor law in particular is that private campaigns have the potential to discourage the practice of "cutting and running".[70] This occurs when a MNC cancels supplier contracts at factories or in jurisdictions where there have been improvements in labor practices, either because of new laws or because employees have exercised legal rights, such as the right to form an independent union. If private initiatives can pressure MNCs to remain in a factory when labor conditions improve, or to continue to invest in a state when national labor laws or enforcement improve, this would contribute to a climate in which employers and states feel more enabled to make those improvements.

For example, in 2002, the Hudson's Bay Company (HBC) was targeted in a campaign by labor and shareholder activists that criticized its decision to pull its orders from factories in Lesotho after serious labor abuses were uncovered by NGOs, all of which violated Lesotho's own domestic labor laws.[71] The campaign included several tactics, including organizing informational leaf-letting protests outside of the HBC flagship store in Toronto's downtown. In May 2002, citing the company's actions in Lesotho, a group of institutional investors introduced a resolution at the HBC shareholder meeting calling on HBC to require suppliers to adhere to core ILO labor rights and to monitor and publicly report on the compliance with those standards. That resolution received a surprisingly high level of support from shareholders, garnering over 36 percent support, which was at the time the highest level of support ever recorded for a Canadian shareholder proposal targeting "social" practices.[72]

Later that year, the NGO Maquila Solidarity Network "awarded" HBC the 2002 "Sweatshop Retailer of the Year". The media release explained that: "Cutting off suppliers whenever workers report abuses discourages workers from acting as whistleblowers, and virtually guarantees that sweatshop practices will be buried rather than addressed.[73] In short order following this campaign, HBC introduced a new supplier factory monitoring system that largely followed ILO core conventions, and included a "Strike Three" policy, which emphasized "exit" as

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[70] *See* Richard Appelbaum, *Fighting Sweatshops: Problems of Enforcing Global Labor Standards*, U.C. SANTA BARBARA, GLOBAL AND INTERNATIONAL STUDIES, WORKING PAPER SERIES, NO. 34, *available* on-line at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1040&context=gis> at 10-11.

[71] *See* CANADA NEWS WIRE, *Shareholder Group Calls on Hudson's Bay To Report On Sweatshop Abuses in Lesotho* (14 May 2002): Factiva, Document cnnw000020020514dy5e002bi

[72] *See* H. Shaw, *Hudson's Bay wants world labor rules: Retailers group would combat sweat shops*, THE NATIONAL POST (13 June 2003), FP4. Factiva: FINP000020030613dz6d0004e; SOCIAL INVESTMENT ORGANIZATION, THE FORUM (12 June 2002), *Shareholder Vote at HBC Sets Record*, *available* on-line at: <http://www.corostrandberg.com/pdfs/June2002Forum.pdf>.

[73] MSN PRESS RELEASE (December 19, 2002), on file with author. *See also Sweatshop Retailer of the Year Announced.*

a final step only after efforts to achieve compliance with HBC's internal code of conduct had first been exhausted.[74]

The internal supplier factory monitoring systems of many MNCs in the apparel industry today include remedial plans that purport to allow cancelling a supplier contract only as a final measure, requiring firstly that attempts to remedy the problem with the local factory management be exhausted.[75] Some multi-stakeholder initiatives similarly encourage remediation as a first step before cancellation of orders.[76] This development is largely attributable to the sustained efforts of stakeholder activist campaigns over the past 15 years, which emphasized the harmful effects of "cut and run" policies and pressured MNCs to use their clout to pressure for positive change in factories through engagement rather than "exit".

It is true, though, that the value of encouraging compliance with national laws may seem marginal if we accept that nation states are under pressure to weaken those laws in order to

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[74] *See* on-line at: <http://www.hbc.com/hbc/hbc_csr_eng/es_monitoring.html>

[75] *See, e.g.*, THE GAP CSR 2006-06 REPORT, *available* on-line at: <http://www.gapinc.com/public/SocialResponsibility/sr_report.shtml>.

[76] *See*, for example, the requirements in the WRC model Code of Conduct:

> VII. Remediation: Remedies herein apply to violations which occur after the Effective Date of the Code.
>
> A. If a Licensee has failed to self-correct a violation of the Code, the University will consult with the Licensee (for itself and on behalf of its contractors, subcontractors, or manufacturers) to determine appropriate corrective action.
>
> B. The remedy will, at a minimum, include requiring the licensee to take all steps necessary to correct such violations including, without limitation:
>
> 1. Paying all applicable back wages found due to workers who manufactured the licensed articles.
>
> 2. Reinstatement of any worker found to have been unlawfully dismissed.
>
> C. If agreement on corrective action is not reached, and/or the action does not result in correction of the violation within a specified reasonable time period, the University reserves the right to
>
> 1. require that the Licensee terminate its relationship with any contractor, subcontractor, or manufacturer that continues to conduct its business in violation of the Code, and/or
>
> 2. terminate its relationship with any Licensee that continues to conduct its business in violation of the Code.
>
> D. In either event, the University will provide the Licensee with thirty (30) days written notice of termination. In order to ensure the reasonable and consistent application of this provision, the University will seek advice from the Worker Rights Consortium regarding possible corrective measures and invocation of options 1 and 2 above.

retain and attract investment.[77] However, the labor laws *on the books* in many countries are quite decent, but they are systemically not enforced. This creates value in a private system that encourages greater compliance with existing laws. Moreover, in the process of encouraging greater compliance with existing national labor laws, PLR initiatives and campaigns can call attention to the difference between states that maintain weak laws and those that fail to enforce relatively decent laws.

To the factory worker, this may seem like a distinction without a difference. But it can be important in shaping public discourse and PLR strategies regarding the decisions of MNCs to invest in particular countries. When the problem is weak enforcement of relatively decent laws, MNCs can be pressured to lead by example and ensure legal compliance notwithstanding the failure of the state to enforce laws. When the problem is inadequate laws (such as when a state prohibits independent unions or waives the application of laws in particular geographic spaces), the nature of the criticism and range of responses changes. MNCs can be encouraged to decline state offers to operate free of local labor laws, and new tactics can be considered, such as filing ILO complaints and waging campaigns to pressure the governments to improve their laws.

