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## In Defense of Transnational Domestic Labor Regulation

David J. Doorey

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# In Defense of Transnational Domestic Labor Regulation

David J. Doorey\*

## ABSTRACT

*Transnational domestic labor regulation (TDLR) is unilateral regulation introduced by a government to influence labor practices in foreign jurisdictions. TDLR has the potential to empower foreign workers and influence the balance of power in foreign industrial relations systems in ways that might lead to improved labor conditions. Particularly interesting is the potential for TDLR to harness or steer private labor regulation—the many non-state sources of labor practice governance already active in shaping labor conditions within global supply chains. However, whether governments should try to influence foreign labor practices at all is a controversial question. This Article explores the arguments both for and against a unilateral legislative strategy that aims to improve working conditions in foreign countries. While the Article ultimately supports this strategy, it concludes that the design of the model must have as its principal objective the empowerment of the foreign workers themselves. TDLR that is poorly designed or loses sight of this objective can produce harmful results that leave the workers even worse off.*

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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 improve labor practices in economically developing countries? Should the U.S. government expend financial and political

resources to improve working conditions in Chinese or Indian factories? These are controversial questions.

On one side of the debate is the argument that determining acceptable employment practices within a particular jurisdiction is best left to its governing political leaders 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 nonexistent or outlawed altogether and where national governments are either unable or unwilling to enforce decent labor standards to protect workers.

In fact, Western governments have sought to influence working conditions in developing countries through a variety of methods, including support for direct trade-labor linkages in regional and supranational trade agreements and “soft law” measures intended to reward decent labor practices and punish offensive ones.<sup>1</sup> Some governments have also enacted unilateral legislation intended to influence labor practices in foreign jurisdictions.<sup>2</sup> This Article focuses on unilateral legislation and, more specifically, on 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 labeled “transnational domestic labor regulation” (TDLR).<sup>3</sup> It is “transnational” in the broad sense envisioned by Philip Jessup, who defined transnational law to

1. See, e.g., Simon Deakin & Richard Hobbs, *False Dawn for CSR? Shifts in Regulatory Policy and the Response of the Corporate and Financial Sectors in Britain*, 15 CORP. GOVERNANCE 68, 68–75 (2007) (focusing on the “social dimension” of corporate social responsibility); Maria Gillen, *The Apparel Industry Partnership’s Free Labor Association: A Solution to the Overseas Sweatshop Problem or the Emperor’s New Clothes?*, 32 N.Y.U. J. INT’L L. & POL. 1059, 1062–64 (2000) (describing the founding of the Free Labor Association and its Workplace Code and Monitoring Principles); Katherine Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT’L L. 987, 1006–19 (1995) (comparing two methods used by North American countries to expand transnational labor regulation: (1) carrying out the North American Free Trade Agreement’s (NAFTA) enforcement and monitoring mechanisms, and (2) applying U.S. labor law extraterritorially).

2. Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253, 253–54 (1987).

3. David J. Doorey, *Who Made That? Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation*, 43 OSGOODE HALL L.J. 353, 365 (2005) [hereinafter Doorey, *Who Made That?*] (discussing the use of domestic regulation to influence foreign labor practices, but employing the terminology of “decentralized regulation” and “reflexive law” rather than “transnational domestic labor regulation”); David J. Doorey, *Transnational Domestic Labour Regulation: Using Domestic Disclosure Regulation to Influence Foreign Labour Practices* 7 (Apr. 2009) (unpublished Ph.D. dissertation, Osgoode Hall Law School) (on file with author).

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.”<sup>4</sup> State-based laws that create incentives for foreign governments to improve labor laws or for foreign producers to improve labor practices are included. For example, Generalized Systems of Preferences grant import preferences based on compliance with specified labor standards.<sup>5</sup> A law that denies the importation of a product made under working conditions that violate a standard—such as the standard not to use child or prison labor—would also qualify as TDLR, since the objective of the law is to encourage foreign suppliers to cease the offending practice.<sup>6</sup>

However, this Article is mostly interested in regulation that is designed to influence or steer the behavior of MNCs and the many factory owners they engage around the world to produce their goods.<sup>7</sup> This type of TDLR offers interesting potential in an era in which capital is global and governance of business behavior is divided into complex arenas of government and private forms of regulation. It draws on the lessons of so-called “de-centered” or “reflexive” legal theory, which is often labeled “New Governance” in North America.<sup>8</sup>

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4. PHILIP C. JESSUP, *TRANSNATIONAL LAW* 3 (1956).

5. See Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 *COMP. LAB. L. & POL'Y J.* 199, 199 (2003) (providing the basic principles of the Generalized System of Preferences); Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 *HARV. INT'L L.J.* 203, 213–14 (2007) (discussing examples in the United States such as legislation on loans issued by the Overseas Private Investment Corporation); Yaroslau Kryvoi, *Why European Union Trade Sanctions Do Not Work*, 17 *MINN. J. INT'L L.* 209, 209–11 (2008) (providing a brief historical overview of the Generalized System of Preferences in the European Union).

6. This was the intended model of legislation U.S. Senator Bill Harkin introduced in the mid-1990s that proposed to ban products made by “child labor,” later known as the Child Labor Deterrence Act, S. 613, 103d Cong. (1993). See Kaushik Basu, *Compacts, Conventions, and Codes: Initiatives for Higher International Labor Standards*, 34 *CORNELL INT'L L.J.* 487, 490–91 (2001).

7. See Basu, *supra* note 6, at 490 (using 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].” (emphasis added)). 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 also targets the actual employers, the MNCs that source from them, and the many other private actors they engage with on labor practice matters.

8. For a thorough overview of the New Governance literature, see Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World*, 54 *CURRENT LEGAL PROBS.* 103 (2001); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *MINN. L. REV.* 343, 344 (2004) (introducing the conceptual framework of the de-centered New Governance model). On “reflexive law,” see Harry Arthurs,

The idea, in very general terms, is that some social and economic problems are more effectively addressed through indirect legal signals that guide, steer, or encourage changes in behavior by influencing the practical conditions under which behavioral norms emerge.<sup>9</sup> A de-centered legal orientation encourages lawmakers to think about what sorts of legal signals might create the perception for employers or MNCs that improving labor practices is in their economic interest.

Viewing concerns about abusive labor practices within global supply chains through the lens of de-centered regulation opens up possibilities for the use of regulation to harness and agitate those forces that, in practice, already influence normative labor conditions. Labor practices within modern global supply chains are today determined not only by national labor laws and prevailing market conditions, but also by pressures, rules, risks, and opportunities whose origins lie in the efforts of non-state activists interested in improving labor practices. These activists employ a number of tactics: they utilize investigations, monitoring, and campaigns, or the threat of them, by nongovernmental organizations (NGOs), unions, academics, and journalists; they encourage multi-stakeholder and industry-led initiatives seeking to eliminate sweatshops; student activists pressure their educational institutions to adopt “no sweat” policies; and consumers and activist investors avoid companies that condone abusive labor practices.

The rules and norms that developed from the interactions of these groups with employers and MNCs have been variously described as “outsourced,” “non-governmental,”<sup>10</sup> or “private labor regulation” (PLR)<sup>11</sup>—the term this Article employs. If PLR in fact

*Corporate Self-Regulation: Political Economy, State Regulation, and Reflexive Labor Law*, in REGULATING LABOR IN THE WAKE OF GLOBALISATION (Cynthia Estlund & Brian Bercusson eds., 2008); Doorey, *Who Made That?*, *supra* note 3, at 366–72 (discussing the decentralized role of the state and the reflexive law paradigm for influencing corporate behavior abroad); David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41, 42–48 (1999); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 239 (1983).

9. See, e.g., Hess, *supra* note 8, at 50 (discussing the merits of reflexive law in guiding the regulatory behavior of private actors).

10. See Dara O'Rourke, *Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards and Monitoring*, 31 POL'Y STUD. J. 1, 2 (2003).

11. See Kolben, *supra* note 5, 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 of 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

influences labor practices, as many authors have claimed, then this creates opportunities for TDLR that have been underexplored in legal literature. For instance, if MNCs are more likely to insist that their suppliers comply with local labor laws because failing to do so will lead to negative publicity in an NGO campaign, then a law empowering the NGOs may create greater pressure on MNCs to monitor their suppliers' labor practices. In other words, TDLR could be used to harness PLR to raise the probability of improved labor conditions in supplier factories.

A law might require MNCs to disclose information about their global supply chains and thereby increase the risk in permitting abusive labor conditions in their supplier factories to go unchecked.<sup>12</sup> States can use regulation to inject risk into supply chain management systems with the expectation that the companies' risk management responses will ultimately improve the environment under which labor practice norms emerge. A law requiring every supplier to be identified with a name and address, for example, could alter the power dynamic between the MNC, its suppliers, and the many private activists engaged in monitoring and reporting on supply chain labor practices. Such a law would make it easier and cheaper for the activists to monitor a company's activities, thereby increasing the risk that abusive labor conditions will be exposed.<sup>13</sup> This change in relative power could indirectly encourage the MNC or the contractor to take steps to reduce the possibility of exposure as a labor rights violator, which in turn could have a positive effect on labor practices.

Whether or not a law that seeks to indirectly influence supply chain labor practices would be effective in practice is an interesting, and as yet, largely untested hypothesis. However, there is another question that needs to be addressed first: whether a regulatory TDLR project that seeks to harness the power of PLR, with the aim of improving foreign labor practices, is good policy. Ultimately, this Article's objective is to defend the use of TDLR as a means of improving labor practices in foreign jurisdictions. However, the Article also recommends that the form and design of any such

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members that participate in the private regulatory process, including welfare and human rights organizations, churches, and trade unions.

*Id.*

12. See Doorey, *Who Made That?*, *supra* note 3, at 393–95 (discussing a proposed amendment to Canada's Act Respecting the Labeling, Sale, Importation, and Advertising of Consumer Textile Articles, R.S.C. 1985, c. T-10, that would require disclosure of factory location).

13. *Id.*; see also David Doorey, *Can Factory List Disclosure Improve Labor Practices in the Apparel Industry? A Case Study of Nike and Levi-Strauss 2* (Comp. L. & Pol. Econ. Research Paper Series, Paper No. 1, 2008) [hereinafter Doorey, *Factory List Disclosure*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1000198](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1000198).

regulation must take account of some legitimate warnings and lessons described by critics of this form of transnational regulation.

Part 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 the governments of many developed countries, and some have actually passed laws to try to influence those practices. It does not require too great a leap of faith to imagine that other governments could be influenced to take similar measures in the future, particularly if their citizens continue to express concern about labor practices.

The remainder of this Article is devoted to debating the key arguments in favor of and against the use of domestic regulation to influence foreign labor practices. Part II examines anticipated arguments against TDLR. Part III considers responses to these arguments and outlines arguments in support of TDLR. One theme that emerges from these debates 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 employers. Part IV fleshes out this argument and contends 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 WITHIN DEVELOPED STATES

The notion that national governments have an interest in labor conditions in foreign states is not new. The original constitution of the International Labour Organization (ILO), Chapter XIII of the Treaty of Versailles of 1919, observed that the “failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”<sup>14</sup> More recently, the vast expansion of global sourcing, combined with the dismantling of trade barriers, provoked heightened interest in the relative conditions of labor around the world. In the advanced economic nations of the global North, this renewed interest in conditions of work in the global South frequently resulted in requests for tariffs or outright bans on the importation of goods from one or more countries in order to protect local industries

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14. J. ATLESON ET AL., *INTERNATIONAL LABOR LAW* 51 (2009).



and employment from what is perceived as unfair trade caused by the availability of cheap labor abroad.<sup>15</sup>

But often, especially in the past decade, the argument in favor of government action to encourage improved foreign labor practices has been characterized as an ethical issue—“rich” countries have a responsibility to use their power to protect vulnerable workers in “poor” countries from labor abuses when their own governments are either incapable or unwilling to do so.<sup>16</sup> The responses of Western governments to demands from their citizens to play an active role in encouraging improved labor practices in developing states have varied.

The Canadian government recently commissioned a study of a proposal made by an NGO, the Ethical Trading Action Group, that would have amended the regulations of the Federal Textile Labeling Act to require disclosure of the name and address of the factory where a garment is manufactured.<sup>17</sup> For a variety of reasons—including, most notably, industry resistance—the final report rejected the proposal to require factory information disclosure.<sup>18</sup> However, it acknowledged a strong consensus among industries and NGOs in favor of an increased role for 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;

15. See PIETRA RIVOLI, *THE TRAVELS OF A T-SHIRT IN THE GLOBAL ECONOMY: AN ECONOMIST EXAMINES THE MARKETS, POWER, AND POLITICS OF WORLD TRADE* 171 (2005) (exploring the many efforts of American apparel makers, retailers, and unions to persuade lawmakers to prohibit or limit apparel imports from low-wage countries in order to protect “American jobs”); Brian Langille, *Eight Ways to Think About International Labor Standards*, 31 *J. WORLD TRADE* 27, 38 (1997) (discussing the inherent hypocrisy in accusing another nation of unfairly offering cheaper labor).

16. See, e.g., Iris Young, *Responsibility and Global Labor Justice*, 12 *J. POL. PHIL.* 365, 374 (2004) (arguing that advanced economic states and their citizens have a “political responsibility” to advance labor rights in developing countries).