C. THE MODEST IMPACT OF PLR INITIATIVES AND CAMPAIGNS ON LABOR PRACTICES AND FOREIGN INWARD INVESTMENT

Of course, when PLR actually does cause increased compliance with the local laws, it could have the effect of making factories in that jurisdiction less desirable to companies that prefer a system in which their suppliers can infringe labor laws with impunity. In that case, PLR could cause some companies to exit. But empirical evidence raises doubts that this would occur frequently enough to negatively impact inward foreign investment. For example, the OECD study noted above including the following findings:

- That "there is no evidence that low-standards countries enjoy a better global export performance than high-standards countries";
- That "concerns expressed by certain developing countries that [compliance with] core standards would negatively affect their economic performance or their international competitive position are unfounded"; and
- That "it is theoretically possible that the observance of core standards would strengthen the long-term economic performance of all countries."[78]

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[77] *See* Hepple, *supra* note 66 at 361 (arguing that a "weakness" of codes of conduct is their "reliance ... on national labor laws at a time when national governments have been disempowered by globalization."); Arthurs, *supra* note 49 at 473.

[78] *See* references in note 62, *supra.*

In the apparel industry in particular, Pollen, Burns, and Heintz found recently that, "there is no relationship between wage and employment growth in considering the individual country evidence for the global apparel industry."[79] Indeed, the OECD's study suggests that improving working conditions may make individual factories and geographic regions *more* attractive as investment options.

Presumably, at some point, increases in labor costs would begin to erode the comparative advantage of developing states, and that eventually, this could cause MNCs to consider cheaper jurisdictions. But this point does not appear to be easily reached. This is important, because while it is possible to find instances in which PLR initiatives and campaigns have encouraged greater compliance with domestic labor laws, it is more difficult to find examples of PLR causing labor practices to improve beyond what would otherwise be required by those laws or prevailing market levels in the region and industry.

For example, as previously noted, many PLR initiatives require respect for freedom of association, including in China, where independent unions are illegal. If Chinese employers began recognizing and bargaining with independent unions as a result of pressures derived from PLR initiatives, for example, then this would directly contradict state policy and could in theory lead to higher labor standards in China (although the OECD study appears to dispute this), which could possibly make China less attractive to MNCs. But even if we accepted that China should have the right to deny its citizens freedom of association rights (a claim which obviously is contested), there is no evidence that Chinese factory owners are in fact recognizing independent unions because of pressure from PLR. This simply does not happen.

Similarly, the "living wage" requirement in some PLR initiatives appears to aim specifically at raising labor costs above prevailing market levels and legal minimums (if any). In theory, therefore, the living wage requirement could price some factories out of the market by effectively eliminating already low profit margins. But, again, I could find no evidence in the economics, human rights, or legal literature that this is actually occurring in the relatively few instances in which a living wage requirement has been implemented. This may be because companies that voluntarily adopt a "living wage" requirement for their suppliers are probably unlikely to then cut orders from factories that meet their standard. To do so would invite the sort of negative campaigning that probably encouraged (or pressured) the company to adopt the standard in the first place.

In fact, it would be naïve to expect that PLR initiatives will cause major structural transformations in the global sourcing model. This is because the model is now fully embedded

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[79] Robert Pollin, Justine Burns & James Heintz, *Global Apparel Production and Sweatshop Labour: Can Raising Retail Prices Finance Living Wages?* (2004), 28 CAMBRIDGE J. ECON. 153 at 169.

in the operations of the MNCs that have created it. The MNCs have a strong interest in preserving the relative cost savings associated with this model, and this financial interest mitigates against the MNCs accepting terms in PLR initiatives that could threaten the benefits sought through the global sourcing model, including access to relatively cheap labour. Ultimately, MNCs are more powerful than any of the other actors at the PLR table. They can be pressured to respond to spotlight campaigns targeting specific abuses.[80] They can be persuaded to engage in constructive dialogues about how things could be done better. They can be convinced to introduce procedural safeguards to allow for better monitoring of supply chain labor practices. They can even sometimes be pressured to provide the public with information about how workers are treated in their supplier factories.

However, because they do these things in order to limit the reputational risk to the corporation and its brands, the extent to which MNCs will "voluntary" impose additional costs on themselves by making demands on their suppliers or by adding layers of complexity to their supply chain management processes is limited. Ultimately, their goal is to reduce the risk of being publicly associated with illegal and abusive labor conditions that could provoke hostile responses from consumers, investors, employers, and lawmakers, while preserving as much as possible the economic advantages of the global sourcing model; it is not to cause a fundamental transformation in that model or in the industrial relations systems in developing countries, or the balance of power prevailing under those systems.[81]

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[80] For a recent example, see the Gap's prompt response to allegations reported in the U.K. newspaper The Guardian of children being used as virtual slave labor in the production of Gap products in India-, which included the following statement:

> We strictly prohibit the use of child labour. This is a non-negotiable for us – and we are deeply concerned and upset by this allegation. As we've demonstrated in the past, Gap has a history of addressing challenges like this head-on, and our approach to this situation will be no exception.
>
> In 2006, Gap Inc. ceased business with 23 factories due to code violations. We have 90 people located around the world whose job is to ensure compliance with our Code of Vendor Conduct.
>
> As soon as we were alerted to this situation, we stopped the work order and prevented the product from being sold in stores. While violations of our strict prohibition on child labor in factories that produce product for the company are extremely rare, we have called an urgent meeting with our suppliers in the region to reinforce our policies.
>
> Gap Inc. has one of the industry's most comprehensive programs in place to fight for workers' rights overseas. We will continue to work with the government, NGOs, trade unions, and other stakeholder organizations in an effort to end the use of child labour.

[81] *See* Blackett, *supra* note 47 at 431: "corporate self-regulatory initiatives have been better at spotlighting selected, often poignant examples of certain kinds of labor rights abuses than at exposing the layers of complexity surrounding compliance with labor standards while crafting broadly satisfying solutions".

That is why, in terms of their direct impact on factory level labor practices, PLR initiatives should be perceived for what they are: modest endeavours. The standards that emerge in internal codes of conduct reflect the corporations' perceptions of what is required to deflect negative criticism that could damage brand image. Multi-stakeholder initiatives often result from complex negotiations, conflicts, and dialogue amongst various labor activist organizations (unions, consumers, investors, NGOs), and in some cases national governments and intergovernmental organizations, and powerful economic interests in the form of MNCs and their lobbyists. And, as in any negotiations, those standards that can be agreed upon represent a consensus of what the various actors involved can live with going forward, taking into account the relative power relations that underlie the negotiations.

It is the balance of power in the relationship between MNCs and the many labor activists engaged in PLR campaigns and initiatives that warrants restraint in the assessment of the potential impact of PLR, and therefore of TDLR that would seek to harness it. Labor activists can attempt to push the boundaries by proposing novel standards, but they have no ability to unilaterally impose them on MNCs. MNCs would be expected to reject measures that will expand their responsibility for supply chain labor practices until: (1) a significant consensus emerges within the industry in favour of the measure; (2) a significant groundswell of consumer, investor, or state pressure emerges to incorporate those new standards; or (3) the MNC is satisfied that the benefit to corporate reputation or economic performance from adopting a measure outweighs the "reputational risks" and anticipated costs associated with doing so.

The result is that it is extremely unlikely that PLR initiatives will cause significant changes in normative labor practices within global supply chains, at least in the short to medium term. The short term impact of PLR initiatives on actual labor practices is more likely to continue to be noticed primarily in marginal improvements in levels of compliance with domestic labor laws, as discussed above. However, this alone may be a useful contribution.

D. PLR ENCOURAGES GREATER DELIBERATION AND DISCOURSE ABOUT ABUSIVE SUPPLY CHAIN LABOR PRACTICES

PLR initiatives and campaigns may serve an even more important function that is often overlooked in the debates surrounding these private forms of governance because it is subtle and often invisible to those outside of the supply chain process. It is in the impact it has on the internal management systems of MNCs, on the ways in which corporations perceive and manage risks associated with supply chain labor practices, and on the ways in which PLR can influence and possibly transform public discourse about these practices. It is in these more subtle effects that the argument in favour of PLR and the use of TDLR that would harness it may emerge more clearly. While these effects may not immediately translate into broad-based

improvements in factory conditions, in the longer term, they may contribute to the development of a climate in which those improvements are more likely to occur.

PLR initiatives and campaigns have encouraged many MNCs to join a dialogue in which broad-ranging issues are being debated related to the global sourcing model and "root causes" of poor labor practices. Within the debates, protests, arguments, and negotiations between private labor activists, employers, and MNCs there is emerging an arena of sophisticated deliberations about the causes of labor practices abuses within global supply chains, and of possible solutions going forward. This is probably a useful development overall, particularly if it leads to changes in the ways that MNCs manage their supply chain labor practices.

How participation in these deliberations influences the ways in which MNCs manage their supply chain labor practices is a question that has received relatively little attention in the academic literature.[82] But it is important, because MNCs can influence how their suppliers treat workers, particularly when they are major customers of the supplier. Therefore, in evaluating the role and impact of PLR initiatives and campaigns, and in considering how TDLR might seek to influence PLR to positively affect labor practices, it is important to understand how ideas come to be legitimized within the PLR discourse, and how those ideas are ultimately absorbed into the risk management processes of the sourcing corporations.

Archon Fung has described how PLR can lead to increasingly sophisticated arguments about how best to control labor practices within global supply chains:
In a typical exchange, activists might condemn the suppliers of some multinational corporation for employing children or paying poor wages, or a government for condoning such practices.

That corporation (or government) might respond by denying culpability, acknowledging these claims but pointing out that such treatment is generous by the standards of the local economy, or by reducing child labor and raising wages. In such contests, those who demand stronger labor standards and those who operate under them must offer increasingly credible claims to be adjudicated in the court of public opinion by a general audience of consumers, investors, concerned citizens, and journalists. In an environment where their claims can be checked, the

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[82] *See* Arthurs, *supra* note 49 at 477, noting the lack of evidence about how codes of conduct affect MNC behavour: "To put it plainly, there is little or no evidence about how codes actually affect the behaviour of [MNCs]. Thus, it is something of a mystery why voluntary codes should have become so numerous in recent year." There are other notable exceptions. For example, *see* David Murphy & David Mathew, *Nike and Global Labor Practices* (Unpublished manuscript, Jan. 2001) (On file with authors); Richard Locke, *The Promise and Perils of Globalization: The Case of Nike*, MIT INDUSTRIAL PERFORMANCE CENTRE (2002), *available* on-line at: http://www.isn.ethz.ch/pubs/ph/details.cfm?lng=en&id=29550>; Dara O'Rourke, *Smoke From a Hired Gun: A Critique of Nike's Labor and Environmental Auditing in Vietnam as Performed by Ernst & Young*, TRANSNATIONAL RESOURCE AND ACTION GROUP (1997), *available* on-line:
<http://www.isn.ethz.ch/pubs/ph/details.cfm?lng=en&id=29550>.

demands of activists and responses of corporations become more reasonable, not because these actors are necessarily motivated by ethical considerations but because that is what public credibility demands. Such open deliberation about labor standards creates opportunities for individuals—as political actors, private consumers, or even workers—to reflect more deeply about the actual practices of firms and the impact of those practices upon often-distant workers and communities. These engagements can in turn transform preferences, assessments, market behaviours, and political positions.[83]

Fung argued that public deliberations associated with the PLR debates are valuable because they can cause actors on all sides to reflect upon the complexities associated with governing labor practices within a global economic model, and to think critically about how to address them.

Blackett has made a similar argument, noting that "corporate self-regulatory initiatives open up opportunities for discussion" and that, "[codes of conduct], and the advocacy they have generated, have shown the potential to open up spaces for discussion—spaces that can be used to spotlight regulatory deficits and to promote cosmopolitan democratic participation by representative stakeholders in the labor context."[84] True, absent government participation and sanctioning powers, the MNCs can walk away from these discussions at any moment, and resist any particular demand by activists. But what keeps at least some MNCs talking, and occasionally agreeing to proposals that emerge from this dialogue, is their desire to reduce the reputational risks associated with their supply chain labor practices, or the hope of improving brand image in the public's perception.

There are numerous examples of MNCs taking progressive steps relating to their supply chain labor practices as a result of engagements with private labor activist organizations or in response to demands by them. For example, whereas not long ago, MNCs routinely argued that they have no responsibility for labor conditions in supplier factories, it is difficult to find any company that argues that position publicly today.[85] Similarly, while in the 1990's few codes

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[83] Fung, *supra* note 34 at 56. Fung, along with his co-authors Charles Sabel and Dara O'Rourke, have made similar arguments about the value of public deliberations and participation in a dialogue about labor practices within global supply chains in their series of papers on *Ratcheting Labor Standards*: see *supra* note 34 at 27.