17. See Act Respecting the Labeling, Sale, Importation, and Advertising of Consumer Textile Articles, R.S.C. 1985, c. T-10; Textile Labeling and Advertising Regulations, C.R.C., c. 1551 (Can.); COMPETITION BUREAU, *GUIDE TO TEXTILE LABELING AND ADVERTISING REGULATIONS* (2000), <http://strategis.ic.gc.ca/pics/cp/textile.pdf>. The findings of the study are found in DAVID BROOK & ANITA MAYER, *PUB. POLICY FORUM, CONSULTATION ON A PROPOSAL TO VERIFY LABOUR STANDARDS IN THE APPAREL INDUSTRY: OUTCOMES AND RECOMMENDATIONS* (2003), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/2005-07-22\\_etag\\_eng.pdf?file/2005-07-22\\_etag\\_eng.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/2005-07-22_etag_eng.pdf?file/2005-07-22_etag_eng.pdf).

18. BROOK & MAYER, *supra* note 17, at 1–2.

- 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 FLA . . . to help identify and promote best practices in encouraging and enabling fair labour practices both domestically and internationally.<sup>19</sup>

Through a variety of institutions and measures, the Canadian government already actively encourages and assists Canadian businesses in developing corporate social responsibility systems and practices for global business and encourages improved enforcement of labor standards in foreign countries.<sup>20</sup>

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.<sup>21</sup> 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.”<sup>22</sup>

In the United States during the mid-1990s, the Clinton Administration responded to pressures from the public, labor groups, and domestic textile and apparel producers to address American apparel companies’ use 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 (FLA).<sup>23</sup> American politicians have proposed legislation that would either limit imports of consumer goods made under abusive labor practices or reward corporations that adopt codes of conduct with labor components and take specified steps towards ensuring compliance

19. *Id.*

20. See, e.g., *Corporate Social Responsibility*, INDUST. CANADA, <http://strategis.ic.gc.ca/epic/site/csr-rse.nsf/en/Home> (last visited Sept. 26, 2010) (describing “corporate social responsibility” initiatives that encourage Canadian businesses to strive to improve labor practices abroad); *Overview: The International Trade and Labour Grants and Contributions Program*, LABOUR, <http://www.hrsdc.gc.ca/en/lp/ila/Overview.shtml> (last visited Sept. 26, 2010) (focusing “on promoting good governance and the rule of law, respect for international labour standards, a more equitable distribution of the benefits of globalization, and participating in international efforts to improve respect for labour rights”).

21. Deakin & Hobbs, *supra* note 1, at 68.

22. *Ethical Trade Initiative*, JOINT INITIATIVE ON CORPORATE ACCOUNTABILITY AND WORKERS RIGHTS, <http://www.jo-in.org/participating.htm#ethical> (last visited Sept. 26, 2010); see also *ETHICAL TRADING INITIATIVE*, <http://www.ethicaltrade.org/Z/abteti/index.shtml> (last visited Sept. 26, 2010).

23. Gillen, *supra* note 1, at 1062; Thomas A. Hemphill, *The White House Apparel Industry Partnership Agreement: Will Self-Regulation Be Successful?*, 104 BUS. & SOC’Y REV. 121, 123 (1999).

throughout their global supply chains.<sup>24</sup> The U.S. government also insisted on the inclusion of a “labor side agreement” in the North American Free Trade Agreement (NAFTA), as well as 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.<sup>25</sup>

The German government utilizes the Gesellschaft für Technische Zusammenarbeit (GTZ), a publicly funded company, in pursuit of improved labor conditions in developing countries.<sup>26</sup> 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.<sup>27</sup>

Among other projects, the GTZ helped fund the development of the RUGMARK initiative that targets child labor in India.<sup>28</sup>

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24. Code of Conduct Act, H.R. 5377, 109th Cong. (2006); see also Arthurs, *supra* note 8, at 23 (describing the Corporate Code of Conduct Act, introduced by Democrat Cynthia McKinney, which would have required American corporations that employ greater than twenty 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).

25. North American Agreement on Labor Cooperation, U.S.–Can.–Mex., Sept. 13, 1993, 32 I.L.M. 1499 [hereinafter NAALC]; see also Marley Weiss, *Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 689–90 (2003) (commenting on the expansion of the NAALC model to subsequent trade agreements).

26. *About Us - Corporate Profile*, GTZ, <http://www.gtz.de/en/689.htm> (last visited Sept. 26, 2010).

27. Heidemarie Wiczorek-Zeul, *Preface to THE WORKING GROUP ON SOCIAL STANDARDS, MAKING GLOBALISATION SOCIALLY EQUITABLE: IMPLEMENTING CORE LABOR STANDARDS IN SELECTED GERMAN DEVELOPMENT COOPERATION PROJECTS* (2004), <http://www.gtz.de/de/dokumente/en-ak-broschuere.pdf>.

28. See Sayan Chakrabarty & Ulrike Grote, *The Impact of Social Labeling on Child Labor in the Indian Carpet Industry* (Leibniz Univ. Hannover, Faculty of Econ. and Mgmt., Working Paper No. 366, 2007), <http://www.wiwi.uni-hannover.de/Forschung/Diskussionspapiere/dp-366.pdf>.

Other countries have recently invested in initiatives 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 Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises and to the principals of the UN Global Compact.<sup>29</sup> In 2003, the Italian Ministry of Foreign Affairs introduced an initiative known as Global Compact Italy: Sustainable Development through the Global Compact. The initiative encourages 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.<sup>30</sup>

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 direct indicators of labor practices.<sup>31</sup> 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 a company’s social and environmental footprint in the communities in which it operates.<sup>32</sup> One notable requirement is that companies must indicate the extent to which their subsidiaries follow ILO core conventions; the methodologies used to track this information; and “the importance of subcontracting to their operations and how they promote compliance by their subcontractors

29. Jonathan Lux et al., *The European Initiatives*, in *CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY* 279, 295 (Ramon Mullerat & Daniel Brennan eds., 2005).

30. *Global Compact Italy – Sustainable Development Through the Global Compact*, INT’L LABOUR ORG., <http://www.ilo.int/public/english/region/eurpro/rome/projects/03.htm> (last visited Sept. 26, 2010).

31. Loi 2001–420 du 15 Mai 2001 [Law 2001–420 of May 15, 2001], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 16, 2001; Décret 2002–221 du 20 Février 2002 [Decree 2002–221 of February 20, 2002], *J.O.*, Feb. 21, 2002, p. 3360. The Regulations apply to French companies listed on the premier *marché*, which consists of companies with the largest market capitalization value. See Lucien Dhooge, *Beyond Voluntarism: Social Disclosure and France’s Nouvelles Régulations Economiques*, 21 *ARIZ. J. INT’L & COMP. L.* 441, 445–52 (2004) (providing a brief history of the NRE social disclosure requirements and an overview of the NRE social disclosure scheme); see also Cynthia Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 *HARV. L. REV.* 1197, 1293–96 (1999) (arguing that American securities laws should require a similar reporting on global activities, including reports on a variety of labor-related variables).

32. See Dhooge, *supra* note 31, at 450–51 (describing Article 148–2 of the Decree).

with fundamental labor rights, including conventions of the International Labor Organization.”<sup>33</sup>

One can speculate on why governments expend resources on these activities. Perhaps they believe that domestic businesses will be more productive and competitive if they source from foreign employers who treat their employees decently (an economic argument); or that all governments have a responsibility to advance human rights issues everywhere (a human rights argument); or that abusive labor practices in foreign jurisdictions amount to an unfair trade advantage over local producers (a trade argument); or that voters simply expect their government to participate in improving conditions for foreign workers (a political argument). 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 may be attractive to politicians from across the political spectrum. It draws on the same core set of beliefs as New Governance and de-centered regulatory approaches.<sup>34</sup> These approaches to regulation are usually directed at the governance of domestic activities, whereas TDLR targets foreign activities, but the similarities are obvious. The philosophy suggests the use of regulation to influence the private development of norms by altering the power relations that shape private negotiations about those norms.<sup>35</sup> Even those politicians otherwise suspicious of business regulation, and of labor regulation in particular, may find this approach attractive because it draws on market forces, citizen empowerment through information creation and dissemination, and a vision of the state as a facilitator.<sup>36</sup> This approach 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. We would expect activists and their political allies to support regulation that makes it easier or

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33. *Id.* Dhooge also 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. *Id.* at 476–77. For more information, see discussion in Mary Lou Egan et al., *France’s Nouvelles Regulations Economiques: Using Government Mandates for Corporate Reporting to Promote Environmentally Sustainable Economic Development 11* (unpublished manuscript) (Nov. 2003), <http://bendickegan.com/pdf/EganMauleonWolffBendick.pdf>.

34. See *supra* note 8 and accompanying text.

35. Black, *supra* note 8.

36. See, e.g., Harry W. Arthurs, *The Administrative State Goes to Market (and Cries ‘Wee, Wee, Wee’ All the Way Home)*, 55 U. TORONTO L.J. 797, 809 (2005) (describing how “neoliberals” perceive the purpose of regulation “to facilitate rather than constrain private conduct”).

less costly to uncover reputation-damaging information about MNCs.<sup>37</sup> It is even possible that corporations would support some forms of TDLR, particularly if there was a realistic possibility of some alternative measures that would impose more direct or costly forms of regulation or if the corporation had already taken all or part of the steps proposed in the legislation. For example, after Levi-Strauss voluntarily disclosed publicly the names and addresses of its global supplier list, its 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.<sup>38</sup>

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 TDLR. Of course, the fact that there may be pressure on governments 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 behavior in other countries is the subject of the remainder of this Article.

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

There are a number of arguments against using domestic regulation to harness, influence, or shape the private creation of labor practice norms in foreign jurisdictions. The following section comments on six of them.

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37. See, e.g., Submission from Ethical Trading Action Grp. on Transparency and Disclosure: New Regulatory Tools to Challenge Sweatshop Abuses to Pub. Policy Forum's Nat'l Consultation on Textile Labelling, Transparency, and Disclosure (Sept. 30, 2003), <http://en.maquilasolidarity.org/sites/maquilasolidarity.org/files/ETAGExecutiveSummary.pdf>; see also Code of Conduct Act, H.R. 5377, 109th Cong. (2006) ("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."). The Ethical Trading Action Group is a coalition of trade unions, human rights organizations, and faith-based organizations interested in improving labor conditions in developing states. About ETAG, MAQUILA SOLIDARITY NETWORK, <http://en.maquilasolidarity.org/about/etag> (last visited Sept. 26, 2010).

38. Doorey, *Factory List Disclosure*, *supra* note 13, at 57–58.

A. *TDLR Undermines Foreign Government National Sovereignty and Comparative Advantage*

The initiatives and campaigns of labor activists may 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 where factories are located. 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. Furthermore, it undermines the comparative advantage of relatively low labor costs that economically developing states exploit in order to attract MNC investment. In other words, PLR is a form of Northern protectionism.<sup>39</sup> Consequently, state-based regulation that encourages and legitimizes PLR initiatives also constitutes an indirect form of protectionism aimed at discounting the comparative advantage of low labor standards.

There are several ways in which PLR initiatives may undermine national labor policies. One occurs if a state has introduced labor laws but has no intention of actually enforcing those laws or if a state 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.<sup>40</sup> PLR that encourages compliance with national labor laws, or with ratified international conventions, would conflict with a state policy of noncompliance and nonenforcement. In these circumstances, the government does not

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39. See, e.g., Basu, *supra* note 6, at 491 (discussing how legislation such as the Child Labor Deterrence Act, S. 613, 103d Cong. (1993), “enable[s] protectionism in the north”); Letter from Jagdish Bhagwati to Columbia Univ. Comm. on a Living Wage (Feb. 16, 2004) [hereinafter Bhagwati], available at <http://archives.econ.utah.edu/archives/marxism/2004w07/msg00043.htm>.

[M]any (including altruistic NGOs) in the poor countries see the drive towards raising the local cost of production of apparel in particular (because that is 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.

Bhagwati, *supra*.

40. See, e.g., Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 *IND. J. GLOBAL LEGAL STUD.* 401, 403–11 (2001); see also Kryvoi, *supra* note 5, at 214, 217, 219 (arguing that governments fail to enforce core international labor conventions because: (1) they lack the capacity or expertise to enforce these standards; (2) they are ideologically opposed to the standards (“political reasons”); or (3) they believe doing so will discourage foreign inward investment (“economic reasons”).

want assistance with enforcement because effective enforcement actually undermines the government's labor strategy.

PLR may also conflict with national labor polices in more obvious ways by producing standards and norms that conflict directly with domestic labor laws. For example, most contemporary private labor initiatives require employers to respect freedom of association and the rights to unionize, engage in collective bargaining, and strike,<sup>41</sup> but these requirements conflict with national labor laws if applied to thousands of suppliers operating in China. These are all "core" rights in ILO instruments, enshrined not only in Conventions 87 (on freedom of association and the protection of the right to organize) and 98 (on the right to organize and collective bargaining), but also in the Constitution of the ILO and in its 1998 Declaration on Fundamental Principles and Rights at Work.<sup>42</sup> However, Chinese law does not permit independent unions and free collective bargaining, and China has not ratified either ILO Convention 87 or 98.<sup>43</sup> Therefore, not only do many PLR initiatives demand that employers provide greater rights to workers than required by Chinese law, but they also require employers to act in a manner that *violates* Chinese labor law.<sup>44</sup>

41. O'Rourke, *supra* note 10, at 2.

42. Declaration on Fundamental Principles and Rights at Work, pmb. para. 2(a), June 18, 1998, 37 I.L.M. 1233 (declaring the right to collectively bargain as a fundamental right); Convention Concerning the Application of the Right to Organise and Bargain Collectively (No. 98) pmb., art. 1.1, July 7, 1949, 96 U.N.T.S. 257 (declaring a right of workers to bargain collectively, and protecting workers from antiunion discrimination, respectively); Convention Concerning Freedom of Association and Protection of the Right to Organise (No. 87) art. 11, July 9, 1948, 68 U.N.T.S. 17 (requiring ILO members to take all necessary and appropriate steps to ensure that workers may organize); ILO Constitution pmb., June 28, 1919, 15 U.N.T.S. 35 (recognizing the right to freedom of association); *see also* ATLESON, *supra* note 14, at 57-66 (discussing the "constitutional" primacy of Conventions 87 and 98, and the ILO Declaration).