[84] Blackett, *supra* note 47 at 442 and 446.

[85] Nike demonstrates this evolution. In the early 1990s and before, Nike's public position was that they have no responsibility for conditions of work in their supplier factories. *See* Donald Katz, JUST DO IT: THE NIKE SPIRIT IN THE CORPORATE WORLD (1994) (quoting a Nike official: "We don't pay anyone in the factories, and we don't set policy within the factory: it is their business to run"): Richard Barnett & John Cavanagh, *Just Undo It: Nike's Exploited Workers* (13 February 1994), *THE NEW YORK TIMES*, 11. Nike's Code of Conduct now includes a list of labor practice standards that all suppliers are directed to respect. See the Code of Conduct on-line at: <http://www.nikebiz.com/responsibility/documents/Nike_Code_of_Conduct.pdf> Nike is also a member of the

of conduct included any reference to the ILO Conventions[86], today, most multi-stakeholder codes and many internal corporate codes do so. [87]

Another example is Nike Inc.'s decision in 2005 to post the names and addresses of all of its global supplier factories in 2005, following years of advocacy by labor rights groups and protestations by the company that factory identity was crucial business information and too difficult to track and maintain.[88] Nike's disclosure prompted Levi-Strauss to do the same, which then put other large apparel companies that did not disclose this information on the defensive. Some companies felt the need to publicly explain their decision to keep their supplier list secret. The Gap posted its reasons on its "frequently asked questions" ("FAQ") page on its CSR website.[89] In the meantime, as more corporations disclose this information, it becomes more and more difficult for laggards to argue that this sort of information has crucial business value, or that producing the information is not technically or financially feasible.

These developments are the direct result of the deliberations that have become commonplace in the PLR movement. Labor activists make a proposal they believe will improve supply chain

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Fair Labor Association and a participant in the Global Compact, both of which assume that MNCs have responsibility for conditions of work in their supplier factories.

[86] *See, e.g.*, Hepple, *Race to the Top*, *supra* note 66 at 360 noting in 1999 of corporate codes that "rather than reflecting international legal norms, tend[ed] to export American conceptions of corporate social responsibility."

[87] For example, the model codes of the SA8000, the Workers' Rights Consortium, the Global Compact, and the Ethical Trading Initiative all refer directly to the ILO's Conventions.

[88] *See* Doorey, *supra* note 10.

[89] *See* web site of the Gap, on line at: <http://www.gapinc.com/public/SocialResponsibility/sr_faq.shtml#a117>:

> When will you publish a list of factories you do business with in the developing world?
>
> Answer:
>
> We don't list specific factories for a variety of reasons. First, the factories producing our goods constantly change based on seasonal production needs. At any one time, we are working with approximately 2,000 factories.
>
> Second, we strongly believe that our sourcing base of approved factories is proprietary information. We invest a lot of time, effort and money in identifying factories that meet our product-quality and vendor-compliance standards. We also invest a lot of time in working with factories to continually improve conditions. Any factory has limited production capacity, and we are in a very competitive business. We believe it would be unwise to provide a complete list of approved factories for our competitors to use.
>
> However, when working with non-governmental organizations, labor unions or others to address factory conditions or specific issues in a city, region or country, we do provide information about whether we have production in specific factories and what we are doing to resolve issues.

labor practices, and arguments then follow about why the proposal is or is not a good idea. More often than not today, MNCs participate directly in those debates, as do academics, NGOs, business lobby groups, even governments.[90] The ideas that gain traction are those that are economically and practically viable from the perspective of the MNCs, and that are backed with the weight of persuasive arguments that MNCs fear may find a sympathetic argument in customers, investors, and governments.

Activists (including NGOs, human rights organizations, unions) too must be prepared to publicly defend their claims and proposals. They are challenged to reflect on their motivations for attempting to influence labor conditions in other parts of the world, and on whether their proposed solutions will actually improve the lives of workers there. Those situated in the developed countries of the global north in particular must wrestle with the claim that their activities, which are designed to improve labor practices in developing countries, may actually cause job losses in developing countries and make matters worse for the workers they are purporting to assist. This is not a frivolous criticism, and it forces labor activist organizations to present arguments that demonstrate an understanding of the complex balancing required when identifying standards and policies that will improve labor practices in developing countries while not at the same time undermining the comparative advantage employers in those countries enjoy in terms of relatively low labor costs.

The important point is that the emergence of PLR has spawned an important and potentially useful dialogue about how working conditions can be improved within global supply chains. Significantly, in recent years, this dialogue has turned its focus towards the global sourcing business model itself, and on how it contributes to poor labor conditions in supplier factories. Companies such as the Gap, Nike, and Levi-Strauss (and in Canada, Mountain Equipment Co-op and the Hudson's Bay Company, for example) have employed "labour compliance" professionals who engage labor activist organizations in discussions about how to address systemic "root causes" that contribute to labor abuses, such as: short-time turnover of orders; last-minute design changes that force suppliers into a position of requiring excessive overtime[91]; the prevalence of short-term supplier contracts, which leave suppliers under threat

[90] For example, the consultations undertaken in support of the Federal government's study into the proposal to require factory disclosure included participation by members of Canada's apparel and retail industries, as well as unions and other NGOs: *see*, *supra* note 12. Another example is the MFA Forum, an initiative bringing together NGOs, unions, and major apparel corporations to encourage dialogue about the impact of the phase out of the MFA tariff system on the dozens of developing countries that were expected to be adversely impacted by the removal of tariffs on imported apparel goods into the U.S. and Europe that took effect in January 2005. As part of this initiative, a Pilot Project is underway in Lesotho that is exploring among other options, a model that would see this small South African country market itself as strong labor compliance country specializing in apparel production factories. *See* the MFA Forum web site at: <http://www.mfa-forum.net/>. For a discussion of the MFA and the impact of its phase out, *see* Rivoli, *supra* note 11, especially Chapter 9.

[91] *See* for example the Gap's 2005/06 CSR Report, *supra* note 75, which includes a section entitled "Supply Chain Business Practices" that begins as follows: "We recognize that some of the everyday business practices in our

of losing orders if they invest in changes necessary to bring their workplaces into compliance with code or legal requirements; and contract tendering systems that reward low cost bids over other factors such as high performance results in labor audits.[92]

These sorts of discussions about root causes of poor supply chain labor practices is a recent development, borne of pressures exerted on MNCs by private actors over a period of nearly two decades.[93] Whereas previously the discourse surrounding PLR initiatives focused primarily on the content of standards and on monitoring and reporting systems, today there is more discussion of what changes need to be made to the global sourcing model itself to create an environment in which labor practices in developing countries might improve without at the same time causing job displacement in those countries.