43. *See* Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China*, 30 *FORDHAM INT'L L.J.* 1050, 1072-74 (2007) (discussing the inadequacies of China's official trade union organization and the prohibition against unions formed without official approval).

44. 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 Ethical Trading Initiative, a U.K.-based NGO, which provides, "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." *ETI Base Code*, ETHICAL TRADING INITIATIVE (June 25, 2009), <http://www.ethicaltrade.org/eti-base-code> [hereinafter *ETI Base Code*]. 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



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 freedom of association in China is not ideal for confronting the problem of conflict between private and state regulation. It might be tempting 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 requirement for ILO members, including China.<sup>45</sup>

Therefore, an argument can be made 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 not to respect these human rights.<sup>46</sup> 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 encouraging respect for a bundle of universally accepted “fundamental” rights, then regulation that encourages PLR could be justified on those terms.<sup>47</sup> For example, if a government believes that the Global

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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.

ETHICAL TRADING INITIATIVE, FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING (2005), <http://www.ethicaltrade.org/sites/default/files/resources/ETI%20Freedom%20of%20association%20and%20collective%20bargaining,%20Guidance.pdf>.

45. Adelle Blackett, *Codes of Conduct and the Labour Regulatory State in Developing Countries*, in *HARD CHOICES*, SOFT LAW 121, 126 (John Kirkton & Michael Trebilcock eds., 2004); see also Roy Adams, *The Supreme Court, Collective Bargaining, and International Law: A Reply to Brian Langille*, 14 CAN. LAB. & EMP. L.J. 111 (2009).

46. See Young, *supra* note 16, at 374–83 (arguing in favor of the existence of such a responsibility).

47. 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 these Conventions by ILO supervisory bodies. See Brian Burkett et al., *Canada and the ILO: Freedom of Association Since 1982*, 10 CAN. LAB. & EMP. L.J. 231, 249–250 (1985); see also Reference re Public Service Employees Relations Act, [1987] 1 S.C.R. 313 (Can.) (holding 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

Compact, the SA8000, or the FLA encourages respect for universally recognized labor rights, then it could require companies within its regulatory grasp to join those programs and to report on their compliance.<sup>48</sup>

Difficulties arise, however, because of the uncertainty associated with PLR. It may evolve in unpredictable ways and produce norms that are inconsistent with those desired by a regulating state wishing to harness PLR to produce specific labor practice norms in foreign workplaces. Although it is possible that PLR may produce results consistent with the values of the regulating state, or with international legal norms such as those espoused by the ILO, there is no guarantee that labor practices will evolve along those lines. Nor is it certain that the norms and standards pursued through PLR, the regulating state's opinion of what norms and standards are desirable, or the nature of internationally recognized norms and standards will remain constant over time. This creates a 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 "living wage" requirement better illustrates this problem. Whereas most governments, and even most MNCs, 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 a living wage requirement.<sup>49</sup> The precise definition of a living wage and 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 workers with the means to afford the basic necessities of life in the communities in which they

interpreted by the ILO to include that right). 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.

48. See, e.g., Archon Fung, *Deliberative Democracy and International Labor Standards*, 16 GOVERNANCE 51 (2003) (arguing for regulatory intervention that encourages "decentralized deliberation" about labor standards by private and public actors, including disclosure requirements); ARCHON FUNG, DARA O'ROURKE & CHARLES SABEL, *Realizing Labor Standards, in CAN WE PUT AN END TO SWEATSHOPS?* 26 (Joshua Cohen & Joel Rogers eds., 2001) (arguing that states could encourage PLR by requiring companies to adopt a code of conduct and report on supplier compliance with its terms).

49. See Wesley Cragg, *Human Rights and Business Ethics: Fashioning a New Social Contract*, 27 J. BUS. ETHICS 205, 208 (2000) (noting that because corporate codes of conduct tend to be self-serving, they do not typically protect the human rights of employees unless the corporation will benefit, but that many corporations, in fact, do benefit from developing practices that protect the human rights of employees); Bhagwati, *supra* note 39 (arguing that a living wage requirement is the "wrong way to [g]o" toward defining social responsibility for multinational employers).

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.”<sup>50</sup> This definition is typical in that 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, where they exist.<sup>51</sup>

The living wage, as it applies to global supply chains,<sup>52</sup> has been advanced 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 (ETI) in the United Kingdom<sup>53</sup> and the Workers’ Rights Consortium (WRC) and the SA8000 Standard in the United States.<sup>54</sup> However, the FLA studied and rejected the living

50 SOC. ACCOUNTABILITY INT’L, SOCIAL ACCOUNTABILITY 8000, § 8.1 (2005), available at <http://www.sa-intl.org/document/docWindow.cfm?fuseaction=document.viewDocument&documentid=136&documentFormatId=244>; see also UNIV. OF TORONTO, CODE OF CONDUCT FOR LICENSEES § 4(C)(1) (2010), [http://www.trademarks.utoronto.ca/downloads/code\\_of\\_conduct.pdf](http://www.trademarks.utoronto.ca/downloads/code_of_conduct.pdf) (“Licensees and their contractors must provide wages and benefits 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.”).

51. See *Living Wage Standards in Codes of Conduct*, MANQUILA SOLIDARITY NETWORK (Oct. 1, 2004), <http://en.maquilasolidarity.org/node/320> [hereinafter *Living Wage Standards*].

The [minimum wage required by law standard] is obviously the easiest to accurately measure, but has been deemed inadequate by most parties because legal minimum wage has been kept artificially low in most countries to attract investment. Market-basket studies have found that, without working excessive overtime hours, the minimum wage in many countries is not sufficient to meet a worker’s basic needs.

*Id.*

52. There is a strong legislative movement in the United States requiring “living wages” for public sector workers as a procurement condition. See, e.g., Bruce Nilssen, *Living Wage Campaigns from a ‘Social Movement’ Perspective: The Miami Case*, 25 LAB. STUD. J. 29, 29 (2000).

53. See ETHICAL TRADING INITIATIVE, LIVING WAGE: MAKE IT A REALITY 1 (2009), <http://www.ethicaltrade.org/sites/default/files/resources/ETI%20Conference%202008%20briefing%20paper%20%20Living%20wage.pdf>.

54. See *Living Wage Standards*, *supra* note 51. Some university licensee codes of conduct also include “living wage” requirements. See, for example, the York University (Toronto) Code, which includes the following language:

Licensees acknowledge that wages are essential to meeting employees’ basic needs. Licensees shall pay employees at least the minimum wage required by local law, the prevailing industry wage or living wage, whichever is higher, and shall provide legally mandated benefits.

YORK UNIVERSITY, CODE OF CONDUCT FOR Licensees, art. 111-8, <http://www.yorku.ca/secretariat/licensing/Forms/CodeofConductForLicensees.pdf>.

wage standard.<sup>55</sup> 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. 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's membership because the company refused to endorse the living wage standard in the ETI base code.<sup>56</sup>

The important point is that PLR may pressure employers to adhere to standards that remain contested and that may effectively undermine domestic labor policy strategies.<sup>57</sup> If the living wage standard became widely adopted as a measure of decent labor practices, it could pressure employers in developing countries to pay more than either national wage laws or local labor market conditions would dictate. This may be good for the workers, but only if the increase in wage costs does not cause foreign investors to downsize or exit altogether in favor of cheaper labor elsewhere.

It is this kind of fine balancing that governments are expected to engage in when determining domestic labor policies. As a result, some economists and many politicians in developing countries oppose

55. See FAIR LABOR ASS'N LIVING WAGE FORUM, BEYOND QUESTIONS OF PRINCIPAL: EXPLORING THE IMPLEMENTATION OF LIVING WAGES IN TODAY'S GLOBAL ECONOMY (2003), [http://www.fairlabour.org/all/resources/livingwage/FLA\\_livingwage\\_forum\\_report.pdf](http://www.fairlabour.org/all/resources/livingwage/FLA_livingwage_forum_report.pdf); *Why Does the FLA Monitor for Minimum Wage and Not Living Wage?*, FAIR LABOR ASS'N, [http://www.fairlabor.org/fla\\_affiliates\\_colleges\\_and\\_universities\\_d3.html#Q10](http://www.fairlabor.org/fla_affiliates_colleges_and_universities_d3.html#Q10) (last visited Sept. 26, 2010) ("Experience shows that it is difficult, if not impossible, to arrive at a region-specific living wage. . . . In light of this, the FLA Workplace Code of Conduct, which is based on ILO standards, does not include a living wage element."); see also O'Rourke, *supra* note 10, at 11, 26 n.4 (explaining that the original union participants in the Apparel Industry Partnership (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).

56. For more information on Levi-Strauss's suspension, see Sarah Butler, *Levi's Suspended by Ethical Group in Living Wage Row*, SUNDAY TIMES (U.K.), Jan. 20, 2007, available at [http://business.timesonline.co.uk/tol/business/industry\\_sectors/retailing/article1294788.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/retailing/article1294788.ece). In February 2007, following the suspension, Levi-Strauss withdrew its membership in the ETI. *Trading Off the Fairtrade Banner?*, IRISH TIMES, Feb. 23, 2007, at 17. See generally *Make a Commitment to Paying a Living Wage*, CLEARINTHEHURDLES.ORG, <http://www.clearingthehurdles.org/proposal/d1> (last visited Sept. 26, 2010) (describing a survey of leading sportswear companies and the reasons given by the companies why they would not support a "living wage" standard for their suppliers).

57. See David Weil & Carlos Mallo, *Regulating Labour Standards via Supply Chains: Combining Public/Private Interventions to Improve Workplace Compliance*, 45 BRIT. J. INDUS. REL. 791, 794 (2007) ("[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 governmental systems.").

the living wage movement and the PLR movement more generally.<sup>58</sup> 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 perform when setting domestic policies.<sup>59</sup> Legislation that seeks to legitimize or empower PLR is similarly objectionable on this basis.

*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. In some countries, for example, child labor is built into the fabric of society.<sup>60</sup> While it may be possible to achieve widespread 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 income to ensure that a family's basic human needs are satisfied.<sup>61</sup> These issues have helped shape the ILO's careful approach to child labor, which concentrates on the "worst forms of child labor," including slavery, child trafficking, bonded child labor, prostitution, and dangerous work.<sup>62</sup>

PLR may produce labor norms that run head-on into prevailing social norms and disturb the prevailing social order in harmful ways. If PLR were to encourage MNCs to avoid contractors that use child labor, it could deprive local families of a crucial source of income without providing any alternative.<sup>63</sup> It would not necessarily mean, for example, that the children simply return to school, because there may not be a school.<sup>64</sup> Children may be forced to find other, more harmful employment, or the children's families may sink further into poverty. This is a cautionary argument against encouraging PLR to

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58. See Basu, *supra* note 6, at 487 (arguing that many in the Third World are understandably opposed to international labor standards reform, as is the author); see also Paul Krugman, *Moral Economics: What the Campaign for a Living Wage Is Really About*, WASH. MONTHLY, Sept. 1998, at 43 (reviewing ROBERT POLLIN & STEPHANIE LUCE, *LIVING WAGE: WHAT IT IS AND WHY WE NEED IT* (1998)).

59. See generally Basu, *supra* note 6, at 488 (arguing that "at this stage [international labor standards] are best left to individual nations").

60. Kaushik Basu, *Child Labor: Cause, Consequence, and Cure, with Remarks on International Labor Standards* 3 (World Bank Policy Research, Working Paper No. 2027, 1998), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=604927](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=604927).

61. See *id.* at 44–45 (explaining the extent to which child labor is "frowned upon" varies substantially in relation to the social norms in different societies).

62. *International Programme on the Elimination of Child Labour (IPEC)*, INT'L LABOUR ORG., <http://www.ilo.org/ipec/lang--en/index.htm> (last visited Sept. 26, 2010).

63. See Basu, *supra* note 6, at 491 (noting that "parents typically do not send their children to work out of sloth but out of desperation").

64. *Id.*

tinker or alter complex industrial relations systems without a full understanding of the components of that system and how they interact with one another.<sup>65</sup>

*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. Kevin Kolben summarizes this objection:

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 in them tomorrow.<sup>66</sup>

Kaushik Basu is blunter in his objection to PLR initiatives 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 and can cause responses by employers and MNCs that actually harm the workers.<sup>67</sup> For example, consumer boycotts can cause layoffs in a factory without creating any alternative employment opportunities for the laid-off workers.<sup>68</sup> Accordingly, deploying Northern market forces to influence labor conditions in developing countries is unsustainable and potentially harmful to the very people it intends to benefit.

This argument is tied up with claims that, in any event, governments should be able to determine their own domestic labor policies without interference by foreign governments or private actors. According to this objection, foreign governments in particular should not attempt to influence policy in foreign states. Wesley Cragg states the argument this way:

65. See generally Basu, *supra* note 6, at 492–93 (arguing that national governments are best situated to address domestic labor practices because only they can understand the complexities of the issues involved.).

66. Kolben, *supra* note 5, at 229.

67. Basu, *supra* note 6, at 493–94.

68. See *id.* at 491 (criticizing a bill incentivizing other nations to keep children out of their labor force as failing to recognize that “it is possible for children to suffer a fate worse than labor, such as starvation”).