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industry can have a significant impact on working conditions in garment factories." The section refers to, and provides a link to a summary of a study conducted by the NGO Women Working Worldwide of the Gap's supply chain. The study identified two major problems in the management of the Gap's supply chain that lead supplier factories to violate labor laws and code requirements. They were: delays at other parts of the supply chain and changes in production requirements made by Gap personnel. *See also:* Richard Locke & Monica Romis, *Improving Work Conditions in a Global Supply Chain* (2007), 48 MIT SLOAN MG'T REV. 54 at 60, who observe similarly that: "Nike had begun an extensive review of the company's own upstream business processes—such as product development, design, and commercialization—in order to identify potential drivers of excessive overtime among suppliers."; Oxfam International, TRADING AWAY OUR RIGHTS: WOMEN WORKING IN GLOBAL SUPPLY CHAINS (2004), *available* on-line at: <www.oxfam.org/en/files/report_042008_labour.pdf>; *Women Working Worldwide, Study on Purchasing Practices at the Gap*, summary *available* on-line at: <www.eti2.org.uk/Z/lib/2007/other/publ/gap_www_study_summary.pdf>

[92] SEE, E.G., *MAQUILA SOLIDARITY NETWORK,* MSN SUPPORTERS HAVE SPOKEN: PAY A LIVING WAGE; RESPECT WORKERS' RIGHT TO FREEDOM OF ASSOCIATION; AND DEAL WITH PURCHASING PRACTICES! *(JANUARY 2008), INDICATING THAT THE LABOR RIGHTS NGO INTENDS TO ADDRESS THE HARMFUL EFFECTS ON SUPPLIER CHAIN LABOR PRACTICES OF THE "PURCHASING PRACTICES OF MNCS" AS A STRATEGIC GOAL IN THE FORTHCOMING YEAR:* AVAILABLE *ON-LINE AT: <HTTP://EN.MAQUILASOLIDARITY.ORG/EN/NODE/752/PRINT>.*

[93] There is to date little academic literature examining "root cause analysis" in relation to global supply chain labor practices. *But see* Locke & Romis, *ibid.* at 61, who argue that "it is time to move beyond merely focusing on codes of conduct and monitoring—so that we can tackle the root causes of poor working conditions in many developing countries." Many corporations today make reference to the need for the company to engage in root cause analysis to identify how changes in management systems may contribute to a climate of improve labor practices. *See*, for example, the Gap's 2005-06 CSR Report, *supra* note 75 at 27 and 22:

> The root causes of poor working conditions in garment factories are varied and complex. As we noted in our 2004 Social Responsibility Report, inadequate labor standards are often the result of a wide range of factors that can be difficult to isolate and address. In some areas, such as our buying practices, we may have considerable ability to drive change.

See also the web site of Gilden Activewear, on-line at: <http://gildan.com/corporate/corporateCitizenship/actionPlanUpdate.cfm> (explaining the need to conduct "root cause analysis training" throughout the organization).

This dialogue is pushed primarily by private labor activists[94], but the idea of examining the supply chain business model for factors that contribute to labor practice abuses is one increasingly being taken up by the MNCs as a means of potentially reducing both the risks of being associated with abusive labor practices and the costs of monitoring those practices.[95] While it is true that MNCs are not required to implement ideas that surface in these dialogues with external stakeholders, some occasionally find business value in doing so. This observation aligns with the observations of Gerstenberg and Sabel, who noted that, "in a complex world, 'strong' actors cannot rule out the possibility that they will come to depend on solutions discovered by 'weak' ones."[96]

E. PLR MAY INFLUENCE INTERNAL MANAGEMENT SYSTEMS OF MNCS IN USEFUL WAYS

By increasing the risk associated with being linked to a suppliers' abusive labor practices, PLR initiatives and campaigns may also motivate some MNCs to put in place complex internal management systems designed to track and respond quickly to potentially embarrassing labour-related situations. This too would be a useful development, because whether or not MNCs are able and inclined to influence their suppliers' labor practices will depend a lot on how they collect, manage, and process information about those labor practices.[97]

I have explained elsewhere the changes to the internal supply chain management systems introduced by Nike and Levi-Strauss, two of the most highly visible brand-based apparel companies, in response to pressure from PLR campaigns.[98] In summary, they include, in addition to the adoption and publication of a code of conduct, the following: the creation of

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[94] *See*, for example, the comments of Kevin Thomas of the Canadian NGO, Ethical Trading Action Group, in their 2006 Transparency Report Card, indicating how labor activists NGOs continue push MNCs to address how their business model influences supply chain labor practices, *available* on-line at <http://en.maquilasolidarity.org/en/node/449>:

> Leading companies have publicly expressed willingness to discuss root causes of persistent labor rights problems in their supply chains," Thomas said, noting that this year more companies are reporting training programs for factory management and other efforts to change persistent bad practices. "But our study shows that companies are less willing to discuss how their own business model of ever-lower prices and highly-mobile production might be causing these problems."

[95] *See, e.g.*, sources in footnote 92.

[96] Oliver Gerstenberg & Charles Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, in GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET (Christian Joerges & Renaud Dehousse, eds., 2002) 289 at 292–93. *See also* Lobel, *supra* note 6 at 461.

[97] *See, e.g.*, Hepple, *supra* note 66 at 351: "Whether or not the quality of employment is raised throughout the global chain of production and distribution depends largely on corporate integration strategies."

[98] Doorey, *supra* note 1.

dedicated labor compliance departments headed by senior executives and staffed by teams of labor compliance personnel; the development of an information database tracking labor practice issues in every supplier factory; the development of information processing systems that encourage information about labor practice problems to be conveyed to senior executives; the creation of multi-level factory monitoring systems; the introduction of regular meetings with senior labor compliance staff to review factory compliance issues; and the development of out-reach programs to encourage dialogue with labor activist organizations and industry competitors.