The problem with democratic regimes is that their conception of 'the public' whose interests they are justified in protecting and advancing are national publics. When national governments seek to extend their definitions of 'the public interest' beyond national geographical boundaries, their definitions of 'the public interest' or what we have described as the common good becomes unilateral . . . Democratic governments can only speak for and legitimately describe the common interests of those who elect them.<sup>69</sup>

In these terms, the argument could be interpreted as a normative claim that governments should not concern themselves with labor practices outside of their direct legislative authority.<sup>70</sup> However, the argument also suggests that governments lack the capacity to know or learn what is in the best interest of foreign citizens, and therefore, they should not attempt to influence foreign labor policies.

#### *D. PLR Legitimizes the Substitution of Private or "Self" Regulation for State Regulation*

PLR can also undermine or supplant national labor regulation by legitimizing a system of governance based principally in self-regulation and market forces. Adelle Blackett argues that corporate self-regulation initiatives tend to supplant national labor laws rather than coexist with them, particularly if the initiatives are intended to apply in places where national labor laws are nonexistent or not enforced, such as in export processing zones:

The cumulative result of MNCs in many EPZs [export processing zones] is the *de facto* deregulation of labor relations in these zones. Perched above these deregulated spaces is a new form of legality—self-regulation of labour standards by actors with annual revenues that far exceed the gross domestic product (GDP) 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 state—and the social partners themselves (that is, local employers and workers)—as the new regulators.<sup>71</sup>

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69. Wesley Cragg, *Ethics Codes: The Regulatory Norms of a Globalized Society?*, in *ETHICS CODES, CORPORATIONS AND THE CHALLENGE OF GLOBALIZATION* 353, 359 (Wesley Cragg ed., 2005).

70. However, that is not what Cragg intends. 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. Cragg, *supra* note 49, at 211–13. He argues that a "cooperative" approach to governance is needed that includes a role for governments, industry, and civil society. *Id.*

71. Blackett, *supra* note 45, at 124–25.

Peer Zumbansen makes the same point about labor codes of conduct by 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.”<sup>72</sup>

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.<sup>73</sup> Therefore, it would be inaccurate to associate all PLR with corporate self-regulation. Nevertheless, the fundamental point remains the same: the absence of the state and its power to coerce the other industrial actors means that PLR envisions a completely different sort of industrial relations system in which relative power is determined by consumer, investment, labor, and product markets.<sup>74</sup> The absence of the state as a countervailing power to capital benefits the more powerful actors in the labor relationship: employers and MNCs.

72. Peer Zumbansen, *The Parallel Worlds of Corporate Governance and Labor Law*, 13 *IND. J. GLOBAL LEGAL STUD.* 261, 295 (2006); *see also* Arthurs, *supra* note 8, 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”); Kolben, *supra* note 5, at 228–29 (“Critics [of PLR] are concerned that private regulation threatens and possibly undermines public regulation.”).

73. For example, the Workers’ Rights Consortium, *see Governance*, WORKERS’ RIGHTS CONSORTIUM, <http://www.workersrights.org/about/govern.asp> (last visited Sept. 26, 2010), and the Ethical Trading Initiative, *see Our Members*, ETHICAL TRADING INITIATIVE, <http://www.ethicaltrade.org/about-eti/our-members> (last visited Sept. 26, 2010), both leading private organizations engaged in monitoring supply chain labor practices, include in their governance structures actors who have traditionally been antagonistic to corporate practices, including unions, human rights organizations, students, and academics. *See generally* Alan Ross, *Introduction to NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS* 30–31 (Andrew Ross ed., 1997) (briefly describing the history of unions in the fashion industry); O’Rourke, *supra* note 10 (comparatively assessing systems of nongovernmental enforcement of regulations).

74. *See* Harry Arthurs, *Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 487 (Joanne Conaghan et al. eds., 2002).

[O]ne might argue, half a voluntary code is better than no regulation. But while this argument may have merit, it does not address a 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 workplaces and communities around the world.

*Id.*



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.<sup>75</sup> Insofar as PLR envisions and legitimizes a system of private ordering that largely or completely ignores this central role of the state and the crucial role of power relations in industrial relations, PLR may be doomed to failure beyond the occasional band-aid fix. Even worse, it may impede the development of more effective state participation by distracting attention from it.<sup>76</sup> This argument suggests that encouraging PLR initiatives and campaigns through domestic regulation is the wrong approach 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.<sup>77</sup>

E. *PLR Shifts Responsibility for Defining Appropriate  
Standards from States to Unaccountable  
Private Actors*

Another criticism of PLR is that it tends to delegate responsibility for determining what standards are appropriate to private actors who ultimately are unrepresentative and unaccountable to anyone. The form of this argument differs depending upon the type of PLR initiative or campaign. For example, initiatives such as codes of conduct that a corporation or industry develops and implements without the participation of other external actors, such as unions or NGOs—referred to above as corporate self-regulation<sup>78</sup>—earn criticism for merging the “regulator” and the “agent” and ignoring the need for a legitimate countervailing power to capital in the form of state regulation or collective bargaining.<sup>79</sup>

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75. The argument that local actors need to be involved in efforts to improve local labor conditions is one made by many authors and developed further in Part IV. See, e.g., Basu, *supra* note 6, at 488; Sean Cooney, *A Broader Role for the Commonwealth in Eradicating Sweatshops?*, 28 MELB. U. L. REV. 290, 332–33 (2004); Kolben, *supra* note 5, at 217; Jill Murray, *The Sound of One Hand Clapping? The “Ratcheting Labour Standards” Proposal and International Labour Law* 8 (Faculty of Law the Univ. of Melbourne Pub. Law & Legal Theory, Working Paper No. 24, 2002).

76. See *infra* note 79 and accompanying text.

77. See *infra* note 79 and accompanying text.

78. See generally Black, *supra* note 8 (commenting on the various definitions and applications of “self” regulation).

79. Arthurs, *supra* note 74, at 482, 487.

The codes of corporate conduct and their enforcement mechanisms signify a crucial theoretical departure from traditional industrial relations principles. They are essentially an extension of management power to self-regulate, but in

These arguments recognize, correctly, that corporations have little interest in building this countervailing power themselves. Corporations usually perceive self-regulation 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.”<sup>80</sup>

When private actors rather than corporations promulgate multi-stakeholder codes and other initiatives, the argument often expands to include attacks on the legitimacy and accountability of those actors. 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 targeted by PLR initiatives and campaigns.<sup>81</sup> Furthermore, NGOs are attacked as being unaccountable to anyone, or for being unduly influenced by the ever-pressing need to preserve donors or expand their donor base.<sup>82</sup> Blackett explains:

The channels of accountability for NGOs are sometimes non-existent. . . . [R]elations 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 affect 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 emphasizes NGO representation without focusing on the representative character of the groups that are engaged in advocacy.<sup>83</sup>

A common theme in these “legitimacy” arguments is concern about the absence of voice and participation by the factory workers who are the intended beneficiaries of most PLR initiatives and campaigns<sup>84</sup> or of local NGOs and unions, who at least can claim to have some direct link to the workers on the ground.<sup>85</sup>

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a domain that would traditionally be addressed through one of two means: protective legislation adopted by the state, or collective bargaining.

Blackett, *supra* note 40, at 422.

80. Blackett, *supra* note 40, at 432.

81. See, e.g., *id.* at 437.

82. See, e.g., Paul Wapner, *Defending Accountability in NGOs*, 3 CHI. J. INT’L L. 197, 197 (2002).

83. Blackett, *supra* note 40, at 438.

84. See, e.g., Arthurs, *supra* note 74, at 487; Blackett, *supra* note 40, at 438.

85. See Blackett, *supra* note 40, at 437 (stating that NGOs can at least claim to represent those who suffer violations of certain fundamental human rights); Zumbansen, *supra* note 72, at 295 (“[C]orporate codes of conduct embrace company-level regulation of work-related issues while often rejecting union involvement or other forms of worker representation.”).

Unsurprisingly, these arguments often conclude with the 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.<sup>86</sup> This point is discussed below in Part IV.

#### 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 outweigh any potential benefits. Often this argument is accompanied by dire predictions of job losses and increased consumer prices, among other adverse effects, particularly if the targeted activity can be transplanted to other markets or is a component of global business activity.<sup>87</sup> Certainly, the trend in recent years has been away from new forms of business regulation, particularly regulation of labor practices.<sup>88</sup> Therefore, any government that attempts to introduce new regulation of domestic businesses that targets *foreign* labor practices should anticipate a hostile response from the business community and be prepared to justify the regulation on a cost–benefit analysis.

If the regulation targets workplaces in other countries, part 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. These arguments face several difficulties. First, the expected benefit of the regulation to foreign workers will often be obscure or speculative. Second, a coordination problem may 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

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86. See Arthurs, *supra* note 74, at 487; see also Blackett, *supra* note 40, at 432–33 (“By diverting attention to management monitoring systems, and away from classic voice mechanisms through labor management dispute settlement machinery, self-regulatory initiatives run the risk of supplanting rather than buttressing democratic participation in the work force.”).

87. For example, manufacturers and retailers in Canada responded to an NGO’s proposal for a law requiring public disclosure of the identity and location of supplier factories for apparel sold in Canada by arguing that the law would threaten the viability of Canadian business. See THE CONFERENCE BD. OF CAN., STUDY OF A PROPOSAL (AND ITS ALTERNATIVES) TO AMEND THE TEXTILE LABELLING AND ADVERTISING REGULATIONS: APPLYING THE CONFERENCE BOARD’S OPTIMAL POLICY MIX FRAMEWORK 17 (2003).

88. See, e.g., Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2002) (“[P]rivate sector labor law—the law that governs workers’ efforts to advance their own shared interests through self-organization and collective protest, pressure, negotiation, and agreement with employers—has shrunk in its reach and its significance, and is clearly ailing.”).

companies will have an incentive to avoid that jurisdictional grasp, perhaps by exiting the consumer market. For example, an American law that obligates companies that sell products in the United States to take certain steps to ensure decent supply chain labor practices could theoretically cause companies to pull out of the American consumer market.<sup>89</sup>

If even some of the companies affected by the regulation exercise the exit option, this could have negative effects on the economy of the regulating state or on consumers in that state through fewer choices or higher prices. Furthermore, enforcing requirements that apply to extraterritorial behavior may prove extremely difficult: factories in foreign states probably would not welcome American inspectors. Therefore, the benefits of TDLR that targets foreign labor practices may prove extremely difficult to measure.

### III. ARGUMENTS IN SUPPORT OF TRANSNATIONAL DOMESTIC LABOR REGULATION

The preceding section described serious objections to PLR, which by inference challenge the TDLR project that would seek to harness PLR to improve labor conditions in foreign states. Those arguments might dissuade governments from exploring TDLR. Certainly, proponents of TDLR and PLR need to respond to the criticisms. This section explores what those responses might be.

It is important to be clear on the central issue. The question is not whether there should or should not be PLR. PLR already exists, having developed largely without the involvement of states. There is little indication that codes of conduct, private monitoring, multi-stakeholder initiatives, and market-based publicity campaigns are going to fade away any time soon. Instead, the question is whether PLR can be put to use in ways that advance policies of the governments of developed countries, such as reducing labor abuses in foreign states.

Furthermore, because 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 foreign products made 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

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89. This seems more realistic when the regulating state has a small consumer market. It is highly unlikely, for example, that a company that sells consumer goods would forego the enormous markets of the United States or the European Community just to avoid a regulation aimed at improving supply chain labor practices, unless that regulation threatened the firm's very survival.

adopt and publish a code of conduct for all of their suppliers. Both types of regulation would meet our definition of TDLR because they are domestic laws attempting to influence foreign labor practices, but they create different incentives and risks. One model of TDLR might lead to greater compliance with host-state labor laws, while another produces no result at all, and a third leads to improvements that exceed 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.

Finally, it is important to recognize that, while improving labor practices may be the ultimate objective of PLR and TDLR, their impact may be subtle at first and not immediately recognizable from outside the affected organizations. One of the lessons of de-centered regulatory theory is that legal signals can influence behavior indirectly over time by influencing the norm-creating processes within institutions and subsystems. Julia Black makes the point, for example, that “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.”<sup>90</sup> 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 MNCs, actually perceive and respond to risks posed by PLR. The arguments in the preceding Part 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. This Part develops these themes more fully.

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90. Black, *supra* note 8, at 126; see, e.g., Daniel Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 HARV. ENVTL. L. REV. 441, 448 (1999) (discussing the use of reflexive law as an alternative to direct regulation of primary behavior); Eric Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1267 (1995) (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); Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State* 9 (Nat’l Europe Ctr., Working Paper No. 100, 2003) (“[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.”).

### 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 that possess 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 ignore unenforced national labor laws might nevertheless find value in complying with those laws, or with codes of conduct, if doing so will attract or maintain orders from MNC customers. Practices that violate local health and safety laws, but that local officials have ignored for years, might be corrected in response to private monitoring. Employees dismissed for union activities might be reinstated in response to PLR campaigns.<sup>91</sup> Personal relationships and interactions at the factory level might influence labor practice norms within global supply chains in the usual ways that labor law and industrial relations scholars have long recognized.<sup>92</sup> Even personal relationships between MNC-employed buyers, production managers, and local factory owners can more significantly impact investment decisions than concerns about labor costs and labor regulation.<sup>93</sup>

In fact, recent studies find that labor costs and labor regulation play a relatively minor role in influencing sourcing decisions, at least in decisions between competing developing countries.<sup>94</sup> In a widely cited study, the OECD found that there was “no evidence that low-

91. For example, Montreal-based Gildan Activewear recently 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 and media outlets, including investigations by the FLA and the Workers’ Rights Consortium, both of which confirmed that Gildan discriminated against the workers for union activities. *Gildan Agrees to Corrective Action Plan*, MAQUILA SOLIDARITY NETWORK (Jan. 24, 2005), <http://en.maquilasolidarity.org/gildan/more>; see also Konrad Yakabuski, *Ethical Tack Pays Off for Gildan*, GLOBE & MAIL (Can.), Dec. 7, 2005, at B2.