While these kinds of internal management systems obviously do not ensure decent labor practices in supplier factories, they do increase the potential for labor practice abuses to be discovered, which may then also improve the chances that efforts will be made to address them. Companies that carefully track information about their supply chain labor practices are obviously in a better position to respond to problems than are companies that pay no attention to those practices. The stronger the threat to corporate reputation associated with MNC complicity in labor abuses within their supply chain, the greater the incentive for those MNCs to better manage their suppliers' labor practices. A strong PLR movement can elevate that risk, and a law empowering that movement can create an even greater incentive for MNCs to insist on suppliers who comply with labor laws.

For example, the Canadian Retail Council indicated recently that many Canadian apparel companies and retailers were not even aware of what factories produce their goods.[99] The obvious implication is that these companies have no idea how workers are treated in those factories. If a strong PLR movement can pressure MNCs into at least paying attention to who is making their products, then this could prove to be a useful contribution in the challenge to improve labor practices.

F. PLR MAY ENCOURAGE INDUSTRY COLLABORATION TOWARDS FINDING SUSTAINABLE SOLUTIONS TO REPUTATION-DAMAGING LABOR PRACTICE ABUSES

Among the potential outcomes of PLR is greater industry collaboration aimed at identifying ways to address shared problems in the management of global supply chain labor practices. Whereas secrecy has traditionally been the mantra of the global apparel industry, more recently, common challenges, risks, and expenses have caused a growing number of apparel corporations to reach out to competitors in attempts to reduce costly duplication of factory monitoring processes and to brainstorm about possible strategies to reduce shared risk of negative publicity associated with supply chain labor practices.

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[99] *See* E. Johnson, *Cut It Off: Campaign Focuses on Sweatshop Labour,* CANADA BROADCASTING COMPANY (27 March 2002), *available* on-line at: www.cbc.ca/consumers/market/files/home/cutitout, quoting Sharon Maloney, spokesperson for the Canadian Retail Council: "...tracking clothing factories is almost impossible."

One example is the Fair Factories Clearinghouse initiative created in 2004 by a number of apparel companies—including Marks' Work Warehouse and the Hudson's Bay Company—which compiles and shares factory monitoring and auditing reports among FFC members.[100] At a more macro level, the recently formed *Joint Initiative on Corporate Accountability and Workers' Rights* brought together the world's leading private labor regulation initiatives in an attempt to consolidate efforts, approaches, and standards targeting supply chain labor practices.[101]

More spontaneous, informal collaborations amongst competitors have also begun to emerge. For example, executives at both Nike and Levi-Strauss came to believe in recent years that industry collaboration, including information sharing, coordinated monitoring, and brain-storming about possible solutions to persistent labor practice issues offered greater potential for improving labor practices (and therefore of reducing corporate risk) than did the traditional approach wherein companies acted independently and secretively.[102] A similar shift in focus towards greater acceptance of the idea of working with competitors is evident in the public documents and actions of other leading apparel companies in recent years.[103]

Greater industry collaboration on issues related to supply chain labor practices is probably a positive development. Industry collaboration and brain storming within industry, and between industry and the many labor activists participating in the PLR movement, may identify useful

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[100] *See* the web site of the Fair Factories Clearinghouse available at: <http://www.fairfactories.org/governance.htm>.

[101] *See* the web site of the Joint Initiative on Corporate Accountability and Workers' Rights at: <http://www.jo-in.org/pub/about.shtml>. The participating organizations are the Clean Clothes Campaign, Ethical Trading Initiative, Fair labor Association, Fair Wear Foundation, Social Accountability International and Workers Rights Consortium. The stated objectives of the organization are: to maximise the effectiveness and impact of multi-stakeholder approaches to the implementation and enforcement of codes of conduct, by ensuring that resources are directed as efficiently as possible to improving the lives of workers and their families; to explore possibilities for closer co-operation between the organizations; to share learning on the manner in which voluntary codes of labor practice contribute to better workplace conditions in global supply chains.

[102] For example, following the release of their global factory list, Levi's executives began organizing informal, roaming roundtable discussions with Nike and several other competitors in which the companies share information and strategies about how to address labor issues in shared supplier factories. Michael Kobori, Vice President Code of Conduct for Levi's, informed me that this development reflected the emerging opinion within the organization that industry collaboration in addressing labor practices will and should begin to grow in the years to come. Interview with Michael Kobori, Levi-Strauss, transcript on file with author.

[103] *See* Doorey, *supra* 1 (review in detail the shift at Nike from a position of secrecy and unilateralism to collaboration and transparency). *See also, e.g.*, the Gap's CSR Report, *supra* note 75 at 34 under the heading "Building Partnerships at the Industry and Multi-Stakeholder Levels".

processes that could positively influence the business environment in which decisions about labor practices in supplier factories are made. These processes in turn may be internalized and then implemented by at least some companies hoping to be perceived as CSR leaders, or as a risk management decision, which would then introduce new pressures for other companies to follow. States too might learn from these deliberations in ways that could inform new forms of state-based legislation.

These possibilities are not as remote as they may appear at first glance. The success of the PLR movement of the past decade in causing MNCs to pay closer attention to their supply chain labor practices in order to reduce corporate risk and to engage antagonistic private actors about root causes of poor labor practices speaks to the potential. This is not to suggest that the concerns about PLR initiatives and campaigns described in Section II of this article should be disregarded. A common theme flowing through each of those objections is that PLR initiatives and campaigns threaten to interfere with the complex system of balancing that characterizes any industrial relations systems without full appreciation of the interests of the local actors and local economic, social, and political circumstances. I will argue in the final part of this paper that this is an important point, but that it should not be perceived as an argument *against* the TDLR project. Rather, it is a prescriptive argument that provides guidance at to what the objectives of a TDLR project should be, and therefore what types of PLR initiatives should be pursued and harnessed as part of that project.

IV. THE NEED TO ENCOURAGE LOCAL ACTOR PARTICIPATION

The previous section made a number of claims about the utility of private labor regulation in the struggle to improve supply chain labor practices. I noted that while PLR has occasionally produced head-line grabbing results, for the most part, its impact has been modest: it keeps the issue of labor practices on the public radar and, by raising the risk potential of negative publicity and consequent damage to brand reputation, it creates an incentive for companies to pay attention to how workers are treated by their suppliers and to take steps to ensure that they are not found to be complacent in the illegal labor practices of those suppliers. That discussion took place in the context of the underlying question being explored in this paper, which is this: Should governments use domestic regulation to influence foreign labor practices, such as by harnessing or steering PLR in ways that might cause foreign employers to treat their workers better?

Of course, the notion of using regulation to harness or influence the norm-creating potential of private actors is not itself a novel idea. Labor lawyers are familiar with this way of thinking about law. North American collective bargaining laws, for example, are described as 'procedural' regulation, precisely because they develop a framework under which private bargaining about substantive conditions of work is to occur. Health and safety laws that

mandate joint worker-employer councils and require them to consult and bargain over safety rules, and European 'works councils' laws that require employers to inform, consult, and sometimes bargain with worker representatives rely on a similar philosophy. For labor lawyers, therefore, the argument that regulation can be used to harness the private systems of governance--such as codes of conduct, private monitoring, public reporting, consumer boycotts, *et cetera*—in pursuit of public policy objectives is not particularly controversial or novel.

However, there is still something qualitatively different about *transnational domestic labor regulation*, which aims to influence conditions of work in foreign jurisdictions by harnessing the power of PLR. It requires us to move beyond the level of the nation state, where most labor lawyers find comfort. Within a nationally based industrial relations system, it is relatively easy to identify the relevant actors and to chart the influences acting on the labor practice norms of a particular workplace or industry. At the core of this analysis is always the employees (and their union) and their employer. Exogenous pressures, forces from outside the workplace, influence those key actors—regulatory law structures their engagements and provides contractual "floors"; product and labor markets influence bargaining options; social factors influence attitudes, and so on; but ultimately the rules that will apply in any workplace setting are determined through the interactions of the workers, unions, and employers.

But once we shift our discussion to the role of PLR that targets MNCs and is designed to influence workplace level behaviour in their globally dispersed supplier factories, the role of employers and employees becomes obscured. For example, I have so far said very little about the participation and opinions of the factory workers, or even the factory owners in my discussion of PLR initiatives. Are those actors not entitled to participate in decisions that will most directly impact on their lives? How are the interests of employers and employees in the supplier factories that are the target of most PLR initiatives represented in deliberations occurring in London, New York, Washington, San Francisco, Tokyo, Amsterdam, and Toronto?

Sometimes, factory workers and local workers' organizations have played an important role in PLR campaigns and initiatives. This was the case, for instance, in the campaign against Gildan Activewear targeting incidents at Honduran factories discussed earlier, in which Honduran workers' organizations played a leading strategic role in the campaign and in implementing and monitoring the remediation plan. In a 2006 report of labor practice case studies in the global sports wear industry, Oxfam described a series of instances in which local unions or workers' organizations participated directly in public relations campaigns intended to persuade MNCs to pressure local factory owners to comply with labor laws.[104] Initiatives such as the Clean Clothes Campaign and the Workers Rights Consortium engage in campaigns only at the invitation of the

[104] *See* Oxfam International, *supra* note 91.

local workers affected. And there are many other examples of campaigns that involve coalitions of Northern-based labor activists and unions and labor groups in developing countries.

But local voices are not always included. Most of the leading PLR initiatives were designed and are still managed without any meaningful input from the actors who are the target of the initiatives. For example, although representatives of industry, universities, unions, and NGOs were invited to participate in negotiations leading to the creation of the Fair Labor Association, all invitees were American-based, and the managing board of the FLA has always consisted exclusively of representatives of American organizations. Some proposals to improve supply chain labor practices, such as the much discussed "Ratcheting Labor Standards" model of Sabel, Fung, and O'Rourke, do not include any necessary participation (or consent) by local workers or their organizations.[105]

One response to the criticism that the views and experiences of those actors who are most affected by PLR initiatives are ignored in the decision-making processes within PLR is that those opinions are accounted for by the dynamic shaped by the respective interests of the participants in most PLR debates. For example, local actors who are concerned that PLR initiatives will drive up costs and cause job losses are protected by the fact that the principal interest of MNCs is maximizing profits from global sourcing their products. As a result, the MNCs have a strong incentive to ensure that PLR initiatives remain modest in terms of their potential impact on factory labor practices. Local actors who would like labor conditions to improve, but fear this will cause the MNCs to cancel orders are protected by the efforts of labor activists to discourage the practice of "cutting and running". In other words, it might be argued that the interests of factory owners and factory employees are vicariously represented by MNCs and the northern-based activists.

There is no doubt some truth in this argument. But it is also a paternalistic claim that fails to capture the richness and diversity of the range of opinions that may be represented at the local factory level. In fact, the employees and their employers in the supplier factories, and other local actors, may have important perspectives on the causes of labor practice problems, and on possible solutions, that are not at all obvious to participants in the PLR dialogues taking place many thousands of miles away. It may be that there are distinctly local explanations for labor compliance problems at a particular factory. It may be that the employees do not want the "assistance" of PLR at all, for any number of reasons, including fear that the PLR, if

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[105] Charles Sabel, Archon Fung, & Dara O'Rourke, *Realizing Labor Standards* in CAN WE PUT AN END TO SWEATSHOPS? (2001). See criticisms of that proposal in: Sean Cooney, *A Broader Role for the Commonwealth in Eradicating Sweatshops?*, (2004) 28 MELBOURNE U. L. REV. 290 at 332; Jill Murray, "The Sound of One Hand Clapping?: The Ratcheting Labor Standards Proposal and International Labor Law" (2001), 14 AUST. J. OF LAB. L. 306 (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=308261)

implemented, may make their situation worse, or because they believe they can deal with the problems in their own ways, using local resources and strategies.

These possibilities present a challenge for PLR, and by implication, for forms of regulation designed to harness PLR towards policy objectives. While PLR is useful because of its tendency to encourage broad-based deliberations about important issues and to cause valuable "corporate self-reflection", it can also be blind to important stakeholder interests, particularly when those stakeholders lack the power to assert their own voice into the process.[106] The absence of local voices—the opinions of factory workers, unions in developing countries where the factories are situated, the factory employers, and even the local governments presiding over the factories—threatens the legitimacy of PLR and the entire TDLR project. It can blind participants to the industrial relations reality that few, if any, workplace problems are solved in the long term without the active participation of the local industrial relations actors—workers and their unions, employers, and local governments.