92. Harry Arthurs, *Understanding Labor Law: The Debate Over ‘Industrial Pluralism,’* 38 CURRENT LEGAL PROBS. 83 (1985).

93. See Vokmar Gessner, Richard P. Appelbaum & William L.F. Felstiner, *Introduction: The Legal Culture of Global Business Transactions*, in RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS (Richard P. Appelbaum et al. eds., 2001) (emphasizing the merits of relational models of contracting over traditional “discrete exchange” models).

94. See, e.g., JODY HEYMANN & ALISON EARLE, *RAISING THE GLOBAL FLOOR* 55 (2010) (describing studies finding that among the countries most competitive in the international business environment, all had somewhat extensive labor protections in place, though the extent of those protections differed somewhat from country to country).

[labor-]standards countries enjoy a better global export performance than high-standards countries.”<sup>95</sup> These results warrant caution in accepting 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 these improvements will cause MNCs to disinvest from those states. Factors other than labor costs, such as the demands of the quota systems governing the international apparel industry,<sup>96</sup> often prove more important than local labor laws to the investment decisions of MNCs. Investment decisions are also affected by 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.<sup>97</sup>

Thus, the link between the roles of national labor laws and investment decisions is tenuous. National governments of host states (states in which the factories are located) still have influence over domestic labor practices, and those practices factor into firms’ investment decisions. However, to suggest that national governments must have a monopoly on the task of defining local labor practice norms to attract and retain foreign direct investment is to ignore what happens in practice. PLR initiatives and campaigns already play a role in influencing normative labor practices and will continue to do so in the future. According to Heyina Dashwood:

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95. Emp’t, Labour and Soc. Affairs Comm. & Trade Comm. of the OECD, *Joint Report on Trade, Employment, and Labor Standards*, in ORG. FOR ECON. CO-OPERATION & DEV., TRADE, EMPLOYMENT, AND LABOUR STANDARDS: A STUDY OF CORE WORKERS’ RIGHTS AND INTERNATIONAL TRADE 9, 12 (1996) (citing a series of studies, including the OECD study, that tend to indicate that labor standards play a minimal unknown role in determining international competitiveness); see also Langille, *supra* note 15, at 39–42 (discussing the OECD finding that “core labor standards do not play a significant role in shaping trade performance”); see generally David Charney, *Regulatory Competition and the Global Coordination of Labor Standards*, 3 J. INT’L ECON. L. 281 (2000) (analyzing regulatory competition in labor standards); Kryvoi, *supra* note 5 (discussing debate regarding whether low core labor standards are linked to economic growth); Alan Hyde, *A Stag Hunt Account and Defense of Transnational Labor Standards: A Preliminary Look at the Problem* 1–4 (Cornell Legal Studies Research, Working Paper No. 06–008, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=896362](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896362) (describing studies finding no link between low levels of labor standards and levels of trade and inward capital investment).

96. See RIVOLI, *supra* note 15, at 164–65 (discussing the effects of quota systems on exporters).

97. See generally ANGELA HALE & JANE WILLS, *THREADS OF LABOUR: GARMENT INDUSTRY SUPPLY CHAINS FROM THE WORKERS’ PERSPECTIVE* (2005) (providing an in-depth account of the structure of global supply chains in the garment industry); Larry Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739, 1751–63 (2007) (describing several of the factors that inform Wal-Mart’s investment decisions).

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.<sup>98</sup>

Bob Hepple describes 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.<sup>99</sup>

The question that should be asked is not whether PLR initiatives and campaigns undermine some theoretical notion of state sovereignty over the governance of labor policy and practices. Rather, the question should be how PLR interacts with national labor laws, labor policies, and the many other factors that influence supply chain labor practices. The answer to this question may demonstrate how to influence those complex interactions to produce *different* labor practices.

#### B. *PLR and TDLR Might Bolster Government Sovereignty by Improving Compliance with National Labor Laws*

In assessing these interrelations, it is important to adopt a realistic and pragmatic understanding of the role and impact of PLR initiatives and campaigns. While one set of PLR critics 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,<sup>100</sup> another set of critics argue that PLR is a corporate-led smokescreen that will never have any meaningful impact on actual labor practices.<sup>101</sup> Both claims cannot be correct all of the time.

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.

98. 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* 189, 189 (2004).

99. Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347, 350, 353 (1999).

100. See, e.g., Basu, *supra* note 6, at 493–94 (arguing that private social sanctions are imperfect, causing disproportionate pain to some, such as already-disadvantaged workers, and too little pain to others).

101. See, e.g., Mark Levinson, *Wishful Thinking*, in FUNG, O'ROURKE & SABEL, *supra* note 48, at 54; Jeff Ballinger, *The Corporate Social Responsibility Farce*, HUFFINGTON POST, Apr. 26, 2007, [http://www.huffingtonpost.com/jeff-ballinger/the-corporate-social-resp\\_b\\_46906.html](http://www.huffingtonpost.com/jeff-ballinger/the-corporate-social-resp_b_46906.html).



Alternatively, PLR may have no impact whatsoever on an employer that is prepared to violate labor laws. The challenge for a government considering TDLR that would harness PLR to reduce labor abuses is to design a regulatory regime that produces the positive effects on labor practices (i.e., improved compliance with labor laws) without also producing the negative effects (i.e., unemployment and worsening of conditions).

While this may prove to be a very challenging mission, it would be wrong to claim that all TDLR that seeks to harness PLR will produce negative effects for the targeted workers and foreign governments. PLR could help both. For example, if PLR encouraged better compliance with local, applicable labor laws when the host-state 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. By ratifying an international labor convention, a government promises to bring the standards of the convention into effect domestically. Thus, insofar as PLR (perhaps bolstered by TDLR) encourages greater domestic compliance with these standards, it supports the host state's policies.

Admittedly, sometimes governments do not want their labor laws to be enforced and do not intend to actually bring an international convention into effect. In these cases, nonenforcement and non-implementation are de facto policy decisions designed to encourage investment or achieve some other objective.<sup>102</sup> However, the argument that states should 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. There is little value in deferring to a supposed right of governments to publicly convey one set of values and 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.

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102. See Blackett, *supra* note 40 (noting the de facto practice of suspending national labor laws within export processing zones in order to attract investment); Kimberley Elliott & Richard Freeman, *The Role Global Labor Standards Could Play in Addressing Basic Needs*, in GLOBAL INEQUALITIES AT WORK 320 (Jody Heymann ed., 2003) (noting that Bangladesh denied unions access into their export processing zones because they feared they would deter direct inward foreign investment); see generally Kryvoi, *supra* note 5 (discussing examples of governments that violated ILO Conventions in their pursuit of other state objectives).

Therefore, an American law that encourages greater compliance with labor standards that a foreign government had itself promised to enforce would not impede that state's sovereignty. Instead, it would aid that state's efforts to enforce its own standards. This is an important point because PLR initiatives often encourage compliance with domestic labor laws. Indeed, respect for national labor laws is one of the most common requirements found in corporate codes of conduct.<sup>103</sup> Labor activists that monitor and campaign against domestic labor law violations can pressure MNCs and local employers to improve legal compliance. Ronnie Lipschutz argues 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."<sup>104</sup> Therefore, he argues, PLR initiatives can "enhance state sovereignty with respect to global capital."<sup>105</sup> Kolben argues similarly that PLR measures often "boost public regulatory capacity" in developing countries.<sup>106</sup>

One reason why this is particularly the case in relation to labor law is that private campaigns have the potential to discourage the practice of "cutting and running," which occurs when a MNC cancels supplier contracts at factories or in jurisdictions where labor practices have improved, either because of new laws or because employees have exercised legal rights like the right to form an independent union.<sup>107</sup> If private initiatives can pressure MNCs to remain in a factory after labor conditions improve or to continue to invest in a state when national labor laws or enforcement improve, employers and states will be more likely to make improvements.

For example, in 2002, a campaign by labor and shareholder activists targeted the Hudson's Bay Company (HBC), Canada's oldest and largest retailer. The campaign criticized HBC's decision to pull its orders from factories in Lesotho after NGOs discovered serious

103. See Rhys Jenkins, *The Political Economy of Codes of Conduct*, in CORPORATE RESPONSIBILITY AND LABOR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY 21 (Rhys Jenkins et al. eds., 2002) (listing compliance with laws as the second most common requirement cited in corporate codes of conduct).

104. Ronnie Lipschutz, *Doing Well by Doing Good? Transnational Regulatory Campaigns, Social Activism, and Impacts on State Sovereignty*, in SOVEREIGNTY UNDER CHALLENGE: HOW GOVERNMENTS RESPOND 294 (John Montgomery & Nathan Glazer eds., 2002).

105. *Id.*

106. Kolben, *supra* note 5, at 233–34.

107. See Richard Appelbaum et al., *Fighting Sweatshops: Problems of Enforcing Global Labor Standards* 10–11 (Aug. 16, 2000) (unpublished manuscript), available at <http://escholarship.org/uc/item/2693m5pn> (stating that companies will often prefer to "cut and run"—abandon a problematic factory rather than risk bad publicity due to the factory's continued operation).

violation of Lesotho's labor laws.<sup>108</sup> The campaign employed several tactics, including organizing informational leaf-letting protests outside of the HBC flagship store in Toronto's downtown.<sup>109</sup> In May 2002, citing the company's actions in Lesotho, a group of HBC's institutional investors introduced a resolution calling on HBC to require suppliers to adhere to core ILO labor rights and to monitor and publicly report on compliance with those standards.<sup>110</sup> The resolution garnered over 36 percent support, which was at the time the highest level of support ever recorded for a Canadian shareholder proposal targeting "social" practices.<sup>111</sup>

Later that year, the NGO Maquila Solidarity Network named HBC the 2002 "Sweatshop Retailer of the Year."<sup>112</sup> 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."<sup>113</sup> Shortly after this campaign, HBC introduced a new supplier factory monitoring system that incorporates ILO core conventions and includes a "Strike Three" policy, which emphasizes exit as a final step only after the company exhausts efforts to achieve compliance with its internal code of conduct.<sup>114</sup>

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. Consequently, MNCs are required to first exhaust attempts to remedy the problem with the local factory management.<sup>115</sup> Some

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108. *Lesotho Workers Win Union Recognition, No Thanks to Hudson's Bay*, MAQUILA SOLIDARITY NETWORK (Dec. 12, 2002), <http://old.maquilasolidarity.org/campaigns/hbc/index.htm> [hereinafter *Lesotho Workers Win Union Recognition*].

109. *How Lesotho Garment Workers Won Respect for Their Rights*, MAQUILA SOLIDARITY NETWORK (Mar. 2003), [http://old.maquilasolidarity.org/campaigns/hbc/update\\_mar2003.htm](http://old.maquilasolidarity.org/campaigns/hbc/update_mar2003.htm); Doorey, *Who Made That?*, *supra* note 3, at 403–04.

110. *Id.*

111. Hollie Shaw, *Hudson's Bay Wants World Labour Rules: Retailers Group Would Combat Sweat Shops*, NAT'L POST, June 13, 2003, at FP4; *Shareholder Vote at HBC Sets Record*, FORUM, June 2002, at 2, <http://www.corostrandberg.com/pdfs/June2002Forum.pdf>; Press Release, Shareholders Ass'n for Research and Educ., Shareholder Group Calls on Hudson's Bay to Report on Sweatshop Abuses in Lesotho (May 14, 2002) (on file with author).

112. *Sweatshop Retailer of the Year Announced*, MAQUILA SOLIDARITY NETWORK (Dec. 19, 2002), <http://old.maquilasolidarity.org/campaigns/awards/press2002.htm>.

113. *Id.*

114. *Ethical Sourcing: Monitoring Our Supply Chain*, HBC.COM, [http://www.hbc.com/hbc/hbc\\_csr\\_eng\\_06/es\\_monitoring.html](http://www.hbc.com/hbc/hbc_csr_eng_06/es_monitoring.html) (last visited Sept. 26, 2010).

115. *Accord GAP INC., 2005–2006 SOCIAL RESPONSIBILITY REPORT 25* (2006), [http://www.gapinc.com/GapIncSubSites/csr/documents/2005-2006\\_Social\\_Responsibility\\_Report.pdf](http://www.gapinc.com/GapIncSubSites/csr/documents/2005-2006_Social_Responsibility_Report.pdf).

All garment factories seeking to produce internally-designed [sic] and branded apparel for Gap, Banana Republic and Old Navy will continue to receive initial

multi-stakeholder initiatives similarly encourage remediation as a first step before cancellation of orders.<sup>116</sup> This development largely derives from the sustained efforts of stakeholder activist campaigns over the past fifteen years. These campaigns emphasized the harmful effects of cut-and-run policies and pressured MNCs to use their clout to encourage positive change in factories through engagement rather than exit.<sup>117</sup>

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 retain and attract investment.<sup>118</sup> However, the labor laws on the books in many countries are quite

inspection visits prior to the placement of any production orders. In certain narrowly-defined [sic] instances, however, garment factories that have resolved all identified major issues may be granted a one-time, conditional approval to produce a special "rush" or "chase" order, even though the factory may still have a few minor issues to resolve. It is important to note that this conditional approval will be short-term, and the factory will not be able to produce additional orders for any Gap Inc. brands until all remaining issues have been resolved . . . .

*Id.*

116. See, e.g., WORKER RIGHTS CONSORTIUM, MODEL CODE OF CONDUCT art. VII.

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.

*Id.*

117. See discussion *supra* notes 108–11 (regarding Hudson's Bay Company).

118. See Hepple, *supra* note 99, 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").

decent; unfortunately, these laws are sometimes systemically unenforced.<sup>119</sup> This noncompliance 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. However, it can be important in shaping public discourse and PLR strategies regarding the decisions of MNCs to invest in particular countries. If the problem results from weak enforcement of relatively decent laws, MNCs can be pressured to lead by example and ensure legal compliance notwithstanding the state's failure to enforce its laws.<sup>120</sup> If the problem results from 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 change. 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, if PLR actually increases compliance with local laws, it could make factories in that jurisdiction less desirable to companies that prefer a system in which their suppliers can violate labor laws with impunity, and these companies might search for suppliers in other countries. However, empirical evidence raises doubts that this would occur frequently enough to negatively impact inward foreign investment. For example, the OECD study mentioned earlier in this Article included 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

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119. Blackett, *supra* note 40, at 426.

120. For example, the MSN campaign targeting the Hudson's Bay Company sought to persuade HBC to pressure its suppliers in Lesotho to comply with that country's existing labor laws. See discussion *supra* notes 108–11.

- that “it is theoretically possible that the observance of core standards would strengthen the long-term economic performance of all countries.”<sup>121</sup>

In the apparel industry in particular, Robert Pollen, Justine Burns, and James Heintz found recently that “there is no relationship between wage and employment growth in considering the individual country evidence for the global apparel industry.”<sup>122</sup> Indeed, the OECD’s study suggests that improving working conditions may make individual factories and geographic regions more attractive as investment options.<sup>123</sup> Presumably, continual increases in labor costs would eventually erode the comparative advantage of developing states, and this erosion could cause MNCs to consider countries with cheaper labor markets. However, empirical evidence indicates that this point is not easily reached. While it is possible to find instances in which PLR initiatives and campaigns have encouraged greater compliance with domestic labor laws,<sup>124</sup> it is more difficult to find examples where PLR has caused labor costs to rise beyond what the applicable laws or prevailing market levels require.

For example, as previously noted, many PLR initiatives require respect for freedom of association. However, in China independent unions are illegal.<sup>125</sup> If Chinese employers began recognizing and bargaining with independent unions as a result of pressure from PLR initiatives, this would directly contradict state policy.<sup>126</sup> In theory, it could lead to higher labor standards in China, which in turn could make China less attractive to MNCs. However, even if we accept that China should have the right to deny its citizens the right to freely associate (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.

Similarly, the living wage requirement in some PLR initiatives appears to aim specifically at raising labor costs above prevailing

121. Emp’t, Labour and Soc. Affairs Comm. & Trade Comm. of the OECD, *supra* note 95, at 12–13.

122. Robert Pollin et al., *Global Apparel Production and Sweatshop Labour: Can Raising Retail Prices Finance Living Wages?*, 28 CAMBRIDGE J. ECON. 153, 169 (2004).

123. Accord ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 95, at 202 (“Practitioners of [socially responsible investing] hope that by steering capital towards what are deemed to be socially responsible firms and away from those deemed to be socially irresponsible, they can wield a positive influence . . .”).

124. For example, when MSN targeted HBC for failing to pressure Lesotho suppliers to comply with domestic labor laws, it also approached Gap Inc. which used the same suppliers as HBC. Gap entered into negotiations with the suppliers that culminated in the employer permitting union organizers access to the factory, as required by Lesotho labor laws. See *Lesotho Workers Win Union Recognition*, *supra* note 108.

125. See discussion *supra* text accompanying notes 41–48.

126. See discussion *supra* text accompanying notes 41–48.

market levels and legal minimums.<sup>127</sup> In theory, therefore, the living wage requirement could price some factories out of the market by effectively eliminating already-low profit margins. Again, however, no evidence was uncovered in the economics, human rights, or legal literature that suppliers have actually been priced out of the market in the relatively few instances in which a living wage requirement has been implemented. Companies that 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 frequently encourages such standards 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 because the model is fully embedded in the operations of the MNCs that have created it.<sup>128</sup> The MNCs have a strong financial interest in preserving the relative cost savings associated with this model, and this financial interest mitigates the possibility that MNCs accept terms in PLR initiatives that threaten their access to relatively cheap labor. Ultimately, MNCs are more powerful than the other actors at the PLR table. They can be pressured to respond to spotlight campaigns targeting specific abuses.<sup>129</sup> They can be persuaded to

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127. See *Living Wage Standards*, *supra* note 51 (reporting that legal minimum wages and prevailing industry wages are insufficient to meet workers' needs).

128. See, e.g., *COMMODITY CHAINS AND GLOBAL CAPITALISM* (Gary Gereffi & Miguel Korzeniewicz eds., 1994) (arguing that cheap labor is ultimately less significant to profit-maximizing MNCs than such competitive advantages as proprietary technology, product differentiation, brand reputation, customer relationships, and constant industrial upgrading); Jennifer Hurley & Doug Miller, *The Changing Face of the Global Garment Industry*, in *THREADS OF LABOUR* 16 (Angela Hale & Jane Wills eds., 2005) (arguing that despite a seemingly large increase in labor regulation, large MNCs have been able to utilize increased international scrutiny to maximize profits).

129. Debora L. Spar, *The Spotlight and the Bottom Line: How Multinationals Export Human Rights*, 77 *FOREIGN AFF.* 2, 7–12 (1998) (highlighting the positive effects of grassroots activism). For a recent example, see Gap Inc.'s prompt response to allegations, reported by Karen McVeigh, *The Sweatshop High Street: More Brands Under Fire*, *GUARDIAN* (London), Sept. 3, 2007, at 1, of children being used as virtual slave labor in the production of Gap products in India:

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.

engage in constructive dialogues about how things could be done better.<sup>130</sup> They can be convinced to introduce procedural safeguards to allow for better monitoring of supply chain labor practices.<sup>131</sup> Sometimes they can even be pressured to provide the public with information about how workers are treated in their supplier factories.<sup>132</sup>

For this reason, PLR initiatives should be perceived as modest endeavors. The standards that emerge in internal codes of conduct reflect corporations' perceptions of what is required to deflect negative criticism that could damage brand image. Multi-stakeholder initiatives result from complex negotiations, conflicts, and dialogue among various labor activist organizations, such as unions, consumers, investors, and NGOs, and in some cases, national governments, intergovernmental organizations, and powerful economic interests in the form of MNCs and their lobbyists.<sup>133</sup> As in any negotiation, those standards that the various participants can agree upon represent a compromise, which takes into account the relative power relations that underlie the negotiation.

The balance of power in the relationship between MNCs and the many labor activists engaged in PLR campaigns and initiatives mandates restraint in assessing the potential impact of PLR, and by proxy the impact of TDLR that would seek to harness PLR. Labor activists can attempt to push the boundaries by proposing novel standards, but they have no ability to unilaterally impose the standards on MNCs. MNCs would be expected to reject measures that expand their responsibility for supply chain labor practices until

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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.

Press Release, Gap Inc., Gap Inc. Issues Statement on Media Reports on Child Labor (Oct. 28, 2007), available at [http://www.gapinc.com/public/Media/Press\\_Releases/med\\_pr\\_vendorlabor102807.shtml](http://www.gapinc.com/public/Media/Press_Releases/med_pr_vendorlabor102807.shtml).

130. See, e.g., Doorey, *Factory List Disclosure*, *supra* note 13, at 51 (describing how both Nike and Levi-Strauss decided, in the 1990s, to engage their critics in a dialogue about how to improve supply chain labor practices); see also Blackett, *supra* note 40, at 442, 446 (describing attempts to bring the business community into a dialogue with the United Nations).

131. Doorey, *Factory List Disclosure*, *supra* note 13, at 51 (noting that Nike and Levi-Strauss responded to demands by labor activists to publish the identity and addresses of their global suppliers).

132. For example, some companies have begun to publish statistics of compliance levels with codes of conduct based on auditing results. See, e.g., GAP INC., 2007–2008 SOCIAL RESPONSIBILITY REPORT (2008), available at [http://www.gapinc.com/GapIncSubSites/csr/Utility/report\\_builder.shtml](http://www.gapinc.com/GapIncSubSites/csr/Utility/report_builder.shtml).

133. See, e.g., Doorey, *Factory List Disclosure*, *supra* note 13, at 13–20 (describing the contested origins of both the FLA and the Workers' Rights Consortium); see generally LIZA FEATHERSTONE, STUDENTS AGAINST SWEATSHOPS (2002) (discussing the student labor activist organization United Students Against Sweatshops (USAS)).



(1) a significant consensus emerges within the industry in favor 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 its reputational risks and anticipated costs.

As a result, it is extremely unlikely that PLR initiatives will cause significant changes in normative labor practices within global supply chains in the short- to medium-term. The short-term impact of PLR initiatives on actual labor practices is more likely to manifest as marginal improvements in levels of compliance with domestic labor laws, as discussed above.<sup>134</sup> 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 serve an even more important function that is often overlooked in debates about PLR because it is subtle and often invisible to those observing from outside of the supply chain process. It is the impact PLR 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 public discourse about these practices. It is in these more subtle effects that the favorable argument for PLR and the use of TDLR that would harness it emerges 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 related to the global sourcing model and “root causes” of poor labor practices are debated.<sup>135</sup> Within the debates, protests, arguments, and

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134. See *supra* Part II.A.

135. See Press Release, Ethical Trading Action Grp., Revealing Clothing Report (Dec. 7, 2006), available at <http://en.maquilasolidarity.org/en/node/449> (“Leading companies have publicly expressed willingness to discuss root causes of persistent labour rights problems in their supply chains,’ [Kevin] Thomas [spokesperson for ETAG] said, noting that this year more companies are reporting training programs for factory management and other efforts to change persistent bad practices.”); see also Doorey, *Factory List Disclosure*, *supra* note 13, at 55–56 (describing the efforts of Levi-Strauss to coordinate information-sharing sessions with competitors and NGOs to discuss sustained solutions to persistent labor issues in supplier factories); Richard Locke & Monica Romis, *Improving Work Conditions in a Global Supply Chain*, 48 MASS. INST. TECH. SLOAN MGMT. REV. 54, 60 (2007) (noting how Nike had “begun an extensive review of the company’s own upstream business processes—such as product

negotiations between private labor activists, employers, and MNCs, an arena of sophisticated deliberations about the causes of labor practice abuses within global supply chains is emerging, along with a discussion of the possible solutions to these abuses.<sup>136</sup> This is a useful development, particularly if it leads to changes in the ways that MNCs manage their supply chain labor practices.

The academic literature has paid very little attention to the question of how these deliberations influence MNC behavior.<sup>137</sup> This question is important, however, because MNCs can influence how their suppliers treat workers, particularly if 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 describes 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

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development, design, and commercialization—in order to identify potential drivers of excessive overtime among suppliers”).

136. See generally Doorey, *Factory List Disclosure*, *supra* note 13 (discussing factory list disclosure at Nike and Levi-Strauss).

137. See Arthurs, *supra* note 74, at 477, noting the lack of evidence about how codes of conduct affect MNC behavior: “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 years.” There are other notable exceptions. See Richard Locke, *The Promise and Perils of Globalization: The Case of Nike* (Mass. Inst. of Tech. Working Paper Series, Paper No. IPC-02-007, 2002) (using a case study of Nike to examine the various difficulties and complexities companies face as they seek to balance both company performance and good corporate citizenship in today’s global economy); David Murphy & David Mathew, Nike and Global Labor Practices: A Case Study Prepared for the New Academy of Business Innovation Network for Socially Responsible Business (Jan. 2001) (unpublished manuscript), <http://www.adapt.it/acm-on-line/Home/IndiceA-Z/perargomento/documento5282.html> (discussing how Nike created and implemented its code of conduct); Dara O’Rourke, *Smoke from a Hired Gun: A Critique of Nike’s Labor and Environmental Auditing in Vietnam as Performed by Ernst & Young*, TRANSNAT’L RES. & ACTION CTR. (Nov. 10, 1997), <http://www.corpwatch.org/article.php?id=966> (arguing that accounting firms retained by manufacturers are not the appropriate organizations to be conducting audits of labor and environmental conditions).

journalists . . . In an environment where their claims can be checked, the 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 behaviors, and political positions.<sup>138</sup>

Fung argues that public deliberations associated with the PLR debates are valuable because deliberation causes 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 these complexities.<sup>139</sup>

Blackett makes a similar argument:

[C]orporate self-regulatory initiatives open up opportunities for discussion . . . [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.<sup>140</sup>

Admittedly, without government participation and sanctioning powers the MNCs can walk away from these discussions at any moment and resist any particular demand by activists. However, what keeps some MNCs talking and occasionally agreeing to proposals that emerge from these discussions is their desire to reduce the reputational risks associated with their supply chain labor practices or the hope of improving their brand image in the public's perception.

Numerous MNCs are taking progressive steps relating to their supply chain labor practices as a result of engagements with private labor activist organizations or in response to their demands. Not long ago MNCs routinely argued that they had no responsibility for labor conditions in supplier factories. Today it is difficult to find any company that publicly argues that position.<sup>141</sup> Similarly, in the

138. FUNG, O'ROURKE & SABEL, *supra* note 48, 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 *Ratcheting Labor Standards* series of papers. See, e.g., Charles Sable, Dara O'Rourke & Archon Fung, *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* (World Bank, Social Protection Discussion Paper No. 0011, 2000).