Many knowledgeable observers have argued that sustainable change of the sort necessary to alter workplace practices in the long run will require local level participation, including the empowerment of workers to enable them to bargain improved conditions of employment with their employers.[107] Arthurs makes this point in the following passage:
Voluntary codes are emerging as the most significant feature of a fragile, inchoate regime of transnational labor market regulation. Employers are supposed to be the object of that regulation, but they are also its primary authors and administrators; they can conjure it up or make it disappear pretty much whenever and for whatever reason they wish. But workers—supposedly the subjects, the beneficiaries of this regulation—lack the power to create it, significantly to influence its terms, or even to insist that they receive its promised benefits; they can only denounce it and try to rob it of its legitimacy. We must somehow square this circle.[108]

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[106] Kolben, *supra* note 3 at 230: "Nor does the design of codes necessarily reflect the preferences or input of workers, or other stakeholders, that the codes purport to benefit. Instead these codes are designed from the top down and are unaccountable and undemocratic."; Arthurs, *supra* note 49 at 487; Claire Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers* (2001), 53 FLA L. REV. 611.

[107] *See, e.g.,*: Basu, *supra* note 5 at 495; Kolben, *ibid.* at 252, arguing that local actors are best situated to identify lasting solutions to the problem of persistent labor abuses: "...rather than disempowering unions and local NGOs, transparent monitoring has provided information to NGOs and unions, which Doorey believes, as do I, are better situated than consumers to strategize on how to improve conditions and pressure brands"; Pollin, Burns, Heintz, *supra* note 79 at 170, arguing that foreign labor activists are a useful supplement in efforts of workers to win better labor conditions, but that "it will be crucial for workers and unions to become increasingly active in this movement, especially if monitoring practices are going to reasonably address their workplace concerns"; Blackett, *supra* note 29 at 415-16.

[108] Arthurs, *supra* note 49 at 487.

Cooney argues similarly that, "if local workers are not involved in devising, monitoring, and evaluating measures to reduce labor abuses, such measures may be unresponsive to worker needs, disempowering, and patronising.[109]

The moral is that PLR initiatives and campaigns that focus on empowering workers at the factory level and on building a climate in which the governments of host states and the factory owners are prepared to recognize labor rights will be most useful. This realization would need to guide any attempt to utilize TDLR for the purpose of improving foreign labor practices. The challenge is to identify ways that a Canadian law, for example, could help normalize processes where the foreign factories are located in ways that could shift the attitudes of workers, unions, employers, and governments over time towards greater acceptance of labor rights.[110]

This is a big and ambitious program that requires a long term, multi-layered plan and a nuanced approach that recognizes differences in local situations. It is a program that, to use the words of Trubek, Mosher, and Rothstein, requires a "weaving together [of] normative arenas at many levels and across borders, deploying private rules, local practices, national laws, supranational forums, and international law".[111] PLR initiatives and campaigns are only one part of that complex puzzle, and their potential contribution should not be overstated. Ultimately, real change in normative labor practices will require local solutions brought about by changes in domestic industrial relations systems.

V. CONCLUSION

Still, for the reasons discussed in this paper, PLR initiatives and campaigns can play a useful role in keeping supply chain labor practices on corporate agendas and by encouraging developments in the ways MNCs manage their supply chains and engage external actors in dialogues about how to improve labor practices. PLR can empower local workers by exposing labor abuses and by pressuring MNCs to address those abuses through engagement with factory owners rather than "cutting and running". It can boost regulatory capacity within states by encouraging MNCs to respond favourably to countries that enforce labor laws, and by punishing those who do not. A project of TDLR could encourage these positive aspects of PLR.

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[109] Sabel, Fung, & O'Rourke, *supra* note 105 at 332.

[110] *See* Kolben, *supra* note 3 at 234, arguing that PLR can "potentially change norms on the ground" by introducing labor rights into local discourses in ways that can over time reduce local employer and state government resistance.

[111] David Trubek, Jim Mosher, Jeffrey Rothstein, *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks* (2000), 25 L. & SOC. INQ. 1187 at 1193.

But a project of TDLR targeting foreign labor practices should be guided by questions like the following: How can we encourage PLR outcomes that will empower local workers and their organizations over time? How can we influence PLR to create norms that empower and encourage foreign governments to more effectively protect core labor rights? How can we encourage these kinds of improvements without at the same time undermining the ability of developing states to attract and retain foreign investment from MNCs, or cause factory owners to layoff workers? And, ultimately, what impact will all of this have on actual labor practices in supplier factories.

These are not easy questions. They appear to require law-makers to, among other things, learn how supply chains operate, learn what forces influence decisions about labor practices in foreign places and how PLR influences those forces, and to then anticipate how legal signals transmitted through domestic regulation into this milieu will be interpreted and acted upon in the hope that these responses might lead to positive developments in foreign industrial relations systems that could translate into improvements on factory floors. The sheer complexity of the project may be enough to discourage many law-makers, even if they are otherwise supportive of a project aimed at encouraging improved labor practices within global supply chains. [112]

On the other hand, some possibilities do exist. It is even possible that some relatively modest legislative steps could provoke useful changes in the ways in which labor practices within global supply chains are managed. Mandatory reporting on matters related to supply chain labor practices is one option that has been explored.[113] Requiring companies to adopt codes of conduct and to then monitor and report on compliance with those codes is another option that has been suggested.[114] These sorts of legislative schemes could prove useful to workers in

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[112] See Black's sceptical explanation of how reflexive, decentered regulation avoids problems associated with more formal, command and control style regulation:

> Procedural law is a shift to more indirect and abstract guidance mechanisms, but ones which are like material law purposive in their orientation. It is the recognition of a heterarchical and not hierarchical relationship between politics, law, and other social systems; its central characteristic is decentral, context regulation. It attempts to affect (irritate) the system in such a way that it moves from its current state to that which is required.... Procedural law requires only (!) that the state understands the strategic structures of systems, 'what makes them tick', knowledge which Tuebner argues it can acquire with limited empirical work.

Julia Black, *Proceduralizing Regulation: Part I*, (2000), 20 OX. J. LEG. STUD. 597 at 603.

[113] *See, e.g*, Hess, *supra* note 6; Doorey, *supra* note 1.

[114] This appears to be a component of the *Ratcheting Labor Standards* model proposed by Sabel, Fung, and O'Rourke, *supra* note 34. And see the proposed legislation described in footnote 18, *supra.*

developing countries in their struggle to win improvements in working conditions if they alter the balance of power within the foreign industrial relations systems in their favour while creating an incentive for MNCs to remain with a supplier despite marginal increases in labor costs associated with those improvements. That is the challenge for the design of transnational domestic labor regulation, and for those who advocate for it.