139. FUNG, O'ROURKE & SABEL, *supra* note 48, at 56.

140. Blakett, *supra* note 45, at 130.

141. Nike demonstrates this evolution. In the early 1990s and before, Nike's public position was that they had no responsibility for work conditions in their supplier factories. See DONALD KATZ, *JUST DO IT: THE NIKE SPIRIT IN THE CORPORATE WORLD* 191 (1994) (quoting a Nike official as saying, "We don't pay anybody at the factories

1990s few codes of conduct included any reference to the ILO Conventions,<sup>142</sup> but most multi-stakeholder codes and many internal corporate codes reference the ILO conventions today.<sup>143</sup>

Another example is Nike Inc.'s decision to post the names and addresses of all of its global supplier factories in 2005, following years of advocacy by labor rights groups and Nike's protests that factory identity was crucial business information that was too difficult to track and maintain.<sup>144</sup> 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.<sup>145</sup> Some companies felt the need to publicly explain their decision to keep their supplier list secret. For example, Gap, Inc. posted an explanation on the "frequently asked questions" page on its Corporate Social Responsibility website.<sup>146</sup> In the meantime, as more corporations

and we don't set policy within the factories; it is their business to run."); Richard Barnett & John Cavanaugh, *Just Undo It: Nike's Exploited Workers*, N.Y. TIMES, Feb. 13, 1994, at F11 (quoting Nike's general manager in Indonesia as saying, "I don't know that I need to know [of labor disturbances] . . . It's not within our scope to investigate."). Nike's Code of Conduct now includes a list of labor practice standards that all suppliers are directed to respect. NIKE, INC., CODE OF CONDUCT (2010), [http://www.nikebiz.com/responsibility/documents/Nike\\_Code\\_of\\_Conduct.pdf](http://www.nikebiz.com/responsibility/documents/Nike_Code_of_Conduct.pdf). Nike is also a member of the FLA and a participant in the Global Compact, both of which assume that MNCs have responsibility for conditions of work in their supplier factories. Press Release, Nike, Inc., Fair Labor Association Accredits Nike Compliance Program (May 12, 2005), [http://www.nikebiz.com/media/pr/2005/05/12\\_Compliance.html](http://www.nikebiz.com/media/pr/2005/05/12_Compliance.html); U.N. GLOBAL COMPACT & U.N. HIGH COMM'R FOR HUMAN RIGHTS, EMBEDDING HUMAN RIGHTS IN BUSINESS PRACTICE II (2007), [http://www.unglobalcompact.org/docs/news\\_events/8.1/EHRBP11\\_Final.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/EHRBP11_Final.pdf).

142. See, e.g., Hepple, *supra* note 99, at 360 (noting that in 1999, corporate codes tended to "export American conceptions of corporate social responsibility" instead of "reflecting international legal norms").

143. For example, the model codes of the SA8000, the Worker Rights Consortium, the Global Compact, and the Ethical Trading Initiative all refer directly to the ILO's Conventions. SOC. ACCOUNTABILITY INT'L, *supra* note 50, at 4; WORKER RIGHTS CONSORTIUM, *supra* note 116, § III(C)(6)(b) (requiring licensees to mandate that their employees and subcontractors comply with ILO health and safety conventions); *The Global Compact and the International Labour Organization*, U.N. GLOBAL COMPACT, [http://www.unglobalcompact.org/participantsandstakeholders/un\\_agencies/International\\_Labour\\_Organization.html](http://www.unglobalcompact.org/participantsandstakeholders/un_agencies/International_Labour_Organization.html) (last visited Sept. 26, 2010); *ETI Base Code*, *supra* note 44.

144. Doorey, *Factory List Disclosure*, *supra* note 13, at 19–21.

145. *Id.*

146. The relevant question is "When will you publish a list of factories you do business with in the developing world?" *Frequently Asked Questions – Social Responsibility*, GAP INC., [http://www.gapinc.com/public/SocialResponsibility/sr\\_faq.shtml#a117](http://www.gapinc.com/public/SocialResponsibility/sr_faq.shtml#a117) (last visited Sept. 26, 2010). In response, the website states:

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

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 labor practices, and arguments follow about why the proposal is or is not a good policy. More often than not, MNCs participate directly in these debates, as do academics, NGOs, business lobby groups, and even governments.<sup>147</sup> The ideas that gain traction are those that are economically and practically viable from the MNCs' perspectives. Furthermore, these ideas are backed with the weight of persuasive arguments that MNCs' fears might resonate with customers, investors, and governments.

Activists, including NGOs, human rights organizations, and unions, must also 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.<sup>148</sup> Activists in developed countries must

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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.

*Id.*

147. For example, the consultations undertaken in support of the Canadian 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 THE CONFERENCE BD. OF CANADA, *supra* note 87, at 11–20. 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 United States and Europe which took effect in January 2005. *MFA Forum in Brief*, MFA FORUM, <http://www.mfa-forum.net/> (last visited Sept. 26, 2010). 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 a strong labor-compliance country specializing in apparel production factories. *Lesotho: An Introduction*, MFA FORUM, <http://www.mfa-forum.net/groups/Lesotho/Introduction.aspx> (last visited Sept. 26, 2010); see also RIVOLI, *supra* note 15, at 157–72 (discussing the MFA and the impact of its phase-out).

148. Critics of PLR emphasize how workers and governments of the developing countries are seldom asked their opinions about whether they believe the PLR campaigns and initiatives will actually help the workers they target. See, e.g., *Kaushik*

wrestle with the argument that their activities may actually cause job losses in developing countries and make matters worse for the workers they purport to assist.<sup>149</sup> This is not a frivolous concern. It forces labor activist organizations to present arguments that demonstrate an understanding of the complex balancing required to identify standards and policies that will improve labor practices in developing countries without undermining the comparative labor cost advantage that employers in those countries enjoy.

Therefore, the emergence of PLR has generated a useful dialogue about how working conditions can be improved within global supply chains. Significantly, in recent years, this dialogue has turned its gaze inward, towards the global sourcing business model and 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—employ “labor compliance” professionals who engage labor activist organizations in discussions about how to address systemic root causes that contribute to labor abuses.<sup>150</sup> These root causes include short-time turnover of orders; last-minute design changes that force suppliers into a position of requiring excessive overtime;<sup>151</sup> the prevalence of short-term supplier contracts, which leave suppliers under threat of losing orders if they invest in necessary changes 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.<sup>152</sup>

*Basu, The View from the Tropics, in FUNG, O'ROURKE & SABEL, supra note 48, at 59, 59–64.*

149. For example, this tension was obvious in the contentious debates leading to the adoption of a code of labor conduct by the International Confederation of Free Trade Unions (ICFTU), the main global umbrella organization of trade unions. The ICFTU struggled to find a consensus that would satisfy unions from the economically-advanced global North and unions from developing countries. See Rebecca Gumbell-McCormick, *The ICTFU and Trade Unions in Developing Countries: Solidarity or Independence?*, in UNIONS IN THE 21ST CENTURY: AN INTERNATIONAL PERSPECTIVE 179, 188–89 (Anil Verma & Thomas Kochan eds., 2004).

150. See *infra* text accompanying note 159.

151. See GAP INC., *supra* note 115, at 29 (“As our social responsibility efforts have evolved, we’ve come to see that some of the everyday practices in our industry . . . can have a significant impact on working conditions in factories.”). The section refers and provides a link to a summary of a study conducted by the NGO Women Working Worldwide on Gap Inc.’s supply chain. *Id.* The study identified three major problems in the management of Gap’s supply chain that lead supplier factories to violate labor laws and code requirements, including delays at other parts of the supply chain and changes in production requirements made by Gap personnel. *Id.*; see also OXFAM INT’L, *TRADING AWAY OUR RIGHTS: WOMEN WORKING IN GLOBAL SUPPLY CHAINS* 51 (2004), <http://www.oxfam.org/sites/www.oxfam.org/files/rights.pdf>.

152. OXFAM INT’L, *supra* note 151, at 51; see also, e.g., *MSN Supporters Have Spoken: Pay a Living Wage; Respect Workers’ Right to Freedom of Association; and Deal with Purchasing Practices!*, MAQUILA SOLIDARITY NETWORK (Jan. 10, 2008), <http://en.maquilasolidarity.org/en/node/752/print> (indicating that the labor rights NGO

Discussions about the root causes of poor supply chain labor practices are a recent development, born of pressure exerted on MNCs by private actors over a period of nearly two decades.<sup>153</sup> The discourse surrounding PLR initiatives previously focused primarily on the content of labor 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.

This dialogue is driven primarily by private labor activists, but MNCs are increasingly taking up the idea of examining the supply chain business model for factors that contribute to labor practice abuses as a means of potentially reducing both the risks of association with abusive labor practices and the costs of monitoring those practices.<sup>154</sup> Although MNCs are not required to implement ideas that surface in these dialogues with external stakeholders, some occasionally find business value in implementing the stakeholders' suggestions.<sup>155</sup> This observation aligns with the views of Oliver Gerstenberg and Charles Sabel, who noted, "in a complex world, 'strong' actors cannot rule out the possibility that they will come to depend on solutions discovered by 'weak' ones."<sup>156</sup>

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intends to address, as a strategic goal in the forthcoming year, the harmful effects on supplier chain labor practices of the "purchasing practices of MNCs").

153. There is, to date, little academic literature examining root cause analysis in relation to global supply chain labor practices. *But see* Locke & Romis, *supra* note 135, at 61 ("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 improved labor practices. *See, e.g.*, GAP INC., *supra* note 115, at 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.

*Id.*; *see also* *Action Plan Update*, GILDAN, <http://gildan.com/corporate/corporateCitizenship/actionPlanUpdate.cfm> (last visited Sept. 26, 2010) (explaining the need to conduct "root cause analysis" training throughout the organization).

154. *See* Doorey, *Factory List Disclosure*, *supra* note 13, at 51–55 (describing several supply chain reforms undertaken by Nike and Levi-Strauss).

155. Nike's decision to disclose its global supplier list in response to demands by labor activists is one example. *See id.* at 18–20.

156. Oliver Gerstenberg & Charles Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, in *GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET* 289, 292–93 (Christian Joerges & Renaud Dehousse eds., 2002).

*E. PLR May Influence Internal Management Systems  
of Multinational Corporations 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 establish more sophisticated internal management systems designed to track and respond quickly to potentially embarrassing labor-related situations. This too would be a useful development because whether or not MNCs are able and inclined to influence their suppliers' labor practices depends on how they collect, manage, and process information about those labor practices.<sup>157</sup>

As already discussed, Nike and Levi-Strauss, two of the most highly visible brand-based apparel companies, instituted internal supply chain management systems in response to pressure from PLR campaigns.<sup>158</sup> In addition to the adoption and publication of a code of conduct, the changes included the creation of dedicated labor compliance departments headed by senior executives and staffed by teams of labor compliance personnel; the development of an information database that tracks 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 multilevel factory monitoring systems; the introduction of regular meetings with senior labor compliance staff to review factory compliance issues; and the development of outreach programs to encourage dialogue with labor activist organizations and industry competitors.<sup>159</sup>

Although these kinds of internal management systems do not ensure decent labor practices in supplier factories, they do increase the probability that a firm discovers labor practice abuses, which improves the chances that the company will attempt to intervene. The stronger the threat to corporate reputation from MNC complicity in labor abuses, 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 has argued that many Canadian apparel companies and retailers are not even aware of

157. See, e.g., Hepple, *supra* note 99, 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.")

158. Doorey, *Factory List Disclosure*, *supra* note 13, at 25–28, 40–43.

159. *Id.* at 51–55.



what factories produce their goods.<sup>160</sup> 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 which factory makes their products, then it 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. Secrecy has traditionally been the mantra of the global apparel industry.<sup>161</sup> 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 the risk of negative publicity associated with supply chain labor practices.<sup>162</sup>

For example, the Fair Factories Clearinghouse initiative created in 2004 by a number of apparel companies compiles and shares factory monitoring and auditing reports among FFC members.<sup>163</sup> 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.<sup>164</sup>

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160. See Erica Johnson, 'Cut It Out' Campaign Focuses on Sweatshop Labour, CBC MARKETPLACE (Mar. 27, 2002), <http://www.cbc.ca/consumers/market/files/home/cutitout> (quoting Sharon Maloney, spokesperson for the Canadian Retail Council as saying, "tracking clothing factories is almost impossible").

161. The reason given by most companies for refusing to publicly disclose the identity of their suppliers is that this information is of great proprietary value and therefore, must be kept hidden from competitors. For example, this was Nike's position prior to its decision to disclose this information. Doorey, *Factory Listing Disclosure*, *supra* note 13, at 31. This was also the position of Canadian retailers and apparel manufacturers during consultations about a proposed law to require public disclosure of this information. See THE CONFERENCE BD. OF CANADA, *supra* note 87, at 13 (2003).

162. See Doorey, *Factory List Disclosure*, *supra* note 13, at 55-56 (discussing Nike's and Levi-Strauss's efforts to reach out toward competitors in an effort to jointly improve supply chain monitoring).

163. *The FFC Mission*, FAIR FACTORIES CLEARINGHOUSE, <http://www.fairfactories.org/what%2Dwe%2Ddo/> (last visited Sept. 26, 2010).

164. See *About Us*, JOINT INITIATIVE ON CORPORATE ACCOUNTABILITY AND WORKERS' RIGHTS, <http://www.jo-in.org/pub/about.shtml> (last visited Sept. 26, 2010). The participating organizations are the Clean Clothes Campaign, Ethical Trading Initiative, FLA, Fair Wear Foundation, Social Accountability International, and Workers Rights Consortium. *Id.* The stated objectives of the Joint Initiative are:

Spontaneous, informal collaborations among competitors are also emerging. Executives at both Nike and Levi-Strauss came to believe in recent years that industry collaboration—including information sharing, coordinated monitoring, and brainstorming about possible solutions to persistent labor practice issues—offers greater potential for improving labor practices (and, therefore, of reducing corporate risk) than the traditional approach of secrecy.<sup>165</sup> A similar shift in focus towards working with competitors is evident in the public documents and actions of other leading apparel companies in recent years.<sup>166</sup>

Greater industry collaboration on issues related to supply chain labor practices is a positive development. Industry collaboration and brainstorming within industry, as well as collaboration between industry and the many labor activists participating in the PLR movement, may identify useful processes that could positively influence the business environment in which labor decisions are made. Companies may internalize these processes in the hope of being perceived as corporate social responsibility leaders. Alternatively, companies may internalize these processes as a risk management decision, which would pressure other companies to institute similar systems. States also might learn from these deliberations in ways that could inform new 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, 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

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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; and to share learning on the manner in which voluntary codes of labor practice contribute to better workplace conditions in global supply chains.

*Id.*

165. For example, following the release of their global factory list, Levi-Strauss 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. Interview with Michael Kobori, Vice President Code of Conduct, Levi-Strauss, in S.F., Cal. (Apr. 2007). Mr. Kobori 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. *Id.*

166. See Doorey, *Factory List Disclosure*, *supra* note 13, at 23–38 (reviewing in detail the shift at Nike from a position of secrecy and unilateralism to collaboration and transparency); see also GAP INC., *supra* note 115, at 34.

initiatives and campaigns described in Part 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 balancing that characterizes any industrial relations systems, without full appreciation of the interests of the local actors and local economic, social, and political circumstances. Part IV argues that while this is an important concern, it should not be perceived as an argument *against* the TDLR project. Rather, it is a prescriptive argument that provides guidance as 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 PARTICIPATION OF LOCAL ACTORS

The previous Part made a number of claims about the utility of private labor regulation in the struggle to improve supply chain labor practices. It noted that while PLR has occasionally produced headline-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 their suppliers treat workers and to take steps to ensure that they are not complicit in the illegal labor practices of those suppliers. That discussion relates to the underlying question being explored in this Article: 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?

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” regulations because they develop a framework under which private bargaining about substantive work conditions occurs.<sup>167</sup> Health and safety laws that mandate joint worker–employer councils and require them to consult and bargain over

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167. Arthurs, *supra* note 74, at 475–77; see William B. Gould IV, *The Third Way: Labor Policy Beyond the New Deal*, 48 U. KAN. L. REV. 751, 754 (2000) (describing the “genius of the New Deal” as being its fundamental presumption that “responsibility for the social contract [should be placed] in the hands of the parties themselves to be resolved through collective bargaining”).

safety rules,<sup>168</sup> as well as European “works councils” laws that require employers to inform, consult, and sometimes bargain with worker representatives, rely on a similar philosophy.<sup>169</sup> 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, and consumer boycotts—in pursuit of public policy objectives is not particularly controversial or novel.

However, there is something qualitatively different about TDLR because it requires a move beyond the level of the nation-state, where labor lawyers feel most comfortable. 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.<sup>170</sup> The employees, their union, and their employer are always at the core of this analysis. Exogenous pressures—forces from outside the workplace—influence those core actors. Regulatory law structures their engagements and provides contractual “floors.”<sup>171</sup> Product and labor markets influence bargaining options, and social factors influence attitudes.<sup>172</sup> Ultimately, however, the interactions of the workers, unions, and employers determine the rules that will apply in any workplace setting.<sup>173</sup>

The shift to the role of PLR that targets MNCs and labor practices within their globally dispersed supplier factories obscures the role of employers and employees. Very little has been said about the participation and opinions of the factory workers, or even the factory owners, in this Article’s preceding discussion of PLR initiatives. Are those actors not entitled to participate in decisions that will most directly impact their lives? How are the interests of employers and employees 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 previously discussed campaign

168. See Lobel, *supra* note 8, at 462 (describing the Occupational Safety and Health Administration’s (OSHA) use of health and safety governance initiatives to improve collaboration within a firm).

169. JOEL ROGERS & WOLFGANG STREECK, WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 339–43 (1995).

170. See JOHN DUNLOP, INDUSTRIAL RELATIONS SYSTEMS 227–52, 287–88 (rev. ed. 1993) (stating that the term “industrial relations system” is variable in scope, and that as the scope of the system grows broader, the status of the actors within the system are particularly affected and become less well-defined).

171. *Id.*

172. *Id.*

173. *Id.*

against Gildan Activewear, which targeted incidents at Honduran factories in which Honduran workers' organizations played a leading strategic role in the campaign and in implementing and monitoring the remediation plan.<sup>174</sup> In a 2006 report of labor practice case studies in the global sportswear industry, Oxfam describes 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.<sup>175</sup> Initiatives such as the Clean Clothes Campaign and the Worker Rights Consortium engage in campaigns only at the invitation of the local workers affected.<sup>176</sup>

Local voices are not always included, however. Many of the leading PLR initiatives were designed and are still managed without any meaningful input from the actors whom they target. For example, although representatives of industry, universities, unions, and NGOs were invited to participate in the negotiations leading to the creation of the FLA, all invitees were American-based, and the managing board of the FLA has always consisted exclusively of representatives from American organizations. Some proposals to improve supply chain labor practices, such as the much discussed "Ratcheting Labor Standards" model of Sabel, Fung, and Dara O'Rourke, do not require any participation or consent from local workers or their organizations.<sup>177</sup>

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174. See *MSN Closes the Book on Honduras Complaint*, MAQUILA SOLIDARITY NETWORK (Dec. 31, 2006), <http://en.maquilasolidarity.org/gildan/honduras/elprogreso> ("Grassroots campaigns targeting Gildan Activewear in Canada and the United States succeeded in pressuring Gildan to enter into an agreement with MSN and the WRC to provide first-hire preference to all former El Progreso workers, including union supporters, at its other sewing facilities in Honduras.")

175. See TIM KELLY & KELLY DENT, *OXFAM INT'L, OFFSIDE! LABOUR RIGHTS AND SPORTSWEAR PRODUCTION IN ASIA* 38 (Maureen Bathgate ed., 2006).

The SPN union represents [sic] Doson workers [in Indonesia]. It organised a vigorous campaign calling on Nike to keep ordering from Doson or, at the very least, to pay workers their full legal entitlements to severance and holiday pay. On 20 August 2002, 4,000 Doson workers marched to the US embassy in support of these demands. Doson workers organised similar demonstrations in other parts of Jakarta in the months that followed.

*Id.* (citation omitted).

176. See, e.g., *What We Believe In*, CLEAN CLOTHES CAMPAIGN, <http://www.cleanclothes.org/about-us/what-we-believe-in> (last visited Sept. 26, 2010) ("Workers can best assess their needs and the risks they take when asserting their rights. Public campaigns and other initiatives to take action in cases of rights violations and the development of strategies to address these issues must be done in consultation with workers or their representatives.")

177. FUNG, O'ROURKE & SABEL, *supra* note 48, at 4–5 (arguing for monitoring, public disclosure, and a pool of easily accessible information to provide incentives for firms to improve the factories in their supply chains). *But see* Cooney, *supra* note 75, at 332–33 (identifying several weaknesses with the ratcheting labor standards proposal); Murray, *supra* note 75, at 19–36 (criticizing the proposal).

One response to the criticism that PLR decision making processes ignore the views and experiences of those actors whom they most affect is that those opinions are accounted for through the dynamic shaped by the respective interests of the participants in the PLR debates. For instance, 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 of 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 for 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 MNCs and Northern-based activists vicariously represent the interests of factory owners and factory employees.

There is some truth in this argument. However, it is also a paternalistic claim that fails to capture the richness and diversity of the opinions that may exist at the local factory level. In fact, the employees and their employers in the supplier factories, as well as other local actors, may have important perspectives on the causes of labor practice problems and possible solutions that are not at all obvious to participants in the PLR dialogues taking place many thousands of miles away. There may be distinctly local explanations for labor compliance problems at a particular factory. The employees may not want the “assistance” of PLR at all for any number of reasons, including fear that the PLR, if implemented, will make their situation worse or because they believe that they can fix 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. PLR is useful because of its tendency to encourage broad-based deliberations about important issues and to cause valuable corporate self-reflection. However, it can also be blind to important stakeholder interests, particularly when those stakeholders lack the power to insert their own voices into the process.<sup>178</sup> 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

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178. See Arthurs, *supra* note 74, at 487; Claire Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611, 624 (2001) (describing the “psychological distance” between a large hub company and the employees of its suppliers); Kolben, *supra* note 5, 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.”).

presiding over the factories—threatens the legitimacy of PLR and the entire TDLR project. It can blind participants to the reality of industrial relations 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.<sup>179</sup>

Most knowledgeable observers agree that sustainable change of the sort necessary to alter workplace practices in the long run will require local level participation, including empowering workers to enable them to bargain for improved employment conditions with their employers.<sup>180</sup> Harry Arthurs makes this point:

Voluntary codes are emerging as the most significant feature of a fragile, inchoate regime of transnational labour 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.<sup>181</sup>

Sean Cooney similarly argues that “if local workers are not involved in devising, monitoring, and evaluating measures to reduce labour abuses, such measures may be unresponsive to worker needs, disempowering, and patronising.”<sup>182</sup>

The moral is that the most useful PLR initiatives and campaigns will be those that focus on empowering workers at the factory level and on building a climate in which the governments of host states and factory owners are prepared to recognize labor rights. This

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179. See Dickerson, *supra* note 178, at 614 (stressing the importance of encouraging MNCs to listen to workers in developing countries).

180. See, e.g., Basu, *supra* note 6, at 495 (endorsing the argument that a long-term solution to the problem of child labor will involve continuing to purchase goods from developing nations, thereby increasing the demand for adult labor and improving the bargaining power of adult laborers); Blackett, *supra* note 40, at 415–16 (arguing for the long-term importance of ensuring employees have the freedom to unionize, but remaining skeptical that employers would allow for freedom of association in the absence of a public regulatory framework); Kolben, *supra* note 5, at 251–52 (arguing that local actors are best situated to identify lasting solutions to the problem of persistent labor abuses and that “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 et al., *supra* note 122, at 170 (arguing that foreign labor activists are a useful supplement to workers’ efforts 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”).

181. Arthurs, *supra* note 74, at 487.

182. Cooney, *supra* note 75, at 332.

realization needs to guide any attempt to utilize TDLR for the purpose of improving foreign labor practices. The challenge is to identify ways that American laws, for example, could help normalize processes in foreign factories and shift the attitudes of workers, unions, employers, and governments over time towards greater acceptance of labor rights.<sup>183</sup>

This is an ambitious program that requires patience and a long-term, multilayered plan and nuanced approach that recognizes differences in local situations. It is a program that 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 . . .”<sup>184</sup> 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 in encouraging developments in the ways MNCs manage their supply chains and engage external actors in dialogues about how to improve labor practices. PLR empowers local workers by exposing labor abuses and by pressuring MNCs to address those abuses through engagement with factory owners, rather than by cutting and running. It can boost regulatory capacity within states by encouraging MNCs to respond favorably to countries that enforce labor laws and by punishing those who do not. A thoughtful TDLR project could encourage these positive aspects of PLR.

Certain questions should guide a TDLR project targeting foreign labor practices. 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 simultaneously undermining the ability of developing states to attract and retain foreign investment from MNCs or causing factory

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183. See Kolben, *supra* note 5, 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).

184. David Trubek et al., *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 LAW & SOC. INQUIRY 1187, 1193 (2000).



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 lawmakers 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 anticipate how legal signals transmitted through domestic regulation into this milieu will be interpreted and acted upon. The hope is 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 lawmakers, even if they are otherwise supportive of a project aimed at encouraging improved labor practices within global supply chains.<sup>185</sup>

On the other hand, it is possible that some relatively modest legislative steps could provoke useful changes in the ways in which labor practices are managed within global supply chains. Mandatory reporting on matters related to supply chain labor practices is one option that has been explored.<sup>186</sup> Another option is to require companies to adopt codes of conduct and to monitor and report on compliance with those codes.<sup>187</sup> If these sorts of legislative schemes alter the balance of power within the foreign industrial relations systems in their favor, they could prove useful to workers in developing countries in their struggle to win improvements in working conditions. In addition, these schemes could create an incentive for MNCs to remain with a supplier despite marginal

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185. Julia Black provides a skeptical explanation of how reflexive, de-centered regulation avoids problems associated with more formal, command-and-control-style regulation. See Julia Black, *Proceduralizing Regulation: Part I*, 20 O.J.L.S. 597, 603 (2000).

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 . . . .

*Id.*

186. See, e.g., Hess, *supra* note 8 (arguing in favour of legislation that would require corporations to undertake "social accounting and auditing" and to disclose their findings); Doorey, *Who Made That?*, *supra* note 3 (exploring the use of domestic disclosure regulation as a means of influencing foreign labor practices).

187. This appears to be a component of the "Ratcheting Labor Standards" model proposed by FUNG, O'ROURKE, & SABEL, *supra* note 48, at 5; see also Act Respecting the Labeling, Sale, Importation, and Advertising of Consumer Textile Articles, R.S.C. 1985, c. T-10.

increases in labor costs associated with those improvements. That is the challenge for the design of transnational domestic labor regulation and its advocates.

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